NATIONAL UNIVERSITY OF LESOTHO

AN ANALYSIS OF PERSONAL LIABILITY OF COMPANY OFFICERS IN MONEY LAUNDERING OFFENCES

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ABSTRACT

Lesotho is faced with the challenges of dealing with individuals who commit money laundering offences under the guise of companies, hoping to hide behind the companies' separate legal personality principles. Section 25 of the Money Laundering and Proceeds of Crime Act 2008, as amended, criminalises money laundering committed by both natural and legal persons.

It is established law in Lesotho under Section 9 of the Companies Act 2011 that companies, once duly incorporated, have a separate legal personality that affords them the capacity to sue and be sued in their own names, independent of their incorporators. Section 16 of the Constitution of Lesotho 1993 recognises the freedom of all persons to associate, even to the extent of incorporating a company, provided the contemplated incorporation is for a lawful purpose. Individuals in Lesotho are free to exercise their right to association and incorporate a company either individually or as a collective. The law recognises that persons so associating to establish a company may not be involved in the day-to-day management of the company; rather, they may vest such responsibility and authority in company officers. The officers have a fiduciary duty to act in the best interest of the company and are held personally accountable for a breach of such duty. The right to freedom of association to incorporate companies and enjoy the benefits that arise from separate legal personality is limited to the engagement in a lawful enterprise. Therefore, where persons constitute themselves into a syndicate and incorporate a company to advance a money laundering enterprise, the law does not permit that.

These officers of the company are the ones that form the requisite *mensrea* of the company. Therefore, the mental requirement of forming an intention must be ascribed to individuals authorised to act on behalf of the company. To identify these company officers, the principle of lifting the corporate veil is applied.

In the quest to analyse circumstances where the officers of the company are personally liable for corporate crimes in money laundering offences, the study inevitably considers the exceptions to the separate legal personality principle. The study adopts a doctrinal approach that involves consideration of existing literature on the subject matter. It interrogates the extent to which the law permits companies to retain their separate legal personality and circumstances where the veil of incorporation could be lifted to identify company officers who committed money laundering offences and to hold them personally liable for such offences.

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Declaration

NATIONAL UNIVERSITY OF LESOTHO

FACULTY OF LAW

SCHOOL OF POSTGRADUATE STUDIES

I LITSOLO PHILLIP MOSOEUNYANE, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook or other media. The contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

Name: LITSOLO PHILLIP MOSOEUNYANE 19990183

Signature:

Date: 27/05/2025

Place: MASERU

Background to the Study

1.1 Introduction

The Lesotho Companies Act 2011 defines a company as a body corporate incorporated or registered in accordance with the Act or its antecedent Companies Act of 1967.[1] Conventionally, and as trite law, a company is brought into existence by persons who contribute to its asset build-up and concur with its proposed vision, and a company has officers who have a fiduciary duty to run its affairs and bind it. According to the Companies Act, a company once incorporated is a legal person with a separate and independent personality from its shareholders and continues to exist until it is removed from the register of companies in terms of the Companies Act.[2] The Act provides that a duly incorporated company has the capacity, rights, powers, and privileges of a natural person and may do anything which it is permitted or required to do by its articles of incorporation or under the Act. For instance, in terms of the Act, a company has the right to sue and be sued, and to hold property in its own name.[3] The rationale behind this principle is to encourage commerce by reducing the risk of investing in a business against the personal assets of the investor. The principle is vulnerable to the risk of abuse by unscrupulous company officers to commit fraud or any other crimes, including money laundering offences.

As a result of the general spread of money laundering offences across the world, Lesotho, in compliance with international standards to combat money laundering, enacted the Money Laundering and Proceeds of Crime Act 2008. Section 25 of the Money Laundering and Proceeds of Crime Act defines and criminalises money laundering as the acquisition, possession, or use of property or the conversion or transfer of property with the aim of concealing, obscuring, or disguising its illicit origin or aiding one involved in the commission of the offence to evade legal consequences.[4] Although the Act criminalises money laundering by both companies and natural persons, it is important to interrogate the extent of personal liability of company officers in order to mitigate the abuse of the concept of separate legal personality.

[1] Section 2(1) Lesotho Companies Act 2011
[2] Section 9 Lesotho Companies Act 2011
[3] Section 9 (2) (a) (c) Lesotho Companies Act 2011
[4] Money Laundering and Proceeds of Crime Act 2008 as Amended.

Regarding the liability of companies in money laundering offences, scholars have written that companies must face criminal liability even though they are artificial creatures in the eyes of the law. Mahommed Suleh-Yusuf states that the rising number of companies facing criminal liability can be ascribed to the court's understanding of the need to impose certain obligations on the company even if it lacks human attributes.[5] The premise of this reasoning is found in the decision in *Alphacell v Woodward,*[6] that if the law imposes an obligation, the corporation must organise itself well enough to abide by the law and perform the obligation to the full extent of the dictates of the law, because the fictional nature of the company has neither bestowed immunity on the company nor excused it from consequences of breaches of criminal statutes. The House of Lords reiterated the position held in *Aphacell v Woodward*[7] in *Seaboard Offshore Limited v Secretary of State for Transport*[8] and decided that a company can be convicted for negligently omitting to take some preventative measures in relation to the commission of crimes. This precedent unequivocally advanced the argument that companies can be held liable for the commission of crimes.

In the face of increasing cases of money laundering crimes where companies are used as vehicles of proceeds of crime throughout the stages of money laundering, namely placement, layering, and integration, because of their legally accepted artificial personality, it has become even more important to consider the personal liability of company directors or officers in money laundering cases. The quest for the determination of the personal liability of company officers whose general actions are cloaked by the veil of incorporation has necessitated piercing the corporate veil in instances of abuse to identify company officers who are authorised to act on behalf of the company. The courts have held companies liable for corrupt conduct and imposed criminal liability on company officers by piercing the corporate veil to reveal individuals who are otherwise cloaked by the corporate veil and orchestrated the money laundering crime.[9]

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[5]Mohammed Suleh-Yusuf. "*Corporate Criminal Liability in Money Laundering and terrorism Financing Prosecution in Nigeria, United Kingdom and United States: A Comparative Review*", International Journal of Human and Social Science Invention; 6 (7) (July 2017): 15-25

[6] (1972) All E.R 475

[7] (1972) All E.R 475

[8] (1994) Lloyd's Rep 75

[9] Understanding the Corporate Veil in South Africa's Companies Act 71 available at https://pagelschulenburg.co.za/understanding-the-corporate-veil-in-south-africas-companies-act-71/ (accessed date 09 March 2025)

It is important to mention that the concept of separate legal personality is not absolute but is restricted by disregarding the veil of incorporation and directing liability to company officers. The law allows resort to disregarding the corporate veil where the legal convenience of the artificial personality is abused by company officers. This means that, where a separate personality is abused, the courts may set aside the separate legal personality principle, pierce the corporate veil, and consequently impose personal liability on company officers. This remedy is known as piercing the corporate veil and remains anchored by Common Law in Lesotho, with no legislative incorporation in the Companies Act 2011 of Lesotho, unlike the explicit statutory incorporation of the Companies Act 2008 of South Africa. The South African Companies Act under Section 20 (9) clearly introduced and articulated statutory grounds for piercing the corporate veil. This marked a momentous development of the jurisdiction's departure from a common law-based approach to legislative entrenchment. The South African Act empowers the Court to declare that a company's juristic personality should not apply in cases of "unconscionable abuse" of the corporate entity.[10]

1.2 Problem Statement

The problem that the study interrogates is the risk of abuse of the separate personality of a company by officers of the company using the company to commit crimes such as money laundering. The study thus analyses the legal position regarding personal liability of company officers in money laundering offences.

According to the separate personality principle, as a juristic person, a company can sue and be sued. This position of the law is entrenched in the Lesotho Companies Act.[11] The case of *Dadoo v Krugersdorp Municipality*[12] where the Court upheld the concept of separate legal personality by emphasising that a company exists on its own as a juristic person, is a demonstration of how the South African Courts have understood the concept. However, since a company is an artificial person created for legal conveniences that encourage commerce, the concept must be limited to assisting legitimate courses only. The problem that this research attempts to solve is the misconception that company officers can escape personal liability for money laundering by invoking the company's separate personality.

[10] See s 20(9) of the South African Companies Act 2008.
[11] Section 9 (2) (a) Companies Act 2011.
[12] 1920 AD 530

1.3 Aim

This study aims to analyse the circumstances under which the courts impose personal liability on company officers in money laundering offences. The study seeks to demonstrate that the application of the separate personality principle is limited to encouraging commerce and advancing legitimate business interests of the company and its shareholders. Since this is such a commercially important principle, with financial implications, the study also aims to outline and encourage statutory incorporation of circumstances under which the courts will pierce the veil of incorporation and impose personal liability on dishonest company officers. The aim of statutory incorporation is to promote certainty, predictability, uniformity, and ease of reference in this area of law to curb abuse of the concept and incidents of money laundering.

1.4 Research Objectives

The research seeks to achieve the following objectives:

- Trace the history and rationale of the common law principle of separate legal personality and outline its advancement over time and its limitations to curb its abuse.
- Outline requirements for piercing the corporate veil to enable the imposition of personal liability on company officers where the concept is abused, especially in money laundering offences.
- Recommend statutory incorporation of limitations of the concept and requirements for lifting the veil to promote certainty of law in this respect.

1.5 Research Questions

The research questions are the questions that the study aims to answer. The questions that the research seeks to find answers to are the following:

- How does personal liability of company officers arise, especially in money laundering cases?
- Why was the company viewed as a separate legal person in the eyes of the law?
- What is the rationale behind the exception introduced in the principle of lifting the corporate veil?
- What are the circumstances that warrant courts to impose personal liability on company officers in money laundering offences?

- What are the conveniences that can result from legislative incorporation of the concept and the requirements for piercing the corporate veil?

The research question to be interrogated by the study is whether company officers can escape liability for money laundering criminality by cloaking their criminal deeds to obfuscate themselves under the guise of a company and abuse the principle of separate personality of the company. The overarching research question is thus, whether company officers can obscure their criminal liability especially for money laundering offences by invoking the principle of separate personality of the company that stands at the heart of company law.

1.6 Methodology

Methodology describes the way of conducting research and discloses the trail that is followed to conduct the research. Methodology is scholarly defined as the science of finding out.[13] This study adopts a desktop or doctrinal methodology. Doctrinal methodology is dependent on the content of Common Law, Case Law, Statutes, Journal Articles, Books, Internet sources, and any other written works about the subject under study. In this study, the researcher analyses the rationale for the evolution, development, and exception to the principle of separate legal personality of the company applied by the piercing of the veil to enable imposition of personal liability on company officers who abuse corporate personality principles to commit money laundering offences.

1.7 Scope of the Study

This study essentially addresses the historical origin and rationale of the corporate personality of a company, how it has developed over time to date, and its exceptions. Emphasis is placed on acts and omissions that attract criminal liability and circumstances where personal liability of company officers is imposed. The study demonstrates that the ultimate quest of the principle of separate legal personality is the promotion of legitimate commercial pursuits and not the protection of unscrupulous company officers.

The main aim of unpacking this is to demonstrate that where company officers abuse corporate personality to commit crime, especially money laundering, the principle of separate personality

[13] Babbie, Earl R. The Practice of Social Research. 9th ed. Belmont, CA: Wadsworth/Thomson Learning, 2001.

cannot apply, because to allow this would be tantamount to encouraging financial crime, an end to which the principle was not introduced to achieve.

1.8 Justification of the Study

There is a misconceived idea that company officers can use the company to commit crimes, especially money laundering crimes, and escape liability by invoking the principle of separate legal personality of the company (corporate personality). Contributing factors to this misconception are reliance on the Common Law and ignorance of the rationale and spirit of the concept.

According to the law in Lesotho, a company attains corporate personality upon incorporation. The Companies Act 2011 outlines the capacity of a company consequent to its incorporation.[14] It is a trite law that companies, as corporate persons, are equally subject to the law as are natural persons, as provided in the Act.[15] This study seeks to justify that Companies are creatures and subjects of law; they are bound to advance the lawful commercial desires of their incorporators, and when this important foundation is compromised or abused, the corporate personality principle must not apply. This study relays the limitations of separate legal personality and demonstrates how personal liability of company officers must be imposed to ensure that personal liability is imposed on company officers who abuse corporate personality.

