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Directors' fiduciary duties: Rwandan companies act choice and the possibility of progress

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Abstract
Application of the concept of directors' fiduciary duties is provided for in the Rwandan Companies Act as part of the matter that directors occupy a central position in systems of corporate governance. Directors exercise their duties to persuasive questions surrounding the expectations defined by the law and jurisprudence. This article explores the relevance of development of directors' duties in advanced market economies to the current Rwandan Companies Act, along with the circumstances under which a director will be personally liable for the breach of the duty owed to a corporation. I assume that courts in Rwanda will develop the concept of directors' duties in such way that it would acquire an additional dimension in the context of substance, especially when it comes to setting a relationship between the constituencies and a corporation as well as to improving the standard of corporate governance, grounds and feedback dynamics of complex business environments.

Keywords: directors' fiduciary duties, rwandan companies

1. Introduction

Corporate Law is not a buzzword in the Rwandan legal system. It became apparent as far back as in 1988. It has evolved and grown in a few years when the country has undergone a major legal reform in a wide range of business sectors. Rwanda has passed the Law relating to companies in 2009 and it has been modified and complemented since then. The most striking conclusion to derive from the regulation of corporate actions is how the law fills the gap in the distribution of powers between the owners and managers, or in the more standard terminology of reduction of agency cost [1].

Insight into trends emerged from the Law relating to companies in Rwanda as modified and complemented to date ("the Companies Act"), show certainly to be true that significant novelties have been constructed toward strengthening a wide spectrum of business practices to shape the relationship among the constituencies. Nonetheless, trends in corporate governance form a cartilaginous continuum in guaranteeing progress and identifying acceptable developments and remedies to maintain the goals of company law. Corporate law is dynamic; it must develop and grow, indeed in anticipation of emerging concepts and challenges [2].

Corporate governance mechanisms are mostly couched on socio-economic, environment and legal frameworks that can be altered through the political process- sometimes for the better. In this way, there are reasons to intensively think about the efficiency of the new Companies Act in creating arrangements conditions to address some of the concerns arising out of the traditional mainstream theory and take shareholder supremacy as the lodestar. Yet in one way or another, the ultimate purpose of companies should be to serve the interests of society as a whole [3].

Still, several scholars take a view that corporations should create more benefit than harm; they should take into account "social value" and "social cost" [4]. While I agree that agency cost gives rise to the separation of ownership and control, or of management and finance, one could argue that regulatory framework need to be poactive to ensure that aspects of formal requirements are effectively enforced and shareholders do not end with self-enrichment or misusing discretion control rights over allocation of investment or expropriating the creditors' funds. In the same vein, reducing agency problems scales down the supremacy traditionally allocated to the shareholders, and empowers the concept that the board of directors is the ultimate team to balance the competing interests, and all major corporate decisions need to be initiated by the board, except an attempt to introduce a case to replace incumbent directors. In some countries, corporate systems require a *veto* power of shareholders to approve ("rules-of-the game") decision to amend the Articles of Association and "game-ending" decisions, which are decision to merge, dispose of all assets, dissolve the company and decisions involve shrinking the company's size ("scaling-down") [5].

In practice, things do not always take a turn for the better on the understanding that lawmakers fall for cherishing the idea of promoting and facilitating new investments. This has an impact on which interests and rights to protect through legislation. Studies are increasingly showing that many policymakers wish to attract foreign investors [6]. It is probably appropriate to have

[1] According to Investopedia, agency cost means "a type of internal cost that arises from, or must be paid to, an agent acting on behalf of a principal. These costs arise because of core problems, such as conflicts of interest, between shareholders and management. Shareholders wish for management to run the company in a way that increases shareholder value, while management may wish to grow the company in ways that maximize their personal power and wealth that may not be in the best interests of shareholders".

[2] Unocal Corp. v. Mesa Petroleum CO. 493 A.2d 946, 1 EXC 391 (Del. 1985).

[3] Greemfiled Kent, The Failure of Corporate Law, (University of Chicago Press, 2007), page 124.

[4] *Ibid same page.*

[5] Robert charles clark, *Corporate Law*, (*Aspen Student Treatise Series*, 1986) page 21-24, 93-140.

[6] C.Bellak, M.Leibrecht & R.STEHREr, 'Policies to Attract Foreign Direct Investment: an industry

the assumption that the level of investors leverage to distill how corporate law should be framed is a matter of concern, particularly in emerging markets. Hopefully, it is entirely obvious that the legislative and judicial processes are touchstones and relevant to influence corporate law as they inform other areas of the law. This statement clarifies the fact that the ultimate issue is whether the agency cost as it is currently enshrined in the Companies Act is effective enough to repair market defects or address the encroachments. The most interesting thing about market self-correcting is to understand legal frameworks around who monitor the monitors.

Getting attention for sustainability reminds me of Enron's fall. As I remember, when one of my classmates inquired about what caused the recession of Enron, Prof. Stefan Messemann, a Lecturer of Comparative Corporate Governance at the Central European University, answered him by repeating the words stated by Steven Pearlstein and Peter Behr, and said "At the Enron, the fall came quickly, what did Enron's blue-chip board of directors and auditors know of the financial shenanigans that triggered the company's fall... Enron was ruined by bad luck, poor investment decisions, negligible government oversights and an arrogance that led many in the company to believe that they were unstopped" [7].

