



CORPORATE OFFENCES AND CORPORATE CRIMINAL LIABILITY IN TANZANIA

By Rose Joseph Jally¹ and Tundonde Steven Mwihomeke²

Abstract

In Tanzanian law and under common law, the criminal liability is usually based on *mens rea* of a person who is committing an offence³. The issue is how to bring a corporate body into criminal liability while the corporate body does not have physical being. The law establishes that the corporate body is placed into being as if it has a soul and mind. It can therefore commit crimes and can sue

and be sued accordingly. The above context has brought several legal issues as to when placing the corporate body into criminal liability, and whom can be found criminally liable as it is clearly known that corporate body is represented by its director and manager. The question therefore arises as to whether any officer of such body can be held liable. This article exposed challenges of bringing the corporate body into criminal liability as such body does not have physical being. It also discusses the crimes that can be committed by a corporate body.

KEY WORDS: Criminal Liability, Offences of Corporate Body

1 LLM, Ruaha University College, LLB Tumaini University College and Assistant lecturer, Institute of Judicial Administration.
2 LLM and LLB University of Venda and Assistant lecturer, Institute of Judicial Administration
3 This is clearly stated in the Criminal Procedure Act No 27 of 2008 where is established under the Penal Code Act Cap 16 of 2002

1. Introduction

The current law on criminal liability over liability of corporate body in Tanzania is provided by several pieces of legislation.⁴ In general, corporation is known as a separate legal body and is considered as a legal person separate from those who are working within the corporation.⁵ A corporate body may not consequently be liable if offences are committed by persons purporting to perform on its name. To establish as to whether a company is guilty of an offence or not depends on building of the offence and the course by which criminal liability can be determined⁶

The general rule in criminal law is that, only natural person can execute an act. However, criminal acts in exceptional circumstances can be committed by a corporate body. Such principle has been established under common law.⁷ As indicated in the above background, this article exposes challenges of bringing the corporate body into criminal liability. It also discusses the crimes that can be committed by a corporate body.

2. Desirability of Punishing a Corporate Body

The prevailing argument is on whether an entity can be punished as a human being who is able to do an act on his or her own⁸. The argument underlines the concept of corporate criminal liability which brings confusion on the discussion as to whether the entity can act like a human being. In this respect, Snyman

4 Geraghty, *Corporate Criminal Liability*, American Criminal Law Review, 2002, Vol. 39, p.327.

5 Gobert, J. *Corporate Criminality: New Crimes for the Times*, Criminal Law Review, 1994 722.

6 *Nicholas Zervos and Janet Ndyetabura {etal}*. Establishing a business in Tanzania, 2017, VELMA Law, Establishes the, a legal person separate to those working within the corporation. A company may or may not therefore be liable if offences are committed by individuals purporting to act in its name. Determining whether a company is guilty of an offence depends on the construction of the offence and the route by which, for any given offence, corporate criminal liability can be determined. In recent years two important pieces of legislation have sought to overcome the historical difficulty in establishing corporate criminal liability by creating specific corporate offences:

7 Gobert, J. *Corporate Criminality: Four Models of Fault*, Legal Studies, 1994, Vol. 14, p.393.

8 Gobert, J & Mugnai, E. *Coping with Corporate Criminality – Some Lessons from Italy*”, Criminal Law Review, 2002, p. 619

has it that:

It is sometimes said that the idea in the concept of blameworthiness inherent in the concept culpability presupposes personal responsibility something which an abstract entity such as corporate body lacks. The corporate body has no physical existence and does not think for itself or act on its own⁹

On the other hand, it means that all acts of a corporate body are performed by persons who have positions in the corporate body on its behalf. The fact that there is a need to observe a greater responsibility due to multiplicity of several corporate bodies, as they perform an important task in the society, it is sometimes not easy to take an individual as a wrongdoer in a corporate body. This is due to the fact that an administrator can simply transfer liability to another person. In other branches of law such as contract law, the law has it that a company or any corporate body has capacity to act, think and exercising its will.