1.9 Literature Review

A literature review is, according to Earl Babbie, what others have said about the topic, what theories address the topic, and what the theories say.[16] Literature review involves consideration of research that has been done previously, whether there are consistent findings, or if past studies disagree and involves consideration of whether there are flaws in the existing knowledge that need to be remedied.[17] This study adopts Babbie's definition of literature review. The study evaluates literature of available knowledge constituting authoritative written works about this chosen subject of research. This study is conducted with the understanding that the main aim of literature review is critical analysis of available knowledge, the rationale

[14] Section 9 (2) (a) Companies Act 2011
[15] Section 9 (2) (a) Companies Act 2011
[16] Babbie, Earl R. The Practice of Social Research. 9th ed. Belmont, CA: Wadsworth/Thomson Learning, 2001.
[17] Babbie, Earl R. The Practice of Social Research. 9th ed. Belmont, CA: Wadsworth/Thomson Learning, 2001

behind it, identification of gaps and of how best such gaps can be bridged. This dissertation therefore engages in a journey of analysing existing knowledge and its rationale, identifying its limitations considering current theories and views of different authorities and solutions to bridge identified gaps.

Personal liability of company officers is considered relative to the liability of the company. It is an established principle that a company is a separate legal person in the eyes of the law. It was held in the landmark English case of *Salomon v Salomon*,[18] that a company once incorporated assumes a separate legal personality. The expression of the principle in *Salomon's case* created the bedrock principle of corporate personality. The Indian case of *Bacha F Guzdar v Commissioner of Income Tax, Bombay.*[19] concurred with the analogy that a company has juristic personality distinct from its shareholders.

There are instances where the separate legal personality of a company is abused to commit fraud, acts of dishonesty, or any improper conduct causing prejudice. This is alleviated by piercing the corporate veil to impose personal liability on company officers. In the cases of *Letegan and Another NNO v Boyes and Another,*[20] and *Botha v Van Niekerk En 'n Ander,*[21] the Courts held that although a company has a distinct legal personality, the veil of incorporation can be pierced where improper, dishonest, or fraudulent conduct is evident.

It is important to note that some jurisdictions, for instance, South Africa, have gone as far as statutorily incorporating the legal personality principle in their Companies Act as provided in section 19 (1) of the Companies Act 71 of 2008.[22] The South African Act provides for the lifting of the corporate veil in section 20 (9),[23] a desirable position which provides the convenience of certainty of the law and ease of reference, and a good legal development for Lesotho to adopt.

The Companies Act 2011 of Lesotho adopts the Common Law principle of separate legal personality under section 9. The Act of 2011 does not, however, provide for the lifting of the

[18] Salomon v Salomon 1897 AC 22 (HL).
[19] 1952 54BOMLR 595, (1952) 22 COMCAS 198 (BOM)
[20] 1980 (4) SA 191 (T)
[21] 1983 (3) SA 513 (W)
[22] Section 19(1) (a) and (b) South African Companies Act 71 of 2008
[23] Section 20(9) (a) and (b) South African Companies Act 71 of 2008

corporate veil, unlike the South African Companies Act of 2008. The Lesotho Companies Act does, however, describe the extent of rights and obligations of a company as an independent person with distinct legal personality. For instance, the Act provides that by virtue of its legal personality, a company has the right to sue and be sued, to incur liabilities and secure obligations with its property.[24]

According to the Lesotho Companies Act, a company shall, upon its incorporation, be a legal person in its own right, separate from its shareholders, and shall continue in existence until it is removed from the register of companies in accordance with the Act.[25] Although this provision demonstrates the development of statutory entrenchment of separate legal personality principles, the shortcoming that comes with it is that the Act fails to articulate the lifting of the corporate veil principle. This leaves our law dependent on the Common law in this area. This means that to successfully sustain a legal argument in pursuit of piercing the corporate veil in Lesotho, one must rely solely on the Common Law. This study, in addition to analysing personal liability of company officers in money laundering offences, highlights this gap and the need for statutory entrenchment to bridge the gap.

The *Money Laundering and Proceeds of Crime Act 2008, as Amended,* defines money laundering as the acquisition, possession, or use of property or conversion or transfer of property with the aim of concealing, obscuring, or disguising its illicit origin or aiding one involved in the commission of the offence to evade legal consequences. The Act criminalises money laundering by all persons, including legal persons. [26] It is currently difficult to establish the position of the Courts of Lesotho in relation to the application of the provision that criminalises the conduct because it has not been tested. However, it is a commendable development that criminalisation of money laundering in the Act includes legal persons. The Act makes an important determination that where companies are involved in the commission of the crime of money laundering as defined in the Act, the provisions apply similarly to persons, which 'persons' obviously encapsulate both natural and legal persons. This position is espoused equally in Nigeria, where the laws, particularly in the area of money laundering and terrorism financing prosecution, recognise that companies, even though they lack the attributes

[24] Section 9 (2) Lesotho Companies Act 2011
[25] Section 9 (1) Lesotho Companies Act 2011
[26] Section 25 Money Laundering and Proceeds of Crime Act 2008 As Amended.

of natural persons, can be culpable to the same extent as natural persons.[27] In the case of *Lekjo v EFCC,*[28] the Nigerian Court confirmed that all ventures set up for business purpose are within the contemplation of the Money Laundering Act.

The immediate difficulty that can be identified with this approach is that of ascribing a guilty mind to an artificial legal person, without converting it to a natural person. Jurisdictions that have adopted this approach have relied on the common law *alter ego doctrine* to attribute the acts of natural persons to the artificial legal person (company) based on whether they actually reflect the mind of the company.[29] This is to say the chief determinant in deciding if the acts in question can be ascribed to the legal person, is if such acts reflect the interest of the company. The obvious converse is that where the conduct does not reflect the interest of the company, the liability for money laundering offence shall be imposed on company officers in their personal capacity.

One of the important cases that laid direction in adjudication in this regard is the United Kingdom case of *Lennard's Carrying Company v Asiatic Petroleum Company Limited,*[30] *in casu*, the Court was clear that in determining corporate criminal liability it must look beyond the abstract qualities of the company and review the activities of its 'directing minds' who are influential enough to be referred to as its 'alter ego'. According to *Mohammed Suleh-Yusuf*, the decision of the Court in this case clearly lays the foundation for looking beyond the veil of incorporation to determine the acts of natural persons, taking into consideration the status and position of such persons.[31]

1.10 Proposed Chapter Framework

This dissertation shall be divided into five Chapters as follows.

CHAPTER ONE **Background**

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[27] Mohammed Suleh-Yusuf. "*Corporate Criminal Liability in Money Laundering and terrorism Financing Prosecution in Nigeria, United Kingdom and United States: A Comparative Review*", International Journal of Human and Social Science Invention; 6 (7) (July 2017): 15-16

[28] FHC/KD/CS/117/2009

[29] Suleh-Yusuf Mohammed "Criminal liability of corporate persons in Nigeria" available at https://www.lawjournals.org/assets/archives/2017/vol3issue4/3-4-19-710.pdf (accessed on 10 March 2025).

[30] (1915) Ac 705 at 75

[31] [31]Mohammed Suleh-Yusuf. "*Corporate Criminal Liability in Money Laundering and terrorism Financing Prosecution in Nigeria, United Kingdom and United States: A Comparative Review*", International Journal of Human and Social Science Invention; 6 (7) (July 2017): 17-18.

This chapter will cover the rule in *Salomon v Salomon*[32] as the landmark case of separate legal personality. The chapter will also highlight legal remedies to curb abuse of separate legal personality and how personal liability of company officers in money laundering offences is imposed. The chapter also circumscribes the scope of the study by outlining justification for the study, research methodology, statement of the problem, aim and objectives of the research, research questions on which the study is based. This part of the work will also present literature review, limitation of the study, and ethical considerations.

CHAPTER TWO **Money Laundering Offence**

This part will define Money laundering offence, its elements, how it is committed, prevalent trends and typologies, predicate offences, how proceeds of crime are laundered, and how companies and company officers can be liable for money laundering crime. The chapter will conclude with a presentation of an outline of efforts that are already in place to combat money laundering in Lesotho.

CHAPTER THREE **Lifting of the Corporate veil in money laundering offences**

The origin of the concept and the significance of lifting the veil of incorporation to remove the corporate personality cloak, obscuring the reach of company officers to bear personal liability for money laundering offences. Discussion of how piercing the veil of incorporation helps impose personal liability on company officers will be the gist of this part of the work.

CHAPTER FOUR **Personal liability of company officers**

This part of the work discusses circumstances where personal liability of company officers ensues and how different jurisdictions have interpreted the principle in money laundering cases to curb abuse of corporate personality.

CHAPTER FIVE **Conclusions and Recommendations**

This chapter covers the conclusions deduced from the analysis conducted, with emphasis on the main parts of the interrogated concepts, specifically personal liability of company officers in money laundering offences. The chapter will cover history and developments that can be recommended for jurisdictions that are still developing their jurisprudence around these concepts, like Lesotho.

[32] Salomon v Salomon 1897 AC 22 (HL)

1.11 Limitations of the Study

Limitations are understood to be the constraints the researcher encounters that impact the findings. This study is constrained by the limitation of decided cases of money laundering in Lesotho. The limitation of time resources was also a factor because the researcher was given time-demanding assignments by employers with pressing timelines from October to December 2024 and sent for work assignments out of the country in February 2025.

1.12 Ethical considerations

Ethics can be understood to be a pool of rules or standards-based considerations or governing prescripts of the conduct of research. Ethics are the rules or standards governing the conduct by which one lives and makes decisions.[33] Research ethics speak to the application of ethical principles or values to the numerous matters and fields of research.[34] The research did not involve human participants or interviews but only focused on published written work, Case Law, and Statutes. The researcher acknowledges all references to avoid plagiarism.

[33] All About Philosophy available at https://www.allaboutphilosophy.org/what-are-ethics-faq.htm (accessed date 09 March 2025)

[34] What Is Research Ethics available at http://eneri.eu/what-is-research-ethics// (accessed date 09 March 2025).

Chapter Two: The Crime of Money Laundering

2.1 Introduction

This chapter deals primarily with the concept of money laundering, the criminal aspect, and how liability for the commission of the offence attaches to companies and natural persons, respectively. The chapter dedicates attention to the circumstances under which the liability for the commission of the crime may attach to the company's officers in addition to attaching to the company itself. To make sense of conduct that attracts liability for money laundering, it is important to ascribe a definition to the concept. The Financial Crimes Academy defines money laundering as the process of transforming illegally obtained funds or dirty money into seemingly legitimate assets, making it difficult to trace the true source of the funds and use them to finance more illegal activities. It involves the evasion of taxes when successfully maneuvered through the three stages of laundering, namely, placement, layering, and integration. The crime of money laundering comprises three stages aimed at the concealment of the origin of ill-gotten wealth. The first of the three stages of laundering, namely, *placement,* is where the illicit funds enter the legitimate financial system, while the second stage, namely, layering, is where the funds are moved around to create confusion regarding their origin by distancing them from their criminal origin. Finally, there is the third stage, namely integration, which is where the money is reintroduced into the economy in a way that makes it appear to have come from legitimate sources.[35]

Some writers define money laundering as a process of making money generated by criminal activity appear to originate from legitimate sources because money from criminal activity is considered dirty, and launderers try to make it look clean. The concept of money laundering is an assumption that a criminal offence, otherwise known as a predicate offence, occurred in order to generate the criminal proceeds which are being laundered.[36] Money laundering may be categorized as *trade-based money laundering*, *Stand-alone or autonomous money laundering* and *third party money laundering*.[37] The Financial Action Task Force (FATF) defines *trade-based money laundering* as the process of disguising the proceeds of crime and

[35] Financial Credit Academy, "The Three Stages of Money Laundering and How Money Laundering Works" available at https://financialcrimeacademy.org/the-three-stages-of-money-laundering/ (accessed on 19 March 2025).
[36] Money Laundering" available at https://www.jerseyfsc.org/industry/guidance-and-policy/money-laundering/ (accessed on 19 March 2025).
[37] The Financial Action Task Force Methodology for Assessing Technical Compliance with the FATF Recommendations and The Effectiveness of AML/CFT/CPF Systems August 2024

moving value using cross-border transactions in an attempt to legitimise their illicit origins and is typically effected through the mis-invoicing of international trade transactions.[38] *Stand-alone or autonomous money laundering* is defined by the Jersey Financial Services Commission as the prosecution of money laundering offence independently when there is no evidence of the true source or origin or a specific predicate offence such as fraud, tax evasion, corruption or any predicate offence the commission of which yielded illicit money.[39] Thirdly, is *third-party money laundering* which refers to the process of using a third-party vendor like a supplier company to hide illicit funds.[40]

The concept of money laundering was domesticated and criminalised about two decades ago in Lesotho through the Money Laundering and Proceeds of Crime Act 2008 as amended. In terms of Section 25(1) of the Act, a person commits the offence of money laundering if the person,

(a) acquires, possesses or uses property; or
(b) converts or transfers property with the aim of concealing or disguising the illicit origin of that property or of aiding any person involved in the commission of an offence to evade the legal consequences thereof; or
(c) conceals or disguises the true nature, origin, location, disposition, movement or ownership of property,

knowing or having reason to believe that such property is derived directly or indirectly from acts or omissions-

(i) in Lesotho which constitute an offence against this Part, or another law of Lesotho punishable by imprisonment for not less than 24 months;
(ii) outside Lesotho which, had they occurred in Lesotho, would have constituted an offence under Lesotho law, punishable by imprisonment for not less than 24 months.