One may argue the reasons why the regulators would leave no stone unturned in the investigation into the malpractice. History shows us that sometimes regulatory bodies do not act immediately to anticipate the challenges and sometimes wait for the system collapses under its own weight. The reason behind this has more to do with disinclination to transplant good lessons from precedent cases, more particularly, in other jurisdictions in another hand and leniency of a system compounds its failure to address the wrongful actions, which in the end whip up repeated infringements on regulatory devices. Poor corporate governance translates into high cost. However, if it is good, the cost of capital will be reduced, and therefore promotes investors confidence and trust. Solution to agency cost has been subject to extensive researches by scholars. Findings have shown that there is no system that has been found immune from the difficulties arising out of the approach to adapting the global principles of corporate governance, according to the varying legal, economic, and cultural circumstances of an individual country.

The ultimate purpose of this article is to bring about workable solutions to agency problems while proposing sound corporate governance practices to bridge shortcomings identified in the Rwanda's current Companies Act. It is worthy to note that the aim of this article is not to answer the question of which system is the best for learning. It is argued that companies in successful market economies, such as the United States, Germany, France, UK and Japan, etc. are subject to different combinations of legal protections, and yet available evidence shows to be true that these economies have potential elements of a good corporate governance system [8].

This article examines the underpinnings of the legal position of management in the context of the Companies Act and exercising the duties over the corporate business and assets. Universally and under the Rwandan legal system, management is composed of a board of directors and the senior officers of the company [9]. As will appear herein, it has been intensely debated by scholars on the question regarding the extent to which the law should create a legal link between ownership and management as to hold the management to certain standards of conduct [10]. This article discusses main legal protections which the law has developed as a fiduciary duty towards the companies. This includes the amount of attention that is subject to business, fidelity to the interest of the company, reasonable business prudence test and disclosure requirements related to conflicting transactions. In applying these duties, a focal point must be put on a distinction which invariably bothers the layman.

This article explores the effective management control in the light of fiduciary duties. Modern corporate governance enhances the agency cost by shaping fundamentals in line with structure, power, composition of the board, and by putting in place electoral ground rules that lay out shareholders voting [11] and protect related parties' interests. It should be noted here that the Companies Act is somewhat half decent as to the procedure regarding shareholder voting rights. In most situations, it delegates some of governance-oriented strategies to Bylaws which do not constitute mandatory requirements in the terms of the process of incorporation of a business in Rwanda, neither for publicly nor privately held companies [12].

At least, the fact that the Companies Act requires less or no formality with regard to the establishment of the Articles of Association, it leaves a window allowing less protection to the disadvantage of minority or dispersed shareholders and other constituencies by any means of ineffective lockdown provisions or inefficient safeguards derived from general rules of the law of contract. Nonetheless, fiduciary duties are designed in such a way that defaulters would have minimum chances to escape from their effect.

2. To whom fiduciary duties are owed?

This brings into play the legal position of management in the context of Rwandan Companies Act. Unlike the legislative texts, jurisprudence has defined and developed fiduciary standards that have contributed immensely to the formation of the basis for decision in several recent judicial decisions in advanced market economy. The Companies Act's language about the fiduciary duties conveys a message that courts and tribunals in Rwanda are going to be absolutely snowed under with putting in a specific context, the theory of fiduciary obligations and its practical applications.

Article 213 of the Companies Act discusses the basis for fiduciary standards. It contains the criteria for validating a decision made either by a director and an officer of the company. This includes the duty to act *bona fide* in the interest of the company, the non-conflicting rule, the reasonable prudent person and the proper purpose rule. This section looks

level analysis', http://www.oecd.org/investment/globalforum/40301081.pdf, accessed on 1st Farburay 2016, 2008.

[7] Washington Post, book page 6.

[8] A survey of corporate governance, 739 page.

[9] Adof A. Berle and Garbiner C. Means, 'The Morden Corporation and Private Property', (transaction publishers, new Bruswich, 1930), page 196.

[10] Kurt A. desender, 'the Relationship between the Ownership Structure and the Role of the Board', (University of Illinois at Urbana−Champaign, 2019), page 17.

[11] Reinier KRAAKMAN and others, 'the Anatomy of Corporate Law, a Comparative and Functional approach', (Oxford university press, 2006), page 34.

[12] Art. 14 of the Companies Act,

into the contents and statements described in this article and illustrates with the help of court cases how the application of fiduciary principles in contemporary jurisprudence may further develop existing understandings of the Companies Act.

Before I delve into the core purpose of this section, I find it essential to draw the attention that one of the important things to underline while discussing the concept of fiduciary duties is to make visible the person to whom the duties are owed. It is of note that the law of contract lays the foundation for company law in the sense that a company, as a separate legal entity, is capable of owning property and entering into legal obligations. In order to carry out its actions, a company will need the intervention of individuals acting on its behalf. Such individuals will be the managers of the company, the board of directors and shareholders [13].

The Companies Act is trite that directors are trustees of the company as a whole. Duties have tremendously evolved treating managers and directors like trustees of the company property by imposing on them duties owed to the company as a whole [14]. This means that a director is not liable for breach of duty, as any duty he/she owes is owed to the company, i.e. shareholders as a body corporate, and is not a trustee for the individual shareholders nor employees and creditors of the company [15]. Unlike the Companies Act, in France, the directors owe the duty of loyalty to shareholders and the company [16].