Holding a corporate body legally accountable in criminal matters brings several procedural questions. The questions include;¹⁰ who is to be summoned, who can stand as an accused, who should represent the corporate body during the trial, and which punishment can be imposed and to whom.¹¹

In Tanzania some of the issues have been addressed under the Criminal Procedure Act.¹² The Act¹³ explains that the summons can be served to the secretary, local manager or the principal of the company at the registered office of that corporate body or by the letter addressed to the chief executive officer of that corporate body.¹⁴ Basing on who should

9 “ CR SNYMAN, Criminal Law, 6th Edition, LexisNexis, South Africa, 2014;

10 Lederman, E. *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, Buffalo Criminal Law Review 2000, Vol. 4, p. 641

11 Leigh, L. *The Criminal Liability of Corporation*, Ottawa Law Review 1977, Vol. 9, 247.

12 The Criminal Procedure Act No. 20 RE 2002

13 op cit

14 Section 105 The Criminal Procedure Act Cap 20 RE 2002 , Service of summons on an incorporated company may be effected

represent the corporate body during the whole trial and stand as an accused, the Act provides that it shall be by any officer¹ of the corporation.²

3. Responsibility of Corporate Body for the Acts of Its Director or Servant

An act by the director or servant of a corporate body is deemed to be an act of the corporate body itself if and only if it was performed in cause of duty. Exemption is made if it is shown that the act was done outside the corporate body.³ To that effect, a corporate body is capable of committing both common law and statutory crimes. It can commit crimes requiring intention and strict liability crimes as provided in the National Security Act:⁴

Where any offence under this Act is committed by a body corporate, then, any person who, at the time of the commission of the offence, was concerned, as a director or officer, with the management of the affairs of such body corporate shall be guilty of the offence and be liable to be proceeded against and punished accordingly unless he proves to the satisfaction of the court that he had no knowledge, and could not by the exercise of reasonable diligence have had knowledge of the commission of the offence.

From this view, any act which has been performed by the director or servant in the course of exercising his duty or performing the interests of the corporate body is said to have been done by the corporate body.⁵

by serving it on the secretary, local manager or other principal officer of the company at the registered office of such company of by registered letter addressed to the chief executive officer of the company and in the case of a registered letter, service shall be deemed to have been effected when the letter would arrive in the ordinary course of post.

1 Section 109(3) of the Criminal Procedure Act Cap 20 RE 2002.

2 Section 109 and 106 of the Criminal Procedure Act Cap 20 RE 2002.

3 In (1915) AC 705. The plaintiff and the second defendant formed a limited company of which they became both shareholders and directors. Subsequently, the plaintiff incurred some expenses in the company's name and wanted them recovered from the two defendants. It was held that as the company was a distinct person, separate from the second defendant, the expenses could be recovered from the company and not from the second defendant as well.

4 Section 20(1) (2) (a) and (b) of the National Security Act No.3 1970

5 Salomon v Salomon (1897) AC 22. when he said, "The company

Additionally, any act if performed by director or servant is regarded not to have been done by them as individuals but in response to his express or implied directions.⁶

Acts by directors or servants are held to include not only acts performed by such persons personally, but acts performed on their instructions or with their express or implied permission.⁷ The culpability of the director or servant is similarly ascribed to the corporate body. The word 'director' has an extended meaning. It may mean any person who controls or governs a corporate body or a member of a body or group of persons which controls or governs a corporate body. In a situation where there is such body or a group of persons, the term 'director' refers to any person who is a member of the corporate body.⁸

4. Piercing the Corporate Veil

Despite the above explanations on the criminal liability of the corporate body, there are situation where courts put aside limited liability and hold a corporation's shareholders or directors personally liable for corporation's actions. The implication of this is to bring the corporate actors' behavior in conformity with particular statutory requirements.⁹

This principle is well enshrined in some of our statutes. The principle is evident in section 49 the Cybercrimes Act. The relevant provision is to the effect that if a corporate body is convicted of an offence every person who was a director, officer or concerned with

is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them."

6 Wells, Celia. Corporations and Criminal Responsibility (2nd edition), Oxford University Press, Oxford (2001). ISBN 0-19-826793-2

7 Wells, Celia, Corporate Criminal Liability in Europe and Beyond. New South Wales Law Society Journal, 39 (2001) 62-66.

8 In *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, Lord Reid said: The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.

9 J. Macey, *The three justification for Piercing the Corporate Veil*, Harvard Law School Forum on Corporate Governance and Financial Regulation

managerial post of the corporate body at the time of commission of an offence is deemed to have committed an offence unless he proves that the commission of offence took place without his consent or he exercised due diligence to prevent the offence.¹⁰

The piercing of veil is also observed in money laundering offences,¹¹ where the Anti-Money Laundering Act provides that, the directors or officers in charge of management affairs of a corporate body may be convicted for corporate offence personally.

5. Establishing Mens rea of a Corporate Body

As mentioned above the imposition of criminal sanctions to the corporate body lies upon if the corporate body is found guilty of the offence it is tried for. Since the companies have no physical being as stated above, it is hard to establish its mens rea. In this respect, the mens rea of the corporate body's representatives will be attributed to the corporate body.¹²

6. Appearance at Trial, Plea and Punishment

Issues relating to appearance of a corporate body in trials, plea taking and imposing punishment attract such questions like; who must come before court to stand in the dock at the trial of a corporate body, who must talk on its behalf and what penalty can be imposed on it, are questions under discussion.

