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DIRECTOR'S ACCESSORIAL LIABILITY: A TOOL FOR BETTER REGULATION

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Abstract

Directors are vital to the existence of companies. In fact, they are the soul of the company as they are responsible for the day to day running of the company. Companies are fundamental to the economic and overall development of any society as it is through the instrumentality of the limited company that dreams and ideas are put to life. A consequence of the existence and recognition of companies by the law is that they are rights and duties bearing entities hence the expectation that they should behave in acceptable standards within the society. As a result of the central role that directors play in company affairs, it is argued that directors are often central to a company's culpability. Yet, the legal position is that a company is a person on its own who should bear responsibility for its actions irrespective of the natural persons in it. However, the reality of the operations of companies suggests that directors are often culpable in companies' criminality. The aim of this article is to analyse the role and position of directors in companies' criminality vis visa with the existing legal framework. This article finds that directors are often culpable in companies' criminality thus; director's accessorial liability has become imperative. It finds further that the existing legal framework in Nigeria can accommodate such only to an extent. It argues that prosecuting directors as accessories to corporate crimes will better enhance regulation as there is greater motivation to ensure a culture of compliance. It therefore recommends prosecutorial activism and also some legislative reforms in respect of regulatory offences.

1. Introduction

The recognition of a company as a person in the eyes of the law concretized in commonwealth jurisdictions by the over a century old case of *Salomon v. Salomon & Co Ltd*¹ means that a company is a

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¹(1897) AC 22

rights and duties bearing entity in the eyes of the law. Hence, it can act as a natural person and even more.³ However, by the very nature of a company as an artificial person, it can actually do nothing for itself without its human elements. According to the fiction theory of law, it is believed that the company is a fiction or myth created by the law, it is the law by a fiction which attributes personality to a company.⁴ This view is correct to an extent as the company truly derives validity from the law and it can only act through its human elements. The provisions of Companies and Allied Matters Act⁵ (CAMA) justify this position as it states in section 61 that the acts which are to be regarded as the acts of the company, it provides that the actions of members in a general meeting, the board of directors and the managing director are the acts of the company. Similarly, section 63 provides that the company can act through its officers and agents under authority of the general meeting or the board of directors. Thus, directors are important elements through which a company acts.

In furtherance of the key role of directors to the administration of companies, section 63(3) provides further that the business of the company shall be managed by the board of directors except those acts that CAMA provides as exclusive to the general meeting or otherwise provided by the article of association.

One of the most revolutionary judicial decisions in company jurisprudence is the decision in *Salomon v. Salomon & Co Ltd* which confers legal personality on a company different from that of its owners and members.⁶ Per Lord Macnaghten:

"when the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate 'capable forthwith' to use the word of the enactment, of exercising all the functions of an incorporated company.' those are strong words. The company attains maturity at its birth ... the company is at law a different person altogether from the subscriber to the memorandum and, although it may be that after incorporation the business is precisely the same as it was before, the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them"

Consequently, one of the implications of this decision that has been given both judicial and legislative validity in Nigeria and most commonwealth jurisdiction is that a company thus becomes a right

³For example, a company enjoys perpetual succession.

⁴See LJB Jurisprudence and Legal Theory 4th Edition, HLY Publications, 1993

⁵Companies and Allied Matters Act Cap C20, LFN 2004

⁶*Salomon v. Salomon & Co Ltd* (1897) AC 22

and duties bearing entity. It becomes a responsible member of the society which is expected to behave in acceptable ways and subject to the laws of the land. Thus, when the company does acts which violate the existing laws, it can be held liable both civilly and criminally.⁶ However, there had been challenges to holding companies liable for crimes essentially because of the inherent technicality of the criminal law⁷ and the fact that the criminal law evolved with the natural person in mind. The question then is should the law close its eyes to the crimes committed by companies in spite of the glaring incidence of corporate crimes.⁸ Also, should a company which enjoys the benefits of personhood and more not be subjected to the liabilities arising as a result? Would it not amount to a double standard to only enjoy the rights and escape the liabilities?⁹ Should the law then close its eyes to acts of companies which clearly violate the criminal law and allow companies go scot free? It seems that a safe way of solving this challenge was through the concept of lifting the veil whereby when a wrong is committed by a company, the law removes the veil of incorporation and hold natural persons behind the company criminally responsible. Yet, lifting the veil does not absolutely solve the challenge of corporate criminality. It seems to support the myth that the company cannot be held criminally liable in its own name and as a result defeating the whole essence of corporate personality. However, reforms in different jurisdictions both legislative and through judicial activism has shown that the company can be brought within the ambit of the criminal in spite of the requirements of *actus reus* and *mens rea*. For example, in the United Kingdom, the Corporate Manslaughter and Corporate Homicide Act¹⁰ recognises that a company can be prosecuted for manslaughter. Also, in Nigeria, the Companies and Allied Matters Act recognises that a company can be civilly and criminally liable.¹¹ In *IGP v. Mandillas and Karaberries & Anor*,¹² a company was convicted with his official of stealing. Although, as stated, there are still challenges with the criminal liability of companies especially with respect to *Mens rea*, it