It is important to note the meaning of "person" for purposes of application of the Act of 2008 and this Section. The Interpretation Section of the Act defines "person" as a natural or legal

[38] "Countering Trade-based Money Laundering – World Bank" available at https://www.worldbank.org/en/olc/course/35619 (accessed on 19 March 2025).
[39] "Money Laundering" available at https://www.jerseyfsc.org/industry/guidance-and-policy/money-laundering/ (accessed on 19 March 2025).
[40] "Third-Party Money Laundering Risks Explained – iDenfy" available at https://www.idenfy.com/blog/third-party-money-laundering/ (accessed on 19 March 2025).

person. This means that, for application of this Act, "person" refers to both natural persons and juristic persons. Therefore, according to Lesotho money laundering law, it is certain that both legal and natural persons can be charged and convicted for the offence of money laundering as defined by the Act in Section 25. This position is consistent with the Nigerian legal stance espoused by the Nigerian Courts in *Yakubu Lekjo and Others v EFCC* ,[41] that all ventures set up for business are within the contemplation of Nigerian Money Laundering Act, therefore, Nigerian companies are within the provisions of the Act.

It is important to highlight the implication of the use of "or" in relation to the elements in Section 25. The use of "or" in articulating the elements of the crime under the Section means that the requirement is not that all elements must be proven to prove that the offence was committed to completion. Rather, the implied meaning is that it is enough to prove any one of the requirements to prove the offence of money laundering under the Act. Therefore, either one of the requirements constitutes sufficient proof for the offence of money laundering under the Section.

2.2 History of the Crime of Money Laundering

Money laundering is a new criminal concept relative to other crimes, such as theft, fraud, and robbery, that have common law origins, rather than money laundering, which is purely a creature of statute. Scholars who have written about money laundering argue that in the late 1980s, there was not one country in the world that had any policy against money laundering; as such, money laundering was not a crime anywhere in the world then. These scholars state that situation has developed quite immensely today with the whole world's intentional and concerted efforts to control money laundering, especially in developing countries that largely have weak control measures.[42] In Lesotho, money laundering was statutorily entrenched as recently as 2008 by the Money Laundering and Proceeds of Crime Act of 2008.

The advancement to criminalise money laundering is at the behest of international interest, chiefly because money laundering transactions cut across borders and require international cooperation to investigate and counter successfully. The hindmost view of the evolution of the

[41] FHC/KD/CS/117/2009

[42] J.C Sherman, "*Power, Discourse and Policy Diffusion: Anti-Money Laundering in Developing States*," International Studies Quarterly 52 (September 2008), 635-656.

crime of money laundering can be traced to the vision of the Financial Action Taskforce (FATF) by the group of seven (G7) countries to counter the scourge of money laundering across the globe. The concerted effort of the G7 to advance the fight against money laundering crime worldwide has led to growing international cooperation on money laundering-related matters. The G7 countries, namely, Canada, France, Germany, Italy, Japan, United Kingdom, and United States of America, pursued the mission to combat money laundering under the auspices of the Organization of Economic Cooperation and Development (OECD) as recent as 1989 and coordinated concerted international efforts to strengthen the fight against money laundering across the globe.

In addition to FATF contribution through protocols documented in instruments styled FATF Recommendations and FATF Methodology aimed at crafting a conventional roadmap for countries to combat the scourge of money laundering, there are regional anti-money laundering groups that monitor the compliance of member countries through these established protocols. Lesotho, by virtue of its geographical location in the Southern part of Africa, is a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLAG). This group encapsulates Southern African Development Community (SADC) member countries, in which the region's criminalisation of money laundering started in the early 2000s. For instance, in Malawi, the Malawian money laundering legislation was enacted in the mid-2000s in the Act that came to be known as the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act 2006. In the Republic of South Africa, the efforts to combat money laundering were established through the Financial Intelligence Centre Act of 2001, which empowered the Centre to assist in combating money laundering activities and the financing of terrorists and related activities.[43]

In West Africa, money laundering criminalisation came much later than in the Southern part of Africa. The levels of awareness of the crime of money laundering in developing West African countries remained low before 2012, as highlighted by the Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA) report of May 2012. The report noted minimal awareness of international Anti-Money laundering protocols, even among the elite

[43] Section 3 (1) (b) Financial Intelligence Centre Act, 2001

functionaries of agencies and bodies for the prevention and control of money laundering in the region.[44]

2.3 Criminal Liability for Money Laundering Offence

The Oxford Dictionary defines criminal liability as the responsibility for any illegal behaviour that causes harm or damage to someone or something.[45] For criminal liability to attach to the conduct of a person, the conduct committed must first be criminalised itself, in addition to which the conduct must constitute the trite requirements of *mens rea* and *actus reus*. What does it mean to say a certain conduct is criminal, or simply put, what is a crime? According to Jonathan Burchell, a crime is what criminal law defines as a crime.[46] This means that money laundering is a crime in Lesotho because the law, in terms of the Act of 2008, defines money laundering as a crime. Therefore, in Lesotho, a person commits the crime of money laundering once their conduct breaches the provisions of Section 25 of the Act, which defines money laundering crime.

According to the recent 2023 National Risk Assessment conducted in Lesotho by ESAAMLAG team of Anti-Money Laundering experts, the most prevalent trends of predicate offences of money laundering in Lesotho are corruption and fraud. In cases where the predicate offence is corruption, it has been determined that public officers largely collude with private companies to manipulate the tender process and award tenders for kickbacks, while in fraud cases, companies are used as if they are vendors while in reality, they have supplied neither goods nor services to the government but government funds have been disbursed to such companies because they are used as vehicles for laundering.

The question that needs to be answered is, upon whom does liability for the commission of such conduct rest? The answer to this question is that liability for money laundering attaches to any person, either natural or legal, who commits the offence as articulated in Section 25 of the Act. Since criminal liability for money laundering attaches to both legal and natural persons, it is important to highlight that, although companies are separate legal persons from their

[44] GIABA Typologies Report on Tax Crimes and Money Laundering in West Africa 2012
[45] "Cambridge Business English Dictionary" Cambridge University Press available at https://dictionary.cambridge.org/dictionary/english (accessed on 20 March 2025)
[46] Burchell J. *Principles of Criminal Law (1997)* 2nd ed. Juta & Co, Ltd Kenwyn

individual incorporators and are legally endowed to sue and be sued in their own name,[47] and may thus bear liability for money laundering, there are circumstances where company officers may be criminally liable in their personal capacity in addition to criminal liability of the company. The following is an outline of the respective circumstances under which either the company (legal person) or company officers (natural persons) may bear liability for money laundering.

2.3.1 Liability of Companies for Money Laundering Offences

Liability of companies is deducible from a common law position that places legal personality upon companies as espoused in the case of *Salomon v Salomon*[48] and statutory provisions of Section 9 of the Lesotho Companies Act 2011. A similar effect in the South African Companies Act 2008 is articulated in Section 19. The common law corporate personality is consistent with the contemplation of Section 25 (1) and (2) of the Money Laundering and Proceeds of Crime Act 2008, which upholds the legal personality of companies. The Section leaves no doubt that companies are subject to the Act as it alludes to the commission of the offence by 'a person' in Section 25(1) and ramifications of contravention by 'a person' in Section 25 (2). This means that where the company's conduct constitutes the offence of money laundering as contemplated in Section 25 of the Act of 2008, criminal liability for the offence can be imposed on the company as a legal person. The Act is even clearer under Section 25 (2) as it alludes to a fine for bodies corporate upon contravention of the Section. The position of the Act in this respect is a demonstration of valuable development to ensure that companies that used to obfuscate the proceeds of crime, as is usually the *modus operandi* of money launderers, do not escape criminal liability.

It is trite law that is even statutorily incorporated in the Lesotho Companies Act 2011, that companies, once duly incorporated, are legal persons with distinct personalities enabling them to sue and be sued in their own names,[49] separate from their incorporators, consequent to which incorporators or shareholders may in fitting circumstances be absolved from liability in disputes involving the company. The tone of this assertion was authoritatively laid down in the landmark case of *Salomon v Salomon,*[50] where the House of Lords held that 'a shareholder is

[47] See s 9 Companies Act 2011
[48] Salomon v Salomon 1897 AC 22 (HL)
[49] Section 9 Companies Act 2011
[50] Salomon v Salomon 1897 AC 22 (HL)

not responsible for the debts of a company and that Salomon was not liable to the creditors as the alter-ego of the company.' In consolidating his stance and the legal principle of separate legal personality, Lord Macnaghten had the following to say:

> "the company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them."[51]

The decision *in casu* laid down a landmark principle in this part of the law with the effect of setting the tone for many jurisdictions, including South Africa, where the Courts in *Shipping Corporation of India Ltd. v Evdomon Corporation and Another*[52] adopted the *Salomon ratio decidendi* and stated that it is of cardinal importance to keep distinct the property rights of a company from those of its shareholders, even where the latter is a single entity, thereby further entrenching the position that companies are distinct legal persona in the eyes of the law and can therefore stand trial in their own name.

The Courts in Lesotho have not tested Section 25; hence, there is no case law regarding the approach of our Courts in the application of the Section. However, the commonality of the Nigerian and Lesotho money laundering Acts with respect to subjecting all companies in these jurisdictions leaves no doubt that Lesotho Courts would most likely adopt a similar jurisprudential approach as Nigerian Courts. The Nigerian Courts have had occasion to interpret a similar question in the case of *Yakubu Lekjo and Others v EFCC,*[53] and held that all ventures set up for business are within the contemplation of the Nigerian anti-money laundering legislation.

The provisions of Section 25 of the Money Laundering and Proceeds of Crime Act 2008, as amended, are clear enough to leave no doubt that in Lesotho, companies are subject to stand trial and be liable on conviction for acts that equate to money laundering as defined under the Act. On the contrary, it is also important to note that the fact that companies are within the contemplation of the Act does not exclude the liability of company officers for similar offences. Rather, the correct purport of the Act is that, since the Act makes reference to 'a person', and

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[51] Salomon v Salomon 1897 AC 22 (HL) note 23 at 51.
[52] *1994 (1) SA 550 (A) at 566 C-F*
[53] FHC/KD/CS/117/2009

it is trite law that person includes both natural and juristic persons, the context should be understood to mean that both the company (juristic person) and its officers (natural persons) are subject to the Act under the Section that criminalises money laundering. The issue now becomes what circumstances warrant company officers' criminal liability under the Act.