10 Section 49 of Cyber Crime Act No. 14 of 2015

11 Section 14 (2) of The Ant- Money Laundering Act No 12 of 2006, provides, the director, manager, controller, partner or a person concerned in the management of affairs of a body corporate or an association may be convicted for an offence under subsection (1) notwithstanding that, such body corporate or association of persons has not been convicted of the offence. (3) Any person who would have committed an offence if any act had been done or omitted to be done by him personally, commits that offence and shall on conviction be liable to the same penalty as if such act had been done or omitted to be done by his agent or officer in the course of that agent's business or in the course of that officer's employment, as the case may be, unless he proves that the offence was committed without his knowledge or consent and he took all reasonable precautions to prevent the doing of, or omission to do such an act.

12 Wells, Celia, *Corporations: Culture, Risk and Criminal Liability*, Criminal Law Review, 1993, 551.

Section 105 of the Criminal Procedure Act [cap. 20 R.E 2002] provides as to how service of summons on a corporate body may be effected accordingly. The service of summons is to be served on the secretary, local manager or any principal officer of the company at the registered office of the company. At the trial of such corporate body, any such officer appearing as a representative of the corporate body is entitled to enter plea for the corporate body and if he fails to do so or where he does not appear the court is entitled to make an order for a plea of not guilty and the trial will have to continue as if the corporation had duly entered a plea of not guilty. Therefore it means that, the officer of the corporation representing the corporation is to be treated as if she/he were the accused. It is she/he who has to stand in the dock.

The Penal Code¹³ is silent on issues relating to punishment of a corporate body. However, some pieces of legislation, like the National Security Act are clear on punishment of corporate bodies offences. Section 21 of the National Security Act states that;

Any person who, at the time of the commission of the offence, was concerned, as a director or officer, with the management of the affairs of such body corporate shall be guilty of the offence and be liable to be proceeded against and punished accordingly unless he proves to the satisfaction of the court that he had no knowledge, and could not by the exercise of reasonable diligence have had knowledge of the commission of the offence.

However, in most cases where the corporate body is found guilty the proper punishment is fine. This is because the corporate body, as an entity, has no physical being as human being. It cannot therefore be thrown into jail, even if this necessitates the attachment and sale of its property.

13 Penal Code Act Cap 16 RE 2002

7. Defences Available to a Corporate Body

The corporate body may invoke all defenses which are available to the natural persons. If there is a reason excluding culpability, the culpability to the company is also excluded. The most important defenses are lapse of time; withdraw of an attempt to commit crime, and indemnification of the victim of criminal offence prior to the initiation of criminal proceedings.¹ With regards to criminal offences committed by employees, the company may defend itself by proving that the management acted with due care.

8. Current Situation of Some Corporate Offences in Tanzania

Corporate crimes refer to offences that are committed either by corporation or individuals that may be identified with a corporation such as directors or any person with managerial post in the corporation. In Tanzania the corporate will be held liable for offences, such as those committed under the Anti-Money Laundering Act,² Cyber Crimes Act,³ National Security Act,⁴ Environmental Management Act⁵ and Companies Act.⁶

8.1 Money Laundering

Money laundering is defined as engagement of a person or persons, direct or indirectly in conversion, transfer, concealment, disguising, use or acquisition of money or property known to be of illicit origin and in which such engagement intends to avoid the legal consequence of such action and includes offence of money laundering.⁷ Section 14 of the Anti-Money Laundering Act provides that where an offence under the provisions of section 12⁸ is committed by a body corporate

or an association of persons, every person who, at the time of the commission of the offence, was (a) a director, manager, controller or partner; or (b) concerned in the management of its affairs, may be convicted of that offence and shall be liable to a penalty specified in section 13,⁹ unless that person proves that, the offence committed without his consent or connivance and that he exercised such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to the circumstances pertaining to commission of the offence.

The sections elaborated above provide for offences which the corporate body can commit. However, the criminal responsibility of the corporate body as per the Act may be shifted to the person who was a director or holding managerial post at the time of the commission of the crime.

