UNIVERSITY OF RWANDA

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School of Law

Master's in Business Law

LIABILITY OF DIRECTORS IN A LIMITED COMPANY

A thesis submitted in partial fulfillment of the requirements
for the award of the degree of Master's in Business Law (LLM)

Presented by: KANSAYIRE CHRISTIANE

SUPERVISOR: Prof. Dr. NGAGI MUNYAMFURA Alphonse

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EPIGRAPH

"Since the responsibility of directorship comes with significant personal liability, executive and non-executive directors should receive relevant development and education to inform them of their duties, responsibilities, powers and potential liabilities in working at board level."

(King II Report) CGF Research Institute PTY LTD Corporate Governance Framework

DECLARATION

I, Christiane Kansayire, hereby declare that the thesis entitled «**The liability of directors in a limited company under Rwandan law** » is my original work. To the best of my knowledge, it has not been submitted by anybody else to any higher learning institution for any award. Where the works of other individuals were used, references were provided.

Student signature

KANSAYIRE Christiane

Date: 10th of June 2015

DEDICATION

I dedicate my dissertation work to the Almighty God.

To my family. A special feeling of gratitude to my loving parents, whose words of encouragement and push for tenacity ring in my ear.

Special thanks to my husband and my children, as they have never left my side and are very special.

To my friends and church family who have supported me throughout the process.

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In the first place, I am deeply grateful to the Almighty Triune God for the gift of Life, Health, Knowledge and everything.

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I would like to express my sincere gratitude towards all people who stood by my side as I was writing this thesis. For all that you did, I acknowledge with lots of thanks. This paper cannot accommodate the mention of all your names but my heart accommodates all of you.

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KANSAYIRE Christiane

ABBREVIATIONS AND ACRIMONIES

$	:Dollar
Art	:Article
AD	:After Christ
Bis	*:*Twice
CA	:Companies Act
Chap.	:Chapter
Co.	:Company
Ed	:Edition
i.e	:That is; that is to say
E.g	:For Example
etc.	:*et cetera*, *et cetera* (and so on)
FA	:Fraud Act
HC	:Haute Cour
http	:Hyper text transfer protocol
Ibidem	:The same author, the same page
Idem	:The same author
In fine	*:*At the end
Inc.	:Incorporated
J.O.	:*Journal Officiel*
KIG	:Kigali
Ltd	:Limited
MINICOM	:Ministry of Commerce and Industries
n^o	:Number
NUR	:National University of Rwanda
O.G	:Official Gazette
Op. Cit	:*Opere Citato* (already cited)
P	:Page
PP	:Pages
RDB	:Rwanda Development Board

RPA	:Requête Pénale et Administrative
RRA	:Rwanda Revenue Authority
Rwf	:Rwandan francs
S	:Section
SS	:Sub-Section
SN	:Special Number
UK	:United Kingdom
ULK	:*Université Libre de Kigali*
UNR	:*Université Nationale du Rwanda*
USA	:United States of America
US	:United States
V	:Volume
VS	:*Versus*
VAT	:Value Added Tax
X	:Unknown author
EU	:European Union

ABSTRACT

In this thesis, two major tasks were carried out. First of all, the duties of directors in Limited Company under the Rwandan Law were discussed. Secondly, the analyses of directors' liabilities in limited company were done, and proposals to reform the Rwandan Company Law were made.

For the first issues, the researcher found that the duties of a company director whether in Rwanda or anywhere else stem from the company's law and/ or articles of association. The duty of care and due diligence, loyalty as well as observing other statutory provisions applicable to all limited liability companies has to be given priority by the director, failure of which will lead to his liability for mismanagement, breach of statutory provisions or by-laws more especially where loss or damage has been caused by such behavior. However in second point, the researcher found that in Rwanda companies 'law, there are some provisions which provide that directors are civil, or administrative and penal liable if she/he breach the laws and regulations related to his/her duties. However, there are some gaps in the Rwanda companies' law which require the improvement in order to implement the good governance in limited companies.

The purpose of this thesis was mainly to examine the liability of directors. The issues were explored through an analysis of Rwandan legislation in general and companies law especially. More important problems are related to issues such as avoidance of conflict of interest, the ambiguous provisions and the lack of the limitation mechanism of directors' liability. During or after the assessment, the researcher makes some comments on those issues, offer the opinions and make the suggestions about the improvement of the provision on liability of directors in a limited company under Rwandan law.

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GENERAL INTRODUCTION

I. PRESENTATION OF THE SUBJECT

Under company law in principle, a company is a legal entity and as such it has a legal personality that is distinct from that of its directors and shareholders. It is obvious that any action taken by the company's director and/or shareholder in the right way and the right time is meant to be an action of the company. Therefore, in principle, the company should be liable for the actions made by its shareholders and directors. The personal liability of a shareholder and/or director should be an exception and be considered in some rare cases.[1]

Directors are expected to work actively to ensure a company's operational sustainability and optimize its profit. In the process, they must act in situations where the consequences of their actions cannot be clearly and unambiguously predicted and the decisions made are often rather risky.[2] Such risky decisions may generate profits, but also losses to the company.[3] To ensure sufficient freedom of action for directors while also protecting the interests of persons associated with a company, (shareholders, creditors…) clear rules of procedure are required. It is important that legislation and case law provide guidance to both shareholders and directors on the extent to which the directors' actions are acceptable and when they could result in liability. If the boundaries are too obscure or where directors may face liability, even when acting in best faith, the position of a director might become ″an office nobody wants.″[4]

In some countries including Rwanda, directors and shareholders may be held liable for their actions and the liability may be either civil liability, administrative or criminal liability.[5] For example in Rwandan law, article 212 of the companies act 2009, provides that a director or officer willfully commits a breach of any duty: 1° shall be liable to compensate the company for

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[1] F. GUIRAMAND et HERAUD A., *Droit des sociétés : des groupements et des entreprises en difficulté*, 10e ed., Paris, Dunod, p.184.
[2] K. MADISSON, *Duties and liabilities of company directors under German and Estonian law: a comparative analysis*, RGSL Research papers, No 7, 2012, p.14.
[3] *Ibid.*
[4] *Ibid.*

[5] E.WERLAUFF,*EU Company Law. Common business law of 28 states*, 2nd edition, DJOD Publishing, Copenhagen, 2003, p.27.

any loss it suffers as a result of the breach; 2° shall be liable to account to the company for any profit made as a result of such breach; 3° any contract entered into between the director or the officer and the company with regard to that transaction may be rescinded by the company"[6].

The Rwandan companies' act of 2009 provides also some provisions which stated about the liability of directors and shareholders even to the extent of the aftermath of the life of the company.[7] For example if the board of directors sees that the company cannot continue to be run in the normal way, they will consider appointing a liquidator or an administrator (the Rwanda law provide for a duty on the part of a company's directors to timely file for insolvency).[8] This is a legal strategy to ensure that creditors' interests are properly taken into account in near-insolvent companies. Typically, this strategy is then buttressed by a consequential liability of directors for any depletion of the company's assets resulting from the delayed insolvency filing.

In which cases are directors of limited company liable? What is the delimitation of his/her liability? What were the directors obligated to do? This thesis deals with issues related to the duties, responsibilities and liability of directors. Through all of those issues, it focuses on the question of how directors must behave in order to avoid liability, and whether and how such liability can be reduced or limited. The work highlights the weaknesses and further regulations needs in the area and offers possible solutions in orders to promote good administration of the Limited Companies in Rwandan law.

[6]Article 212 of the law n° 07/2009 of 27/04/2009 relating to companies, in *O.G* n°17bis of 27/04/2009 (hereinafter the Rwanda Companies act)

[7] Article 360 of the Rwanda Companies act, provides the continuation of liability of directors and shareholders. It states that the removal of a company from the register of companies shall not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register and that liability continues and may be enforced as if the company had not been removed from the register.

[8] Art. 16 of law n°12/2009 of 26/05/2009 relating to commercial recovery and settling of issues arising from insolvency, in *O.G.* n° special of 26/05/2009.

II. CHOICE AND INTEREST OF THE SUBJECT

The researcher's choice and interest in the subject stems from the fact in today's world, business has become a central factor in determining the economic life of different countries. As such, there are a number of legal issues emanating from management of companies. There have been many cases where company directors have acted contrary to their responsibilities or, in their responsibilities they have made actions which have caused prejudice and thus they are held liable. However, it remains a question as to which actions should company directors is liable for and to what extent? This raises the interest for the researcher to choose the topic as there is need to search deeply and find out the way the directors' liability comes in.

III. STATEMENT OF THE PROBLEM

In Rwanda, the law on companies provides that directors can be liable for any acts committed or any omissions during the execution of duties by a director of any a company. Furthermore, the director may be liable for such activities when the company is no longer in existence[9]. However, the law does not clearly prescribe whether the director shall be liable both criminally and civilly and both personal and administrative acts. It is thus important to make a comparative study with other countries as well as commercially developed companies.

1. What are the responsibilities which bear directors?
2. Which actions should directors is personal liable for and to what extent?
3. What are the conditions of their liabilities?

Such and others related questions was been answered by the researcher in this thesis.

IV. OBJECTIVES OF THE RESEARCH

The aim of this thesis originates from the researcher's feeling that there is some complexity in the Rwandan law on companies regarding the liability of directors of a limited liability company. It is thus deemed vital to venture into this research and examine concrete practical cases related to such a liability.

[9] Art. 360 of the Rwandan companies act 2009.

It is also interesting to look at other different jurisdictions and find out if our domestic law can be improved after probably making a thorough comparative work and having appreciated or criticized different provisions on the liability of directors in a limited liability company. This research is also aimed at finding out if the liability can be civil, administrative or criminal and if it can be carried both during and after the life of the company. At the end of the day, the research shall play a significant role in helping people that are directors and/or those that aspire for the same as more often than not directors in a company have quite a good number of duties and responsibilities which or whose consequences they do not normally seem to understand. Recommendations born from the findings shall be given to be considered and consumed by many companies.

V. METHODOLOGY

The researcher has analyzed different laws and regulations that have some provisions on the role and liability of directors both under Rwandan law and laws of other jurisdictions. A number of text books related to company law shall also meet the researcher's concerns. Furthermore, existing case law has been used to analyze cases related to the subject.

In this research the researcher has used the qualitative method. The researcher has read legal text books, made organized interviews to find out whether corporate directors really understand their liability. Cases have been analyzed too to understand better how directors have been treated in case they committed acts that they have been liable for, the decisions that were taken by different courts in different jurisdictions have also been analyzed critically. This research shall, however, lay emphasis on the limited liability companies other than unlimited liability companies.

VI. SUBDIVISION OF THE STUDY

The study is divided into two chapters. The first chapter covers the liability of directors (general Concept) under which the researcher looks at the roles and liability of directors and how they are appointed and removed from office and look at other relevant aspects while the second chapter covers the analysis of directors, their roles and liabilities. Finally through the general conclusion, we summarize our findings and recommendations.

CHAPTER ONE: GENERAL CONSIDERATIONS ON LIABILITY OF DIRECTORS

In their duties, company directors are normally likely to breach legal provisions. In Rwanda, the Companies Act provides cases where if company directors breach the provisions of the law, they shall be held liable. In this chapter, it is important to look at the types of directors, their duties, their rights as well as their liability and the types of liability they may be subjected to. It is also necessary to talk about the limited company in this chapter.

I.1: Overview on company directors

A director is a member of the board of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.[10] However, this definition does not give a clear understanding of the "director" as it repeats the word director in the definition. Rwandan Law relating to companies does not define the notion of a director although it defines a non- executive director.[11]

There are different types of directors, and a person becomes a director only when that person has given his or her written consent to serve as a director, after having been appointed or elected or holding office.

The business and affairs of a company must be managed by or under the direction of its board of directors which has the authority to exercise all of the powers and perform any of the functions of the company.

I.1.1. Notions on company directors

Under the UK law, The UK Companies Act of 2006 (hereinafter the act) is also unhelpful to anyone seeking a definition of a director. It states only that directors it includes *"any person occupying the position of a director by whatever name called"*.[12] The Act makes no distinction between executive and non-executive directors.

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[10] D. DENNIS et al., *Companies and other business structures in South Africa*, Cape Town, Oxford University Press, 2009, p.77.

[11] Art. 2, 4, 1° of the Rwandan companies act of 2009.

[12] The UK Companies Act of 2006, Section 250.

The principles of good faith and honesty and duties of care and skill (detailed further below) were developed by the UK courts largely in relation to non-executive directors, since an executive director's service contract will usually impose obligations on him that go beyond his basic duties as a director.[13] In Rv Kritzinger 19741(2) SA 57 (A) the point was made that a company is an artificial person that cannot read a written representation or hear a spoken representation. It reads or hears a representation through the eyes or ears of, *inter alios,* its directors acting in the course of their duty and "board "is the collective term used to designate the directors when they act together in the course of their duty to the company.[14]

J. ROSSER in his book, while commenting on the UK companies Act of 2006 points out that the definition of a "Director" covers any person who *de facto* acts as a director despite his appointment being invalid or whether the person had in fact been appointed at all. The author continues to mention that because the only definition given in the UK Companies Act 2006 is not exhaustive, in practice, it is necessary to examine the function of the person, the constitution of the company and the term of contract between the company and the person etc. to decide whether a person is occupying the position of a director.[15]

Under Rwandan law, it is quite surprising that the Company law does not define the term "Director". It, on the contrary defines an officer, a shareholder and a non-executive director. It is thus problematic to give a lot other provisions relating to the 'director" without defining the term.

I.1.2. Types of directors[16]

In Rwandan Law, Companies act doesn't given or define several types of directors such as executive directors, non-executive directors, independent directors, shadow directors, *ex officio* director, Memorandum of Incorporation-appointed director, temporary director, alternate director

[13] D. DENNIS et al., *op. cit.,* p.77.
[14] Rv Kritzinger 1971(2) SA 57 (A) 77.
[15] J. ROSSER*, Tolley's Company Law handbook,* 18th Edition, Scotland, 2010, p.334.
[16] D. DENNIS et al., *op.cit,* pp.78-79.

and elected director.[17] However, the South African Company Law and others statute provides and defines those types of directors mentioned above.

I.1.2.1. Executive directors

According to D. DENNIS and others, the King Code[18] identifies three types of directors. Rwandan law, on the other hand, unlike under South African law does not clearly unearth the types of directors. It just gives the definition of the non- executive director but does not talk of executive directors and independent directors.

Executive directors are involved in day-to-day management. They are employees of the company, and/or employees of any of the company's subsidiaries.[19] One can rightly add that they are concerned with the day to day management of the company.

I.1.2.2. Non-executive directors

Under Rwandan Law, a non-executive Director is defined as one who is not involved in the day to day management of the company.[20] Non-Executive Directors are not involved in day-to-day management and are not full-time salaried employees of the company or any of its subsidiaries.

I.1.2.3. Independent directors

Independent directors are normally Non-executive directors.[21] Under the South African Company law, these are not representatives of a controlling shareholder.[22] Another element of independent directors is that they are not employed by the company in an executive capacity and have no contractual or business interest in the company or group.

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[17] In practice the company should have a board of directors composed by non executive directors and executive directors. In Rwanda there is same example such as BRALIRWA Ltd which have five member of the board of directors, among them there are 2 executive directors and 3 non executive directors

[18] In March 2002, as a result of the work of the King Committee, a Report (the so-called King 2 report) on Corporate Governance for South Africa 2002 was made public. This report introduced a code of Corporate Practices and conduct (hereinafter referred to as "King Code"). Many of the provisions of this code have been practically adopted by companies in South Africa, and the content of the King Code is therefore important for anyone wishing to have a comprehensive practical knowledge of company administration, management and control (voy.*id*.)

[19] F. SHAND, understanding the exposures and liabilities of directors in a turnaround situation, on line at https://www.abl.com.au/.../directorsliabilities04113, accessed on may 22,2015

[20] Art.2, 41° of Rwandan companies act of 2009.

[21] D. DENNIS et al., *op.cit*, pp.78-79.