2.3.2 Liability of Company Officers for Money Laundering Offences

The criminal liability of company officers is generally premised first, on the ground that they are legal subjects and can sue and be sued, and second, that when they act on behalf of the company, they are bound by fiduciary duty and only when they breach the duty are they liable in their personal capacity.[54] Although company officers are generally shielded from liability by the veil of incorporation that creates a distinct legal personality of the company in the eyes of the law, the law also provides for lifting the veil of incorporation to identify the individuals who are cloaked by the veil of incorporation where there is an abuse of the veil of incorporation to commit illegality. The illegality contemplated here covers crimes and breaches of fiduciary duty. Some of such illegalities are provided under the Companies Act 2011.[55]

It is important to note the circumstances under which the Companies Act specifically imposes personal liability on company officers. In addition to the criminal liability of companies contemplated by the Money Laundering and Proceeds of Crime Act 2008, all companies, by virtue of being incorporated under the Companies Act of 2011, are creatures and subjects of the Act. Company officers are subject to the Act where their conduct is within the ambit of the company's operations, hence bound by the fiduciary duty to serve the company's interests. The provision on offences and penalties envisaged under Part XX of the Companies Act[56] binds company officers consequent to their actions during their service to the company as employees or agents of the company.

The Act under Part XX creates the offence of "false statement" where a person who, with respect to a document required by or for the purpose of the Act, makes or authorises statement that is false or misleading, knowing it to be false, or omits or authorises omission of any matter knowing that the omission makes the document misleading in a material way.[57] Under Section

[54] See section 63 Companies Act 2011.
[55] Section 175, 176 and 177, Companies Act 2011
[56] Part XX, Companies Act 2011
[57] Section 175 (1) (a) and (b), Part XX, Companies Act 2011

175 (2), a director, officer or employee of a company who makes, authorises or permits the making of a statement or report that relates to the affairs of the company that is false or misleading in a material way in relation to, a director, employee, auditor, shareholder, debenture holder, or trustee, a liquidator, judicial manager, or manager of property of the company, knowing it to be false or misleading commits an offence.[58] The Act not only creates these offences, but is also much akin to the Money Laundering and Proceeds of Crime Act, which provides sentencing guidelines for liability of a fine and imprisonment on conviction. The clarity and certainty that the Act gives here is that company officers are liable for the offences created by the Act. The argument that is deduced from this is that the specific offences that the Companies' Act creates can yield proceeds of crime, thus rendering them predicate offences to money laundering. Consequently, since the offences relate directly to natural persons, it becomes clear that, in terms of the Companies Act, natural persons can be personally liable for offences that can be viewed as predicate offences to money laundering. The inference drawn is, therefore, that company officers are liable for criminality, including money laundering, because they are liable for predicate offences under Part XX offences of the Companies Act.

The predicate offences that Part XX of the Companies Act creates are the offence of false statements, the offence of fraudulent destruction of property, and the offence of falsification of records under Sections 176 and 177, respectively. The former provides that a director, employee, or shareholder of a company, who fraudulently takes or applies the property of the company for his or her own use or benefit, or fraudulently conceals or destroys property of the company, commits an offence. The latter creates the offence of falsification of records where a director, employee or shareholder of a company with intent to defraud or deceive another person, destroys, mutilates, alters, or falsifies any register, accounting records, or other documents relating to the company, or is party to the said, or makes or is party to making of false entry in register, accounting records, book, paper, or other document belonging to the company commits an offence. And where any electronic device is used, any person who records any false or misleading matter in a material manner or with intent to falsify or render records or registers misleading, or fails to record or omits any matter, commits an offence.[59]

[58] Section 175 (2) (a), (b)and (c) Part XX, Companies Act 2011
[59] Section 176 (1)(a), (b) and 177 (1)(a), (b) and 177 (2) (a), (b) Companies Act 2011

The connection between Companies Act, Part XX offences with money laundering can be summarised in that all offences, the commission of which illicitly benefit perpetrators financially, are predicate offences to money laundering. This means that where company officers commit offences envisaged under Part XX of the Act, where such offences yield illicit financial gain to them, such conduct already commences the offence of money laundering, and they are thus personally liable.

2.4 Conclusion

The landmark case of *Salomon* upheld the separate personality principle of the company. The Companies Act 2011 adopts this common law approach in Section 9. Inasmuch as the position is clearly articulated in both common law, which continues to be part of our law, and in the Act of 2011, it is important to state that the corporate personality principle is not absolute. The principle is limited lest it be abused by dishonest company officers. The law provides the principle of the veil of incorporation to cloak company officers and protects them from liability where they acted in good faith and for the benefit of the company. To ensure that the protection is not abused to commit criminalities such as money laundering while hiding behind the cloak of incorporation, the law provides for piercing the veil of incorporation, which enables identification of the human elements that caused or assisted the company to commit the crime. These individuals can equally face the wrath of the law according to the Money Laundering and Proceeds of Crime Act 2008, as amended which criminalises the conduct of all persons that contravenes the provisions of Section 25 of the Act and Part XX of the Companies Act

Both the Companies Act 2011, and the Money Laundering and Proceeds of Crime Act 2008 are cognizant of the connotation ascribed to the word "person", which means both legal and natural persons. This means that neither is exempt from liability for offences created under the respective Acts. Having defined the crime of money laundering and how it applies to legal persons and natural persons and alluding briefly to the concept of piercing the corporate veil, the next chapter dedicates attention to the application of the principle of piercing the corporate veil and the rationale behind it, together with circumstances that warrant its invocation.

Chapter Three: Piercing Corporate Veil

3.1 Introduction

The concept of piercing the corporate veil can best be understood if the concept of corporate personality to which it relates is first appreciated, together with its intended legal conveniences. According to the concept of corporate veil, a company is distinct from its members and is recognized as a separate entity, whose actions are separate from the actions of the shareholders.[60] This means that the concept of separate personality is a corollary of the corporate veil. The corporate veil, therefore, defines the legal person that is attributed to the artificial personality in the company to give it a distinct personality before the law, separate from its incorporators. Corporate veil consequently means that upon incorporation of a company, an imaginary or artificial veil is placed by the law between the company and its owners and controllers, which separates the company's identity from those of the owners and controllers, the real essence of which is to insulate owners from the liability for company debts.[61]

A legal person is a body of persons, or an entity considered as having rights and responsibilities akin to those of a natural person, particularly the right to sue and be sued.[62] Legal and corporate personality shall be used interchangeably to refer to a company with adequate characteristics ascribed to it by law. Legal personality is originally a common law concept and is upheld by the Lesotho Companies Act 2011.[63] This study is conducted on the understanding that the common law concept of legal personality is enjoyed by a collective of persons with a common mission and vision to use an artificial creature of statute to conduct some *bona fide* business to which they have collectively committed and to be styled a company and subject to the Companies Act. The Act adopted the concept to the extent that a company is, upon incorporation, a person in its own right, separate from its shareholders, and shall continue in existence until it is removed from the register of companies in terms of the Companies Act.[64] The concept of legal personality consequent to the Act imputes upon a company a similar status of being as subject to law as natural persons, with the only difference being that one is artificial

[60] "Corporate Veil Theory: Explanation, Cases, and Frequently Asked Questions" available at https://www.vedantu.com/commerce/corporate-veil-theory (accessed on 04 March 2025.
[61] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition,* https://doi.org/10.22495/cbv11i3art11https://doi.org/10.22495/cbv11i3art11 (accessed on 04 April 2025)
[62] Merriam-Webster's Dictionary of Law (2011) Merriam-Webster Incorporated 283
[63] Section 9 Companies Act 2011
[64] Section 9 Companies Act 2011

while the other is natural. According to Cilliers, legal personality is a mental construction but not a fiction. It is a juristic creation legally created with the capacity to sustain rights and duties, which are also legal creations themselves, and it does not follow that it is not something real; rather, it follows that it is artificial.[65] A company, as a juristic person with an independent and distinct personality, is therefore an artificial legal creature for legal convenience.

The concept of separate legal personality is not absolute and may be disregarded where the veil that cloaks the company apart from its incorporators may be pierced if circumstances so dictate. The circumstances that warrant disregard or piercing of the corporate veil form the crux of this research and shall be highlighted. The status of legal personality is imputed upon a company immediately upon incorporation and commencement of a distinct personality from its incorporators, which effectively means those running the affairs of the company do not incur personal liability in the course of doing so.[66]

The concept of legal personality is not immune to abuse, and the law provides circumstances under which the Courts are enabled to protect the company from its officers, directors, employees, or even shareholders from circumventing the principle, effectively abusing the concept by improper conduct. It is indisputable that the Courts have demonstrated readiness to disregard separate personality and impose personal liability upon company officers where their conduct is proven to be improper.[67] The Courts are enabled to achieve this through the exercise of judicial discretion or as empowered by statute. The powers of the Courts to lift the corporate veil were envisaged in the case of *Littlewoods Mail Order Stores Ltd. V Inland Revenue Commissioner,*[68] where the Court stated that Courts can and often do pull the mask to see what really lies behind. This research endeavours to highlight the circumstances under which the veil that cloaks legal personality may be pierced to see what lies behind the cloak of incorporation to place liability where it must lie.

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[65] Cilliers A "*critical enquiry into the origin, development and meaning of the concept "Limited Liability" in Company Law*. Regshistoriese en regsvrgelykende Studies LLD Thesis 1963

[66] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 04 April 2025)

[67] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 04 April 2025)

[68] (1969) 1 WLR 1241 at 1254, (1969) 3 All ER 855 at 861

3.2 Origin of the Concept of Corporate Veil

The corporate veil is a legal concept that defines the corporate cloak designed by law to separate the actions of the company from those of its shareholders and officers in general. It fundamentally defines the independent and distinct legal personality of the company. The foundation of company law rests on the fact that a company has a legal personality[69] cloaked by the corporate veil to distinguish it from its incorporators and officers. It cannot, however, be overemphasised that even though a company is merely a legal concept that has no physical existence and is merely artificial, it possesses its own legal personality that it acquired upon incorporation and has its own rights and obligations that are distinct from those of its directors and shareholders.[70] It is therefore deduced from this that the concept of legal personality being a creature of law is subject to relevant statutes such as the Companies Act 2011 and the Money Laundering and Proceeds of Crime Act. The essence is to encourage entrepreneurship and advance commerce; hence, the Courts demonstrably, through case law, showed more inclination towards upholding the legal personality of the company than disregarding it.

Emphasis is hereby made to the point that the primary purpose of the doctrine of separate legal personality is to encourage entrepreneurship, by shifting the risks of business failure away from entrepreneurs to creditors and other risk bearers,[71] such that company officers may have the appetite to take *bona fide* commercial risks without fear of possible consequential personal liability. The limitation of liability created by the veil of incorporation must, however, never be abused, for such abuse attracts the Courts' intervention to apply their discretion under relevant circumstances and pierce the veil of incorporation. This limitation of liability to the company equates to preventing individuals from being liable for the company's financial losses and debts in their personal capacity. The limitation of liability effectively insulates the property of the members from that of the company and puts them beyond the reach of the creditors in times of insolvency.[72] According to the limited liability principle, in the event of business failure, liability is assumed by the company rather than its constituent members or

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[69] Cassim R "*Piercing the veil under Section 20 (9) of the Companies Act 71 of 2008: A New Direction*' (2014) 26 SA Merc 307

[70] Cassim R "*Contemporary Company Law*" 2ed (2012) at 31

[71] M Salim "*Corporate insolvency: separate legal personality and directors 'duties to creditors*." UITM Law Review 2 (2004) at 90

[72] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 04 April 2025)

shareholders.[73] This principle is vulnerable to abuse by unscrupulous shareholders with financial greed and deficient business ethics.

The resolute protection of the separate personality principle, demonstrable in a wide plethora of case law, renders the principle vulnerable to abuse. For instance, the decision in Macuara v Northern *Assurance Co Ltd.*[74] that shareholders do not have any right to the property of the company, for they have no legal or equitable interest therein, demonstrates the Court's determination to uphold the principle of distinct and separate legal personality of the company. It is argued that realizing Courts' determination in this regard, some dishonest company officers resort to being opportunistic and use companies as vehicles for proceeds of crime with the plan that should matters go wrong, only the company will bear liability for the crime of using the company as a vehicle for criminal proceeds. It is important to demonstrate the misconstruction of the principle that such opportunistic individuals labour under to think that they would be unreachable as long as their misdeeds are executed under the guise of a company. The demonstration involves piercing of the corporate veil that is exercised by Courts to uncover, among others, company officers' malfeasance using a company as a front.

