A CRITICAL ANALYSIS OF THE DUTIES AND LIABILITIES OF DIRECTORS OF A COMPANY: A CASE STUDY OF KAMPALA DISTRICT

BY

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DECLARATION

I Musiime Bridget, declare that, this report entitled "A Critical Analysis of the Duties and Liabilities of Directors of a Company" carried out in Kampala District is entirely my own effort and has not been submitted to any other institution of learning for any award.

Student's Name: **Musiime Bridget**

Signature: .... **Date:** 22/10/16

APPROVAL

This report entitled "A Critical Analysis of the Duties and Liabilities of Directors of a Company, Case Study Kampala District" has been under my supervision and is ready for submission to the faculty of law.

Supervisor: **MR. WABWIRE DENNIS**

Signature: .... **Date:** 22 | 10 | 2016

DEDICATION

This piece of work is a dedication to my parents Mr. and Mrs. Tumusiime Beda for their parental guidance and financial support towards my academic career.

ACKNOWLEDGEMENT

I am greatly indebted to my supervisor Mr. Wabwire Dennis for his endless and tireless guidance. I appreciate him for his great contribution in the accomplishment of this piece of work. I also recognize the effort of all lecturers in the Faculty of Law, for their knowledgeable and professional contribution towards my academic career.

Special appreciation goes to my entire family, particularly to my father and Mother Mr. and Mrs. Tumusiime Beda for their great support both spiritual and financial. To my brother Birungi Collins and to my sisters Lisa and Cathy, you were such a great encouragement. Thank you all.

I cannot forget to thank my classmates for being cooperative during my years of study with them. Special thanks to Winnie Prisca your spiritual support is indeed appreciated.

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God Bless You All.

ABSTRACT

This study "A Critical Analysis of the Duties and Liabilities of Directors of a Company" was carried out in Kampala to specifically examine; the different duties of directors of a company and their liabilities; the effectiveness of the legal regime that provides for directors and their duties; the various enforcement challenges that the company directors encounter in course of performing their duties; to analyze possible remedies that are available to an aggrieved shareholder where a director has breached his duties and the defenses available to a director; and to suggest possible recommendations to the problems being encountered by directors in the performance of their duties. To comprehend this, literature review of the specific variables was carried out and the study was mainly centered on book and documentary evidences as well as primary data sources thus was qualitatively driven.

The study established that much as there is a revised law to govern duties and liabilities of companies, remedies have not adequately been provided. While one becomes a director he/she receives a direct impact on the strategy and success of the business which imposes a lot much more than the law has to protect directors, as much as companies continue to be addressed as separate legal entities. The law of recent imposes a strict liability on personal mistakes of directors.

The study concludes that much as directors have general duties and liabilities to the growth of companies, they apparently have a strict liability imposed on them as different from the liability traditionally enjoyed under the cover of the company name. Directors have become more responsible for the liabilities they commit.

The study recommends; Re-defining the interpretation of company by law; Engaging with legal councils ahead of challenges; establishing risk management systems supervisory of the board; engaging customers than firing employees and contracting agencies; Promoting recognition of the rule of law;

LIST OF CASES

[1] [1974] UKPC 3

LIST OF STATUTES

National Instruments

The Constitution of the Republic of Uganda (1995)

The Company Act of Uganda (as amended 2012) Cap 110\

Occupation Safety and Healthy Act (2006)

The Penal Code Act 1950

CHAPTER ONE
GENERAL OVERVIEW

1.1 Introduction

The study critiques the duties and liabilities of directors of a company with a particular focus in Kampala district. The report reflects on the background of the continuing challenges encountered by directors of a company in the due course of fulfilling their duties and liabilities world over and especially in Uganda more so in light of the existing supporting law.[2]

Precisely expressed, a company is an incorporated association which is an artificial person, having separate legal entity.[3] This study sought to examine the prevalence and universality of the law relating to the obligation of directors of companies while at the same time mapping out the gaps in the law and the difficulty they face in executing their duties, particularly in Uganda. It is agreed that whereas incorporation has for long protected companies to avoid risk of company property seizure in respect to members' separate liability, it has on the other side not provided a so long history of concern in protecting members from company liability,[4] directors in particular. Directorship embeds incorporation. Precisely, incorporating a company stretches to existing in perpetuity, suing outsiders and own members, possessing a common seal to facilitate distinction between the acts of the company and those of its members.[5]

1.2 Background of the Study

1.2.1 Evolution of Directorship of a Company

Gone are the days when sole proprietorship and partnership were the most cherished and preferred forms of business.[6] While these continue to exist today, consumers' taste has shifted with an increasing need for huge funds for large scale production resulting from an advanced manifold of technology.[7] But as demand grew, the possibility of huge funds to be raised amidst a handful of persons involved in sole proprietorship and partnership at the time was next to

[2] The Company Act of Uganda (2012) Cap 110
[3] Jeffery Sonnenfeld (2002), What makes Great Boards Great" Harvard Business Review
[4] Ibid
[5] Rahul Kumar Singh (2013), Origin and Evolution of the Modern Company Law, National Law University, Jodhpur, India.
[6] Rahul Kumar Singh (2013), Origin and Evolution of the Modern Company Law, National Law University, Jodhpur, India.
[7] Ibid

impossible.[8] Indeed with time demand also shifted from traditional to capital goods all of which called for huge amounts of labour and capital supply.[9] To beat this high investment need, the company form of business had to come into existence[10] whereof "company" derives from two Latin words *Com* (with or together) and *Panis* (bread) originally referring to an association of persons who shared meals together. Hence, from these groups companies started to form.[11]

Prior to this, various forms of associations such as chapters, monasteries, and boroughs were known to medieval law and to some of which incorporation was only originally applied to ecclesiastical and public bodies as a convenient method to distinguish rights and liabilities of members from the association.[12] These usually had a corporate personality conferred upon them by a charter from the crown or by prescription of having received such a grant[13] and were principally known as guild of merchants, which till now have resemblances and relics in the existing modern companies.[14]

Specifically, these guilds acquired charters from the Crown to gain monopoly for their members either in branches of trade or for trading in specific commodities.[15] Through monopoly power, many joint stock companies were formed as partnerships by agreement under seal, providing for the division of the undertaking into shares which were transferable by the original partners with greater or less freedom according to the terms of the partnership agreement. At this time there was no limit to the number of partners, but in fact they were generally small in number with additional capital only raised by levitations or calls on the existing members rather than by invitations to the public.[16]

It was not until the 17th century when guilds became more common in England following their participation in foreign trade, that the Bubbles Act[17] was passed to not only prohibit the formation of fraudulent companies, but to also make these companies illegal.[18]The

[8] Jeffery Sonnenfeld (2002), What makes Great Boards Great" Harvard Business Review
[9] Ibid
[10] Ibid
[11] Rahul Kumar Singh (2013), Origin and Evolution of the Modern Company Law, National Law University, Jodhpur, India
[12] Ibid
[13] Ibid
[14] Ibid
[15] Ibid
[16] Ibid
[17] The Bubbles Act of England 1720
[18] Rahul Kumar Singh (2013), Origin and Evolution of the Modern Company Law, National Law University, Jodhpur, India

differentiation between unincorporated partnerships and incorporated companies was firmly established.[19] However, this was almost with no success in putting joint stock companies on a proper basis. Prior to this, while members traded jointly in stock, they had many fraudulent dealings.

In England for example in the early 14th Century merchant adventures was the very first to be referred to as company. During this period, incorporation was not that essential because each member operated with separate stock and thus each had an entirely separate trading liability from the company.[20] Similarly, this is traced under the East India Company which received its first charter in 1600 granting it a monopoly of trade with the Indies, but it was not until the second half of the seventeenth century that differentiation between unincorporated partnerships and incorporated companies was firmly established in India.[21] In Rome, much as persons were provided with powers and capacities similar to corporate powers under modern law, companies had no juristic personality like elsewhere for entities that had rights and duties.[22] The associations for example constituted; the Municipia which had powers to acquire property and contract through legacies;[23] the Populus Romanus;[24] the Collegia which could be founded without state authority;[25] and the charitable funds associations regulated by imperial legislation whose power was vested in the hands of administrators.[26]

Precisely, whereas among trading companies limited liability was recognized in the 17th century when traders realized the clear advantages of incorporation, it had been accepted as early as the fifteenth century among non-trading corporations.[27] Traders realized the clear advantages of incorporation. That a corporation was capable of existing in perpetuity; it could sue outsiders and its own members; and possession of a common seal facilitated the distinction between the acts of the company and those of its members and most importantly; limited liability came up as an afterthought.[28] While this was the case, limited liability was only mainly recognized and valued

[19] Rahul Kumar Singh (2013), Origin and Evolution of the Modern Company Law, National Law University, Jodhpur, India
[20] Ibid
[21] Jeffery Sonnenfeld (2002), What makes Great Boards Great" Harvard Business Review
[22] Ibid
[23] the citizen body, originally composed of the conquered cities and later of other local communities
[24] Granting the people of Rome with powers to acquire property and make contracts as well as be appointed heir.
[25] This constituted various private associations with specialized functions e.g. craft, trade guilds, burial societies and religious societies.
[26] These donated properties to the church which then would supervise the fund.
[27] Ibid
[28] Jeffery Sonnenfeld (2002), What makes Great Boards Great" Harvard Business Review

for avoiding the risk of company property seizure in respect of members separate debts, rather than a method to enable members to escape company liability.[29] This rationale contributed to, and explains the fast growth and evolution of companies.[30]

1.2.2 Theoretical Background of Directorship of a Company

This study derives its theory from the work of Dovan and Tunjic[31] which provides directors of companies and those who assume the responsibilities of directorship with a practical way to organize their understanding and to excel at the art of directorship. Dovan and Tunjic opiate that directorship starts and ends with a promise and constitute a separation of powers between the board and management, putting the board in a position to provide answers to shareholders.[32]

The dual[33] argues that, directors are managers of other peoples' money than their own. For this reason, it is therefore well expected that directors should watch over it with the same anxious caution just like partners in private companies (owners) will frequently watch over their own. To this effect, negligence and profusion must more or less always prevail in the management of the affairs of such a company. [34] Directors protect shareholders against managerial self-interest to maximize shareholder value.[35] Hence laws of all countries will oblige shareholders to incorporate a company at least with a minimum of one director but most commonly two.[36] According to Donovan and Tunjic it is acknowledged that whereas directors give the gift of life to the company, the company gives directors a gift of control in return.[37] But precisely this is not just an exchange of gifts, but promises between the company and directors. Such promises are either described in the company's constitution, directors' letters of appointment or by the law itself.[38] Directors are responsible for approving the capital structure; dividends and budgets;

[29] Andrew Donovan & Tunjic Peter (2009), 4 in 1 An Obvious Theory of Directorship, Australian National University, Melbourne Australia.
[29] Ibid
[30] Jeffery Sonnenfeld (2002), What makes Great Boards Great" Harvard Business Review
[31] Andrew Donovan & Tunjic Peter (2009), 4 in 1 An Obvious Theory of Directorship. Australian .National University, Melbourne Australia.
[32] Ibid
[33] ibid
[34] Ibid
[35] Jeffery Sonnenfeld (2002), What makes Great Boards Great" Harvard Business Review
[36] Ibid
[37] Ibid
[38]

monitoring solvency and risks; and ensuring that company has a sound strategy with all legal requirements being met.[39]

While conditions are laid out in the classified promise above, the consent to become directors is recognized as an offer, and acceptance on the other hand is the appointment of directors by shareholders to complete the bargain. But in actual practice this relationship may barely be settled following the fact that as directors are essentially viewed as agents of shareholders, the possibility that their relationship can actually be one of equal joint venture in the company should always remain open.[40]

Squarely, in fulfilling his duties a director whatever paths he may take to achieve, should demonstrate that he has delivered basing on his original promise to the company. But this simply opens directorship to new possibilities and promises, else there would be no reason to imply purpose on a corporate board.[41] Precisely, in the course of time and with challenges underway promises become the forgotten internal combustion engine of the company and yet remain the primary sources of the company's sustainable advantage.[42] The major difficulty for directors is that without a theory, it is difficult if not impossible to manage and meaningfully prioritize the actual functions of directorship. It is therefore to no surprise that as directorship becomes more complex, explanations for what directors do are also becoming shorter and shorter.