8.2. Tax Evasion

Tax evasion in the Tanzanian laws means evading to pay tax, whether partially or totally. This happens when a person or a corporate body is required to bring the required percentage which is needed to the Government revenue authority and does not do so.

predicate offence; (b) converts, transfers, transports or transmits property while he knows or ought to know or ought to have known that such property is the proceeds of a predicate offence, for the purposes of concealing, disguising the illicit origin of the property or of assisting any person who is involved in the commission of such offence to evade the legal consequences of his actions; (c) conceals, disguises or impedes the establishment of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, while he knows or ought to know or ought to have known that such property is the proceeds of a predicate offence; (d) acquires, possesses, uses or administers property, while he knows or ought to know or ought to have known at the time of receipt that such property is the proceeds of a predicate offence; or (e) participates in, associates with, conspires to commit, attempts to commit, aids and abets, or facilitates and counsels the commission of any of the acts described in paragraphs (a) to (d) of this section, commits an offence of money laundering. Penalties for acts of money laundering

9 13. Any person who contravenes the provisions of section 12 shall, on conviction: (a) if the person is an individual, be sentenced to a fine not exceeding five hundred million shillings and not less than one hundred million shillings or to a term of imprisonment not exceeding ten years and not less than five years; or (b) if the person is a body corporate, be liable to a fine not exceeding one billion shillings and not less than five hundred million shillings or be ordered to pay the amount equivalent to three times the market value of the property, whichever amount is greater

In terms of corporate entities, the relevant provisions are section 53 and 115 of the Income Tax Act¹⁰. Section 53 provides that a corporate body will be held liable to pay tax separate from its shareholders. Where the corporation fails, section 115 provides criminal liability to the directors or managers of the entity. In such a scenario, the company may be charged with tax evasion.

Here, the court may unveil the limited liability of the company and punish the main actors of the corporate body. This affects several individuals including; persons, companies, institutions, enterprises and corporate bodies.¹¹ In effect, corporate bodies are also required to pay the tax, although they sometimes evade as provided by Rosen in the following words:¹²

Evasion or avoidance is one of the most important problems that any tax administration faces. It is important to distinguish between tax avoidance and tax evasion. Tax avoidance is changing one's behaviour in such a way as to reduce legal tax liability, and as such, tax avoidance is not illegal. Tax evasion is failing to pay taxes which are legally due. If a tax on oranges is levied and you sell fewer oranges, it is tax avoidance. If you fail to report your sales of oranges to the tax authorities, it is

10 Income Tax Act No. 332 of 2006

11 Fjeldstad (2003), high tax rates and complicated regulations were reasons behind tax evasion. He argued that high tax rates and complex set of rules, especially for 23 customs and corporate taxes, resulted in large potential rewards for tax payers to evade the tax burden. Taylor (2001) asserts that tax compliance is determined by probability of detection and legal sanctions, when the probability of being caught and punished is high, noncompliance or rather tax evasion will be low. This provides the views that tax payers always weigh between benefits and losses resulting from tax evasion. Grasmick and Scott (1982) not only acknowledged the relationship between the threat of legal punishment (detection probability) and intention to evade taxes but also pointed the issue of social stigma attached to tax evasion. This imply that how does the society consider the person who has evaded the tax, a hero or villain? And how does the person feels before the society, sense of guilty or sense of achievement? Smith and Tyler (1996) pointed that Tax revenue authority collects revenue on behalf of governments. If the government is perceived to be representative then tax payers will be willing to pay taxes but when the tax payers perceives that government is not representative tax evasion is likely to occur. Fjeldstad and Semboja (2001) see that line in terms of tangible benefits in return of taxes. They argue that taxes are perceived to be unfair and people receive few tangible benefits in return for tax compliance.

12 www/nyc.com, retrieved on 18/04/2018 12.00 p.m. By J. Rosen

tax evasion. Tax evasion is not a new problem. Even Plato observed, when there is an income tax, the just man will pay more and the unjust less on the same amount of income

Recently tax evasion brought public attention which brings a lot of confusion and political issues. On that fact it is very cumbersome to figure out the effect of tax evasion. It is clear that the habit of many people including corporate bodies to evade tax through cheating is common. This happens even if the tax base rates are lowered. Thus, there is no guarantee that low rates will significantly discourage incentives to evade income tax.¹³ Therefore, the fact is established that in order for one to put himself from an offence of tax evasion he or she is supposed to know clearly that, when one wants to pay tax is supposed to pay the amount specified by the tax base as established by the revenue authority. This principle was enshrined by judge Rowlatt.¹⁴

8.3 Terrorist Proceeds

Proceeds of terrorism means all kinds of properties¹⁵ which have been derived or obtained from commission of funds traceable to a terrorist act, and include cash irrespective of a person in whose name such proceeds are standing or in whose possession or control they are found.

