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TOPIC: THE IMPLEMENTATION AND BALANCING OF INTERESTS BETWEEN BOARD OF DIRECTORS AND SHAREHOLDERS OF THE COMPANY UNDER RWANDAN LAW

Thesis submitted in partial fulfillment of academic requirements for the award of the Master's Degree in Business Law

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Declaration

I, **……………………………………………………**, hereby divulge that the thesis entitled "*THE IMPLEMENTATION AND THE BALANCING OF INTERESTS BETWEEN BOARD OF DIRECTORS AND SHAREHOLDERS OF THE COMPANY UNDER RWANDAN LAW*" contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature: ………………………….

Date: ……. /…….. / 2020

Dedication

To the Lord the Most Merciful

To my lovely Family, Wife and Children

To the Legal Fraternity

Acknowledgement

I would first like to thank my thesis Supervisor Dr. Didas KAYIHURA of the School of Law at the University of Rwanda. The door to Dr. Didas' office was always open whenever I ran into a trouble spot or had a question about my research or writing. He consistently allowed this paper to be my own work, but steered me in the right the direction whenever he thought I needed it.

I would like to thank the experts who were involved in the validation survey for this research project: Dr. Richard Karugarama and Dr. Yves Muhire at the School of law at the University of Rwanda. Without their passionate participation and input, the validation assessment could not have been successful.

Finally, I must express my very profound gratitude to my parents and to my loving wife for providing me with unfailing support and continuous encouragement throughout my years of study and through the process of researching and writing this thesis. This accomplishment would not have been possible without them.

Thank you.

List of abbreviations

BOD: Board of Directors

CEO: Chief Executive Officers

CIC: China Investment Corporation

ICBC: Industrial and Commercial Bank of China

ORG: Office of the Registrar General

RDB: Rwanda Development Board

RG: Registrar General

UK: United Kingdom

US: United States

USA: United States of America

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ABSTRACT

The study entitled "the implementation and balancing of interests between board of directors and shareholders of the company under Rwandan law" is meant to assess the efficiency of the law regulating companies in Rwanda as far as its responses to various issues are concerned. Indeed, there was wondered whether the company law adequately balance the Interests of shareholders, Board of Directors and company interests; whether the Registrar General has sufficient powers to enforce the balance of interests between Board of Directors and shareholders and whether the sanctions for breach of the Balance of interests between Board of Directors and shareholders sufficient under Rwanda Company law. There was then found out that the Registrar General detains sufficient powers to regulate the relationships between interests of the company, those of directors and those of shareholders and that besides, he is entitled to sue people in justice in case of disputes compromising such interests. In fact, the law governing companies in Rwanda managed to distinguish interests of the company as it has a dual nature, as an association of its members but also as a person separate from its members.

Besides, sanctions established vary between fines estimated from thousands to millions and imprisonment amounting to 5 years and we deem all deterrent, dissuasive to prevent offences likely to be committed in this matter.

Furthermore, if there is assumes that the law recognize that a company is a separate legal entity distinct from its shareholders. Therefore the courts usually do not look behind "the veil" to inquire why the company was formed or who really controls it. This trend may harm third parties interests, the reason why exceptionally such a veil must be lifted. in this respect, the fact that a company is treated as a separate legal person may work to the disadvantage of third parties. This is especially so in cases where creditors have negotiated with a natural person who then disclaims personal responsibility for the transaction on the basis that a company was the real actor and they were merely its conduit.

It is, therefore, perhaps not surprising that the so-called ‘veil of incorporation’ may be penetrated in certain circumstances that are prescribed by the common law and statute. However, this does not mean that a company is suddenly not incorporated (companies remain incorporated until deregistered) but it does mean that the fact of its incorporation will be ignored for the purposes of the impugned transaction.

I. GENERAL INTRODUCTION

1. BACKGROUND TO THE STUDY

Corporate governance includes all types of firms and its definitions could extend to cover all of the economic and non-economic activities. Literatures on corporate governance provide some form of meaning on governance, but fall short in regard to the precise meaning of governance. Such ambiguity emerges in words like control, regulate, manage, govern and governance. Owing to such ambiguity, there are many interpretations. It may be important to consider the influences a firm has or affected by in order to grasp a better understanding of governance. Owing to vast influential factors, proposed models of corporate governance can be flawed as each social scientist is forming their own scope and concerns. This paper will review under corporate governance the fundamental shareholders and directors' duties and interests. These duties and interests have been provided for by the law but this paper will basically be interested to analyze whether the Rwandan law reasonably provides for the enforcement, implementation and balancing of shareholders and directors interest. This will lead the paper to analyse/find out who is responsible for the enforcement. This will be done regarding the duties ofdirectors; the company and shareholders' interests and finding out to whom, under Rwandan Law, the directors owe their duties/responsibilities. Hence, whether corporate governance legislation favors balancing of the company and shareholders' interests and how this is reflected in the Rwandan Company law.

Much of the world's public attention of the early years of the 21st century had its origin in failures within Big Multinational Corporations such as Enron and Parmalat, that evidenced that the functioning of certain elements of late 20th century Corporate Governance models based on maximization of shareholder's interests, were not able to ensure sustainable development of Corporation activities[1].

Corporate governance through the protection of a wider set of interests can be regarded as an alternative way of efficiently conducting Corporate Governance. Taking into consideration other stakeholders' interests is often regarded as fairly recent in development, and Milton Friedman[2] is generally cited as its landmark. However, neither this idea nor many of its practices are new.

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[1] *Berle, A. "For Whom Corporate Managers Are Trustees" Harvard Law Review, num. 44, (1931), 1365,1372*

[2] M.FRIEDMAN. The role of monetary policy. American Economic Review,vol.58, N°1pp.1-17

Recently, academic and practical interest for "other constituencies" approach to Corporations' management has progressed in parallel with the critics of Corporate Governance theories that evolve around the maximization of short-term revenue to shareholders. "It has occupied much of the academics works in the last decade. Sometimes it appears hidden behind terms such as Corporate Social Responsibility, corporate citizenship, corporate accountability, or triple bottom line (of environmental social and financial reporting), in other occasions it is used as a rebrand to Corporation's charities and donations"[3].

Corporate Governance copes with Corporations organization and the way through which decisions are taken. One of its key objectives is to guarantee the resourceful confluence of otherwise competing interests that are affected by Companies' activities. "The debate about the relationship between shareholders' interests (those of investors and owners of the issued shares of the Corporation), Board of Directors and other stakeholders' or "other constituents" "interests (those related to a varied number of constituencies such as employees, citizens of the Community where the Corporation interacts, etc) is as old as Corporations. It is rooted on different theories that support the idea of legal persons (firms, Corporations, etc.). The modern discussion about this dichotomy goes back at least to the early years of 20th century and to the influential works of Berle, Dodd and other Professors of the time"[4]. Considering corporate behaviour currently, originates from the improved freedom granted to Corporations to develop their business activities and the need that this freedom is used wisely and responsibly.

There are many standpoints to view Corporation's practices of promotion of constituencies other than shareholder's interests. We relate them to two competing theories of Corporate Governance: shareholders theory (agency) and stakeholder's theory.

"Shareholders' theorists of Good governance tend to follow Milton Friedman statement that social responsibility of business is to increase business and consider that shareholders interest in the increase in value of their shares is paramount of Corporations goals"[5]. "This conception implies that Company's Directors and Executives serve as agents of the shareholders, and should use Corporation's resources only for their principal's benefit. In addition, it is said that left to their own, agents would pursue their own interests".

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[3] *Friedman, M Capitalism and Freedom. University of Chicago Press, 1962.*

[4] *Fundacion empresa y Sociedad. FES (2003): Las empresas mejor percibidas por su acción social. Ranking 2003. Fundación Empresa y Sociedad, Madrid [http://www.empresaysociedad.org].*

[5] *Friedman, M Capitalism and Freedom. University of Chicago Press, 1962.*

Actions to foster "Community interests" are seen, as a way for Manager's to promote their own strength and prestige, and to expropriate shareholders of their resources. "Shareholders' theorists are favorable to acknowledging shareholders rights over decisions on how their investment is used, and are concerned by the information asymmetry between the principal and the agent"[6]. These arguments are often premised on the idea of perfect and efficient markets[7] that can be rooted in some of the main Utilitarian philosophers such as Bentham who supported the pursuance of self-interest to maximize utility. Adam Smith's economic theory is considered as leading a similar strategy for business. He was of the idea that business acted in a self-interested manner, that the market place would control their behavior and that its "invisible hand" would guarantee social benefit. Shareholders' theories emphasize that Directors and Officers of Public (Registrar General) and Private Companies owe fiduciary duties only to shareholders, to whose benefit they must manage Corporations' business. "Protection of other interests is located beyond their duties, except in those situations where they are contractually compelled to do so. These theories acknowledge the relevance of investor's input into the company". However, taken in absolute terms, they can lead to abuse of shareholders' rights and can contribute to the long-term instability of Companies.

"Those advocating in favor of taking into account interests other than those of shareholders in the Corporation's decision-making process, favour giving stakeholders other than shareholders an independent right to influence Companies activities"[8]. "Corporation's theories and practices to support shareholder's interests are generally built on the identification of many different factions within society to whom Companies may have some responsibility, and on the prediction of how businesses should function in order to care, not only for their shareholders economic benefit, but also for others".

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[6] *"This asymmetry makes it difficult to guarantee whether the agents have fulfilled their duties to shareholders and whether the later have had their instructions followed and their aims achieved. Agency Theory is prevalent in Anglo-Saxon Common Law countries. It is said that managers to a business have a fiduciary duty to Shareholders. This fiduciary duty is interpreted by some in a very narrow sense (implying a duty of maximisation of the Corporation Shareholders' investment), and lately in a wider form by means of suggesting that fiduciary duties simply require that the fiduciary has an open and honest relationship with the shareholders and does not extract illegitimate benefits from his or her office".*

[7] *Druker, P "The new meaning of Corporate Social responsibility", California Management Review, pages 53-63.*

1994, number 26. Jensen, M "Corporate Control and the Politics of Finance", Journal of applied corporate finance, Vol 20(2) 1991, pages 13-33.

[8] *D Ronnegard, "Corporate Moral Agency and the Role of the Corporation in Society, London School of Economics, 2006. (Unpublished theses, on consultation)."*

The definition of "other constituents" or stakeholders is wide and there is not a overall consensus on it. "Some encompass within it all those groups without whose support the organization would cease to exist. Others widen the boundaries of the definition to include any individual or group who can affect or be affected by the achievement of the organization's objectives"[9].

Taking shareholders' interests into account in the Corporation's' decision making processes has been linked to a "democratic idea" similar to that of Tocqueville in Democracy in America, 1835 in so far as each group is considered equal to the other[10]. However, this interpretation is to be criticized as it is over idealistic and utopic[11].

Balance between the diverse groups of stakeholders is crucial to the long-term viability of the Company. Fair and balanced stakeholder's perspective results in long-term shareholder maximization value[12]. Good Company Governance is about reconciliation of otherwise diverging interests. The dichotomy we have described sets its origin in long standing philosophical traditions. In our opinion it is also entrenched in impractical theories. Shareholders short-term maximization of wealth leads to system abuses, such as we have seen in the dramatic financial scandals through history, namely in the early years of 21st century. Stakeholders' interest maximization can lead to Company's assets waste and diversion. Governance analysis must serve as a means to organize, structure and to create an efficient prioritization of interests.

"Stakeholder's movement contains a prescription for corporations to pursue ends that go beyond the single interests of shareholders and means that Directors and Officers are to care for the interests of others involved in the company activity.