1.2.3 Conceptual Background of Directorship of Companies

Conceptually, directors are not alone in directorship."[43] Individuals, who occupy the space of management, will usually have a role to play in directorship. Chief Executive Officers, External advisors and other employees may partially work in directorship even when their appointment letters do not precisely state so. These may not generally be viewed as directors and may have their full time jobs outside directorship.[44] However, working together with the directors gets

[39] Andrew Donovan & Tunjic Peter (2009), 4 in 1 An Obvious Theory of Directorship, Australian National University, Melbourne Australia.
[40] Ibid
[41] Jeffery Sonnenfeld (2002), What makes Great Boards Great" Harvard Business Review
[42] Ibid
[43] Jeffery Sonnenfeld (2002), What makes Great Boards Great" Harvard Business Review
[44] Andrew Donovan & Tunjic Peter (2009), 4 in 1 An Obvious Theory of Directorship, Australian National University, Melbourne Australia.
[44] Ibid

them on board of the directorship team. It is the entire team and not only the directors performing the four functions in here.

Critically, each member of the team plays a different role depending on which role of directorship is being performed. The fact being that each role has its own skills and knowledge and most importantly, each role has its own unique behavior that contributes to the overall performance of the entire team. According to Sonnenfeld[45] therefore, directorship may depend on the circumstances surrounding the performance of different roles within the four functions of directors either as a delegate, a service provider, a director, or as an advisor. While this may seem true that some roles are specifically performed by directors, there should be a distinction between the individuals and the changing roles they perform within the four functions.[46]

Indeed according to Anne Skipper[47] being a director is more than following best practices of good governance. It is the manner in which the director leads that sets him/her apart. She further asserts that nothing can truly prepare a director for that inevitable first governance crisis when directly thrown into the deep end where things move at a rapid pace and with great intensity, but to adapt.[48] According to Skipper, the art is about learning how to be more influential, more persuasive, and how to work with divergent views in challenging situations. It is also about understanding more about emotional intelligence and directors own unique style and where it does and doesn't have influence.

1.2.4 Contextual Background of the Duties and Liabilities of Company Directors

Worldwide, directorship of companies is not only an old, but a complex responsibility. In England modern company law began in 1844 when the Joint Stock Companies Act was passed. In India this began in 1850 with the Societies Registration Act. In Kenya this was in 1989 with later amendments in 2015.

[45] Jeffery Sonnenfeld (2002), What makes Great Boards Great" Harvard Business Review
[46] Ibid
[47] Anne Skipper (2009), Mastering the Art of Directorship, Australian Institute of Company Directors http://www.companydirectors.com.au/courses/courses-for-the-director/mastering-the-boardroom/mastering-the-art-of-directorship
[48] Ibid

In Uganda the law governing companies and their directors came into force in 1969 with further amendments realized in 2012 following various challenges that necessitated the improvement of the law.[49] The new law is more detailed and constitutes several provisions pertaining to the duties, responsibilities and liabilities of directors. It introduces new requirements for directors of a company compared to the previous law. However, it introduces more challenges whose gaps remain uncovered and require immediate attention.

Prior to the introduction of the Act, the duties of Company Directors were governed by Common Law in Uganda. The Act codifies the Common Law position and makes a few notable additions which do not significantly alter the common law save for the general object clause for "carrying on trade and business which new development essentially abolishes the operation of the ultra-vires doctrine.[50] The Act extends the duties of directors and increases their accountability to shareholders of the company.[51] Whereas directors of companies in Uganda have duties and responsibilities delegated to them by the general meeting of shareholders, they also have other responsibilities compelled unto them by the Law. In Uganda like elsewhere the role of directors has greatly been twisted of late. This is clearly portrayed under the Uganda Companies Act as amended,[52] which expresses concern on the role and liability of directors.

According to Okwenywe Tonny[53] company law in Uganda like elsewhere in the world is not static, and that if consolidation was to wait until all the measures in the pipeline at the time it was enacted it would be delayed almost indefinitely. Indeed according to Wendell Holmes[54] the most enlightened judicial policy is to let people manage their own business in their own way. Reflecting on this background and setting the study makes an appraisal of directorship of companies, in particular duties and liabilities of directors.

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[49] The Company Act 2012 amendments in respect to management and administration of the company, duties of directors, disqualification of directors, connected and related persons, corporate governance and execution of documents by a company (all of which directly affect directorship of a company)

[50] https://www.linkedin.com/pulse/20141015042933-30339539-analysis-of-the-uganda-companies-act-amendment-2012?trk=pulse-det- Analysis of Uganda's Amended Company Act (2012)

[51] Ibid

[52] The Company Act of Uganda as amended (2012)

[53] Tonny Okwenye (2014) Company Law in Uganda

[54] Oliver Wendell Holmes (1911)

1.3 Statement of the Problem

It is imperative to state that good directorship of a company is a bedrock of successful management and therefore of great significance to the growth and existence of companies.[55] Fulfillment of the duties and liabilities under directorship is therefore not only central for the company's protection and success, but also fundamental for the protection of directors from company liability. Directors in Uganda indeed have both general and legal duties and obligations to not only ensure that a company achieves growth, but to as well achieve growth within the realms of the law. It is in view of the above that Company Law was incorporated in the laws of Uganda.

But while this is the case the law remains with gaps which need to be addressed. When the Company Act (amendment) Bill was introduced, its development had serious consequences on the liability of directors, much as to the directors' fulfillment of duties and liabilities in the best interests of the company. Directors are experiencing difficulties in advancing company success in respect to general duties and legal liabilities. In various enforcement challenges insured vs insured claims, unregulated digital advances vs employee willingness to adapt[56] are some of the challenges encountered by directors in due course of performing their duties. These have either left the shareholders aggrieved or the directors without defenses especially in cases of breach. Several directors have been charged and held liable for offences regarding their general duties and obligations, while shareholders have been left aggrieved when directors seek refuge under corporate veil to escape and impose liability on the company itself. Directors of companies are indeed experiencing difficulties. While general duties prevail they remain challenging as legal liabilities cannot be escaped. This study was motivated by the identified gaps in the current law that introduces biases in the fulfillment of liabilities for directors to act with utmost good faith, diligently and to the best interest of the company, thus the rapid assessment of the law relating to duties and liabilities of directors as a way forward to provide possible suggestions for review.

1.4 Purpose of the Study

This study is expected to contribute to unearthing appropriate interventions and strategies that can be adopted by government and companies to review the design and strategy of company

[55] Jeffery Sonnenfeld (2002), What makes Great Boards Great" Harvard Business Review
[56] Tonny Okwenye (2014) Company Law in Uganda

directorship in respect to duties and liabilities in particular for this study.

1.5 Objectives of the study

1.5.1 General Objective

The major objective of this study was to examine the effectiveness of the law governing directors of a company in fulfillment of their duties and obligations in Uganda, Kampala District in particular.

1.5.2 Specific Objectives

The specific objectives of the research were as follows;

(i) To examine the different duties of directors of a company and their liabilities.

(ii) To examine the effectiveness of the legal regime that provides for directors and their duties.

(iii) To examine the various enforcement challenges that the company directors encounter in course of performing their duties.

(iv) To analyze possible remedies that are available to an aggrieved shareholder where a director has breached his duties and the defenses available to a director.

(v) To suggest possible recommendations to the problems being encountered by directors in the performance of their duties.

1.6 Research Questions

i) What are the different duties and liabilities of directors of a company?

ii) How effective is the legal regime that provides for directors and their duties in Uganda?

iii) What are the various enforcement challenges that the company directors encounter in course of performing their duties?

iv) What are the possible remedies available to an aggrieved shareholder where a director has breached his duties and what are the defenses available to a director?

v) What are the possible recommendations to the problems being encountered by directors in the performance of their duties?

1.6 Scope of the Study

1.6.1 Time Scope

The study focuses mainly on the period 2012 to date, this being the period during which supportive laws were enacted. The study however also relies on a brief historical perspective for purposes of effective comparisons.

1.6.2 Content Scope

The study was limited to; examine the different duties of directors of a company and their liabilities; effectiveness of the legal regime that provides for directors and their duties; various enforcement challenges that the company directors encounter in course of performing their duties; analyzing possible remedies that are available to an aggrieved shareholder where a director has breached his duties and the defenses available to a director in order to suggest possible recommendations. Examples were also drawn from other common wealth jurisdictions for purposes of drawing on a comparative study.

An examination of the duties and liabilities of directors is chosen because in the present day Uganda, the implementation of this right has become an economic problem yet not much study has been undertaken in that specific regard. It is hoped that this study contributes to the righteous struggle to proper claims in general for both directors and shareholders in particular in the due course of breach of duty.

1.6.3 Geographical Scope

Kampala District was relied upon because of its convenient location and following the fact it has many companies and legally aware customers who have imposed strict liability on directors and management for breaches performed by directors other than companies and that the researcher is also familiar with selected companies.

1.8 Significance of the Study

The study cross examines the challenges responsible for the directors' breach of duty and the liability that they are exposed to, Kampala District in particular.

The study is also expected to provide information that may be of help to the government, legislators, and companies in light of the obligation to execute duty to the best interest of the company. The study findings will be of use to government and legislators by acting as a basis for review of the existing policy and legal frameworks governing directorship.

Client support and intervention will be solicited through creating awareness programmes against negligent breaches by directors and management. In this regard shareholders as company owners and other stakeholders will be accorded more liability autonomy for negligent duty performances or non-performance by directors.

The study will serve as a basis for future research in addition to providing substantial information for review of program designs to other stakeholders, policy makers and companies.

To the researcher, the study will contribute towards the award of a Diploma of Laws of Kampala International University (KIU).

1.9 Methodology of the Study

Research Methodology

Design

This study was carried out to appraise directors of companies in Uganda with specific interest on their duties and liabilities particularly with companies in Kampala. Respondents were guaranteed confidentiality during the process of interview. This was intended to ensure that respondents provide information without fear of possible reprisal from their superiors.

Procedure

The researcher used a qualitative method of research. Textbooks, were reviewed as well as various articles and reports published in addition to decided cases. This was also through library research especially from the registrar of companies and Kampala International University library. The researcher also used informal interviews especially with directors and management of companies including East African Importation and Distribution Company Limited, Mukwano Industries, JK Traders and Distributors Company as well as with Maganjo Maize Milling Company.

Study Population

The target population consisted of shareholders, company secretaries, directors, managers of different companies in Kampala as well as lawyers from different firm involved in handling company cases.

Sampling Methods and Sample frame

30 people were randomly and purposively selected from different companies especially among the management and directors. 5 shareholders from different companies were also interviewed making a total sample of 35 respondents. All these groups were specifically selected because they are conversant with matters pertaining directorship and company law and thus this would add more quality to the research results.

