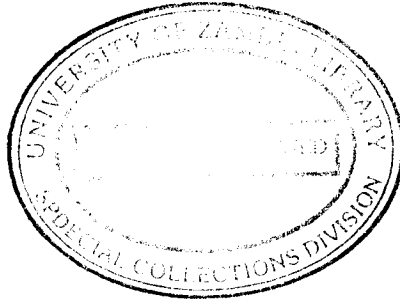


COMPANY LIABILITY AND THE DAIRY INDUSTRY  
DEVELOPMENT ACT



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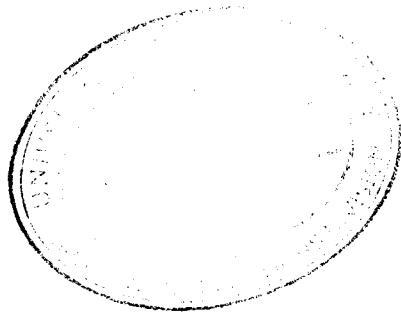
**Malama Mushinge**

A dissertation submitted to the University of Zambia in Partial  
Fulfilment of the requirements of the Bachelor of Laws Degree (LLB)


THE UNIVERSITY of ZAMBIA  
LUSAKA  
2012

**DECLARATION**

**I hereby declare that this dissertation represents my own work and that it has not previously been submitted for a degree at the University of Zambia or another University.**



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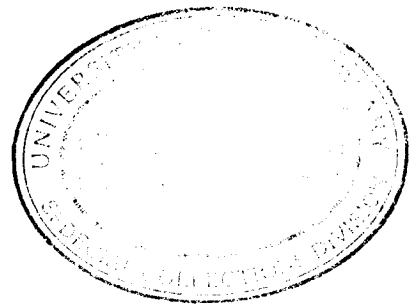
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## **Abstract**

One of the features of a good legal system being to respond to changes in society, this thesis gives an account of company liability under the Dairy Industry Development Act. By so doing the paper shows how the aforementioned Act has responded to Privatisation through the inclusion of companies in the Act. This discourse therefore endeavours to identify the extent to which the Act has embraced the concept of the liability of companies.

In the first chapter the paper sets the scene by making a few remarks on separate corporate liability by pointing out that a company like a person is capable of suing and being sued.

In the second chapter the dissertation, puts into context the two main features of incorporation, the company as a separate legal entity and also the company as a body whose member's liability is more often than not limited. On that premise the chapter highlights the instances when a company may have an unlimited liability of its members and also some of the problems caused by the personality doctrine.

In the third chapter however, the paper, gives an account of the dairy industry in Zambia and thereby points out the differences between the functions of the Dairy Produce Board and those of the Dairy Industry Development Board. This is in order to show how the Dairy industry Development Act has responded to the wave of privatisation.

The fourth chapter in its analysis of corporate criminal liability shows the extent to which the Dairy Industry Development Act sits uncomfortably with the principles of companies and the extent of their liability.

The fifth chapter on the other hand outlines the recommendations and draws a general conclusion that, away from the fact that the best recommendation would be to amend section 32 of the Dairy Industry Development Act, this function is left to the legislature.

## **Dedication**

For Mum and Dad and Mumba :for believing in me.This work could not have been compiled if it was not for the encouragement i got from you. You are the reason I have gotten this far, thank you for being the wind beneath my wings.

## **Acknowledgement**

Above all else I wish to thank my supervisor for having guided me until this far.

I would not be where I am without my family and I would like to say thank you to all of them for the joy they are. To all my friends, you know who you are and I say “Dueces”

Specifically, I would like to thank Seline, Dina, Ruth, Patricia and all those people who have given me a glimmer of hope and inspiration, to you all I say, thank you.

**Table of Statutes**

Companies Act Cap 388 of the Laws of Zambia

Dairy Industry Development Act No 22 of 2010

Dairy Produce Board Cap 230 of the Laws of Zambia

Dairy Produce Establishment Act Cap 235 of the Laws of Zambia

Dairy Produce Marketing and Levy Act Cap 234 of the laws of Zambia

**Table of Cases**

Associated Chemicals Limited v Hill and Delamin Zambia Limited and Ellis and Company  
(as a Law firm) (1998) S.C.J. No 7 of 1998

Abdul Aziz Bin Atan & 87 Ors v Ladang Tengo Malay Estate Sdn Bhd [1985] 2 MLJ 165

Barakot Ltd v.Eplette Ltd [1998] BCLC 283

DHN Food Distributors Ltd v Tower Hamlets LBC [1976] 1 WLR 852

DPP v Kent and Sussex Contractors Ltd [1944] KB 146

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FG Films Ltd [1953]1 WLR 483

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Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd[1915] AC 705

Littlewoods Mail Order Stores Ltd v IRC[1969]1 WLR 1241

Macaure v.Northern Assurance Co Ltd [1925]A.C 619

Moore v I Bresler Ltd [1944] 2 All ER 515

Re Noel Tedman Holdings Pty Ltd [1967] QDR 56



R v Birmingham and Gloucester Rly Co [1842] 3 QB 224

R v Great North of England Rly Co [1846] 9 QB 315

Saloman v. Saloman [1897] A.C. 22

Smith V. Anderson [1880] 15 Ch.D 247 per James L.J at p.275

Standard Chartered Bank Zambia Ltd v. Peter Zulu and others (1996) SCZ Appeal No.59

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## CHAPTER ONE

### 1.0 Introduction

This chapter is meant to foreground the crux of this entire research which is presented in the title, “Company Liability and the Dairy Industry Development Act. It thereby introduces the concept of corporate legal personality. By doing so, the chapter sets the scene by identifying that this concept enables limited liability of shareholders and members of a company to the shares issued or to the guarantees taken from the members, that they will contribute up to a fixed amount to the debts of the company when it is wound up or when it needs money in particular circumstances. In this vein, limited liability companies have the advantage that the member’s liability to contribute to the debts of the company has a fixed limit which is always clear.

### 1.1 A Few Remarks on Corporate Personality in this Paper

A company like many other legal terms and words has not one but many definitions. In this vein the word company is seen as not having any strict legal meaning. Under section 2 of the Companies Act,<sup>1</sup> a company is one that is inco-operated under the Act. It is however seen as clear in legal theory, that, the term implies an association of a number of people for some common object or objects.<sup>2</sup>

Nevertheless, in *Macaura v. Northern Assurance Co Ltd*<sup>3</sup> a registered company was defined as an inco-operated association which on its formation is a new legal personality with its own legal rights and obligations, in addition to and separate from those persons who are

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<sup>1</sup> Cap 388 of the Laws of Zambia.

<sup>2</sup> Gower L.B.C, D.Prentice and B.Pette. Gower’s Principles of Modern Company Law (London: Sweet & Maxwell, 1992), 3.

<sup>3</sup> [1925]A.C 619

associating together. A corporation is seen as an artificial legal person. A legal person is any entity, human or otherwise, which is accepted by the law as having certain defined rights and duties; it is capable of being the subject and object of legal rights and duties.<sup>4</sup> Consequently, incorporation, the process conferring corporate status, results in the corporation being recognised by the law as having a legal personality separate and distinct from its human members creating what is referred to as the veil of incorporation.<sup>5</sup>

Put differently, the essence of a company is that it has a legal personality distinct from the people who create it. The case of *Saloman v. Saloman*<sup>6</sup> is by no means the first case to depend on the separate legal personality of a company, but it is the most widely discussed in this context.<sup>7</sup> In this celebrated case, Lord Macnaughton stated that;

“A company is at law a different person altogether from the subscribers.”

This is embodied in section 22(1) of the Companies Act<sup>8</sup> which states that;

“A company shall have, subject to this Act and to such limitations as are inherent in its corporate nature, the capacity, rights, powers and privileges of an individual.”

The Salomon case also established that (a) provided the formalities of the Act are complied with, a company will be validly incorporated, even if it is only a “one person” company and (b) the courts will be reluctant to treat a shareholder as personally liable for the debts of the company by “piercing the corporate veil.”<sup>9</sup> It is this concept that enables limited liability for

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<sup>4</sup> Available at [www.download-it.org/learning resources](http://www.download-it.org/learning resources) (accessed December 20th, 2011).

<sup>5</sup> Available at [www.download-it.org/learning resources](http://www.download-it.org/learning resources) (accessed December 20th, 2011).

<sup>6</sup> [1897] A.C. 22.

<sup>7</sup> Janet Dine and Marios Koutsias, *Company Law* (London: Macmillan Press Ltd, 1991), 19.

<sup>8</sup> Cap 388 of the laws of Zambia.

