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CASE ANALYSIS - MILIEUDEFENSIE V ROYAL DUTCH SHELL

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Introduction

On 12th November 2024, the Hague Court of Appeal delivered judgment in *Milieudefensie v Royal Dutch Shell*, clarifying corporate responsibility and the extent that a corporate entity could be legally obligated to reduce greenhouse gas (GHG) emissions across its operation specifically with respect to scope 1, 2 and 3 emissions. The decision overturned the earlier 2021 District Court ruling which had compelled Shell Plc ("Shell") to align its policies with the Paris Agreement and achieve a 45% reduction in net CO2 emissions by 2030. In reaching its decision the Court of Appeal engaged with the legal reasoning with respect to the difficulty and basis of imposing specific quantifiable reduction targets on corporate entities and the complexity with respect to scope 3 emissions. Generally, a company's carbon emissions can be classified into three (3) scopes: Scope 1 – Direct emissions from installations that are owned or controlled in full or in part by the company; Scope 2 – Indirect emissions from third-party installations from which the company purchases electricity, steam or heat for its business activities; Scope 3 – Other indirect emissions not included in scope 2 generated in the company's value chain, including emissions generated from the use or consumption of products the company supplies to third parties, such as other organisations or consumers.[1]

Background/Facts

In April 2019, Milieudefensie (Friends of the Earth Netherlands), alongside five other environmental associations and NGOs filed a lawsuit against Shell. They argued that Shell's contribution to GHG emissions violated its duty of care under Dutch law and human rights obligations. They further argued that Shell's climate policies did not

[1] Rechtspraak.nl - Zoeken in uitspraken. (n.d.). Rechtspraak.nl. Retrieved November 21, 2024, from https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2100&showbutton=true&keyword=2100&idx=1

align with the Paris Agreement and sought amongst others, a court order compelling Shell to reduce its CO_2 emission levels across all scopes by 45% by the end of 2030, relative to 2019 levels.

The claim fundamentally relied on Article 6:162 of the Dutch Civil Code, which establishes an unwritten social standard of care. The claimants urged the court to interpret this standard in light of human rights obligations, global climate commitments especially the Paris Agreement. They argued that Shell's failure to adequately act endangered the rights to life,[2] and right to family life,[3] protected under the European Convention on Human Rights (ECHR).

Case Summary

1.1. The District Court's Decision

The District Court, in its ruling, held that Shell's operations and products significantly contributed to global GHG emissions and that its corporate policies did not sufficiently align with the time and temperature goals set out in the Paris Agreement for the global reduction of greenhouse gas emissions.[4] This conclusion was based on multiple legal and factual details such as the provisions of the Dutch Civil Code, scientific evidence on the impacts of climate change,[5] human rights instruments particularly the ECHR, and soft law instruments such as the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises.

The District Court ruled that Shell should reduce its global net CO2 emissions by 45% by 2030 compared to 2019 levels. This ruling marked the first attempt to bind a private corporation to a GHG emissions reduction percentage in alignment with the Paris Agreement.

1.2. The Court of Appeal's Decision

The Court of Appeal took an alternative approach to the case by balancing Shell's corporate responsibilities, climate considerations, and practical legal and policy considerations. While affirming that climate protection is important, it rejected the specific reduction percentage imposed by the District Court. Key aspects of the Court's decision include:

1.2.1. Human Rights and Corporate Responsibility

The Court of Appeal reaffirmed that protection from dangerous climate change constitutes a human right, drawing on decisions of the Supreme Court, European Court of Human Rights (ECtHR) and resolutions/reports of United Nations bodies.[6] While acknowledging that human rights obligations arising from treaties primarily bind states, the Court recognized their application to private relationships through the doctrine of indirect horizontal effect.

Essentially, the court emphasized that Shell has an obligation to take steps to limit CO2 emissions, even in the absence of explicit legal requirements.