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[9] *S Cooper, "Corporate Social Performance: A Stakeholder Approach, Ashgate Publishing Cia, London-Hants, UK, Pages pages 21-22, citing other authors particular Freeman."*

[10] *Hummels, H., "Organising Ethics: A Stakeholder debate", "Journal of Business Ethics, October, Vol 17 (13) 1998, pages 1403-1419".*

[11] *Gioia, D A "Practicability, paradigms, and problems in stakeholder theorising", "The Academy of Management Review, Vol 24 (2)1999, pages 228-232. Also Sternberg E, Just Business: Business Ethics in Action, Little, Brown and Company, London, 1994. Others have argued that its implementation would demand great efforts to identifying stakeholders and to determining which should receive what portion of management time Cooper, S, Corporate Social Performance: A Stakeholder Approach, Ashgate Publishing Cia, London-Hants, UK, pages pages 20-21."*

[12] *R S Kaplan and D P Norton, "The Balanced Scorecard – Measures That Drive Performance", "Harvard Business Review, January-February, 1992, pages 71-79. , R S Kaplan, and D P Norton", The balanced Scorecard: Translating Strategy into Action, Harvard Business School Press, Harvard 1996. R S Kaplan, and D P Norton, "Using the Balanced Scorecard as a Strategic Management System", "Harvard Business Review, January-February, 1996, pages 75-85. These leading authors on management strategies points at the fact that to achieve a correct and efficient balance, businesses are to obtain positive valuation from 4 perspectives: customer perspective, internal perspective, innovation and learning perspective, and financial perspective. Shareholders, taken into account within the financial perspective, and customers are two specific stakeholders. Innovation would imply the need for employee development. Supplier relations should be incorporated within the internal-business perspective."*

In doing so, shareholders long term interest are also benefited: increasingly consumers prefer to buy products from companies they trust, suppliers are interested in business partnerships with companies they can rely on; employees rather work for companies they respect; large investment funds favour socially responsible firms"[13]; and most appreciated NGOs prefer to collaborate with companies conciliating their investment interests with Community goals[14].

Boards of Directors are normally, in accordance this view, to reconcile stakeholders and shareholders' needs and interests though approaches capable to raising both economic and social and environmental standards. "If the decision-taking process within company hierarchies were considered and controlled by one set of stakeholders, other stakeholders might eventually cease to cooperate, to withhold inputs in the future, and try to withdraw inputs over which they have influence. The complex nature of modern corporations implies that shareholders investment is better protected though the care and respect of those "external" assets". Violations of social or environmental laws, bring penalties and sanctions to Companies and reduce shareholder's profits. In the absence of imperative laws, lack of respect for social, environment issues can have catastrophic consequences for the Company's activities and profitability.

Considered in the medium or large term, bonafide interests of most stakeholders coincide with those of shareholders and the Company: Customers and clients are stakeholders whose satisfaction is a great challenge to the Corporation. "No company can create great wealth for its shareholders without a stable and growing revenue base, which comes from customers. As long as management invests in higher levels of customer satisfaction that earns an economic return, there is no conflict between maximizing shareholder value and maximizing customer satisfaction. Suppliers are crucial to developing and implementing strategies that generate wealth. Attempts to pay prices that are below market levels may allow achieving a greater short term profit. They are also likely to lead to supply disruptions or quality problems". Management systems are built on collaboration with suppliers to improve quality, delivery-production schedules and inventory. Those exercises help raising both suppliers' profits and value for shareholders.

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[13] *"Social investment funds seek to invest in economic activities consistent with a particular social agenda."*

[14] *"W B, Jr Werther and D Chandler, Strategic Corporate Social Responsibility. Stakeholders in a Global environment, Thousand Oaks (California)- London, 2006, Pages 6-9."*

Maximizing value for shareholders demands enlightened staff. Companies that pay their employees below market, or deal with their employees in ways which undermine their talents are wasting valuable assets and are not maximizing wealth for shareholders. Companies with sound human resource records are in a well-positioned to achieve long-term profitability.

Corporation's prestige in the Communities where they interact helps in achieving long-term cooperative relationship. This is, too, a good ground for long term wealth maximisation.

In USA, “traditional state and corporate law doctrine establishes that Directors and Officers of both public and private Companies owe fiduciary duties to shareholders alone”. “Directors and officers must manage for the exclusive benefit of its shareholders”. However, “this has been reformed in a majority of states that authorizes Directors to take into account the interests of other "constituencies" such as employees, suppliers, customers, and the local community in making business decisions”. “These a known as other constituencies statutes. Some apply to all Director decisions, while others apply only to decisions about mergers”[15]. Some allow Directors to consider the interests of other constituencies, without additional qualification, while others limit the Directors' concern to the long-term and short-term interests of shareholders, but permit the Directors to define the shareholders' long-term interests as including the well-being of other groups. All of these statutes, however, generally expand the directors' discretion in making corporate decisions. As regards jurisprudence, some well-known cases support, under precise circumstances, the “other constituencies view”. In ***Dodge v. Ford Motor Co***.[16], “Directors were accused of subordinating shareholder interests to other interests”. In the very case, the Directors, dominated by Henry Ford, refused to pay dividends and instead reduced the price to consumers. Michigan Supreme Court stated that Directors decision did not sacrifice shareholders’ interests. In ***Unocal Corp. v. Mesa Petroleum Co***.[17], the court stated that a takeover defense must be "reasonable” and that the directors' determination of reasonableness involves an analysis of the nature of the takeover bid and its effect on the

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[15] “Pennsylvania in late 1983 was the first state to adopt a statute that specifically authorized directors to consider the interests of groups other than shareholders in making decisions. Since then, most of the rest states have adopted similar laws: Arizona, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Wisconsin, and Wyoming.”

[16] “Dodge v. Ford Motor Co, 204 Mich. 459, 170 N.W. 668 (1919)”.

[17] “Unocal Corp. v. Mesa Petroleum Co ., 493 A.2d 946 (Del. 1985).”

corporate enterprise. "The Supreme Court of Delaware added that the Directors may consider are the impact on 'constituencies' other than shareholders, such as, creditors, customers, employees, and the community generally." It underlined, however that they could not do so at the expense of shareholders". In ***Revlon Inc. v. MacAndrews & Forbes Holdings, Inc***.[18], the Delaware Supreme Court described the possibility of a board of Directors to take account of the interests of "various corporate constituencies"' in more limited way stressing that in doing so there must be some benefit to stockholders. "Although it seems contrary to traditional Corporate Law, in many ways, the corporate constituency statutes reflect the early and traditional jurisprudence relating to director obligations, which made it clear that a director's sole duty was to the corporation and not the shareholders"[19]. Nevertheless these laws and Court decisions, the discussion is open and support of non-shareholders' interests is often criticized.

Clay says that,[20] the idea of using the registered company as a tool or medium for trade and commerce is straightforward. A company is created or 'incorporated' by a promoter. The company issues shares to shareholders who are originally 'the subscribers' to the company's constitution, who then enjoy control over the company by voting in meetings, in proportion to the number of shares they hold.

Though Organizations are the main concern and dominant institution, they have gone through every part of the world in various sizes, abilities and inspirations. "The organizational contribution in good governance has influenced economies and various aspects of social background. Shareholders are seen to be losing confidence and market value has been extremely affected. However, with the advent of globalization, there is greater deterialization and less of governmental control, which results is a greater need for accountability (Crane and Matten, 2007)"[21]. Hence, corporate governance has become a vital issue in managing organizations in the current global and complex environment.

Premised on the above, it is vivid that corporate governance is concerned with the social political and legal environment in which the company operates systems practices and

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[18] *"Revlon Inc. v. MacAndrews & Forbes Holdings, Inc 506 A.2d 173 (Del. 1986)."*

[19] *Steven M.H. Wallman, "The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties", 21 Stetson Law Review 163, 166 (1991)*

[2020] *Clay Odari, director's duties: balancing shareholder and stakeholder interests under the companies act of kenya cap 486* *https://www.academia.edu/20769261/DIRECTOR_S_DUTIES_BALANCING_SHAREHOLDER_AND_STAKEHOLDER_INTERESTS_UNDER_THE_COMPANIES_ACT_OF_KENYA_CAP_486*

[21] *Wan Fauziah Wan Yusoff and Idris Adamu Alhaji1on Insight of Corporate Governance Theories Journal of Business & Management Volume 1, Issue 1 (2012), 52-63 ISSN 2291-1995 E-ISSN 2291-2002 Published by Science and Education Centre of North America 52 © Science and Education Centre of North America.* *http://www.todayscience.org/jbmcitations?paper_id=199500005*

procedures the formal and informal rules that governed the corporation. Briefly, corporate governance is essential in every organization, because good corporate governance contribute to better firm performance, it is expected for every other organization to enforce corporate governance policy and laws, in order to achieve an envisaged goal. The captain/s of corporate governance is none other than the directors of companies/organizations. This is because,the daily running of the company's business is generally entrusted to directors who are appointed by the shareholders and are usually, but not necessarily, from among their number. Crucially, any assets accrued by the company are owned both legally and beneficially by the company alone and the shareholders have no direct interest in them at all. "This is as a result of the fact that a registered company is an incorporated association and that, on its formation, a new legal personality, with its own legal rights and obligations, is created in addition to and separate from those persons who are associating together. It is this new personality or entity which owns the accumulated assets"[22]. As an illustration of this, a person who owns all the shares in a company can still be convicted of stealing from thecompany[23].

Under Rwandan Law, upon registration of its incorporation documents, a company is appropriately incorporated as a company having own legal personality, separate from that of its shareholders.[24] The appointment of the first and subsequent member of the Board of Directors of the company is sanctioned by a shareholders' ordinary resolution.[25] The members of the board ordinarily owe the following main responsibilities/duties:

a. Fundamental duty
b. Duty to existing shareholders

According to law governing companies in Rwanda, it is provided that the "fundamental duty of a member of the Board of Directors of a company, when exercising powers or performing duties as a member of the Board of Directors, is to act in good faith in a manner that he/she believes on reasonable grounds is in the best interests of the company, and use reasonable diligence in the discharge of the duties of his/her office."[26]

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[22]***Macaura –Vs- Northern Assurance Co. Ltd. [1925] AC 619.***
[23] *R –Vs- Philippou [1989] 89 Cr App 290.*
[24]*Article 23 of Law governing Companies. Law N°17/2018 of 13/04/2018. Official Gazette n° Special of 18/04/2018*
[25]*Article 152 Law governing Companies. Law N°17/2018 of 13/04/2018. Official Gazette n° Special of 18/04/2018*
[26]*Article 145 of Law governing Companies. Law N°17/2018 of 13/04/2018. Official Gazette n° Special of 18/04/2018*

Additionally, the Rwandan company law creates the duty to existing shareholders by providing that "a member of the Board of the Directors of a company shall not, when exercising powers or performing duties as a member of the Board of Directors, act or agree to the company acting in a manner that unfairly prejudices or unfairly discriminates against any existing shareholder of the company, unless the director believes on reasonable grounds that his/her duty as a director requires him/her to do so."[27]

However, there are general duties created and observed under common law and equity, which include[28]:

a. The Duty of Care
b. Fiduciary duties

Fiduciary duties refer to trust and confidence. A fiduciary is a person who agrees, or undertakes to act for or on behalf of, or in the interests of, another person in the exercise of power or discretion which will affect the interests of that other person in a legal or practical sense – per Mason J in ***Hospital Products Limited -Vs- United States Surgical Corporation***[29]

In ***Imperial Mercantile Credit Association –Vs-Coleman***[30], in which Lord Porter said[31]"*Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form".*

Equity imposes duties on a fiduciary requiring him not to exercise his power or discretion in a manner detrimental to the person he represents and not to abuse the trust and confidence reposed in him. Lord Greene MR in ***Re Smith & Fawcett Ltd.***[32]Stated that directors of a company must act: "…*bona fide in what they consider – not what a court may consider- is in the interests of the company, and not for any collateral purpose".*

The Courts in England formulated a test to check on whether any director has abused

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[27]*Article 146 of Law Governing Companies. Law N°17/2018 of 13/04/2018. Official Gazette n° Special of 18/04/2018*

[28] *Clay Odari, director's duties: balancing shareholder and stakeholder interests under the companies act of kenya cap 486* *https://www.academia.edu/20769261/DIRECTOR_S_DUTIES_BALANCING_SHAREHOLDER_AND_STAKEHOLDER_INTERESTS_UNDER_THE_COMPANIES_ACT_OF_KENYA_CAP_486*

[29] *[1984] 156 CLR 41, High Court of Australia, at pp 96-7.*

[30] *[1873] LR 6 HL 189.*

[31]*At p. 159.*

[32] *[1942] Ch. 304, CA at p. 306.*

power in **Re Lee Behrens & Co. Ltd.**[33]by EveJ:

i. Is the transaction reasonably incidental to the carrying on of the company'sbusiness?
ii. Is it a bona fidetransaction?
iii. Is it done for the benefit and to promote the prosperity of thecompany?

