

CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES IN MALAWI

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I. INTRODUCTION

In criminology, corporate crime refers to crimes committed either by a corporation (i.e, a business entity having a separate legal personality from the natural persons that manage its activities), or by individuals that may be identified with a corporation or other business entity.¹ The individuals are so much in command of the corporation that their acts are treated as if they were acts of the corporation as in the case of *Lennard's Carrying Co. v Asiatic Petroleum Co Ltd*.² Corporate crime overlaps with white-collar crimes because the majority of individuals who may act as or represent the interests of the corporation are employees or professionals of a higher social class. It further overlaps with organized crime because criminals can set up corporations either for the purposes of crime or as a vehicle for laundering the proceeds of crime.³ Every country in the world has faced corporate crime of one type or the other. The countries have different ways and legislation of dealing with corporate crime and Malawi is not an exception. This paper, therefore, will examine and analyse the current situation, problems and challenges in the investigation, prosecution and trial of corporate crime in Malawi.

II. CRIMINAL LIABILITY AND CORPORATE CRIMINALIZATION IN MALAWI

A. Liability of Legal Persons

1. Criminal Liability of Corporate Entities in Malawi

In Malawi, upon incorporation, a company attains the status of a body corporate with a personality of its own distinct from that of its members and its management.⁴ As a result of this distinction, liability incurred by a company is its responsibility and not that of the shareholders. In *Naidoo v Mazi Import & Export Ltd and Tchongwe*,⁵ 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.

In Malawi, the law recognizes that a company has dual identity as an association of persons⁶ which requires that for a company to be formed there should be an association of at least two persons and a person which is distinct from its members. In the latter case, it is recognized that it requires human agency to fulfill the mission and carry out the business of a corporate entity. Consequently, while in many cases the activities of the company will be identified with it as a person, there are instances where the law will hold its members or officers responsible for its actions as to hold otherwise would lead to absurdities.

2. Legal Framework of Criminal, Civil and Administrative Sanctions

Corporate entities in Malawi are criminally liable for some offences and are not for others. The companies will be held liable for offences committed under the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act, 2006, Environmental Management Act, Capital Market Development Act and Workers

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¹ http://en.wikipedia.org/wiki/Corporate_crime

² (1915) AC 705.

³ http://en.wikipedia.org/wiki/Corporate_crime

⁴ Section 15(2) of the Companies Act, 1984.

⁵ Civil Case No. 706 of 1985.

⁶ Section 4 of the Companies Act, 1984.

Compensation Act.

The corporate entities are also liable in tort and contract separate from its directors and shareholders once they are incorporated under Section 15(2) of the Companies Act. As a result they can enjoy rights, own property, sue and be sued in their own right, and not as agents or trustees for their members. Lord Macnaughten made this point very eloquently in the classic case of *Salomon v Salomon*⁷ when he said, "The company 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."

Since the companies are separate legal persons under Section 15(2) of the act, they are amenable to any administrative action the state may want to take against them separate from their directors and shareholders.

III. CURRENT SITUATION OF SOME CORPORATE CRIMES IN MALAWI

A. Money Laundering

Money Laundering, Proceeds of Serious Crime and Terrorist Finance Act, 2006 provides *inter alia* for the offence of money laundering. Parliament enacted this law in 2006. It was gazetted recently and it is now operational under Malawian law.⁸ This piece of legislation criminalizes an act of money laundering under Section 35 of the act. According to the said section, an offence of money laundering is said to have been committed if a person knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of crime-

- (i) converts or transfers property knowing or having reason to believe that the property is the proceeds of crime, with the aim of concealing or disguising the illicit origin of that property, or of aiding any person involved in the commission of the offence to evade the legal consequences thereof;
- (ii) conceals or disguises the true nature, origin, location, disposition, movement or ownership of that property knowing or having reason to believe that the property is the proceeds of crime;
- (iii) acquires, possesses or uses that property, knowing or having reason to believe that it is derived, directly or indirectly, from proceeds of crime;
- (iv) participates in, associates with or conspires to commit, attempts to commit and aids, abets and facilitates the commission of any act or omission referred to in (a), (b) or (c).

