

## **Shell liable for oil spills in Niger Delta**

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### ***The Hague Court of Appeal decisions of 29 January 2021***

#### **1. Overview**

Four Nigerian farmers and Milieudefensie (MD, the Dutch branch of Friends of the Earth) sued parent company Royal Dutch Shell (RDS) and its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC) for oil spillages in the Niger Delta in 2005 (Oruma, case A), 2004 (Goi, case B), and 2007 (Ikot Ada Udo, case C).

In preliminary decisions, the [District Court](#) and the [Court of Appeal](#) had decided that they were competent to hear the case, that Nigerian law applied to the substance of the claims and Dutch law to the procedural aspects, and that the claimants had standing. As regards RDS' liability, the Court of Appeal considered that there were no relevant Nigerian cases yet and that it therefore relied on recent English case law, particularly [Vedanta](#).

Before the District Court, the claimants had lost cases A and B but they were successful in the Court of Appeal. The Court of Appeal suspended its decision in case C, which the claimants had won in the District Court.

The current procedures only concern the liability question. Damages and compensation will be established in a separate court case.

Appeal to the Dutch Supreme Court (Hoge Raad) is only possible on points of law. In Dutch law, the application of foreign law is considered to be a factual matter.

The main findings of the Court of Appeal are, first, that SPDC is strictly liable for the cause of the oil spills, because it could not prove beyond reasonable doubt that these were caused by sabotage (points 3 and 8 below). Second, SPDC and RDS are ordered to ensure that the Oruma oil pipeline is equipped with a leak detection system (points 4 and 5 below). The decision is breaking new legal ground, as it is the first time a parent is held responsible for a failure of its subsidiary.

#### ***A. Oguru and Efanga v. SPDC and Royal Dutch Shell (Oruma)***

#### **2. Introduction**

This case is about Fidelis Oguru and Alali Efanga, two farmers from the village of Oruma. The latter passed away in 2016. The claim regards an oil spill in 2005. It took SPDC three days to verify the spill and eleven days to stop the spillage.

The claims regarded (i) the Cause of the leak ('Ontstaan'), (ii) the Response to the leak ('Reactie'), and (iii) the Remediation of the area ('Sanering').

The [District Court](#) had rejected all claims. It considered (i) that the oil spill was caused by sabotage, (ii) that SPDC had stopped the leak as soon as was reasonably possible, and (iii) that it had not been established that the affected area had been insufficiently cleaned. The [Court of Appeal](#) (CoA) disagreed with the District Court on points (i) and (ii).

### **3. Cause of the leak**

SPDC's liability for the cause of the oil leak was based on the strict liability rule of s. 11(5)(c) [Nigerian Oil Pipelines Act 1956](#). One of the defences is sabotage ('the malicious act of a third person'). Section 135 [Nigerian Evidence Act 2011](#) provides that if the commission of a crime is at stake in civil or criminal proceedings, this must be proved beyond reasonable doubt.

On the basis of expert evidence, the CoA held that, although sabotage was the most likely cause of the leak, it had not been established beyond reasonable doubt that the leak was caused by sabotage. Hence, SPDC was strictly liable for the cause of the leak.

The CoA dismissed liability of parent RDS, as SPDC had not acted negligently or unreasonably. Sabotage rather than poor maintenance was still the most likely cause of the leak.

### **4. Response to the leak: SPDC**

As notifications of oil spills are regularly incorrect, SPDC did not immediately shut off the oil supply, but first verified the leak. When it wanted to investigate the leak, SPDC was also often denied access to the area, which prevented it from intervening in a more expedited way. The CoA held that in these circumstances, SPDC's response had not been inadequate.

However, the CoA held that SPDC was liable on the basis of the tort of negligence for not installing a Leak Detection System (LDS) on the Oruma pipeline. Such an LDS (already recommended by the American Petroleum Institute in 2001), does not require site access and could have prevented damage to a very large extent (here an area of one or two rather than ten football fields).

The CoA also ordered SPDC to install such an LDS on the Oruma pipeline within one year. In case of non-compliance, SPDC must pay the claimants a penalty of € 100.000 per day.

### **5. Response to the leak: parent RDS**

With reference the English [Vedanta case](#), the CoA considered that a duty of care of the parent company 'depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (...) of the subsidiary'.