The question now becomes one of the meanings of the bona fide interests of the company. Lord Greene MR used the phrase in his *dictum* in ***Re Smith & Fawcett Ltd***to mean "*bona fide for the benefit of the company as a whole"* as used by Lindley MR in ***Allen –Vs- Gold Reefs of West Africa Ltd.***[34]

The main aim of this thesis will be to find out under the Rwandan law whom the directors owe their responsibilities/duties. This will be in contrast with corporate governance theories. Specifically, the other objectives are:

i. To distinguish the directors and shareholders' interests considering Rwandan law and common law; and
ii. To establish whether the Rwanda's Company law favors balancing and implementation of the directors and shareholders' interests.

At the surface without going in detail one can say that the Rwandan law favors the interests of the company but this will be analyzed and put to test under this thesis by pointing out who directors owe their responsibilities/duties between the company and the shareholders and the rationale behind it.

For example, in the Rwandan Company law one of the provisions enshrines that the fundamental duty of a member of the Board of Directors of a company, when exercising powers or exercising responsibilities as a member of the Board of Directors, is to act in good faith in a manner that he/she believes on reasonable reasons is in the best interests of the company.[35]

It reflects from the above background that Rwanda's Company Law creates and provides for what isincorporation, capacity and functioning of a company, who constitute board of directors, their duties/responsibilities, shareholders' rights, liabilities, powers and meetings. However, the law does not go beyond and provide specifically in detail what are the company and shareholders' interests, the difference between the company and shareholders' interests, to whom directors owe their duties and why. With that, the

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[33] *[1932] 2 Ch. 46 at p.51.*
[34] *[1900] 1 Ch. 656, CA.*
[35] *Article 145 of Law Governing Companies. Law N°17/2018 of 13/04/2018. Official Gazette n° Special of 18/04/2018*

problem now lay in the act of balancing those interests under Rwandan law. The primacy in the competing interests between shareholders and the company in the day-to-day running of the company by directors. Whom should they serve?

Hence, the need to create knowledge through this thesis about directors' duties/responsibilities to balance the company and shareholders' interests in contrast with the duties and responsibilities of the Registrar general to enforce, implement and balance the shareholders and directors' interests. Furthermore, under Rwandan law, it is not yet settled and remains clearly undecided on whether there is a difference between the company and shareholders' interests and the specific sanctions regarding the failure to implement the shareholders and directors' interests. This paper intends to put the above questions and queries to rest as discussed in depth below.

2. RESEARCH QUESTIONS

This thesis will be guided by the following research questions:

1. Does the company law adequately balance the Interests of shareholders, Board of Directors and company interests?
2. Whether the Registrar General has sufficient powers to enforce the balance of interests between Board of Directors and shareholders?
3. Are the sanctions for breach of the Balance of interests between Board of Directors and shareholders sufficient under Rwanda Company law?

3. SIGNIFICANCE OF THE STUDY

This thesis will create knowledge on the relationship and impact of corporate governance theories, the company and shareholders' interests, directors' duties/responsibilities and to whom they owe their duties and why under the Rwandan law. The fact that many authors have tried to create knowledge on Corporate Governance in Rwanda, there is still space for specific knowledge on how the Rwandan law observes corporate governance theories in relation to company and shareholders' interests, directors' responsibilities and to whom they owe their duties.

The current legislation in Rwanda is not conclusive on: Corporate Governance, Corporate Governance theories, responsibilities of directors, Company and Shareholders Interests; distinction between shareholder interests and Company interests; the balancing of shareholder's interest with Company Interest and to whom director owe their duties and why. This directly and indirectly makes this thesis significant more so in these times because of the existing good corporate governance practices among other reasons, that makes the nation set to attract more local and foreign investment. Hence, all pending questions around corporate governance will have to be tackled in a satisfying way to keep Rwanda going forward with satisfied investors.

A preliminary literature review shows that past studies are primarily focused on basically what is Corporate Governance in Rwanda. Limited efforts have been made on classifying what are really the Corporate Governance Theories and whether they are reflected in the Corporate Governance legislation in Rwanda in terms of balancing the company and shareholders' interests. In terms of clarifying the responsibilities/duties of directors in Rwanda, various approaches have been drawn and recommended by the Rwandan Company law. For example, the clearly holds that the business and affairs of a company are managed by or under the direction of the Board of Directors of the company which has all powers required for the management.[36]

In Kayihura's[37] research titled *corporate governance and the liability of corporate directors: the case of Rwanda*, he brought out the corporate context and functioning; corporate governance landscape / framework in Rwanda; duties and liabilities of corporate directors and officers under Rwandan law; and directors' understanding of their duties and potential liabilities. This did not maximize the findings whether the corporate governance in Rwanda favor balancing of the company and shareholders' interests, and less was elaborated on what is the difference between the company interests and shareholders' interests. Other Authors like *Jimmy Walabyeki* on "Corporate Governance in Rwanda: Opportunities and Challenges″[38]–explores the recent corporate governance developments in Rwanda. He notes that the development of corporate governance in Rwanda has been fostered by direct and indirect factors. Direct factors include annual governance reviews, enactment of legislation to promote a robust legal framework, establishment of institutions, establishment of a commercial justice system, and deliberate efforts of sensitization about corporate governance. On the other hand, indirect factors include privatization of government owned enterprises, establishment of a Capital Market, and the liberalization of the economy. Challenges facing effectiveness of good corporate governance in Rwanda are also discussed. It was shown that Rwanda has made a lot of headway in creating a favorable framework for corporate governance, in spite of certain challenges still facing effective corporate governance. Clay Odori[39] in his work: "*Director's duties: balancing shareholder and stakeholder interests under the companies act of Kenya cap 486"*focuses his research to addressing the problems faced by directors in their day to day running of a company and whom should directors serve under the Laws of Kenya.

[36] *Article 142 of Law Governing Companies. Law N°17/2018 of 13/04/2018. Official Gazette n° Special of 18/04/2018*

[37] *Didas Muganga Kayihura ~ Corporate Governance And The Liability Of Corporate Directors: The Case Of Rwanda. http://rozenbergquarterly.com/didas-muganga-kayihura-corporate-governance-and-the-liability-of-corporate-directors-the-case-of-rwanda/*

[38] *Walabyeki, Jimmy, Corporate Governance in Rwanda: Opportunities and Challenges (April 17, 2017). Available at SSRN: https://ssrn.com/abstract=2953960 or http://dx.doi.org/10.2139/ssrn.2953960*

[39] *Clay Odori on director's duties: balancing shareholder and stakeholder interests under the companies act of kenya cap 486. https://www.academia.edu/20769261/DIRECTOR_S_DUTIES_BALANCING_SHAREHOLDER_AND_STAKEHOLDER_INTERESTS_UNDER_THE_COMPANIES_ACT_OF_KENYA_CAP_486*

4. METHODOLOGY

The primary research method for this study is literature review for all related studies.

It is worth to note that, this project will majorly rely on desktop research. The desktop analysis method is opted because the research involves an examination of the legal principles and corporate governance theories in relation to company and shareholders' interests and directors' responsibilities/duties and whom they owe their duties under Rwanda's legal system. The research methodology will also involve the use of secondary sources of data.

In conducting this research, a qualitative methodology will highly be considered and used to tackle the raised research questions mentioned therein above as well as to discharge the set objectives and aims of the thesis. For example, to bring out the qualitative results, some of the activities that are conducted include:

i. Analysis of various pieces of legislation relevant to the study;

ii. Analysis of various court decisions both domestic and foreign relating to corporate governance, duties/responsibilities of directors; company and shareholders' interests and corporate governance theories.

iii. Review of various scholarly writings relevant to the study.

This study frames within the years 2017 and 2019.

5. SCOPE

This study shall be limited to analyzing the Balancing and Implementation of shareholders and directors' interests under the Rwandan law with a focus on the duties and powers of the RG in relation to enforcement of balancing of interests. It is expected to cover, among other things, sanctions for breach of balancing of interests and whether the company law adequately balances the Interests of shareholders, Board of Directors and company interests.

CHAPTER ONE: GENERAL CONSIDERATIONS

To make accessible the analysis conducted throughout the study, there is deemed to clarify some key concepts seeming cross-cutting and overview the available literature on the matter.

1. 1. THE CONCEPT OF SHAREHOLDER

Black’s law Dictionary defines a shareholder as one who owns or holds a share or shares in a company, esp. a corporation. Also termed shareowner (in a corporation).[40] Therefore, a “shareholder can be a person, company, or organization that holds stock(s) in a given company. A shareholder must own a minimum of one share in a company’s stock or mutual fund to make them a partial owner. Shareholders typically receive declared dividends if the company does well and succeeds”. A shareholder (also stockholder) can also be defined to mean an individual or institution (including a corporation) that legally owns one or more shares of stockin a public or private corporation. Shareholders may be referred to as members of a corporation. Legally, a person is not a shareholder in a corporation until their name and other details are entered in the corporation's register of shareholders or members.[41]Also named a stockholder, they have the voting right on certain matters with regard to the company and to be elected to a seat on the board of directors.

The Rwandan Company law[42] defines a shareholder as:

“*person whose name is entered on the share register as the holder for the time being of one or more shares in the company; a person whose name is entered in an application for company registration at the time of its incorporation and who is regarded as a shareholder until his/her name is entered in the share register; a person whose name is to be entered on the share register under an amalgamation proposal is regarded as a shareholder in an amalgamated company until his/her name is entered in the new company share register*”

The company law also provides for *register of shareholders*: which is a company’s register which gives information as to the shareholders’ names and their shareholdings and such other particulars necessary regarding the shareholder.[43]

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[40] *Black’s Law Dictionary 9th Edition pg 1500*

[41] *ADAM HAYES "Shareholder". investopedia.com* https://www.investopedia.com/terms/s/shareholder.asp*Updated Apr 8, 2019*

[42] *Article 2 of the law governing companies. Law N°17/2018 of 13/04/2018. Official Gazette n° Special of 18/04/2018*

[43]*Article 2 of the law governing companies. Law N°17/2018 of 13/04/2018. Official Gazette n° Special of 18/04/2018*

Also the law creates that the date for "determination of shareholders entitled to receive notice of or vote at a meeting of shareholders is: the close of business on the day directly preceding the day on which the notice is given; if no notice is given, the day on which the meeting is held". The "date for the determination of shareholders rights for any purpose except determining the right to receive notice of or to vote at a meeting is at the close of business on the day on which the directors pass the resolution relating thereto". "The Board of Directors fixes in advance a date on which the shareholders of the company are to be determined for the purpose of determining shareholders entitled to receive notice of or vote at a meeting of shareholders, provided that the date fixed may not precede by more than forty (40) working days or by less than fifteen (15) working days the date on which the meeting is to be held."[44] Upon this, when the rights are determined, he/she can thereafter exercise his/her rights as a shareholder.

1. 1. 1. **Types of Shareholders**

The Black' law dictionary enshrines that there are five forms of shareholders, these include:

Controlling shareholder. A shareholder who has power to influence the corporation's activities because the shareholder either owns a majority of outstanding shares or owns a smaller percentage but important number of the remaining shares are widely distributed among many others.

Dummy shareholder. A shareholder who owns stock in a name only for the benefit of the true owner, whose identity is usually concealed.