<sup>9</sup> [1897] A.C. 22.

shareholders to occur as the debts belong to the legal entity of the company and not to the shareholders in that company.<sup>10</sup>

Simply put, limited liability means that the company's liabilities are the legal responsibility of the company and the members will not be liable for the company's debts. No personal liability will arise for the members in addition to the full price of the shares already purchased (in the case of a company limited by shares) or the value of the guarantee pledged (in the case of a company limited by guarantee).<sup>11</sup>

## 1.2 Statement of the Problem

The Dairy Industry Development Act<sup>12</sup> was enacted to regulate the dairy industry so as to develop an efficient and self sustaining dairy industry that effectively contributes towards poverty alleviation, household food security and employment creation; establish the Dairy Industry Development Board and provide for its functions and powers.<sup>13</sup> The Dairy Industry Development Act<sup>14</sup> replaced the Dairies and Dairy Produce Act, 1931.<sup>15</sup> What is more is that the repealing Act also makes provision for a fund,<sup>16</sup> and the Act states that the Board shall manage the Fund for its respective functions.<sup>17</sup>

Most significantly, the Act makes provision for the liability of companies in Section 32 which states that;

Where a company commits an offence, any officer, director, employee or agent of the company who directed, authorised, assented to, or acquiesced in the commission of the offence shall be a party to and commits the offence, and shall be personally liable to punishment

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<sup>10</sup> A.Digman and J.Lowry, Company Law (London: University of London Press, 2006), 26.

<sup>11</sup> L.E Talbot, Critical Company Law (New York: Routledge Cavendish,2008), 24.

<sup>12</sup> Act No 22 of 2010.

<sup>13</sup> Preamble to the Dairy Industry Development Act.

<sup>14</sup> Act No 22 of 2010.

<sup>15</sup> Cap 230 of the Laws of Zambia.

<sup>16</sup> S.24.

<sup>17</sup> S.17.

provided for the offence, whether or not the company has been prosecuted or convicted.

This provision can be said to be sitting uncomfortably with the rationale behind the doctrine of separate legal personality and limited liability of companies which is one of the consequences of incorporation. This discourse has identified that a registered company is regarded by the law as a person, just as a human being is a person. This artificial or juristic person can own land and other properties, enter into contracts and sue and be sued.

In the recent decision of *Barakot Ltd v. Eplette Ltd*<sup>18</sup> Sir John Balcambe described the decision in *Salomon v. Salomon*<sup>19</sup> as:

“Good and basic law that a company and its share holders were to be treated as separate legal entities.”

The courts in Zambia also recognise this now entrenched principle of law. One such instance is the case of *Associated Chemicals Limited v Hill and Delamin Zambia Limited and Ellis and Company (as a Law firm)*<sup>20</sup> where the Supreme Court of Zambia held that a company is a person distinct from its members or share holders. The Supreme Court was of the further view that upon the issue of a certificate of incorporation, the company becomes a body corporate.

If a company is to be regarded as a person under the law, it follows that it can incur liabilities as can any other person either where a principle would be liable for the acts of an agent or an employer liable for the acts of an employee.<sup>21</sup> Consequently, as this discourse will further explain, the courts have held that a company can be convicted of crimes and such a company may be so liable, vicariously, for a crime which is committed by an employee. The courts

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<sup>18</sup> [1998] BCLC 283.

<sup>19</sup> [1897] A.C. 22.

<sup>20</sup> (1998) S.C.J. No 7 of 1998.

<sup>21</sup> P.Davies, *Principles of Modern Company Law* (London: Sweet & Maxwell, 1998), 37-38.



have further held that if the criminal acts were committed by persons of sufficient importance in the company, those acts will be seen as the acts of the company itself. The question that remains to be asked is whether section 32 of the Dairy Industry Development Act has to any extent embodied the rationale behind separate legal personality of companies and its consequences thereby.

### **1.3 Objectives of the Study**

This study seeks to establish the extent to which section 32 of the Dairy Industry Development Act<sup>22</sup> has upheld the general law of companies. Being a newly enacted Act repealing the Dairies and Dairy produce Act<sup>23</sup>, and thereby reflecting privatisation, it is prudent to identify the extent to which the Act is in conformity with the general law on the liability of companies. In this discourse, by highlighting the inconsistencies of the Dairy Industry Development Act, the proposed research will then act as relevant evidence to the possible, necessary amendments that could be made to the Act.

### **1.4 Specific Objectives**

1. To establish a company as a corporate personality.
2. To interesting note the existence of unlimited companies and the problems that come with the separate legal personality of companies.
3. To show the mischief that the Dairy Industry Development Act seeks to remedy as a repealing Act.
4. To highlight the instances in which the veil of incorporation can be lifted.
5. To illustrate how through the identification theory a company can be criminally liable for offences committed by officers who are the directing mind and will of the corporation.

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<sup>22</sup> Act No 22 of 2010.

<sup>23</sup> Cap 230 of the Laws of Zambia.

6. Having delved into the above objects, this research paper will illustrate the extent to which S.32 of the Dairy Industry Development Act<sup>24</sup> sits awkwardly with the principle of corporate legal personality.

7. In making the above observation, an opinion is formed on how section 32 of the Dairy Industry Development Act can be reconciled with the provisions in the Companies Act through the interpretation of statutes flowing from techniques of judicial process.

## **1.5 Rationale and Justification**

In an empirical study of small businesses, it was discovered that, overwhelmingly, the most important reason given by the respondents for the formation of a company was the advantage of limited liability.<sup>25</sup> In protecting limited liability, company law protects investors and the role of investment in the economy more generally.<sup>26</sup> This is so because directors and managers would be hampered if they constantly had to look over their shoulders when commercial judgements had to be made, in case an action could be brought against them.<sup>27</sup>

It is therefore only reasonable that officers, directors, employees or agents of the various companies in the dairy industry operate under the assurance that, in the event that a company incurred liability, whether criminal or civil, they are covered by the veil of inco-operation. This then would justify their choice to operate under an inco-operated body or otherwise expect to incur liability under a non- inco-operated body which is not a separate legal entity distinct from its members. This protection is as granted to them by one of the consequences of inco-operation. The findings in this research therefore, are bound to be relevant to any

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<sup>24</sup> Act No 22 of 2010.

<sup>25</sup> H.A.Drury, and S.J.Combe "Alternative Company Structures for the Small Businesses: ACCA Research Reports", No 42[1995]:5.

<sup>26</sup> Talbot, Critical Company Law, 23.

<sup>27</sup> Dine and Koutsias, Company Law, p.3.

company dealing in dairy products. This notwithstanding the paper also tries to show that even though some companies may have unlimited liability of its directors, the Act does not exemplify this difference in the liability of companies and hence the recommendations made in the final chapter.

## **1.6 Research Questions**

- 1.What is a company and what are the consequences of incorporation?
- 2.What is the difference between the concept of separate corporate personality and the rationale behind limited liability of companies?
- 3.What are the advantages of companies with limited liability and what are the exceptions to the limited liability company?
- 4.What is the background to the enactment of the Dairy Industry Development Act?
- 5.To what extent has the Act embodied the limited and the unlimited liability company?
- 6.What is the future concerning the law regarding the liability of companies under the Act? Should it continue to subsist as it is or should section 32 be amended so as to accommodate the rationale behind the separate corporate personality of companies and its consequences thereto?

## **1.7 Methodology**

The methodology will be both primary and secondary. Little or no research has been done on this study as the Dairy Industry Development Act is a newly enacted Act. Primary sources will be interviews with personnel in the ministry of Agriculture livestock and fisheries, Zambia National Farmers Union and also the Dairy Association of Zambia. In addition, the study will undertake a secondary approach by looking at textbooks, statutes and other related literature in so far as they relate to company liability.

## 1.8 Conclusion

This chapter has endeavoured to define a company as is outlined in the companies Act and also in the case of *Macaura v. Northern Assurance Co Ltd*<sup>28</sup>. It has gone further to exemplify the concept of the separate corporate personality of companies in their very nature. One of the consequences of incorporation, limited liability has also been mentioned. The chapter has in this vein set the scene for this paper.

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<sup>28</sup> [1925] A.C 619.

## **CHAPTER 2**

### **2.0 Introduction**

This chapter brings to the fore the features of incorporation in the hope that the idea of corporate personality is widely viewed in line with its consequences. It will put into context the two main features of incorporation, the company as a separate legal entity and also the company as a body whose member's liability is more often than not limited. On that premise the chapter will highlight the instances when a company may have an unlimited liability of its members and also some of the problems caused by the personality doctrine. By indulging in this discussion the chapter tries to illustrate that section 32 of the Dairy Industry Development Act does not distinguish limited liability from unlimited liability companies.

### **2.1 Features of Incorporation**

Some of the features of incorporation forming the reasons why those running a business would wish to form a company and that remain arguably the most important for this discourse are as follows:

**Limited Liability:** It is argued that the principles of separate corporate identity have lent themselves to the concept of limited liability.<sup>29</sup> Under this concept as will be further illustrated in this paper, each member of a limited company is liable to contribute only the amount he has agreed to pay on his shares or how much is guaranteed to be contributed on winding up or when contribution to the company is needed.<sup>30</sup>

**Perpetual Succession:** A company does not die but continues to exist until its name is struck off or dissolved through a legal process known as winding up or liquidation even though

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<sup>29</sup> W. Smith and S. Weinsten, *Keenan's Company Law* (London: Longman press, 2000), 2.