⁶Section 65 CAMA

⁷The criminal law is based on the twin requirements of *actus reus* and *mens rea*. These requirements are foundational to criminal liability.

⁸It seems corporate crimes increased with development and the advent of technology. It can be suggested that corporate crimes are a global reality which may never go away but which can definitely be reduced.

⁹K.O. Akanbi "Perspectives on the Legacy of *Salomon v. Salomon* on the Nigerian and Malaysian Company Laws" Legal Network Series, 1LNS (A) 1VIII (2012) p.23

¹⁰UK Corporate Manslaughter and Corporate Homicide Act 2007

¹¹See section 65

¹²(1958) W.R.N.LR

is safe to assert that there has been a gradual but steady move towards concretizing corporate criminal liability.¹³

The question then is the culpability of directors in the scheme of things, by virtue of the key role they play in the running of companies.

2. Who is a director?

Directors are persons who control and manage the affairs of the company.¹⁴ CAMA provides in section 244 that directors are persons duly appointed by the company to direct and manage the business of the company. Directors are central to the activities of a company as they are responsible for running the affairs of a company. They stand in a fiduciary relationship with the company and must act with utmost good faith. They are often referred to as trustees and sometimes as agents of the company. The truth is that they can be classified as both trustees and agents as the case maybe. According to Jessel M.R in *Forest of Dean Coal Mining Company*¹⁵:

"Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners. It does not matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and all other shareholders in it."

While directors may not be trustees absolutely, they can be regarded as trustees to the extent that they are trustees of the company's monies and properties and they have a duty to act with utmost good faith.¹⁶ Also, directors have some similarities with trustees as both hold and control another person's property; they both also exercise such powers with discretion and carries risk too.

However, this should not be mistaken as being trustees for individual shareholders. In *Howards Smith Ltd v. Ampol Petroleum Ltd*,¹⁷ Lord Wilberforce held:

"...directors within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office."

They can also be regarded as agents of the company because the company can be vicariously liable for their actions done in the course

¹³ See Akanbi K.O. "The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom" *IJUM Law Journal*, Volume 22, Number 1 (2014) pp.116-136

¹⁴ See *Olufosoye v. Fakarede* (1993) 1 NWLR, @72 (1978) 10 Ch 450

¹⁵ See *Okeowo v. Migliore* (1979) NSCC 210 at 263 (1974) AC 821 at 887

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of the company's business as they ordinarily incur no personal liability in this instance. They can also be regarded as agents because they act on behalf of the company within the scope of their authority. In *Yalaju Amaye v. AREC Ltd*,¹⁸ the Supreme Court gave an exposition of the status of company directors when it held per Nnaemeka Agu JSC that:

"...to my mind, it would be wrong to hold that because the relationship of a managing director and a company was based on contract, it was ipso facto, a matter of master and servant for which the Federal High Court has no jurisdiction. A managing director does not cease to be director simply because he is managing the company. And the better view is, perhaps that directors of a company are trustees, agents and fiduciaries of the company." It is submitted that directors stand in a special position within a company and is therefore able to influence the activities of a company.

3. Duties of Directors

Directors as stated are persons duly appointed to direct and manage the affairs of the company. Such appointment can be by subscribing to the memorandum of association of the company, by ordinary resolution of the members at a general meeting, by naming them in the article of association and by the board of directors in the event of a casual vacancy.¹⁹ In the same vein, directors as managers and directors owe some duties to the company. These duties are ordinarily spelt out in the memorandum and article of association of the company. However, aside the specific duties, there are general statutory duties stated in the Companies and Allied Matters Act. The most important duty of directors and upon which all other duties are founded is the fiduciary duty. This means director must act with utmost good faith with the company.²⁰ This is because with growth, it becomes practically impossible for investors or shareholders who are the owners of the company to convene physically to manage the day to day affairs of the company. Hence, it became necessary to hand over the affairs of the company to a trusted few who would discharge the duty with absolute honesty. Section 279 (1) aptly captures this duty. It states:

"A director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf."