The sample was drawn from various companies for purposes of data comparison. Other respondents included 5 legal advocates from different law firms. These were targeted because they deal in company cases and thus had a better image of the legal and policy designs. The reason for selecting 40 respondents was that the number would be manageable and representative enough to ensure that the data collected was a true reflection of the position on ground.

Research Instruments

In-depth Interview guides

An in-depth Interview guide was designed and administered to different key informants within the sample frame. It was mainly administered on company directors, managers and some shareholders as well as to some members of the legal fraternity. This instrument was more appropriate in capturing their voices and concerns. The interview guide enabled the researcher to have a dialogue with respondents in a participatory manner in order to reflect their views.

Document analysis

The main sources of secondary data included the following; reviewing of company profiles, magazines, municipal and international laws, newspapers, reports and publications, and cases for orientation in the field, existing data sets, reports and textbooks. From these sources, location of the study area, population characteristics and existing literature relating to the topic were obtained.

Research Procedure

A letter of introduction was acquired by the researcher from the Dean, School of law, Kampala International University and this was used to introduce the researcher to the research participants.

Data Analysis

Coding

A coding frame based on themes and sub-themes was developed. This was done by looking through each question and answers from different respondents to particular variables. Data was accordingly and concurrently arranged.

Editing

The interview guide was edited for accuracy, consistency and completeness of information before leaving the field. Thereafter, editing was done at the end of each working day after gathering data from the field.

Limitation of the Study

Key informants and respondents of the interview thought that researcher was either politically hired to spy on them or doing this for sabotage purposes. Effort was taken to explain that the study was purely academic and there were no political or sabotage intentions that would come with accurately answering questions. In addition, some of the questions covered in this study dealt with sensitive issues on management and legal matters and thus a threat to personal security as well as job security. A lot of effort was required to avoid distress to respondents and also to allay fears. Critical limitations faced also included time, given the demanding nature of this research being a one on one. The other was financial aspect and materials. Some of the vital submissions required was difficult to access from employers. Nevertheless, the researcher did her best to ensure that these did not compromise the quality of the work produced.

Ethical Considerations

Right from the beginning of this research, the researcher considered it crucial to recognize that it is important during the process of research to understand that participation is voluntary; participants were free to refuse to answer any questions and to withdraw at any time.

Another important consideration taken into account was getting the informed consent of those that were met during the research process which involved interviews and observations bearing in mind that the area bears a lot of debate. Accuracy and honesty during the research process were very important for academic research to proceed. With this in mind, the research was treated with utmost care, in that there was no temptation to cheat and generate research results, since it would jeopardize the conception of research.

Personal confidentiality and privacy were very important throughout the process since the thesis is public. For directors and individuals that were consulted to provide information, their privacy has been respected and for any private information that was accessed, confidentiality is maintained.

1.10 Literature Review

Whereas too much literature has been provided on the subject of companies in general at common and statutory law, not enough literature has been provided on the duties and liabilities of directors of a company in particular under the domestic perspective. The major challenge here is that not much specific literature has been provided on the defenses of directors against claims and the defenses of an aggrieved director especially where a director through his fiduciary duties finds him/herself in breach. This section concentrates on not only reviewing literature on the subject from previous scholars, but also identifies the gaps in the existing literature.

Duties and Liabilities of a Director of a Company

Directors not only constitute board, but also shadow directors "those that instruct the directors upon how they can act, and those persons that exercise powers of the board by delegation.[57] According to **Van** and **Rankin**[58]directors have several duties that they owe to companies. The duty to act in good faith; the duty to act in the best interests of the company; the duty to apply power for a proper purpose; the duty to comply with the law and the company's constitution; the duty of care and skill; and the duty to use information and advice and yet avoiding self-interest.

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[57] Peter Van Rij and Tim Rankin, (2011), Duties and Liabilities Imposed on a Director of a New Zealand Company, Parry Field. http://www.parryfield.com/duties-and-liabilities-imposed-on-a-director-of-a-new-zealand-company/
[58] Peter Van Rij and Tim Rankin, (2011), Duties and Liabilities Imposed on a Director of a New Zealand Company, Parry Field. http://www.parryfield.com/duties-and-liabilities-imposed-on-a-director-of-a-new-zealand-company/

For **Dovan** and **Tunjic** directorship is divided into four functions. That is; approving capital structure; dividends and budgets; monitoring solvency and risks; and ensuring that company has a sound strategy with all legal requirements being met.[59] Precisely, **Dovan** and **Tunjic** acknowledge the role of the board to primarily be making, managing and keeping the best promises it can. The first promise provided the capital and the last promise the return on capital as purely clear in the global financial crisis of 2008[60] which proved that the company's survival ultimately depends on board's ability to keep its promises following the fate of many companies which could not repay their loans because directors made the wrong promises which they could not keep.[61] Indeed according to **Van** and **Rankin**, it is asserted that directors owe their duties directly to companies, giving it the right to sue a director for breach of duty other than shareholders or creditors.[62] The two however also concede that there are also other provisions where shareholders or creditors may directly pursue directors for example under circumstances of insolvent trading.

Dovan and **Tunjic** further submit that new developments have reduced board from monitoring, decision making and problem solving in the interest to maximize shareholder value hence opening directorship to new possibilities.[63] In respect to this, the dual believes that, reinforced by what directors are actually expected to do, the reality is that there is much more directors do to make, manage and keep promises. This study explores into the circumstances under which directors of companies in Uganda may find themselves participating under insolvent trading, despite the prohibition in the promises they make.

In India where as a company has the most striking features of being a distinct legal personality, with perpetual succession and easy transferability of shares, limited liability, centralized and with democratic governance, it is not a citizen under the citizenship Act, 1955 or the constitution of India as held by the Supreme Court in ***State Trading Corporation of India Ltd. v. C.T.O.*** As far

[59] Andrew Donovan & Tunjic Peter (2009), 4 in 1 An Obvious Theory of Directorship, Australian National University, Melbourne Australia.
[60] Andrew Donovan & Tunjic Peter (2009), 4 in 1 An Obvious Theory of Directorship, Australian National University, Melbourne Australia.
[61] Andrew Donovan & Tunjic Peter (2009), 4 in 1 An Obvious Theory of Directorship, Australian National University, Melbourne Australia.
[62] Peter Van Rij and Tim Rankin, (2011), Duties and Liabilities Imposed on a Director of a New Zealand Company, Parry Field. http://www.parryfield.com/duties-and-liabilities-imposed-on-a-director-of-a-new-zealand-company/
[63] Ibid

as the Companies Act of India[64] is concerned it defines the company as a company formed and registered under this Act or an existing company. An existing company means a company formed and registered under any of the former companies Acts. This definition does not reveal the real distinctive characteristics of a company.

The case is not different with Uganda. Similarly in Uganda the Act[65] defines a Company as;

> "*a Company formed and registered under this Act or an existing company or a re-registered company under this Act*;[66]

This definition may amount to the same defenses in Uganda where a director has acted in breach of his general duties to meet his legal liabilities.

Lord Justice Lindley perhaps gives a clearer definition when he defines a company as;

> "*an association of many persons who contribute money or moneys worth to a common stock and employ it in some trade or business, and who share the profit and loss as the case may be arising there from. The common stock so contributed is denoted in money and is the capital of the company and the persons who contribute it, or to whom it belongs, are called as members. The proportion of capital to which each member is entitled is his share which is always transferable although the right to transfer them is more or less restricted.*"

Challenges of Directors in Executing Duties

According to **Skipper**[67] directorship involves bringing the outside in. She strongly opiates that the main challenges faced by modern company directors in Australia are the same regardless of company size. These according to Skipper are mainly 3 and include; the pace of change which has never been faster; the increased complexity in the issues of directors regarding compliance and regulation; and the ambiguity and uncertainty about the disruptors which can impact their businesses. This literature however falls short of explaining challenges outside Australia. The study explored whether the same challenges are experienced by directors in Uganda.

Skipper's view however does not differ much from other scholars like Neal, Kane and Booh. According to **Neal** (2013), the managing Director of consulting firm BBS, in Salt City and through his client base of different sizes, in his Little Black Book of Billionaire Secrets reveals that directors' greatest challenges include; Treachery in the navigation of businesses. Neal notes

[64] The Company Act 2012)

[65] The Company Act of Uganda (2012) Cap 110

[66] Ibid Section 2

[67] Anne Skipper (2009), Mastering the Art of Directorship, Australian Institute of Company Directors, Sydney http://www.companydirectors.com.au/courses/courses-for-the-director/mastering-the-boardroom/mastering-the-art-of-directorship

that navigating a business is extra tricky these days. He attributes this mainly to rapid changes in technology. **Neal** asserts that the speed of economic and technological changes means that the right path yesterday may not work today and could be a disaster by tomorrow. To **Neals**, the ability to solve these dynamic problems separates those who excel, from companies who are closing the doors.[68]

Boon Koh (2012) holds an almost similar opinion. Boon asserts that digital shift is a very multi-disciplinary area for companies incorporating marketing, communications, IT, and service. Boon expresses that whereas a banner ad campaign might be seen as falling under the marketing department, it necessitates IT department involvement to build optimal landing pages, and to track visitors via tags and cookies and probably at the same time the analytics department may also have to be involved to assess effectiveness of the ads and to do the A/B ad testing in case company is running variants.[69] Precisely put, making a digital shift requires certain skills like managing different stakeholders, a strong grasp and understanding of new technology and applying it to business processes as well as a high project management experience. To Boon therefore, it is significant that companies establish a separate digital department team that can own and bring together these different areas in the company in order to make a digital strategy happen.[70]This study explores the convenience of shareholders setting up a separate digital department amidst a reduction of revenue and the challenge of directors in Uganda to influence such a decision amidst satisfying shareholders promises and yet at the same time not messing up with employee contract terms.

Further still, but on a similar note **Kane Rusell** (2012) notes that all too often marketing is operationally a function on its own. Digital on the other hand spans more than just marketing but is vertically bundled into the marketing business which is completely wrong. Large corporate companies need to start putting digital at the heart of their business objectives and that starts with the right people having a seat at the table.[71]

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[68] Neal Jenson (2013), The Little Black Book of Billionaire Secrets. The '8 Great Challenges Every Business Faces and How to Master the All. http://www.forbes.com/sites/cherylsnappconner/2013/03/04/the-8-great-challenges-every-business-faces-and-how-to-master-them-all/#3
[69] **Boon Koh (2012), The major challenges worldwide companies are facing while migrating into digital marketing,**
[70] **Boon Koh (2012), The major challenges worldwide companies are facing while migrating into digital marketing,**
[71] Kane Russell (2012), Risks Facing Directors and Officers https://www.quora.com/What-are-the-major-challenges-worldwide-companies-are-facing-while-migrating-into-digital-marketing

Indeed, **Drew Ostry** (2012) complements Kane's view when he opiates that skill lies with optimizing media but not actually buying it, like it is quite often experienced in large corporate companies which exercise buying power. To **Ostry**, this is an implication that little in the digital space, knowledge and experience are much more valuable.[72] Indeed Ostry professes that one of the biggest pitfalls is the lack of understanding on a very basic level across the entire company. This follows the fact that, digital marketing moves way too quickly for many key decision makers. Security issues, social media optimization, search among others is beyond the scope of knowledge for many.[73]