<sup>30</sup> Digman and Lowry, *Company Law* (London: University of London Press, 2006), 30.

without any directors, members, employees or business.<sup>31</sup> Its members may come and go but this does not affect the legal personality of the company.<sup>32</sup>

Company owns its own Assets: A company may own property distinct from the property of its members. The members only own shares in the company but do not have a proprietary interest in the property of the company and therefore, a change in membership of a company will have no effect on the ownership of the company's assets.<sup>33</sup>

Company may Sue and be Sued: Because a company is a separate legal entity it follows that it may enforce rights by suing and conversely it may incur liabilities and be sued by others. In fact the rule in *Foss v Harbottle*<sup>34</sup> requires the company itself to be the person enforcing the rights. Members generally cannot do this on their company's behalf although a company may sue and be sued by its own members.

The companies Act and decisions of the courts which have laid down the principles of company law are undoubtedly the greatest contribution made by lawyers to the industrial and commercial revolution of the last hundred and fifty years. The Undertaking of industrial and commercial enterprises on the vast scale with which we are familiar today would be impossible if the law did not provide the means by which large sums of capital may be raised from a multitude of investors. The application of that capital may also be confided within broad limits to a small group of managers or directors, and the investors guarded against personal liability to the creditors of the enterprise if it fails.<sup>35</sup>

The law has provided the means for the achievement of these objects in the form of the limited company. Companies formed under the companies Act have two principal features:

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<sup>31</sup> Re Noel Tedman Holdings Pty Ltd [1967] QDR 56.

<sup>32</sup> Abdul Aziz Bin Atan & 87 Ors v Ladang Tenggo Malay Estate Sdn Bhd [1985] 2 MLJ 165.

<sup>33</sup> Macaura v Northern Assurance Co Ltd [1925] AC 619.

<sup>34</sup> [1843] 2 Hare 461; 67 ER 189.

<sup>35</sup> R.R. Pennington, Company Law (London: University of Birmingham), 19670, 7.

First, as already alluded to, they are corporations, which makes them artificial legal persons invested by the law with most of the powers and responsibilities of natural persons. This means that companies may own property, enter into contracts, inflict or suffer wrongs, sue and be sued, and in fact, do or have done to them most of the things which may be done by or to a human being. It means furthermore, that the rights and liabilities of a company belong to it and to it alone, and cannot be enforced by or against its directors, agents, or members personally.<sup>36</sup>

It has sometimes been said that a company's directors are trustees for it but this is merely rather a clumsy way of saying that they owe fiduciary duties to it analogous to those which trustees owe to their beneficiaries. It does not mean that the directors or any other persons for that matter have the company's property or contractual or other rights vested in them upon trust for the company. The legal relationship of a company and its directors is that of principal and agent, not beneficiary and trustee.<sup>37</sup>

The second main feature of companies is that the liability of their members to contribute toward payment of their debts is usually limited. This feature is the logical consequence of the existence of a separate legal personality of a company. Today, many traders and businessmen would see as the main attraction of forming a company the advantage of avoiding liability for business debts.<sup>38</sup>

## **2.2 Limited Liability Explained**

Whilst limited liability in the form we know it today might have been an afterthought, for the new registered company in the mid-19th century, it soon became an integral part of it. the

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<sup>36</sup> Pennington, Company Law , 1.

<sup>37</sup> Smith V. Anderson [1880]15 ch.D 247 per James L.J at p.275.

<sup>38</sup> Simon Goulding. Company Law (New York: Cavendish publishing ltd, 1996),53.

intentions of the legislature were originally to ensure that a business was run by a corporate body which could, itself, enter into contracts and sue and be sued (and have execution levied against it), as opposed to a partnership with many partners or an unincorporated association, and also to provide a means by which extra capital could be attracted into industry by shareholders buying shares in the corporation and contributing to its joint stock.<sup>39</sup>

The Limited Liability Act 1855 was passed to promote the latter aim so as to ensure that it was safe for the investor to buy shares in a company. If it were otherwise (as originally conceived in s 66 of the 1844 Act), the purchase of a single share in a company would expose the shareholder to unlimited liability if the company were to fail. The possibility that a single trader might take advantage of the Act to obtain limited liability for himself, by forming a company which only issued enough shares to satisfy the requirements of the Act, was raised in the debate in the House of Commons on the Limited Liability Act but was thought to be unlikely. Nevertheless, this is precisely what did occur and, by the end of the century, this type of arrangement was commonplace.<sup>40</sup>

The legality of this practice was ultimately put to the test in the celebrated case of *Salomon v Salomon and Co Ltd*.<sup>41</sup> Here, a sole trader had formed a company, sold his business to it for £39,000 and had been largely paid for it by taking 20,000 shares in the company and £10,000 worth of debentures. The requirement at that time for a limited company to have a minimum of seven members was satisfied by the trader's wife and his five children, each being issued with one share.

The company declined into insolvent liquidation and there were insufficient assets to satisfy all the creditors. In these circumstances, the validity of the debentures issued to Salomon was challenged, especially since, on the evidence, it was established that too high a value had

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<sup>39</sup> Goulding, *Company Law*, 58.

<sup>40</sup> Goulding, *Company Law*, 59.

<sup>41</sup> [1897] AC 22.



been placed on the business. The liquidator also put in a claim for an order that Salomon be made liable to indemnify the company for its debts.

Vaughan Williams J<sup>42</sup>, at first instance, largely as a result of the control which the trader continued to exercise over the business, held that the company was simply the agent of the trader and therefore, under the ordinary laws of agency and agent, should be indemnified by the principal in Salomon.

The Court of Appeal unanimously agreed<sup>43</sup> that the trader should be made liable but they concentrated their judgments on the ground that the use to which the Companies Act had been put was improper. The tenor of the Court of Appeal decision is encapsulated in the judgment of Lopes LJ, who stated that:

The Act contemplated the incorporation of seven independent bona fide members, who had a mind and will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader. To legalise such a transaction would be a scandal.<sup>44</sup>

The Court of Appeal went on to suggest that, rather than an agent, the company was a trustee holding business on trust for Salomon the beneficiary. However, all this was swept aside by the House of Lords, which unanimously reversed this decision.<sup>45</sup> The decision of the House of Lords can be summarised in the following way:

Once registered in a manner required by the Act, a company forms a new legal entity separate from the shareholders, even where there is only a bare compliance with the provisions of the Act and where the overwhelming majority of the issued shares are held by one person. Furthermore, and importantly, merely because all, or nearly all, of the company's issued shares are held by one individual, there does not arise by reason of that fact an agency relationship between the shareholder and the company.<sup>46</sup>

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<sup>42</sup> Salomon v Salomon [1897] AC 22.

<sup>43</sup> Salomon v Salomon [1897] AC 22.

<sup>44</sup> Salomon v Salomon [1897] AC 22.

<sup>45</sup> Salomon v. Salomon [1897] AC 22.

<sup>46</sup> Salomon v Salomon [1897] AC 22.

The House of Lords further decided that;

It is also worth noting that these conclusions are premised on the basis that there was no fraud perpetrated by the corporator and that their Lordships did not rule out the possibility of an agency relationship arising by virtue of other circumstances. Finally, it was stated that the motives behind the formation of a corporation, once it is registered, are irrelevant in determining the rights and liabilities of the company.<sup>47</sup>

Strong judgments have been given since *Salomon*, embracing the view that the formation of a company leads to the creation of a separate, independent entity with its own rights and liabilities.

For example, in *Lee v Lee's Air Farming*<sup>48</sup>, it was held by the Privy Council that Lee, who held 2,999 out of the respondent company's 3,000 issued shares and was the only director, could, nevertheless, be an employee of the company for the purpose of a workers' compensation statute. Lee, although he exercised complete control over the company, could, nevertheless, cause the company to employ him under a contract of service. Since Lee and the company were two separate entities, there was no impediment to them being the parties to a contract.

In *Macaura v Northern Assurance Co Ltd*,<sup>49</sup> despite the fact that Macaura and his nominees held all the shares in a company, the House of Lords held that, when Macaura sold property to the company, he ceased to enjoy any legal or equitable interest in it. The property was wholly and completely owned by the company. Since shareholders have no rights in property owned by the company, they cannot take out an insurance policy in respect of it. So, here, when the property was destroyed by fire, it was held that Macaura could not claim on his insurance policies as they were invalid.

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<sup>47</sup> *Salomon v Salomon* [1897] AC 22.

<sup>48</sup> [1961] A.C. 12.

<sup>49</sup> [1925] AC 619.

Recently, in the case of *Barakot Ltd v Epiette Ltd*,<sup>50</sup> the Court of Appeal (reversing the decision of David Eady QC sitting as a deputy judge of the High Court) held that “a sole, beneficial shareholder and the company were separate legal entities and were not to be treated as privies for the purpose of the doctrine of *res judicata*.”