In the event that a corporate entity is convicted of the same, the punishment is a mandatory fine of MK10,000,000 (Malawi Kwacha) and automatic loss of business authority. However, the law on money laundering has not been tested in courts because it is relatively new. Money laundering was on the increase in Malawi because there was no law to regulate the crime. Secondly, the offence is most of the time committed together with corruption which is a serious problem in Malawi. Despite the act being enacted last year, there are some big money laundering cases involving some companies currently being investigated in the country.

B. Terrorist Financing

The same Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act, 2006 which is an omnibus piece of legislation, addressing issues of money laundering and proceeds of serious crime, also provides for the offence of terrorist financing. According to Section 36 of the Act, the offence of terrorist financing is committed when a person who, by any means whatsoever, engages in terrorist financing activities. In the event that a corporate entity is convicted of the offence, the law provides for a mandatory fine of MK15,000,000 and an automatic loss of business authority. There is no registered case so far in Malawi on terrorist financing.

C. Tax Evasion

The offences of tax evasion are provided for under the Customs and Excise Act, Cap 42:01 of the Laws of Malawi. Tax evasion is the most frequently committed offence of all economic crimes in Malawi because

⁷ (1897) AC 22.

⁸ Section 74 of the Constitution of the Republic of Malawi.

Malawi has a small economy. As a result, most of the companies would like to pay as little tax as possible in order to maximize their profits. Evading tax is seen as a way of achieving that goal.

In terms of corporate entities, the relevant provision is Section 141 of the said act. The section provides that a company will be held liable if any of its directors, managers or secretaries contravene any of the customs laws. In such a scenario, the company may be charged with tax evasion. Upon conviction, the penalty is a fine of not less than three times and not more than ten times the amount of tax which was supposed to be paid or imprisonment for three years.⁹ Tax evasion offences are most of the time settled out of court after the accused has been fined and paid the required money to the government. However, some cases end in trials. The fine is determined by the Commissioner General of the Malawi Revenue Authority which has an investigative department that investigates tax evasion.

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

The Capital Market Development Act, 1990 criminalizes the submission of securities reports containing false information,¹⁰ market manipulation,¹¹ and insider trading.¹² In the event of a conviction on any of the above offences, a person is liable to a fine of MK10,000 and to imprisonment for two years. Under this legislation, a corporate entity can be prosecuted and fined while its directors who are acting on its behalf may be imprisoned. Noting the shortfalls in the act and other ancillary acts like the Companies Act, 1984 in respect of regulating the securities market, the government has proposed an amendment bill with the aim of taking into account the shortfalls. The current act is not comprehensive and the penalties contained therein are very minimal in today's value.

E. Fraud

The law on corporate fraud is provided for in the Penal Code under Section 333. 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. Corporate fraud is not common in Malawi.

IV. INVESTIGATIONS

A. Specialized Investigative Authorities and Training Methods in Malawi

In Malawi there are two authorities that are mandated to investigate any corporate crime, namely the Anti-Corruption Bureau (ACB) and the Fiscal Department of the Malawi Police Force. The Anti-Corruption Bureau was created by an Act of Parliament in 1995 called the Corrupt Practices Act (CPA)¹³ to investigate all alleged or suspected corrupt practices in both the public and private sectors.¹⁴ The Act was amended in 2003 giving the ACB powers to investigate any crime that may be disclosed in the course of investigating corruption, hence the investigation of corporate crime. The Fiscal Police is a department within the Malawi Police Service which was created by the Republic of Malawi Constitution.¹⁵ The two institutions are independent of each other and have different ways of training their investigations officers. However, in some instances the two institutions conduct training of their officers together, like in the Financial Investigations and Computer Evidence Course.

In both institutions, the officers undergo a mandatory investigative skills course when they are recruited. Thereafter, they are trained on the job whereby they are attached to an experienced officer in order to have a hands on approach to the art of investigation. After six months, the officers undergo an Advanced Investigative Skills Course for four weeks. They are then paired with an experienced officer to start actual investigations. During the course of their work, some are attached to sister institutions within Southern Africa to learn how investigations are conducted in other countries, like Zambia, South Africa, Botswana and Tanzania. The training of officers is a continuous process. The officers are further trained in the United Kingdom, United States of

⁹ Section 142 of Customs and Excise Act.

¹⁰ Section 41 of Capital Market Development Act.

