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Court of Appeal confirms no liability for UK mining company in relation to human rights abuses in Sierra Leone

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Summary

The Court of Appeal's recent decision in *Kadie Kalma & Ors v African Minerals Ltd*[1] stands as a stark reminder of the risks and responsibilities companies bear when operating in sectors and jurisdictions with a high risk of human rights abuses.

The decision in this case, arising out of tragic events in a remote region of Sierra Leone, reiterates the English Courts' general unwillingness to place a duty on companies to prevent harm caused by third parties. The decision suggests that companies may interact with local authorities to support their businesses without necessarily assuming liability for the future unlawful actions of those authorities, even in circumstances where those unlawful actions may be characterised as foreseeable.

The case is one in a growing trend of attempts to hold UK parent companies liable in the English Courts for adverse human rights impacts overseas. Whereas other recent cases have considered the imposition of liability on UK-parent companies for the actions of their overseas subsidiaries, discussed here and here[2], this case highlights, in particular, another potential legal route – accessory liability in tort – by which businesses can be sued in England for the acts of third parties. The case also highlights, more generally, the increased level of scrutiny to which companies are likely to be subject as their operations interact with local communities and security forces.

Facts

The case arises out of two episodes of police brutality against civilians in Tonkoli, a remote district in the north of Sierra Leone, in 2010 and 2012. African Minerals Ltd ("**AML**"), an AIM-listed mining company, which had iron ore operations in the area, had given various support (accommodation, vehicles and cash) to the local police. Without such support, AML's operations would have been extremely difficult.

Local unrest broke out in response to AML's operations and ancillary infrastructure projects. The police reportedly responded to unrest with excessive force. Local residents were subjected to "*violent chaos*", during

1 *Kadie Kalma & Ors v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* [2020] EWCA Civ 144

2 *See*, for instance: *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2018] EWCA Civ 191; and *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Ors.* [2019] UKSC 20.

the course of which, many were "*variously beaten, shot, gassed, robbed, sexually assaulted, squalidly incarcerated and, in one case, killed*".[3]

The High Court Decision[4]

142 Tonkoli residents, all of whom had been affected by the violence, brought proceedings in the English High Court against AML and other entities[5]. They argued that the defendants should be held liable under English[6] common law (in vicarious liability, negligence, procurement liability, and accessory liability) for the harm committed by the police due to AML's (and its employees') alleged direct involvement in, failure to prevent, or encouragement of, the violence.

The High Court rejected all of the claims,[7] finding that:

- as a matter of fact, AML and its employees had not participated in or procured the wrongdoing (*i.e.*, there was no vicarious or procurement liability);
- as a matter of fact, AML had not intended that the police use excessive violence (*i.e.*, there was no accessory liability by reason of common design)[8]; and
- AML had not breached any duty of care. The Court on this point followed the established position under English law that a Defendant will not be liable for acts of third parties unless certain exceptions apply (*e.g.*, creating the danger) (*i.e.*, there was no negligence).

Grounds of Appeal

The Claimants appealed against the first instance decision on five grounds, centred on three topics: accessory liability; duty of care; and causation:

(i) Accessory liability by reason of common design

The Claimants argued that the Court should have inferred from the AML's provision to the police of "*money, vehicles and accommodation*", or the activities of its employees, that AML had intended the police "*to quash protest **if need be** by the use of excessive violence*" (emphasis added), such that they had a "*common design*" with the police to justify the imposition of accessory liability.

(ii) Existence of a duty of care in negligence

Further, the Claimants' case was that the Judge had taken the wrong approach in treating this case as a "*pure omissions*" case (as explained below). Instead, the Judge should have applied a less restrictive inquiry and found that AML owed a self-standing duty of care, according to more general tort principles.

The Claimants submitted that, in the alternative, if this was a "*pure omissions*" case, the Judge should have imposed liability in any event, on the basis that AML had been involved in the creation of the danger.

3 at paragraph 2.

4 [2018] EWHC 3506 (QB).

5 The entities having inherited relevant rights and obligations from AML.

6 While the law of Sierra Leone applied to the dispute, the parties agreed that the law of Sierra Leone could be treated as being identical to English law.

7 In a 92 page decision, after a 24 day long trial, the first week of which had seen the English Court sitting in Sierra Leone, understood to be the first time an English judge had travelled overseas to hear allegations of human rights abuses against a UK company, and having examined a huge volume of argument and evidence.