[22] *Idem.*

The company law doesn't define the independent directors, however, the regulation on corporate governance of banks define the independent director as a director who has no relationship or interest in the banking institution or any of its subsidiaries or affiliates or their related interests.[23]

I.1.2.4. Shadow directors

Shadow directors are people who are not officially appointed as directors. They do not complete the consent to act form, they do not comply with other formalities on appointment; and their particulars do not appear in the register of directors and officers.[24] Despite this, these people may be able to give instructions to the Board, and the Board does indeed act on their instructions. The King Code discourages the existence of shadow directors.

I.1.2.5. An *ex officio* director

An *ex officio* director is a person who holds office as a director of a company solely as a result of that person holding another office or title or status.[25] *Ex officio* directors are not appointed by the shareholders. An *ex officio* director of a company has all the powers and functions of any other director, except to the extent that the company's Memorandum of Incorporation restricts such powers and functions.[26] Such director has all of the duties and is subject to the liabilities of any other director.

I.1.2.6. A Memorandum of Incorporation-appointed director

Such a director does not have to be appointed by the shareholders.[27] The memorandum of Incorporation can specify how and/or by whom such a director is appointed.

I.1.2.7. An alternate director

An "alternate director " is defined as a person elected or appointed to serve, as occasion requires, as a member of the board of a company in substitution for a particular elected or appointed

[23] Art. 2. Regulation n° 06/2008 on corporate governance of banks, in *O.G.* n° 02 of 10/01/2011.
[24] IAN COX, South Africa: the appointment of directors under the 2008 Companies Act, http://www.mondaq.com/x/203172/Directors+Officers/The+Appointment+Of+Directors+Under+The+2008+Companies+Act , accessed May 22, 2015.
[25] I*bid*.
[26] *Ibid.*
[27] *Ibid*.

director of that company**.**[28] The UK 2006 Companies Act provides that a Memorandum of Incorporation can provide for the appointment or election of one or more persons as alternate directors. In the case of a profit company at least 50% of alternate directors must be elected by shareholders.[29]

An alternate director may be appointed or elected depending on contents of the Memorandum of Incorporation**.**

I.1.2.8. A temporary director

A Memorandum of Incorporation can provide for the appointment of a temporary director. Unless the Memorandum of Incorporation provides otherwise, the directors may appoint a temporary director.

I.1.2.9. *De jure* Directors

Generally speaking, a *de jure* director is the one who has been validly appointed under the country's company law and / or in accordance with the articles of association of the relevant company in question.[30] However, the one that has been provided for, as the company's director must also express his consent to assume the responsibilities attached to his office[31]. Where this consent has not been expressed, it means that the appointed person is not ready to be bound by the duties attached to his appointment and office. This kind of director is always concerned in case of a liability involving a company director since he is the one most known. He is liable first, for the acts he commits himself, and also often jointly and severally liable for the acts committed by other directors where the law provides for it. He may also be civilly liable for the faults of his employees who are directly under his supervision.

[28] IAN COX, *op.cit*., p.1.
[29] Section 66(4)(a)(iii) of the UK 2006 Companies Act.
[30] IAN COX, *op.cit*., p.2.
[31] Art. 177 of the Rwanda companies' act of 2009 stated that the consent has to be presented in writing and must, in addition, affirm or attest that he is not disqualified to be a director as required by the law or by the articles of association of that particular company.

I.1.2.9. *De facto* Directors

A de facto director on the other hand, is the one who acts as a company's director, but who is not a *de jure* director. He is a person assumed to work as a director and the company recognizes his actions in the company although he was not actually or validly appointed as such.[32] Such people are often recognized in the court rulings in respect of some offences committed where they put in wordings similar to this; 'any person who was purporting to act in any such capacity (as a director)', and this makes them liable just like the *de jure* directors for similar offences committed either to the company, or to the third parties.[33]

Concerning the nomination to the Board of directors, article 177 of Rwandan companies act 2009 provides that a person shall not be appointed as a director of a company unless that person has consented in writing to be a director and certified that he/she is not disqualified from being appointed or holding office as a director of a company.

Regarding starting to hold office, article 178 of Rwandan companies act 2009 states that a person appointed as a director in an application for registration or in an amalgamation proposal shall hold office as a director from the date of registration or the date the amalgamation proposal is effective until that person ceases to hold office as a director in accordance with this Law. The Law does not however provide specifically for the term of office and how long it shall be. In other words, one may be appointed a director at the time of incorporation and stays so forever as long as the company exists except where as provided by article 181 of Rwandan companies act 2009:

The office of director of a company shall be vacated if the person holding that office: 1° resigns in writing; 2° is removed from office; 3° no longer meets the requirements; 4° dies.

The provisions of article 180 of Rwandan companies act 2009 states the procedure and how a director may be removed from his office as a director. Interesting to note is that it is different with public companies and private companies.

[32] F. MASENGO, KAYIHURA D.K. and BINDA E.M., *The new Rwandan company law*, 2011, p. 90, (unpublished).
[33] *Ibid.*

Whereas it requires an ordinary meeting to resolve for the removal of a director in a public company, it may be a resolution to remove such a director in a private company taken by an extra-ordinary shareholders' meeting provided it was clearly stated in the agenda of that meeting.

All subsequent directors of a company not those who assumed their offices at registration or amalgamation time shall, unless the Articles of association of the company otherwise provide, be appointed by ordinary resolution.

I.1.3. Rights and power of Directors

A director has a right to the exercise of his office. He may not be prevented by his fellow directors from discharging his duties as a director. He is entitled to inspect and take extracts from the company's books.

I.1.3.1.1. Right to exercise of office

A director has the right to the exercise of his office. He may not be prevented by his fellow directors from discharging his duties as directors. He is entitled to inspect and take extracts from the company book.

Article 178 of Rwanda companies' act stated that a person appointed as a director in an application for registration or in an amalgamation proposal shall hold office as a director from the date of registration or the date the amalgamation proposal is effective until that person ceases to hold office as a director in accordance with this Law.

I.1.3.1.1. Right to recognition and participation

A director who has been properly elected possesses several rights of every basic nature, for instance, the right to be recognized as a director by his or her associates, the right to receive notice of board meetings and the right to attend and participate in them.[34]

[34] R.A. HOWELL & Others, *Business Law, Text and Cases*; 2nd Ed. Illinois; The Dryden Press; 198, *p.663*

I.1.3.1.2. Right of directors to inspect all corporate records

The right of directors to inspect all corporate records is somewhat similar to the inspection right possessed by shareholders. However, the reasons for allowing inspection by directors are even stronger than those for allowing shareholder inspection.[35] Directors must have complete access to corporate records in order to fully discharge their decision- making responsibilities.

It obviously would be unfair to hold them responsible for paying an illegal dividend, for example if corporate financial records have not been completely at their disposal. Because of this compelling need for access to corporate books, most states hold that a director's right of inspection is absolute and unqualified (that is, not subject to the various limitations that are often placed on a shareholder's inspection right). Of course the director's abuse of this right can provide a basis for his or her removal from the board.[36]

I.1.3.1.3. Right of directors to compensation

Traditionally, in many countries, there was a rule that directors were not entitled to compensation for their services to the company because there was an assumption that directors were usually shareholders and would receive their compensation in the form of dividends.[37] The rule also took into account the fact that some directors also served as company officers and received compensation for their services in those positions.[38] Nowadays, however, it deserves notice that a great number of directors serve only as directors without holding any other office in the company. For this reason, in modern companies, directors are given the right to compensation and this right is usually catered for in the company articles or by-laws.

In fact, the statutes of many companies in some states today provide for example, that the board of directors can fix the compensation of its own members unless the articles of by-laws state otherwise. Directors are of course responsible for any abuse of such power and there is a likely temptation of abuse.

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[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid*.

Under Rwandan Law, the Companies Act stated that the members of the board of directors have the right to remuneration and other benefits approved by ordinary resolution of the company. Accordingly, former members of the board of directors may also be given some allowances including any allowances for loss of membership.[39]

I.1.3.1.4. Right of directors to indemnification

The performance of their management responsibilities sometimes causes directors to become involved in legal proceedings. For example, the directors may be sued by a shareholder who claims that they acted negligently in managing the company. Or they may be charged by the government in a civil or criminal suit with a violation of the antitrust laws.

The costs of such lawsuits to the individual director, in terms of both expenses and potential liability for damages or fines, may be quite substantial.[40] Today, the statutes of most states (if not all) permit indemnification of corporate directors in a number of circumstances for example where it is believed that the director acted in the best interests of the company and that he or she acted in good faith or if there is no reasonable cause to believe that the director's conduct was unlawful.[41]

I.1.3.2. Overview on the power of directors

A company's directors act on behalf of the company. They only have powers to do what the company itself is legally entitled to do. The powers that directors have are those which have been conferred upon them by the company, usually via the company's articles of association. Normally, directors' powers are conferred collectively. The powers are formally exercised by a resolution at a board meeting, usually decided by a majority of votes.

The management of a company is entrusted to the Board of directors named by the annual meeting of shareholders. It should be noted however, that the Rwandan law (on companies) did not thoroughly address the issue of the structure and organs of the company as it was at least in

[39] Article 9 of Law No. 14/2010 of 07/05/2010 modifying and Complementing the Law No. 07/2009 of 27/04/2009 relating to Companies, *O.G.* no..Special of 14/05/2010.
[40] R.A. HOWELL, *op.cit.*, pp. 644-645
[41] *Ibid.*

the previous law (the company law of 1988). Indeed, the annual meeting of shareholders appears in the law but in a very loose manner, and without coherent structure and functioning.[42]

The administrators of a company work together, jointly as a Board of directors and they cannot duly meet if their number is lower than the required quorum by the articles of association.[43] It is interesting to note however that although as per the companies' law, the articles of association are optional; the law is not explicit on the proceedings of the company, on matters for example regarding the procedures, the quorum required for a Board Meeting to lawfully take decisions, etc.

It is nevertheless clearly provided for by the law that the activities and business of a company are managed under the leadership and supervision of the Board of directors. The Board of directors has all necessary powers for the management, the direction and the supervision of the activities and business of the company.[44]

The Board of directors of the company may certainly delegate to the Committee of Directors, or to a Director or to an employee of the company or to any other person, part or all of the powers that are conferred to it.[45]

It is obvious, and well articulated by Art. 173 of the Companies law that the Board of Directors that delegates power to any of the above mentioned (whether a committee, one of the directors, an employee or any other person) shall be responsible for the exercise of the power by the delegate as if the power had been exercised by the Board of Directors itself. In other words, the liability in case of fault or wrong doing during the exercise of such powers shall remain to the entire board that delegated such powers. For example, where the Board of Directors delegated its powers of any kind to the company's Chief Executive Officer (CEO), he (the CEO) shall be acting, not on his behalf as the CEO of that company, but as a delegate of the Board of Directors and so, where a liability is engaged, it is the Board's liability and not the CEO's.[46]

[42] F. MASENGO, KAYIHURA D.K. and BINDA E.M, *op. cit.*, p.87.

[43] *Ibid.*

[44] Art. 169 of Rwanda Companies act of 2009.

[45] Art. 173 of the Rwanda Companies act of 2009.

[46] F. MASENGO, KAYIHURA D.K. and BINDA E.M, *op. cit.*, p.87.

Moreover, at least one of the administrators of the company must reside in Rwanda.[47] This was emphasized especially with international companies. Whereas such companies are encouraged and facilitated to incorporate in Rwanda, for the purposes of proper administration and management, one of its directors has necessarily to reside in Rwanda. It should be noted that, this does not mean that one of the directors must be a Rwandan. All that is sought by this provision is to have one of the directors whether Rwandan or not to be residing in Rwanda.[48]

According to the article 205 of Rwandan companies' law, the proceedings of the Board of Directors which are not provided for in this Law shall be governed by instructions of the Registrar General.

I.1.4. Appointment of directors

Under Rwandan Company law, a person cannot be appointed as a director of a company unless the person has consented in writing to be a director and certified that he/she is not disqualified from being appointed or holding office as a director of a company.[49]

Article 178 provides that a person appointed as a director in an application for registration or in an amalgamation proposal shall hold office as a director from the date of registration or the date the amalgamation proposal is effective until that person ceases to hold office as a director in accordance with the law.[50]

The Rwandan law on Companies also provides the procedures of appointing company directors in case the procedure is not provided in the company's articles of association. In such a case, the directors shall be appointed by an ordinary resolution.

[47] *Ibid.*
[48] Interview with CYIZA Clement, legal officer of national bank of Rwanda in legal services department, on 24th may, 2015.
[49] Art. 177 of Rwandan companies act of 2009.
[50] Art. 178 of Rwandan companies act of 2009.

Except where the corporation/company statutes requires the initial board of directors to be designated in the articles or certificate of incorporation, the board is elected by the shareholders who have voting rights.[51]

Modern statutes frequently give the board the function of appointing new members to its body upon the death or resignation of a director, the new member to serve until the next annual meeting of the shareholders when directors will again be elected. The board may also be given the power to remove a director upon his insanity established by a court, or upon his bankruptcy, or if he does not acquire the qualifications set up in the articles or by-laws, and for other stated reasons.[52]

Although the initial board of directors is either named in the articles of incorporation or selected by the incorporators, its term ordinarily extends only until the first meeting of shareholders. The selection of directors then becomes a shareholder function.[53]

I.1.5. Remuneration and other benefits for directors

A director does not have an automatic right to remuneration in terms of the Act of 2008. Section 66(9) of the South African law for instance provides that a company may pay remuneration to a director, unless prohibited in a Memorandum of Incorporation, must be approved by a special resolution within the previous two years. The Memorandum of Incorporation can provide for payment of remuneration to directors.

A director may hold any other office or position of profit in the company, other than that of auditor, in conjunction with his directorship, and may be appointed thereto upon such terms as to remuneration, tenure of office and otherwise as may be arranged by the directors.[54]

In Rwanda, the company, by an ordinary resolution, approves the remuneration and any benefits payable to the members of the board of directors and any allowances to a former member of the

[51] N.D. LATTIN, *the Law of Corporations,* 2nd Ed., New York, The Foundation Press, INC. 1971; pp.239-240.
[52] *Idem.,* p.244.
[53] R. A. HOWELL & Others, *Business Law, Text and Cases,* 2nd Ed. Illinois; The Dryden Press; 1981; P.636
[54] J.T. PRETORIUS& Others, *Huhlo's, South African Company Law through the cases, ,* 6th ed., Pretoria, Juta& co, Ltd, 1999, p.274.

board of directors, including any allowances for loss of membership. The Board of Directors may determine the terms of any service contract with a Managing Director or other Executive Director.[55]

When one analyzes the law relating to companies, it is not clear whether members of the board of directors including the Managing Directors are entitled to any salaries although in practice, the Managing Director is normally paid a salary. The law does not mention whether other members of the board of directors other than the Managing Directors and/or other executive directors are prohibited from earning salaries.

Before its amendment, the 2009 Law on companies had provided that:

"*The company must by ordinary resolution, approve the remuneration and all advantages due to administrators, including all compensations due to an administrator who loses his status or to a former administrator. The Board of directors can determine modalities of remuneration for a contract of service with a Director General or Executive Director.*

The company administrators have the duty to endorse all expenses incurred by administrators with regard to their journeys, accommodation and other cost duly incurred by them during the board meetings or those in relation with the activities of the company" (art. 206).

In its April 2010 amendment as regards the directors' remunerations, privileges and other advantages, the amendment provides that:

"Article 206 of Law n° 07/2009 of 27/04/2009 relating to companies is modified and complemented as follows:

"The company shall by ordinary resolution approve the remuneration and any benefits payable to the members of Board of Directors and any allowances to a former member of the Board of Directors, including any allowances for loss of membership.

The Board of Directors may determine the terms of any service contract with a managing director or other Executive Director.

[55] Art.9 of the law No.14/2010 modifying and complementing the law n°7/2009 relating to companies

The member of the Board of Directors may be paid all traveling, accommodations and other expenses properly incurred by them in attending any meetings of the Board of Directors or in connection with the business of the company.
Except for companies involved in granting loans, companies shall not be allowed to grant loans to their Board members."

In the amendment, it is remarkable that restrictions on the provision of loans to directors by the companies involved in the granting of loans as their activity was emphasized. By this, the legislator wanted to avoid any abuse of power, where a given director would use his influence to acquire such undue loans from the same company to which he or she is a director. By this as well, conflict of interests by the director vis-à-vis the company is also limited or put correctly, avoided in that regard.

