decision

AMSTERDAM COURT

Decision on the application made on 27 February 2025 and registered under case number C/13/765329 HA/RK 2s/68 by:

1) **the foreign-law company**
   Mercedes-Benz Group AG, based in
   Stuttgart, Germany
2) **the private limited liability company Mercedes-Benz Nederland B.V.**
   established in Utrecht

Hereinafter jointly referred to as: the applicant,
lawyers: J.S. Kortmann and B.M. Katan

requesting the challenging of Mr R.H.C. Jongeneel, judge in Amsterdam, hereinafter referred to as 'the judge'.

Proceedings

The Challenge Chamber has taken note of the following procedural documents:

- The challenge request dated 26 February 2025, with covering letter;
- the judge's written response dated 3 March 2025;
- the judge's e-mail dated 17 March 2025 containing a further response with attachment.

The judge does not acquiesce in the challenge.

The application was heard in open court on 31 March 2025. Appearing at the oral hearing were:

- On behalf of the applicant Ms Y. Siebenhaar and Messrs. B. van Emmerik, accompanied by Ms K. van den Berg (English interpreter) and both lawyers;
- court, with the team president Handel;
- Mr G. Wanders and Mr A. Reznitchenko, lawyers of Stichting Car Claim. an opposing party in the main action (hereinafter: Car);
- Mr J. Edixhoven and Mr Q. Bogaerts, lawyers of Stichting Diesel Emissions Justice, also an opposing party in the main case (hereinafter SDEJ).

The applicant and the judge further explained their positions - the applicant also using a pleading note - and answered questions.

Car Claim and SDEJ - following a prior written reasoned request - were granted limited speaking time, to which the applicant did not object. Car Claim and SDEJ their views means of a pleading/speaking notes.

1. Facts

a) SDEJ and Car Claim brought claims against the applicant and its network partners under the Class Action Mass Claims Settlement Act ("WAMCA"). The proceedings are known to this court under case and role numbers C/13/686493/ HA ZA 20/697 and C/13/695611 / HA ZA 21/60. The judge presides over the three-judge panel hearing these cases.

b) The allegations made against the applicant by SDEJ and Car Claim in the proceedings are essentially that the applicant's vehicles, in conditions other than the test environment, emit more than the emission limit in force during the test, which would have put the applicant in breach the European Emissions Regulation.

c) In his capacity as a rolling judge, the judge singularly on 24 March that the court did not consider the pre-trial hearing requested by the applicant to be necessary at that time.

d) The judge wrote a chapter in the book Collective Actions in the Financial Sector' entitled Mass Disputes from the Judiciary' Perspective (hereafter, the publication). In this chapter, the judge as far as relevant - written:

(...) The shit en'le role vcin cle t however in tVA!ïICA -zakc-n (neen spi eekt also vcin 'regic- ') is based, inter alia, on ele cirticles 19 and 20 Rv, which hef'alen cltii ele rc-chter cille takes decisions clie noclig are voot c-c-n goecl ver loop win Ele pi occ-clw e and 'Plat he' ii'aakt against ont edelfJke verti aging of the pi ocecltire and takes daca toe -o necessary macitregc-len. I gc-e]'c-and pcicii nice images sun the direction that ':lc judge can take. For example, parlia "ons can have rilllei eizucken that affect the way manu "p the **y/'o"er/ui e 'i oor**/*/ conducted. Some requests are i'olkomen gegrun':I, andc'i c' vers-oeken* **£t/r/uc'n** *be a slrcilegie to delay le i'erooi riken. A "ooi image." the geduag'le may request an i egic'zilling le hoii':ten. Dii may make an i edeliyk request -ij "n in ge "want which' in 'too an ofcin'lere maniei cifirijken sun previous gev'illen. (...)' niel in every zcirik is a regie illing no':lig and hel "rcigen ervnn may be a .tiny' be "n to accelerate the f'i'oceJure ie endure in planls erin le.(...) The' court* **gnrf/** *duration therefore niel rillijd in mee. [voelnool*