Kane Russell (2012), it is submitted that companies experience a challenge of digital shift because the directors fail to understand that digital marketing strategy is different from the previously applied media marketing. To Kane, **the absence of a switch-approach from media to digital remains a major challenge for management. While this is the case, directors as part of the entire team are similarly affected. As this may seem a management problem, especially when an agency has to be hired to effect the change, and where employees are redundant to adapt to change leaves a stumbling block for the company and how it should achieve growth.**

But digital migration is not about hiring and firing. According to Kane, (2012), digital marketing is about increasing customer life time value over time. He indeed gives a classic example of a company sending emails as a test (similar to buying a television airtime in a small market) but email is not a media buy and sending one email therefore may not produce results in the majority of cases. What will produce results is developing an email strategy overtime where sub-sequential action builds on the previous one. It is best that the customer is engaged in a digital conversation that crisscrosses the various digital medial touch points.[74]

Possible defenses to Shareholder and to Director when Director Breaches Duty

While companies are treated by English law as being distinct legal persons, a company cannot be functional without human beings. All activities of a company are necessarily conducted through

[72] Ibid
[73]
[74] Kane Russell (2012), Risks Facing Directors and Officers. https://www.quora.com/What-are-the-major-challenges-worldwide-companies-are-facing-while-migrating-into-digital-marketing

the medium of human beings even though company law theory treats companies as having sufficient legal personality to create contracts, to own property and so forth. Generally, stated, the most significant human beings in conducting activities of any company are its directors. Indeed the management of a company's affairs is ordinarily entrusted ultimately to its directors.[75]

According to Dominik, it is noted that the enlightened shareholder value approach is still largely accepted in most jurisdictions to underpin and classify which directors are required to act in the best interests of the company. The approach basically reminds directors of their primary duty which is to look after the collective interests of the shareholders. To this effect, Dominik confirms that the interest of other stakeholders such as employees, creditors, customers and suppliers is also taken into account, where this may ultimately be the interest of shareholders.[76]

Indeed according to Boon,[77] there is a growing trend for the actions of directors to be the subject of greater scrutiny by other stakeholders. Indeed, Dominik complements this when he notes that a number of provisions in the South African Companies Act creates significant rights of oversight and participation in favour of employees and trade unions. Regulators such as the competition authorities and the courts may also in future play a greater role to enforce stakeholder interests. This same idea is tested in this study for the Company Act of Uganda.

According to Flockhart[78] it is asserted that, today's legal and regulatory climate has put directors to greater scrutiny than ever before. But prior to this, as asserted by Dentice,[79] the law has historically, protected directors and officers from personal liability for decisions taken in relation to the company. Indeed, according to Dominik it has been a traditional principle that a company is a separate legal entity and that directors and officials generally only owe duties to the company, not to shareholders and other third parties. This has meant that only the company can take action against directors and officers for any breach of duty, and any damages recovered be

[75] Alastair Hudson, Stephen Girvin and Sandra Frisby, (2010), Company Law, Sweet & Maxwell Publishers.
[76] Dominik Bark (2011), Ways in which Pressures Exerted by Regulators, Creditors, Customers and Suppliers Increase Personal Risk for Directors of Companies in Today's Business World.
[77] Opcit Boon Koh
[78] Flockhart
[79] Nathan Dentice

paid to the company. It is no longer as easy for directors to protect themselves behind the structure of the company.[80]

Different from the past, Dominik affirms that directors face potential liabilities arising from investigations by the increasingly active regulators; new legislation which can impose personal liability on directors or officers in a variety of contexts; increased shareholder activism, which has in recent years led to an increase in claims being brought against directors for breaches of duty; and claims brought by third parties, such as customers or clients of companies, who are increasingly willing to take action against those companies and the individuals who control them.[81] Indeed Dentice[82] submits that in the recent years, companies have increasingly seen new regulatory duties imposed directly upon directors and new avenues created by which directors may face civil claims from third parties including creditors, customers and suppliers.

In Germany for example, the law imposes a direct personal liability on directors for financial losses both a consequence of decisions that cause harm to third parties as well as for the damage done to the company itself.[83] In Germany there is a legal duty for the supervisory board to sue executive directors if there is evidence of breach of duty resulting into a financial loss to the company. Claims are brought forward as insured vs insured claims.[84] On the other hand insolvency administrators and liquidators try to enforce indemnification claims. Thus investigations relating to criminal proceedings are constantly increasing, which often have the potential to result in directors' claims at a later stage.

The study explored this in the Ugandan context whether trend is visible particularly given the recent institution of the new collective redress mechanisms for unprotected workers in factories in Uganda.

However, according to Morrison,[85] pressures from these constituencies have existed for years. But it is the pressure focus that is changing over time. Morrison indeed confirms that today shareholders can voice their views concerning executive compensation through non-binding, advisory votes which may at times result in litigation under which the plaintiff shareholders can

[80] Dominik Bark
[81] Dominik Bark
[82] Opcit Nathan Dentice
[83] Feifel
[84] Feifel
[85] Morrison Peter B

allege that directors failed to properly disclose material information relating to the request for the advisory shareholder action concerning executive compensation. Indeed Dominik further adds that the pressures have also enabled regulators to bring actions against directors of non-depository institutions for alleged violations of consumer protection laws in a manner that violated state laws.[86]

In the same line Bark notes that the historic economic crisis that emanated from the financial collapse in 2008/09 has dramatically changed the way third parties perceive the responsibilities of directors. [87] This literature implies that various stakeholders have come to recognize matters that may arise through the various actions of directors and compensatory gains from the consequences impacted.

Indeed, **Bark** further notes that, there is a much more direct correlation between the acts of Directors or the lack of action thereof and the potential liability.[88] It is obvious with Bark that whenever people are losing money they will go directly after the ones they believe are responsible for the loss or that have deep pockets. To Bark this is dramatically recognized in the way regulators respond to liability. Mainly three trends that can be observed, the regulators target individuals rather than only the legal entity; regulators are more determined to achieve a punishment as they are now equipped with much more effective tools; and finally regulators go international and collaborate across borders as much as the companies which they are watching over do.[89] The study explored this in the context of Ugandan regulatory authorities.

In respect to the director defences, in the abstract there could be two ways in which the law could operate: either by taking an objective view of what court thinks the director ought to have done, or the law could leave the decision subjectively to the director and consider whether or not the directors were acting in the best interests of the company. The law takes the latter approach. This is seen in ***Mutual Life Insurance v The Rank Organization***, [90]Goulding J. applied this

[86] Dominik Bark
[87] Dominik Bark
[88] Opcit at Bark
[89] Opcit at Bark
[90] [1985] BCLC 11

distinction between questions relating solely to management of the company and other questions in upholding a rights issue which was not made available to certain U.S. shareholders.

This is unlike in the *Howard Smith* case it was held that this particular arrangement did not upset the status quo within the company but rather maintained the investment policy of the company. As considered above, in ***Howard Smith v Ampol***[91] it was held that it was unconstitutional for the directors to exercise their powers purely for the purpose of destroying an existing majority or creating a new majority which had not previously existed, and consequently it was not a question relating solely to the management of the company over which the directors had exclusive competence.

The company's constitution is separate and distinct from the powers themselves. Thus it would be a breach of duty for the directors to operate contrary to the memorandum or articles of the company or to enter into a contract on behalf of the company whereby they remained in post as directors so that the shareholders could not exercise their constitutional rights to appoint new directors. 36 Similarly, using company funds other than for the commercial purposes of the company is contrary to the purpose for which management is delegated to the board. In other cases which are regarded as being management areas, however, the courts will simply apply the bona fide test to decide whether the directors have acted in breach of their duty in exercising a power under the articles, for example to vary the terms of the managing director's service contract.

If the directors act in breach of their duty, then they will be liable to account for any profits made and to compensate the company for any loss incurred. If the director actually obtains corporate assets for himself, he becomes a constructive trustee of those assets and the company will be able to recover the property or its proceeds from him. If the directors, in abuse of their powers, have entered into a contract with a third party, clearly the members can ratify it, but under certain circumstances third party nonetheless may enforce the contract against the company. This is seen in ***Criterion Properties Ltd v Stratford UK Properties LLC.***[92] The alleged

[91] [1974] UKPC 3
[92] [2004] UKHL

abuse of power was an agreement entered into by the then managing director of a company which allowed for the sale of certain assets to S if another party obtained control of Criterion. This made company less attractive to outside predators because valuable assets could be sold off. Since there was evidence that this contract would damage the company more than an outsider gaining control of the company, the Court of Appeal held that it was an abuse of power.

A director may be liable for debts incurred by the company at a time when the company itself is unable to pay those debts, as and when they fall due. This is because one of the fundamental duties of a director of any company is to ensure that the company does not trade while it is insolvent. A company is insolvent if it cannot pay its debts when they become due. Common signs of insolvency include: low operating profits or cash flow from the business; problems paying trade suppliers and other creditors on time; trade suppliers refusing to extend your business further credit; problems with meeting loan repayments on time or difficulty keeping within overdraft limits and where legal action is taken, or threatened, by trade suppliers or other creditors over money owed to them.

Therefore, to determine if a company is trading while insolvent, directors will need to assess: the cash flow of the company; determine whether company's anticipated current and future cash flow will be sufficient to enable it to pay current and future debts as and well they fall due and if the financial position of the company in terms of the assets and debts it has as a whole. Else allowing a company to trade while insolvent is acting illegally and in breach of the criminal provisions in Australia.[93] This same situation is tested in the context of Uganda under the current study.–

1.11 Chapterization

Chapter one covers the introduction, lays out the background of the study, statement of the problem that influences this research, purpose of the study, objectives, research questions guiding the data collection, scope, significance of the study, literature review, methodology and synopsis of the study.

[93] Andrew Donovan & Tunjic Peter (2009), 4 in 1 An Obvious Theory of Directorship, Australian National University, Melbourne Australia.

Chapter two provides and examines the normative framework governing directors in executing duties at both common and statutory law.

Chapter three on the other hand provides a detailed analysis of the effectiveness of the legal and policy framework governing companies, in particular directors in the execution of duties.

Chapter four provides a presentation of the findings as well as the interpretation of the data collected from the field and through documentary analysis with more information drawn directly from company shareholders, directors and legislators. This chapter further discusses the challenges of aggrieved shareholders in case of breach of duty by any of the directors as well as a comparative study of other jurisdictions under the Common Wealth with attention paid to decided cases where the breach of duties by a director has been discussed in the context of showing the nexus between the duties of directors and shareholder rights.

Chapter five provides the summary, conclusions as well as recommendations made under the study.

CHAPTER TWO: DUTIES OF DIRECTORS BOTH AT COMMON AND STATUTORY LAW

2.1 Introduction

In Uganda, attempts to reduce company liability in the face of negligent behavior in the performance and execution of duties by directors and management has been made through different laws for example the Constitution of the Republic of Uganda, the Company Act of Uganda, the Penal Code Act and several others. While these laws exist, examining the liability of directors in case of breach of duty requires bearing in mind the distinction between self-interest and the best interest of the company. The distinction if not clearly drawn, implies that legal system will encounter much difficulty however much it tries to ensure that the right is observed.