I.2. NOTIONS ON LIABILITY OF DIRECTORS

Many authors and legislators have written about the liability of directors of companies. A director may be liable criminally and civilly; personally or severally with other co-directors as we shall see below. There are even cases where directors have been convicted of the acts or omissions done in breach of the laws and regulations in place.

Rwandan law provides that a director may continue to be liable even when the company is no longer in existence.[56]

I.2.1. Definition of liability

It is interesting to note that although there are a lot of provisions relating to the liability of shareholders and directors in our Companies Act, however, the law does not define the term "liability". It may therefore be difficult for users of the law to understand the liability provided in the law without clearly understanding the meaning and notion of liability itself.

Generally, "liability" is defined by the state of being legally responsible for something. Liability as a legal term is defined by business dictionary as "Responsibility for the consequences of one's

[56] Art.360 of the Rwandan companies act of 2009.

acts or omissions enforced by civil remedy (damages) or criminal punishment" or "an obligation to do or refrain from doing something"[57].

I.2.2. Types of liabilities

There could be many types of liabilities depending on the context focused on. For instance, liability may be seen in a financial and/or accounting context in which case it would be understood in relation to assets.[58] However, for the purposes of this research work, we shall see the types of liability in the legal context analyzing the liability of directors for their acts or omissions. As such, these shall include personal and several liability, civil, administrative and criminal liability, internal and external liability.

1.2.2.1. Personal liability of directors

Historically, corporate directors relied on insurance, furnished by their corporations, to cover any liability arising out of their decisions. In 2005, former directors of World-com and Enron reached agreements with creditors and shareholders. In these cases, the directors agreed to contribute money out of their personal funds to the settlement.[59]

In general, a company is liable for performance of its obligations with all of its assets and the members of its management board are not personally liable for the activities of the company. However, in circumstances where a management board member violates his/her obligations, he/she may be held personally liable before the creditors, shareholders or the company. In this context, a management board member may in theory carry two types of liability – towards the company (*internal liability*) and towards third persons (*external liability*).[60]

Management board members are not strictly liable for any loss suffered by the company or by the creditors of the company. Unsuccessful management will eventually have a negative impact on the company but it will not automatically bring about personal liability for possible losses.

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[57] H. DICKINSON, Directors and Officers Liability: the legal position in the United Kingdom, on line at www.hilldickinson.com/.../directors%20and%20officers , accessed on May 25, 2015.
[58] *Ibid*.
[59] O. LEE REED, *The legal and regulatory environment of business*, 14th Ed., New York, 2008, p.348.
[60] K. MADISSON, *"Duties and liabilities of company directors under German and Estonian law: a comparative analysis",* RGSL Research papers, No 7, 2012, p.14.

Directors may become personally liable for any culpable violation of their duties. Such duties may originate from a contract (articles of association, contract with the director) or from law (civil, corporate, criminal or insolvency law). "The most frequent violation is the breach of loyalty obligations (non-compete covenants during and after employment or the collection of kick-backs) and illicit disbursements from the company's equity (indirect refund to shareholders/partners, distribution of hidden dividends)."[61] German law on directors' liability differentiates between liability towards the company (internal liability) and liability towards third parties (external liability).[62]

Internal liability is based on a breach of duties arising from the position of director in the company. The members of the management board are jointly and severally liable for damages caused if they fail to apply the care of a prudent and diligent manager. The term "jointly and severally" denotes that liability for the entire amount of damages falls on each managing director. Directors, shadow directors, and *de facto* directors are generally held liable as *de jure* directors.

In many cases, directions or instructions of the majority shareholder, who is not legally a director and does not participate in the firm's management, are routinely followed by the directors and employees. He/she may be held liable for damage to the company in the same way as *de jure* directors.[63]

External liability is the liability towards all other persons except the company. The duties of the management board are primarily owed to the company and not to third parties; therefore, external liability is very rare. As a rule, any third party claims for damages can be filed against the company only, and the company may have recourse against the director.[64] There are also many duties of a managing director that are aimed at protecting the interests of third parties such as the company's creditors, contracting parties, purchasers of securities, shareholders and even

[61] K. MADISSON, *op.cit.,* p. 90.
[62] *Ibid*.
[63] K. MADISSON, *op.cit.,* p. 90.
[64] *Id.*, p.15.

the general public (for example, the tax and social security authorities). In recent years, liability to third parties has become more and more important.[65]

One cannot tackle the liability of directors without saying something about "Lifting the Corporate Veil". Lifting/piercing the corporate veil refers to the exceptional circumstances where the court either ignore the separate legal existence of the company and treat its members as if they were the owners of the assets and had conducted the business of the company in their personal capacities or where the court attributes certain rights or obligations of the members of the company. When the court lifts/pierces the corporate veil it ignores the legal existence of the company only for the purpose of adjudicating the rights and liabilities of the parties to the particular dispute before the court. In other words, for all other purposes, the separate legal existence of the company continues to be recognized in law.[66]

Although the corporate veil will, in circumstances where a director acted in accordance with his designated authority, usually shield the director from the incursion of personal liability, a director's immunity from the imposition of personal liability will not be safeguarded where he undertook a collateral and personal obligation on behalf of the company, notwithstanding that the undertaking was instigated to benefit the company.[67] For example, in circumstances where the assets of a company are insufficient to secure corporate liabilities, a director may be obliged to enter into a contractual obligation to personally guarantee the payment of the company's debts. A letter of comfort may take the form of a personal assurance from a director of a company whereby he personally promises that a corporate date will be met.

A director of a company will also be personally liable on any contract which he entered into on behalf of the company at a time prior to the company's incorporation. Although a pre-incorporation contract may be for the future benefit of a company, until the company is incorporated, it can have no legal existence and therefore cannot be bound by contracts made in

[65] *Idem.,* p.92.
[66] D. DENNIS *& others, op.cit., p.21.*
[67] S. GRIFFIN, *Company Law Fundamental Principles,* 3rd Ed., 2000, Oxford, Pearson Education, p.300.

its name or on its behalf. Even after its incorporation, a company cannot expressly or by conduct retrospectively ratify or adopt a contract made in its name or on its behalf.[68]

In the case KAYCEE LAND & LIVESTOCK V. FLAHIVE, the Supreme Court of Wyoming affirmed that in the absence of fraud the entity veil of a limited liability company can be pierced in the same manner as that of a corporation. The court concluded that no reason exists in law or equity for treating a limited liability company differently from a corporation when considering whether to disregard the legal entity.[69]

1.2.2.2. Several Liabilities of Directors

Members of the management or supervisory board who have breached their duties are jointly and severally liable together with any third party that influenced them to act against the interests of the company.[70] This provision applies also to the shareholders and to the supervisory board members who influenced the directors.

The directors of a corporation may be held liable for unlawfully paying a dividend. At Common Law, directors are held liable for distribution of prohibited dividends if they are negligent or act in bad faith. Recent statutes in virtually all states impose liability on directors for payment of dividends in violation of statutory provisions.[71]

The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof, nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock. The directors who violate such provisions and distribute unlawful dividends in their individual or private capacity are jointly and severally liable to the corporations and to the creditors thereof to the full amount of the capital stock so divided, withdrawn or paid out or reduced.[72]

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[68] *Ibid*.

[69] Kaycee Land & Livestock V. Flahive, Supreme Court of Wyoming, 2002, 46 p.3d323,cited by ROBERT W. and others, "Cases and Materials on Corporations including partnerships and limited liability companies, 11th edition, Thomas Reuters, St.Paul, USA, 2010, pp.1229-1234.

[70] W. ROBERT and others, *op.cit.*, p. 1233.

[71] ALEXANDER H.FEREY *& Others, Cases and Materials on Corporations,* Little Brown and Company, Boston, 1966, p. 918

[72] ALEXANDER H. FEREY *& Others, op.cit.,* p.919.

1.2.2.3. Civil liability of the Directors

Under Rwandan Law, article 72 of the law relating to companies has something to say about the civil liability of a director or someone who will become a director within an interval of time or promoter of a company who authorizes or causes the issue of a prospectus and states that that person shall be liable to pay compensation to any person who subscribes or purchases shares or debentures on the faith of a prospectus for any loss or damage sustained by reason of an untrue statement in the prospectus, the willful non disclosure in the prospectus of any matter which he/she had knowledge and which he/she knew to be material.[73]

In many jurisdictions, directors are held civilly liable for damages caused especially to the employees of the company. However, it is often argued that the directors' liability should be limited to the act or omission made by the directors themselves whereby these acts and/or omissions are the ones that have caused damages to the victim and so such damages have to be redressed by the director or severally by the directors involved.

1.2.2.4. Administrative liability of Directors

In Lativia, a company may incur administrative liability under the Administrative Violations Code and thus might be subject to the administrative fine. The administrative fine may cause losses to the company and this might be a reason for the company to initiate a claim for compensation of losses against directors. However, in addition to the administrative fine imposed on the company, in certain cases an administrative fine can be imposed also to the company's management board members as they are recognized as company's 'officials' under the Administrative Violations Code (*Administratīvo pārkāpumu kodekss*).[74]

The article 212 sets out penalties for a director or an officer who willfully commits a breach of any duty as follows: 1° she/he shall be liable to compensate the company for any loss it suffers as a result of the breach; 2° she/he shall be liable to account to the company for any profit made

[73] art. 72 of Rwandan Companies Act of 2009.

[74] Code of administrative violations of the republic of Latvia, on line at www.vertic.org/media/.../LT_Code_Administrative_Violations.pdf, accessed on June 21, 2014.

as a result of such breach; 3° any contract entered into between the director or the officer and the company with regard to that transaction may be rescinded by the company.

1.2.2.5. Criminal Liability of Directors

In addition to the ordinary criminal liability that derives from the provisions of the Rwandan Criminal Code[75], the Companies Act should provides for specific criminal liability for directors for various specific offences of the Companies Act. The most common are violations of the directors' duty of information (failure to submit or publish the annual accounts in due time, fraudulent misstatements of the balance sheet or the profit and loss accounts, etc.)[76]. Others are more specific, like the fraudulent use and destruction of company's property (*abus de biens sociaux*),[77] consisting in the use, with bad faith, of either the assets or the credit of the company, or of the power which directors have or the votes they may cast, for a purpose which the directors knew was contrary to the interests of the company, for personal uses, or for the benefit or another company or undertaking in which they were directly interested.

In accordance with the general principles of criminal law, directors will be presumed innocent until their guilt is proven beyond legitimate doubt.[78] Since 2012, criminal sanctions may apply to a legal person.[79] Indeed, a legal person can be held criminally liable in Luxembourg if the violation has been committed in its name and to its advantage. However, since the criminal liability of the company itself does not exclude that of its directors, any criminal offence committed by a director can call for their criminal liability.

I.3. NOTIONS ON LIMITED COMPANY

In order to analysis the roles and liability of directors in a limited company, it is important to first acquire a better understanding of limited company with regard to its definition, types and

[75] Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, *O.G.*, *n*º Special of 14 June 2012 (hereinafter Rwandan Penal Code).
[76] Art. 365 of Rwandan Penal Code.
[77] Art. 367 of Rwandan Penal Code.
[78] Art. 33 of Rwandan Penal Code.
[79] Art. 19 of constitution of the republic of Rwanda of 04 June 2003 as amended to date;

characteristics. In this section we shall look at the definition, types and characteristics of a limited company.

I.3.1. Definition of limited company

A limited company is form of incorporation that limits the amount of liability undertaken by the company's shareholders. The naming convention for this type of corporate structure is commonly used in the United Kingdom. It is commonly known as a limited liability company (LLC) in the United States and other parts of the world. In a limited company, the debts of the company are separate from those of the shareholders. As a result, should the company experience financial distress because of normal business activity, the personal assets of shareholders will not be at risk of being seized by creditors.

Black's law dictionary defines a limited company as a company in which the liability of each shareholder is limited by the number of shares he has taken; so that he cannot be called on to contribute beyond the amount of his shares. In England, the memorandum of association of such company may provide that the liability of the directors, manager, or managing director thereof shall be unlimited.[80] Rwanda company law defines a limited company "as a company whose liability is limited by shares or by guarantee or a company whose liability is limited both by shares and guarantee."[81]

I.3.2. Types of liability limitation

A limited company is one in which the liability of the members is limited to a certain amount beyond which they cannot be asked to contribute anything towards the payment of company's liabilities or claims against the company. If the company has registered as a limited one, member's personal patrimony cannot be seized in any way to cover the expense, debt or liability of the company in the event of company's winding up.

[80] M. A., HENRY CAMPBELL BLACK, Black's law dictionary: definitions of the terms and phrases of American and English jurisprudence, ancient and modern, fourth ed., ST. Paul, West Publishing CO., 1968, p. 352.
[81] Art. 2 of Rwanda company law.

The limitation of the responsibility in Company law does not mean that the liability of the company is limited. The company has to discharge its debts as long as it has assets to do so.[82] The liability limitation concerns the member's responsibility towards the company expenses debt and liability.

According the article 8 of the Law n° 07/2009 relating to companies, limited companies are sub-divided into three types:

- Those limited by shares, and
- Those limited by guarantee;
- Those limited by both shares and guarantee.

I.3.1.1. Companies limited by shares

First it should be noted that limitation of liability refers to members and not to the company itself. The liability of the company is always unlimited in the sense that it must discharge its liabilities so long as it has assets to do so.[83]

Limitation of liability by shares may occur on formation, where is so the liability of each member to contribute to the capital of the company is limited to the nominal value of the shares that he has agreed to take up or, if he has agreed to take up such shares at a premium for example at more than their nominal value, to the total amount agreed to be paid for such shares. Once the member has paid the company for his shares, his liability is discharged completely and he/she cannot be made responsible for making up the deficiencies of the company or of other shareholders.[84] Furthermore, he/she has no liability whatever in respect of unissued shares. However, in the case of a small private company, the advantages of limited liability tend to be illusory, since those who give the company a significant amount of credit and bank overdraft facilities will in practice require personal guarantees from its directors and major shareholders.[85]

Pursuant to the article 2, 14° of the Law n° 07/2009 relating to companies, a company limited by shares is a 'company in which the liability of shareholders is limited to the number of subscribed shares, whether paid or not". This definition shows clearly that the liability of a member can't reach his/her personal patrimony.

[82] K. ABBOTT, N. PENDLEBURY and K. WARDMAN, *Business Law*, Continuum, London, 2002, p.380.
[83] D.KEENAN, *Smith&Keenan's company law*, 13th ed., Harlow, 2005, p.23.
[84] D.KEENAN, *op.cit.*, p.24.
[85] *Ibid.*

The member is liable to pay for the amount of their shares, either in money or money's worth (non-cash assets, goodwill or know-how). The liability can arise only when the member has not paid or has partly paid his/her shares. In such a case, he or she may be called to pay the remaining balance amount[86]. Once the member has paid for his/her shares, he/she is under no further liability. If the company becomes insolvent, the members are not required to make any further contribution to discharge its debts than the worth of their shareholding.

I.3.1.2. Companies limited by guarantee

In the company limited by guarantee, members guarantee to meet the debts of the company up to a specific limit in the event of its failure. They have no further liability for the debts of the company beyond their guarantee. The company's constitution sets out how people can become or cease to be members.[87]

According to the article 2, 13° of the Law n° 07/2009 relating to companies, a company limited by guarantee is a "company formed on the principle of having the liability of its members limited by its constitution to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up'. Such amount has to be specified in the Memorandum of Association which is part of a company's constitution. If the company is wound-up, each member is required to contribute up to the amount of his guarantee towards payment of debts incurred during their membership. Moreover, in this type of companies, a member's liability is contingent; his money is only called-up in the event of liquidation. This model of liability limitation is well recommended for non-profit making purposes and where the ability to raise capital is not important.[88] According to the article 8, a company limited only by guarantee must be a private company.