[2] Article 2, ECHR, https://www.echr.coe.int/documents/d/echr/convention_ENG
[3] Ibid, Article 8
[4] Articles 2 and 4 Paris Agreement, https://unfccc.int/process-and-meetings/the-paris-agreement
[5] IPCC 6th AR (2023), https://www.ipcc.ch/report/sixth-assessment-report-cycle/
[6] Rechtspraak.nl - Zoeken in uitspraken. (n.d.). Rechtspraak.nl. Retrieved November 21, 2024, from https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2100&showbutton=true&keyword=2100&idx=1

1.2.2. EU Climate Law Analysis

The Court of Appeal noted that the Corporate Sustainability Reporting Directive (CSRD) and Corporate Sustainability Due Diligence Directive (CSDDD) imposed obligations on companies like Shell to draft mandatory climate transition plans that align with the Paris Agreement and the EU's objective of climate neutrality by 2050. These plans are required to contain time-specific goals in five-year increments, starting from 2030 through to 2050. However, while companies may include absolute emission reduction targets, specific percentages are not mandated but are left to corporate discretion.

The court determined that while these regulations create specific obligations for companies like Shell, they do not impose rigid reduction target. Instead, they emphasize market-based mechanisms and flexible approaches, allowing companies to determine their method for compliance, provided their plans remain consistent with the spirit of the Directives and the Paris Agreement.

Furthermore, in overturning the 45% carbon emission reduction order, the Court found that global reduction targets do not apply to companies or countries individually. The Court noted that reduction methods would vary by sector and region and that Shell's operations and customer base differ significantly from global averages. As such, it would be inappropriate to directly apply global reduction percentages to its operations.

1.2.3. Shell's New Investments in Oil and Gas, Despite Carbon Reduction Obligations

It was argued that Shell's planned new investment in Oil & Gas would lead to further carbon emissions as the new investment would put the Company in a state of "carbon lock-in". The Court considered whether Shell was acting in violation of the Social Standard of Care by making new investments in oil and gas and held that "***it is reasonable to expect oil and gas companies to take into account the negative consequences of a further expansion of the supply of fossil fuels for the energy transition also when investing in the production of fossil fuels. Shell's planned investments in new oil and gas fields may be at odds with this. In these proceedings, however, the court of appeal does not have to answer the question of whether Shell's planned investments in new oil and gas fields violate its social standard of care".***[7]

1.2.4. Shell's Obligations as Regards Scope 1 and 2 Emissions

The Court examined whether there was a threatening violation of a binding obligation on the part of Shell in contravention of the Company's obligations under GHG Protocol's Scope 1 – Direct emissions from installations that are owned or controlled in full or in part by the company; and Scope 2 – Indirect emissions from third-party installations from which the company purchases electricity, steam or heat for its business activities. The Claimant prayed the Court to grant an order preventing Shell from a future violation of the standards required under Scope 1 and 2.

[7] ibid

The Claimants argued that there was an impending violation because though Shell had made statements about its set goals for reducing carbon emissions, Shell had adjusted its policy in the past, and the new set target offered no guarantee of further or permanent carbon emissions reductions.

The Court held that the mere fact that Shell has previously watered down targets cannot, in any event, justify a finding that Shell will not comply with its set goals for carbon emissions reduction with respect to Scope 1 and 2.

1.2.5. Shell's Obligations as Regards its Scope 3 Emissions

Scope 3 emissions, also known as downstream emissions, are indirect emissions not included in Scope 2, which are generated in the company's value chain, including emissions generated from the use or consumption of products the company supplies to third parties, such as other organisations or consumers. The Court considered whether Shell can be bound by the report from a consensus in climate science that 45% (or any other percentage) of carbon reduction standards should apply to companies in the Oil & Gas sector such as Shell.

The Court held that Shell could not be bound by such sectoral standards and rejected the argument that since there were no agreements on how the reduction commitment was to be divided among companies, the obvious approach was to apply the percentage of 45% to all companies.

Lastly, regarding scope 3 emissions, the Court refused to grant a specific reduction order. It noted that a specific reduction order could be ineffective because Shell could technically comply by simply reducing its trading of third-party fossil fuels. However, since those fossil fuels will still be in demand, other companies would simply fill in the gap by trading those third-party fossil fuels. The court concluded that such compliance would not serve the Claimant's fundamental goal of reducing actual global emissions.