This meant, in effect, that, simply because proceedings which a shareholder had brought against a third party for the recovery of certain sums of money had been dismissed, did not preclude the company from itself bringing proceedings itself against the third party in respect of the same money. Both the shareholder and the company had claimed separate agreements with the third party, which they sought to enforce.<sup>51</sup>

## 2.3 Advantages of Limited liability

Liability is generally viewed as a device for minimizing the social cost of private activities, and for forcing actors to internalize the full cost of their actions. An efficient liability system causes actors to consider the full cost of their actions. Limiting liability can thus be seen as subsidizing risky behaviour and allowing some actors to externalize part of the costs of their actions. While corporations generate positive as well as negative externalities there is no way to measure the balance of these externalities under a regime of limited liability.<sup>52</sup>

Secondly, it has long been argued that joint and several unlimited liability would discourage wealthy investors from investing in risky enterprises, particularly when they intended to play a passive role where they could not monitor and supervise the firm’s risky activities. This is

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<sup>50</sup> [1998] 1 BCLC 283.

<sup>51</sup> *Barakot Ltd v Epiette Ltd* [1998] 1 BCLC 283

<sup>52</sup> W.David, Limited Liability: Tort Victims and Creditors (Columbia Law Review, 1991), 91 1565-1650.

supported by one study that suggests that the choice of limited liability is positively correlated with the wealth of owners.<sup>53</sup>

Thirdly, a joint and several liability rule would force shareholders to monitor not only firm activities, but also the wealth of their fellow shareholders, which leads to excessive monitoring costs. It is further argued that, joint and several liability of shareholders would destroy efficient capital markets, because the value of shares would be a function of the expected cash flows of the business and the wealth of each individual buyer, and of expected fellow shareholders.<sup>54</sup>

Finally, there is some evidence that unlimited liability, at least on a joint and several basis, would reduce the number of shareholders and thus the amount of capital contributed to firms. Both limited liability and unlimited liability banks co-existed in eighteenth and early nineteenth century Scotland. From the beginning of the nineteenth century the average size of the limited liability banks was ten times that of the unlimited liability banks, and when the unlimited liability banks were later given the choice of forms, all chose limited liability. Unlimited liability banks had lower levels of capital than limited liability banks in relation to total assets, and shareholders in unlimited liability banks earned higher returns (risk premiums) on their investments.<sup>55</sup>

## **2.4 Problems Caused by the Personality Doctrine**

The first personality problem that can arise is that experienced by seeking to form a company in order to carry on a business. While they are completing the formalities which will lead to

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<sup>53</sup> H. Michael and W. Michael, "Entrepreneurs and the Choice of Limited Liability: Olin Program in Law and Economics," Stanford University Law School. Working Paper No. 129(1996), 78.

<sup>54</sup> H. Frank and F. Daniel, Limited Liability and the Corporation (University of Chicago Law Review, 1985), 89-117.

<sup>55</sup> E.Lewis and Q.Neil, "Shareholder Liability Regimes, Principal-Agent Relationships, and Banking Industry Performance," Journal of Law and Economics, no 2 [June 1995]:97-520.

registration of the company and the consequent gain of legal personality for the company, its creators may wish to sign contracts for the benefit of the company when it is formed. The difficulty is that the company does not exist as a legal person until registration and therefore cannot be party to any contract, nor can it employ agents to act on its behalf.<sup>56</sup>

In addition a limited liability company can be a very powerful weapon in the hands of one determined on fraud and on defeating a creditor's rightful claims. It is on this premise that the courts' piercing of the corporate veil maybe justified.<sup>57</sup>

That notwithstanding, a survey of the case law shows that the courts do contravene the strict principle of the separateness of the company from time to time. There is general agreement among those who have sought to analyse the relevant cases that the only principle that can be gleaned from them is that the courts will look at the human reality behind the company if the interests of justice provide a compelling reason for doing so. This may sound an excellent principle, but when the huge variety of fact situations that are likely to arise is considered, such a vague notion makes it extremely difficult to predict what a court will do in any given case.<sup>58</sup>

## **2.5 Unlimited Companies**

It is imperative to mention that it is possible for a company to be formed without any limit on the liability of its members, and in that case each member will be liable to contribute the last penny of his personal fortune when the company is wound up in order to satisfy its liabilities.<sup>59</sup>

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<sup>56</sup> Dine and Koutsias, Company Law , 26.

<sup>57</sup> Dine and Koutsias, Company Law , 26

<sup>58</sup> Dine and Koutsias, Company Law , 26.

<sup>59</sup> Pennington, Company Law, 44

However, it is still a corporation just like a limited company and so its creditors cannot sue its members personally for the debts it owes. The difference between an unlimited and limited company is simply that when an unlimited company is wound up, there is no limit to the liability of its members to contribute toward meeting its liabilities.<sup>60</sup> This is provided for in section 20(3) of the companies Act<sup>61</sup> which states that;

“Where an unlimited company is wound-up, a member shall be liable to contribute, without limitation of liability.”

From this detailed discussion in this chapter, it is evident that a company can either be limited or unlimited and that in either case, creditors while a company is a going concern, cannot sue its members personally for the debts that it owes. Section 32 of the Dairy Industry Development Act<sup>62</sup> does not reflect this distinction when it states that:

Where a company commits an offence, any officer, director, employee or agent of the company who directed, authorised, assented to, or acquiesced in the commission of the offence shall be a party to and commits the offence, and shall be personally liable to punishment provided for the offence, whether or not the company has been prosecuted or convicted.

This provision clearly treats companies as having a blanket unlimited liability of its officers, directors, employees or agents of the company. This is thereby contrary to the concept of separate legal personality which gives a distinction between members of a company and the company itself which is an artificial person capable of suing and being sued. What is more, as already espoused in this paper is that, whether or not a company has limited liability, this rationale behind the separate corporate legal personality of a company still subsists. With respect to an unlimited company, creditors can only hold members of a company personally liable upon winding up of the same as opposed to when it is a going concern.

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<sup>60</sup> Pennington, Company Law, 44

<sup>61</sup> Cap 388 of the Laws of Zambia

<sup>62</sup> Act No 22 of 2010

## **2.6 Conclusion**

This chapter has shown some of the advantages that come with incorporation and the fact that limited liability is arguably the greatest advantage upon which individuals seeking to establish a company rely. The chapter has also observed the problems associated with the concept of the separate corporate legal personality of companies and the existence of unlimited companies. Upon such findings, the essay has shown how section 32 of the dairy Industry development Act catapults above the distinction between limited and unlimited companies and the flowing legal concept of the separate legal personality of companies.

## **Chapter 3**

### **3.0 Introduction**

This chapter will give an account of the brief history of the dairy industry in Zambia. It will further show that from small traces of dairy farms, the industry was faced with high dairy consumption and hence the need for the Dairy Produce Board. On that basis, the chapter will show that, due to its inadequacies the board was swept off by the wind of privatisation.

The chapter further illustrates that, the government had to respond to the change in the dairy industry by repealing the Dairies and dairy Produce Act and replacing it with the Dairy Industry Development Act. This repeal thereby left the Dairy Produce Board obsolete and replaced it with the Dairy Industry Development Board whose function is restricted to advisory, promotional and supervisory functions. Having delved in the aforementioned issues, the chapter justifies the importance of discussing the ‘company’ as a consequence of privatisation.

### **3.1 An Account of the Dairy Industry**

In Zambia, commercial components of the dairy industry have been in place since the 1920s, when a small group of white settler farmers introduced dairy cows to the country. A modest dairy industry was established by independence in 1964. Following independence, the departure of many white dairy producers and new primary production development schemes instituted by the Zambian government, the sector was substantially restructured.<sup>63</sup> Due to a decline in commercial milk production from the mid 1960s into the 1970s, the government

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<sup>63</sup> B.Kenny and C Mather, “Milking the Region: South African Capital and Zambia’s Dairy Industry.” [www.AfricaFiles.org](http://www.AfricaFiles.org) (accessed November 4<sup>th</sup>, 2011)



established parastatal dairy operations on former white settler owned farms.<sup>64</sup> The term parastatal or state owned enterprise is used to refer to a public enterprise (i.e. state-owned) which is quasi-autonomous and outside the regular civil service structure.<sup>65</sup> It was around this time that the Dairy Produce Board (DPB) was established to control milk processing.<sup>66</sup>

The Dairy Produce Board was established under the Dairy Produce Board (Establishment) Act.<sup>67</sup> This Act provided, among other things, for the establishment of the Dairy Produce Board and Committees under it. It also provided for the composition and membership of the Board, a prescription of the functions and powers of the Board as well as for the enforcement of certain contracts. The Dairy Produce Board derived its functions from the Dairy Produce Marketing and Levy Act.<sup>68</sup> This was reflected in Section 10 of the Dairy Produce Board Establishment Act<sup>69</sup> which stated that;

“The Board shall have and may exercise all the powers and functions and shall perform all the duties conferred or imposed on the Board by the Dairy Produce Marketing and Levy Act.”

The Dairy Produce Marketing and Levy Act<sup>70</sup> was an Act to make provisions with respect to the operation and functions of the Dairy Produce Board, to provide generally for the regulation of the marketing of dairy produce and for the imposition and collection of levies on certain dairy produce, and for incidental matters.<sup>71</sup>

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<sup>64</sup> B.Kenny and C Mather, “Milking the Region: South African Capital and Zambia’s Dairy Industry.” [www.AfricaFiles.org](http://www.AfricaFiles.org) (accessed November 4<sup>th</sup>, 2011), 5.