I.3.1.3. Companies limited by both shares and guarantee

This type of company has the privilege of combining both the liability limited by shares and by guarantee. Members accept to be liable for the company to the extent of their amount given to the company and to the amount that they undertake to contribute to the assets in the event of its

[86] G. K. VARSHNEY, *Corporate Legal Framework*, Sahitya Bhawan Publications, Delhi, 2005, p.23.
[87] D.KEENAN, *op.cit*., p.40.
[88] *Ibid*.

being wound up. A company limited by shares and by guarantee may be a public or a private company.[89]

The Rwandan Company Law has tried to establish a legal framework by which used to govern any types of the corporate, although these efforts have not been real known by everyone. In the following chapter, the researcher analyzes the issues of directors' liability of limited company under Rwandan law in order to detect the defect of it.

[89] Art. 2, 15^0 of Rwandan Companies act of 2009.

CHAPTER TWO: ANALYSIS OF THE ROLE AND LIABILITY OF DIRECTORS

Company directors have many roles. Some authors call them as duties and they are also interwoven with liabilities if in execution of their duties, directors breach the provisions of laws and regulations in force. Laws provide sanctions that may be applicable to directors who misuse their powers and/or misuse their office and do any other things that are prohibited by the law. In this chapter, the researcher analyzes especially the duties of directors as well as their liabilities in implementing the policies of the company.

II.1.THE DUTIES OF COMPANY DIRECTORS

When conducting the business of the company, corporate directors are bound by several duties. These duties can arise from the articles of association or from the internal regulations of the company. They also may arise from the decisions taken at a shareholders' meeting or from statutory provisions.

The new company act of 2009 has tried to at least mention the different duties of a company director or officer in its article 211 where it states that: "Every officer of a company shall exercise:

1° the powers and discharge the duties of his/her office honestly, in good faith and in the best interests of the company;

2° the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

In this section the researcher analyses the duties of companies' directors under Rwandan law on comparison to other jurisdictions.

II.1.1. Duties and obligations of company directors under Rwandan law

Company law, whether in Rwanda, France, in the UK or elsewhere, is founded on enacted laws. However, as regards the duties of company directors, case-laws in the UK are the ones that have contributed to significant and elaborative principles. Such principles have been drawn from older areas of law and a full understanding of company law in most countries particularly, the duties of

company directors calls for some appreciation of the way in which those principles have been fashioned.[90] Based on this assumption, it has made the English system richer in identifying the liability of company directors through matching the achievements or failures of a director with the duties he ought to have accomplished.

The former Rwandan company law (1988) did not explicitly show what the duties of company directors should be, apart from providing for the strict measures and various statutory controls of their (directors') wide powers.[91] However, the general duties like the duty of the board to draw up the annual inventory of the company's assets every end of the financial year, preparation of the annual accounts, calling for general meetings as many times as provided for in the company's articles, appointing and dismissing the chairman and executive officers of the company as well as fixing their remunerations and others ought to be known by every person appointed as a company director.[92] These duties are all based on the obligation to operate with loyalty, with sufficient skills and due diligence of a diligent manager or an orderly businessman, which are derived from the general principles of civil law and case law dealing with mismanagement.[93]

The new company law of 2009 has tried to at least mention the different duties of a company director or officer[94]. The article 1 of Board Director Charter elaborate by Rwandan Private Sector Federation (PSF)[95], stated that *"in accordance with the principles of good corporate governance, each director undertakes:*

• *To act first, foremost and always in the best interest of the company and not for any other collateral purpose;*

[90] FORD, H A J., *Principles of Company Law*, 2nd edit, Butterworths, Sydney, 1978.

[91] For example, under Rwandan companies code of 1988, arts. 131, 134-136 (for SARL) and arts. 191, 195, 197, and 199 (for SA) provided for these restrictions. Article 136 for example provided for a situation where there is a conflicting interest between a director and the company he leads. It stated *« Le gérant qui a, dans une opération, un intérêt direct ou indirect opposé à celui de la société est tenu d'en informer ses collègues et de faire inscrire sa déclaration au procès-verbal de la séance ; il ne peut assister aux délibérations relatives à ces opérations ni prendre part au vote. »*

[92] J.E. PARKINSON, *Corporate power and responsibility: issues in the theory of company law*, Oxford University press INC., New York, 1993, pp.27-30.

[93] F. MASENGO, KAYIHURA D.K. and BINDA E.M., *op.cit.*, p. 94.

[94] Art. 211 of Rwanda companies' act of 2009.

[95] See Private Sector Federation, "guiding code of corporate governance, July 2009", available on line at http://www.psf.org.rw/ , accessed on January 12, 2015.

• To exercise his/her power in the executive duties in good faith; and

• To act with the care a prudent person would take when acting on their own behalf.

Each director undertakes that, in arriving at a decision on any issue, he /she shall strive to ensure that the decision is in the best interest of the company and is not driven by any other interests."

From what is providing by the provisions stated above, Rwandan law requires directors to act honestly and in good faith with a view to the best interests of the corporation. "Good faith" is not defined in either the company law or the Board Director Charter. Directors who exercise their powers to advance their own interests obviously breach the duty of honesty and good faith. A more difficult situation is where a decision plausibly was taken to advance the corporation's interests, but also provides a personal benefit to the directors. The directors will claim they have acted in good faith. In deciding whether the directors have breached their duty, the court will seek to ascertain which motive was dominant – a motive to benefit the company, or a motive to benefit themselves. The courts will consider whether there were reasonable grounds for the directors' claim that they acted primarily in the interests of the corporation.[96]

For example, in the case the Prosecution v. KALISA A. G., public prosecution accused KALISA A. G. the offense of breach of trust, basing on the fact that he used his post, as director, and used the patrimony of former BCDI SA (currently ECOBANK) violating the rules and practice of the bank, by receiving the money without any due interests. In this case, the High Court stated that "the fact that the accused spent four years issuing checks without money on his account which lead to a persistent debit status of his account shows that it was no longer an overdraft with purpose of rescuing him, but he had transformed it into a permanent loan (line of credit) not applied for. This does not have any other meaning other that the accused as PDG has used his position to receive money at any time. The court constants that those facts are waste of the bank's money that he was charged to manage in his own purpose and constitute a crime of breach of trust provided for by article 424 of the penal code.

[96] *See* Teck Corporation v. Afton Mines Ltd., [1972] 33 D.L.R.3d 288 (Can.).

His role is shown by the fact that a PDG was issuing checks in other to benefit loans that he was calling overdraft which is normally a king of help given by a bank to a staff or a client. His has been by fraud because he was aware of the procedures. The court also constants that those acts have caused damages to the BCDI SA because that money should have given to other clients who could pay it in time with interests." [97] As regard of this motivation of the High Court Judges, when making the decision, directors should consider the interest of the company at the first level, before his own interest.

Robert W. Hamilton, Jonathan R.Macey and Douglas K. Moll point out that as a general rule, in discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may in considering the best interests of the corporation consider to the extent they deem appropriate:[98]

a) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation and upon communities in which offices or other establishments of the corporation are located.
b) The short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation.
c) The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.
d) All other pertinent factors.

Other than the general rule, the authors recommend consideration of interests and factors and point out that the board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor.[99]

[97] The tradition of the researcher, the original document is written in *Kinyarwanda.*
[98] R.W.HAMILTON, J.R.MACEY, D.K.MOLL, *Cases and Materials on Corporations including Partnerships and Limited Liability Companies,* 7th Ed. Thomas Reuters, 2010, pp.512-513

[99] R.W.HAMILTON, J.R.MACEY, D.K.MOLL, *op.cit.*, pp.512-513.

The English Law for example, has for it tried to elaborate much more concerning the director's duties. It is detailed as for a person involved in the running of a business as a company director, to comply with the company legislations related to various areas affecting the companies life like; health, safety at work, consumer protection, pollution, Value Add Tax and other taxation requirements, and to mention just a few. But, as will be seen later, as a general principle for the limited liability companies whether in Rwanda, the UK, or elsewhere, many of these liabilities would fall to the company itself and will only be attributed to the director individually only where he acted either beyond the powers conferred upon him by the company's rules and regulations, where he did not perform as to meet the kind of skills expected from a person of his office, where he performed to meet his, but not the company's interests, or where it was due to the breach of his duty of care and due diligence in performing his actions as a company director.

II.1.2. Nature and the basis of director's duties

The duties of a company director whether in Rwanda or anywhere else stem from the company's law and/ or articles of association and, a general duty of care and due diligence, loyalty as well as observing other statutory provisions applicable to all limited liability companies has to be given priority by the director, failure of which will lead to his liability for mismanagement, breach of statutory provisions or by-laws more especially where loss or damage has been caused by such behavior. However, their duties and consequently the liability after their breach will again depend on their appointment.[100]

Apart from some specified cases under French law for example where directors will be held jointly[101] for the shared responsibilities, separate and specific responsibilities and duties are held. Failure to accomplish such duties, more especially where it results into a prejudice whether to the company, individual shareholder or to a third party, will lead to a specific liability of the particular director concerned who caused the prejudice. It would rather be divided where a country's system is a two-tier system, where there is the ordinary Board of Directors and the supervisory Board as was the case for some companies in the former company's law (1988) of

[100] Interview with C. NYIRANSHIMIYIMANA, legal advisor of MINICOM, on May 10, 2015.
[101] Art. L. 210-8 Par.1&2; Art. L.223-10 and L.223-22(1) of the French Commercial code.

Rwanda.[102] In the one-tier system there are only two corporate organs which make decision: shareholders meeting and Board of Directors, this model has been adopted by Rwandan companies' law[103]. Decision need to be taken for the day-to-day operation of the public company usually is made by executive directors individually. Strategic and long-term resolutions usually are taken by the Board of Directors.[104]

Where it is a two – tier system, the liability of the supervisory board would be limited to the breach of their duty to supervise the managers, and in principle, excludes liability for mismanagement.[105] To some extent, this might not make sense since, being the supervisors of the managers; they have all the possible means of avoiding the mismanagement by either advising or to the worst even, stopping the managers from mismanaging their company. So, where it so happens that the company has been mismanaged without their express intervention, then, they should also be held liable for having not accomplished their duties as supervisors.

The principle duties of the board of directors include the monitoring of the management of the company. It safeguards the invested capital of the company's shareholders through their legal authority to hire fire and compensate top management. Where this authority as conferred upon them by the members is not exercised, they (the board of directors) should also be accountable for it. Many problems in Rwanda companies may accumulate due to the fact that the board did not regularly meet, from where potential difficulties facing the company would be identified, discussed and solved.[106] The board, on behalf of the members (shareholders), has the right to any kind of information concerning the company, a factor that helps them to carry out their monitoring functions effectively.

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[102] F. MASENGO, KAYIHURA D.K. and BINDA E.M., *op.cit.*, p. 94.
[103] Art.167-200 of Rwandan Company Law.
[104] Art.168 of Rwandan company law state that Board of Directors manages the business and affairs of the company and shall have all the powers necessary to do so.

[105] P. L. PERIN and I. MEYRIER, for SJ Berwin (Paris office) on; "Liabilities of nominated directors, observers and members of the supervisory boards" on line at http://altassets.com/casefor/countries/2005/nz7566.php, accessed on 13/2/2014.

[106] Interview with A. MUSINGUZI, a tax consultant at KPMG, on May 24, 2014.

As it has already been mentioned before, the tasks of a director of a corporation are to determine its policy, to exercise control and supervise in the execution of that policy and to enter into contract on behalf of the company.[107] LEVESON argues that, the successful operation of a company's business will therefore depend on the energy, acumen and diligence displayed by its directors in the exercise of their functions.[108] It should be noted however that, within this framework of the matters concerning policy selection and business administration, a wide range of duties are imposed on directors, among as the duties of good faith, loyalty, skill and diligence as well as other duties of a statutory nature.[109]

From the English approach, the duties of good faith[110] and loyalty result from the fact that directors occupy a fiduciary position in relation to the company and that in that regard, their duties are not different from those of trustees. Here the emphasis is on the relationship between the director and the company. As for the matters of care and skills[111] in business administration, courts have been reluctant to intervene and penalize errors of business judgment[112]. This according to LEVESON, is an understandable approach since, while it may be a simple matter to prescribe a test of negligence, it must always be borne in mind that success in business is often achieved by a degree of enterprise which involves an element of risk.[113]

Should there be a presumption of good faith conduct by managers and directors, which must be overcome to find liability? There is not solution to this issue in Rwandan companies' law.

II. 1.3. Fiduciary duties of directors

The word *"Fiduciary"* comes from the Latin *"Fides"* meaning faith or confidence and was originally used in the common law to describe the nature of the duties imposed on a trustee.

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[107] G. LEVESON, *Company Directors; Law & Practice*, Butterworths, Durban, 1970, p.108.
[108] *Ibid*.
[109] Julian Velasco, "*How many fiduciary duties are there in corporate law?"*, 83 S. CAL. L. REV. 1231, 1232–33 (2010).
[110] The duties of good faith and honesty/loyalty are provided for in art. 211 (point.1) of the 2009 Rwandan Company Law.
[111] The duties of care and skills are provided for by art.211 (point 2).
[112] S. M. BAINBRIDGE, "*the Business Judgment Rule as abstention doctrine*," 57 VAND. L. REV. 83, 90 (2004).
[113] G. LEVESON, op. cit., note 88, p.109.

Today, the basic notion survives the officers, directors and controlling shareholders owe enforceable duties to the corporation and, through the corporation to the shareholders. Historically, courts have articulated these fiduciary duties as comprising a duty of care and a duty of loyalty[114]. Duties must be imposed on directors contractually, or in the company 'constitutions. In addition, directors have statutory and common –law obligation.

II.1.3.1. Duty of care, skills and diligence

The duty of care, skills and diligence are provided for by article 211 (point 2) of the Rwandan companies law, which stated that "Every officer of a company shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

There is no any other uniform measure up to now of how the duty of care and diligence can be evaluated**.** As for the skills, just like for that of the care and diligence, English courts have been basing themselves on the reasonableness. A director is not expected to deliver more than what would be reasonably delivered by another director of his position, knowledge, and experience.[115] Concerning the duty of care, skills and diligence, ROMER J.[116] in a classical English decision, formulated three general propositions as follows:

"(1) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected of a person of his knowledge and experience. A director of a life insurance company, for instance, does not guarantee that he has the skill of an actuary or a physician. In the words of LINDLEY, M.R.: 'if directors act within their powers' if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company.'[117] It is perhaps another way of stating the same proposition to say that directors are not liable for mere errors of judgment.

[114] J. D. BAUMAN, *Corporations Law and Policy, Materials and Problems,* 7th Edition, Thomas Reuters, St. Paul, USA, 2010, p. 23.
[115] J. D. BAUMAN, *op.cit.,* p.24.
[116] *Re City Equitable v Fire Insurance Co., Ltd*., [1925] Ch. 407, p.428.
[117] *Lagunas Nitrate Co. v. Lagunas' Syndicate*, [1899] 2 Ch. 392, p.435.

(2) A director is not bound to give continuous attention to the affairs of a company. His duties are of an intermittent nature to be performed at periodical board meetings and at the meetings of any committee of the board on which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever in the circumstances he is reasonably able to do so.

(3) In respect of all duties that, having regard to the exigencies of business and articles of association, may properly be left to some other official, a director is, in absence of grounds for suspicion, justified in trusting that official to perform such duties honestly."

In the first proposition as quoted above, ROMER J. suggests the standard of skills expected from the director of a company as he performs his activities on behalf of his company. He acknowledges that a director cannot have all the skills as required by his company, but that, at least to meet that that would be expected of any reasonable man that would be placed in the same post and given the same authority. In an example of the insurance company for example, the director will not be required to know all sorts of insurance laws for instance, but as LEVESON puts it, must possess some attributes of advantage to the company such as to invest large sums of money in a changing financial climate and the ability to exercise an intelligent and independent judgment on all major problems relating to company policy.[118] Intelligent judgment here would also mean to include the director's consultations from experts in the field that he does not feel well conversant with.

The second proposition caters mainly for the outside directors who may not be required to keep a daily eye on the business affairs of the company. It also seems to exonerate directors from their duty to attend board meetings. However, as we mentioned it before, members of the board will be in most cases held jointly liable for damages that a company may suffer due to the decision taken on policy issues by the board. Where it is established that a director was absent when a damaging course was voted, that director will be exempted from any liability there accruing.