Implications for Nigeria's Climate Regulatory Framework

In Nigeria, the Climate Change Act 2021 is the primary legislation addressing the reduction of GHG emissions and the promotion of sustainable development. The Act sets a net-zero target for 2050-2070 in line with its international climate change obligations.[8] Further, the Act provides for a general carbon budget to be set by the Federal Ministry of Environment in consultation with the Federal Ministry for National Planning.[9] In addition to the carbon budget, a national emissions review and an Action Plan setting out national and sectoral climate vulnerability and risk assessments for adaptation shall be conducted and this will serve as the basis for setting the carbon budget.[10] The Act however does not impose sectoral emissions target nor direct reduction mandates on private companies, including companies involved in the fossil fuel extraction. Instead, it mandates private entities with 50 or more employees to put in place measures to achieve the country's annual carbon emission reduction target and to submit annual reports on its efforts at meeting such targets.[11]

8 s1(e) Climate Change Act 2021
9 Ibid, s19(1)
10 Ibid, s19(5)
11 Ibid, s24(1)

Nigeria is a party to the Paris Agreement and has through its Nationally Determined Contribution (NDC), committed to reduce greenhouse gas emissions by 20% below business-as-usual by 2030 unconditionally, and 47% conditionally (with international support).[12] However, unlike the EU's approach, Nigeria's NDC focuses on a sectoral approach, identifying key areas such as oil and gas, power, and transport for emission reduction initiatives, while emphasizing the need for economic development alongside climate action.

The National Climate Change Policy (2021–2030) further elaborates on Nigeria's climate strategy, focusing on policy measures and incentives rather than mandatory reduction targets for companies. While the policy recognizes the significant contribution of the oil and gas sector to national emissions, it does not mandate specific scope 1, 2, or 3 emission reductions. Instead, it promotes measures such as ending gas flaring, improving energy efficiency, and encouraging renewable energy adoption through market-based mechanisms and voluntary initiatives.

The Hague Court of Appeal's judgment offers valuable insights into the thinking and the approach towards meeting climate targets and the responsibility of private entities for emissions. Regarding the possibility of imposing additional corporate responsibility for mitigating climate change beyond regulatory requirements, Nigerian law which has roots in common law, differs significantly from the Dutch civil law system which establishes the unwritten standard of social care. Thus, the extent to which Nigerian courts might recognize corporate climate obligations in the absence of specific statutory requirements remains uncertain. Any such recognition would likely depend on existing binding and enforceable frameworks.

Public Companies and Public interest companies are bound by the Nigerian Codes of Corporate Governance 2018 and their sectoral codes, which require the Boards of these companies to put in place Environmental, Social and Governance (ESG) policies within their organizations. These policies are expected to promote environmental stewardship.

It is worthy of note that in the case under review the Court noted that the policy adopted by Shell as the holding company of the subsidiaries in the Shell Group includes climate policy. It was noted that Shell's board had primary oversight over the climate policy of Shell. It further explained that the Board reviewed the energy transition strategy of the Shell periodically and oversees its implementation and delivery. It follows that if any stakeholder was to be held responsible for the carbon emission of Shell, this could have involved the Board members of Shell.

Conclusion

This case represents a critical development in the evolving relationship between corporate responsibility and climate action. It emphasizes that companies, especially those in carbon intensive sectors, have a role in contributing towards efforts to combat climate change whilst also recognizing the challenges of imposing strict reduction targets on such entities.

The Court of Appeal, in quashing the District Court's judgement against Shell, agreed with Shell that it was not under any obligation to comply with the specific global

12 National Climate Change Council (2023). Nigeria's Long-Term Low-Carbon Development Strategy; FME (2021) Report of Updated NDC, https://unfccc.int/sites/default/files/NDC/2022-06/NDC-Cover%20Letter%20for%20the%20Subnission%20of%20Nigeria%27s%202021%20NDC.pdf

reduction target of 45% as such a rigid target was a global average and therefore could not reasonably apply to individual companies. Furthermore, the Court emphasized that the Corporate Sustainability Reporting Directive (CSRD) and Corporate Sustainability Due Diligence Directive (CSDDD) which impose a mandatory obligation of creating climate transition plans on companies like Shell, allow such companies to determine their method of compliance provided that the plans align with the intention and goals of the Paris Agreement.

The Court of Appeal's decision to overturn the decision of the District Court mandating Shell to a 45% carbon emission reduction by 2030 strikes a balance between legal principles, practical realities, and the broader framework of EU climate policies, which favor flexible, market-driven solutions over rigid mandates.

Ultimately, this case highlights the point that effective climate action requires concerted and a coordinated response with the cooperation of Countries and the private sector as GHG emissions are not place or industry specific.

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