The decision in *y v Harbottle*[75] that a company is a separate juristic person with *locus standi* laid down a landmark rule in corporate law that, because a company has *locus standi in judicio,* in any action in which a wrong or even crime is alleged to have been committed against a company, the proper claimant is the company itself because of its capacity to sue and be sued. The *Foss v Habottle rule* has come to be known as the proper plaintiff rule. Towards the end of the nineteenth century *Foss v Habottle rule* was reinforced in the case of *Salomon v Salomon*[76] where the Court held that the Company is a separate legal person which marked the inception of jurisprudential assertion of separate legal existence of the company. This remains the basis of our law to date even though there are some developments occasioned at the instance of statutory incorporation of legal personality in the Lesotho Companies Act 2011. It is important to mention that the South African jurisprudence in this relation has had its share of persuasion to Lesotho jurisprudence even though Lesotho still lacks a provision regarding

[73] (LLC) Square Glossary "what is a Limited Liability Company" available at https://squareup.com/gb/en/glossary/limited-liability-company accessed on 1 April 2025
[74] (1925) AC619 at 626-627.
[75] (1843) 2 Hare 461, 67 ER 189
[76] Salomon v Salomon and Co. Ltd. (1897) AC 22 (HL)

piercing of the veil of incorporation that the South African counterpart has legislated in the Companies Act 2008. Lesotho law remains heavily dependent on common law in this respect.

The *Salomon v Salomon rule* indicates that company officers, by way of directors or shareholders, would not automatically benefit in their personal capacity, nor would they be personally liable for obligations of the company because the company is distinct from its incorporators and officers. This rule was laid down in the famous dictum of Lord Macnaghten that,

> "the company is at law a different person altogether from the subscribers to the memorandum, and though it may be that after incorporation the business is precisely the same as it was before, and the same persons and managers and the same hands receive profits, the company is not in law the agent of the subscriber…"[77]

The common law concept of separate legal personality is subsumed in the Lesotho Companies Act 2011 under Section 9. The effect of this inclusion means that, in addition to the common law circumscription of the concept, the Lesotho Act reinforces the parameters of the legal personality concept under Lesotho company law.

The origin of the concept of piercing the corporate veil was conceived as an exception to the separate personality principle espoused first in *Foss v Habottle rule*, and later in *Salomon v Salomon rule*, as the common law foundation of the concept and much recently in the Lesotho Companies Act 2011 incorporated the concept to complete the Lesotho legal position in this relation. The effect of the principle is to disregard the distinctness of a company under exceptional circumstances that adequately warrant it. A wide plethora of South African precedence that has a persuasive effect in our jurisprudence makes it abundantly clear that Courts do not have a general discretion to simply disregard a company's separate legal personality upon a whim-based discretion. Rather, the correct implication of the Courts' powers is that there should, at the very least, be unusual grounds that create a reasonably pressing need in the interest of justice.[78]

The doctrine of piercing the corporate veil has covered considerable mileage to the assertion that the Courts' powers are circumscribed to the extent that they are empowered in certain

[77] Salomon v Salomon and Co. Ltd. (1897) AC 22 (HL)
[78] Botha v Van Niekerk 1983 (3) SA 513 (W)

circumstances to disregard the principle of the separate legal existence of a company to attain a more acceptable judicial result.[79] The question of deciphering when and when not to pierce the corporate veil remains a complex one, especially in Lesotho, where judicial precedence in this relation is much deficient.

3.3 The rationale behind the concept of piercing the corporate veil

The corporate veil concept deduced from common law into statutory provision in the Lesotho Companies Act 2011 includes the acquisition of independent legal personality status by a company upon incorporation and the consequent accrual of rights and duties separate from incorporators. The effect of the concept is that the Courts may disregard the separate personality of a company and place liability elsewhere than on the company for conduct that may seem like that of the company but, on scrutiny, proves not to be in the interest of the company. Such circumstances may include conduct that constitutes fraud or any financial crimes against the company, including money laundering. The Courts have generally denounced the improper use of the company to advance fraud.[80] The attitude of the Courts in this relation is evident in the case of *Lazarus Estates Ltd. v Beasly*,[81] where it was held that no Court will allow a person to keep an advantage he obtained by fraud, nor would any order of a Minister be allowed to stand if it has been obtained by fraud. The rationale for piercing the corporate veil is, therefore, among others, to root out corporate financial crime, thus preventing potential use of separate personality to advance criminal enterprise.

Where the circumstances so warrant that the separate personality of the company be disregarded because the conduct in question does not reflect the interest of the company, the Courts are empowered to pierce the corporate veil. To pierce the corporate veil is much akin to removing the cloak of incorporation that places upon the company a veil that distinguishes the company from its incorporators. This is done in the spirit of commercial exigencies. The net effect of disregarding the separate personality of a company means that personal liability attaches to company officers who misuse the company's legal personality.[82] According to

[79] Larkin MP 'Regrading Judicial disregarding of the Company's separate identity; South African Mercantile Law Journal 1989 pg.277

[80] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 04 April 2025)

[81] (1956) 26 OR 3d 481 (CA)

[82] Deputy Sherriff Harare v Trinpac Investment (Private) Ltd. & Another (2012) JOL 28241 (ZH)

Nwafor, the Courts rely on prescripts established at common law to contend preservation of the distinct legal personality of the company in circumstances where duties requiring officers of the company to act in good faith and in the best interest of the company are breached. In addition to these, the Courts are triggered where officers acted in conflict of interest, made secret profits, and failed to exercise due care and skill in the execution of company affairs.[83]

These circumstances provide a premise for disregard of the corporate veil; thus, where detected, they constitute adequate artillery for the Courts to pierce the veil of incorporation to counter the abuse of the concept by unscrupulous company officers. Since establishment of the fact that separate personality principle is vulnerable to abuse by company officers acting as though the dichotomy between company officers and company does not exist, or exists to shield unscrupulous endeavour of taking advantage of the concept to benefit individuals at the expense of the company, the principle is circumscribed by empowering the Courts to disregard it in fitting circumstances. If not so circumscribed by the invocation of the remedy of piercing the corporate veil, the separate personality principle would be abused to advance financial crime and ultimately money laundering.

In determining whether to maintain the separate personality principle so as to hold a company liable for conduct in question, or disregard separate personality to impose liability upon company officers, the Courts are bound to balance two conflicting interests, namely, protecting separate personality and the public interest of exposing improper conduct, such as any predicate offence to money laundering. In the quest to counter the use of the company as a vehicle for money laundering. A guiding attitude of the South African Courts in interpreting how a balance must be struck is found in the case of *Cape Pacific v Lubner Controlling Investments (Pty) Ltd. And Others*,[84] *in casu*, the Court held that Courts should refrain from lightly disregarding company's separate personality and strive to uphold it, for to do otherwise would undermine the policy and principles that underpin the concept and the legal conveniences it was devised to uphold. However, even though the Courts have so much inclined towards upholding separate personality, where malfeasance such as fraud, dishonesty, or any improper conduct is detected,

[83] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 04 April 2025)

[84] Cape Pacific v Lubner Controlling Investments (Pty) Ltd. And Others 1995 (4) SA 790 (A)

the need to preserve separate personality, balanced against policy considerations of piercing the corporate veil, is outweighed.

According to the established application of piercing the corporate veil, Courts should, where there has been misuse of separate personality, disregard the concept and give way to the placement of liability where it must lie. The contention is that liability lies where, were it a benefit, it would lie. The closing remark tendered in this regard is thus that the remedy of piercing the corporate veil is a control measure mitigating and guarding against abuse of separate personality. It is, therefore, safe to conclude that piercing the corporate veil is an exception to the separate personality principle. It is emphasized in conclusion that the courts are empowered to lift the veil, but only where to do otherwise would compromise the interests of justice, for the veil is pierced to address the specific impropriety which is the subject of judicial inquiry.[85]

3.4 Piercing the Corporate veil as a remedial action for abuse of separate personality

The separation between company officers and the company is represented by the veil of incorporation, as already outlined. It is indisputable that the Courts have placed importance that rests at the heart of Company Law in the concept of separate legal personality enunciated in the case of *Salomon v Salomon*.[86] This ultimately constituted the fundamental principle that was established *in casu* to illustrate the separate, independent, and distinct artificial personality that is imputed on the company to distinguish it from its owners. The advent of separate personality, as espoused from common law and adopted by the Companies Act 2011, provides the convenience of a vehicle to conduct business, a vehicle that is sometimes abused to effect commercial malfeasance and corporate crimes, predicated on money laundering. The abuse of the doctrine is usually by those who hold the control apparatus of the company, aiming to escape accountability and liability for actions they committed under the cloak of the company. The manifestation of increasing corporate criminality and mounting attempts of company officers to escape accountability for criminal actions of the company has necessitated the development of jurisprudence that led to the conception of the doctrine of piercing the corporate veil.

[85] Dadourian Group International Ltd v Simms (2006) EWHC 2973 para 682, Warren J observed that "if the veil is to be lifted, it is to be lifted for the purposes of the relevant transaction"
[86] 1897 AC 22 HC

Although limited liability is the crux of the concept of separate personality, and limited liability is a vital principle of corporate law, it must be emphasized that corporate liability has never been completely limited, hence the conception of remedial piercing of the corporate veil. According to this doctrine, the Courts occasionally exercise the power to pierce the corporate veil to save the concept of separate personality from abuse by unscrupulous company officers. In *Ex Parte Gore*,[87] Binns-Ward J describes piercing the corporate veil as the process to disregard the distinctness ascribed to the company according to the company's separate legal personality and allocating obligations or liabilities away from the company towards an individual or group of individuals.

The remedy to pierce the corporate veil is a common law judicial philosophy that the separate personality of juristic persons should be disregarded only under exceptional circumstances.[88] This means that for the Courts to exercise discretion, the Court must first be convinced that the circumstances in question are exceptional. To allow the disintegration of the corporate veil for anything less than exceptional circumstances would erode the separate corporate personality, the very tenet of the concept of corporate veil. The interpretation of exceptional circumstances is a subjective one that may further create inconsistency and uncertainty, let alone potential floodgates for abuse. The South African case law has developed enough to delineate what it refers to as conduct that constitutes 'unconscionable abuse' of the juristic personality of the company as a separate personality.[89] The South African Companies Act 2008 provides for the requirement of 'unconscionable abuse' to pierce the corporate veil. The Act, however, fails to define what constitutes 'unconscionable abuse,' and thus does not deliver much assistance, since the concept of 'unconscionable abuse' remains to be interpreted. According to Nwafor, the failure to assign a definite meaning to the concept of 'unconscionable abuse' could be construed as acceptance of absence of generally acceptable conditions for disregarding corporate personality of the company even though the Act provides that the only acceptable condition for piercing the veil to hold directors liable for corporate transactions is on the ground of 'unconscionable abuse' of the corporate entity.[90]

[87] NO and Others NNO (2013) 2 All SA 437 (WCC) at para 29.
[88] NO and Others NNO (2013) 2 All SA 437 (WCC) at para 27
[89] Section 20(9) Companies Act 71 of 2008
[90] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 04 April 2025)

In Lesotho, the law remains reliant on the Common Law concept of exceptional circumstances. South African precedents augment Lesotho jurisprudence, in this regard, only to a persuasive and non-binding extent, though. That South African Courts' precedence is not binding but only persuasive does not mean no lessons can be learned from the advanced South African jurisprudence. This is more so especially because the South African Companies Act has advanced so far as to statutorily incorporate the concept of piercing the veil of incorporation to afford the Courts a general discretion to pierce the veil where the conduct of the company constitutes an 'unconscionable abuse' of the juristic personality of the company as a separate entity.[91] The dismay associated with this development is that the absence of a definite description of what constitutes the ground of 'unconscionable abuse' renders it neither here nor there because the Courts still have to exercise their own discretion to ascribe a context to 'unconscionable abuse.'

It is important to allow Courts reasonably adequate parameters to decide when to pierce the corporate veil, depending on the circumstances of each case, and not to confine them to a fixed or rigid principle that lacks definite meaning. To interfere with the discretion of the Courts and fail to sufficiently define the parameters of the interference constitutes an unfair meddling in the jurisdiction of the Courts. The legislature must issue proper guidelines developed to attain some level of certainty and predictability of when the corporate veil should be pierced.

It is conceded that the approach of statutorily stipulating pre-requisite conditions for veil piercing balances the sanctity of the corporate structure and the circumstances that justify the need to disregard the corporate veil where it no longer serves the convenience it was designed to support, but it is contended that unclear terms prescribe for application by the judiciary do not help much in attaining certainty of grounds for piercing the veil. The quagmire that the research untangles is the conflicting purpose of preserving the concept of separate legal personality of the company and policy considerations that warrant piercing the corporate veil by disregarding separate personality.