(...) Furthermore, the court can prevent vertrciging if /if *it takes decisions aimed at ensuring* that *all the necessary fn[ormcition for ele inhotideliyke behcindment is tiyüig available. He' core dcit do this, for example, by ordering pcirtiyen to bring certain documents into the proceedings o[clarify statements even beforeaj'gcicincl man the inhotideliyke behcincleling pursuant to article 22 paragraph 1 Rv. [footnote 18] '*

Footnotes 17 and 18 read, as relevant:
'17. For instance, in several accounts on 'sham'oftsi!nre ' a procedural order vaslgestel'l
flodéf/ jf2ffJ'rfeo *written hcidden response to a proposal vcin the*

rechtbcink, <-ie biyvooi image Rb. Amstel dcim, roll decision vcin 21 cipril 2021, rechtspraak. nl SiteColleclionDociiments RBA.VS roll decision-21-cipril-2021-Daimler-cs.pdf(!ïIercedes). (...)
18.(....) See also in a zcicik on sjoemelsofHi cire v .mercedes the vonnfs vcin Rb. Amsterdcim 17 cipril 2024. ECLI:NL.'RBA.IIS.'2024. 3630 '

e) By (interlocutory) order dated 17 April 2024, the judge, as chairman of the combination hearing the , granted the applicant an order under Section 22 of the Code of Civil Procedure, to provide further information in the proceedings.

2. The request and its grounds

2.1 It follows from the challenge request and from what was in thereof at the hearing of the xvrakingskamer that the challenge request is based on the following grounds.

2.2 With the two cited passages in the publication, the judge, according to the applicant, showed bias or at least created the appearance bias. This is evident from the fact that in the publication, the judge refers to the applicant's pending case with the word 'sham software', while, according to the applicant, this is clearly not the in her . The word 'sham software' stems from the earlier proceedings against Volkswagen. But the applicant's is w'ezen different from this. For instance, in the case of
Volkswagen mentioned software whose purpose was to mislead the inspection authority and Volkswagen also acknowledged that it was guilty of this. By to the applicant's case twice in the publication with the word "sham software" - once even without inverted commas - the court suggests that there is evidence of sham software in the applicant's case', while the applicant flatly disputes that this is at issue in the present proceedings.

2.3 In addition, the passage '.Uffffr thief *in each >-acik* fs *a direction hearing noclig and its w ngen core a stcip -tin to accelerate ele proceedings in plcitits vcin. (...) Den rechter gaat dcicir dcin ook niel ciltijcl in mee."* together with the reference in footnote 17 to the applicant's case cannot be otherwise than that the judge viewed the applicant's request for a pre-trial hearing in the applicant's case as part a delaying tactic by the applicant.

2.4 In the application, the applicant also cited examples of substantive and procedural (surprise) decisions taken in her proceedings that raised concerns with her about how the court dealt with the fundamental rules of civil procedural law. As the applicant explained at the hearing, she forward these examples to show context, but the circumstances detailed therein are not independent grounds for challenge. The judge' statements in the book are the proverbial drops that made the bucket overflow.

3. **Judge'**s response

3.1 The judge explained that if the case against the applicant is referred to in an article that deals with collective actions in the financial sector as a case about sham software", this obviously does not mean that the examining judge already considers it proven that the applicant used sham software". According to the judge, this is simply the common designation of such cases. The fact that the publication mentions that requesting a pre-trial hearing may be a delaying tactic does not mean that it is said that the applicant used this tactic or that this impression was created. After all, the article also noted that not every case requires a pre-trial hearing. The proceedings are just examples of cases where a request for a pre-trial hearing was not deemed necessary and the proceedings took shape in other ways.

3.2. In so far as the applicant has objections to certain decisions (in the) in the applicant's case and the underlying interpretation of the procedural documents in the (interlocutory) judgments rendered by the court, these are open appeal, but cannot be of in an application for challenge, the court said.

4. The grounds for **the decision**

4.1 Under Section 37(1) of the Code Civil Procedure (Rv), the challenge is made as soon as the facts or circumstances on which the challenge is based have become known to the applicant. Although Car Claim and SDEJ argued that the applicant was aware of the judge's publication as early as November 2024 as the applicant's authorised representative also contributed to the book, which the publication, the Challenge Chamber - like the judge - sees no reason to tw'ich the statement given at the hearing by mr. Kortmann that he did not become aware of the precise content of judge's contribution to the book until 23 February 2025 and that he subsequently entered into direct consultation with the applicant and drafted the w'raking request. The applicant's request can therefore be granted.