The Terrorism Prevention Act of 2002 and Anti Money Laundering Act of 2006¹⁶ are compilation pieces of legislation which provides for the offence of terrorist financing,¹⁷

13 Bulyanhulu Gold Mine Limited V Commissioner general (TRA) Case No. 90,2015 (unreported) Where it was found that, in ordinary life, taxes are in fact as complex as life itself. They are in derogation of personal rights and properties interest worldwide. Therefore no tax can be levied and collected without the authority of law.

14 (1933) 17 TC 569 at 572, Rowlatt, J. observed in "... In taxation you have to look simply at what is clearly said. There is no room for any intendment; Income Tax Law in Tanzania equity about tax; there is no presumption as to tax; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax."

15 property" means any property and any assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments evidencing title to, interest in, such property or asset and includes bank account;

16 The Anti-Money Laundering ACT No 12 of 2006

17 https://www.fiu.go.tz/WhatIsMoneyLaundering.asp (01, 08, 2018) 12:00: p.m. noon G.M. In recognition of the effects that money laundering and terrorist financing can have in

offences covered are money laundering, takings/proceeds of severe crime. According to the Acts, the offence of terrorist financing is committed when a person who includes the legal person engages in terrorist financing activities. Where by a corporate body is convicted of the terrorist financing offence, the law provides for a mandatory fine and an automatic loss of business authority.

8.4 Submission of Securities Reports Containing False Information, Market Manipulation and Insider Trading

Companies Act¹ provides that a corporate entity is liable and guilty for offences of false information containing in a corporation's offers², returns, certificates, accounts or any other document. However, section 472³ of the Companies Act provides that the directors and managers of a corporate body at a time of the commission of the said offences are liable for the offence and may be sentenced to imprisonment or fined.

8.5 Fraud

A dictionary defines a word fraud to be wrongful or criminal deception intended to result in financial or personal gain⁴

The law on corporate fraud is provided for in the Penal Code under Sections 314, 315 and 316.⁵ It does not target the company as a corporate body but its directors and other officers of the corporation. Upon conviction, a person is liable to imprisonment for seven years to fourteen years depending to the circumstances⁶.

achieving national goals and cognizant of international efforts in this important area, Tanzania is determined and committed to combat money laundering and terrorist financing and has joined the international community in fighting.

1 Companies Act No. 12 of 2002 R.E

2 Section 51 of the Companies Act No. 12 of 2002 R.E

3 Op cit, note 45

4 <https://en.oxforddictionaries.com/definition/fraud> Accessed (01/08/2018) 13:00 pm noon G.M

5 Penal code Cap 16 R.E 2002

6 Op cit, Section, 315. Any person who— being a director or officer of a corporation or company, receives or possesses himself as such of any of the property of the corporation or company otherwise than in payment of a just debt or demand, and with intent to defraud, omits either to make a full and true entry thereof in the books and accounts of the corporation or company, or to cause or direct such an entry to be made therein; or Penal Code [CAP. 16, section 316, being a director, officer or member of a corporation or company, does any of the following acts with

9. Conclusion

Corporate body crimes are among complicated economic crimes in the modern period. Most of African states face crimes into different ways, keeping this into mind, different countries have formulated different pieces of legislation so as to solve the overwhelming problem of corporate crimes. However, the laws themselves are not sufficient to protect the victims. Indeed, there are several offences committed by corporate bodies which cause serious harms to the public and yet the public remain unprotected. The recommendation is made to the Tanzanian Government that, should find a way on how mens rea can be placed effectively into directors and managers of the corporate body in order that they can be prosecuted and be imprisoned as individuals. Such changes will help to avoid crimes which are now committed by the corporate body which has no physical body and not its directors, secretary or any of its principal officers.

intent to defraud, that is to say— (a) destroys, alters, mutilates or falsifies any book, document, valuable security or account, which belongs to the corporation or company, or any entry in any such book, document or account, or is privy to any such act; or (b) makes, or is privy to making, any false entry in any such book, document or account; or (c) omits, or is privy to omitting, any material particular from any such book, document or account, is guilty of a felony, and is liable to imprisonment for fourteen years. 316. Any person who, being a promoter, director, officer or auditor of a corporation or company, either existing or intended to be formed, makes, circulates or publishes, or concurs in making, circulating or publishing, any written-statement or account which, in any material particular, is to his knowledge false, with intent thereby to effect any of the purposes following, that is to say— (a) to deceive or to defraud any member, shareholder or creditor of the corporation or company, whether a particular person or not; (b) to induce any person, whether a particular person or not, to become a member of, or to entrust or advance any property to, the corporation or company, or to enter into any security for the benefit thereof, is guilty of a felony, and is liable to imprisonment for seven years.