3.5 Conclusion

This study attempts to balance the vulnerabilities of the separate personality concept to potential abuse and the crucial commercial convenience that piercing the corporate veil is

[91] Section 20(9) Companies Act 71 of 2008

intended to protect, where failure to so pierce prevents equitable results. For instance, it would defeat the rationale behind the genesis of the principle for it to be abused to advance illegality, such as money laundering. As such, the remedial result of dismantling a separate personality where there is proof that upholding it prevents an equitable result of combating money laundering must be allowed. This is achieved by empowering the Courts to pierce the corporate veil in exceptional circumstances to identify company officers and hold them accountable where it is equitable to do so.

Chapter Four: Personal Liability of Company Officers

4.1 Introduction

The concept of company officers is quite general and warrants a clear articulation of the intended meaning for which it is used, which leads to the question, "Who are company officers?" Since companies are formed as separate legal entities from their owners[92] to allow them to enter into contracts, raise capital, assume liability for debts and lawsuits, the law requires them to constitute a group of company officers with respective responsibilities to ensure accountability within the company's administration echelons and enforcement of legitimate business conduct on behalf of the company. At the highest level of their governance structure, companies are required to have a board of directors, which is constituted by a quorum of directors acting together as a board of directors, and if a company has one director, its board constitutes that director.[93]

4.2 Who Are Company Officers?

Company officers are the board of directors executive appointees styled "officers of the company", who may comprise chief executive officer, treasurer, auditor and other officers the board may deem necessary to exercise day to day management functions of the company in accordance with the articles of incorporation and to be held to the same fiduciary responsibilities as the board of directors.[94] As regards a director, the Lesotho Companies Act 2011 defines a director as one named as such in the application for incorporation of the company or an individual entitled to control the exercise of powers that, apart from the articles of incorporation, would be exercised by the board or one to whom a power of the board is delegated.[95] It is important to note at this point that every director is a company officer; however, not all company officers are directors; some company officers may be appointed from outside the company directors.

Even though company officers are, in general, legally protected for the legitimate execution of their duties on behalf of the company, they may lose legal protection and bear personal liability

[92] Section 9 Lesotho Companies Act 2011
[93] Interpretation Section Lesotho Companies' Act 2011
[94] Section 60 (1), (2) and (3) Lesotho Companies Act 2011
[95] Section 58 (1) and 56 (1) (a) and (b) Lesotho Companies Act 2011

where the legal protection is abused to commit fraudulent conduct or actions in conflict with the interests of the company.[96] The list of circumstances under which company officers may lose legal protection is inexhaustible, although it can be aggregated as exceptional circumstances that constitute abuse or misuse of the protection. Imposition of personal liability, whether premised on common law or statute, is a consequence of the courts' discretion to lift the corporate veil that normally exists to shield company officers from personal liability for the legitimate execution of the company's operations. Attempts akin to the South African Companies Act 2008 to define such circumstances as 'unconscionable abuse'[97] have not yielded much result besides the fact that the Courts retain their jurisdiction to decline the protection through piercing of the incorporation veil. This Court's discretion is applied as a remedy aimed at identifying the individuals responsible for the abuse of the legal protection and conduct in question, as held in *Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners,*[98] that Courts can and often do draw aside the veil, they pull off the mask to see what really lies behind.

Company officers, by virtue of their appointment by the board of directors, are the key management executives who carry out the daily work of the business and report to the board of directors. They oversee specific business functions per their respective responsibilities that must be matched with their area of expertise.[99] Company officers have a detailed range of responsibilities to enable them to account according to their appointment roles and ensure that the board of directors' decisions are implemented.[100] It must be noted that once named as a director according to the provisions of Section 58 (1) of the Lesotho Companies Act 2011, a director so named becomes an officer of the company, because every director is an officer of the company. This important note brings up an equally important point that holds conversely, that one may be an officer of the company even though they are not a director. It must be

[96] Communication Specialists (Pty) Ltd. v Nyembe and Another (30354/2019; A136/2019) [2021] ZAGPJHC 681 (10 November 2012)
[97] Section 20(9) Lesotho Companies Act 2011
[98] [1969] 3 All ER 855 at 861
[99] Indeed for employers "Officers of a Corporation: Roles and Responsibilities" available at https://www.indeed.com/hire/c/info/officers-of-acorporation-roles-and-responsibilities (accessed on 27 April 2025)
[100] CorpNet "Who are the Officers of a Corporation" available at https://www.corpnet.com/blog/officers-of-a-corporation/ (accessed on 27 April 2025)

highlighted that, unless clearly stipulated and strictly prohibited by state law, company officers may also be shareholders and directors.[101]

These emphases highlight the importance of discerning differences between company directors and ordinary company officers, even though the two roles may and many times do work collaboratively to advance the lawful goals of the company. The seemingly slim but quite material difference between the two roles relates to their scope of influence. Company directors are strategy custodians who craft policies and carve the long-term vision of the company, while officers execute the strategy and ensure smooth operational efficiency by meeting targets set out by directors. Consequently, a seamless interaction of these two roles fosters a balanced and efficient corporate governance.[102] It is noteworthy that the distinction between directors and company officers is more of a basis for corporate governance roles and that all companies have directors who are considered officers of the company that serve as chief officers in respective company portfolios, especially because they are often chosen from among the directors.[103] The inclination to subscribe to this belief is irresistible and is concurred with and adopted in this study.

The rationale behind the status of a company director automatically conferring upon directors the status of being officers of the company is that a company is an artificial being legally personified to create the legal and commercial conveniences that warrant separate personality, but the need to implement operations, assert rights and discharge responsibilities needs assistance of natural beings by way of executive officers of the company. The Lesotho Companies Act under Section 56 (1) clarifies the meaning of a director in relation to a company as:

> a person who exercises or is entitled to exercise or who controls or is entitled to control the exercise of powers which, apart from the articles of incorporation would be exercised by the board or a person to whom a power or duty of the board has been directly delegated by the board with that person's consent or who exercises the power or duty with the consent of the board.[104]

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[101] CorpNet "Who are the Officers of a Corporation" available at https://www.corpnet.com/blog/officers-of-a-corporation/ (accessed on 27 April 2025

[102] "Officer vs Director Roles, and legal insights" available at https://www.upcounsel.com/officer-vs-director (accessed on 27 April 2025)

[103] Adam K. "Officers of a Corporation: Roles and Responsibilities" available at https://www.lawdepot.com/resources/business-articles/corporate-officers/ (accessed on 27 April 2025)

[104] Section 56 (1) (a) (b)

Since it is not uncommon for company officers to be appointed from among the company's directors, it follows that the true meaning of who is a company officer is deduced first from appointment as a director and second from the role a person is assigned to discharge. Therefore, once entitled to control the exercise of powers or consented to execute a control function or is so delegated, then such a person qualifies to be a company officer. It is important to reiterate that company directors are accountable in respect of those specific roles to which they are appointed. The difference between directors and officers therefore also hinges on the fact that directors automatically become officers by virtue of status as directors while non-director officers become company officers by virtue of appointment to occupy corporate office positions such as Chief Executive, Chief Operations Officer, Chief Financial Officer, and Corporate Secretary, appointed by the board of directors to oversee the company's management activities and implement the board's vision.[105]

Company officers can be founders of the company, its directors, or even its employees. It is therefore important to highlight the interconnectedness of the concepts of 'company founders', company directors', 'company officers', and 'company employees' to determine with certainty that these usually carelessly used terms in reality do not always mean the same thing even though they can, depending on the role assigned to them, mean company officers. Company founders simply refer to those involved in the founding of the company; as the name suggests, they are the starters of the company who secured start-up funding, and whose assemblage of ideas brought about the company. They may take employment with the company, but unlike ordinary non-director employees whose relationship terminates completely when they leave the company, founders remain with the title of founder even after they have left the company. Company officers lead and manage the day-to-day operations of the company, while company employees are employed by the company and earn wages or a salary.[106]

[105] Bisanz M., Kim G. "Whose role is it anyway? Distinguishing Corporate Officers from Directors" available at https://www.mayerbrown.com.en/insights/publications/2024/03/whose-role-is-it-anyway-distinguishing-corporate-officers-from-directors accessed on 01 May 2025

[106] StartupProgram.com Team "What Are the Differences Between Founders, Directors, Officers, and Employees?" available at https://startupprogram.com/what-are-the -differences-between-founders-directors-officers-and-employees/ accessed on 01 May 2025

4.3 What Are the Roles of Company Officers?

The premise is that company officers are all those whose ascribed roles involve the day-to-day running of the business, even though they may be founders, directors, or even employees of the company. This premise forms a prelude to the roles of company officers that they are involved in the day-to-day running of the business of the company, as envisaged in *Fisheries Development Corporation of South Africa Ltd v Jorgensen,*[107] where the Court held that executive directors are involved in the day-to-day running of the business of the company.

Company officers are appointed to handle the essential daily operations of the company thus overseeing different business areas that inform high-level business decisions, as such they are responsible for maintaining awareness of company objectives, policies, employee conduct, financial handling and other important areas of business, hence are obliged to avoid conflict of interest with the company and duty bound to promote best interest of the company. This means that they are under a duty to declare an interest in proposed transactions that involve the company. These duties may render company officers liable in their personal capacity where they fail to discharge their duty according to their obligation and area of expertise per their appointment and role.[108]

Company officers are under a duty to observe several responsibilities, which are as fiduciary as those of the board of directors.[109] The following are some of the key general duties that company officers must uphold without compromise. It is a duty to act within the authorized and conferred powers according to common law, statute, and the articles and memorandum of association. The duty to promote the success of the company imposes a duty to have consideration for the potential consequences of decisions in the long run, and to act fairly and maintain the company's reputation. Company officers are bound to act in good faith in the interest of the company and exercise reasonable care, skill, and diligence, and avoid accepting undue benefits from third parties and committing fraud.[110] In case of commission of fraud, the liability ensues to the company officer who knowingly participated in the fraudulent conduct

[107] 1980 (4) SA 156 (wld)
[108] Indeed for employers "What Is a Corporate Officer? Key Duties and Responsibilities" available at https://www.indeed.com/hire/c/infor/corporate-officer (accessed on 27 April 2025)
[109] Section 60 (3) Lesotho Companies' Act 2011
[110] Section 63 (1) (2) Lesotho Companies Act 2011

because such conduct is considered an abuse of the company's separate personality, as clearly demonstrated in *Fisheries Development Corporation of South Africa Ltd. v Jorgensen.*[111]

The established connotation of the law of separate legal personality is that company officers, according to the concept of separate legal personality, are protected from personal liability while acting on behalf of the company. This was enunciated in the case of *Shipping Corporation of India v Evdomon Corporation and Another*,[112] where Corbett CJ held that the separate personality of the company from the shareholders is of utmost importance, as such, deviation from the rule should only occur in the rarest of cases where there are elements of 'fraud or improper conduct'. Company officers are therefore under a duty to avoid fraud or improper conduct. This means that the actions and omissions of the company are construed to equate to the company so long as it can be proven that such conduct was strictly on behalf of and for the benefit of the company and does not constitute 'fraud or improper conduct.' An illustrative scenario is of a third party aggrieved by the company, such third party cannot under normal circumstances sue the company officers who acted on behalf of the company to commit conduct that the third party is aggrieved by, unless it can be proven that the conduct had elements of fraud or improper conduct or was *ultra vires* relative to the scope of authorised or entrusted duty of the company officers. The purport of this contention is that the personal liability of company officers can ensue following contravention of their established duties, consequent to their appointment as company officers, where it can be proven that the conduct has elements of fraud or improper conduct.

For instance, in a transaction of a company employee signing a bank loan agreement on behalf of a company, the company officer cannot ordinarily be held personally liable if the company defaults in repayment instalments. The recourse of the bank that lent money to the company is to recover from the company's assets, not from the personal assets of the employee who appended his signature on the loan agreement, because the conduct is devoid of fraud or improper conduct, but bona fide execution of a legitimate duty. This is the extent to which the principle of separate legal personality protects company officers. It is a remedial prerogative of the Courts that where the separate personality principle is abused or its invocation leads to

[111] 1980 (4) SA 156 (wld)

[112] 1994 (1) SA 550 (A)at 556

contravention of public policy considerations, the Courts can invoke their discretion to pierce the corporate veil.