The effect of the third proposition is that, directors cannot be held liable for the failures of an employee, unless, of course, they were negligent from the moment of his (employee)

[118] LEVESON, G., *op.cit*, p.110.

appointment.[119] However, where he has been performing beyond suspicion that he was incompetent; directors will still stand in a better position to escape any liability for his appointment. Liability would only result from employing a person whom they knew, or should have known that he was incompetent.[120]

II.1.3.2. Duty of loyalty to the company

Although Rwandan law does not explicitly talk about the duty of loyalty, it tries to cover its contents in other provisions**.** The fiduciary relationship that exists between the director and his company also prevents him from placing himself in a position where his duty to the company conflicts with his personal interests[121]. This proposition results in the general rule that, in certain circumstances, a director is not permitted to enter into a contract with his company. The company is entitled to enjoy the undivided loyalty of its directors and, for this purpose; they must always remain in a position where their decisions on behalf of the company are not affected by personal motives.[122] Even the former (1988) Rwandan law for example forbids a director in course of his activities to enter into any deal or transaction that bears a direct or indirect conflict between him and his company. Where he wanted to do so, he was obliged to inform his colleagues on the board who will in response hold deliberations about the issue.[123] It should be noted that, although the concerned director forms part of the board of directors, the law stipulates it clearly that he will neither participate in the deliberations nor will he take part in the voting for a resolution. This is done in order to avoid any kind of influence.

Thus, in an old South African case for example, where a director had purchased a property for himself at a time when it was his duty to have acquired it for the company's business, and thereafter, without disclosing his ownership, he re-sold the property to the company at a profit, it was held that the company was entitled to recover the profit made by the director.[124] Dealing with issue of profits in that case, INNES, C.J. said: "Profits may be claimed, it is said, when the

[119] M. GARBARSKI, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA, Geneve, 2006, p. 145.
[120] M. GARBARSKI, *op.cit*., p. 130.
[121] Art. 213 (point 2) renders a decision taken by a director on behalf of a company but which decision in having personal material interest with the same director taking the decision.
[122] LEVESON, G., *Company Directors: Law and Practice*, Butterworths, Durban, 1970, p. 120.
[123] 1988 Rwandan Companies code (repealed) art.136.
[124] Robinson v. Randfontein Estate Gold Mining Co., Ltd., 1921 A.D. 168.

property was acquired under circumstances which constituted the director a trustee for the company, or which conferred the equitable ownership upon the company, or when a director stood at the time in a fiduciary relationship towards the company – by which I understand a fiduciary relationship directly affecting the acquisition. The test is expressed, for the most part, in terms peculiar to English law; but the principle which underlies it is not foreign to our own. For it rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interests (e.g. by making profits) at that other's expense."[125]

As INNES put it for the case of South Africa, this doctrine too, is neither foreign to French law, nor is it Rwandan law. From a common law approach, this principle does not only apply to direct contracts with the company, but also to any transactions in which the directors are in some way interested, whether because they personally benefit from it, no matter how indirectly,[126] or may be because they may possibly be subject to a conflicting duty.[127]

The general rule that is in play here is that directors may not enter into any transaction in which their personal interests are in conflict with those of the company.

The duty of loyalty also includes the management board member's *duty of confidentiality*.[128] Management board members have essential information about the company's business. The members are obligated to maintain confidentiality of business matters, trade secrets and other proprietary information belonging to the company. The duty of confidentiality does not end upon removal from office and lasts without a term.

II.1.3.3. Duty to act *bona fide*

This duty is not expressly mentioned by the Rwandan companies' law of 2009 or in its 2010 amendments. However, it has become common knowledge that directors are always required to act *bona fide* and cannot lawfully use their powers except for the benefit of the company as a

[125]G. LEVESON, *op.cit*., p.179.
[126] Victors, Ltd. V. Lingard, [1927] 1 Ch. 323.
[127] Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co., [1914] 2 Ch. 488; [1914 – 15] *All E.R. Rep*. , 987.
[128]A. LOOS, "Directors' Liability*", in a Worldwide Review,* 2006, p. 286.

whole.[129] Consequently, they cannot seek to justify the exercise of their powers for the benefit of themselves or a section only of shareholders or, for that matter, for employees.[130] What is interesting here is that, they are at the same time the best arbiters of what interests the company especially that even courts have no right to interfere with the directors' exercising of their discretionary powers more especially as they take their business judgments.

In the United States for example, courts have held that it is not their function to inquire into matters of business judgment. There, "the courts will not in general undertake to review the expediency of contracts or other business transactions authorized by the directors. A large discretion is lodged in them. Questions of value and policy are for their business judgment, although their errors may be so gross as to show their unfitness to manage corporate affairs. But it is pre-supposed in this business judgment rule that reasonable diligence and care have been exercised."[131]

Thus, in a Pennsylvanian court, where the directors of a trust company had invested in a doubtful securities in order to gain high rates of interest and losses had been suffered in these investments, it was held that they were not liable for honest mistakes of judgment, although so gross as to appear absurd and ridiculous.[132]

This is also comparable to the English approach where it has been said that it is not fair and desirable for the courts to formulate precise rules for the guidance or embarrassment of business men in the conduct of their affairs.[133] The common expression under the French system would be, having a director fully acting "*comme un bon père de la famille"* which also would require reasonable diligence and care in order to avoid more risks to the family that you, as a father, head.

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[129] LEVESON, G., *op.cit.,* p.115; Bennet's case, 24 L. J. Ch. 130; *Treasure Trove Diamonds, Ltd. & Anor. v. Hyman*, 1928 A.D. 464 at 479; *Greenhalgh v. Arderne Cinemas, Ltd*., [1951] 1 Ch. 286; [1950] 2 All E.R. 1120.

[130] Parke v. The Daily News, Ltd., [1962] Ch. 927; [1962] 2 All E.R. 929. But as Leveson argues, the argument may succeed that a scheme for the benefit of employees, although it may be for their immediate advantage only, may constitute encouragement or incentive to them which can only benefit the company in a long term. Situations may arise where it will be hard to draw the line of distinction.,

[131] G . LEVESON., *op.cit.,* p. 112.

[132] Spering's Appeal, 71 Pa. St. 11, 10 A.M. Rep. 684.

[133] Devoy v. Cory, [1901] A.C at 488.

II.1.3.4. Duty not to exceed powers

Directors must not do any act or enter into any transaction which is illegal or *ultra vires* to the company[134] and they must not, without the sanction of the members in a general meeting, do any act or enter into any transaction which is beyond the powers conferred on directors by the the law and/ or the articles of association. The duties are absolute and the fact that a director acted *bona fide* and with approval of a majority of the shareholders, or without negligence, cannot avail him with a defense to a claim by the company.[135]

II.2. DIRECTORS' DUTY AND CORPORATE RESPONSIBILITY

The directors' duties are owed to the company. This means that the directors should have regard to the interests of the shareholders as a whole but there is no duty to individual shareholders. An action may be brought against a director in certain circumstances as discussed further below.

II.2.1. Duty of directors in implementing the policies of the company and protecting the interests of the shareholders

The role of directors is generally to implement the policies of the company and protecting the interests of shareholders. Usually the policies are long term and the directors act the eye of the shareholders and ensure that the management team of the company does everything possible to make sure the daily management of the company focus on the policies laid out by the board. In some instances, however, the interests of the management body tends to conflict those of the board of directors as the former usually tends to focus on short term goals than long term.

HANNIGAN and PRENTICE highlight that, according to the UK Companies Act of 2006 section 172 (1), a director of a company must act on the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole and in doing so have regard among other matters to:[136]

[134] Selongor United Rubber Estates Ltd v. Cradock (No. 3) [1968] 2 All ER 1073, [1968] 1 WLR 1555.
[135] Cullerne v. London & Suburban Building Society, [1890] 25 Q.B.D. 485.
[136] PRENTICE, "Duties of Directors" in Hannigan and Prentice (eds), *The Companies Act 2006—a Commentary* (London: Butterworths Law, 2007), at para.3.47.

a) The likely consequences of any decision in the long term;
b) The interests of the company's employees;
c) The need to foster the company's business relationships with suppliers, customers and others;
d) The impact of the company's operations on the community and environment;
e) The desirability of the company maintaining a reputation for high standards of business conduct and;
f) The need to act fairly as between members and the company.

All the above roles are geared at promoting the success of the company and the interests of shareholders. Directors also have the duty to avoid conflict of interest according to UK law and this is the basic principle. A director must avoid situations where his/her own interests conflict with those of the company.[137] This is clearly explained by Dr. Stephen Hill.[138]

Policy matters concerning the retention of earnings for future corporate/company operations, the payment or non-payment of dividends, labor relations, prices, development of new products, and of territorial expansion for the sale of products, the building of new plants, when expansion seems advisable, determining the method of financing, and other policy matters, with the over-all supervision of the business, are functions of the directors. Since the board is the source of

[137] Regarding the conflict of interest, Rwandan law (2010 amendment) in its articles 7 &8 reckon on that where they provide that for example in art.7 (*amending art.191 of the law No. 07/2009 of 27/04/2009*) obliges a director to disclose any supposed conflict of interest:

"A member of the Board of Directors of a company shall, forthwith after becoming aware of the fact that he/she is interested in a transaction or proposed transaction with the company, cause to be entered in the Register of interests of the members of the Board of Directors, if any, and immediately disclose to the Board of Directors and shareholders of the company:

1° the nature and monetary value of that interest, where the monetary value of interest of the member of the Board of Directors is able to be quantified;

2° the nature and extent of that interest where the monetary value of the interest of the member of the Board of Directors cannot be quantified."

Art. 8 (amending art.200 of the law No. 07/2009 of 27/04/2009) provides that:

"A member of the Board of Directors of a public company who finds out that he/she acquires or disposes of a relevant interest in the transfer or issuance of shares shall immediately disclose to the Board of Directors and shareholders of the company:

1° the number and class of shares in which he/she holds relevant interest;

2° the nature of the relevant interest;

3° the consideration paid or received;

4° the date of acquisition or disposal."

[138] S.HILL, *Coroprate Fraude: Prevention and detection,* 2nd Ed., England, Wales, 2009, p.10.

authority to carry on the corporate business, contracts and other transactions entered into by the corporation should derive their origin from the board rather than form the shareholders, except where statutory or legitimate provisions of articles or by-laws provide otherwise.[139]

II.2.2. Duty of the directors in the daily management of the company

The scope of a director's duty under English law was previously governed by general principles rather than specific rules (such as laid down in certain jurisdictions, for example, the United States of America).[140]

Other than the Managing director, other company directors do not have a role in the daily management of the company. However, in practice, they should be updated on the way the company is run on daily basis and this is normally done through the regular board meetings as well reports from the management.[141]

However, there are many fundamentals differences between being a "director" and a "manager". A "manager" is an "employee" of a company, whereas a director does not have to be. In fact, the King Code recommends that there should be a majority of non-executive directors, to ensure objective decision making, and a non-executive director should ideally be independent, and be identified as such in the annual report.

According to the documents of the Institutes of Directors of London, there are many fundamental differences between being a director and a manager:[142]

- First of all, basing on the domain of leadership, it is the board of directors who must provide the intrinsic leadership and direction at the top of the organization. But it is the role of managers to carry through the strategy on behalf of the directors. The management body and the board of directors are two but inseparable bodies that normally work together for the interests of the entire company.

[139] S.SIME and M.TAYLOR, *Company law in practice*, 7th ed., Oxford University Press, New York, 2008, p.92.

[140] H. DICKINSON, *op.cit.*, p.13.
[141] N.D.LATTIN, *op.cit.* p.243.
[142] Institute of Directors, "The key differences between directors and managers", available on line https://www.iod.com/MainWebSite/Resources/Document/managers.pdf, accessed on May 28, 2015.

- On the decision making, directors are required to determine the future of the organization and protect its assets and reputation. They also need to consider how their decisions relate to "stakeholders" and the regulatory framework. Stakeholders are generally seen to be the company's shareholders, creditors, employees and customers. But the managers are concerned with implementing the decisions and the policies made by the board.
- According the duties and responsibilities, directors have the ultimate responsibility for the long term prosperity of the company. Directors are required by law to apply skills and care in exercising their duty to the company and are subject to fiduciary duties. If they are in breach of their duties or act improperly, directors may be made personally liable in both civil and criminal law. On occasion, directors can be held responsible for acts of the company. Directors also owe certain duties to the stakeholders of the company. But Managers have far fewer legal responsibilities but they cannot act contrary to the interests of their employer.
- In carrying out their duties, directors act as agents of the company. They are, however, more than just agents; they are also fiduciaries of the company which means they also have a duty to protect the company's interests. Such duties are collectively called fiduciary duties.
- In ethics and values domain, Directors have a key role in the determination of the values and ethical position of the company. However, Managers must enact the company ethos, taking their direction from the board.
- According to company administration, Directors are responsible for the company's administration. While the related duties associated with company administration can be delegated to managers, the ultimate responsibility for them resides with the directors.
- According to disqualification as sanction, Directors can be disqualified as directors under the 2008 Companies Act or in terms of a company's Memorandum of Incorporation. The control over the employment of a manager rests with the board of directors and control is exercised in accordance with a manager's employment contract.

The Rwandan companies' law is silent about the issue of difference between being a "director" and a "manager", however, it is impossible to settle on the liability of one of them, without knowing their role and responsibility in the government of the company. De *lege ferenda*, those differences stated above should be incorporate in Rwanda companies' law.

II. 3. ANALYSIS OF LIABILITY OF DIRECTORS

The principal means for enforcing directors' duties is the prosecution of defaulting directors under the Rwandan law. Alternative remedies for breaches of directors' statutory obligations to their companies or the infringement of statutory prohibitions imposed on them are rarely specified in the Rwandan companies' law. On the few occasions when Rwandan companies' law does create a specific remedy, it most frequently takes the form of a power for the company to rescind an offending transaction; or to recover funds of the company which have been improperly expended; or to require a director who is improperly benefited to account to the company for the value of the benefit he obtained; or to recover damages or compensation from a director responsible.

To a large extent, these mainly relate to duties of internal management, for example the keeping of accounting records, the preparation of annual accounts, the filing of documents with the Registrar of Companies and the keeping of the statutory books of the company. Failure to perform these duties or to ensure that they are performed may result in fines both for the company and the defaulting directors. Directors may also be subject to imprisonment.

II.3.1. Liabilities of company directors in case of breach of duty

Flowing from above therefore, anybody appointed to be a company's director ought to know the burden that is pressed upon his/her shoulders. Rwandan law obliges whoever is appointed as a company's director to acknowledge that in writing as art. 177 of the companies law so provides: *"A person shall not be appointed as a director of a company unless that person has consented in writing to be a director and certified that he/she is not disqualified from being appointed or holding office as a director of a company."*

Consequently, article 212 sets out penalties for a director or an officer who willfully commits a breach of any duty as follows:

1° she/he shall be liable to compensate the company for any loss it suffers as a result of the breach;

2° she/he shall be liable to account to the company for any profit made as a result of such breach;

3° any contract entered into between the director or the officer and the company with regard to that transaction may be rescinded by the company.

This is reasonable because, the law has clearly stated the criteria for the validity of decisions by administrators or another officer in article 213. This would serve as a checklist for any director before any decision is taken. The article provides that:

" A decision made by a director or another officer of a company shall be considered as valid if:

1° it is made in good faith for a proper purpose;

2° he/she not have a material personal interest;

3° the company is appropriately informed of the decision's subject matter;

4° he/she reasonably believes that the decision is in the best interests of the company.

The director's or officer's belief that decision is in the best interests of the company shall be taken to be a reasonable one unless the belief is one that no reasonable person in his/her position would hold.

II.3.1.1. Liability vis à vis the shareholders

In very few and specific cases, shareholders are given the right to submit a direct claim against a member of the board. Shareholders would have personal claims against the company's directors in cases of tort. The directors are not considered trustees of the shareholders and they owe their contractual obligations and duties to the company itself. "This doctrine makes practical sense if, for instance, in case of a theft the missing amount is repaid to the company and by that the "reflex damage" suffered by the shareholders is leveled out.