2.2 Duties of Directors at Common Law

According to **Werksman Attorneys,**[94] it is acknowledged that common law dictates the directors' actions to be in the utmost good faith and in the best interests of their companies including the need to exercise care, skill and diligence in promoting the company's success through independent judgments. On the other hand the failure to properly perform the common law duties may render a director personally liable to pay monetary damages.[95]

Directors of companies, at common law are shielded from personal liability for all decisions they take on behalf of the company, however their protection has been curtailed by the ever changing legal and environmental demands.[96]This implies that directors of companies can no longer hide behind the firm. Directors will accordingly, continuously face liabilities that arise from investigations through the increasingly active regulators, increased shareholders activism; new legislation reviews which imposes personal liability in a various contexts and also by claims brought by clients and customers who may more unexpectedly take action against the company.[97]

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[94] Werksmans Attorneys (2012), Duties and Liabilities of Directors: Companies Act No. 71 of 2008, Western Cape, SA.
[95] Ibid
[96]Financier World Magazine (2014), Risks Facing Directors and Officers. August Issue. http://www.financierworldwide.com/roundtable-risks-facing-directors-officers-aug-2014/
[97] Alastair Hudson, Stephen Girvin and Sandra Frisby, (2010), Company Law, Sweet & Maxwell Publishers.

Directors must manage the company in good faith and with full responsibility. Every member of the Board of Directors is personally liable for any loss suffered by the Company if he/she acts wrongfully or fails to perform his/her duties in the manner stated above. If the Board of Directors consists of more than one member, the above liability applies jointly among each of the members.

However, a Director may not be personally held liable if he/she can prove that: the loss suffered by the Company is not due to his/her wrongful actions or failure to perform his/her duties; he/she has managed the Company in good faith and prudently for the benefit of the Company and in accordance with the purpose and objectives of the Company; he/she has no conflict of interest either directly or indirectly in the management of the Company that causes a loss; and he/she has taken all the necessary actions to prevent the occurrence or continuance of the loss.

In case company runs bankrupt, then a director may not be held liable if he or she can prove that; the bankruptcy is not due to his/her fault of negligence; he/she has managed the Company in good faith, prudently and with full responsibility for the benefit of the Company and in accordance with the purpose and objectives of the Company; he/she has no conflict of interest either directly or indirectly in the management of the Company; and he/ she has taken all necessary actions to prevent bankruptcy.

On the other hand, the Board of Directors may be held liable under the following situations:
If there is a share buyback conducted by the company but voided by law, the directors though acting in good faith become jointly and severally liable to shareholders who suffer a loss from the share buyback transaction executed by the board.

If directors furnish inaccurate, untrue and misleading financial reports causing loss to third parties, members of the board are jointly and severally liable unless the directors can prove that it was not caused by their fault or negligence.

The failure to accept returned interim dividends holds directors accountable once loss occurs where shareholders cannot return the dividends declared.

The failure to report ownership of shares by board of directors affects such persons acting in the position of directors who failed to report their shareholdings and where this failure causes losses to the company.

In case company runs bankrupt as a result of fault or negligence of the board of directors, leaving insufficient assets for the company to cover the losses incurred in the bankruptcy, then members of the board remain jointly and severally liable for the balance of obligations that cannot be repaid from the assets.

The law restricts the board of directors from; Having a voting right in the general meeting where director acts as proxy of the shareholders; Performing any legal action on behalf of the Company after the expiration of the term of the Company; Filing for the bankruptcy of the Company without approval from the General Meeting of Shareholders; and conducting corporate actions such as a merger or acquisition, placing security over the company's assets amending the Articles of Association without seeking approval from the general meeting of stakeholders.

No member from the Board of Directors has an entitlement to represent the Company in the event of a dispute between the Company and the relevant Director, or the relevant Director has a conflict of interest with the Company. In this case, another member of the Board of Directors will represent the Company, or the Board of Commissioners will do so if all the Directors have a conflict, or another party appointed by the General Meeting of Shareholders if all the members of the Boards of Directors and Commissioners have a conflict of interest with the Company.

Indeed Blakiston and Crabb[98] assert that, under common law principles, a director should act honestly; exercise reasonable care and skill; be diligent, aware of and understand the fiduciary responsibilities of his/her position. According to the dual directors' duties are thus highlighted as; acting bona fide in the interests of the company (act in good faith); exercising care, skill and diligence; exercising the powers for the purpose for which they have been conferred; retaining discretionary powers; and avoiding conflict of interest.[99]

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98 Blakiston and Crabb (2007), Overview of Duties Imposed on Directors of Public Companies.
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In addition, directors also have extra statutory duties imposed by law. These do not deviate from common law, but adopt a statutory defense of business judgment rule. Directors cannot escape liability in case of breach of the duty of care, skill and diligence as long as the requirements of the rule are not met.[100] Therefore, whereas it is reasonable for a company to rely on directors' trust, confidence and loyalty, directors have an obligation not to breach their fiduciary duties.[101]

2.3 Duties of Directors at Statutory Law

In Uganda like elsewhere, company directors occupy a special position vis-à-vis the companies of which they are directors. Without regulation, directors could potentially enter into transactions with their companies which would result in them placing their interests before those of the company, its shareholders and/or its creditors. The strings of connection for a person to be connected with a director include filial relations, a body corporate with which the director is associated, a trustee of any trust the beneficiaries of which include the director and his/her relations and a partner to the director or any person otherwise connected to the director.

2.3.1 The Constitution of the Republic of Uganda 1995

The Constitution of Uganda is the supreme law has various articles that highlight the duties and liabilities of directors of companies. Indeed, subject to Article 245 a corporate social responsibility is imposed on directors of companies to protect and preserve the environment from abuse, pollution and degradation in addition to promoting environmental awareness.

Guiding principle XXVI is for purposes of accountability. Chapter fourteen provides the leadership conduct. Directors of companies are part of the leaders of the companies. Directors like all other officers are prohibited from conducts that are likely to compromise their honesty, impartiality and integrity maintenance of honesty, probity, impartiality and integrity in public affairs and the protection of public funds and other public property.

2.3.2 The Company Act of Uganda (2012 amended) Cap 110

The Act was signed into law in 2012 and became operative in 2013 on the 1st of July. According to the Act "company" means a company formed and registered under this Act or an existing

[100] Werksmans Attorneys (2012), Duties and Liabilities of Directors: Companies Act No. 71 of 2008, Western Cape, SA.
[101] Blakiston and Crabb (2007), Overview of Duties Imposed on Directors of Public Companies.

company or a re-registered company under this Act. A company constitutes 3 bodies namely a) the Shareholders; b) the Board of Commission; and c) the Board of Directors in particular for this Study.

The Board of Directors (BOD) is an authorized organ by shareholders that may constitute one or more directors responsible for the management of the company in the interests of the company as well as to the achievement of the objectives of the company.[102] The board is also responsible for the representation of the company both within and outside the courts in compliance with the provisions of the Article of association.[103] It is responsible for the management of the company as far as operations and business is concerned and is usually under the supervision of commissioners. On the other hand the shareholders constitute members that contributed shares (capital) to the company and have the right to appoint and terminate members of the Board of Directors and Commissioners.[104] The Act contains a range of duties and statutory liabilities for directors. These include among others; government reporting requirements; proper identification of the corporation; membership list disclosure provisions; and, winding-up procedures.

To qualify for the position of a director, a person must have the capability to perform legal actions within a period of 3 years prior to his/her appointment and she/he must have never been declared bankrupt, a member of board of a company who caused that company to become bankrupt, must have never been sentenced for committing a crime causing financial loss to the State. A statement letter from the individual to be appointed as a new Director confirming that he complies with the requirements must be provided to the Company.

Company Law in Uganda, obliges the Board of Directors to among other things;
Deliver an annual report that includes the financial statement of the Company after it has been examined by the Board of Commissioners to the General Meeting of Shareholders within 6 months to the end of the Company's financial year;[105] The failure to file the required reporting

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103 Makarim and Taira S (2009), Duties, Responsibilities and Liabilities of Board of Directors and Board of Commissioners of an Indonesian Limited Liability Company.

104 Makarim and Taria S (2009), Duties, Responsibilities and Liabilities of Board of Directors and Board of Commissioners of an Indonesian Limited Liability Company.

105 Section 132- 136

requirements can lead to personal liability for directors with no limitation or possible defense to directors who permit a breach to occur.

Prepare a business plan that includes an annual budget plan for the next financial year prior to the commencement of the next financial year and submit the business plan to the Board of Commissioners or General Meeting of Shareholders of the Company as regulated in the Articles of Association of the Company.

Prepare and maintain a Register of Shareholders of the Company and a Special Register containing information on the share ownership in the company and/or other companies of members of the Board of Directors and the Board of Commissioners and their immediate family members; Archive the resolutions of the Shareholders and Board of Directors of the Company and all other corporate documents. This is in addition to obtaining approval from the General Meeting of Shareholders for the transfer or the encumbrance of more than 50% of the total assets of the Company in one or more transactions, whether related or not, in one or more financial years as regulated in the Articles of Association of the Company;

Hold a General Meeting of Shareholders including to send invitations or summons to the shareholders either annually or extraordinary as necessary or requested by certain Shareholders, Commissioners or Directors of the Company as regulated in the Articles of Association of the Company.[106] This is in addition to notifying the Registrar of Companies of any change to the composition of the Boards of Directors or Commissioners of the Company within 10 days as of the date of the resolution of the General Meeting of Shareholders with regard to the change.[107]

More still recording any transfer of shares or encumbrance of shares in the Company Register and notify the registrar regarding the change of the shareholders within 30 days as of the date of the transfer of shares; Notifying the creditors of the Company if there is a reduction in the capital of the Company in at least one newspaper within 30 days of the resolution of the General Meeting of Shareholders regarding the reduction.

[106] Section 138
[107] Section 90 - 91

Also, in certain transactions such as the merger, acquisition, consolidation, segregation or dissolution of the Company, the Board of Directors also has a number of obligations regarding the transaction, such as to prepare the transaction plan, announce the proposed transaction in the newspapers, or act as the liquidator in the dissolution of the Company.

Under Section 2 subject to the interpretation of the terms applied in the Act, a director includes any person occupying the position of director by whatever name called and shall include a shadow director. Whereof a shadow director means a person in accordance with whose directions or instructions the directors of a company are accustomed to act but does not include a person who gives advice to the directors in a professional capacity.

Section 186[108] of the Act provides that the business and affairs of a company must be managed by or under the directives of its Board of Governors which is endorsed with the authority to exercise all of the powers and perform all of the functions of the company except to the extent where the Act or the Company's Memorandum of Incorporation (MOI) provide otherwise.

Section 198[109] addresses the standard of conduct expected of Directors of a Company. The Section compels directors to act honestly, in good faith and in a manner reasonably believed to be in the best interests of/benefic of the company. Thus Subject to **Section 198 Subsection (a)** to **(d)** [110] any director who acts in that capacity, must exercise the powers and perform functions of a director; a) in good faith and for a proper purpose; b) in the best interests of the company; and c) with a high degree of care, skill and diligence as reasonably expected of a person carrying out the same functions in relation to the company as carried out by the director and having the general knowledge, skill and experience of that director. Director's duties have been codified under the Act and directors are expected to act in good faith in the interests of the company and ensure the company's compliance with the Act and any other law. Common law duties such as the duty to retain discretion, despite not being codified, also remain enforceable.

Subject to **Section 199** of the law stipulates the disqualification of directors: The Act introduces a statutory bar to a person acting as a director for a period of three years if he or she fails to keep

[108] The Company Act of Uganda
[109] Ibid
[110] Ibid

proper accounting records, prepare and file accounts, send returns to the Registrar, file tax returns and pay tax and/or allows a company to trade while insolvent.