4.4 Why Are Company Officers Protected by Law?

Company officers are protected by law from personal liability by the concept of separate legal personality of the company, which enables the company to bear its own liabilities separate from the company officers, to mitigate the potential for risk of entrepreneurship affecting their personal assets. The separate legal personality of a company cannot be overemphasised, even though it is not absolute. In *Hulse Reutter and Others v Godde*,[113] Scott JA held that the separate legal personality of the company is to be recognised and upheld except in 'most unusual circumstances' because the Court has no general discretion to disregard the separate personality of the company whenever it considers it just or convenient to do so.

Consequent to the concept of separate personality, company officers are protected in law to enable them to achieve lawfully desired commercial objectives to preserve the lawful interests of the company without fear of accruing liability unto themselves in their personal capacity while acting under fiduciary duty to the company. The concept of separate personality was deduced from common law and established in the case of *Salomon v Salomon* that:

> 'it is indisputable that once a company is legally incorporated, it must be treated like any other independent person with its own rights and liabilities **appropriate to itself**'[114]

The emphasis on 'appropriate to itself' highlights that a company is only capacitated to assert rights and assume liabilities 'appropriate to itself' such that the implication is that company officers are protected when acting on behalf of the company to pursue interests that are appropriate to the company. The converse of this is that where company officers abuse the protection to achieve objectives other than those appropriate to the company, the legal protection shall cease to apply. For instance, where money laundering cases are committed using a company, the company officers who executed the laundering cannot be protected.

It is important to highlight that legal protection of company officers does not hinder the Courts' discretion to pierce the corporate veil, where, in terms of the South African Companies Act

[113] 2001 (40 SA 1336 (SCA)
[114] Salomon v Salomon (1897) AC 22 (HL) at para 30

2008, there is 'unconscionable abuse', even though, despite making it a ground for piercing the corporate veil, the Act fails to define it. Professor Nwafor construes the failure to assign a definite meaning to this concept as an acceptance of the absence of generally acceptable conditions for disregarding the corporate personality of a company.[115] The consequence of this is that adjudication in this respect, although it may mention the concept of 'unconscionable abuse', the truth is that the Courts simply apply their discretion in the circumstances. In the wise words of Professor Nwafor, nothing stops the Court, depending on the circumstances of each case, from adopting a purposive interpretation of the provision, giving it a wide reach even in the absence of an express inclusion of *(specific words).*'[116]

4.5 When May Company Officers Lose Protection of the Law?

Company officers may lose protection of the law where it is established that the protection of the law was abused or misused to achieve ulterior motives such as fraud or any common law or statutory offence, the commission of which prejudices the interests of the company and benefits the company officer financially. As already highlighted, company officers are not immune to liability in their personal capacity; rather, the law solely protects them where they acted lawfully and had not sought to abuse the protection. In *Pioneer Concrete Services Ltd v Yelnah Pty.*[117]the Court held that, although when a company is formed, a separate legal personality is formed, Courts will on occasions look behind the legal personality to the real controllers. The interpretation of this decision is that Courts are, among other grounds, prone to disregard legal protection of company officers and pierce the veil of incorporation on the ground of commission of fraud, which is a predicate offence to money laundering.

Another notable ground upon which company officers lose legal protection, thus causing the Courts to pierce the corporate veil, is the use of fictitious companies to advance money laundering. Fictitious companies are essentially used to disguise or conceal; they are a pretense intended to benefit one who hides behind the fictitious company.[118] In the case of *Trustor AB*

[115] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 04 April 2025

[116] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 04 April 2025)

[117] (1986) 5 NSWLR 254 (SCNSW) 264

[118] "FindLaw Dictionary of Legal Terms" available at https://dictionary.findlaw.comShamTransaction (accessed on 14/04/2025)

v Smallbone and Others[119] the Court delivered an illustration of the attitude of the Courts where a company is used to hide the real purpose of its controller(s) and held that in such circumstances the Court is entitled to pierce the corporate veil to discover the controllers and impose liability on them in their personal capacity. *In this case, the Court pierced the corporate veil to hold Mr. Smallbone personally liable for the actions of the company used as a device to receive the* Trustor's money. The crux of the decision is in the following dictum:

> 'the Court is entitled to 'pierce the corporate veil and recognize the receipt of the company as that of the individual(s) in control of it, if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing liability of those individuals'

The interpretation ascribed to this decision is that the Court was emphatic that its discretion to pierce the veil of incorporation is triggered where it is proven that the company controllers' efforts are geared at concealing their identity with the cloak of incorporation, thus abusing the protection of the law established by the concept of separate legal personality. The contention is therefore that in such cases the liability for the predicate offence committed rests with the company officers vested with control powers of the company in their personal capacity, and so is the liability for the consequent money laundering offence.

In most money laundering cases in Lesotho, for instance, the notorious Fifty Million fraud case in the Ministry of Finance of the government of Lesotho, the criminals had used sham companies to transfer funds from Lesotho to South Africa.[120] This is a common trend in money laundering offences to use companies as a façade to conceal the true origin of the illicit funds. This trend is discernible in *Rex v Platcorp Holdings*[121], where sham companies were used to distribute financial proceeds of crime. To dismantle such complex money laundering offences, the Courts, as they did in *Jones v Lipman*,[122] pierce the veil of incorporation to identify the company officers acting as controllers of the company used as a façade to conceal illicit funds. In these cases, it was discovered that the companies that had been formed were shams or façades used to cloak and obscure the illicit conduct and proceeds of the involved company officers acting as controllers of the company from the sight of the law. Since concealment and

[119] (2001) EWHC 703 (CH)
[120] CR 0692/2021
[121] CRI/T/MSU/0879/24
[122] (1962) 1 All ER 442

disguising of origin constitute elements of the crime of money laundering, company officers who launder money through the use of sham companies, thus concealing or disguising the origin of properties using the company, lose protection of the law and may be personally liable on conviction for money laundering.

When a company is a facade that enables shareholders to effect sham transactions, as in the case of *Children's Media Ltd and Others v Singapore Tourism Board* [123] where an individual, through a company which he owned and controlled, received payment from the Singapore Tourism Board to organize a mega-event, which it turned out he never intended to stage, the Courts are justified in piercing the corporate veil to untangle the façade and impose personal liability on individual company officers involved in the crime. In that case, the Court ordered the company controller to personally repay. It is the contention subscribed to that company officers with control capacity must lose protection of the law and be held personally liable for the misrepresentation that amounts to fraud, or any predicate offence to money laundering. The rationale behind this contention is that the conduct of the company's controller in question and the consequent benefit for a failed event clearly equaled the proceeds of crime of a fraudulent promise to organise the event. In money laundering terms, such conduct and proceeds are illicit and constitute the offence of money laundering according to the purport of Section 25 of the Money Laundering and Proceeds of Crime Act 2008 as amended.

The law is clear that it does not protect company officers where there is the commission of fraud. The Courts use fraud as a ground for piercing the corporate veil where there is an intention to use the corporate structure in such a way that it denies the prejudiced party a pre-existing legal right.[124] Some arguments are premised on the idea that in fraud cases, sham companies are used to conceal the illicit origin of funds that are ultimately laundered. The Courts should, in such cases, be even more inclined to exercise their discretion to pierce the veil of incorporation to determine whether criminal liability must, in addition to the company, be imposed on the controllers and officers of the company in their personal capacity. In *Lennard's Carrying Company v Asiatic Petroleum Company Limited*,[125] the Court categorically stated that in determining corporate criminal liability, the Court must look beyond the abstract

[123] [2008] SGHC 77
[124] Payne J *Lifting the Corporate Veil: A Reassessment of the fraud exemption* Cambridge Law Journal 1997 Vol 56 pp284-290
[125] (1924) AC 705 at 75

qualities of the company and review the activities of its 'directing minds' who are influential enough to constitute its *alter ego*. Lord Denman, in the case of *The Queen v Great North of England's Railway Company*[126] held that the doctrine of *alter ego* attributes the actions of company officers to its corporate personality and does away with the obstruction of corporate abstraction that affects the gauging of the company's *mensrea* and *actus reus.* Simply put the mental state of company officers is attributed to the company such that their *mens rea* and *actus reus* are considered that of the company.

The decision in the case of *Lennard's Carrying Company*[127] cited above lays down the foundation for looking beyond the veil of incorporation to determine the acts of company officers, considering their status and positions, and attributing them to the company. It is contended that if the mind of the company officer can be attributed to the company, it is argued that the same mind must also be attributed to the company officer himself. The adoption of this line of thought dictates that, as much as companies can be held liable through the application of the alter ego doctrine, the company officers must also be held liable for being the originator of the *mens rea* and *actus reus* of the prohibited conduct (predicate offence to money laundering) that manifests through the company. To do otherwise would provide an unfair convenience to money launderers by allowing them to use their protection of the law for illicit ends. Simply put, it would be absurd to assign and append the conduct of the company officers to the company but allow such conduct not to affect the company officers themselves as the initiator or originator of the criminal thought and conduct.

In the light of this analogy, it is argued that company officers and originators of the *mens rea* and *actus reus* that ultimately manifest through the company must account and bear liability in their personal capacity for crimes committed using the company and the conveniences attached to it. This is because not only are they originators but they are also legally bound to exercise due care in the interest of the company and when they intentionally fail to do that, and opt to misuse or abuse the protection of the law, they actually counter the spirit for the protection of the law and they must not be seen to benefit from that.

[126] US English Reports 1294 (Q.B 1846)
[127] (1924) AC 705 at 75

4.6 Money Laundering and Proceeds of Crime Act Provisions Imposing Liability on Company Officers.

Since companies are incorporated and awarded separate legal personality by law to facilitate legitimate commercial enterprise, the same law cannot be seen to be providing a fortress for criminals to hide behind and escape liability for money laundering. The use of the company's separate personality as a vehicle for concealment or disguise of illicit proceeds thus committing money laundering is contravention of the Money Laundering and Proceeds of Crime Act 2008 as amended and an abuse of the company's separate personality because the law does not allow for companies to be incorporated to facilitate commission of the crime of money laundering as defined in section 25 of the Act.[128]

The Act, in addition to defining the offence of money laundering in section 25, prohibits any person, whether a company or its officers, from tipping off in terms of section 24(1). The section provides that any director, officer, or employee of an accountable institution is prohibited from tipping off or disclosing to any third parties that reports or information were provided to the Financial Intelligence Unit concerning suspected money laundering or that a money laundering investigation is being conducted.[129] This means that where the act of tipping off is committed, since it is a prohibited conduct and prejudices the interests of the accountable institution company, the implied consequence is that the person who fails to comply with the prohibition of tipping off commits an offence. According to section 113 of the Act, such a person may be personally liable as implied in the section that a person who contravenes a provision of the Act where no penalty is provided shall be liable on conviction and sentenced within the stipulated sentencing guidelines. The prohibition and subsequent criminalization of tipping off constitutes an offence, the commission of which attracts personal liability, thus complementing the common law imposition of liability for crimes committed within the sphere of company law.

The other instance relates to Section 26 (5) of the Act that criminalises disclosure to third parties of particulars of a Suspicious Transaction Report (STR) that can potentially prejudice any investigation of possible offence of money laundering and imposes liability on conviction of either imprisonment for period not exceeding Ten (10) years or a fine of not less than Fifty

[128] Section 25 Money Laundering and Proceeds of Crime Act 2008 as Amended.
[129] Section 24 Money Laundering and Proceeds of Crime Act 2008 as Amended

thousand Maloti (M50 000.00).[130] The provision stipulates a possibility for the imposition of personal liability on company officers by imposing liability for contravention on any person. This means that on conviction for contravention of the prohibition against tipping off under section 24 or disclosure of the particulars of suspicious transaction report to third parties under section 26, the Court can impose personal liability on company officers because the provision creates the possibility for liability to be imposed on any person. The liability for contravention of these provisions potentially rests with company officers in their personal capacity because such disclosures happen under the cloak of corporate veil and amount to abuse of the legal protection offered by the separate personality concept, an abuse that attracts the Court's appetite to pierce the veil to see who is behind.