There remain, however, instances where the company as such is not affected and, at the same time, the breach of its director's contractual obligations is not a tort." These cases are, for example, wrong information about the current financial status of the company (shareholders invest further equity capital and lose it because the firm goes bankrupt), wrong information in the course of a takeover of the company, where directors have neglected to properly handle the collection of capital contributions. In such cases the shareholders may sue the directors personally on the grounds that they violated their duties to the shareholders. "Shareholders can make claims on their own account in the case of prospectus liability or where there has been a breach of information requirements, such as for the immediate release of *ad hoc* notices."

II.3.1. 2. Liability vis à vis the third parties

Directors' personal liability towards third parties requires a culpable violation of mandatory law for creditor protection, e.g. tax law, criminal law, insolvency law. For example, according to the German Tax Code, a managing director may become personally liable for payment of the relevant taxes. Third party claims may also be possible if payments to the shareholders are made in violation of the capital maintenance rules. They might be obligated to restore the full amount plus any ensuing damage.[143]

External liability is usually observed in case of the company's insolvency. If the company is in financial difficulties, there is a greater onus on the management board to act in the interests of creditors. The directors cannot conclude any transactions (enforce payments or transfer assets) which may lead to insolvency (causation of insolvency) or which may deepen the insolvency (deepening of insolvency).[144] There is greater liability and additional prohibitions if an insolvency situation appears e.g. no payments to the shareholders, to related parties, to the directors. The director is personally liable for payments effected after the company became insolvent (cash-flow insolvency) or over-indebted (balance-sheet insolvency), and these sums must be repaid immediately regardless of any agreement to the contrary.[145]

[143] K. MADISSON, *op.cit.* 15.
[144] *Ibid.*
[145] *Ibid*.

Personal liability is excluded only if the payments were in line with the diligent conduct of a prudent businessperson, which means that every single payment must be justified as necessary or as preventing further and higher damage to the company. Violating the obligation to file an insolvency petition or prohibition of payments in an insolvency situation, the director is liable for damages not only to the company but also to third parties. Moreover, failure to file an insolvency application in time is a criminal offence.[146] Creditors of the company may claim director's liability for losses caused by unreasonable continuance and creditors who entered into a contract after the company became *de facto* insolvent can claim liability for their losses in full - fraudulent pretence[147].

A member of a company's management body may also be directly liable towards a creditor if he/she has damaged the creditor by intentional conduct contrary to good morals.[148] The Supreme Court of Estonian has ruled that intentional conduct contrary to good morals is present in cases where a director fails to notify a creditor of the initiation of compulsory dissolution procedures against the company or pays out an amount deposited with the company to secure the performance of a third person's contract.[149] The court has also accepted a shareholder's direct right of claim against a director as equal to a creditor's right of claim. In its decision of 23.04.2008, the court found that if the management board provides false data to a shareholder, thereby damaging the shareholder, the director and the company may both be liable for damage caused to the shareholder.[150]

A director's direct liability to the state (public interest) should be separately established by tax laws. Directors who intentionally, or by gross negligence, breached the obligation of the company to declare the tax obligations correctly are jointly and severally liable with the company.[151]

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[146] Art.336 of Rwandan penal code.

[147] K. MADISSON, *op.cit.*, p.25.

[148] *Ibid.*

[149] Estonian Supreme Court decisions n^{o} 3 - 2 - 1 - 90 - 07, 02.11.2007, RT III 2007, 39,307.

[150] Estonian Supreme Court decision No 3 - 2 - 1 - 29 - 08, 23.04.2008, RT III 2008, 35,234.

[151] MARTHA O'BRIEN, "The Directors Duty of Care in Tax and Corporate Law", 36 University of British Columbia Law Review 673, 676 (2003).

Article 202 of the Rwandan companies' law governs a situation where a director is liable for the amount that is equivalent to the fair value of shares or debentures. The article provides that where a director acquires shares or debentures, the director shall be liable to the person from whom the shares or debentures were acquired for the amount by which the fair value of the shares or debentures exceeds the amount paid by the director.[152] This seems that the director is personally liable as he/she, by acquiring shares or debentures, acts on his own behalf and this should normally not affect the company. Hence, in light of article 360 of the Rwandan companies' law, even if the company has been removed from the register of companies, the director in such case shall be liable as it is clear that he/she did not act in the name of the company.[153]

II.3.2. Administrative Liabilities directors

Under administrative law, the distinction between the liability of the director and of the company must be applied again. Certain administrative laws stipulate specific obligations of directors, such as tax legislation, public procurement legislation, and trade legislation.[154] A failure to comply with such obligations would result in the direct administrative liability of the director.

However, a much larger group of public law regulations stipulate obligations that the company must comply with. These regulations include environmental laws, anti-money laundering legislation, and accounting legislation. A breach of these laws would give rise to the administrative liability of the company.[155]

[152] Art. 202 of Rwandan Companies act of 2009.

[153] Art. 360 of Rwandan Companies act of 2009.

[154] For example art.35 of Regulation nº07/2009 of 29/07/2009 on corporate governance requirements for insurance business, *O. G.* n°*35* 0f 30/08/2010, stated that "the Directors and officers shall not engage directly or indirectly in any business activity that competes or conflicts with the institution's interest. Whenever possible, they shall avoid situations that would give rise to a conflict of interest."

[155] For example, in Rwanda, under law on competition and consumer protection, the Regulatory Body may impose against an enterprise that violates the provisions of this Law an administrative fine of five per cent (5%) to ten percent (10%) of the enterprise's annual turnover of the preceding fiscal year in which the violation has occurred (art. 52 of Law nº 36/2012 of 21/09/2012 relating to competition and consumer protection, in *O.G.* nº 46 of 12/11/2012)

Subsequently, under Rwandan companies law, the company would have recourse against the board of directors who acted (or failed to act, as the case may be) on behalf of the company. The subject matter of the recourse may, for example, be the amount of the fine paid to a regulator.

Directors' duties in relation to pollution and protection of the environment have increased in the last decade or so. The position at present, is that when an offence under the Rwanda environment protection act 2005[156] , which has been committed by a body corporate, is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager or other officer of the body corporate or any person who was purporting to act in any such capacity, the director, manager or officer, as well as the body corporate, is guilty of that offence and is administrative liable to be proceeded against and punished accordingly.

And then, all companies resident in the Rwanda are chargeable to corporate Income Tax calculated on the basis of the company's annual profits.[157] Liability for corporation tax, therefore, lies primarily with the company. However, everything to be done by a company under the Taxes Acts must be done by the company acting through its "proper officer". For these purposes, the "proper officer" of a company is the company secretary or a person acting as the company secretary. A failure by the company secretary to discharge his duties may result in a charge of cheating the public revenue. Directors who deliberately connive at such failure may also be guilty of this offence.

Directors and officers of a company may be made personally liable for dishonest evasion of value added tax (VAT) where it appears to the VAT administration that the conduct of such a director or officer was, in whole or in part, the principal factor giving rise to a penalty imposed on the company in respect of that offence. In those circumstances, the Commissioners may serve a notice on the company and on the director or officer in question specifying the amount of the penalty to which the company is liable, and stating that the Commissioners propose to recover

[156] Art. 104-108 of Organic Law n° 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of environment in Rwanda, *O. G.* n° 9 of 1st May 2005.
[157] Art.1 of law nº 16/2005 of 18/08/2005 2005 on direct taxes on income, in *G.O* , no 1 of 1st January, 2006

the whole or a certain portion of that penalty from the director or officer. That amount is then recoverable from the director or officer as if he were personally liable.[158]

According to Commissioner General's rules**,** the VAT administration may petition the court to establish the responsibility of managers, directors, partners and share holders, agents and legal representatives of companies, associations and other bodies for payment of the VAT liability of a taxable person when it is found that they have been responsible for fraudulent actions in relation to the fulfilment of tax obligations in their duties of management that have given rise to tax debts or difficulties in recovering payment in respect of the tax liability of a debtor.[159]

However, basing on the investigation report carried out by National Bank of Rwanda in conjunction with the Ministry of Trade and Industry has made of February 19, 2014 on the operations of P.L.I Telexfree Rwanda Ltd, Rwanda government concluded that P.L.I Telexfree Rwanda Ltd activities are similar to pyramid scheme which can easily be a channel to jeopardize the financial sector and facilitate money laundering.[160] The report on the P.L.I Telexfree Rwanda Ltd case, quoted that "the operations conducted by Rwanda Ltd has indicates that the company was involve in money laundering estimated to Rwf 7 billion (USD10.4m) from foreign companies in the US and Germany, those money are related to tax evasion.[161]"

The government of Rwanda announced the ban of all operations of P.L.I Telexfree Rwanda, as administrative sanction, because there is the poof that it involved in money laundering. Even if the administrative decision has taken against the company, there is no administrative or penal action against the directors of P.L.I Telexfree Rwanda ltd.

From this, it seems difficult to differentiate the company administrative liability and personal directors' liability under Rwanda law. The boundaries are too obscure about where directors may face liability, even when acting in good faith.

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[158] H. Dickinson, *op.cit*. p.15.

[159] Commissioner General's rules nº 01/2001 of 01/08/2001 governing value added tax (VAT), in *Compilation of fiscal laws and regulations in use in Rwanda*, 2010.

[160] F. KANIMBA, public announcement of the Ministry of Trade and Industry banning the operations of P.L.I TELEXFREE RWANDA Ltd in Rwanda, Kigali 14th march 2014.

[161] *Ibid.*

II.3.3. Civil liabilities of company directors

General tort liability is regulated by Article 258-259 of the Civil Code Book three (CCBIII), which provides that any person, who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation. Although similar to general tort liability, civil liability of corporate directors is subject to a special provision of the provisions of Rwandan Companies Act of 2009 (art.211-2018), which is *lex specialis* to articles 258-259 of the CCBIII.

II.3.3. 1. General conditions of civil Liability

The general conditions for liability of corporate directors are quite similar to the general conditions set out by article 258-259 of the CCBIII in the context of liability for torts. According to the general principles of Rwandan tort law, damage consists of the non-voluntary decrease of a person's assets cause by the act of another person. Assessment of damage involves evaluation of the difference between the actual value of the assets and the hypothetical value of the same assets had the damage not occurred.[162] In this thesis, this subject will not be deeply analyzed.

II.3.3.2. Special conditions of civil liability

The conditions that must be fulfilled are the existence of damage, an unlawful breach of duty, a natural (or factual) and adequate causality between violation of the duty and the occurrence of damage, and fault.

II. 3.3.2.1. Damage

However, the Rwandan Companies Act of 2009 provides that a director or an officer who commits a breach of duty shall be liable. Where a director or officer willfully commits a breach of any duty: 1° shall be liable to compensate the company for any loss it suffers as a result of the breach; 2° shall be liable to account to the company for any profit made as a result of such breach; 3° any contract entered into between the director or the officer and the company with

[162] For more explanation see A.M. NGAGI, *Cours des droits civil des obligations: manuel pour les étu*diants, les éductions de l'Université National du Rwanda, Butare, 2004, p.154 .

regard to that transaction may be rescinded by the company.[163] From this, in general the damage is the loss of company resulting to the breach duties by the directors.

II. 3.3.2.2. Unlawful Breach of Duty

There are several statutory duties, the violation of which may give rise to a liability claim. For example, infringements of the duty of care, duty of loyalty, duty of equal treatment, duties related to specific information and action in case of capital loss and/or over-indebtedness, as well as non-transferable and inalienable duties may give rise to a claim.[164] Additional duties may be set forth by the company's articles of association and in a possible mandate/employment agreement between the company and the members of its board.

The article 212 of Rwandan companies' act of 2009 seems to be clearer, it is logical that a director who commits a breach shall be liable for any consequences of such breach. However, this article is also quite broad and it would thus be more meaningful if there were specific braches which may not necessarily be exhaustive.

II. 3.3.2.3. Fault

A corporate director can be held liable only if he has committed fault that is, if he has breached his duty intentionally or by negligence.[165] Negligence, however, presupposes that the corporate director could have reasonably foreseen the damage.[166]

According to French regal scholars, requirement of fault is always met when the respondent has not acted in the way in which a corporate organ with the necessary competences would have acted in the same circumstances.[167]

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[163] Rwanda Companies Act of 2009, art. 212.
[164] These duties have been discussed in `Duties of Corporate Directors', above.
[165] F. CHAUDET, A. CHERPILLOD, and J.C. LANDROVE, *Droit suisse des affaires*, 3rd ed , Helbing Lichtenhahn, 2010, n° 872.
[166] M. GARBARSKI, *La responsabilité civile et pénale des organes dirigeants de sociétés anonymes*, Schulthess Juristische Media Juridiques SA, Genève, Zurich, Bale, 2006, p. 195.

[167] F. CHWEXHOULY-SICARD, *La responsabilité civile des dirigeants sociaux pour faute de gestion*, thèse Paris II, 11982, p.20. See also Y.GUYON, *Droit des affaires : droit commercial général et sociétés*, tome 1, 7e ed., ed. Economica, Paris, 1992, 472.

II. 3.3.2.4. Causality

The behavior imputed to the corporate director should have resulted in the damage being invoked. In other words, there must be a causal relation between the violation of duty committed by the corporate director and the occurrence of damage.

For example under Swiss law, mere natural (or factual) causality is necessary, but is not sufficient, adequate causality also is required. An act will be considered an adequate cause only if, in the ordinary course of events and the `general experience of life', such an act is likely to have an effect similar to the act that has occurred.[168]

II. 3.3.3. Issue of liability and indemnity of directors

The liability and indemnity of directors and employees of a company is limited to decisions that are made in case they are invalid. The Companies Act stipulates that where a company establishes that the decision made by a director or a company's officer is not valid, such director or officer shall be held liable for that decision. Where a company establishes that the decision made by a director or a company's officer is valid, such director or officer shall be indemnified for that decision.

However, a company shall not indemnify a director or employee of the company or a subsidiary company in respect of[169]:

a) liability for any act or omission in his/her capacity as a director or employee;
b) Costs incurred by that director or employee in defending or settling any claim or proceedings relating to any such liability. An indemnity given in breach of this provision shall be void.

The above article is also not all that clear. It is true that if the decision made by the director of employee is invalid, it will give birth to liability but it is not straightly clear why if the act or omission is invalid the director or employee shall be indemnified.

[168] F. CHAUDET, A. CHERPILLOD and J.C. LANDROVE, *op.cit.*, n° 872.

[169] Rwanda compagnies' act of 2009, Art. 214.

Why should the company indemnify the director or employee? Point 2 of this article is more convincing as a solution provider. It indicates that the company shall not indemnify the director or employee if the director or employee incurs any costs (on behalf of the company) in trying to defend or settle any claim or proceedings relating to any such liability which is impliedly committed by the company.

A director or a company's employee may be compensated by the company in two cases. In the first place, a company may indemnify a director or employee of the company or a subsidiary company for any costs incurred by him or her or the company in respect of any proceedings that relate to liability for any act or omission in his/her capacity as a director or employee and/or in which judgment is given in his/her favor, in which he/she is acquitted, which is discontinued, in which he/she is granted relief or where proceedings are threatened and such threatened action is abandoned or not pursued".[170]

Thus, when the director is involved in the court proceedings for the acts or omissions he/she commits in his capacity and he/she wins the case or is acquitted, or the case is discontinued or is granted relief and in case of any act or omission in his/her capacity as a director or employee the company shall indemnify him/her.

Article 218 continues to unearth that, where a director fails to comply with this article, at the time of that failure the company was unable to pay its debts as they fell due and the company is subsequently placed in liquidation the Court may, on the application of the liquidator or of a creditor of the company, make an order that the directors shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing its business.[171]

However, it is possible that the losses in the company could have been caused by specific employees or the managing Director or the Management team or one of the department due to a decision made by one of the above or a loophole in the policies and practices.

[170] Rwanda compagnies' act of 2009, art. 215.
[171] Rwanda compagnies' act of 2009., art. 218

In this and the above mentioned articles, such cases are not catered for, yet, to avoid any prejudice to any employee or director or even shareholder, it is important to follow the trace of the losses and consequential failure to pay debts.