Interested shareholder. A person who owns enough of a corporation's stock to affect corporate decision making usually at least 15-20% of the corporation's outstanding stock. This is sometimes termed interested stockholder.

Majority shareholder. A shareholder who owns or controls more than half the corporation's stock.

Minority shareholder. A shareholder who possesses less than half the total shares outstanding and thus cannot control the corporation's management or singlehandedly elect directors.

On the other hand, some researchers write that there are principally two types of shareholders, for example: *Adam Hayes*[45]defines common and preferred shareholders as:

"Common shareholders". are those that own a corporation's common stock.

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[44] *Article 89 of the law governing companies*

[45] *Adam Hayes https://www.investopedia.com/terms/s/shareholder.asp*

"They are recognized as the more prevalent type of stockholders and they are vested with the right to vote on matters regarding the company". "As they also have control over how their firm is managed, they have the right to file a class action lawsuit against the company for any wrongdoing that can potentially harm the organization".

Preferred shareholders, on the other hand, are rarer. "Unlike common shareholders, they own a share of the company's preferred stock and have no voting rights, or any say in the way the company is managed. Instead, they are entitled to a fixed amount of annual dividend, which they will receive even before the common shareholders are paid their part". Though both common stock and preferred stock see their value increase with the positive performance of the company, it is the former that experiences higher capital gains or losses.

Rwanda company law provides for *controlling shareholder* : to mean a "shareholder that controls more than fifty percent (50%) of the voting interests in the company".[46] Despite that the company law does not specifically define other forms of shareholders, it provides that, where a firm has more than one class of shares, the classes confer all the rights set out in the company law , but one class need not confer any of such rights on its holder. "Unless otherwise specified in the incorporation documents, each share has attached to it the following rights: with respect to the right to share in the distribution of the dividends of the company, the right to an equal share; with respect to the right to share in the distribution of the surplus assets of the company upon its winding up, the right to an equal share; with respect to the right to vote on shareholders' resolutions, the right to one vote". If the company is a public company, a share is fully transferable.

If the company is a private company, "unless some other restriction on transfer is specified in its incorporation documents, a share is transferable subject to the right of the shareholders to decline to register a transfer to a person of whom they do not approve. The right to decline registration also applies to a person to whom the right to any share in the company has been transferred by operation of law."[47]

In addition, "where the share capital of a company is divided into different classes of shares, a company shall not take any action which varies the rights attached to a class of shares unless that variation is approved by a special resolution of shareholders".

[46] *Article 2 of the law governing companies in Rwanda*
[47] *Article 88 of the company law*

It must be noted that, “where the variation of rights attached to a class of shares is approved and the company becomes entitled to take the action concerned, the holder of a share of that class, who did not consent to or cast any vote in favor of the resolution for the variation, may apply to a competent Court for an order against acts that are prejudicial to a shareholder, or he/she may require the company to purchase those shares”.[48]

1. 1. 2. **Liability of a shareholder**

It must also be appreciated that “if the company is getting liquidated and its assets are sold, the shareholder may receive a portion of that money, provided that the creditors have already been paid. When such a situation arises, the advantage of being a stockholder lies in the fact that they are not obliged to shoulder the debts and financial obligations incurred by the company, which means creditors cannot compel stockholders to pay them.”[49]

Also, in Rwanda, except in an “unlimited liability company, a shareholder is not liable for the obligations of a company only because of being a shareholder.” “The liability of a shareholder to the company, or for the company's obligations is limited to”: “any amount unpaid on a share held by the shareholder; any liability expressly provided for in the company's incorporation documents which may provide that the shareholder's liability is unlimited; any distribution received by the shareholder but which has to be recovered in accordance with the law governing companies in Rwanda. When the incorporation documents of a company provides that a share imposes a liability on its holder, that liability is attached to the holder of the share for the time being, and not to a prior holder of the share, even if the liability became enforceable before the share was registered in the name of the current shareholder”.[50] However, “a court may pierce the corporate veil to hold a shareholder liable for obligations of the company if the court finds that the shareholder has abused the company form for fraudulent or illegal purposes or abused the company’s assets as if they were personal assets.” In this regards, this exception is illustrated by the RCOMA 0673/15/HCC opposing RRA and MUNYAMPUNDU the Commercial High Court ruled that the Directors should be individually held responsible for faults committed behind the veil of the company they were representing.[51]

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[48] *Article 90 of the company law*

[49] *Adam Hayes* *https://www.investopedia.com/terms/s/shareholder.asp*

[50] *see Article 95* of the law governing companies in Rwanda

[51]Commercial High Court, RCOMA 0673 MUNYAMPUNDU vs.RRA rendered on 31/03/2016

"Where a share makes its holder liable to calls, or obliges any other liability on its holder, that liability is attached to the holder of the share, and not to a prior holder of the share, even if the liability became enforceable before the share was registered in the name of the current holder."[52]

"Where a personal representative of the estate of a deceased person is registered as the holder of a share comprised in that estate, the liability of that personal representative, in respect of that share, does not exceed the value of any assets which, at the time when any demand is made for the satisfaction of such liability are held by that personal representative upon the same trusts as are applicable to that share". As provide for under the law governing companies in Rwanda.[53]

The Rwandan law further provides that "where a trustee in bankruptcy is registered as the holder of a share, the liability of that trustee in bankruptcy, in respect of that share, cannot go beyond the value of any property of the bankrupt which, at the time when any demand is made for the satisfaction of such liability, is vested in the trustee."

It must clearly be noted that nothing discussed above "affects any liability arising out of a contract or other obligation expressly entered into by a shareholder."

A limited liability company is defined as the company in which the shareholders' liability with regard to the loss or deficit is limited by shares. In that regard, the sole investment a shareholder does consist of investing to buy the shares distributed. In any case the company collapses or goes bust, then the shareholders do not have to engage their personal property or balance to repair the loss. Shareholders have limited and precised risk in the company. The rationale is that the legal behavior and the performance of a company are different from that of its shareholders or partners.

The major objective "of this system, is to give the investors minimum insurance in the business over their own personal lives." "Therefore, only the amount paid for the shares and the value of the investment are at risk without taking into consideration of his personal wealth and belongings.

[52] *Article 96 of the law governing companies in Rwanda*
[53] *Article 97 of the law governing companies in Rwanda*

In a company which is incorporated with limited liability status where ownership is divided into shares that were paid fully at once by its shareholders will not be liable for any debts of that company". Incorporation by registration was introduced in 1844 and the doctrine of limited liability followed in 1855. Later, "in 1897 in *Solomon v. Solomon & Company* the House of Lords effected these enactments and cemented into English law the twin concepts of corporate entity and limited liability". "In that case the apex court simply laid down that a company is a distinct legal person entirely different from the members of that company. What this means is that the company has life of its own, can own property, can sue and be sued in its own name, has perpetual life and existence to name a few of the benefits of incorporation." "It is a trite law that a rather hefty veil is drawn between these two that can be lifted only in a limited number of circumstances that seem to be fluctuating according to current judicial thinking. However, the courts have not always applied the principal lay down in *Solomon v. Solomon & Co*[54]". "In a number of circumstances, the court will pierce the corporate veil or will ignore the corporate veil to reach the person behind the veil or reveal the true form and character of the concerned company. The rationale behind this is probably that the law will not allow the corporate form to be misused or for the purposes which is set out in the statute". In those conditions in which the court espouses that the corporate form is being abused "it will rip through the corporate veil and expose its true character and nature disregarding the Solomon principal as laid down by the House of Lords."

1. 1. 2. 1. Salomon v Salomon & Co Ltd[55]

Where a sole trader (A. Salomon) "turned his leather making business into a company (A. Salomon and co. Ltd.) later company collapsed, the creditors tried to enforce their debts from Mr. Salomon himself. The very facts of the case was that Mr. Salomon has sold his business to a company that he formed for £40000 in return of the fully paid up share to himself and his family members £20000 in form of shares (£1 per share) among its family members. Company issued him debentures of £10000 and rest £10000 in cash". "Mr. Salomon become debenture holder, shareholder and he was director of the company. At the time when company collapsed and went into liquidation, Mr Salomon won his claim to be paid off in priority to other creditors, as secured debt ranked at a higher priority to those debts and successfully proved that he did not have to indemnify the company in respect of its debt, as it

[54] *[1896] UKHL 1, [1897] AC 22*
[55] *[1896] UKHL 1, [1897] AC 22*

had a separate legal personality. There was no fraud was involved, the court found that Mr Salomon was not personally liable for the company's debts. The principle of separate identity is today known as the veil of incorporation and allows higher parent companies to own subsidiary companies, yet not be responsible for many of their liabilities. Where owners of companies are unable to claim the protection of separate identity, for instance in the case of fraud, this is referred to as lifting the veil".[56]

Referring to the universal, Rwandan company law definition and forms/types of a shareholder, it makes a shareholder part of the company in a way that a company cannot exist without a shareholder. This makes us to find out what is the role of shareholders yet they are not even directly liable if a company is indebted as discussed prior, this is explained below:

1. 1. 3. Roles of a Shareholder

Normally, being a shareholder is not all just about receiving profits, as it also includes other responsibilities. Shareholders make a financial investment in the corporation, which entitles those with voting shares to elect the directors. Shareholders do not normally have any rights to be involved directly in company management.[57] Their connection to company management is typically via the Board of Directors as described in this thesis. If shareholders are not satisfied with the performance of the directors, they may remove the directors or refuse to re-elect them. Under this part let us look at some of shareholders' responsibilities.

Rwandan company law provides for the fundamental rights and roles "attached to shares, shares confer on their holders: the right to share in the distribution of the dividends of the company; the right to share in the distribution of the surplus assets of the company upon its liquidation; in accordance with other rights and privileges and subject to such limitations or conditions on such rights as may be provided for under the company's incorporation documents or under the law, the right to vote on shareholders' resolutions includes: to appoint or remove an auditor or director; to approve a major transaction; to alter or adopt articles of

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[56] *https://www.lawteacher.net/free-law-essays/business-law/limited-liability-company-law-essays.php?vref= accessed August 2019*
[57] *A guide on Directors' Responsibilities and Liabilities by Osler Hoskin & Harcourt LLP. http://www.venturechoice.com/articles/roles_of_shareholders_and_directors.htm*

association; to dissolve the company; approve an amalgamation".[58] With this, it can be observed that shareholders are responsible for the following: "Brainstorming and deciding the powers they will bestow upon the company's directors, including appointing and removing them from office;Deciding on how much the directors receive for their salary. The practice is very tricky because stockholders must make sure that the amount they will give will compensate for the expenses and cost of living in the city where the director lives, without compromising the company's coffers;Making decisions on instances where the directors have no power over, including making changes to the company's constitution"; and checking and making approvals of the financial statement of the company.

Powers entrusted to the shareholders by the law governing companies or by a company's incorporation documents "are exercised by shareholders' resolution: at a shareholders' annual general meeting; at a shareholders' extraordinary general meeting; by shareholders' written resolution in lieu of meeting; by a unanimous shareholder agreement".[59]

The company law under *Article 101* provides that "a shareholder may by written notice to the Board of Directors propose any matter for discussion or resolution at the next meeting of shareholders at which the shareholder is entitled to vote. The shareholder submitting it must sign the proposal". The proposal may relate to the management of the company.