<sup>65</sup> Caleb Kaunga, “Privatisation: The Zambian Experience Public Enterprises in Zambia. Economic Research “Papers”, no. 35 [June 2008]: 1.

<sup>66</sup> B.Kenny and C Mather, “Milking the Region: South African Capital and Zambia’s Dairy Industry.” [www.AfricaFiles.org](http://www.AfricaFiles.org) (accessed November 4<sup>th</sup>, 2011), 6.

<sup>67</sup> Cap 235 of the Laws of Zambia.

<sup>68</sup> Cap 234 of the Laws of Zambia.

<sup>69</sup> Cap 235 of the laws of Zambia.

<sup>70</sup> Cap 234 of the Laws of Zambia.

<sup>71</sup> Preamble to the Dairy produce Marketing and Levy Act, Cap 235 of the Laws of Zambia.

However, In the 1990s, Zambia's embarkation on a wide-ranging structural adjustment programme had a dramatic impact on the dairy sector. Central links in the parastatals commodity chain, including the DPB and the dominant state-owned national supermarket chain, were earmarked for restructuring and privatization.<sup>72</sup>

The term Privatization is often loosely used to mean a number of related activities, including any expansion of the scope of private sector activity in an economy and the adoption by the public sector of efficiency enhancing techniques commonly employed by the private sector. While acknowledging that no definition of privatization is water tight, privatization, for the purpose of this paper, will be defined as the transfer of productive asset ownership and control from the public to the private sector.<sup>73</sup>

The transfer of assets can be total, partial or functionary, with the sale being implemented by methods such as private sales, leasing arrangements, employee buy outs and share issues. In Africa, many governments have embraced the idea of privatization, brought to the fore mainly as a part of the adjustment and stabilization programs of the mid-eighties and the nineties. Privatization now frequently features in government policy statements and in conditionalities from donors.<sup>74</sup>

The cornerstone of the parastatal dairy sector, the DPB, was privatized in the mid 1990s when its majority stake was sold to South African-based Bonnita. There are at least 30 other smaller processing plants that are involved in a range of fresh and processed dairy products, with several of these linked to local dairy cattle farms.<sup>75</sup>

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<sup>72</sup> B.Kenny and C. Mather, "Milking the Region: South African Capital and Zambia's Dairy Industry." [www.AfricaFiles.org](http://www.AfricaFiles.org) (accessed November 4<sup>th</sup>, 2011), 7.

<sup>73</sup> Caleb Fundanga, Privatization of Public Enterprises in Zambia. Economic Research Papers , no. 35 [June 2008]: 13.

<sup>74</sup> Caleb Fundanga, Privatization of Public Enterprises in Zambia. Economic Research Papers , no. 35 [June 2008]: 13.

<sup>75</sup> B.Kenny and C. Mather, "Milking the Region: South African Capital and Zambia's Dairy Industry." [www.AfricaFiles.org](http://www.AfricaFiles.org) (accessed November 4<sup>th</sup>, 2011), 9.

It is on this premise that the dairy legislation in Zambia had to undertake major changes so as to fit into the restructuring process that took over the Industry. The Dairy Industry Development Act<sup>76</sup> was enacted to regulate the dairy industry so as to develop an efficient and self sustaining dairy industry that effectively contributes towards poverty alleviation, household food security and employment creation and establish the Dairy Industry Development Board and provide for its functions and powers.<sup>77</sup>

### **3.2 Comparative Analysis of the Dairy Produce Board and the now Dairy Industry Development Board**

Some of the functions of the board relevant for this discourse as espoused in section 14 of the Dairy Produce Marketing and Levy Act<sup>78</sup> were as follows;

buy at the appropriate prescribed prices any butterfat, cream or milk which is delivered by a registered producer-wholesaler of butterfat, cream or milk, as the case may be, to any depot appointed by the Board for the purpose; manufacture and prepare milk products; market, within and outside Zambia, milk and milk products.

In the same vein, making reference to section 15(1) of the Dairy Produce Marketing and Levy Act<sup>79</sup>, which states that, “subject to the provisions of this Act, the Board may, with the approval of the Minister, do all or any of the things specified in the Schedule either absolutely or conditionally and whether solely or jointly with others,” the schedule to the same states the powers of the Board, relevant to this paper, to be as follows:

1.To acquire, establish and construct dairies, creameries, factories and other works within Zambia and to provide, maintain and operate distributing, handling and processing facilities and depots within or outside Zambia necessary or convenient for or ancillary to the exercise

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<sup>76</sup> Act No 22 of 2010

<sup>77</sup> Preamble to The Dairy Industry Development Act No 22 of 2010

<sup>78</sup> Cap 234 of the Laws of Zambia

<sup>79</sup> Cap 234 of the Laws of Zambia

of the functions of the Board, and for that purpose to buy, take on lease or in exchange, hire or otherwise acquire immovable property and interests therein and rights over the same and concessions, grants, rights, powers and privileges in relation thereto.

5. To carry out or enter into contracts for carrying out any work in connection with the production, handling, grading, treatment, processing, preparation, manufacture, purchase or sale, storage, import or export of dairy produce and ices and flavoured milk products.

6. To carry on the business of manufacturers of and dealers in ices and flavoured milk products.

7. To buy or otherwise acquire such quantities of dairy produce for sale or for storage or for such other purposes as the Board may think desirable and sell and otherwise dispose of such dairy produce as and when the Board thinks fit and generally to carry on the business of dealers in dairy produce and, in so doing, to act as agents for the sale of dairy produce and margarine.

10. To carry on the business of importers and exporters of dairy produce and ices and flavoured milk products.

25. To introduce, develop and give effect to measures for-

the improvement of, and the promotion of quality in, the production of dairy produce in Zambia such as the giving of prizes for specific or general competition in connection with the production, manufacture or preparation of dairy produce, the granting of money for the purposes of improving the quality of dairy livestock and the making of loans to registered persons for the purchase of equipment facilitating the production or handling of dairy produce; and the encouragement of the consumption of dairy produce within and outside Zambia.

On the other hand, some of the functions of the Dairy Industry Development Board appropriate for this discourse as expounded in section 6 of the Dairy Industry are as follows:

- a) Promote the development of the dairy industry and advise the Minister (minister of livestock and fisheries as defined in section 2) on policies and strategies for the promotion and development of the dairy industry;
- d) Cause to be conducted research in dairy farming and investigate problems affecting the industry;
- e) Develop and monitor strategies and plans designed to achieve and maintain self sufficiency and efficiency in milk production, processing, manufacturing and marketing in Zambia;
- i) Create and promote a competitive environment conducive to fair play among the stakeholders in the industry;
- f) promote the training and improvement of skills in technological advancement in the dairy sector through training programmes, visits, study tours and agricultural shows and ensure that such technologies address the sensitivities of gender;
- (o) Encourage and promote the consumption of milk and milk products within Zambia.

Having looked at the respective functions of the Dairy Produce Board and those of the Dairy Industry Development Act, it is evident that with the wind of privatisation the new Board is no longer directly involved in Dairy activities but focuses on the advisory, promotional supervisory functions.

The Act in section 32, by providing for the liability of companies, shows the extent to which the Act ensures a self sustaining dairy industry. This as opposed to the parastatal run dairy industry as envisaged in the dairy produce marketing and levy Act.

### **3.3 Conclusion**

This chapter has given an account of the dairy industry in Zambia. It has shown that privatisation is the main motivation towards the government's stance to enact the Dairy

Industry Development Act in the hope of repealing the Dairies and Dairy produce Act. The chapter has also illustrated the reflection of privatisation in the new Act by a comparative analysis of the Dairy Produce Act and the new Dairy Industry Development Board. This analysis has brought to light the fact that in as much as the Dairy Produce Board was directly involved in the activities of the Dairy Industry, the new Board simply engages in advisory, promotional and supervisory functions.

## Chapter 4

### 4.0 Introduction

The paper in this chapter will show instances when the veil of incorporation may be lifted with a view to emphasising that express provision must be shown in an Act before the veil is lifted on statutory grounds. In this vein, the paper shows that the Dairy Industry Development Act<sup>80</sup> does not consist of an express provision on which basis the veil may be lifted. This chapter acknowledges the fact that through the identification theory, directors and officers of a company can be criminally liable for offences that require *mens rea*.