The Act also further expands the rules in respect to extension of loans to directors under **Section 203**. The Act states that a company shall not make a loan to a director of the company or its holding company, or enter into any guarantee or provide any security in connection with a loan made by any person to such director. This rule relates to public companies only and no pecuniary threshold/bar is provided. This prohibition is designed to protect the company's creditors and the company itself. However, there are a number of exceptions. The Act recognizes the major exception that a company may provide any of its directors with funds to meet expenditure incurred or to be incurred for the purposes of the company or to enable the directors perform their duties provided prior approval from the general meeting is sought.[111]

The Act subject to **Section 205**, bars substantial property transactions between a company and a director of the company or its holding company or a person connected with such a director unless the arrangements is approved by an ordinary resolution of the company or, if the director or connected person is a director of its holding company or a person connected with the director, by an ordinary resolution of the holding company. Arrangements entered into by the company in contravention of this rule are voidable at the instance of the company unless full restitution is not possible, any consequential rights acquired in good faith for value by the transactions would be affected by its avoidance or the arrangement is affirmed by the company in a general meeting within a reasonable period.

Director disclosures are provided for under **Section 218** of the Act as part of the general equitable principle that directors should avoid a conflict of their interests and duties. The Act requires a director to disclose interests and other substantial transactions involving the company of which he/she is a director. For example, all substantial contracts involving the director and the company must be disclosed. Thus subject to **Section 226**, the directors' interests should be registered. By performing any function of a director in respect to any matter subject to **Section**

[111] The Company Act of Uganda 2012 Section 206

198[112] a director will have satisfied his or her obligations under the Act if he has taken utmost good faith.

2.4.3 The Occupation Safety and Healthy Act (2006)

Responsibility for health and safety matters is a responsibility of the company rather than of individual directors. Nevertheless, where a body corporate commits a health and safety offence with the consent or connivance of a director or the offence is attributable to his neglect, then he is liable to prosecution. In this context consent refers to knowing the circumstances and risks while connivance is about knowing and not doing anything about the risks. Neglect means unreasonable breaching of a duty of care. These may lead disqualification or imprisonment of a director. General duties, obligations and responsibilities of employers in particular directors in regard to workers safety and health for this study are clearly provided for under Section 13 to 21 of the Act as seen in ***Lee vs Lees Air Farming Limited***[113]

Companies and individuals including the directors and managers of a company are subject to the common law offence of manslaughter by gross negligence, which applies where according to ***R v Adakai***[114] the defendant owed a duty of care to the deceased; there had been a breach of this duty of care; and the breach was so grossly negligent that the defendant can be deemed to have had such disregard for the life of the deceased that the defendant's conduct should be seen as criminal and deserving of punishment.

2.4.4 The Penal Code Act (as amended in 2007)

Under **Section** 7 the Code provides for the claim of right and declares persons, directors in particular for the current study not criminally responsible in respect of offences relating to property if the act was done or omitted with respect to the property the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim without intention to defraud.

Section 8 on the other hand covers cases of intention and motive and provides that in cases of negligent acts and omissions, a person is not criminally liable for an act of omission which

[112] The Company Act of Uganda (2012)
[113] [1961] AC 12
[114] [1994] 3 All ER 7

occurs independently of the exercise of his will for events which occur by accident unless the intention is expressly declared to be an element of the offence constituted.

In respect to mistake of the fact, Section 9 holds that a person who does not omit to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act of omission to any greater extent. And Section 288 explains specific rush and negligent acts with no precautions taken to prevent harm.

2.5 Conclusion

The law relating to directorship in Uganda as reflected above has been crafted reflecting on the various cases and breaches by the directors to the integrity of the company. But while this remains the case, the company will always remain an association that exists in perpetuity and distinct from the members that constitute it and thus requires a separate legal existence from its members.

CHAPTER THREE: EXAMINING THE LEGAL REGIME AND ITS EFFECTIVENESS

3.1 Introduction

This chapter provides a critique of the available legal regime governing duties and liabilities of directors of a company in Uganda. The chapter further highlights the consequences of breach for directors.

3.2 The Policy Framework Governing Directorship

For one to be a director of a company, it may not necessary come through a formal acceptance of a contract, but also where one exercises sufficient influence over a company under certain circumstances having acted as one for certain purposes.[115] The law prohibits certain people from acting as directors of company e.g. persons under 16 years of age, auditors of the company,[116] disqualified persons and bankrupts.

In practice companies have different grades of director including full-time, executive directors, part time and non-executive directors. Generally executive directors may not control all aspects of management, especially decisions relating to their own salaries. Non-executive directors decide issues which directors ought not to decide alone generally drawing from backgrounds which give them useful perspectives on the company's business to in turn advise the executive directors on the most appropriate ways for the company to act in a number of circumstances.

The more complex the company, the more likely it is that different directors will have very different responsibilities within the organization for example managing a particular sales and purchases unit, supervising the organization's financial affairs, or personnel, or whatever. As a consequent, there are differences in levels of power, influence and remuneration of directors. Thus a number of different types of people may then come to be treated as a director, depending on their responsibilities and contributions. This is clear for De factor directors as seen in ***Re Hydro Dan (Corby) Ltd***[117], where Millett J held that;

[115] (1994) 2 B.C.L.C. 180, 183
[116] (1994) 2 B.C.L.C. 180, 183
[117]

"a de factor director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company, it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of a company's affairs or undertook tasks in relation to his business which cannot properly be performed by a manager below board level.

The above situation although squarely applied in ***Secretary of State for Trade and Industry v Morrell***[118] it is unlikely applied in the case of ***Re Richborough Furniture Limited***[119] Lloyd J criticizes it on grounds that there ought not be a requirement that such a person should be holding himself out as being a director nor that he be held out by the company as being a director. Lloyd J instead upheld that such a person be entitled to a benefit of doubt and that court requires clear evidence that he has been the sole person directing the affairs of the company or acting on an equal footing with others who act as directors in directing the affairs of the company.

Directors as fiduciaries; A director owes fiduciary duties to the company and will act as an agent of the company.[120] The director's fiduciary duties and duties of care to the company are considered in ***Aberdeen Railway***[121] Lord Cranworth L.C held that;

> *Directors are a body to whom is delegated the duty of managing the general affairs of the Company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.*

Directors' duties at the heart of company law

The nature of directors" duties is one of the most interesting aspects of company law. Given that the activities of companies are in fact conducted by human beings, albeit under the disguise of corporate personality, and given that a company's directors are its principal

118 (1996) B.C.C 229
119 (1996) 1 B.C.L.C 507
120 Mills V Mills (1938) 60 C.L.R 150 at P. 186.
121 Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461 at p. 471.

human actors, then the duties of those directors to the company, and the effect of those duties on third persons such as the shareholders, employees, creditors and others, are central to the legal control of companies.

The Companies Act 2012 introduced a statutory code of directors' general duties for the first time. The statutory code expressly preserves the effect of the previous case law and allows the precise nature of those duties to develop with any later case law. The case law relates specifically to the common law on directors' duties and significantly applies the equitable principles which govern the liabilities of all fiduciaries, including directors. The purpose of the statutory code was to formalize directors' duties so that all people outside the legal fraternity can understand their duties as directors more clearly.

3.2.1 General Duties of Directors of a Company

The Company's Act sets out the general statutory duties of a director among which is the duty to comply with the company's constitution and decisions made under the constitution and to exercise the powers only for reasons for which such power has been accorded.[122]

The Act also imposes a duty for a director to act in a way he/she considers good faith which will most likely the success of the company for the benefits of its members as a whole. In performing this duty, the director must therefore have regard to all relevant matters that can lead to success, but not forgetting to put the likely consequences into consideration. In particular, the likely long term consequences; the interest of the company's employees; the need to foster the company's business relationships with suppliers/customers/and creditors; the impact of the company's operation on the environment and on communities; and the desirability of the company to maintain a reputation for high standard business conduct as well as the need to act fairly between the members of the company.

Further still is the duty to exercise an independent judgment power that is not subordinate to the will of others. This however does not imply that directors cannot seek or rely on device as long as they are able to exercise their own judgment on whether to follow or not.

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More still, is the duty to exercise reasonable care, skill and diligence. This requires a director to be diligent, careful and well informed about the company's affairs. If a director possesses a particular skill, experience or knowledge relevant to this function expectations regarding what is reasonable will be judged accordingly.

Further still is the duty not to accept benefits from third parties individually, other than as a company by reason of the company. This implies that acceptance of benefits is authorized by the company subject to its constitution to enable director to benefit from reasonable corporate hospitality. This is in addition to declaring any interest in any proposed transaction or arrangement. Before the company enters such a transaction, the director ought to have made such a declaration already.

In addition to the above, is the duty to avoid conflict of interests. The interest of the director and those of the company should never conflict, thus in all his actions directors' decisions should meet company consent with all necessary formal requirements. The duty to maintain confidentiality of the company's affairs and yet at the same time consider and act in the interests of creditors especially in times of threatened insolvency.

A director may also be an employee of the company. Under this circumstance he/she typically becomes an executive director. The general duties of directors outlined above apply equally to executive directors, but an executive director will also be bound by the terms of his employment contract.

3.2.2 Consequences of Breach for General Duties

The general duties outlined above are owed by the director to the company and only the company (but in limited circumstances, also to the shareholders) will be able to enforce them as such. Remedies available for breach of these duties include injunctions to prevent further breach for instance by setting aside an affected transaction entered into in breach of requirements on conflict for purposes of restoration of company property held by the director and damages. A breach may also be grounds for termination of an executive director's service contract.

This note only covers the general duties of directors under the Companies Act before 2012 and it is beyond the scope of this note to identify all circumstances where a director may be personally liable for acting as a director. By way of illustration only as provided under the Companies Act.

A director may be liable for failure by the company to make required filings at Companies House; under the Insolvency Act,[123] a director may be personally liable for wrongful or fraudulent trading in the context of insolvency of the company; and the board and each director has responsibilities under the Occupation Health and Safety Act[124]breach of which may result in criminal sanctions on a director. In certain circumstances, a director may be disqualified from being a director under the Company Act.[125]

3.3 General Liabilities of Directors of a Company

There are some circumstances where directors who breach the law can become personally liable for the company's debts and/or be the subject of other regulatory action against them.[126] This may apply particularly if a company is a separate legal entity; if director is personally liable; and consequences of failing to perform duties as a director.

A company is a separate legal entity if a company has a distinct legal existence that is separate from that of its owners, managers, operators, employees and agents and exists in perpetuity. This is seen in ***Micheal Oscar Kayemba vs James Mulwana and 3 Ors***[127] where the company continues in perpetual existence despite change in membership, unless terminated under the legal process of winding up, death, insolvency or insanity of any of the members cannot affect the company's legal existence; if company has its own property, its own rights and its own obligations and if the company's money and other assets belong to the company and must be used for the company's purposes. This is in addition to having powers to own and dispose property and assets; enter into contracts; and sue and be sued.

[123] Insolvency Act of Uganda (2011)
[124]The Occupation Safety and Healthy Act (2006)
[125] The Company Act of Uganda (2012) Section 199
[126] Ibid Section 231
127127

A director of a company cannot be exempted from liability subject to **Section 231** and **Section 221**[128] in connection with any negligence, default, breach of duty or breach of trust in relation to the company. A director cannot be indemnified by the company against those liabilities unless the indemnity meets specific statutory criteria. The prohibition does not prevent a company from providing insurance for directors, but this does not clear them from their obligations.

A company may generally ratify acts carried out by a director in breach of duty. Appropriate procedures need to be followed for ratification and not all acts can be ratified for instance, fraudulent acts of the director. A court may relieve a director if it considers that the director has acted both honestly and reasonably and that he ought fairly to be excused subject to **Section 219**.

This section has provided a general overview of general duties of directors of limited liability companies under the Companies Act 2012. However, different or additional issues may arise for other types of entity or for companies operating in regulated or specific sectors.