In the case of Peskin v Anderson in England, the discussion centered on the issue to whom a director owes the duties. In this particular case, the claimants cease to be members of the Royal Automobile Club (RAC) during 1998, a club owned by RAC Ltd. According to the Articles of Association and club rules of RAC Ltd, any former members could be granted the alternative to reapply for membership within a period of three years from the date of resignation. After the elapsed time of years, the RAC Ltd disposed of its motoring services business and members of the club received over £ 34,000. The claimants petitioned that the directors of RAC Ltd, who were committee members, had failed to advise them before they resigned as membership in a bid to benefit from the sale of the aforesaid motoring business. The Court held that directors owe duties to the company they serve and not to any individual shareholders, unless the duty of disclosure arises from the facts of the case or any other special relationship between the directors and shareholders is emerging.

The duties imposed on directors are owed to the company as a whole. In the case of Percival v. Wright, the shareholders initiated a proposal and asked the directors to purchase their shares. Negotiations were engaged, however, the directors did not mention that a takeover bid had been made for the company, which slowed down the price of the shares. The court held that the only duty the directors owed was owed to the body of shareholders and not to any individual shareholder.

In contrast with Stock Corporation Act "AktG", the Companies Act does not shed light on the duties of the directors of a subsidiary in the group of companies, especially when it is not a wholly owned subsidiary. The interesting question is whether a director must subordinate the entire interest of a subsidiary company or to the interest of a holding company [17].

In practice, it may be awkward when a director is faced with a dilemma arising out of the context of certain consideration about unreconcilable interests between a parent company and its subsidiary or affiliate company. Imagine a scenario whereby a subsidiary company transacts with its parent in a manner that it disregards the arm's length principle. One could bring into play remedial actions related to transfer pricing in ensuring the fairness and accuracy of a transaction entered into between the different segments of a multi-entity company. The foregoing hypothesis does not remedy a concern adhering to a situation where a parent company may want to root the subsidiary or have the subsidiary engage in sweetheart transactions and deals in order to improve its stand-alone bottom line. This is explained by the fact that the directors owe the fiduciary duty to both the subsidiary and parent companies *ex ante and ex post* allocation of risk.

In this particular case, the directors will need to consider the circumstances of each company depending on the interests of other constituencies, including the subsidiaries' creditors and corporate regulations. In the United States, court cases are known to validate the argument supporting the idea that the directors of a wholly-owned subsidiary owe the company fiduciary duties, just as they would to any other company [18].

Let me make one further remark on the duties of the partners in contractual partnership. The Companies Act does not go that far. The most famous *dictum* of Justice Cordozo in Meinhard v. Salmon [19] raises the question that traditional rules of business entities need to be tailored to the new contexts. The New York Appeals Court held that partners owe one another fiduciary duties in a business where the opportunity arises during the life of the partnership. The court emphasized that in a joint venture a partner breaches the duty of communication when he/she fails to get informed his/her co-partner of a profitable opportunity that was offered by a third-party who was unaware of the partnership. The court also held that the duty of loyalty is forfeited when a partner withholds the interests resulting from his/her status as a partner without allowing his/her co-partner to participate in a competition [20].

It might go without saying that a fiduciary duty is delegated and appropriate only if the owner delegates open-ended power to a manager. This raises the concern of how much delegation would amount to a fiduciary relationship. Practical cases have revealed that a manager must exercise the power on behalf of the owner, and in doing so, the owner can be subject to liability

[13] Jon Rush and Michael Ottley, *Business Law*, (Thomson, 2016), page 247.

[14] Peskin v. Anderson (2001) 1 BCLC 372.

[15] Percival vs. Wright (1902) 2 Ch 421.

[16] Cass. Com. 27.02.1996, JCP E 1996, II, 838, D. Schmidt and N. Dion. "In its decision dated 27 February 1996,the French Supreme Court (*Cour de cassation*) imposed a duty of loyalty on directors. In this case, the chairman of the board of a company not listed on the stock exchange was engaged in negotiations with a potential buyer who was prepared to purchase shares at a price of 8,000 French francs per share. At the same time, a minority shareholder requested the chairman to find a buyer for his shares. The director decided to purchase the shares of the minority shareholder himself for 3,000 French francs per share and resell them a few days later at a price of 8,000 French francs. The minority shareholder brought an action for compensation. The French Supreme Court approved the award of damages based on a breach of the duty of loyalty".

[17] § 317 German Stock Corporation Act (2013).

[18] Stefan J. Padfield, 'In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries', (Fordham Journal of Corporate & Financial Law, volume 10, issue 1, 2004), page 74.

[19] Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928)

[20] Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928)

for the manager's acts with respect to matters within the scope of obligations entrusted to him/her [21].

3. The no-conflicting rule

Before addressing the main issue of this section, a cursory glance at the Companies Act turns our attention to the concept of the no-conflicting rules as it refers to the Penal Code in consolidating the relief to remedy the transactions involving the company in which a director has a personal interest. Article *190bis* provides that a director may conflict with the company's interest directly, indirectly and through associated person provided that he/she fails to disclose, without delay, that he or any associated person will benefit from such a transaction. It does not matter whether the nature and monetary value of that interest is quantifiable or not [22].