4.2 Pursuant to the provisions of Section 36 of the Dutch Code of Civil Procedure, it must be examined in an excusal procedure whether there are facts or circumstances which might the impartiality of the judge. This is the case if the judge is biased against a participant in the proceedings or if the fear thereof is objectively justified. The starting point here is that a judge is presumed to be impartial because he has been as a judge. There are only grounds for that judicial impartiality is nevertheless prejudiced in the event of special circumstances that provide a weighty indication for (the objectively justified appearance of) bias.

4.3 In essence, the is based on the fact that the judge showed bias, or at least created the appearance of bias, with the passages quoted above from the publication, taken together.

4.4 As noted by the applicant, various codes of conduct generally discourage a judge from commenting publicly on cases on which a judicial (final) decision has yet to be given, and describe that it is not desirable for a judge to write articles on or comment publicly on judgments of his or her own court. And that the more closely a judge is involved in a case, the less room there is to anything about it in public. However, it does not follow from all this that a judge should not say anything at all about cases that are going on in his court or that pending before him, but that he should be cautious and circumspect in making those (non-substantive) statements.

4.5 The applicant had pointed on several occasions that the allegations made against it were substantially different from those made against Volkswagen in the 'sham softw'are' proceedings. Volkswagen had acknowledged using software that it had specifically developed to the German authorities. whereas in the applicant's case, there was no software w'are that recognised test situations and adjusted the vehicles' performance accordingly.

4.6 In the proceedings in which this challenge has been filed, the question at issue (at its core) is whether there has been the use of manipulation tools and/or software that result in vehicles (being able to) emit different emission values under conditions other than those in the test environment. In the opinion of the Challenge Chamber, the term 'sham software' from the scandal surrounding Volkswagen'use of the software in question. has been warped over time into a more general term that refers to the use of manipulative tools and/or software (illegal or otherwise) to gain some advantage (intentionally or unintentionally) in measurement results. In the opinion of the Challenge Chamber, the explanation given by the applicants that 'sham softivare' only refers to software for recognising the test environment so that other emission values are measured during the test is, in the meantime, too narrow an interpretation of this word.
Therefore it cannot be inferred from the quoted passages of the publication that by using the term 'shoemaking software', the court is drawing conclusions or anticipating any (final) decision to be taken in this case. Nor are there any other indications that by the term sham software', with or without inverted commas, there is (the objectively justified appearance of) bias on the part of the judge.

4.7 Nor can it be inferred from the quoted passages in conjunction with footnote 17 that the judge considered that the approach of the pre-trial hearing requested by the applicants was to cause delay, as the applicant has claimed. The judge merely referred factually and observatively, without commenting on the substance, to the applicants' proceedings to illustrate cases in which no pre-trial hearing was stipulated. In doing so, the did not state whether

suggested that the request for a pre-trial hearing involved delaying tactics on the part of the applicant. Again, therefore, no (objectively justified appearance of) bias on the part of the court can be inferred from this.

4.8 In view of what has been above, in the opinion of the Challenge Chamber, the (subjective) bias experienced by the applicant is not objectively justified. This is also not the case if the passages cited are considered in conjunction with the other decisions taken in the proceedings on the merits (such as the interlocutory judgment referred to earlier under e) and the court's interpretation of procedural documents that did not previously cause the applicants to challenge. Since the applicant's fear of bias is not objectified by the facts and circumstances put forward, the challenge request will be rejected.

DECISION

The Challenge Chamber:

- w'the challenge;
- determines that the cases with case numbers C '13 '686493 / HA ZA 20-697 and C/13'695611HA ZA 21-60 are continued in the state in which they were at the time ian filing the challenge.

This b eli ssing was given by M.V. Ulrici, chairman, and C.P.E. Meewisse, and H.M. Patijn members, in the presence of the Registrar and, in public tiitgesprokan at 10.April 2025.

Tegen dethey decision is, by virtue of the provisions of Section 39(5) Rv, no facility open.

FOR AWESTSCHRIFT CoNFoRM
THE GkFFIER VAN THE COURT