¹¹ Section 37 of the Capital Market Development Act.

¹² Section 37 of the Capital Market Development Act.

¹³ Section 4 of the Corrupt Practices Act.

¹⁴ Section 10(1)(b-h) of the Corrupt Practices Act.

¹⁵ Section 152 of the Constitution of the Republic of Malawi.

America, South Africa and Botswana, among other countries. The main emphasis is in specialization of the officers in specific crimes like computer forensic analysis, financial investigations, money laundering, banking fraud, undercover operations and surveillance.

B. Co-operation between Investigative Authorities in Malawi

As earlier explained, the two investigative authorities conduct their own investigations. However, there is always co-operation, co-ordination and sharing of information as far as big and complex investigations are concerned. In some instances, officers from the two institutions form a task force (team) to investigate a case. A case in point is the Investigative Team which has been formed recently among ACB, Fiscal Police Officers, Malawi Revenue Authority (MRA) and Reserve Bank of Malawi (RBM) officers. It is involved in the investigation of a money laundering case involving four shell companies. This happens frequently when need arises. There is a clear understanding between the investigative authorities because their end goal is to deal with the crime and their co-operation, co-ordination and information sharing is of vital importance, especially in huge corporate crimes.

C. Acquisition of Information on Corporate Crime

The mode of acquiring information on corporate crime at both the ACB and the Fiscal Police is the same. The information is obtained in any of the following ways:

- People going to the institutions in person to lodge or give information if they suspect that a crime has been committed by any corporate entity or directors or managers of the said entities;
- People can phone the institutions, write a letter, e-mail or fax the allegation of the crime;
- The print media often write about any corporate crime that may come to their attention. The two institutions may use the information in those articles as a basis for commencing an investigation;
- The police have confidential informants who sometimes give them information about an alleged crime. However, the ACB does not have confidential informants even though people are free to remain anonymous after giving information;
- Whistleblowers are also a source of information for the two institutions. The whistleblowers are protected by Section 51A of the Corrupt Practices Act. It is an offence to take any action of any kind to punish or victimize a person solely because he or she has been a whistleblower or informer.

D. Material and Electronic Evidence

In modern times, where there is advancement of technology, more often than not investigators encounter a scenario where they are required to identify, obtain and preserve electronic evidence. All investigators at the ACB and a good number at the Fiscal Police have been trained in basic skills of obtaining and preserving such evidence. However, computer data, recovery of deleted data and forensic analysis is left to the computer experts and not the investigators. In isolated cases, there might be outsourcing of expertise on the recovery of deleted computer data and forensic analysis. It is mainly done by United Kingdom computer experts. This, however, has huge financial implications as the services are always expensive.

E. Obtaining Statement Evidence

1. Interrogation Techniques

The investigators are well equipped during training with techniques of obtaining statements that contain relevant and sufficient information which will prove the case in court or lead to further line of inquiry during the investigation. Statements are taken during the interrogation time. Investigators are taught techniques of interrogations that will lead to the interviewee disclosing whatever the investigator wants from him or her. Interrogation is always conducted through open questioning in the presence of a lawyer.

2. Plea Bargaining

The law in Malawi does not provide for any plea bargaining between the State and the accused person. However, prosecutors treat each case depending on the available evidence. They may, for example, use one of the accused persons as a witness against the other. In such a case, the accused is charged, enters a plea of not guilty and the charges are then dropped against him or her.¹⁶ This only happens if the prosecution does not have other evidence to prove the case apart from the evidence of one of the accused persons.

¹⁶ Section 81B of the Criminal Procedure & Evidence Code.

3. Immunity of Investigators

The investigators at the ACB are immune from any action or proceedings for any act or thing done or omitted to be done in good faith in the exercise of their duties.¹⁷ The same applies to Fiscal Police officers.

V. PROSECUTION IN MALAWI

A. Mitigating Punishment of an Accused Person

In Malawi, there is no specific law or provision relating to lighter punishment in respect of an accused person who provides substantial co-operation in the investigation and/or prosecution of an offence. However, the prosecutor has the discretion to charge the accused person with a less serious offence if he or she has assisted in the investigation and/or prosecution. The discretion only arises if there are alternative offences to the serious offences committed by the accused. The facts of the case, therefore, must fit in the lesser offence for discretion to be exercised.