I am willing to go further and say that article *190bis* puts emphasis on tying directors up instead of pursuing actionable remedies as how an aggrieved party, the company in this case, may be hedged from incurring undue harm. Perhaps more importantly, I note that the effect of invalidating a transaction made, at the expense of the company and against the non conflicting rules within the purview of article 194, shies away from avoiding a transaction if the purchaser acquired the title and interest to a property in good faith and from the person other than the company, and in return the company receives a fair value [23]

For now, what is important to note is that the Companies Act is lacking interest in adopting effective remedial actions to the disadvantage of transactions that give rise to the breach of the no-conflicting rule. By that means, the legislator should appreciate the strict application of the no-conflicting rule and recognize the reality that the relief consists of rescission of the transaction, account for profit, damages and ratification could have useful reasoning in creating a real deterrent effect against directors manifestly intended to infringe on conflict of interest principle. It has been unsurprising for companies to have liabilities stemmed from the fact that the director has received an inducement from other party to the contract or where the company has entered into a contract with a director [24]. By causing the Companies Act so strengthened, the directors would be subject to a comprehensive duty of loyalty and care in executing their functions.

3.1 Rescission of the transaction

Following the conceptual guidelines of the CISG (United Nations Convention on Contracts for the International Sale of Goods) and Unidroit principles, a rescission of the contract must not be confused with avoidance since the latter gives rise to release the parties' obligations [25]. A party who has performed the contract in part or whole, may claim compensation from the other party [26]. As a matter of law, a rescission leads to annihilating the contract *ab initio*. It has an effect from the inception of the contract and it brings the parties, as far as possible, back to the positions where they would have been if no transaction had ever been made, the status *quo ante* [27]. It is clear that the Companies Act preferred to use the avoidance of the contract basically because the legislator did not intend to unmake or unwind a contract entered into with the director pursuing his/her personal interest. With this background, the Companies Act faced also a lot of negative feedback from the case of Aberdeen Railway Company v Blaikie Bros [28]. whereby a court held a director liable for allowing a company to enter into transactions in which he has a personal interest conflicting. Lord Fullerton observed that Mr. Blaikie conflicted with his duty as he had failed to give his co-directors all the knowledge and skill about the benefit he could bring to bear on a contract transacted with a firm for the manufacture and supply of iron chairs. The contract was set aside by the court through the process of rescission [29].

The Belgium Company Code states that the company (and only the company) can sue to rescind a self-dealing transaction, if the person dealing with the company in respect with the conflict of interest were or ought to be aware of the breach of the duty of no-conflicting rule [30]. In my view, if a director has shown a strong feeling or acted with gross negligence, in a manner that his/her action or omission constructed to nail down the no-conflicting rule, the company would be immunized from such kind of situations and the option for a rescission should be open, unless, the matter is not subject to cure and *restaurabile.* In addition, article 193 of the Companies Act also establishes a fair value as a threshold to determine avoidance of a transaction in which the director is associated with a conflict of interest. I argue, to the contrary, that in determining a fair value, the company's interest should be primarily dependent on the company's objectives and purpose set out in its Articles of Association or Statute, not just appropriate price. The Companies Act expressly grants a rescission if the director has breached any duty while transacting with the company itself [31].

3.2 Account for profit and damages

In order to prevent unjust enrichment, the company can lodge an action or compel the director to account for any secret profit he/she has made as a result of the breach of fiduciary duties. In the USA Securities Exchange Commission, this remedy is commonly known as disgorgement of profits or benefits [32]. This may apply irrespective of whether the company negates or affirms the contract. In the famous case of Boston Deep Sea Fishing Co v Ansell, the court held that a director of BDSF was liable to account to the company for the commission received while contracting on behalf of the company for the building of fishing vessels [33].

Unlike the Companies Act, the company may seek compensation from a defaulting director for any loss in connection with entering into the contract in which the director has an interest and decides to sue the director in order to

[21] See RESTATEMENT (SECOND) OF AGENCY §13 (1958).
[22] Art. 190 of Companies Act,
[23] Art. 193
[24] Aberdeen Railway Co. V Blaikiee Bro (1854)
[25] See art 49 of United Nations Convention on Contracts for the International Sale of Goods and 3.2.16 Unidroit principles of international commercial contract 2010.
[26] CISG art. 81.
[27] Richard R.W. Brooks and Alexander Stremitzer, *Remedies On and Off Contract*, (Yale Law School Legal Scholarship Repository, 2010), page 720.
[28] Aberdeen Railway company v Blaikie Bros (1854).
[29] Aberdeen Railway company v Blaikie Bros (1854).
[30] Art. 523 § 2/524 §6/524ter § 3 CC of the Belgium Company code.
[31] Article 2012, Companies Act.
[32] Vibra-Tech Eng'rs., Inc. v. Kavalek, 849 F. Supp. 2d 462, 496–98 (D.N.J. 2012) (
[33] Boston Deep Sea Fishing Co v Ansell (1888).

account to the company for any profit materialized as a result of a breach [34]. However, in the face of jurisprudence, the company has to choose either account for profit or a claim for damages. It must not choose the two remedies at the same time [35].