A director may have numerous other responsibilities in relation to a company. These arise, for instance, in arrangements between the director and the company, share dealing including in relation to insider dealing, financial reporting and accounting, share issues and winding up. This is in addition to situations where breach of duty causes company loss. Under such circumstances, a director may have acted illegally, be in breach of a civil or criminal provision of the Company's Act and may be required to compensate company for the loss caused.

It is important to remember that a director's obligations may continue even after the company has ceased trading and has been deregistered.

3.3.1 Personal liability that May Be Imposed on Directors

In addition to the circumstances set out above in which a director may be required to account for monies received or to indemnify the company against losses incurred, a director may be personally liable;

a) to a Fine if the company does not comply with any of the requirements in the Companies Act or disclosure legal requirements;

[128] Ibid

a) for contracts signed by him purportedly on behalf of the company before its incorporation;
b) if he acts in the management of the company while disqualified or acts on the instructions of someone whom he knows to be disqualified;
c) if he has previously been director of a company which has gone into insolvent liquidation and is then concerned in the carrying on by another company of business under a name which is the same as or similar to the name used by the insolvent company within 12 months before it went into liquidation
d) for damages if he makes a fraudulent or negligent misrepresentation in the course of negotiating a contract between the company and the third party;
e) under a contract if he fails to make it clear that he is contracting as an agent of the company and not personally;
f) to a third party for damages for breach of an implied warranty of authority if he concludes a contract on behalf of the company but exceeds his authority in so doing and the company is therefore able to set the contract aside; or
g) in relation to wrongful trading or fraudulent trading by the company under the Insolvency Act 2011.

A number of statutes contain provisions stating that if a company commits a criminal offence, a director is also guilty of the offence if it is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, the director. In this context, 'consent' means being aware of what is going on and agreeing to it; and connivance means knowledge together with a negligent failure to prevent. Neglect implies that there is no need for knowledge of the matters amounting to the offence, instead, there merely is a failure to act when under a duty to do so.

3.4 Conclusion

In Uganda like elsewhere in the business world, the nature of directorship for companies in is central to company law. Directors are viewed as fiduciaries, but they may also have other capacities, not least their personal capacities. This is clear in private companies where directors may be substantial shareholders as well as managers of the company. While this remains the case, it introduces the possibility for conflicts between a person's fiduciary position and his or her personal capacities as different from a public company where directors have few shares of the total shareholding the fact being that ownership and management are more likely separated.

CHAPTER FOUR: A PRESENTATION AND DISCUSSION OF THE FINDINGS

4.1 Introduction

This chapter presents and discusses field findings of the concepts and notions that directors of companies should uphold while conducting duties and meeting their obligations to the company and the practical challenges they face. In particular, the fundamental laws that govern directorship as acquired through interviews and books reviewed.

4.2 The normative framework governing Directors of Companies

In Uganda, the law governing duties and liabilities of directors of companies is not adequately providing remedies to address the concerns of the company and directors themselves. Indeed, the question as to whether common law and statutory law have provided sufficient solutions to directors to effectively execute their duties and fulfill their liabilities is hereunder discussed;

In the current study it was established that, becoming a director gives status and a direct impact on the strategy and success of a business but the director has binding obligations and yet on the other hand has the liberty to exercise his diligence in the best interest of the company and yet under the law. Indeed, according to one of the directors, this leaves discretion as to when a director is free to act alone while bearing obligations and duties in mind. It was submitted that whereas in the day to day management of a company directors are delegated by its shareholders, they have no right whatsoever to act in bias irrespective of whether one owns major shares compared to other shareholders.[129]

While this is the case, it was also pointed out that directors also have a duty to abide by the statutory amidst the fulfillment of the company's interests. Indeed decisions of directors can never be taken in isolation but collectively as a board.[130]

Indeed, according to one of the lawyers interviewed it was held that a director cannot act as a director on his own unless only one director has been appointed. Decisions are either taken by majority vote at board meetings or by the signing by all the directors of a written resolution.

[129] Interview held with Counsel Atugonza Flavia of Osinde Sentomero and Himbaza (OSH) Advocates
[130] Interview held with Counsel Atugonza Flavia of Osinde Sentomero and Himbaza (OSH) Advocates

But the law will take a single director liable for a decision that was passed by the entire board all become equally liable. Unsatisfactory, the minority group of directors may have strongly voted against an inapplicable decision, but run over by the majority. Yet in the end, a suit filed affects all of them equally for having been present and signatory of a misleading decision that leads company into loss.

The mere fact of appointment does not normally give a director any executive powers. Most directors are, however, also employees of the company with specific powers delegated to them. A managing director usually has extensive powers to take decisions on behalf of the company. Other directors such as sales directors or finance directors will have a more limited role.

Directors owe a duty to the company and, if insolvency threatens, to creditors, Directors have key duties placed by on a statutory footing with restrictions and duties that they ought to have fulfilled. These include a duty to keep proper books and records and restrictions on entering into certain transactions with the company or accepting loans from the company. Breach of these duties and requirements can result in a director being disqualified from acting as a director and in many cases can lead to the director incurring personal liability. Insurance can be obtained to cover some cases of personal liability.

Study findings also revealed that, once a company is registered, its separate legal status, property, rights and liabilities continue until deregistered by the Registrar of Companies. This is seen in ***Micheal Oscar Kayemba Vs James Mulwana and 3 Ors***. Obligations of a director may continue even after the company has ceased trading and has been deregistered. Under certain circumstances, the director may be personally liable as a director for the company's debts and other losses.[131]According to one of the directors consulted it was criticized that the law in this remains unsatisfactory especially where new decisions are medaled into the old decisions as solutions to gap introduced by the old decision, of which person that is no longer serving as a director may still be held responsible.[132]

According to Sekitoleko, the members of a limited company are not liable in their capacity as shareholders for the company's debts. As shareholders, their only obligation is to pay the

[131] Interview with Counsel Ssekitoleko David
[132] Katongole Frank Director East African Importation and Distribution Company Limited.

company any amount unpaid on their shares if they are called upon to do so. However, members who are also directors may become personally liable under certain circumstances. The key areas of potential personal liability as a director according to Counsel Sekitoleko include; debts incurred when the company becomes insolvent; company losses caused by a breach of directors' duties if you act as a guarantor or provide security over personal assets; debts incurred by the company acting as trustee; illegal activity; other regulatory action that might be taken against when debts are incurred as company becomes insolvent.

The principal in case law which relieves director of liability is seen in the case of Re Smith. While directors are compelled by the law, they are expected to act bona fide under certain circumstances. In ***Re Smith and Fawcett Ltd*** [133]it was held that the directors were required to act bona fide in that they consider not what a court may consider is in the interests of the company, and not for any collateral purpose.[134]

Similarly in Uganda, the bona fide principle in directorship gives birth to two statutory principles that is to say; that directors must act in accordance with the company's constitution and their powers, and the principle that directors must promote the success of the company subject to Section 198.[135]

One of the ways through which directors have abused their powers following the bona fide principle is in obstructing takeovers. For example in ***Punt v Symon***[136] Byrne J stated that;

> *the power to issue shares had been given to the directors for the purpose of enabling them to raise capital when required for the purposes of the company. ... but when I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest to prevent a vote in favour of a takeover, I do not think that is a fair and bona fide exercise of the power."*[137]

[133] [1942] Ch 304
[134] [1942] Ch 304, 306, per Lord Greene MR.
[135] The Company Act 2012, Cap 110
[136] [1903] 2 Ch 506.
[137] [1903] 2 Ch 515.

This is similar in ***Hogg v Cramphorn*** [138]where controlling director wanted to prevent takeover of the company by Baxter. Indeed, the controlling director convinced compliant directors to issue shares to people who would vote against takeover. In was upheld that the power to issue share capital was a fiduciary power which could be set aside if it was exercised for an improper motive even if it is held in good faith in the belief that it is the interests of the company. This use of power was held to be ultra vires.

In the same veil as seen in ***Teck Corporation Ltd v Millar***[139] it was held that once shares were issued to prevent a takeover, directors are entitled to consider the reputation, experience and policies of anyone seeking to take over the company. On the contrary however, if the directors decided on reasonable grounds that the takeover would cause substantial damage to the company's interests, they are then entitled to use their powers to protect the company. Thus issuing shares otherwise than to raise capital is not always a breach of duty.

The challenge then remains on court to identify an improper exercise of a power. The approach to this is laid down in the case of ***Regentcrest Ltd v Cohen***[140] for the right exercise of powers with a duty imposed that directors acting bona fide in the interests of the company remains a subjective text as to whether director honestly believed that his act or omission was in the interests of the company. The court therefore in this case cannot substitute its own view of what a director should have done in place of directors own decision.[141]

4.2 Challenges Faced by Directors of Companies Act in Fulfilling their Duties

The study findings established that directors are at a risk of digital fraud cover, following the fact that the employees are failing to migrate at the same pace as the digital changing needs[142] and yet have to apply it in actual practice.[143] One of the directors for instance noted that[144] whereas directors are responsible for choosing actions proper to meeting the company's best interests, directors face a challenge of employee adaptation to digital change. The directors cannot fire employees for failure to migrate, but yet have to keep akin eye. Indeed, the challenge here is that

[138] CH 254
[139] (1972) 33 D.L.R. (3d) 288.
[140] [2001] 1 B.C.L.C. 80 at 105b.
[141] Re Pantone 485 Ltd [2002] 1 B.C.L.C. 266.
[142] Interview held with Mr. Juuko Swaibu a shareholder of EAI Co Limited
[143] Interview with Counsel Ssekitoleko David
[144] Interview held with Mr Juuko Swaibu a shareholder of EAI Co Limited

most of the directors themselves are not well conversant if not ignorant about the digital systems themselves.

Feifel indeed foresees this as directors' inability to provide a regulatory environment which can sufficiently cover all the cyber related risks which can result from malicious intrusions due to employee negligence or employee ignorance.

This finding implies that directors are yet to suffer under the unforeseen decisions taken in this area of operation and yet fail to seek indemnification under the company. This raises question of whether personal claims that may arise are sufficient to protect company from directors' breach or non-action.

Further still on the issue of failure of employees to catch up with digital shift thrift it was acknowledged that, directors have at times failed to make the right choices. This was mentioned to be particularly true especially where the company may seem to be spending too much money on incorporating digital through contracting. According to one of the shareholders, it was noted that;[145]

> *because the directors can not directly terminate services for failure of shift skill acquisition, they end up looking for any simple mistake to fire employees in order to secure their position in maximizing revenue and reducing labour expenditure. Cutting costs, without assessing the legal consequences at one time in point had put the company in a much graver position when fired employee dragged company to court.*

For example, management even under the influence of directors cannot fire old staff for failing to catch up as employment contract may not support this. This barely leaves company with only one option, contracting a digital department to avoid employee-employer's breach of contract. But this cuts into the revenue of the company and medals with the directors' promise to shareholders.

It was however noted by one of the shareholders, that migrating to digital strategy requires a swift switch approach from media strategy. This can only be attained by regularizing and familiarizing staff with the change. Kane[146] holds the same contention when he notes that, for a long time traditional marketing campaigns have operated under the strategy of media buying for

[145]Interview held with Frank Katongole, Shareholder East African Importation and Distribution Company Ltd.