B. Granting of Immunity to Co-operating Persons

In the case of a co-operating accused person whereby the case can not be successfully prosecuted without him or her being the state witness, prosecution proceeds on the basis of Section 81B of the Criminal Procedure & Evidence Code. In such cases, soon after the accused person has entered plea of not guilty, the charges are withdrawn against him or her, leading to his or her acquittal. He or she then is turned into a state witness against the other accused persons. Immunity from prosecution is only granted when the state can not dispense with the person as a state witness.

C. Considerations in the Prosecution of a Corporate Entity

Under the Malawian laws which distinguish a company as a separate legal entity and under the prevailing principle of *Salomon v Salomon*,¹⁸ a corporate entity can be prosecuted for some offences, like money laundering and terrorist financing, while they can not be prosecuted for others, like fraud and tax evasion. In the latter scenario, the law allows the prosecution of its directors.

VI. TRIAL AND ADJUDICATION

A. Disclosure of Evidence

Criminal trials in Malawi can be initiated either in the subordinate courts or in the High Court.¹⁹ Corporate crimes are initiated in the subordinate courts where the rule of disclosure of evidence does not apply. However, the Director of Public Prosecution (DPP) can commit any case to the High Court from the subordinate Courts.²⁰ Corporate crimes are frequently committed to the High Courts due to their complexity. In the High Court the disclosure of evidence applies as a matter of practice and not as requirement by law. One can ably say that it is a silent rule.

B. Clarification of Disputes before the Trial

In Malawi, clarification of any disputes before trial is commonly known as Preliminary Objections and is done under Section 151(2) of the Criminal Procedure & Evidence Code. One normally objects to the charge and there are several circumstances under which it can be done:

- if the charge is defective either in substance or form;
- if the evidence discloses an offence other than the offence with which the accused is charged;
- if the accused desires to plead guilty to an offence other than the offence with which he/she is charged.

The accused is at liberty to object to any matter at the initial stage before trial commences. Should an accused person fail to raise these at the trial court, he or she is estopped from raising them on appeal according to the Malawi Supreme Court of Appeal ruling of *Republic v Lucius Chicco Banda*.²¹ Any clarification must be

¹⁷ Section 22 of the Corrupt Practices Act.

¹⁸ Supra Note 6.

¹⁹ For Treason under Section 38 of the Penal Code and Murder under Section 209 of the Penal Code which are only tried in the High Courts.

²⁰ Section 289 of the Criminal Procedure & Evidence Code.

²¹ Malawi Supreme Court of Appeal, Criminal Appeal No. 1 of 2007.

made before the first witness is called.

C. Effective Methods of Fact Finding

1. Witness Protection

There is no witness protection law in Malawi except under Section 51 of the Corrupt Practices Act which provides for the protection of whistleblowers. This provision only protects whistleblowers who have provided information to the Anti-Corruption Bureau. As such, our laws are lacking as far as witness protection is concerned.

2. Expert Witnesses

An expert witness may be allowed to state his or her opinion on a matter related to his or her expertise. Section 190 of the Criminal Procedure & Evidence Code provides that the opinion of experts may be sought, "Upon a point of foreign law, or of science or art, or as to the identity of handwriting or finger-prints."

Section 190 is couched in wide terms and would appear to cover any matter which is the subject of special knowledge.²² The section defines an "expert" as any person "specially skilled" in a particular field. It is for the court to determine a person's competency as an expert before his/her evidence is admitted. The expert may give his/her evidence both in the subordinate and High Court.

D. Sentencing Process

The courts pass sentences on the accused persons after they have heard the prosecution on the antecedents and also the accused persons in mitigation. The courts hear the antecedents and pleas in mitigation following a conviction in the subordinate court and High Court under Section 260 and 321(J) of the Criminal Procedure & Evidence Code. Under Section 12 of the Code, any court may pass any lawful sentence combining any of the sentences which it is authorized to pass, subject to the court's general jurisdiction under Section 14 of the same Code. Different considerations are taken into account depending on the circumstances of the case. The statute, therefore, only gives what are maximum or minimum sentences to which the offender is liable.