8 In particular, the Court noted that the Claimants had failed to prove that AML's support to the police went beyond "encouragement to do a proper job with proportionate enthusiasm" into the realm of "giving instructions to deploy unlawful means".

(iii) Causation in negligence

The Claimants asserted that the Judge had been wrong to consider whether each (hypothetical) breach individually caused the harm. Instead, they argued that he should have considered whether, taken cumulatively, the breaches caused the harm.

The Appeal Decision

The Court of Appeal dismissed the appeal in its entirety. Coulson LJ, who delivered the leading judgment, made clear that the High Court's findings as to the facts of AML's involvement were not susceptible to dispute.[9] On the five grounds asserted by the Claimants, Coulson LJ found as follows:

(i) No Common Design

Coulson LJ provided a useful reminder of the relevant English law authorities on accessory liability in tort, namely:

- A defendant may be liable in tort for a wrong committed by another where the defendant and the wrongdoer intend the same objective by the commission of the wrong, *i.e.*, the wrong is the means to achieve a "*common design*".
- Accessory liability in tort is far narrower than in criminal law. While in criminal law one may be liable as an accessory if one foresees the harm of the act, in tort, one must actually intend the harm. Coulson LJ repeated the example cited by the Court of Appeal in *Fish & Fish v Sea Shepherd UK*[10] that: "*selling a person a gun knowing that the person will use it to kill someone else will make the seller an accessory to murder but it will not in itself make him liable in tort*".

Coulson LJ found that this limb of the appeal was "*based squarely on foreseeability*".[11] In providing resources to the police, AML may have *foreseen* that the police might have used excessive violence to quash unrest, but this had not been their intention. Holding that he considered foresight to be "*a very different thing from intent*"[12], Coulson LJ found that, following the authorities on common design, foreseeability could not justify the imposition here of accessory liability.

Putting aside the trial Judge's finding as to *actual* intention, Coulson LJ considered that it was possible, in theory, for accessory liability in tort to be made out on the basis of an *inferred* intention. However, this would only be possible where the conduct justifying the inference does so very clearly. Coulson LJ recalled *Shah v Gale*[13], and observed that, by way of example, directing an aggressor to the house of someone you wanted "*beaten up*"[14] would be a sufficiently clear implication of a common design to cause harm. Nothing in AML's conduct gave rise to such inference.

Instead, it seemed more likely to Coulson LJ that AML's provision of facilities to the police was "*consistent with the prudent exercise of the respondents' duties to their employees and… to do all they could to ensure that peace was kept*".[15]

Coulson LJ noted an overarching "*fundamental flaw*" in the Claimants' case on common design as penalising AML for calling for help: "*a party who calls on the services of the police to restore law and order cannot be*

9 Coulson LJ noted scale of the task already undertaken by the High Court and the English law position that an appellate court will not interfere with any finding of fact of a lower court, unless such finding cannot reasonably be explained or justified.

10 Fish & Fish v Sea Shepherd UK [2013] EWCA Civ 544; [2015] UKSC 10.

11 At paragraph 85.

12 At paragraph 85.

13 Shah v Gale [2005] EWHC 1087 (QB).

14 At paragraph 100.

15 At paragraph 104.

liable in tort for the actions of the police simply because it is foreseeable that the police may use excessive force to achieve that result… That is not the law".[16]

(ii) No Duty of Care

Coulson LJ, disagreeing with the Claimants, went further than the High Court and classified this case as a "*case of pure omissions*".[17] He found that AML had not carried out any relevant activity to cause the loss. Since the general rule holds that there is no liability in negligence for the acts of third parties, AML could, therefore, only be liable for the acts of the police if it itself had created the danger. The provision of money, vehicles and accommodation was not a breach of any duty; indeed "*such assistance was… common in Sierra Leone*"[18] (and, the decision implied, lawful).[19] While AML had not prevented the loss, it had not been under any duty to do so (and the assistance it did provide to the police, Coulson LJ considered, had most likely mitigated the violence)

Coulson LJ went on to consider whether, ignoring its conclusion above, a freestanding duty of care could exist. He reiterated the basic legal ingredients for a duty of care: (1) foreseeability; (2) proximity; and (3) that it is fair, just and reasonable to impose a duty. The Claimants' case failed on (2) and (3).[20]