The shareholders may adopt "a resolution relating to the management of the company, but such a resolution is not binding on the Board of Directors." "However, the Board of Directors may refrain from complying with such a resolution if satisfied that the resolution is contrary to the company's interests." As per *Article 102* of the law governing companies in Rwanda

"The chairperson of any shareholders' general meeting gives the shareholders a reasonable opportunity to discuss and comment on the management of the company. A shareholders' general meeting may pass a resolution which makes recommendations to the Board of Directors on matters affecting the management of the company".[60]

[58] *Article 88 of the law governing companies in Rwanda*
[59] *Article 100 of the law governing companies in Rwanda*
[60] *Article 104 of the law governing companies in Rwanda*

1. 1. 4. Interests of shareholders

The Rwandan company law under *Article 91* which provides that the "Board of Directors of a company sends to every shareholder of the company within the specified time limits the following documents: a copy of the company's annual accounts approved and signed; a copy of the auditor's report on those accounts; a copy of the Board of Directors' report relating to the same accounting period as those accounts. The time limits for disclosure of such information are: within four (4) months of the company's accounting reference date, in the case of a private company; within four (4) months of the company's accounting reference date, in the case of a public company". Therefore, accessing the company's information is one the interests created by the Rwandan company law as illustrated therein above.

"Any document to be sent to shareholders may be delivered physically or by electronic means to the shareholder, posted or delivered to the address for that shareholder shown on the register of shareholders. The document posted to a shareholder is deemed to be received by the shareholder five (5) working days after it is delivered to the address for that shareholder shown on the register of shareholders. If a document sent to a shareholder at the address shown on the register of shareholders is returned unclaimed three (3) consecutive times, the company does not have to send any further documents to the shareholder until the shareholder notifies the company of his or her new address".[61]

It must be noted that shareholders shall be given information related to: proceedings at shareholders' meetings and the incorporation documents. A disclosure referred to shall be made to seek shareholders' authorization with respect to: the power to alter company's incorporation documents; class authorization; major transactions; change of status; manner of authorizing amalgamations.

The other interest of the shareholder is receiving a "report of the members of the Board of Directors. The company law enshrines that in respect of the accounting period to which the annual accounts relate, a report of the members of the Board of Directors for a company shall be in writing. Such report: states the amount, if any, which the Board of Directors recommends should be paid as dividend and the amount, if any, which they propose to carry to reserves; states any donations exceeding the prescribed amount, including charitable or

[61] *Article 94 of the law governing companies in Rwanda*

political donations made by the company since the date of the previous report; states particulars of any entries in the register of interests made since the date of the previous annual report; is signed on behalf of the Board of Directors by two (2) directors of the company, or, if there is the only one director, by that director". Whereas, in the case of a public company, the report also: states the essential activities of the company and its subsidiaries during the period "and any significant changes in those activities during the period; and contains a fair review of the development of the business of the company and its subsidiaries during the accounting period and of their positions at the end of it." It must be noted that the prerequisite "for a report of the directors does not apply in the case of a private company where shareholders have opted out of this requirement."[62]

"Where a special resolution is passed for the purpose of: altering the incorporation documents of a company with a view of imposing or removing a restriction on the business or activities of the company; approving a major transaction or an amalgamation of the company, and the shareholder cast all the votes attached to shares registered in the shareholder's name against the exercise of the power to pass the special resolution; or did not sign the special resolution, he/she is entitled to require the company to purchase the shares".[63]

The other instance where we see the interests of the shareholders are respected under the Rwandan law is when where the Board of Directors agrees to the purchase of the shares by the company, the Board within "seven (7) days of issuing the notice to the shareholder of its decision: states a fair and reasonable price for the shares to be acquired; gives written notice of the price to the shareholder. A shareholder who considers that the price stated by the Board of Directors is not fair and reasonable, not later than fifteen (15) days of receipt of the notice, gives written notice of objection to the company. Where the shareholder does not raise an objection, the company, on such date as the company and the shareholder agree or, in the absence of any agreement, as soon as practicable, purchases all the shares at the stated price. Where the shareholder gives written notice of an objection, the company: identifies arbitrators who to set the fair and reasonable price; and makes a provisional payment following the price determined by the Board of Directors on each share within seven (7) days".

[62] *see Article 92* of the law governing companies in Rwanda
[63] *Article 109 of the law governing companies in Rwanda.*

In case the price fixed by arbitrators exceeds the provisional price, the company immediately pays the balance owing to the shareholder.[64]

The above illustrate the balancing and implementation of shareholders' interests and indirectly the directors' interests. Which brings us to the section of finding out whether the shareholder can be a director and the concept of the director accordingly.

1. 1. 5. Conflicts of interest within a group of stakeholders

In closely held companies, major shareholders can exploit minority shareholders by abusing their control power. Frequently, directors are manipulated "by the controlling shareholder sitting on the board." "Their directorship as shareholders, preference for capital structure, dividend policy, and investment strategy, or their position with regard to mergers and acquisitions might be in conflict with other shareholders."

In "2015 Volkswagen AG's supervisory board" comprised 20 members, "with only one independent director. The founding Piëch and Porsche families co-dominated the board in alliance with unions and the government. Volkswagen chairman Ferdinand Karl Piëch, the grandson of Ferdinand Porsche (Porsche founder), leaked the following comment to the press without the board's knowledge": "I am distancing myself from Winterkorn (Volkswagen CEO)." "These six words further inflamed a decades-long battle between the two-shareholding families behind Volkswagen and Porsche". "Ferdinand Karl Piëch probably instigated this tension with the intention of extending his influence as a controlling shareholder. But during the shareholder showdown, Winterkorn won the support of the Porsche family, the labor leaders and the state of Lower Saxony. After losing the battle, Ferdinand Karl Piëch resigned as chairman of Volkswagen AG". "However, before long Martin Winterkorn found himself having to resign amid the VW emissions scandal in September 2015."

The Volkswagen situation illustrates that it is hard for a board to optimize the interests of shareholders when they have conflicting interests. Practically, "when most directors on boards are shareholders or stakeholder representatives, infighting becomes a common issue".

[64] *Article 111-113 of the law governing companies in Rwanda*

“Minority shareholders are vulnerable when the controlling owner tries to squeeze out the other shareholders, for example by buying, selling or leasing assets at non-market prices, as a way to shift corporate resources to the large owner.”

Misunderstandings “within one group of stakeholders are not limited to shareholders. Creditors on boards could have an unfair advantage over other creditors in that situation they could use insider information to shield themselves from potential trouble and hurt other class of debt holders, especially when the firm is in financial distress.”

1. 1. 6. Can the Shareholder be a Director?

“Shareholders and directors have two completely different roles in a company. The shareholders (also called members) own the company by owning its shares and the directors manage it.” “Unless the articles say so (and most do not) a director does not need to be a shareholder and a shareholder has no right to be a director.”[65]

The shareholder, as earlier mentioned, is a part owner of the company and is eligible to privileges such as getting profits and exercising control over the management of the company. A director, on the other hand, is the person hired by the shareholders to perform responsibilities that are related to the company’s daily operations, with the intent of improving its status.

In Rwanda, a shareholder can be a director except if: “1°is under the age of sixteen (16) years; is an undischarged bankrupt; in the case of a public limited company, is over seventy five (75) years of age; is subject to a disqualification by a court’s order; has been sentenced in the immediately preceding five (5) years to a penalty under this Law, or the Law regulating Capital Market; does not comply with any qualification for members of the Board of Directors contained in the company's incorporation documents; has a mental disability as certified by a board of recognized medical doctors”.

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[65] Company Law Club, “What is the difference between shareholders and directors?”, Available at https://www.companylawclub.co.uk/what-is-the-difference-between-shareholders-and-directors (Accessed on 20/05/2020) at p.1.

This leads us to the next concept, who is a direct of a company because although corporate governance involves the different roles each of the stakeholders play in the management and control of companies, company laws and practice put the pivotal role on the shoulders of the company directors.

1. 2. WHO IS A COMPANY DIRECTOR?

*Directo*r. "A person appointed or elected to sit on a board that manages the affairs of a corporation or other organization by electing and exercising control over its officers. A director is also termed *trustee"*.[66]Then, *Board of directors* (BoD). "The governing body of a corporation, elected by the shareholders to establish corporate policy, appoint executive officers, and make major business and financial decisions. Also termed board of trustees. BoD is also defined as governing body of a corporation, partnership, association, or other organization, elected by shareholders or members to establish policy, elect or appoint officers and committees, and make other governing decisions. Often shortened to *board"*.[67] "Many authors have tried define a director but I can say there is no comprehensive definition of a director, but, in essence, it means a person who (together with the other directors who form the board of directors) is responsible for the management of a company. The term "director" includes any person occupying the position of director, by whatever name called. For example, in some companies, management may be entrusted to "Governors" or "Council Members", but they will be treated as directors for company law purposes. Directors of charitable companies (for example, companies limited by guarantee) are typically referred to as "trustees", but are subject to company law as directors (as well as to charity law and regulation)".[68]

It must be noted that calling someone a "director" does not make them a director for company law purposes, but may be relevant in determining whether or not they are, in fact, a director. "A person may be appointed as a director in accordance with provisions in company law (an appointed director), may be a director through acting as one (a de facto director) or may be treated under company law as a director if exercising the requisite influence over the board (a shadow director)".

[66] *Bryan A. Garner Black's Law Dictionary 9th ED west pg 527*
[67] *Bryan A. Garner Black's Law Dictionary 9th ED west pg 196-197*
[68] *https://www.icaew.com/membership/regulations-standards-and-guidance/membership/icaews-guide-to-directors-responsibilities/companies-directors-and-company-law*

In Rwanda, the company law defines a director as "a member of the Board of Directors (BoD), whether a shareholder or not, being appointed by shareholders to make follow-up on the management of a company."[69]From this definition, generally, the Board of Directors (BoD) is entrusted with the running and management of the business and affairs of the company by directing and supervising the management. The company law further provides that "the business and affairs of a company are managed by or under the direction of the Board of Directors of the company, which has all powers necessary for the management."[70]

In Rwanda, the appointment of the first and subsequent member of the Board of Directors of the company is authorized by a shareholders' ordinary resolution.[71] This means Directors are directly or indirectly voted or nominated to office by the shareholders. The board of directors in return, may and often do, delegate some of their powers.[72] It must also be appreciated that "a person who is not disqualified from appointment as a member of the Board of Directors and who has indicated his/her consent in writing may be appointed as a member of the Board of Directors of a company. A person named as a member of the Board of Directors in the company's incorporation documents is a Director until that person ceases to hold office as such in accordance with the law governing companies".[73]

A private company in Rwanda must have at least one Director and a public company shall have at least two (2) members of the Board of Directors and every company in Rwanda must have at least one (1) director who resides in Rwanda[74]. Members of the Board of Directors must act in a collegial administration and must be of a sufficient number provided for in incorporation documents of the company for a meeting to be attained.[75] As per *Article 153* of the law governing companies, the "shareholders of a company may vote on a resolution to appoint a director of the company only if: the resolution is for the appointment of one (1) Director; single resolution for the appointment of two (2) or more persons as members of the Board of Directors of the company be so voted after it on has first been passed without a vote being cast against it. In relation to a public company, a motion for the appointment of one (1) director or more persons as members of the Board of Directors of the company by a single

[69] *Article 2 of the law governing companies*
[70] *Article 142 of the law governing companies*
[71] *Article 152 of the law governing companies*
[72] *Article 144 of the law governing companies*
[73] *Article 152 of the law governing companies*
[74] *Article 155 of the law governing companies*
[75] *Article 151 of the law governing companies*

resolution may not be made at a shareholders' meeting, unless a resolution that it shall be made has first been agreed to by the meeting without any vote being given against it".

In Rwanda, a "company appoints a natural person as a member of the Board of Directors. However, no person shall be appointed to hold office as a Director of a company if he/she: is under the age of sixteen (16) years; is an undischarged bankrupt; in the case of a public limited company, is over seventy five (75) years of age; is subject to a disqualification by a court's order; has been sentenced in the immediately preceding five (5) years to a penalty under the law governing companies, or the Law regulating Capital Market; does not comply with any qualification for members of the Board of Directors contained in the company's incorporation documents; has a mental disability as certified by a board of recognized medical doctors".