3.3 Ratification

The Companies Act provides that the exercise of power confined to a director or by the Board of Directors of the company so that power belongs to the shareholders, can be ratified the shareholders as if this power was exercised by them and if this does not prejudice the interests of the company [36]. Despite the Companies Act, courts of law have developed further easy-going remedial actions against wrongful actions of the directors. For instance, in the North-West Transportation Co v Beatty, the court held that at the Annual Meeting of shareholders, it is fair practice to allow the director to retain any secret profit made, yet shareholders can ratify any transaction in which the director has an interest. A shareholder can exercise his vote to ratify such a transaction, in the absence of fraud and oppression [37].

I believe it is useful to highlight that article 191 of the Companies Act as modified and complemented by article 7 of Law n° 14/2010 of 07/05/2010 makes use of statement of conflict of interest of the directors. However, to some extent, it does not clarify safe harbor to rescue such transactions in which the director has an interest. I think, consistent with Section 144 of the General Corporation Law of the State of Delaware that in considering directorial interest, the approval by a majority disinterested directors, acting in good faith, fairness and on an informed basis, is essential to get rid of the taint of conflict of interest. The good faith component is satisfied, if the evidence shows that a majority of disinterested directors were careful to act in the interest of the company and "unswayed by loyalty to the interests of their colleagues or cronies" [38]. A transaction is considered to be fair as to the company as of the time it is authorized, approved or ratified by the board of directors, even though the disinterested directors would make up a minority or be less than a quorum [39].

In my opinion, whenever a director has a personal interest in the company transaction, the principle of disclosure and ratification should have its own place both in public and private companies. This does suggest ignoring article *119te*r, added by article 8 of the Law n° 15/2015 of 05/05/2015, which states that the director shall disclose his/her interest in any major transaction involving a public company, and external auditors need to review such transactions before commencement. I seek to show that a major transaction amounts to ten (1o) per cent of the company's assets. And with good reason, the Securities Exchange Act of 1934 applies to Company Act, and has traditionally subjected such kind of disclosure to directors, officers and principal stockholders who are "directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security" [40]. I would prefer considering a director, whose personal interest is non-equity-based yet escalated to 10 per cent of the company's assets, as a potential client or creditor depending on the nature of the transaction than holding him in office. This rests on the understanding that 1o per cent of the public company's balance sheet is significant and separating ownership from management is a safe harbor protection in reference to agency cost; otherwise independence of the directors could be impaired.

In order to strike the right balance, the concept of disclosure in public companies most fundamentally requires the use of the authority of the regulator that administers securities laws, Rwanda's Capital Market Authority in this case, in lieu of counting on external auditors. It is essential that the board of directors exercise their discretion to advance the company's best interest. By allowing external auditors to review the no-conflict rule, it leaves a vacuum that a consulting review conducted by external auditors may be far more lucrative than the auditing engagement, and therefore presents the appearance of a conflict of interest. This is one of the novelties brought about by the Sarbanes-Oxley Act of 2002 which was enacted a little bit before the financial crunch in the United States [41].

4. The Duty of Care

From a shareholders' viewpoint, the duty of care constitutes the real emblem of their ownership, ultimate control and monitoring of those who manage the company on their behalf and benefit. It also allows the courts examine unreasonable managerial behavior of the directors [42]. Comparatively, I have noticed the stark contrast between the Companies Act and Model Business Corporation Act even though they seemingly sound more coherent in defending the essence of a duty of care. The Companies Act has not so far made further progress in defining the substance of the duty of care as such. On the hand, the Model is very precise in providing practical details on the application of a duty of care. While the Companies Act is dull when it comes to the subject of board committees for effective board of directors, the Model puts a focal point on the director's discretion to rely on work done by the board committee if is reasonably believed that a committee merits confidence. Directors and officers owe a duty of care in performing their duties in good faith in a manner that they reasonably believe to be in the best interest of the company and with such care "that a person in a like position would believe appropriate under similar circumstances" [43]. A prudent person test compels directors to make decisions on an informed basis, with diligence and in an objective manner. It does not mean that the directors are required to be informed of every fact, but rather a board should be reasonably informed [44]. The tendency is that courts often refer to the reasonable prudent person's standard by insisting that a decision taken by a director is to be compared to strict sensu of the person of prudent might and in

[34] Article 2012 (2), Companies Act.
[35] Mahesan v Malasian Government's officers' co-operative Housing Society.
[36] Art. 227 companies act,
[37] North-west transportation Co v Beatty (1887).
[38] BLAKE ROHRBACHER, and others, 'Finding Safe Harbor: Clarifying the Limited Application of Section 144', (The Delaware Journal of Corporate Law, Vol.33, 2008), http://www.rlf.com/files/Corp04.pdf, accessed on 15 March 2016.
[39] Delaware Code Tiled 8. Corporations § 144.
[40] Section 16 of the Secutities Exchange Act of 1934.
[41] section 103 of the Sarbanes-Oxely Act of 2002
[42] THOMAS C. LEE, *Limiting Corporate Directors' Liability: Delaware's section 102(b)(7) and the Erosion of the Directors' Duty of Care*, (New York University, 1981), page 239.
[43] See § 8.30 Model Business Corporation Act by America Bar Foundation (2002) and Art. 211 of the Copmanies Act,
See also Graham v.s Allis-Chalmers Mfg.Co., 188 A. 2d 125, 130 (Del. 1963).
[44] See Brehm v.Eisner, 746 A. 2d 244, 262 (Del. 2000).

reference to the person of ordinary judgement and average risk assessment talent [45].