VII. INTERNATIONAL CO-OPERATION

A. Problems and Challenges in Investigations, Prosecution and Trial

In most cases, the investigations conducted by ACB require conducting investigations and obtaining of evidence in foreign countries. This is so because the perpetrators of the crime always transact with foreign companies and organizations. The two countries from which Malawi most of the time requires assistance in investigations are the Republic of South Africa and the United Kingdom. Malawi conducts its business mainly with these two countries.

The ACB does not have a direct link with foreign investigative authorities who can assist in investigating its cases. When the ACB would like to conduct foreign investigations, it uses the Police Service through its Interpol department to arrange that its (ACB) officers are allowed entry and power to investigate in foreign countries, hence the incorporation of a police officer in all foreign investigations. However, there is a good and strong partnership between the ACB and similar institutions in other countries like Zambia, Tanzania, Botswana and South Africa who greatly assist whenever we need to get information from the respective countries. The ACB has assisted many countries when they would like to investigate in Malawi. Some of the countries on whose behalf the ACB has conducted investigations are Zambia, the United Kingdom, South Africa, Botswana, the United States of America and Australia. At the moment, there is an ongoing investigation in which the Australian Police has requested the ACB to assist them in investigating an Australian company that is suspected of involvement in shady deals. The company is investing in Malawi. The ACB has assigned a team of investigators to conduct the investigations. In 2004, the ACB assisted investigating a case in which the North West Regional Asset Recovery Team (RART) of Lancashire Constabulary investigated a case of money laundering. With the evidence collected by the Malawi Team and passed to the UK, the accused persons were charged in the UK and pleaded guilty and were convicted accordingly. The RART confiscated approximately 2.9 pounds of property from the convicts.

²² Eg. Opinion of expert in computer forensics, like in the case of *Rep v Dr Bakili Muluzi*.

The foreign investigations have their setbacks. Topping the list is the financial constraint involved in the whole process. They are very costly and Malawi being a third world poor country can not afford to conduct all the investigations at the needed time and in the required manner. As a result of this, these investigations are sometimes stalled by the mere fact of lack of financial resources. Secondly, the process of obtaining information or being allowed to investigate in another country is very frustrating. Some countries are of the view that we are wasting their time as they have their own work to do. The matter becomes complicated if you do not know a person who can assist in the country you intend to obtain information from. It is much easier for a foreigner to obtain information or investigate in Malawi than the other way around. We are not rigid in accommodating international investigators.

The ACB has made its officers available if they are needed during prosecution and trial in any country where their services are required. A case in point is the UK case mentioned above. The ACB has also been assisted by other countries, especially the UK and South Africa, during prosecution of our cases. They have made available their personnel to testify in our courts. The only problem is the same issue of financial constraints when it comes to pay for their travel, accommodation and upkeep expenses.

B. Problems and Challenges in Obtaining and Providing Mutual Legal Assistance

Mutual Legal Assistance in Malawi is provided by the Attorney General through the Ministry of Foreign Affairs and International Co-operation. Any mutual legal assistance required from Malawi should also go to the Attorney General through the Ministry of Foreign Affairs and International Affairs. The process is not without problems and challenges. The major one is that the process is long and frustrating. It can take a year before a request is honoured. A quicker and simpler process could have been of much more help than the current one.

C. Problems and Challenges of Other Types of International Co-operation

Malawi has been involved in several joint investigations with other countries like the UK, South Africa, Zambia, Kenya and Tanzania. There is always great co-operation and understanding during these operations. The only problem and challenge is the same matter of financial constraints of some of the countries. On top of the joint investigations, Malawi is in constant touch with other countries and does exchange relevant information on corporate crimes in the respective countries.

VIII. CONCLUSION

Corporate crime is one of, if not the most, complex of economic crimes in modern times. The advancement of technology has aggravated the complexity of the crime in terms of uncovering it. Technology has also made it easy for some corporate entities to commit the crime. Every country in the world is faced with this crime in one way or the other. Bearing this in mind almost all countries have put in place different ways and legislation to regulate and curb the vice. However, legislation alone is not sufficient. There is great need for closer co-operation among the investigative and prosecution authorities in the world to join hands in the fight. The investigators and prosecutors who are at the forefront of uncovering the crime and prosecuting the offenders should be well equipped with the latest skills to enable them do the job with utmost competency and ability.