1. 2. 1. Management of a company

In Rwanda, the "business and affairs of a company are managed by or under the direction of the Board of Directors of the company which has all powers necessary for the management except where the company's incorporation documents or the law governing companies expressly reserve those powers to the shareholders or any other person." "Where a private company has one Director, he/she exercises the powers and carries out the duties of a Board of Directors provided for in the law governing companies."[76]

1. 2. 2. Duties and Responsibilities of members of the Board of Directors

In the case ***The Charitable Corporation v Sutton***[77] is an important old English law case, which holds in substance that a director of a company owes duties to the company in the same measure and quality as does a trustee to a trust. It makes the point that judges should not be quick to judge decisions of directors with hindsight. Lord Hardwicke held that because the directors are agents of the people who grant them power to manage the corporation's affairs, they are liable for any negligent acts or omissions. He held that the five who were engaged in taking money were liable to make good all losses, and that the remaining forty-five were liable to make up any shortfall.

[76] *Article 142 of the law governing companies*
[77] *(1742) 26 ER 642*

1. 2. 2. 1. Fundamental duty

The company law properly enshrines that the "fundamental duty of a member of the Board of Directors of a company, when exercising powers or performing duties as a member of the Board of Directors, is to act in good faith in a manner that he/she believes on reasonable grounds is in the best interests of the company, and use reasonable diligence in the discharge of the duties of his/her office". (*SeeArticle 145* of the law governing companies). Hence, the fundamental interest of the BoD is to accomplish the interests of the company. For example: A "member of the Board of Directors of a company shall not agree to the company entering into a contract or arrangement or acting in any other manner unless he/she believes at that time on reasonable grounds that the act concerned does not involve an unreasonable risk of causing the company to fail the solvency test". The law also provides that "a member of the Board of Directors of a company shall not agree to the company incurring an obligation unless he/she believes at that time on reasonable grounds that the company will be able to perform the obligation when required to do so".[78]In ***Re Smith and Fawcett Ltd.***[79], which is a UK Company law case, concerning the meaning of "the interests of the company".
Lord Greene MR said:

"*The principles to be applied in cases where the articles of a company confer a discretion on directors are, for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose. The question, therefore, simply is whether on the true construction of the particular article the directors are limited by anything except their bona fide view as to the interests of the company".*

Under *Article 149* of the law governing companies, it is mentioned "that a member of the Board of Directors of a company, when exercising powers or performing duties as a member of the Board of Directors, shall exercises the care, diligence and skills reasonably to be expected of a director acting in like circumstances". A member of the Board of Directors also exercises the power for a proper purpose in the interests of the company and the shareholder.

[78] *Article 148 of the law governing companies*
[79] *Re Smith and Fawcett Ltd. [1942] Ch 304*

In the case of ***Percival v Wright***[80]is a UK company law case concerning directors' duties, holding that directors only owe duties of loyalty to the company, and not to individual shareholders. This is now codified in other company laws for example the United Kingdom's *Companies Act 2006, section 170*. Indirectly we see that the company law of Rwanda has some provisions in the favor of the case whereas other provisions are contrary as explained below and it has been distinguished in at least two subsequent cases. In ***Coleman v Myers***[81] and ***Peskin v Anderson***[82] the court described this as being the general rule, but one which may be subject to exceptions where the circumstances are such that a director may owe a greater duty to an individual shareholder, such as when that shareholder is known to be relying upon the director for guidance, or where the shareholder is a vulnerable person.

1. 2. 2. 2. Duty to existing shareholders

"A member of the Board of the Directors of a company shall not, when exercising powers or performing duties as a member of the Board of Directors, act or agree to the company acting in a manner that unfairly prejudices or unfairly discriminates against any existing shareholder of the company, unless the director believes on reasonable grounds that his/her duty as a director requires him/her to do so.[83] This is the other interest of the Director while managing a company in law. It must be observed that even when the law is creating this duty it still makes it second to the company interests".

1. 2. 2. 3. Compliance with incorporation documents and the law governing companies

Under the law governing companies in Rwanda, *Article 147* provided that "a member of the Board of Directors of a company shall not act or agree to the company acting in a manner that contravenes its incorporation documents or the law governing companies." This explains that complying with the company's constitutional documents and the company law is the other interest of the Directors while managing a company. It is further provided that "a member of the Board of Directors of a company, when exercising his/her powers or performing duties as a member of the Board of Directors, may accept as correct, reports, statements, financial data and other information prepared, and professional or expert advice given, by any of the following persons: an employee of the company whom a member of the Board of Directors

[80] *[1902] 2 Ch 401*
[81] *[1977] 2 NZLR 225*
[82] *[2001] BCLC 372*
[83] *Article 146 of the law governing companies*

believes on reasonable grounds to be reliable and competent in relation to the matters concerned;any professional or expert person in relation to matters which a member of the Board of Directors believes on reasonable grounds to be within the person's professional or expert competence; any other member of the Board of Directors, or a committee of members of the Board of Directors upon which he/she did not serve, in relation to matters within his/her or committee's designated authority". "The acceptance of a member of the Board of Directors is to the extent only that the member acts in good faith, after reasonable inquiry when the need for inquiry is indicated by the circumstances and without knowledge that would cause such acceptance to be unwarranted."[84]

According to *Article 168* of the law governing companies in Rwanda, it is provided that "a director has a duty to act with loyalty to the company. This duty includes but is not limited to the following: not to use property of the company for the director's personal benefit; not to disclose or use confidential information of the company for the director's or any other person's personal benefit; not to take business opportunities of the company; not to compete in business with the company including but not limited to competing individually or as a director of another company which competes in business with the company". "A member of the Board of Directors must not make improper use of his or her position as a director employee of the company or of any information acquired solely by virtue of his or her position, to gain directly or indirectly, a personal benefit for himself or for any other person or to cause detriment to the company other than for the purposes of the company."

"A member of the Board of Directors may disclose, use, or act on the basis of any information if particulars of the disclosure, use or act are entered in the register of interests and the director is authorized to do so by the directors and the company receives fair value thereof." This is clearly reflected in the well-known case of ***Keech v Sandford***[85], this is "a foundational case, deriving from English trusts law, on the fiduciary duty of loyalty. It concerns the law of trusts and has affected much of the thinking on directors' duties in company law. It holds that a trustee owes a strict duty of loyalty so that there can never be a possibility of any conflict of interest.

[84] *Article 150 of the law governing companies*
[85] *[1726] EWHC J76*

The case's importance derives partly from its historical context, with the South Sea Bubble. Lord King LC, who decided the case, replaced the former Lord Chancellor, Thomas Parker, 1st Earl of Macclesfield who was tried and found guilty of accepting bribes in 1725". "The remedy of granting a useful trust over property, and the strict approach that all possibility of a conflict of interest was to be avoided, derived from the general outrage at the time."

1. 2. 2. 4. The case of Keech v Sandford[86]

1. 2. 2. 4. 1. Facts

A child had inherited the lease on "Romford Market near London. Mr Sandford was entrusted to look after this property until the child matured. But before then, the lease expired. The landlord had told Mr Sandford that he did not want the child to have the renewed lease. There was clear evidence of the refusal to renew for the benefit of the infant. Yet the landlord was happy (apparently) to give Mr. Sandford the opportunity of the lease instead. Mr Sandford took it. When the child (now Mr. Keech) grew up, he sued Mr Sandford for the profit that he had been making by getting the market's lease".

"*A person being possessed of a lease of … a market, devised his estate to trustee in trust for the infant; before the expiration of the term the trustee applied to the lessor for a renewal for the benefit of the infant, which he refused, … there was clear proof of the refusal to renew for the benefit of the infant, on which the trustee sets a lease made to himself.*"[87]

1. 2. 2. 4. 2. Judgment

The Lord Chancellor, Lord King ordered Mr Sandford should disgorge his profits. He wrote,

"*I must consider this as a trust for the infant, for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to the cestui que use; though I do not say there is a fraud in this case, yet [the trustee] should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui que use. So decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.*"[88]

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[86] *[1726] EWHC J76*
[87] *Keech v Sandford [1726] EWHC J76*
[88] *Keech v Sandford [1726] EWHC J76*

1. 2. 2. 4. 3. Significance

"Mr Sandford was meant to be trusted, but he put himself in a position of conflict of interest. Lord King LC was worried that trustees might exploit opportunities to use trust property for themselves instead of looking after it. Business speculators using trusts had just recently caused a stock market crash. Strict duties for trustees made their way into company law and were applied to directors and chief executive officers.The principle of strict and absolute duties of loyalty laid down in Keech was a decisive break with prior case law, seen in Holt v Holt,[89]Rushworth's Case",[90] and Walley v Walley.[91] "The influence of Keech has reached beyond the duties of trustees, into the fiduciary duties of company directors. The approach being taken in England (c.f. the position in Delaware corporate law) is that any possibility of a conflict of interest means a breach of trust". This has also been indirectly reflected in the company law of Rwanda. Indeed, article 150, 3°of the Rwandan company law reads: "any other member of the Board of Directors, or a committee of members of the Board of Directors upon which he/she did not serve, in relation to matters within his/her or committee's designated authority."

1. 2. 3. Interest in a company's transaction

The company law enshrines about balance of shareholders, the company and directors' interests when it provided a "member of the Board of Directors or controlling shareholder of a company who is interested in" "a transaction or proposed transaction with the company, shall immediately after becoming aware of the transaction or proposed transaction cause to be entered in the register of interests, the annual report of the company and if the company has more than one director, disclose to the board the nature and extent of his/her interest and where the interest can be quantified and the monetary value of that interest.The notice entered in the register of interests, the annual report or disclosed to the Board of Directors to the effect that a member of the Board of Directors or controlling shareholder is a shareholder, member of the Board of Directors, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person, is a sufficient disclosure of interest in relation to any such transaction".[92]

[89] *(1670) 1 Ch. Cas. 190*
[90] *(1676) 2 Freem. 13*
[91] *(1687) 1 Vern 484*
[92] *Article 164- 165 of the law governing companies*

In the situation of any particular proposed transaction, "disclosure of all material facts concerning the interest of the member of the Board of Directors in the transaction shall be made. However, a failure by a member of the Board of Directors to comply with the above does not affect the validity of any transaction entered into by the company, the member of the Board of Directors or controlling shareholder". Als*o, See* ***Regal (Hastings) Ltd v Gulliver***[93], which is a leading case in UK company law regarding the rule against directors and officers from taking personal advantage of a corporate opportunity in violation of their duty of loyalty to the company. The Court held that a director is in breach of his duties if he takes advantage of an opportunity that the corporation would otherwise be interested in but was unable to take advantage. However, the breach could have been resolved by ratification by the shareholders, which those involved neglected to do.

The law further provides that a shareholder or any other interested person may bring an action against a director who fails to disclose his/her interest in a transaction. The seized court may order that: that director be disqualified from continuing to discharge his duties as a director of that company; such director be disqualified from representing or holding a position on the Board of Directors or management of a company for a period of at least one (1) year; such director, as well as other members of the board of Directors who inadequately approved the transaction knowing of the interest, are liable to the company or the shareholders for damages caused to them resulting from such misconduct which is unfair or prejudicial to them. A director is liable to repay profits earned by such director as a result of the transaction.

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[93] *Regal (Hastings) Ltd v Gulliver [1942] UKHL 1, The House of Lords, reversing the High Court and the Court of Appeal, held that the defendants had made their profits "by reason of the fact that they were directors of Regal and in the course of the execution of that office". They therefore had to account for their profits to the company. The governing principle was succinctly stated by Lord Russell of Killowen, "The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon questions or considerations as whether the property would or should otherwise have gone to the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made.*
"Lord Wright said (at 157"), "The Court of Appeal held that, in the presence of any dishonest intention, or negligence, or breach of a specific duty to acquire the shares for the appellant company, the respondents as directors were entitled to buy the shares themselves." "Once, it was said, they came to a bona fide decision that the appellant company could not provide the money to take up the shares, their obligation to refrain from acquiring those shares for themselves came to an end. "With the greatest respect, I feel bound to regard such a conclusion as dead in the teeth of the wise and salutary rule so stringently enforced in the authorities." "It is suggested that it would have been mere quixotic folly for the four respondents to let such an occasion pass when the appellant company could not avail itself of it; Lord King, L.C., faced that very position when he accepted that the person in the fiduciary position might be the only person in the world who could not avail himself of the opportunity."