Furthermore the chapter shows that, section 32 of the Act<sup>81</sup> extends liability to agents and employees of a company and hence legislating above the principles of agency relations and vicarious liability. The Act does so by conferring several and joint liability on both agents and employees of the company and the company itself

### 4.1 A critique of S 32 of the Dairy Industry development Act.

#### 4.1.1 Lifting the Veil

The principle of separate corporate personality as established by Salomon's cases and emphatically reasserted in later cases, forms the cornerstone of company law. The authority of these cases is unshakeable and yet exceptionally in some instances the law is prepared to disregard or look behind the corporate personality and have regard to the realities of the situation. This approach, which has come to be known as 'lifting the veil' of incorporation, is sometimes expressly authorised by statute, and sometimes adopted by the court of its own record.<sup>82</sup>

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<sup>80</sup> Act No 22 of 2010

<sup>81</sup> Dairy Industry Development Act. No 22 of 2010

<sup>82</sup> L.S. Sealy, Cases and Materials in Company Law (London: Butterworth's & Co Publishers, 1992), 46

#### 4.1.2 Under Statute or Contract

When analysing the judicial decisions on lifting the veil, it is crucial to distinguish between those situations where the court is applying the terms of a statute (other than the Companies Act) or, less often, a contract, from those where, as a matter of common law, the veil is lifted. The reason is that the justification for lifting the veil is to be found in the policy of the statute or the intention of the contracting parties. It is suggested that it is perfectly in line with the doctrine of limited liability that parties should contract out of it and so there is nothing remarkable in the courts deciding that this has occurred in a particular case, provided the parties' intention has been accurately identified.<sup>83</sup>

Equally, parliament is free to decide that the policy of a particular statute requires that the doctrine of limited liability needs to be overruled, though it is doubtless the case that if parliament took this step routinely, one would begin to have doubts about its commitment to the doctrine of limited liability. In looking at the statutory cases, it is also crucial to distinguish between those cases where the courts decide that the separate legal personality of the company should be disregarded and those where in consequence of this disregard, the additional consequence follows that the shareholders are made liable for the company's debts or other obligations.<sup>84</sup>

There are in fact very few, if any, cases where the courts have concluded that the policy of the statute requires the separate legal personality of the company to be ignored so that personal liability can be imposed on shareholders, except where the statute in express terms requires this approach. It is therefore difficult to avoid the conclusion that the courts are

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<sup>83</sup> Davies, *Principles of Modern Company Law*, 200.

<sup>84</sup> Davies, *Principles of Modern Company Law*, 205.



committed to the preservation of separate legal personality of companies except where the statutory wording clearly requires so.<sup>85</sup>

### 4.1.3 Common Law Exceptions

Challenges to the doctrines of separate legal personality and limited liability at common law tend to raise more fundamental challenges to these doctrines, because they are formulated on the basis of general reasons for not applying them, such as fraud, the company being a ‘sham’ or ‘facade’, that the company is the agent of the shareholder, that the companies are part of a ‘single economic unit’ or even that the ‘interests of justice’ require this result. However, the courts seem, if anything more reluctant to accept such general arguments against the doctrines than arguments based on particular statutes or the terms of particular contracts.<sup>86</sup>

### 4.1.4 The Single Economic Unit argument

Occasionally, the courts have pierced the veil between companies in a group on the basis that, while legally distinct, economically they exist as one single, interdependent unit.<sup>87</sup> This view was taken in *DHN Food Distributors Ltd v Tower Hamlets LBC*<sup>88</sup> when the veil between the three companies in this group was pierced in order to achieve what the judges considered to be an equitable result. The Court of Appeal held that the veil would be pierced, stating: “This group is virtually the same as a partnership in which all three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should be justly payable for disturbance.”

In examining the criteria upon which the veil could be pierced, Lord Keith stated that the economic unit argument was only applicable in cases ‘where legal technicalities would

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<sup>85</sup> Davies, *Principles of Modern Company Law*, 205.

<sup>86</sup> Davies, *Principles of Modern Company Law*, 205.

<sup>87</sup> Davies, *Principles of Modern Company Law*, 205.

<sup>88</sup> [1976] 1 WLR 852.

produce injustice in cases involving members of a group of companies'. That is, when the courts were attempting to give effect to an outside legal document or statute and could only achieve this end by piercing the veil.<sup>89</sup>

#### **4.1.5 Where the Company is a mere Façade**

This exception applies when the corporate form is utilised in order to avoid an existing legal obligation or to evade limitations imposed by the law and in that respect such usage may be fraudulent. There are a number of different factual circumstances which have caused the court to hold that the corporation is being used as a façade.<sup>90</sup>

For example in *FG Films Ltd*<sup>91</sup> under-capitalisation was the basis for holding that the company was a mere façade. Although the *Salomon* case showed that a company was not automatically the agent of another company or other individual, it did not preclude the possibility of an agency relationship arising from fact. In order for the parent company to claim compensation it had to show that the subsidiary was not a separate entity but was in fact an agent of the parent company.<sup>92</sup>

#### **4.1.6 To determine the nationality of the company**

In certain discreet circumstances, the veil may be pierced in order to ascertain the nationality of the owners and controllers of a company in order to establish their nationality as the true nationality of the company. Ordinarily a company's nationality is determined by its place of registration but in these cases the part of the veil which contains national identity is set aside, or disregarded.<sup>93</sup>

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<sup>89</sup> *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 WLR 852

<sup>90</sup> Davies, *Principles of Modern Company Law*, 205.

<sup>91</sup> [1953] 1 WLR 483.

<sup>92</sup> *Re FG Films Ltd* [1953] 1 WLR 483

<sup>93</sup> *Re FG Films Ltd* [1953] 1 WLR 483

#### **4.1.7 The Interest of Justice**

Although the interests of justice may provide the policy impetus for creating exceptions to the doctrines of separate legal personality and limited liability, as an exception in itself it suffers from the defect of being inherently vague and providing to neither courts nor those engaged in business any clear guidance as to when the normal company law rules should be displaced. Consequently, it is difficult to find cases in which, “the interests of justice have represented more than simply a way of referring to the grounds identified above in which the veil of incorporation has been pierced.”<sup>94</sup>

From the aforementioned instances, when the courts can pierce the veil of incorporation, it is noteworthy, that, the statutory exception is the most significant to this discourse. With reference to the Dairy Industry Development Act, it would be difficult to overlook the temptation to conclude that it has not expressly made provision for the piercing of the veil of incorporation and hence inconsistent with the concept in question.

#### **4.2 Identification Theory and Company Criminal liability.**

A company can only act through human agents, and those who manage its business are called directors. The directors are agents of the company and may *inter alia* transact business, on behalf of the company. The other members are called shareholders who hold the position of an owner of one or more shares in the company, which shares usually carry a right to vote at general meetings, and if profits are made the right to receive dividends, if declared, on his shares.<sup>95</sup>

Hitherto, this paper has shown that a company is a person just like a natural person and it would thereby be interesting to determine, the thinking, knowhow or even the intention of this artificial, fictional person especially when its liability is in question. The interpretation of

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<sup>94</sup> Davies, Principles of Modern Company Law , 206

<sup>95</sup> Girvin Stephen, Charlesworth's Company Law( London:Sweet and Maxwell, 2005) ,2

the judgment of the leading case of *Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd*<sup>96</sup> was that one must look for the 'directing mind and will' of the company. What he or they thought, knew or intended was what the company thought, knew or intended.

In this case, a claim was brought against the company by the owners of some cargo which had been destroyed by fire while it was on board a ship belonging to the company. The company had a defence to the claim under what was then S. 502 of the Merchant Shipping Act 1894 if it could show that the loss occurred without its 'actual fault or privity'. So, the question was then raised as to whether the company was at fault and the way in which the question should be answered was provided by Viscount Haldane LC, who stated that:

A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association.<sup>97</sup>

On the evidence, L was the active director of the company but had not been called to give evidence. Viscount Haldane continued:

Therefore the question was whether the natural person came on behalf of [the company] and give full evidence ... about his own position and as to whether or not he was the life and soul of the company. For if [L] was the directing mind of the company, then his action must have been an action which was the action of the company itself within the meaning of S 502.

In those circumstances, and the onus being placed on the ship owners to rebut the presumption of liability, the company was liable.

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<sup>96</sup> [1915] AC 705.

<sup>97</sup> [1915] AC 705.p.713.

Therefore, the identification theory proceeds on the basis that there is a person or a group of persons within the company who are not just agents or employees of the company but who are to be identified with the company and whose thoughts and actions are the very actions of the company itself.<sup>98</sup>

This was taken further by Denning LJ in *HL Bolton (Engineering) Ltd v TJ Graham and Sons Ltd*,<sup>99</sup> a case concerning s 30(1) (g) of the Landlord and Tenant Act 1954, where a landlord challenged the right of a tenant to renew a business tenancy on the ground that it 'intended' to occupy the premises for the purposes of a business to be carried on by it. The landlord was a company and the tenant argued that, as no board meeting had been held to consider formally this issue, the company could not intend this at all. In the course of dismissing this argument, Denning LJ invoked the identification theory in the following way:

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 do 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. The state of mind of these managers is the state of mind of the company and is treated by the law as such.<sup>100</sup>

The analogy with the human body which Denning LJ makes here is unfortunate in one sense, especially from the point of view of those who would like to see an expansion of corporate liability. This is because, under this analysis, the court is directed to place too much emphasis on only the very senior persons within the company.<sup>101</sup> Lord Justice Denning's judgment was explained in *Tesco Supermarkets Ltd v Natrass*.<sup>102</sup>

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<sup>98</sup> Goulding, Company Law, 106.

<sup>99</sup> [1957] 1 QB 159.