- As to (2), the Claimants were or could be all residents living in a large and remote geographical area, with no apparent limits on the physical boundaries of that area, and were not said to be at an enhanced or special risk. There were no unique factors sufficient to establish proximity with AML.
- In the circumstances, as to (3), it would not be fair, just and reasonable to impose a duty on AML to protect "*a large group of inhabitants of Sierra Leone from their own police force*".[21] It would not be fair for AML to "*take over the liability and responsibility*" of the police. [22]

(iii) No Causation / Breach

The trial Judge had concluded that each of the alleged breaches (*e.g.*, failing to carry out a risk assessment and failing to liaise with the police to reduce the risk of abuse) were of no causative effect. Following from that conclusion, Coulson LJ held there was no basis for the conclusion that the sum of these breaches caused the loss: "*nought plus nought plus nought usually equals nought*".[23] Again, Coulson LJ emphasised the trial Judge's conclusion that it was not any intervention or failure to act by AML that caused the harm, but the "*fear, ill-discipline, anger and testosterone*" of the police that was to blame.[24]

Comment

This decision falls into a trend of recent cases that have attempted to hold UK-registered corporations liable in the English Courts for harm suffered overseas, due to the acts of their subsidiaries or third parties. This trend will likely continue, given the increasing expectation on companies to conduct their business in pursuit of best

16 At paragraph 103.

17 At paragraph 125.

18 At paragraph 124.

19 Although this was not an issue on appeal, the Court of Appeal also described such assistance as "*reasonable and proportionate*" (see paragraph 146). The High Court had implied that the assistance was lawful in the circumstances: although it had been unlawful for the police to demand such assistance, the assistance constituted "pragmatic incentives and not bribes to achieve tortious ends". The lawfulness of any assistance will turn on the particular circumstances of that assistance and we would encourage companies to limit their assistance to what is explicitly allowed by local law and, in any case, take advice as to the lawfulness of that assistance. From an English law perspective, this is particularly important to avoid any offence under the UK Bribery Act 2010 – pursuant to which an English company may be liable for failing to prevent bribery, *e.g.*, by an overseas subsidiary.

20 Even though it could be made out, it is trite law that (1) foreseeability alone does not alone create a duty of care (see paragraph 139).

21 At paragraph 147.

22 At paragraph 147.

23 At paragraph 165.

24 At paragraph 168.

practice for the protection of human rights. The Claimants in this case have announced that they will seek leave to appeal.

This decision confirms that companies engaging with local authorities to support their operations and personnel do not necessarily assume responsibility for the actions of those authorities, even there is a foreseeable risk that those authorities might behave unlawfully. Even so, the lawfulness of such support, it seems, will turn on a case by case proportionality assessment. As such, companies should seek advice as to the precise scope of their engagement with such authorities, to ensure that their engagement is proportionate (and lawful).

In addition, in the view of the English Court of Appeal, there is *"nothing in the Voluntary Principles [on Security and Human Rights] which make companies operating abroad generally liable for the unlawful acts of the police forces of the host countries in which they are operating*".[25] Rather, the Court emphasised the traditional view that it is the governments of those countries (and not the companies) who have the primary responsibility to promote and protect human rights.

The decision turned on the facts in this case, and there remains a live legal risk that parties may be fixed with an inferred "common design" to cause harm by unlawful acts of a local third party. In this case, the harm was police brutality, but a wide range of harms could form the basis for such accessory liability – for instance, pollution or other environmental nuisance or impairment.

Companies must be cautious to avoid anything that may encourage the use of unlawful means or add to the danger of harm materialising. This is especially true for companies involved in extractive and natural resource industries, or other industries that are generally accepted to bear a potentially high risk for human rights abuses (*e.g.*, infrastructure and construction, agribusiness and food production, textiles and clothes production).

Investors and broader stakeholders are increasingly demanding enhanced disclosure and risk assessments in these areas. As the UN Guiding Principles on Business & Human Rights[26] and the Voluntary Principles[27] promote, best practice to mitigate against such risks should include conducting human rights impacts assessments for all operations, and taking steps to mitigate the identified risks.

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25 At paragraph 151.

26 https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

27 https://www.voluntaryprinciples.org/the-principles/