A director should not take advantage of his or her position. “As the key decision makers within the organization, board members should act in the interest of the key stakeholders, whether owners or society at large, and not in their own. Major conflicts of interest could include, but are not restricted to, salaries and perks, misappropriation of company assets, self-dealing, appropriating corporate opportunities, insider trading, and neglecting board work”. “All board members are expected to act ethically at all times, notify promptly of any material facts or potential conflicts of interest and take appropriate corrective action.”

In comparison with the United Kingdom, the central equitable principle applicable to directors is to avoid any possibility of a conflict of interest,[94] “without disclosure to the board or seeking approval from shareholders. This core duty of loyalty is manifested firstly in *section 175* which specifies that directors may not use business opportunities that the company could use, unless they have approval. Shareholders may pass a resolution ratifying a breach of duty, but under *section 239* they must not have an interest in the transaction”. “This absolute, strict duty has been consistently reaffirmed since the economic crisis following the South Sea Bubble in 1719.”[95] For example, in ***Cook v Deeks***,[96] “three directors took a railway line construction contract in their own names, rather than that of their company, to exclude a fourth director from the business. Even though the directors used their votes as shareholders to” "ratify" “their actions, the Privy Council advised that the conflict of interest precluded their ability to forgive themselves.”

Similarly, in Bhullar v Bhullar,[97] “a director on one side of a feuding family set up a company to buy a carpark next to one of the company's properties”. “The family company, amidst the feud, had in fact resolved to buy no further investment properties, but even so, because the director failed to fully disclose the opportunity that could reasonably be considered as falling within the company's line of business, the Court of Appeal held he was liable to make restitution for all profits made on the purchase.” “The duty of directors to avoid any possibility of a conflict of interest also exists after a director ceases employment with a company, so it is not allowed to resign and then take up a corporate opportunity, present or maturing, even though no longer officially” a "director".[98]

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[94] See Boardman v Phipps [1966] UKHL 2
[95] See Keech v Sandford (1726) Sel Cas Ch 61, Whelpdale v Cookson (1747) 1 Ves Sen 9; 27 ER 856, Ex parte James [1803-13] All ER Rep 7, Parker v McKenna (1874) LR 10 Ch App 96 and Bray v Ford [1896] AC 44
[96] [1916] 1 AC 554
[97] [2003] EWCA Civ 424
[98] e.g. Industrial Development Consultants v Cooley [1972] 1 WLR 443, CMS Dolphin Ltd v Simonet [2001] 2

In ***Towers v Premier Waste Management Ltd***[99], "Mummery LJ, Wilson LJ and Etherton LJ held that a director who accepted a free loan of equipment from a customer without disclosure or approval breached his fiduciary duty. Regal Hastings" and Foster considered "a member of the Board of Directors or a controlling shareholder of a company is to be treated as interested in a transaction to which the company is a party if the director or the controlling shareholder": "is a party to or will or may derive a material financial benefit from the transaction; has a material financial interest in another party to the transaction; is a member of the Board of Directors, officer or trustee of another party to, or person who will or may derive a material financial benefit from, the transaction, not being a party or person that is: the company's holding company being a holding company of which the company is a wholly-owned subsidiary; a wholly-owned subsidiary of the company; a wholly-owned subsidiary of a holding company of which the company is also a wholly-owned subsidiary; is the parent, child, or spouse of another party to, or person who will or may derive a material financial benefit from, the transaction; is otherwise directly or indirectly materially interested in the transaction". "However, a member of the Board of Directors of a company shall not be treated as interested party: in respect of any remuneration or other benefit given to a member of the Board of Directors in accordance with the law governing companies"; regarding any indemnity given or insurance provided in accordance with the law governing companies; where "the transaction comprises only of the giving by the company of any security to a third party which is unconnected with the member of the Board of Directors, at the request of the third party, in respect of a debt or obligation of the company for which the member or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security." (*See Article 164* of the law governing companies in Rwanda)

Aberdeen Railway Co v Blaikie Brothers[100] is a UK company law case. "It concerns the fiduciary duty of loyalty, and in particular, the duty not to engage in self-dealing". "It laid down a basic rule that if a director had an interest in a corporate transaction, the transaction is voidable at the company's will, and it is the duty of directors to avoid any possibility of a

BCLC 704, In Plus Group Ltd v Pyke [2002] EWCA Civ 370, and Foster Bryant Surveying Ltd v Bryant [2007] EWCA Civ 200

[99] *[2011] EWCA Civ 923*

[100] *[1854] UKHL 1_Macqueen_461*
[1854] UKHL 1_Paterson_394
(1853) 15 D (HL) 20
(1854) 1 Macq 461
(1854) 1 Paterson 394

conflict of interest". "This case preceded the UK's Companies Act 2006 section 177, that requires that if directors are interested in a proposed transaction, they should merely declare that interest to the board, and section 239 which stipulates that in approving any transaction the interested director may not vote". We have also seen that this is also exactly provided in the law governing companies in Rwanda us illustrated therein above.

1. 2. 4. **Removal of one or members of the Board of Directors**

In another way, the company law balances the interests of shareholders by providing that a company can, by an ordinary resolution passed at a shareholders' meeting "remove one or all of the directors before the expiration of their term of office, with or without a stated reason or cause. This does not deprive such a director of compensation or damages as a result of termination of office and disqualification from other duties associated therewith". However, the company law provides that a direct can resign from office with notice. In CMS ***Dolphin Ltd v Simonet***[101] Lawrence Collins J held that Mr. Simonet resigned without giving proper notice, and so he was in breach of contract. He had made no proper disclosure and had misused confidential information. The maturing business opportunities were the company's property, 'where he knowingly had a conflict of interest, and exploited it by resigning from the company'. Resignation was not a fiduciary power in itself, and no obligations continued after the end of the relationship**.**

Having looked at what is directorship of a company. We realize that the directors serve the company, shareholders and stakeholders. All these normally have different interests which like to cause conflict of interest. Therefore, briefly let us herein below, discuss some of the conflict of interest that may be faced by the Board of Directors.

The average shareholder, who is typically not involved in the day-to-day operations of the company, relies on several parties to protect and further his or her interests. These parties include the company's employees, its executives and its board of directors. However, each one of these parties has its own interests, which may even sometimes conflict with those of the shareholder as explained therein above.

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[101] *CMS Dolphin Ltd v Simonet [2001] EWHC Ch 415*

With all the above it can be observed that the board of directors is elected by the shareholders of a corporation to manage and oversee the management and to make corporate decisions on their behalf. As a result, the board is directly responsible for protecting and managing shareholders' interests in the company.

For a board of directors to be successful, it ought to be objective and proactive in its policies and dealings with management. “This helps to ensure that management is generating shareholder value. A more objective board of directors, or one that is separate from a company's management, is expected to promote or protect the best benefits of the company's shareholders”. For instance, “a board of directors made up entirely or primarily of management would clearly be hindered by conflicts of interest, and the protection of shareholder value might not be a priority”.
Another reason that has an effect on the effectiveness of a board of directors is compensation. “Adequately compensating board members for their work is one way to ensure that they will make every effort to promote and protect investor interests. The members of a board of directors are paid in cash and/or stock. Likewise, management and employees also need to be aligned with investors, and this can be achieved through the compensation that both groups receive”. This may include making both parties owners (investors) in the company.

“When management and employees are also shareholders, they will be motivated to protect shareholder interests as their own”. “This helps to protect a company from mismanagement and weak employee productivity. Also, a bonus targeting system can be used in which employees and managers receive bonuses when certain goals are met. Such strategies help to align the interests of employees and management with those of investors”. “If these groups are not associated with the interests of investors, big problems can arise and destroy shareholder value”. “Although the average shareholder does not have control over the board of directors or the day-to-day operations of the company, the ultimate responsibility for the protection of shareholder value lies with each individual investor”.

“The investor is ultimately responsible for reviewing corporate policy and governance as well as for the compensation of managers. Investors who feel that a company does not show an adequate level of commitment to shareholders can always sell their investment”.[102]

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[102] *https://www.investopedia.com/ask/answers/05/shareholderinterest.asp*

1. 2. 5. Conflict of interest faced by board directors[103]

Conflicts of interest takes place at the board level. “They constitute a significant issue in that they affect ethics by distorting decision making and generating consequences that can undermine the credibility of boards, organizations or even entire economic systems. Many corporations require board members to sign a conflict of interest policy at the time of appointment or to declare any conflicts of interest at the beginning of board meetings. Conflict of interest policies normally specify how directors should avoid conflicts of interest”. “This narrow focus only scratches the surface, given the scope, responsibilities and dynamics of decision making in the boardroom”.

“The real danger lies in the extent to which boards and directors are unaware of the many subtle conflicts of interest that they are dealing with”. “The boardroom is a dynamic place where struggles of ego, power, rules, and authority continuously surface, and it is not always clear, in the turmoil of group dynamics, what constitutes a conflict of interest or the manner in which one should participate in board deliberations”. “Furthermore, director duties tend to diverge from one company to another and from country to country, which adds even more complexity”.

“In countries with relatively strong shareholder rights, such as in the US, directors are expected to be accountable to shareholders”. “However, excessive promotion of the interests of shareholders can lead to conflicts with other stakeholders. Due to different contractual arrangements, the interests of stakeholders are often in conflict”. Board members are required to always use ethical and appropriate judgment to make seemingly correct choices when conflicts arise.

Mostly, directors have a duty to the company, not to shareholders. “In Germany, for example, the company is considered distinct from the collective shareholders, which prevents shareholders from claiming that the directors have a duty toward them first and foremost”.[104] “Shareholders are seen as one kind of stakeholder among a pool of many, and the company does not have a duty to maximize shareholder value. Boards are composed of interested

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[103] *By Professor [Didier Cossin](#) and Abraham Hongze Lu*

[104] *https://www.investopedia.com/ask/answers/05/shareholderinterest.asp*

directors, such as representatives of employees, shareholders, and other stakeholders”. “The loyalties of these stakeholder representatives are often divided, and seeing that multiple-role directors have to rebalance different interests, the probability for conflict becomes clear”.

When the benefits of a big number of shareholders, such as an administration or society, are added to the mix, this judgment goes far beyond what may be included in a written conflict of interest policy. “In the present work we seek to examine conflicts of interest as a four-tier pyramid by exploring more in depth the conflicting situations, right down to the central purpose of business, in view of helping board directors make fairer decisions by taking an right position in shaping business in society”.

With experience, it can be said that “conflicts arise when a board member’s duty of loyalty to stakeholders or the company is compromised”. “This would happen when certain board members exercise influence over the others through compensation, favors, a relationship, or psychological manipulation”. Though some directors describe themselves as “independent of management, company, or major shareholders,” “they may find themselves faced with a conflict of interest if they are forced into agreeing with a dominant board member”.

“Under particular circumstances, some independent directors form a distinct stakeholder group and only demonstrate loyalty to the members of that group”. They tend to represent their own interest rather than the interests of the companies”.

Also, “conflict emerges when the interests of stakeholder groups are not appropriately balanced or harmonized. Shareholders appoint board members, usually outstanding individuals, based on their knowledge and skills and their ability to make good decisions. Once a board has been formed, its members have to face conflicts of interest between stakeholders and the company, between different stakeholder groups, and within the same stakeholder group. When a board’s core duty is to care for a particular set of stakeholders, such as shareholders, all rational and high-level decisions are geared to favor that particular group, although the concerns of other stakeholders may still be recognized”. “Board members have to address any conflicts responsibly and balance the interests of all individuals involved in a contemplative, proactive manner”.