<sup>100</sup> [1957] 1 QB 159.

<sup>101</sup> Goulding, Company Law, 106.

<sup>102</sup> [1972] AC 153.

Here, Tesco was prosecuted under the Trade Descriptions Act 1968 when it was discovered that one of its stores was selling packets of 'Radiant' washing powder which had been marked with a different price from that advertised. Tesco had a defence if the company could show that the offence was committed by 'another person' and it had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence. In fact, the incorrect pricing had been the work of the shelf stacker and a store manager, whose job was to see that packets were properly priced, had failed to spot the error.

It was held that, since the store manager was an employee, or 'hands to do the work' under Denning LJ's formulation, and did not represent the 'directing mind and will' of the company, the act was done by 'another person' separate from the company. Further, it was held that the company itself had taken all reasonable precautions by setting up a system to avoid offences being committed under the Act. As Lord Reid stated:

Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion.<sup>103</sup>

His Lordship then went on to distinguish the case of the subordinate employee from the case where the board had actually delegated some part of its management functions to a delegate. In the latter case, it would be possible to consider the delegate's act as the act of the company. The store manager had not been delegated the duty of setting up and implementing the system. This approach is quite different from cases such as *The Lady Gwendolen*<sup>104</sup> and *The Truculent*,<sup>105</sup> where the court focused on whether the relevant act, thought or intention

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<sup>103</sup> Tesco Supermarkets Ltd v Nattrass [1972] AC 153, p 171.

<sup>104</sup> [1965] P 294.

<sup>105</sup> [1952] P 1.

was that of a person who had been given or assigned the responsibility for a particular task or role.<sup>106</sup>

There is now strong evidence to suggest that the courts are prepared to move away from the *Bolton v Graham* approach. However, before looking at these developments, some consideration must be given specifically to corporate criminal liability.<sup>107</sup>

### 4.3 Corporate Criminal Liability

Companies, even though they are fictitious legal persons, can be held to be criminally liable. This was decided as early as the 1840s in two cases concerning statutory railway companies.<sup>108</sup> Today, there are a considerable number of important regulatory statutory offences for which companies are commonly prosecuted. Practically, there are no company law problems raised by these prosecutions, since the statutory offences are offences of strict liability, so that the issue is whether a certain state of affairs existed and, if it did, the company can be convicted and fined.<sup>109</sup>

A company is invariably criminally liable for offences that do not require an element of *mens rea* for its incapacity of constituting a mind. Offences of strict liability are those crimes, which do not require *mens rea* with regard to at least one or more elements of the *actus reus*. The defendant need not have intended or known about that circumstance or consequence. Liability is said to be strict with regard to that element. The vast majority of strict liability crimes are statutory offences. However, statutes do not state explicitly that a particular

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<sup>106</sup> Goulding, Company Law, 107

<sup>107</sup> Goulding, Company Law, 107

<sup>108</sup> *R v Birmingham and Gloucester Rly Co* (1842) 3 QB 224; *R v Great North of England Rly Co* (1846) 9 QB 315.

<sup>109</sup> Goulding, Company Law, 107

offence is one of strict liability. Where a statute uses terms such as "knowingly" or "recklessly" then the offence being created is one that requires *mens rea*.<sup>110</sup>

Alternatively, it may make it clear that an offence of strict liability is being created. In many cases it will be a matter for the courts to interpret the statute and decide whether *mens rea* is required or not.<sup>111</sup>

Quite a different legal question is raised when the relevant alleged offence is one which requires the prosecution to prove that the accused had the necessary *mens rea*. One hundred years after the courts held that it was possible to bring criminal prosecutions against companies in the cases cited above, the courts, in a series of cases in 1944, used what is now referred to as the identification theory to establish the company's *mens rea*.<sup>112</sup>

In *DPP v Kent and Sussex Contractors Ltd*,<sup>113</sup> the company was charged with doing an act with intent to deceive and making a statement which it knew to be false. The Divisional Court held that the company could be liable and, therefore, have the necessary intent to deceive. In the words of McNaghten J:

It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imported to the body corporate. ... If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive ... his knowledge and intention must be imported to the company.<sup>114</sup>

Similarly, In *Moore v I Bresler Ltd*,<sup>115</sup> the company secretary, who was also the general manager of the Nottingham branch of the company, together with the sales manager of the same branch, caused documents and accounts to be produced which were false and which

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<sup>110</sup> [www.lawteacher.com](http://www.lawteacher.com) (accessed December 20<sup>th</sup> 2011)

<sup>111</sup> [www.lawteacher.com](http://www.lawteacher.com) (accessed December 20<sup>th</sup> 2011)

<sup>112</sup> Simon Goulding Company Law (New York: Cavendish publishing Company, 1999), 108  
<sup>113</sup> (1944) KB 146.

<sup>114</sup> *DPP v Kent and Sussex Contractors Ltd* (1944) KB 146

<sup>115</sup> (1944) 2 All ER 515



intended to deceive, so that the company was liable to pay less purchase tax. Both were convicted and so was the company. On appeal by the company, the Quarter Sessions quashed the conviction, but this was restored by the Divisional Court of the King's Bench, Viscount Caldecote stating that:

These two men were important officials of the company, and when they made statements and rendered returns ... they were clearly making those statements and giving those returns as the officers of the company, the proper officers to make the returns. Their acts ... were the acts of the company.<sup>116</sup>

In all these cases, what is apparent is that the judges were using the identification theory in a wider and quite different way from the way in which it was subsequently developed and used in *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd* and by Lord Reid in *Tesco Supermarkets Ltd v Natrass*. In the latter cases, the emphasis is on the seniority of the natural person whose act is in question, that is, it is only where the natural person is at the head or centre of the company that his acts can be considered as the acts of the company.<sup>117</sup> In the earlier cases, the emphasis is on whether the agent or officer is carrying out his role in the company which he was appointed to do.<sup>118</sup>

Bringing section 32 of the Dairy Industry Development Act into perspective, prima facie, the wording in the Act does suggest that the liability imposed thereunder is that of strict liability as it does not make emphasis on neither knowledge nor recklessness as aforementioned. This attracts a conclusion that since strict liability seems to be apparent, section 32 sits strangely with the concept behind corporate criminal liability. Liability of this nature makes a company strictly liable without regard to the identification theory. From the wording of the Act;

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<sup>116</sup> Moore v I Bresler Ltd(1944) 2 All ER 515

<sup>117</sup> Goulding, Company Law , 109

<sup>118</sup> Goulding,,Company Law,109.

“where a company, commits an offence, any officer, director, employee, or agent of the company who authorised,.....in the commission of the offence shall be a party to and commits an offence.”

Hitherto, paper has shown that where intention is not a requirement to an alleged offence then a company is strictly liable thereto. By the Act extending the liability to officers and directors whether or not the company is liable, is a total disregard to the concept of a company's capability of assuming criminal liability where intention is not an element of the offence in question.

The Act<sup>119</sup> in section 32 further extends liability to employees and agents of companies found wanting under the Act whether or not the company has been prosecuted or convicted of the same. This can be seen to be inconsistent with the principles surrounding vicarious liability and agency relationships.

#### **4.4 Agency**

The law of agency is an area of commercial law dealing with a contractual or, quasi contractual or non-contractual set of relationships when a person, called the agent, is authorized to act on behalf of another (called the principal) to create a legal relationship with a third party. Succinctly, it may be referred to as the relationship between a principal and an agent whereby the principal, expressly or impliedly, authorizes the agent to work under his control and on his behalf. The agent is, thus, required to negotiate on behalf of the principal or bring him and third parties into contractual relationship. This branch of law separates and regulates the relationships between: Agents and principals; Agents and the third parties with whom they deal on their principals' behalf; and Principals and the third parties when the agents purport to deal on their behalf.<sup>120</sup>

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<sup>119</sup> Dairy Industry Development Act, No 22 of 2010

<sup>120</sup> [www.LawTeacher.com](http://www.LawTeacher.com) (accessed 3<sup>rd</sup> January 2012)

The reciprocal rights and liabilities between a principal and an agent reflect commercial and legal realities. A business owner often relies on an employee or another person to conduct a business. In the case of a corporation, since a corporation is a fictitious legal person, it can only act through human agents. The principal is bound by the contract entered into by the agent, so long as the agent performs within the scope of the agency. An agent who acts within the scope of authority conferred by his or her principal binds the principal in the obligations he or she creates against third parties.<sup>121</sup>

There are essentially two kinds of authority recognized in the law: actual authorities (whether express or implied) and apparent authority. Actual authority can be of two kinds. Either the principal may have expressly conferred authority on the agent, or authority may be implied. Authority arises by consensual agreement, and whether it exists is a question of fact. An agent, as a general rule, is only entitled to indemnity from the principal if he or she has acted within the scope of her actual authority, and may be in breach of contract, and liable to a third party for breach of the implied warranty of authority. In tort, a claimant may not recover from the principal unless the agent is acting within the scope of employment.<sup>122</sup>

Apparent authority (also called "ostensible authority") exists where the principal's words or conduct would lead a reasonable person in the third party's position to believe that the agent was authorized to act, even if the principal and the purported agent had never discussed such a relationship. If a principal creates the impression that an agent is authorized but there is no actual authority, third parties are protected so long as they have acted reasonably. This is sometimes termed "agency by estoppel" or the "doctrine of holding out", where the principal

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<sup>121</sup> [www.LawTeacher.com](http://www.LawTeacher.com) (accessed 3<sup>rd</sup> January 2012)

<sup>122</sup> [www.LawTeacher.com](http://www.LawTeacher.com) (accessed 3<sup>rd</sup> January 2012)

will be estopped from denying the grant of authority if third parties have changed their positions to their detriment in reliance on the representations made.<sup>123</sup>

If the agent has actual or apparent authority, the agent will not be liable for acts performed within the scope of such authority, so long as the relationship of the agency and the identity of the principal have been disclosed.<sup>124</sup>

Following the rationale behind agency relations, the Act<sup>125</sup> in section 32 is gravely inconsistent with the same by extending liability to agents of companies that authorise the commission of an offence under the Act. Seemingly, the Act embraces a blanket liability without regard to whether or not such an agent acts within the scope of his authority.