¹⁸(1990) 4 NWLR (pt. 145) 422 SC

¹⁹Sections 247-249 CAMA

²⁰See *Astra Industries Nigeria Ltd v. Nigerian Bank for Commerce & Industry* (1998) 4 NWLR (Pt. 546) 375

It provides further in (3) that a director should act in the best interest of the company and to promote its business and preserve its assets in a faithful, diligent, skilful and careful manner.

Also, in the American case of *Inre Caremark International Inc. Derivative Litigation*²¹, it was held that directors have a fiduciary duty to oversee and adopt a compliance programme even when there is no notice of wrongdoing.²²

As stated, the fiduciary duty is the foundational duty upon which all the other duties are based. Section 280 also makes it a duty on a director not to allow his personal interest conflict with the interest of the company and when he is directly or indirectly in a contract with the company, he should disclose same to the company.²³ A director also have a duty not to accept a benefit from a third party conferred by reason of his being a director or by reason of doing an act as a director.²⁴ However, if he accepts such gift or benefit, he is liable to account for it irrespective of the fact that the company benefitted from it or that the benefit was accepted in good faith.²⁵ Section 282 provides that a director must discharge his duties with care and skill. Failure to exercise reasonable care is actionable both as negligence and breach of duty.²⁶ Thus, all the directors' duties show a responsibility to act in good faith and with the best interest of the company at heart.

4. Company's Crime and Director's Culpability

There have been various attempts at defining what constitutes company or corporate crimes. This is because there are challenges in adapting the definitions of crimes to a company because of its artificial nature.²⁷ Corporate crimes have been defined as illegal acts, omissions or commissions by corporate organisations themselves as social or legal entities or by officials or employees of the corporation acting in accordance with the operative goals, procedures or norms of the organization with the intent to benefit the organization.²⁸ It has

²¹698 A. 2d959 (Del.Ch. 1996)

²²Per Chancellor William T. Allen, although the court held further that it could not impose liability unless the director acted in bad faith.

²³ See the English case of *Guinness v. Sanders* (1990) 1 ALL ER 652, see also *Oguntoye v. Adebunju* (1997) 12 NWLR

²⁴ See section 287 CAMA

²⁵ Section 287 (4) CAMA

²⁶Section 282 (2) CAMA

²⁷K.O. Akanbi & D.A. Ariyoosu "Corporate Criminal Liability: Imperatives of Criminalising Corporate Wrongs" *University of Ilorin Law Journal, UILJ*, Vol.9, (2014) p.189

²⁸C.Reasons "Crime Against the Environment: Some Theoretical and Practical Concerns" *Crime LQ*, Vol.34 nov1, (1993). See R. Kramer "Corporate Criminality"

also been defined as the conduct of a corporation or its employees acting on behalf of a corporation which is punished by the law.²⁹ It is submitted that what is important in defining corporate crimes is that the act or omission which is a violation of the law must be acts or omissions that are clearly that of the company as opposed to individual members of the company; and the company is the truly blameworthy party. Also, the reality of corporate crime is that the crimes occur mostly as a result of a systemic breakdown within the company hence the company as "the system" is the truly blameworthy one.

Having established the role of directors in the management of companies and the very nature of corporate crimes, it is safe to assert that in most if not all instances, when a company commits a crime, directors would have actual or constructive knowledge. The director manages and directs the affairs of a company and therefore in a position to ensure that the company acts in a legally acceptable way and that there is no breakdown of the existing system. According to Lord Denning in *Bolton (Engineering) Co. Ltd. V. Graham and Sons*:³⁰

"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does..."

This dictum was followed by the Court of Appeal in the case of *Nigerian Bank for Commerce and Industry v. Integrated Gas (Nig.) Ltd.*:³¹

"it must be realised that although a company is a separate legal person, it can do nothing for itself nor think for itself since it is a fiction and does not exist in the physical world ...the directors, managers, the general managers or the managing directors, represent the directing mind and will of the company and control what it does..." Thus, control which the director exercises over the company's acts is key to suggesting that a director will almost always be culpable in company's criminality.