II.3.3. 4. Judicial proceedings in connection with civil liability of directors

Directors of companies owe their duties to the company. The company, therefore, is the proper plaintiff in an action against the directors where the directors breach their duties towards the company. In some cases, however, the directors who are in breach of their duties may be in control of the company. Thus, it may be difficult to take action against the wrongdoers. The common law principles applicable to derivative actions were established by the leading English case of *Foss v Harbottle.*[172]

II.3.3. 5. Derivative suit

At the common law, shareholder could only pursue an action on behalf of the company if the circumstances giving the rise to the claim fell with one of the exception to the rule in *Foss v Harbattle*. This common law rule provides that where a wrong has been done to a company, only the company may sue for damage caused to it.[173]

However the rule in *Foss v Harbattle* does not prevent minority shareholders from bringing an action in respect of acts which are *ultra vires* the company or illegal. Nevertheless the UK's concept is strongly based on the traditional view: only the company and not every individual shareholder can assert claims on behalf of the company. In the *ultra vires* cases derivative suit aims to prohibit an act beyond the competence of the company. Also a shareholder is entitled to sue in the name of the company when there is a case of exception under *Foss v Harbattle;*

[172] Foss v Harbottle (1843) 67 ER 189.

[173] The exception to the rule "Foss v Harbattle" which provide an avenue for a minority shareholder to take action on behalf of the company, are where the conduct complained of:

- is *ultra vires* (i.e. beyond the capacity of) the company or illegal;
- constitutes a "fraud on the minority", with the wrongdoers themselves being in control of the company, and thus will not cause the company to bring an action;
- is an irregularity in the passing of a resolution which requires a special or extraordinary majority of the shareholders; or infringes the personal rights of an individual shareholder (e.g. The rights to vote, pre-emption rights, etc.)

example: an illegal act when the alleged wrongdoers are in control of the company preventing company from suing in its own name.[174]

The most significant problem with the derivative suits concept of common law in United Kingdom[175] is that it cannot treat effectively the overlaps between personal claims of shareholder and protection of company by individual shareholders. If the committed act is detrimental to company and against a personal interest of a shareholder, the practice is not consistent in deciding whether to grant a derivative suit for the individual or not.[176]

In the case of *Daniels v Daniels*,[177] the English court stated that in cases where there is no other remedy a minority shareholder can bring an action against the directors of the company when they use their powers either deliberately or unwittingly, fraudulently or negligently in a way which benefits them to the company's detriment. This was also the outcome in the Cypriot Supreme Court case of *Aimilios Thoma and others v. Iakovos Eliades* Civil Appeal 11784 (2006) 1B S.C.J. 1263,[178] in which the Court considered that the conduct of the directors of the company constituted fraud as they attempted directly and indirectly to retain from the company, in which they were shareholders, money, property benefits and rights which belonged to the company and to which the other shareholders also had rights.

In Rwanda, the company law stated that a member of the Board of Directors or a shareholder may request the court to file a claim on behalf of the company or its subsidiary, but there are same criteria provide by the article 223 of company law which state that "those applying for the authorization to file a case or intervene shall take into consideration the following:
1° the likelihood of the proceedings that may follow;

[174]For more detailed discussions in this issue see J.G. MACINTOSH, "The Oppression remedy: Personal or Derivative*?"* (1991), 70 *Can. Bar Rev.* 29.
[175] Such "derivative claims" were formerly governed by the common law and were rarely brought. However, they have now been given statutory force through ss260-264 of the Companies Act 2006. The Act permits derivative claims arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director. This is wider than the old common law test where the act had to amount to a fraud on the minority. Further, under the old rules a director who was also a majority shareholder could ratify the disputed act. However, under s239 of the 2006 Act, a shareholder-director responsible for the negligent act will not be able to vote at a meeting of members called to ratify the act or omission.
[176] S. M. BECK, "The Shareholders' Derivative Action", in *Can. Bar Rev.* 159 , 1974, p.185-186.
[177] Daniel v Daniels (1978) 2 *All E.R* 89.
[178] Aimilios Thoma and others v. Iakovos Eliades Civil Appeal 11784 (2006) 1B S.C.J. 1263.

2° the costs of the proceedings in relation to the decision to be taken;
3° the nature of any action already taken by the company or its subsidiary;
4° the interests of the company or its subsidiary in the proceedings being commenced, continued, defended or discontinued."

This provision allows any shareholders, a right to make derivative action. Therefore, the improvement of this article should aim to add more detailed regulations as to the feasibility of the provision. For example, the shareholders shall be explicitly given the right to raise the lawsuits, so that they do not have to rely on the mercy of judges in order to have the trial heard.

According to F. ABIMANA, when a shareholder brings a suit, the company may sometimes ask for joining the proceedings. The company will claim, logically, that it is the beneficiary of the lawsuit, and should be entitled to participate in some way. At the same time, experience suggests that, in many cases, if allowed to participate, the company will seek to lose the case rather than win it, or seek to complicate the case to reduce the chances that the shareholder will succeed.[179] This concern is especially acute when the underlying concern is completion of a conflict-of-interest transaction. The directors who approved the transaction can hardly be expected to authorize the company to sue themselves for having approved it. Concerns about whether the company will vigorously pursue a case against its own director or managers are the justification for allowing a derivative suit in the first instance.

We recommend that this situation be addressed as follows. The Rwandan companies' law should be amended to specify that the suit is brought in the name of the shareholder-plaintiff, with the company considered as a third-party beneficiary. This will clarify that decisions about the litigation should be made by the shareholder and not by the company.

II.3.3. 6. The lack of enforcement instrument of directors' civil liability

The personal action is an ordinary civil suit initiated by a shareholder to seek relief for some injury caused directly to her rights as a shareholder, such as the failure to receive notice of a

[179] Interview of F. ABIMANA, member of board of directors of SULFO RWANDA Ltd on May 14, 2015.

meeting to which she was entitled."[180] Professor Stanley M. Beck emphasized "personal wrong" as the one of the principal criteria by which to bring a personal suit: Where a legal wrong is done to shareholders by directors or other shareholders, the injured shareholders suffer a personal wrong, and may seek redress for it in a personal action.[181]

That personal action may be by one shareholder alone, or (as will usually be the case) by a class action in which he sues on behalf of himself and all other shareholders in the same interest (usually, all other shareholders save the wrongdoers). Such a class action is nevertheless a personal action.[182] Professor Clark further emphasizes that in a personal suit, "recovery in these individual or class actions goes to the suing shareholders, not their corporation."[183] When the personal rights of shareholders are infringed, a personal suit would be the most suitable suit to assure legal protection as a fundamental legal rule.

Article 224 provides that "a shareholder or former shareholder may bring a claim against a company, its Board members or a director or an officer, for breach of a duty owed to him or her as shareholders. An action may not be brought to recover any loss in the form of a reduction in the value of shares in the company or a failure to increase the shares in value by reason only of a loss suffered, or a gain forgone, by the company." Theoretically, this should be manageable, but realistically, it is not feasible because it is too abstract.[184] Therefore, the improvement of this article should aim to add more detailed regulations as to the feasibility of the provision. For example, the shareholders shall be explicitly given the full right to raise the lawsuits, so that they do not have limitations in order to have the trial heard. For us the second paragraph must be removed.

In modern company laws of the major legal systems, personal suits are generally recognized. For example, in Canadian corporate legal practices, although "the courts have traditionally been

[180] J. A. VANDUZER, *the Law of Partnerships and Corporations*, Ontario, Irwin Law, 1997, p. 250.
[181] BECK S. M., "The Shareholders' Derivative Action", in *Can. Bar Rev*. 159, 1974.
[182] S. M. BECK, *op.cit.*, pp.185-186.
[183] R. CH. CLARK, *Corporate Law*, Boston, Little, Brown and Company, 1986, p. 362.
[184] Interview J. KOMEZUSENGE, Attorney at law, member of Kigali Bar Association, Kigali, June 18, 2012.

reluctant to grant a wide scope to the personal action"[185], "…the courts began to allow personal actions in a wider range of circumstances. Personal actions were permitted so long as breach of a personal right was alleged. It was irrelevant if the same breach might constitute a breach of fiduciary duty as well"[186].

This study concludes that gaps and deficiencies exist less with regard to the substantive rules on directors' duties, and more in relation to enforcement. In the vast majority of cases, breaches of directors' duties do not normally lead to judicial enforcement of claims against directors as long as the company continues to operate as a going concern. There are several factors that contribute to what may be seen as under-enforcement of directors' duties. We find that the most important of these factors cannot easily be addressed by changes to the national law rules concerning directors' duties; rather, the relevant obstacles are of a structural nature.

First, in Rwandan companies the most important business decisions are taken by, or with the formal or informal approval of, the controlling shareholders which are directors. Consequently, it may be said that the issue in need of regulatory intervention is not so much wrongdoing by the directors that affects the shareholders as a class, but rather the minority/majority shareholder conflict.

Second, the rules on standing do not seem to be working well. If the board of directors in companies with a one-tier board structure has authority to instigate proceedings on behalf of the company, the conflict of interest is apparent, in particular where incumbents are sued. However, it seems that the problem is not alleviated by allocating the power to enforce the company's claims to another organ, for example the general meeting.

Third, the institutional preconditions may not always be conducive to enforcement. Even where the law on the books seems to be, in principle, satisfactory, enforcement is perceived as being

[185] HONGSONG SONG, "The Minority Shareholders' Rights and the Protection by the Company Law", (2000) 13:4 Journal of Yantai University (Social Science) 401 at 406.
[186] *Ibid*.

lengthy, expensive, and fraught with uncertainties.[187] In addition, shareholders' doesn't know their rights. Consequently, Shareholders may prefer to remove the incumbent directors and appoint new ones, rather than applying to the courts.[188]

II.3.3. 7. Issues of Directors' duties and liability related to insolvency

Where, at a meeting called under this article the Board of Directors does not resolve to appoint a liquidator or an administrator; or at the time of the meeting there were no reasonable grounds for believing that the company was able to pay its debts as they fell due or where the company is subsequently placed in liquidation; the Court may, on the application of the liquidator or of a creditor of the company, make an order that the directors, who did not attend the meeting and voted in favor of appointing a liquidator or an administrator, shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.[189]

Directors who did not attend the meeting to decide on the appointment of an administrator or liquidator, and consequently the company continues to trade, if there are losses incurred by the creditors, the court may hold liable the directors who did not attend and did not thus vote. They shall be liable for the whole or any part of any loss suffered by the creditors of the company because if they had attended and voted, possibly the losses would be avoided by an administrator. However, one is forced to believe that those who were represented as well as the directors who did not attend with apologies should not be liable under the present article.

II.3.4. Criminal liability

In addition to the principal of legality of an offence, all criminal offenses are composed of two elements, one physical and the other mental. It is a requirement of law that for there to be an offense, both the physical element (*actus reus*) and the mental element (*mens rea*) must exist.

[187] Interview with MURAGIJIMANA Emmanuel, legal advisor and board secretary of former BCDI on May 19, 2015.
[188] *Ibid.*
[189] Rwandan companies act of 2009, art. 218, par.4

Not only must both elements exist, but there is a further requirement that they must exist simultaneously. Without the concurrence of these elements there is no crime.[190]

The Rwandan companies' act of 2009 provides sanctions for breach of provisions therein. Articles 361-373 stipulate sanctions for breach of the law or any regulations made in accordance with the law. The penal code of Rwanda also provides sanctions especially if the act or omission is made by the director and/or any other employee of the company. However, as opposed to the law on companies which provides sanctions specifically for the Company directors and other company employees, the penal code provides the sanctions in general.

When analyzing the case KALISA V. Prosecution, KALISA G.A was accused of abuse of trust, a crime that is related to his use of the bank's money in his own interests, at the level of appeal, the High Court sentenced him for 6 years of imprisonment basing on the provisions of the Rwandan Penal Code.

According to the case, KALISA G. A. was the Executive Chairman of BCDI SA (currently ECOBANK) and was accused of the breach of trust, an offence provided for and punishable by the article 424 paragraph 2 of Rwandan penal code, the charges was the following:

- Having, at the head office of BCDI SA in Nyarugenge sector, Nyarugenge District, Kigali Town, on different dates between 1995 and 2005 when he was the managing Director of BCDI SA and the President of the administration board of BCDI SA, as personal , or as accomplice or an informer, as provided for and punishable by article 89,90, and 90 of the first book of criminal laws of Rwanda, committed the offense of breach of trust, provided for and punishable by the article 424 paragraph 2 of Rwandan penal code[191]:

    - ✓ By conducting the construction of BCDI SA building with excessive amount than provided;

[190]J. BIKORIMANA, *Corporate criminal liability under Rwandan law: the case of corporate mens rea, Thesis,* INILAK, 2011, p.5.(Unpublished).

[191] Decret-Loi N° 21/77 code pénal du 18 aout 1977, *J.O*., 1978, n° 13 bis (former penal code which has been repealed)

- ✓ By conducting the construction of BCDI SA building by the bank client's deposits;
- ✓ Granting loans in illegal procedures to his company, SAKIRWA, to the relatives of the shareholders of BCDI SA;
- ✓ Self-granting of the salary.

- Having committed the offense of favoritism using his position in the manner early evoked provided for and punishable by the article 22 of the law n° 23/2003 of 07th /08/2003 regarding the fight and punishment of corruption and other related offenses;
- The offense of violation of the central bank regulations by infringing article 18 of the law n°08/99 determining the regulations regarding the banks and other financial institutions of 18th /06/1999 and article 5 and 8 of the regulation s of the central bank of 19/12/200, those offenses being punished by article 71 of the law n°08/99 determining the regulations regarding the banks and other financial institutions;
- Having committed the offense of traffic of influence provided for and punishable by article 23 of the law n° 23/2003 of 07th /08/2003 regarding the fight and punishment of corruption and other related offenses;
- Having committed as personal, or as accomplice or an informer, as provided for and punishable by article 89, 90, and 90 of the first book of criminal laws of Rwanda, the offense of forgery provided for and punishable by the article 202 and 204 of Rwandan penal code. [192]

Remember that he case was judged before the current law no 7/2009 of 27/04/2009 relating to Companies and the Organic Law no 01/05/2012/OL of 02/05/2012 instituting the penal code of Rwanda were enacted.

As mentioned above, articles 361-373 of the Rwandan companies' law stipulate sanctions for breach of the law or any regulations made in accordance with the law on companies.

[192] Case RPA 0573/08/HC/KIG of 21/11/2008.

According to this law, a director may be liable and even continue to be liable even when the company has been removed from the register of companies (article 360).[193] Article 365 provides the sanctions for any person who issues a false or misleading notice. Such person is liable to a fine of between Rwf 500,000,000 and Rwf 2,000,000,000.[194] This provision seems to include even directors as many of the notices are normally filed by the Managing Directors who are also normally members of the board of directors.

It deserves notice that this sanction may be light or heavy depending on the prejudice caused by the notice and the amount of money that may be caused. This is because the notice may cause so much harm compared to one that may be light to the point that the minimum fine is unrealistic compared to the maximum fine.

It is also punishable to knowingly submit a false document and, notwithstanding the provisions of the penal code, any director or employee of a company who knowingly makes or submits, or authorizes the making or submitting of, a false or misleading statement or report with regard to:

- a director, employee, inspector, shareholder, debenture holder or trustee for debenture holders of the company;
- a liquidator, liquidation committee, or receiver or manager of property of the company;
- where the company is a subsidiary, a director, employee or inspector of its holding company;
- a stock exchange or an officer of a stock exchange; commits an offence and shall be liable to a fine of between one million (1,000,000 Rwf) and ten million Rwandan francs (10,000,000 Rwf).[195]

This article seems to be realistic but when one considers the size and nature of companies, where the company's share capital is at times little, these sanctions may not be successfully enforced as the director may not be able to pay the fine. Hence, in this case the legislator of the companies act should be harmonized with the penal code such that in case the fine cannot be enforced, the provisions of the penal code shall apply otherwise in the companies act it is not quite explicitly clear.

[193] Rwandan Companies' act of 2009, art. 360.
[194] Rwandan Companies' act of 2009, art.365.
[195] Rwanda Companies' act of 2009, art. 366.

In the case of KALISA for instance, there was only an imprisonment sentence and not any fine.[196] Furthermore, there were no civil liabilities according the court's judgment. However this case was judged in December 2008 and the previous penal code was applied. Probably if the new penal code had been in place together with the companies act, the sanctions would have been different as both the penal code and the law relating to companies would be applied concurrently.