It is important to note here that a duty of care consists of conduct standards framed so broadly, that the chances of prevailing in a claim based on it is slim as a consequence of the business judgment rule, a concept that will be discussed later on page 17. As mentioned earlier, in discharging their duties, directors are required to take the level of the diligence, skill and care in an objective and comparatively high standard. Directors cannot run the entire company's business without the help of other constituencies such as employees and experts. Their decision will depend on information, opinion and judgement provided by employees or experts. The standard of diligence requires that directors need to take all possible care with an objective standard and skill, knowledge and experience expected in the service of the company [46]. The standard of diligence is objective and compulsory in the sense that a defense based on the fact that a director acted with such care as he would apply in his own affairs will not succeed, and thus the Articles of Association or the contract with the director cannot moderate the standard [47].

Before proceeding, I want to emphasize that the business of any company counts on a duty of care and in many cases, directors fail to give this the importance that it deserves. In doing so, it shows they do not feel the collegial responsibility in fulfilling their duties. Corporate practice also tells a story that the concept of directors as "organ" leaves a room for unfettered control over the company. An influential director can fight to get a resolution passed that has never been duly discussed. Hopefully, the Companies Act has observed this issue of collegial administration of the directors in article 167. As for efforts to expand the liability of the directors, individual and collegial approaches strike the balance between the directors' authority and accountability. The negative effect of collegial responsibility is that it activates an alternative to litigation and derivative suits. On the other hand, reaching consensus in the decision-making process could turn into a process that pits directors against each other. For instance, one director may claim that his c0-directors withheld relevant information to avoid accountability. The consequence drawn, the board may want to get the minutes, a pile of papers to evidence the accountability and role played by each director in deliberations, and therefore refocuses the attention on personal tenacity rather than the business of the company at stake [48].

On balance, decision-making process of the board needs to be based on a committee because it is expected to have advanced and impeccable knowledge of the market and greater expertise on matters within its purview. It is commonly accepted that the board committee form part of the corporate governance mechanism. From the above effect, it is strongly advised that the Companies Act establishes a compulsory framework that requires the existence of committees in companies and introducing the landscape of committee functioning, especially in publicly held corporations. This allows proper functioning of the board as a "body", not just a part, and prepares a committee to exercise the duty of care on behalf of the full board without prejudice to collegial accountability approach. This can result in discouraging a influential director to taint the board's overall decision-making process.

Belgium Company Code and AktG Section 93 (2) provide that directors are jointly and severally liable [49]. A director can only challenge this presumption by demonstrating that he/she was absent from the meeting with an apology or voted against the contested decision, blameworthy, and challenged the contested decision at the earliest annual meeting, earliest board of directors or executive committee meeting. The Aktg further clarified that a director is not an agent of other directors, being the reason that personal liability of the director needs to be established. In this regard, I believe that the Companies Act is to make a further step to set the bounds of individual liability of the directors and margin of appreciation test, which in fact constitutes the basis for protection for directors when faced with a legal action prevailing the duty of care.

5. The duty of loyalty

Officers and directors owe to companies a duty called "duty of loyalty" which requires that there be no conflict between duty and self-dealing. By appropriating company's assets or an opportunity or using his office to promote, advance or make a transaction between the company and himself or any associated person, knowing that it is not substantially and entirely fair to the company; a director is held liable for the breach of the duty of loyalty [50]. Many court cases take the view that good faith is a subsidiary element of the duty of loyalty. "A breach of a director's duty of good faith is essentially an egregious of the duty of good faith" [51].

The Supreme Court of Delaware clarified that acting in good faith does not constitute a separate fiduciary duty, but the core of the duty of loyalty [52]. Very surprisingly, the duty of loyalty is not explicitly stipulated in the Companies Act. It appears that it confuses good faith with the duty of loyalty. Good faith describes a subjective intent and a state mind of a director in acting within the realm of the duty of loyalty. The duty of loyalty demands that a director's company decision be addressed with a good-faith beliefing that it will serve the best interest of the company [53]. An effort to consider good faith as an independent fiduciary duty is ill-defined because this term delineates a state of mind being the honesty with which a director holds "belief", whereas fiduciary duties describe the way directors are to conduct themselves in discharging their duties [54].

5.1 Distinguishing bad faith and Gross Negligence

The Companies Act does not reserve the relationship between bad faith and gross negligence. It is crucial to differentiate bad

[45] Ball C., and Sonniee M. & TRiponel A., 'Mergers and Acquisition Trends and Development', 2010, https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acqisitions/us-ma-mergers-and-acquisitions-trends-2016-year-end-report.pdf, page 143, accessed on 2nd January 2017.

[46] Theodor Baums, 'Personal Liabilities of Company Directors in German Law', https://www.jura.uni-frankfurt.de/43029388/paper35.pdf, page 10.

[47] Theodor Baums, ibid.

[48] Darian M. Ibrahim, 'Individual or Collective Liability for Corporate Directors?', College of William & Mary, Law School, 2008, page, 964, http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2726&context=facpubs, accessed on 12th October

[49] Art. 528 Belgium Company Code.