#### **4.5 Criminal Vicarious Liability**

In criminal law, corporate liability determines the extent to which a corporation as a legal person can be liable for the acts and omissions of the natural persons it employs. It is sometimes regarded as an aspect of criminal vicarious liability, as distinct from the situation in which the wording of a statutory offence specifically attaches liability to the corporation as the principal or joint principal with a human agent.<sup>126</sup>

The imposition of criminal liability is only one means of regulating corporations. There are also civil law remedies such as injunctions and the award of damages which may include a penal element. Generally, criminal sanctions include imprisonment, fines and community

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<sup>123</sup> www.LawTeacher.com (accessed 3<sup>rd</sup> January 2012)

<sup>124</sup> www.LawTeacher.com (accessed 3<sup>rd</sup> January 2012)

<sup>125</sup> Dairy Industry Development Act, No 22 of 2010

<sup>126</sup> Geraghty, "Corporate Criminal Liability: American Criminal Law Review," Vol. 39, (2002):327.

service orders. A company has no physical existence, so it can only act vicariously through the agency of the human beings it employs.<sup>127</sup>

From this understanding, this paper illustrates how the Act<sup>128</sup> drifts away from the principles of vicarious liability by imposing liability on the employees of a company whether or not the company is itself liable of an offence under the Act.

#### **4.6 Conclusion**

This chapter has given a critique to section 32 of the Dairy Industry Development Act in relation to company liability, by establishing the following; Firstly, from the many instances in which the courts may decide to disregard corporate personality, the most appropriate of all for this discourse, is that found in the policy of the statute. This paper has shown that a statute with such a policy must be express in its wording.

Secondly, the paper has shown that in instances where the element of *mens rea* is relevant to the proving of an apparent offence then the identification theory is of great relevance.

Thereunder, the directors and usually managers of a company or any important personnel to the company are considered as the 'directing mind and will' of the company. The intention of such individuals is thereto seen as that of the company. The paper has however shown that save the element of *mens rea*, companies are criminally liable for offences committed by it. This notwithstanding, Section 32 has nonetheless not reflected this in the liability of companies under the Act.

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<sup>127</sup> Geraghty, "Corporate Criminal Liability: American Criminal Law Review," Vol. 39, (2002):327.

<sup>128</sup> Dairy Industry Development Act.No 22 of 2010

Finally, the chapter has noted that section 32 drifts from the principles of agency and vicarious liability by extending liability to agents and employees of companies found wanting.

## **Chapter 5.**

### **5.0 Introduction**

The preceding chapters have given an account of company liability and the dairy Industry Development Act. This chapter will thereby present findings that have been elucidated in the aforementioned chapters. By so doing conclusions and recommendations shall be drawn.

This study was based on two broad objectives. The first objective was to establish the extent to which section 32 of the Dairy Industry development Act has upheld the general law of companies. The second objective on the other hand is that by highlighting the inconsistencies that come with the Act, this research remains relevant evidence to the possible, necessary, amendments that could be made to the Act.

In achieving these two objectives the paper has given the justification for this achievement as being to ensure that, officers, directors, employees or agents of the various companies in the dairy industry operate under the assurance that, in the event that a company incurred liability, whether criminal or civil, they are covered by the veil of inco-operation. This then would justify their choice to operate under an inco-operated body or otherwise expect to incur liability under a non- inco-operated body which is not a separate legal entity distinct from its members. This protection is as granted to them by one of the consequences of inco-operation. Thereby, findings in this research therefore, are bound to be relevant to any company dealing in dairy products.

### **5.1 General Conclusion**

In attaining the first objective, the paper has shown that the main feature of companies is that the liability of their members to contribute toward payment of their debts is usually limited.

This feature is the logical consequence of the existence of a separate legal personality of a company. Today, many traders and businessmen would see as the main attraction of forming a company the advantage of avoiding liability for business debts.<sup>129</sup> Corporate legal personality on the other hand has been seen to be a feature that allows a company to be distinct from its members and thereby being able to *inter alia* sue, own property, constitute limited liability of its members and have perpetual succession.

It is on this background that s.32<sup>130</sup> has been criticised in that it has conferred a blanket liability on officers, directors, employees and agents of the companies found wanting under the Act. The Act is accordingly criticised for its failure to reflect the company as a separate legal entity. In maintaining this critique, the paper has shown that, due to the separate personality of the company from its individual members, questions of liability always arise.

This paper has outlined instances in which the veil of incorporation may sparingly be lifted and that the statutory grounds for piercing the veil are the most appropriate to the topic of this discourse. Thereunder, the principle is that the wording in a statute disregarding the separate legal personality of a company must be express in its wording. From the wording in The Dairy Industry Development Act, it is evident that the Act does not expressly provide for this disregard.

This notwithstanding, company can only act through human agents, and those who manage its business are called directors. The directors are agents of the company and may *inter alia* transact business, on behalf of the company. The other members are called shareholders who hold the position of an owner of one or more shares in the company, which shares usually

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<sup>129</sup> Goulding, Company Law, 53

<sup>130</sup> Dairy Industry Development Act, No 22 of 2010



carry a right to vote at general meetings, and if profits are made the right to receive dividends, if declared, on his shares.<sup>131</sup>

Under the identification theory *the directors and managers of a company are seen as the mind and brain of the company* and therefore any action done by them within their authority is seen as an act done by the company. This theory is applicable in deducing the intention of a company by considering such intention as that of the managers and directors of the company.

Moving away from this restrictive approach to the liability of a company where *mens rea* is an element of such liability, in recent cases, there is an emphasis on whether the director, manager, agent or officer is carrying out his role in the company which he was appointed to do.<sup>132</sup> This is as opposed to the requirement for the person acting as a company to hold a certain position of manager or director or any other that can be considered to be at the centre of the company operations.

Borrowing from this reasoning, even if there was a requirement for the element of *mens rea* section 32 of the Dairy Industry Development Act would still have been out of line with the past and present approach to the identification theory. This is due its imposition of liability on the officers and agents of companies where a company commits an offence.

This discourse has further shown that extension of liability to agents and employees under section 32 of the Dairy Industry Development Act has catapulted above the principles of agency and vicarious liability respectively.

## 5.2 Recommendations and Conclusions

From the above findings, it would be appropriate to suggest amendments to the Act in question so that it is in line with the principles in the Companies Act. However the dairy

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<sup>131</sup> Girvin Stephen, Charlesworth's Company Law (London: Sweet and Maxwell, 2005) ,2

<sup>132</sup> Goulding, Company Law, 109.

Industry development Act is not the first Act to be inconsistent with a previously enacted Act. The courts in dealing with such instances therefore delve into statutory interpretation in order to reconcile such differences.

In the case of *Standard Chartered Bank Zambia Ltd v. Peter Zulu and others*,<sup>133</sup> in which case section 35 of the Employment Act and Sections 28 and 29 of the banking and financial services Act were in question the Supreme Court observed as follows:

On the conflict of the two Statutes, the learned counsel referred the court to the 6<sup>th</sup> edition of Craies on statute law. The learned author says that where two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed the other. He further says that unless the two Acts are so plainly repugnant to each other, effect cannot be given to both at the same time, a repeal will not be implied. Special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together.

Before coming to the conclusion that there must be repeal by implication, the court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can, from the language of the later. Then, imply the repeal of an express prior enactment, that is, the repeal must if not express, flow from necessary implication.

The learned author continues by stating that:

To determine whether a later statute repeals by implication, an earlier, it is necessary to scrutinise the terms and consider the true meaning and effect of the earlier Act. Until this is done, it is impossible to ascertain whether any inconsistency exists between the two enactments.

From the aforementioned reasoning, in as much as the best recommendation for the problems that this research seeks to identify, are the necessary amendments, the overall solution to the inconsistencies in the companies Act and the Dairy Industry development Act remains a matter of statutory interpretation, of which function is conferred on the courts.

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<sup>133</sup>( 1996) SCZ Appeal No.59

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