The Development of an Idea"; in E Holchestedler ed. *Corporate as Criminals*, (Sage Publications), 1984

²⁹ John Braithwaite *Corporate Crime in the Pharmaceutical Industry*, (Routledge and Kegan, UK 1984) 6

³⁰ (1957) 1 Q.B 159

³¹ (1999) 8 NWLR, pt.613 at 129

Another justification for imposing liability on directors is that in the absence of personal liability, it is easier for director(s) especially in the small one man companies to hide under the corporate cloak to commit offences as seen in the case of Salomon.³² In addition, directors usually have wide discretionary powers in managing the affairs of a company³³ and personal liability will serve as a motivation to ensure compliance with the law thereby making the law more effective.

It must be stated that director's liability can be in form of personal liability or accessorial liability. Personal liability of directors is well entrenched in most jurisdictions. For example, in the United Kingdom, specific statutes place personal liability on a director. For example, section 37 of the Health and Safety at Work Act 1974 provides that when a health and safety offence is committed with the consent of a director, secretary or manager, such a person as well as the corporate body will be liable.³⁴ Similarly, in the case of *Standard Chartered Bank v. Pakistan National Shipping Corp (No1)*³⁵ it was held that even if the company would be liable for deceit done by the director, he too will be personally liable for his own fraud.³⁶

In Nigeria, personal liability of directors is recognised. The Companies and Allied Matters Act has a number of provisions imposing liability on directors. For example, section 277(4) makes a director liable for failure to disclose his interest in a contract being proposed to the company and liable on conviction to a fine. Section 38 (2) recognises that a director can be liable when a company makes a political donation contrary to the provisions of the Act. Also, all directors who knowingly are a party to the payment of dividend in contravention of the Act will be personally liable.³⁷ Similarly, the Assets Management Corporation of Nigeria Act³⁸ in its section 49, 50

³²Here, Salomon effectively formed a one man company using his wife and children as stooges to fulfill the requirement of the then company legislation. He owned more than 20,001 shares with his wife and children 1 share each. The company ran into problem and its assets were only enough to discharge the debentures which he himself held and nothing was left for the unsecured creditors. Although, the court of appeal and the trial court held that the company was a sham, the House of Lords however held that the company was validly formed and that Salomon as a debenture holder was different from the company even though he was the majority shareholder.

³³H. A. J Ford, *Principles of Company Law* 3rd Edition, (Butterworths, Australia 1982), 361. See also section 63(5) of the Companies and Allied Matters Act

³⁴Also section 9 of the Enterprise Act 2002 also recognizes personal liability for cartel offences.

³⁵(2003) 1AC 959.

³⁶Also, in *R v. Robert Millar (Contractors) Ltd* (1970) 2 Q.B. 233, the company and the managing director were charged under the Road Traffic Act.

³⁷Section 386, see also section 506

³⁸2010

and 61 holds directors of borrowing companies personally liable for non-performing loans. In the case of *Onakoya v. F.R.N.*³⁹ a director of the now defunct Savannah Bank was prosecuted and convicted for violating the provisions of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No 18 of 1994 as amended. It however seems that in Nigeria, in the absence of specific legislations imposing personal liabilities on directors, the company will still bear liability alone.⁴⁰

Directors' accessorial liability on the other hand implies making the director liable as an accessory for aiding the corporation to commit the offence. Therefore, accessorial liability is based on the culpability of the corporation itself.

The main criminal legislations in Nigeria are the Criminal and Penal Codes and both recognise that there are different classes of offenders. Section 7 of the Criminal Code⁴¹ provides four categories of principal offenders as follows:

- a) A person who actually acts or omits to do an act which constitute an offence
- b) A person who acts or omits to do an act which enables another person to commit an offence.
- c) A person who aids another to commit an offence
- d) A person who counsels or procures another to commit an offence

The interpretation section of the Code defines a person to include corporations of all kinds. Thus, a director's role in respect of company's culpability can be accommodated under (b) and (d). This is not excusing director's personal liability which can be accommodated under any of the sub heads especially (a) and (c).

In addition, a director may also be an accessory after the fact. Section 10 describes an accessory after the fact as a person who assists another who to his knowledge is guilty of an offence in order to escape punishment. This situation can be when director(s) aids or alters company's records in order to hide company crime(s).