[50] Solash v. Telex Corp., 1988 Del. Ch.

[51] Ball c., and Sonniee ibid, page 18

[52] Stone v. Ritter, 911 A.2d 362 (Del. 2006).

[53] Clark W. Furlow, GOOD FAITH, 'Fiduciary Duties, and the Business Judgment Rule in Delaware', (UTAH LAW REVIEW, 2009, No. 3) page 1062, http://epubs.utah.edu/index.php/ulr/%EE%80%80article%EE%80%81/viewFile/249/221, accessed on 18 January 2017.

[54] Clark. W. Furlaw, Ibid, page 1063.

faith from gross negligence. In *McPadden v. Sidhu* the Court of Delaware of Chancery held that gross negligence is "conduct that constitutes reckless indifference or actions that are without the bounds of reason". This case arises from a sale transaction between i2 and Trade Service Holdings (TCH). In June 2006, the board of directors of i2 gave authority to an officer of the company named " Anthony Buderville", to stay in control of the sale, according to which i2 wanted to sell Trade Service Corporation (TSC), a wholly owned subsidiary, to TCH for $ 3 million. Prior to the board decision to sell TSC, the board came to know that Anthony did not contact potential buyers, which were competitors of TSC. In carrying out the sale, Anthony disregarded to consider the opportunity offered by the sister companies VisionInfoSoft and Material Express.com (VIS/ME), which had previously accepted to pay upwards of $25 million for TSC. i2 conducted a re-evaluation of TSH and found out that its valued ranged from $6 to $10.8 million to a much lower figure of $3 to $7 million. The board was also aware that Mr. Anthony is the principle owner of TCH. Two years after, is coming to the plaintiff attention that VCH, a company that bought TSH, resold it for $25 million. The plaintiff claimed that both i2's board of directors and Anthony breached the duties of care and loyalty.

The plaintiff failed to demonstrate that the directors acted consciously and disregarded their duties so as to amount to "bad faith" as required by Section 102 (b) (7) of the Dewalare General Corporation Law. The court held that that gross negligence does not equate to bad faith, and thus does not breach the duty of loyalty, but it falls in the realm of a duty of care. Bad faith is defined as "intentional dereliction of duty, a conscious disregard for one's responsibilities [55] and a failure to act in the face of a known duty to act, thereby demonstrating a conscious disregard for one's responsibilities and deliberation to cause a specific bad consequence" [56]. Finally, the Delaware Court of Chancery refuted a business judgment rule advanced by the defendants against the plaintiff and held that i2's directors and Anthony are liable for the breach of their duty of care. In order to crystallize the standards of negligence, the Section 93 of AktG lays down principles that underpin areas where a director may act in a culpable way. In line with the understanding of this Section, a defense based on incompetence, lack of expertise or knowledge does not exculpate the director [57].

5.2 Directors duties derived from the duty of care and loyalty

In the light of uncertainties with regards to the relationship between different duties enshrined in the Companies Act, there is a need to elaborate circumstances where directors' duties may be cumulative.

5.2.1 The duty of Disclosure

As discussed earlier, directors are required to disclose a transaction that constitutes a conflict of interest with the company or when they are seeking to acquire shares in the company. The duty of disclosure is also known as "duty of candor". It is a part of the fiduciary duty of loyalty and care. The Companies Act, neither discloses what a definition of "disclosure" is nor provides the difference between the duty of disclosure and duty of care and duty of loyalty. In Feldama v. Cutaia, the Supreme Court of Delaware held that the duty of disclosure is an obligation imposed on directors and officers to provide information with accuracy and completeness [58].

A director is obliged to be entirely fair with respect to the full and true facts and material aspect of the information required to disclose. In O'Reilly v. Transworld Healthcare, Inc., the court ruled that:

"Directors' disclosure obligations arise out of the fiduciary of care and loyalty. A claim for the fiduciary duty of disclosure implicates only the duty of care when the factual basis for the alleged violation suggests that the violation was made as a result of good faith, but nevertheless, erroneous judgment about the proper scope of the content of the required disclosure. However, where a complaint alleges or pleads facts sufficient to support the inference that the disclosure violation was made in bad faith, knowingly or intentionally, the alleged implicates the duty of loyalty" [59].

5.2.2 Confidentiality and non-competition

On top that the Companies Act does not deal with keeping business secret and non-competition, there are no substantial disparities between private and public companies regarding regulation of directors' duties and liabilities. The AktG provides that the duty of confidentiality and non competition fall within the realm of the duty of loyalty and they trigger individual liability of a director [60]. Members of executive management are required to preserve business secrets and are not allowed to compete the activities of the public companies, post termination. A non competition duty suggests that the director is a sole proprietor, a partner or a managing body and he is engaged in the area of similar activity of public companies.

A non-competition duty may be waived by explicit permission of the board of directors. For a private company, it requires that a non-competition clause be included in the agreement between a director and a corporation. In the case Thomas v. Farr, the England and Wales Court of Appeal upheld that a non-competition clause is enforceable if the outgoing director of the company is privy to all major strategic and operational decisions for which a company has a legitimate interest to protect [61]. The Latvia Commercial Law [62] provides remedies for non-competition breach. Once it is proven that there is a causal link between the loss and breach of non-competition, a company may step into the shoes of the particular management board in exercising the claim and interest that would have been entitled to him [63].