The purport of the Act's Sections that create offences under the Act is cognisant that money laundering can be committed by either a company or its officers by abusing the separate personality principle, thus hoping to obfuscate themselves from the law using the cloak of incorporation, and recognizes that company officers may be liable for such contraventions of the provisions. The Act under section 113 criminalises failure to comply with the provisions of the Act and provides sentencing guidelines upon liability on conviction. This part of the Act also highlights the possibility that company officers may lose protection of the law where they fail to comply with any part of the Act, and the Courts may impose personal liability in such circumstances. This means that where it is established that abuse of the separate personality concept led to non-compliance with provisions of the Act, the Court can impose personal liability on company officers. On the strength of the cited provisions of the Act that articulate conduct that constitutes an offence of money laundering and respective sentences, it is concluded that the Act envisages the possible imposition of personal liability on company officers for contraventions of parts of the Act. This clarifies the position that company officers can be convicted and bear personal liability for money laundering offences.

4.7 Conclusion

Company officers, being the ones responsible for the daily execution of the company's operations in their respective operational responsibilities, are ultimately responsible for the respective actions of the company. By virtue of being responsible as chief executive officer, treasurer, auditor, and other officers, the board may deem it necessary to exercise day-to-day

[130] Section 26 Money Laundering and Proceeds of Crime Act 2008 as Amended

management functions of the company. Company officers are the engine of the company that causes it to sustain its purpose. For this reason, even though the practicality of company law is premised on the separate personality principle demonstrable in the proper plaintiff case of *Foss v Harboottle*[131] and established in the case of *Salomon v Salomon*,[132] and even though since inception, Courts have intimately maintained a resolute preservation of the principle and only disregard it in "exceptional circumstances" the law affords the Courts capacity to disregard separate personality principle where the concept is abused or misused either by failure to observe binding duties of company directors or using the company as a façade to hide the criminal enterprise.

The concept of piercing the corporate veil owes its origin to common law; some jurisdictions have succumbed to the temptation to incorporate it in statute. The lesson learned from the statutory entrenchment of grounds for piercing the corporate veil is considered materially deficient, hence potentially the reason the Lesotho Companies Act 2011 does not offer any provision for veil piercing, possibly because experience informs that there exist infinite, thus inexhaustible, different reasons that may warrant piercing the corporate veil. Professor Nwafor contends in consensus that the failure of the South African Companies Act 2008 to define the ground of 'unconscionable abuse' provided under Section 20(9) is potentially an acceptance of the lack of generally acceptable conditions for disregarding the corporate personality of a company.[133] History informs us that despite statutory inclusion Courts' discretion to disregard the veil under fitting circumstances remains intact and not swayed by Statutory incorporation.

Armed with the discretion to pierce the veil and look behind the corporate veil, the Courts have adequate artillery to identify company officers responsible for commission of offences where the company is used to conceal, convert, disguise or transfer proceeds of crime with the intention to obfuscate with the corporate cloak the illicit origin of the criminal proceeds thus committing the offence of money laundering. Even though the Courts fondly preserve the separate personality principle, the Court's jurisdiction to exercise the discretion to disregard the separate personality of the company is irresistible where the Court has identified abuse of the

[131] (1843) 2 Hare 461
[132] (1897) AC 22
[133] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 04 April 2025)

legal protection of the separate personality of the company or where company officers breached their fiduciary duty to the company. Where the Courts have established either of these grounds they may pierce corporate veil and identify the company officers misusing the company as a façade to achieve their criminal enterprise, and effectively impose liability upon them in their personal capacity, hence the contention that personal liability must attach to company officers where it is proven that they used the company to commit money laundering offence. The Courts succumb to the appetite to piercing the corporate veil to identify individual perpetrators where the protection of company officers offered by the separate personality principle is abused.

Chapter Five: Conclusions and Recommendations

5.1 Introduction

It has been established that company law is anchored by the concept of separate legal personality, which distinguishes the company from its shareholders and officers, a common law principle established in the landmark case of *Solomon v Salomon*.[134] Resultantly, the Courts are mindful that the concept is the foundation on which the premise that a company has a separate legal personality, rendering it distinct from its members, rests.[135] It has further been determined that the company law guiding liability in the corporate sphere in Lesotho is governed by both common law and statute by way of the Companies' Act 2011. The provisions of the Lesotho Companies' Act in this regard have been determined to be arguably deficient for solely depending on common law and failing to provide guidance for piercing of the corporate veil, like section 20(9) of the South African Companies Act 2008. The Lesotho position of dependence on common law takes preference, having considered that statutory incorporation of the principle has failed to deliver certainty regarding circumstances where Courts are justified to pierce the veil, for precedence demonstrates that Courts remain adamant to exercise discretion to pierce the veil where it has determined abuse or misuse, depending on the circumstances of each case.

The principle of piercing the corporate veil according to Lord Staughton in *Atlas Maritime Co SA v Avolon Maritime Ltd, The Coral Rose No.1*[136] means to have regard to the shareholding in a company for some legal purpose which essentially alludes to the Courts' discretion to disregard the separate personality of the company and identify the company's officers for some legal purpose. This means that the Courts' discretion to pierce the veil remains justifiable so long as it is to advance a legal purpose which bestows the open-endedness of the Courts' discretion in this regard. Professor Nwafor although addressing the South African Section 20(9) of the Companies Act of 2008 that statutorily entrenched in the South African Companies Act 2008, the ground of "unconscionable abuse" for lifting the corporate veil, attributes the failure to assign a definite meaning to the term as implied succumb to absence of any generally acceptable conditions for disregarding corporate personality of the company.[137] However, he

[134] Salomon v Salomon 1897 AC 22 (HL)
[135] Cape Pacific v Lubner Controlling Investments (Pty) Ltd 1995 (4) SA 790 (A)
[136] [1991] 4 All ER 769 CA at 776
[137] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 10 May 2025)

also concedes that the provision brings about the fact that a remedy can be provided whenever the illegitimate use of the concept of separate legal personality adversely affects third parties, or contravenes the law in a way that should not be countenanced.[138] A concurrence to this argument is preferred over divergence because the failure to solve the uncertainty by statutory incorporation of the concept has effectively subjected the exercise back to the sole purview of judicial discretion. The Courts are adequately equipped with this discretion to identify abuse of the legal protection resulting from separate legal personality and pierce the veil to impose liability upon company officers responsible for committing money laundering using the company as a facade.

5.2 The Significance of Separate Legal Personality

Since the establishment of the principle of separate legal personality, the Courts have continued to uphold the separate personality of the company from its officers fondly, hence the Court's denial to hold the person running the business of the company liable for the debts incurred by the company in the course of doing business.[139] The essential consideration seems to be that it is a different person in the eyes of the law. One of the impactful thoughts justifying this approach is found in Professor Nwafor's position that this stance even though seemingly harsh on the owner or controller of a company, it is of essence in the furtherance of the concept of limited liability of the company as it seeks to insulate the property of the members from that of the company and puts them beyond reach of creditors in the instance of insolvency.[140] In the case of *Adams v Cape Industries Plc*[141] the Court upheld the principle of distinctness of the company even in circumstances where it seemed absurd to a layman, as demonstrated by the upholding of the distinctness even where a company trades in a foreign country and where it trades in a foreign country through a subsidiary, and has full power to control its activities, and said the difference was not slender as it seemed. The Court thus merely expressed sympathy with the submission but upheld the distinctness of the company. To demonstrate the rigidity with which it intimately upheld the principle, the Court even conceded that indeed the distinction is in reality a slender one that can arguably exist only in the imagination of one

[138] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 15 May 2025)
[139] Salomon v Salomon 1897 AC 22 (HL)
[140] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 10 May 2025)
[141] [1991] 1 All ER 929 at 1019

making it, but insisted that is exactly what the law permits.[142] In *Bank of Tokyo Ltd v Karoon,*[143] in alignment with this attitude, the Court held that even though companies may be one economically, the distinction is fundamental and unavoidable, for it is law and not economics that the Court is concerned about.

Owing to these jurisprudential approaches, the Courts' resistance to any pressure seeking to tilt them from this position would fail any day because, as fictitious as the distinction seems, it is the law and has been widely adopted in various jurisdictions across the globe, hence forming well-established legal precedence to this day. The rationale appears to be materially commercial as preservation of the concept offers guarantees of no exposure to risks and liabilities attendant to business operations and is an enticement for investment. To lure investment, the guarantee of preservation of this principle is inevitably required to insulate investors from business risks, for the more they are assured of the security of their personal assets, the greater the prospect of investing in companies.

The congruent readiness of the Courts to counter the abuse of separate legal personality cannot be underestimated and compels that instances of abuse or misuse must project beyond the protection and strike those who abuse control of company affairs for unlawful personal gain, such as the commission of money laundering. The challenge for clear delineation of the circumstances for striking abusers and misusers of the principle has remained an unsettled judicial quagmire best addressed by the application of the Courts' discretion to pierce the veil where the Courts have determined abuse or misuse of the separate legal personality principle. In conclusion, it is maintained consistent with the wise words of Professor Nwafor, it is not in dispute that the corporate veil could be pierced where there is impropriety in the running of the affairs of the company, however the dispute lies in identifying the nature of the impropriety and when such an impropriety should warrant the exercise by the Court of the power to pierce the veil.[144]

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[142] *Adams v Cape Industries Plc* [1991] 1 All ER 929 at 1019
[143] [1986] 3 All ER 468 at 485
[144] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 15 May 2025)

5.3 Ramifications of Abuse of Separate Legal Personality to Commit Money Laundering

The Court's discretion to interfere in dispute resolution extends to where established legal principles akin to separate legal personality are abused, especially where the abuse leads to a global menace such as Money laundering. The provisions of the Money Laundering and Proceeds of Crime Act 2008 that criminalise money laundering offences all recognise both legal and natural persons, which means that the Act allows for conviction and imposition of liability on both corporations and company officers. As such, upon misuse and abuse of separate legal personality and commission of any money laundering offence using a company as an instrument of laundering, the Court is entitled to disregard the veil and identify and impose liability on company officers responsible for the offence. Scott J in *Hulse-Reutter and Others v Godde*[145] held that what is clear as a matter of principle is that there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it, with the result that an unfair advantage is afforded to the latter. In proceeding from this premise, it is argued that an unfair advantage accruing from the abuse of corporate structure to secure illicit proceeds, thus committing the offence of money laundering using a corporate entity, justifies the Courts' disregard of the corporate veil and ultimate imposition of personal liability on company officers.

5.4 Recommendations

The legislature's statutory incorporation of the grounds for piercing the corporate veil should desist from attempting to define the circumstances under which the Courts are entitled to invoke that discretion; it must simply interfere only to ensure that company officers responsible for the menace committed under the veil of incorporation assume commensurate liability. It is recommended that an amendment be considered aimed at providing guidelines for piercing the veil. The provision should be as open-ended as to adequately preserve judicial discretion to interfere where there is use of the company to commit possible multiple crimes that are predicate to money laundering, or for the purpose other than one for which it was incorporated thus prejudicing interests of the company and creating undue benefit that equates to proceeds of crime thus money laundering.

[145] [2002] 2 All SA 211 (A)

The rationale for an open-ended approach is to provide adequate safeguards that would cater for a wide range of money laundering spectrum, checks and balances on the judiciary, while preserving the Court's discretion and advancing marginal certainty of the law in this relation. The resolve emanating from legislative intervention has proven meagre because no matter the acumen of the draftsman, it cannot be exhaustive of the circumstances where the discretion can be applied. This is especially so in the broad spectrum of money laundering offences. Professor Nwafor maintains that legislative intervention to provide guidelines on when the corporate veil could be pierced has delivered minimally, with the result that Courts retain power to exercise judicial discretion, though with proven outcome of inconsistency and conflicting judicial pronouncements.[146] For this reason, it is evident that the Courts are better left to retain power to exercise judicial discretion and accept the marginal certainty that comes with it. This way, the legislative intervention would serve merely as a curtailment of judicial discretion for checks and balances while maintaining the status quo that Courts retain judicial discretion.

[146] Nwafor, A. O. (2015). Piercing the corporate veil: An incursion into the judicial conundrum. *Corporate Board: role, duties and composition, 11(3),* 136-152. https://doi.org/10.22495/cbv11i3art11 (accessed on 15 May 2025)

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