Under Rwandan law, fraudulent use and destruction of company's property is also punishable with a fine of between one million (1,000,000 Rwf) and ten million Rwandan francs (10,000,000 Rwf).[197] Notwithstanding the provisions of the penal code, any director, employee, or shareholder of a company who fraudulently takes or applies property of the company for his own use or benefit, or for a use or purpose other than the use or purpose of the company or fraudulently conceals or destroys any property of the company commits an offence and shall be liable to a fine of between one million (1,000,000 Rwf) and ten million Rwandan francs (10,000,000 Rwf).[198]

In some companies, it is a common practice for company directors to falsify records especially relating to audit and financial reports to avoid or reduce taxes charged or conceal mistakes and errors that were made by the employees, Management or Directors.[199] This is an offence under Rwandan law as spelt out in the Rwandan Companies Act of 2009[200] and Penal code of 2012.[201] Article 368 stated that, "notwithstanding the provisions of the penal code, any director, employee, or shareholder of a company who, with intent to defraud or deceive a person:

- destroys, displaces, mutilates, alters or falsifies, or is a party to the destruction, mutilation, alteration, or falsification of any register, accounting records, book, paper or other document belonging or relating to the company;
- makes, or is a party to the making of, a false entry in any register, accounting records, book, paper, or other document belonging or relating to the company; commits an

[196] Case N^{O} RPA 0573/08/HC/KIG of 21/11/200, Prosecution V KALISA.
[197] Rwanda Companies' act of 2009, Art. 367
[198], see Rwandan penal code of 2012, art.344.
[199] Interview with P. RUGAYABAHUNGA, clearing agent of SOFARU Ltd, on May 21, 2009.
[200] Rwanda Companies' act of 2009, art. 368.
[201] Rwandan penal code of 2012, art. 609.

offence and shall be liable to a fine of between one million (1,000,000 Rwf) and ten million Rwandan francs (10,000,000 Rwf)".[202]

In the case of Prosecutor V. KAJEGUHAKWA and others, KAJEGUHAKWA as director of BACAR S.A. has been accused of Counterfeit or use of a counterfeit document and breach of trust.[203] The accused has been found guilty of those crimes. In fact KAJEGUHAKWA as director and his accomplices has used the false documents in order to fraudulently take the money of the company.

In conclusion of this section, the researcher note that the board of directors is a collegiate body, but liability is personal; it does not attach to the board as a corporate organ (which does not have legal personality), but to the individual director. This gives rise to the question how collegiate decisions that constitute a breach of duty translate into liability of the directors who participated in the decision by voting in favor or against it, and directors who were absent but were later involved in the implementation of the decision or could have prevented its implementation. These questions have not been addressed under Rwandan law.

II. 3.5. Solution proposed de *lege ferenda* on limitation of directors' liability

Directors are expected to work actively to ensure a company's operational sustainability and optimize its profit. The board of directors should be the body which has the best knowledge of how to implement the company's strategy and should therefore be free to apply discretion. Thus, in order to prevent slowing the development of companies down, board members should be granted a widened scope of business judgment and have an insurance of their liabilities, the courts should only interfere in case of obvious diligence or loyalty failures.

II. 3.5. 1. Business judgment rule

Under Rwandan law, there is no "business judgment rule" as a distinct legal concept, which would limit the circumstances in which a court will find liability based on a breach of Rwandan

[202] Rwanda Companies' act of 2009, art. 368.
[203] see the case n° RP 0245/04/T.P.I/NYGE Prosecutor V. KAJEGUHAKWA and others , July 29, 2005 (unpublished).

companies law provisions for tortuous or negligent acts of director. Yet, if one examines actual court decisions of others jurisdictions, it becomes clear that when only negligence is involved, and not self-dealing, a minor degree of negligence is unlikely to result in liability.

As a general rule, American courts do not hold directors liable for business decisions, made without a conflict of interest, unless those decisions are completely irrational. This doctrine of judicial non-interference is known as the "*business judgment rule*."[204] The business judgment rule involves a presumption that the directors have acted on an informed basis, in good faith, and in the interests of the corporation.[205] The plaintiff must rebut one or more of these presumptions.

In cases involving a conflict of interest, it will often be straightforward to overcome the presumption of good faith. If a conflict of interest cannot be shown, then it will be rare for the plaintiff to be able to rebut the presumption of good faith.[206] If the plaintiff cannot rebut the presumption of good faith, the plaintiff is left with the difficult challenge of showing that the directors have not acted on an informed basis, and overcoming the presumption that they have acted on an informed basis. If the plaintiff cannot rebut the presumption that the directors have acted on an informed basis, the plaintiff will lose the case. The courts will not review the merits of the decision they made. The business judgment rule, not the ordinary negligence standard, sets the standard by which breach of the duty of care is measured.[207]

A number of jurisdictions have adopted some form of the "business judgment rule," even if not the strong form found in the United States.[208] Sometimes, this rule is explicit; sometimes it can be inferred from decided cases. The core idea, which we believe to be sound, is that if directors become reasonably informed, and act without a conflict between the company's interests and their own interests, the courts should give a high degree of deference to their decisions, in order to encourage directors to take risks, which may turn out to be wildly successful or wildly

[204] B. BLACK, *Comparative analysis on legal regulation of the liability of members of the management organs of companies*, Law Working Paper n°103/2008, 2008, p.35.
[205] *Ibid*.
[206] B. BLACK, *op.cit*., p.36.
[207] RONALD J. GILSON, "A Structural Approach to Corporations: The Case against Defensive Tactics and Tender Offers*"*, 33 Stanford Law Review 819, 823 (1981).
[208] *Ibid.*

unsuccessful. If directors face a significant risk of being liable for failed decisions, they will be reluctant to take risks, and this will harm rather than benefit shareholders on average.

We recommend that Rwandan law to adopt a form of the business judgment rule, in which if directors are reasonably informed, and adopt a decision that does not personally benefit themselves, their fellow directors, or the company's controlling shareholders, there should be a strong presumption that they have acted reasonably. As long as there is no evidence of a conflict of interest, the plaintiffs should be required to show that no rational director could have adopted the decision, in order for the court to find that the directors are liable for failure to act reasonably.

The core idea is that even if the directors have acted foolishly, the risk of such action is an ordinary business risk that shareholders can fairly be asked to assume. If the law creates a significant risk that directors may be found liable for foolish decisions, they may respond by becoming risk averse. They may make fewer large mistakes, but they will also have fewer large successes.

II. 3.5. 2. Insurance of liability of members of management organs

Liability insurance is one possible way to limit endangerment of personal assets of board members. "The first ever Director & Officer Insurance (D&O insurance) policy came out of Lloyd′s of London in the late 1930s."[209] D&O insurance covers liability of the managing director vis‐à-vis both the company and third parties.

The Rwandan companies law doesn't mention the Directors and Officers liability insurance (D&O insurance), but such products is available on the market.[210] The statutory personal liability of the members of the board of directors and the supervisory board is one of the greatest risks faced by top executives; these members are liable with all their property for damage to the company arising from the breach of their statutory or contractual obligations (duties).

[209] R.P. TAFFAE, *the ABCs of D&O Insurance Clauses*, National Underwriter P&C, 21.12.2009, on line at http://www.propertycasualty360.com/2009/12/21/the-abcs-of-do-insurance-clauses , accessed on may22, 2015

[210] UAP, Corporate Products & Services: General Insurance, Liability of Directors and Officers Liability, (Covers the directors and managers of an organization against claims that may arise from the decisions and actions taken within the scope of their regular duties.) on line at https://portal.uap-group.com/sites/rwanda/pages/Corporate-Directors-And-Officers-Liability-Rwanda.aspx , accessed on May 22, 2015

The purpose of the insurance is to protect the directors against the financial consequences of civil liability actions. In practice, the company, and not the director or the shareholders, takes out the insurance. The recent development in directors' liability insurance was inspired by the United States, where D&O insurance is common.[211]

The beneficiaries of the insurance are both *de facto* and *de jure* directors. However, only natural persons who are directors are covered by the contracts, legal persons are excluded. Permanent representatives of legal persons who are designated as directors of a company may be covered by an insurance taken out by the company. Directors of subsidiaries and of lower-tier subsidiaries are generally included in the coverage taken out by the parent company.

In USA, the Companies are also permitted to pay directors' defence costs as they are incurred (or provide directors with the funds to do so) in other types of action, including criminal cases and even claims brought by the company against the director (although any costs advanced would have to be repaid in non-third party actions if the director were unsuccessful in their defense or their application for relief was refused by the court).[212] This widening of the company's powers to indemnify reflects the usual D&O policy terms, although the standard 'insured v insured' exclusion of any costs or damages arising out of a claim brought by the company (however acting) against a director will probably continue not to be covered.

Articles 214-216 of the Rwandan Companies law 2009 allows companies to protect directors by indemnifying them in respect of actions brought by third parties, covering both legal costs and the financial cost of any adverse judgment in a civil action even where the directors are found to have committed a breach (in the absence of any morally culpable behavior such as dishonesty).[213]

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[211] C.GERNER-BEUERLE, PEACH P. and SCHUSTER E.P., *study on directors' duties and liability in EU, the London school of Economics and Political Science*, 2011, p. 281.

[212] DEBEVOISE and PLIMPTON, Directors' and officers' liability insurance: problems and pitfalls, on line at: http://www.legal500.com/developments/8758#sthash.5c9d3zYF.dpuf , accessible on 25 may 2015.

[213] Article 216 of Rwandan companies' law fixes the criteria of compensation by indicating that a company may indemnify a director or employee of the company or a subsidiary company in respect of: 1° liability to any person, other than the company or a subsidiary company, for any act or omission in his/her capacity as a director or employee; 2° costs incurred by that director or employee in defending or settling any claim or proceedings relating to any such liability.

In the opinion of researcher, a director should always ensure that they have both an agreement to indemnify and access to D&O cover because the two are complementary. The Rwandan Companies law 2009 should be amended to create a clear legal basis for directors' liability insurance.

To summarize, the typical mechanisms that protects directors from personal civil liability for the decisions they make on behalf of a corporation are indemnification, insurance liability and Business judgment rule. Persons under the duty of loyalty must not only refrain from (negatively) damaging the company managed by them but should also (positively) act to promote the company's interests. For management board members to be able to take justified risks in the course of business management they should enjoy sufficient freedom and any unreasonable liability associated with risk‐taking should be eliminated. It goes without saying that risk‐taking is a central aspect of a director's role. After our research, we found that those mechanisms has been use in several jurisdictions and has allowed the effective governance of the limited liability companies. Consequently our suggestion in this issue is to adopt those mechanisms in Rwandan Company law.

GENERAL CONCLUSION

The liability regime of executive and non-executive directors in companies constitutes a necessary corollary to control issues within a company. It is based on the determination of specific duties, it establishes the limits of directors' behavior and it provides stakeholders and third parties dealing with the company with legislative protection against management misconduct. In that respect, directors' liability is an important and effective compliance and risk-allocation mechanism. In that case, it is important to note that the knowledge of the roles and liabilities of company directors is fundamental. The Rwandan companies' Law does not quite clearly spell out the details relating the appointment, remuneration and removal of a director in a limited liability company.

In this thesis, two major tasks were carried out. First, the duties and responsibilities of directors in Limited Company under the Rwandan Law were discussed. Secondly, some analyses of liabilities of directors in limited company were done, and proposals to reform the Rwandan Company Law were made.

For the first point, the researcher found that the duties of a company director whether in Rwanda or anywhere else stem from the company's law and/ or articles of association. The general duty of care and due diligence, loyalty as well as observing other statutory provisions applicable to all limited liability companies has to be given priority by the director, failure of which will lead to his liability for mismanagement, breach of statutory provisions or by-laws more especially where loss or damage has been caused by such behavior.

Thus, the Rwandan law on companies does not seem to depict the international standard of a Limited Liability Company in as far as the management of the company is concerned. For example the Rwandan companies' law is silent about the issue of difference between being a "director" and a "manager" of limited company, however, it is impossible to settle on the issues of liability of one of them without knowing their role and responsibility.

From the present research, it is noted that there is a complexity of provisions relating to directorship in a limited liability company which must be respected by all companies as such.

However, the enforcement procedures are lacking in the law of companies. It should be responsible of the authority/institution in charge of companies in Rwanda to put in place enforcement procedures and work in conjunction with other related authorities to ensure that the provisions enshrined in the law are respected even before the matter may be taken to court. For example, the law does not spell out the enforcement procedures for directors who delay or fail to file annual financial returns and/or other notices within the Office of the Registrar General.

There a lot other provisions in the 2009 Rwandan Law on Companies for which there are no implementation tools which leaves the provisions difficult to enforce and consequently, the risk at hand is that directors end up not fulfilling their obligations and go unpunished as seemingly no one raises the case as a victim.

Under Rwandan Law, it is provided that a director can be liable even when the company is no longer in existence. However, the law does not specify in which cases the director may be liable for after the company has been removed from the register of companies. One would quickly confirm that such a case would occur in the context of personal liability and criminal liability whereby even after the removal of the company from the register of companies, the director's personal liability stands especially if the liability is a criminal liability. In such a case the director shall be punished for the crimes he/she committed while in office during the life time of the company. What should be pointed out though is that this provision (art.360 of the law on companies as modified and complemented to date) leaves some questions hanging as regards the scope and interpretation.

However in second point, the researcher found that in Rwanda companies 'law, there are some provisions provide that directors are civil, administrative and penal liable if she/he breach the laws and regulations related to his/her duties. However, there are some gaps in the Rwanda companies' law which require the improvement in order to empower the good governance of limited companies. The liabilities of directors are provided in different laws and have not been combined into a single code. Thus, the directors must keep themselves informed of all the laws and ensure that the company's activity complies with all requirements. A directors cannot be expected to be aware of all legal provisions that may influence a company's operations (such as accounting provisions, tax laws, competition law, environment protection law etc), but he/she

must be aware to the sufficient extent required for due diligence or involve experts in required fields if necessary.

The purpose of this thesis was to examine the liability of directors. The issues were explored through an analysis of Rwandan legislation in general and companies law especially. More important problems are related to issues such as avoidance of conflict of interest. The researcher finds that the concept of conflict of interest has not been established in sufficient detail and the law does not treat transactions with companies closely connected to the director e.g. through shareholding, relatives etc as conflicts of interest.

RECOMMENDATIONS

1. Provisions in the Rwandan Companies Act of 2009 relating to the roles and liabilities of directors of companies are general and some even seem to be narrow in such a way that the readers of the law may not easily understand the way implementation is done. The Rwandan Lawmaker has to review them in order to clearly spell out the details relating the for example appointment, remuneration and removal of a director, conflicts of interest, difference between being a "director" and a "manager" in a limited liability company.
2. In Rwandan law there is a gap on legal mechanism limiting directors' liability such as business judgment rule and liability' insurance of directors, consequently it is crucial to adopt those mechanisms in Rwandan Company law.
3. The duties and obligations of directors as provided in the companies' act of 2009 as modified and complemented to date also have sanctions for breach of the same duties. However, this is not enough as there is need for compliance measures to be put in place in form of regulations and instructions and the institution/authority empowered with the control of companies should have staff in charge of compliance of companies regarding the duties obligations and responsibilities of directors. Furthermore, the sanctions provided for breach of the law on companies relating to liabilities should also be determined depending on the gravity of the breach or damage.

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VI. INTERVIEWS

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2. Interview with C. NYIRANSHIMIYIMANA, legal advisor of MINICOM, on May 10, 2015.
3. Interview with A. MUSINGUZI, a tax consultant at KPMG, on May 24, 2014.
4. Interview with P. RUGAYABAHUNGA, clearing agent of SOFAMU Ltd, on May 21, 2009.
5. Interview J. KOMEZUSENGE, Attorney at law, member of Kigali Bar Association, Kigali, June 18, 2012.
6. Interview with MURAGIJIMANA Emmanuel, legal advisor and board secretary of former BCDI on May 19, 2015.
7. Interview of F. ABIMANA, member of board of directors of SULFO RWANDA Ltd on May 14, 2015.