[55] Morris James, 'The Delaware "Bad faith" Dilemma: The Problem and a Possible Solution, ase Summaries, Directors, 2008, http://www.morrisjames.com/blogs-Delaware-Business-Litigation-Report,the-delaware-bad-faith-dilemma-the-problem-and-a-possible-solution, accessed on 23 Janury 2017.

[56] Stone v. Ritter, Del. Sup. CT., 911 A.2d 362 En Banc (2006).

[57] Judgment of the *RG* from 28.02.1940, II 115/39, RGZ 163, 200, 208; *Landwehrmann*, in: Anwaltkommentar zum Aktienrecht, Bonn 2003, § 93 para 106.

[58] Feldman v. Cutaia, No. 466, 2007 (Del. May 30, 2008).

[59] Kathleen S. O'REILLY, Plaintiff, v. TRANSWORLD HEALTHCARE, INC., 745 A2d 902 (del. Ch. 1999).

[60] Section 79 and 84(1) of AktG.

[61] Thomas v Farr Plc & Anor [2007] EWCA Civ 118 (20 February2007).

[62] Latvia Commercial Law 2000, section 171 (2).

[63] Estonia Commercial Code § 312. § 312 1.

6. Remedies for breach of fiduciary duties by the Companies Act

This paragraph discusses combinations of legal protections available for a director to demonstrate evidences required to rebut the presumption that he/she acted in a manner which does not breach the elements required to establish the fiduciary duties. In today's era of corporate scandals, alternative views have been developed to create doctrinal concept that protects directors from personal civil liability for the decision they make on behalf of a company.

The Companies Act does not provide the lifespan for a director's liability. The context of article 360 of the Companies Act drives the premise that the liability of any former director or shareholder is retained even if the company was removed from the register and that such liability continues to exist and may be enforced as if the company had not been removed from the register of companies.

Several distinctive elements in the Companies Act implicitly disagrees with the aspect of statute limitations for filing the claim. It certainly seems unfair to expose a director to a litigation risk at any time of the litigant's convenience. The Companies Act does not establish the time an interested party has to file a lawsuit, in a manner that after such time a potential plaintiff will be barred from lodging a legal action. I am of the view that the Companies Act is to encourage filing claims in a reasonable diligence and avoid litigation about cases that occur so far in the past, otherwise fact-finding could be severely at the disadvantage of the directors with a valid cause, because they might have lost evidence to protect themselves from a stale claim, and so is inconvenient to keep them living in perpetual fear of a potential lawsuit.

Moreover, the Companies Act brings as much clarity as possible to the subject of Director &Officer Insurance for good reason that companies and the directors can be sued over their decisions by a variety of plaintiffs, including, customers, suppliers, competitors, regulatory agencies, creditors, shareholders-derivative actions, lenders, and employees. D&O insurance can cover the personal liability of the directors and protect them from lawsuits which may arise from the decisions and actions taken with the scope of their managerial duties [64]. Beyond the statute structure, one may note that the practice of D&O in Rwadan corporate actions is a practical matter should consider in making business decisions.

Lastly, the Companies Act expressly grants business judgement rule for directors' decisions made in the course of their regular duties. In technical terms, business judgement rule revolves around two things. First, it underpins a presumption that the directors acted in good faith and made an informed decision for a proper purpose, and they acted with an honest belief that the decision or action was made in the company's best interest. On the other hand, the rule creates a high standard of judicial review for assessing the merit or quality of directors' decisions. Secondly, the formulation of the standard looks ultimately to rationality and combines a "subjective component (the directors' actual belief) and an objective component (whether the directors' actual belief was rational)" [65].

My suggestion is that the criteria for validation of a decision is defined loosely and appears to be generous and indulgent since the Companies Act does not illustrate the criterion of good faith, company's best interest and proper purpose's test, which are idiosyncratic visions as to predict attitudes towards a scenario that counts as a business judgement. We assume that courts in Rwanda will develop the application of the concept of business judgement rules in a such a way that it would acquire an additional dimension and require a special definition of the substantive elements of business judgement.

7. Conclusion

In judging the effective rationality of directors' fiduciary duties, one should attend to the differences in practical applications and remedial provisions between advanced market economies precedents and progress made in aligning the agency cost and management controls in the Companies Act. Because of these differences, it makes sense to recommend a legal arrangement in the director duty settings, and to set up unconventional statutory default rules to fill in the gaps identified.

As seen above, the young Companies Act remains focused traditional, and in some extent; followed in the footsteps of the older England and Wales laws. This article examines court decisions interpreting operating protection device on the issue of fiduciary duties. Fiduciary duties in Companies Act need to move another step forward to include progressive possibilities in such a way that clarity and predictability of these duties would grow in importance and substance.

It can be admitted that there is an amount of similarities between the Companies Act and fundamentals of the Law of Agency. However, the Companies Act seems to have led to different results in establishing a balance to delineate illegal conducts and treatment of the basic of fiduciary duties of corporate manager. But again, it is argued that coherent case laws discussed would bring about further structures to Companies Act and provide different construction of remedies for breach of fiduciary duties and effective deterrent precautions against directors' default.

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