The CoA considered that at least from 2010, RDS has fairly intensively interfered with the question whether the pipelines in Nigeria should be provided with an LDS. RDS was also aware that SPDC was not able to respond adequately to leakages at the Oruma pipeline for lack of an adequate LDS. Nonetheless, RDS did not use its authority to induce SPDC to apply an LDS. The CoA considered

that RDS owed the people living in the vicinity of the Oruma pipeline a duty of care to ensure that an LDS was installed. It ordered RDS to ensure that within one year the Oruma pipeline will be equipped with an LDS. In case of non-compliance, RDS must pay the claimants a penalty of € 100.000 per day.

## **6. Remediation**

The CoA used the remediation standard from the Environmental Guidelines and Standards for Petroleum Industry in Nigeria (EGASPIN), published by the Department of Petroleum Resources (DPR). The parties agreed with this standard but interpreted differently. The CoA concluded that Shell had remediated the area according to the intervention standard and that it was not required to comply with target values (basically aiming to return the soil to its old state). Therefore, the still existing residual pollution does not constitute an unlawful situation.

However, further going remediation obligations may arise from SPDC's strict liability for the cause of the leak, and (partly) from its failure to apply an LDS.

As a breach of duty by SPDC had not been established, the CoA dismissed the remediation claim against RDS.

### ***B. Dooh v. SPDC and Royal Dutch Shell (Goi)***

## **7. Introduction**

This case was about Barizaa Dooh, a Nigerian farmer and fisherman, who lived near Goi. He passed away on 14 January 2012. His son Eric continued the case as a claimant. The claim regards an oil spill in 2005 from the Goi pipeline. Two days later the leak was temporarily plugged and repaired the next day.

In 2013, the [District Court](#) rejected all claims of Dooh and MD. It considered (i) that the leak was caused by sabotage, (ii) that SPDC had stopped the leak as soon as it was reasonably possible, and (iii) that it had not been established that the affected area had been insufficiently cleaned. Just like in the Oruma case, the [Court of Appeal](#) disagreed with the District Court on points (i) and (ii).

## **8. Cause of the leak**

The CoA held SPDC strictly liable for the cause of the oil leak. Just like in the Oruma-case, it accepted the experts' conclusions and decided that although sabotage was the most likely cause of the leak, sabotage had not been established beyond reasonable doubt.

The CoA dismissed liability of RDS for the cause of the leak, as it had not been established that SPDC had acted negligently or unreasonably. Sabotage had not been proven beyond reasonable doubt, but it was still the most likely cause of the leak, rather than poor maintenance.

## **9. Response to the leak**

SPDC had employed a helicopter to confirm the leakage one day after it had received the notification. The CoA considered that SPDC had not made sufficiently clear why it could not have employed a helicopter on the same day. It held that SPDC owed the persons in the vicinity of the spills a duty of care to shut down the oil supply on the same day.

The CoA also considered that an LDS would have achieved the same result as a same-day helicopter inspection. This means that the claims were only awarded to the extent that they related to a one-day delay in shutting down the oil supply.

The CoA dismissed the claim against parent RDS, because it had not been made aware of the oil spill. The CoA also dismissed claims to order SPDC and RDS to provide the Goi pipeline with an LDS, as SPDC had already done so when replacing the pipeline 2019.

## **10. Remediation**

Just like in Oruma, the CoA dismissed the claims for further remediation. Also here, further going remediation obligations may arise from SPDC's strict liability for the cause of the leak, and (partly) from its failure to apply an LDS.

As no negligence had been established on the part of SPDC, the CoA dismissed the remediation claims against RDS.

### ***C. SPDC v Akpan (Ikot Ada Udo)***

This dispute arose in response to two spills from an oil well near Ikot Ada Udo village. This well had not been used since 1959. The wellhead was closed above ground with a so-called Christmas tree. Although the handwheels had been removed, it was still possible to open the valves with a large wrench.

After a limited spill in August 2006, a much larger one followed about a year later. This leak was stopped on 7 November 2007. Friday Akpan suffered damage to his farmland and fishponds.

The [District Court](#) had ruled that SPDC was not strictly liable because it successfully argued that the leak was caused by sabotage. However, it also held that SPDC had been negligent towards Akpan by not sufficiently protecting the well against sabotage.

The [Court of Appeal](#) dismissed the appeal against the District Court's finding that the leak was caused by sabotage. It did not yet decide whether SPDC was liable on the basis of the tort of negligence for not sufficiently protecting the well. It asked the parties for more information about, inter alia the location(s) of the contaminated area(s) and whether the remediation had been adequate. The CoA will decide the case on the basis of this additional information and the pleadings of the parties.