[146] Kane Russell (2012), Risks Facing Directors and Officers https://www.quora.com/What-are-the-major-challenges-worldwide-companies-are-facing-while-migrating-into-digital-marketing

example by simply buying a television or radio spot and then wait to see what kind of bump-in-sales this television spot gets them and then move on from there. But companies that have incorporated digital can increase their revenue from existing customers without much need to rely on or contract agencies to do this work. A one-time payment is enough to establish trained personnel to do this work even without having to increase salaries.

According to Mr. Juuko Swaibu[147] it is noted that;

> *The legal and environmental concerns have finally returned shareholders protection that has in the past years been violated by directors in face of taking refuge under the company's name. They too have their say now in every matter that arise depending on the consequence upon which they act. Directors are finally careful about their dealings.*

Similarly, Mr Sewakiryanga [148]appreciates their defense to be a result of the various mistakes committed by directors under the cover of the company to which a concerted effort has been developed. Indeed, according to Mr. Ssewakiryanga the growing trend for the actions of directors are subject to greater scrutiny by other stakeholders as the law has allowed for and created significant rights for oversight and participation especially in favour of employees workers' associations for immediate oversights and regulators who play a greater future role to enforce stakeholder's interests.

Indeed according to Nakibuule Jessica[149] shareholder value approach is the best thing that the regulators, creditors, customers and suppliers have done which unknowingly is a give-back to shareholders that promotes investment stability. This underpins which directors are required to act in the best interests of the company and in so doing, directors are obliged to primarily focus on their duty to look after collective interests of the shareholders and other stakeholders such as employees and customers.

According to Sekitolekko, it is submitted that one emerging risk that will most likely cause calamity to directors in the execution of duties is cyber insecurities. The greatest challenge here is that directors either design means of addressing it, or the fail to do so at their own risk.

[147] Interview held with Mr Juuko Swaibu a shareholder of EAI Co Limited
[148] Interview held with Mr Ssewakiryanga John Paul, the Director/Shareholder of FIEP Cooperative.
[149] Interview held with Ms Nakibuule Jessica a Director of JK Traders

Sekitoleko indeed asserts that, the failure implements a protective system from cyber threats will only create potential exposure and a crackdown into the company's confidential system. For example, cases have arisen in bank of Baroda where shareholders have filed lawsuits against directors and officers concerning alleged deficient cyber security systems. This submission implies that, the technological environment is changing at a faster pace than ever and represents a threat to companies and a clear increase to personal risk of directors and officers.

To this effect therefore, Directors need to ensure that their companies comply with the different data privacy regulations within all the boundaries under which they operate. Directors according to Counsel Atugonza need to be watchful that such potential negative impact does not affect the reputation of the company and its valuation as a consequent because this risk affects third parties and insurance covers.

According to one company secretary, it was noted that directors have a challenge of balancing a greater number of stakeholder interests especially in circumstances where such interests have not been aligned or where opposed. Indeed, according to Kibuuka, the global economic climate has contributed to accelerated corporate failures and increased demands by stakeholders for companies to apply good corporate governance. This coupled with greater disclosure obligations and enhanced remedies for stakeholders have had cumulative effect that has increased the potential for personal liability of directors. Indeed, according to Kibuuka, courts are even more willing to handle certain groups of management equally liable as directors in assessing duties and liabilities.

4.3 Remedies Available to an Aggrieved Shareholder where a Director Acts in Breach

The study findings revealed that, the regulatory authorities and their implication versus the scope of claims of directors' rights for liability imposed due to personal negligence of duty has provided a different approach to understanding and acceptance of complete liability on the company.

Indeed, according to Nakibuule the increased regulatory inquiries, inspection and scrutiny has increasingly minimized the directors' claims landscape. Regulatory authority in Uganda is increasingly willing to ensure that enforcement action against individual directors for alleged breaches of regulatory obligations is undertaken.[150] In particular this followed a shift from public opinion according to Katongole. The public does not only look at punishing the company but the people who control the companies as a way of maximizing justice. Indeed the costs of defending regulatory enforcement actions are very high and for such reasons the director in this cannot take refuge under the company but his or her insurance cover as shareholders may differ in this opinion to seek their own justice by not taking up compensation of actions that are not proved to be in the best interest of the company.[151]

Indeed the managing director[152] asserted that;

> *It is most commonly that shareholders' claims will arise against directors in cases especially where company is placed into liquidation and where this has introduced a disagreement among the major shareholders.*

The liquidator will assume control of the company and will assess the company's rights of action against former directors and management and where necessary enforce the rights to recover money for the company's creditors.[153] Katongole complements this when he notes that;

> *The law has commenced enforcement actions against audit committees focusing on director's oversight responsibilities. In particular risk oversight is a key competence of the board and failing to avoid risk should be proved against reasonable doubt as not a failure for directors' discharge of their fiduciary duties.*

Precisely, fiduciary law provides a source of such claims in connection with claims of recklessness that may have been exercised by the directors in course of duty, else company cannot indemnify its directors depending on class of action that the board took.

In the same context, Bouwman for example notes that court oversight has become more prominent as seen in the case of a director of a mining company who was held personally liable as a result of environmental degradation and non-compliance with rehabilitation measures by the company and was sentenced to five years, but suspended only on condition that the director rehabilitates all areas damaged by mining activities.[154] This finding supports the view that,

[150] Nakibuule
[151] Katongole
[152] Kakooza Isma Shareholder JK
[153] Ibid
[154] Bouwman

directors have at times executed duty negligently and not to the best interest of the company, because they thought they would always escape liability and live it to the company.

Just like Nakibuule notes that;

> *The legislature has imposed new regulatory duties directly upon directors expanding their risks with a right for third parties to claim for damages for any breach of the regulatory duties especially the requirement for proper safeguard of information and at the same time the requirement to disclose obligations. Indeed, the law has introduced new civil tribunals that underpins directors.*

Indeed Morris[155] notes that the economic crisis which resulted in a strong increase in company bankruptcies globally remains understandably the number one cause for directors' claims which according to Morris come in the form of securities class actions and have a severe financial impact on the individual director and the company as well hence demonstrates the importance of risk transfer. This is in addition to shareholder derivative actions on behalf of the company which target directors due to their misrepresentation. This according to Morris is common in situations where a company has to sell assets fast in order to stay afloat.

Additionally, Kibuuka James[156] expands this view when he reveals that:

> *Even upon liquidation, shareholders who still have a good financial status and willing to protect their commercial interests or exert pressure may choose to take a diverging action on behalf of the company against the directors not withstanding that damages recovered from directors be paid to the company.*

However, according to one of the directors[157] interviewed, it is now common that directors have come to accept their liabilities, which has made it more possible and easy for the parties involved to reach an agreement to avoid further claims from arising when shareholders sue directors. Indeed Mr. Juuko Swaibu[158] added that regulation of directors' actions from being covered under the company's name, has increasingly and closely been accompanied by a culture of increasing litigation as it is now becoming more common to bring up director's claims not only in large companies but also small ones.

[155] Morris
[156] Kibuuka James
[157] Mr Lubwama Frances (East African Importation and Distribution Company Limited)
[158] Mr Juuko

This finding implies that, with changes in the legal environment, various claim approaches can be adopted by the shareholders to institute their private claims against directors. It can therefore be submitted that, there is a wide range of possible regulatory actions that can be undertaken to impose on directors a liability that previously companies in Uganda have been suffering.

In addition to this it was also established that having executive powers does not qualify for abuse. Acting on behalf of the company directors are not expected to offer or receive a bribe and if found to have acted in consent to or connived in bribery directors shall be held liable. However, the company commits an offence of bribery if a person associated with it receives a bribe. A person is said to be associated with a company if the company performs services for or on behalf of the company regardless of the capacity in which they do so for example its employees, agents, subsidiaries and suppliers all of whom can potentially render the company guilty of the offence. While this may not be the motive of the company it was established that the law looks at this as a strict liability with no need to prove a motive and thus company can receive an unlimited fine if found in breach.

The company however can only have a defense by proving that it had adequate procedures in place to prevent bribery. These may range from proportionate; risk assessment; due diligence; monitoring review; top level commitment and communication which may involve training. It was indeed submitted that whilst this offence relates to the company rather than directors individually, the board needs to be happy with the company's overall approach to preventing bribery.

4.4 Conclusion

In respect to the changing legal environment and regulatory demands, directors of companies in Uganda are at an edge where they can no longer play a hide game for their actions which impose liability on a company. It has rather changed to a hide and seek game where directors now have to extra carefully execute their duties to avoid possibilities of exposing companies and shareholders to strict liability.

CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The chapter presents the summary conclusions and recommendations of the study carried out on the law regulating directors of a company in executing their duties and obligations and how it has solved the problem of aggrieved shareholders in cases of breach by any of the directors in respect to available defenses. Thus a summary to the problems encountered is provided with conclusion and possible recommendations.

5.2 Conclusion

While directors have general duties and liabilities to promote company growth and success, the law imposes a strict liability for directors to act carefully and diligently with skill, for a proper purpose, in utmost good faith, in reliance, to best interest of the company, following key development in the recent company law trends. Legal and regulatory obligations have been placed on directors which are even stringent than before. The law has dramatically changed directors becoming directly liable for wrongful acts. Directors who breach the board's fiduciary duty of loyalty may not survive the pleadings stage or litigation stage given the new developments. This implies that directors have become more responsible for their actions and less likely to make reckless mistakes. However, this does not imply that all mistakes made are out of recklessness. Directors are not usually personally responsible for contracts that they sign on behalf of the corporation, however, personal liability of directors for contracts may arise at common law or under statute in specific situations if the company is not satisfactorily identified on documents. At common law, liability can arise where a director purports to enter a contract on behalf of a non-existent corporation.

5.3 Recommendations

According to the study findings, the researcher drew the following recommendations as a way forward to effective directorship of companies in Uganda.

5.3.1 Re-defining the Interpretation of Company by Law

Responsibilities come with guidelines. There is need for the law governing companies to redefine the meaning of company to cover all aspects that suit a legal person. For purposes of avoiding isolation of company from those that execute company duties where liability needs to be shared.

5.3.2 Recognition of the Rule of Law

There is need for directors not only to focus on satisfying their promises to shareholders, but also use their potentials to work to the best interest of the company by not victimizing the employees for the sake of satisfying shareholders, else they end up working to suit shareholders' interests other than those of a company.

5.3.3 Focusing on Engaging Customers than Firing Employees and Contracting Agencies

To reduce digital constraints, it is best that company employees are motivated and sensitized on the willingness to spend time studying what has been changed for purposes of pulling useful insights. Precisely for companies to be in a better place, they need to reduce over reliance on agencies.

For directorship of companies to be successful, they need to focus on customer engagement value overtime. The best way to increase engagement is viewing digital through the lens of customer relationship management, thus developing personalized engagement with digital, global companies will be successful.

5.3.4 Establishing Risk Management Systems Supervisory Board

Risk management systems vary from company to company depending on the size of company and regulatory environment available. There is need for companies to establish a risk management system supervisory board to ensure that the directors are maximally acting with diligent. This purposely to help directors who do not intentionally breach duty, to be heard if a proper management of anticipated as well as emerging risks and threats is to be handled effectively and carefully without fear of liability concerns.

5.3.5 Engaging with Legal Councils

It is important that directors always engage with legal councils ahead of time for advice. Directors should fully understand that a fiduciary duty is attached to any acquisition and a detailed due diligence on their behalf is of utmost importance. Secondly directors should also always critically look at the existing indemnification policy of its employer and how it responds to unintended breaches.

5.4 Recommendations for Future Research

The study recommends further investigation for directors who may effectively hide under the corporate veil for the liabilities that they have intentionally committed and which constitute a tort.

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