In the same vein, the Penal Code recognises that there may be different categories of accused person⁴²; and it similarly defines a person to include a company or association or body of person whether

³⁹(2002) 11 N.W.L.R (pt.729) 595. See also *F.D.B Financial Services v. Adesozu* (2002) 8 N.W.L.R 668

⁴⁰Per Niki Tobi J.C.A as he then was in *Adeniji v. State*(1992) 4 N.W.L.R (pt.234) 248 at 263-264

⁴¹ Cap C38, L.F.N 2004

⁴² See section 82 which provides that where several persons are engaged in the commission of a criminal act, each person may be guilty of a different offence or offences by means of that Act.

incorporated or not.⁴³ Chapter V of the Act defines abatement and explains instances of when an offence can be said to be abetted. Section 83 defines abatement as when a person instigates another to do an act or engages with others in a conspiracy or intentionally aids or facilitates the doing of an illegal act or omission. Thus, a director can be liable in appropriate circumstances for abetting a criminal act done by a company. In fact, section 87 makes a person liable for abatement even if the act done is different from the act abetted as long as the act done is a likely consequence of the abatement. Thus, when a director allow, encourages or facilitate the act or omission of a company resulting in to a crime, then the provisions of the Penal Code cited can be a ground for holding it as an accessory more so as the Code already recognises that an offence can be committed by means of several acts and several persons.⁴⁴

As stated, the concept of director's accessorial liability is a realistic approach which validates the principle of corporate personality from which corporate liability evolves, yet practical enough to recognise the salient role played by directors in company affairs and by extension, company's liability. Thus, there is nothing stopping the prosecution of directors as accessories to company crimes in appropriate circumstances especially as the provisions of both the Criminal and Penal Codes suggests that same can be accommodated. In Australia, directors' accessorial liability is recognised in relation to some specific legislation. For example, the provisions of section 75B (1) of the Trade Practices Act Australia 1974 recognises the liability of a person who aided, abetted or is directly or indirectly involved in the contravention of the law support director's accessorial liability.⁴⁵ Also, the New South Wales Occupational Health and Safety Act⁴⁶ provides for accessorial liability. Section 6 of the Act provides for accessorial liability of directors and also recognises two defences of due diligence and not being in a position to influence decisions in order to protect diligent directors. This Act is worthy of commendation as a good initiative because directors are better motivated to ensure the company do what it should ordinarily do and thus greater compliance with the law.

⁴³ Cap 1 Penal Code Cap 89, LFN 2004

⁴⁴ Section 81

⁴⁵ See *Australian Society of Accountants v. Federation of Australian Accountants Inc* (1987) ATPR 40-796. See also *Medical Benefits Fund of Australia Ltd v. Cassell* (2003) 135 F.C.R.1. Although the individuals in the latter case was not found liable because he did not have the requisite knowledge.

⁴⁶ 2000

In addition, the available defences will mean that only truly blameworthy directors are subject to liability since a director that can establish that it had done all he could will necessarily escape liability.

5. Conclusion and Recommendations

The idea of prosecuting directors as accessories to company's criminality is an idea whose time has come. This is in view of the central role that directors play in company affairs. As managers and controllers of the affairs of the company, there is a high probability of directors' culpability as accessories to company's criminality. Also, the high discretionary powers that they enjoy mean that they are in a position to influence corporate behaviour. Without liability, it is easier for directors to hide under the corporate cloak to commit offences. In fact, there might be no motivation to promote a corporate culture of compliance. Thus, the fear of personal liability will ensure better corporate behaviour and ultimately better regulation. As noted in this article, directors' liability can be personal and accessorial. While personal liability of directors is well entrenched in the Companies and Allied Matters Act, same cannot be said of liability as accessories to corporate criminality. This is also what obtains in a number of regulatory legislation. Thus, there is the need for some legislative amendments to include directors' accessorial liability as corporate offences are sometimes violations of regulations. For example, the Companies and Allied Matters Act be amended to include accessorial liability.

On the other hand, the main criminal legislations viz Penal and Criminal Code can accommodate the idea of directors' liability as accessories to corporate criminality. Thus, it is recommended that there should be some form of prosecutorial activism whereby prosecutors charge directors as accessories to corporate offenders in appropriate circumstances. Clearly, there is nothing stopping such prosecution going by the wordings of both the Penal and Criminal Codes.

With respect to legislative amendments, the approach of the New South Wales Act on occupational health and safety can be a guide. There is no danger of punishing an innocent director as defences of due diligence and not being in a position to influence action will avail an innocent director. Thus, only truly blameworthy directors will be liable. This will serve as motivation for better supervision and control and ultimately makes regulation easier.

This will go a long way to enhance regulation as there is greater motivation to ensure a culture of compliance.