Having said this, "conflicts are those between a company and society and arise when a company acts in its own interests at the expense of society. The doctrine of maximizing profitability may be used as justification for deceiving customers, polluting the environment, evading taxes, squeezing suppliers, and treating employees as commodities. Companies that operate in this way are not contributors to society. Instead, they are viewed as value extractors. Conscientious directors are able to distinguish good from bad and are more likely to act as stewards for safeguarding long-term, responsible value creation for the common good of humanity". "When a company's aim is in conflict with the interests of society, board members need to take an ethical stand, exercise care, and make fair decisions".

1. 2. 5. 1. Conflicts: Individual directors vs. company

Directors, are expected to "possess the highest personal and professional ethics, integrity and values, and be committed to representing the long-term interest of the shareowners." Nevertheless, "in many cases shareholders have sued directors for taking advantage of the company. An actual or potential conflict between a board member and a company is called" conflict of interest.

"A company is normally considered as a separate legal entity that is independent from its directors, executives and shareholders". "Powerful directors such as founders or dominant shareholders can be accused of misappropriating company assets if they are found stealing from their own company; directors who trade on the basis of material, non-public information can be sued for insider trading; those caught accepting bribes or working for competing companies may be asked to resign; directors who sign agreements on behalf of the company that mainly contribute to their own enrichment may be charged with self-dealing. For example, the well-known case of ***Guth vs. Loft Inc***".[105] Delaware Court of Chancery "addressed the issues of individuals pursuing business opportunities for self-enrichment".

The famous case of ***Guth v. Loft Inc***,[106] is a Delaware corporation law case, important for United States corporate law, on corporate opportunities and the duty of loyalty. "It deviated from the year 1726 rule laid down in *Keech v Sandford*"[107] that a fiduciary should leave open no possibility of conflict of interest between his private dealings and the job he is entrusted to do.

[105] *5 A.2d 503, 23 Del. Ch. 255 (Del. 1939)*
[106] *5 A.2d 503, 23 Del. Ch. 255 (Del. 1939)*
[107] *[1726] EWHC J76*

1. 2. 5. 1. 1. Facts

Charles Guth was the president of Loft, Inc., "a candy and syrup manufacturer, which served a cola drink at its fountain stores. Loft's soda fountains purchased cola syrup from Coca-Cola Ltd., but Guth decided it would be cheaper to buy from Pepsi after Coke declined to give him a larger jobber discount. Pepsi went bankrupt before Guth (and Loft) could inquire about obtaining syrup from Pepsi. Guth then personally bought the Pepsi company and its syrup recipe". With the aid of Loft chemists, he reformulated the recipe, and soon purported to sell the syrup to Loft.

1. 2. 5. 1. 2. Judgement

Daniel J. Layton, the concurrent chief justice, gave the lead judgment for the Delaware Supreme Court. He started off by paying service to the general principle against conflicts of interest.

"*Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interest of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers."*

But then he stated the main principle as this, "*On the other hand, it is equally true that, if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, which is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself*."

Therefore, where a corporation cannot take an opportunity because: no money; different business; and/or it has not "*interest or reasonable expectancy*" in taking the opportunity, “then a director will be found to have legitimately taken an opportunity for itself. Layton felt that there was no real standard for loyalty and it depends on the facts of the case. The court may enquire and will decide upon the fairness of any transaction”.

“*The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale*.”

He was pursued by Loft's shareholders, who put forward a claim that, he violated his fiduciary duty of loyalty to the company by failing to offer that opportunity to Loft, instead appropriating it for himself.
“When board members fail to dedicate the necessary effort, commitment and time to their board work, it can result in a conflict between the board member and the company”. “Directors often serve on multiple boards in order to benefit from several compensation packages”. “This can often complicate matters for the respective directors, as they may not be able to allocate sufficient time to governing any one company”. “According to the Spencer Stuart US Board Index 2014, approximately 25% of S&P 500 boards do not impose a limit on the number of board positions”. “Crainer and Dearlove described that directors who were unable to devote a sufficient amount of their time to any one board”, “stuffed the document in their briefcases, all 200 pages or so, and leafed through them in the taxi to the meeting. They extracted, at random, a paper, formulated a trick question and entered the meeting room ready to fire”. Therefore, board work is a power game.” Lack of effort, focus and dedication are types of conflict of interest that have not yet received the attention they deserve.

It is should be well noted that, “conflicts arise when directors take advantage of their positions. However, when directors lack commitment and dedication to their duties, the conflict of interest is somewhat subtler and much less obvious”. Companies should “to issue guidelines regarding directors’ conflicts of interest and ensure that directors follow these rules and act in the interest of the organizations they serve”.

Sometimes, “Companies can self-assess their exposure to conflicts by asking the following questions: Has the company experienced situations in which individual directors have taken advantage of the company through compensation, self-dealing, stealing, insider trading, accepting bribes or appropriating opportunities for personal benefit? How could negligence of board work or lack of commitment present a conflict of interest? Would signing a code of conduct at the time of appointment be helpful?”

1. 2. 5. 2. Conflicts: Directors vs. stakeholders

To whom do board members owe their loyalty? We have seen from the above that “this depends very much on law and tradition and the prevailing legal system, social norms or the company’s specific situation. For example, directors might declare that they owe their duty of loyalty to shareholders, the company itself, certain stakeholders or other board members”.

For instance, “in the US, directors often have a duty of loyalty toward the company’s shareholders. The idea of maximizing shareholder value came from *Milton Friedman*, who proposed that executives and directors should focus solely on creating value for shareholders. Others argue that since the company pays the directors and executives, they are employees of the company – not of the shareholders – so they should thus focus on the interests of the company rather than on those of the shareholders”.[108]

According to *Lynn Stout*, “a distinguished professor of corporate and business law at Cornell Law School, shareholder value maximization is a choice, not a legal requirement. The assumption that shareholders are principals and that directors are their agents is legally incorrect. Corporate law clearly states that shareholders cannot control directors or executives”.

“They have the right to vote on the positions of the directors of the board and recover damage compensation from directors and executives if they are found to have stolen from the company but they have no right to tell executives how to run the company”.

Being loyal to shareholders is, in any case, easier said than done. “Shareholders come and go and their interest in the company is limited to their shareholding period. Shareholder’s interests vary depending on their investment horizon, degree of diversification and

[108] *https://www.investopedia.com/ask/answers/05/shareholderinterest.asp*

investment strategy. Given the many types of shareholders, reaching a consensus for all of them is a daunting task. Ordinary individuals and families who invest for their retirement or to fund future expenses are often represented by institutional investors such as sovereign wealth funds, banks, hedge funds, pension funds, insurance companies and other financial institutions. These powerful representatives interact with board members frequently and exercise most of the pressure, but when they put personal interest before that of the ultimate shareholders, interests could be misaligned". "For example, the representatives may be striving for short-term personal gain or compensation while the ultimate investors may want the same as all other stakeholders: the creation and preservation of the corporation's long-term sustainable wealth".

If maximizing shareholder value is a widely accepted norm, "then board members would be better positioned if they announced that their loyalty lay with the ultimate shareholders. This would lead them to become stewards of the company and refrain from being distracted by proposals that generate immediate stock returns but endanger the long-term prospects of the company".

A study of directors' duties "in all 27 EU member states and Croatia showed that in Europe directors primarily have a duty of loyalty to their company. This principle is universally accepted and undisputed across the 27 EU countries. All board members, including shareholder representatives, are required to balance the interests of all stakeholders with the long-term prospects of the company. To balance the interests, composition and independence of the board of directors are often defined in the corporate governance codes".[109]

For example, according to the Swedish Corporate Governance Code[110], "boards of Swedish listed companies are composed entirely or predominantly of non-executive directors. The Code also states that a majority of the members of the board should be independent of the company and its management. At least two members must also be independent of the company's major shareholders, which mean that it is possible for major shareholders of Swedish companies to appoint a majority of members with whom they have close ties." "Even if all directors have a duty of loyalty to their company, most directors serving on the Swedish boards could have close ties with major shareholders, and according to the Code,

[109] https://www.investopedia.com/ask/answers/05/shareholderinterest.asp

[110] *(applicable from November 1, 2015)*

some directors could have ties with minority shareholders, management, or other stakeholders. The ties with various stakeholder groups potentially create divided loyalties for directors".[111]

The laws of some States, "require stakeholder representatives on boards to serve the interests of their respective principals in some situations. For example, banker directors, who are only appointed as board members when a company is in financial distress, must be loyal to their bank, which lent money to the company in question. When the company nears insolvency, the duty to shareholders or to promote the success of the company will be modified by the obligation to act in the interest of the creditors. While it may be perfectly legal for such interested parties to be members of the board, it can help if each stakeholder group puts their ultimate objectives on the table before starting negotiations". This permits "minority shareholders and minor stakeholders to have their perspectives heard, which may incite majority shareholders to be more inclined to balance their own interests with those of others".

Influence of domineering board members on others. "Both independent and interested directors can potentially be influenced by powerful CEOs, chairpersons or other directors through compensation, favors, relationships or psychological manipulation. Board members may also forsake their institutional duties out of personal loyalty to the CEO or chairperson". "One way directors can determine whether they have been overly influenced is by asking themselves", "Have I been influenced or manipulated in order to agree with others?"

Convincing influence often comes from people having the combined role of CEO and chairperson as they can sway other board members' compensation. Even though "a board comprises primarily independent directors, it may not be able to remain truly independent from the management". "Paul Hodgson, director at BHJ Partners in Portland, Maine, reportedly said about boards that" "Shareholders can sit back and say 'These directors are being paid so well that I can't see them ever questioning management on anything, because this is a gig they would hate to lose" If the majority of the board members make a significant total revenue "from board compensation packages, how independent could they be in reality"?[112]

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[111] https://www.investopedia.com/ask/answers/05/shareholderinterest.asp
[112] https://www.investopedia.com/ask/answers/05/shareholderinterest.asp

“Personal, familial and professional relationships can also potentially affect an independent director’s judgment”. “The social connections between directors and CEOs or chairpersons cannot always be thoroughly checked. For example, retired CEOs may remain chairpersons on the company’s board, and many of the directors on that board may owe the chairperson their job. Or the CEO may invite close friends to join the board as directors. In both cases, the directors in question may be influenced by a sense of loyalty or duty to the chairperson or CEO, even if the CEO or chairperson is not acting in the best interests of the company or its shareholders or other stakeholders”. Independent directors would be unwilling to oppose the views of a CEO or chairperson to whom they felt they owed their loyalty, so rather than do so they may either comply or step down from their role.

Boardrooms are dynamic places where heated discussions occur. “Those occupying positions of power, such as the CEO and the chairperson, may manipulate directors into agreeing with their preferred decisions using psychological tactics such as tone of voice and eye contact to dominate the discussion, rebuff criticism, or intimidate others for their personal gain. In some cases, board members may feel as though they are being victimized or manipulated while those dominating the discussion may just think that they are leading a dynamic interaction”. “Such unbalanced dynamics, including superiority and inferiority complexes, diminish the effectiveness of board discussions and prevent independent directors from exercising their duty as directors”.

Board directors organized as a self-interested stakeholder group. “Regulators and researchers have argued that boards should comprise a greater number of independent directors to ensure that business decisions are not disproportionately influenced by powerful stakeholders. The Spencer Stuart Board Index 2014 survey confirmed that S&P 500 boards elected 371 new independent directors in the 2014 proxy year, a 9% increase from 2013. This followed a 16% increase during the 2013 proxy year”.[113]

“Independent directors can form a distinct stakeholder group”. “This happens more often when directors are put in a “survival” mode, in case of financial or political crisis, severe shareholders’ conflicts, hostile takeover or growing tension with management”. “Such coalitions are growing in power and authority as independent board members increasingly

[113] https://www.investopedia.com/ask/answers/05/shareholderinterest.asp

remain loyal to each other in the boardroom, subjugating the interests of the organizations they are supposed to represent to their own". "In other words, these stakeholder groups have their own motives and interests and the strategic decisions they make benefit themselves rather than the organizations they are paid to serve".

In certain countries, "unless specified otherwise, directors decide what their salary, shares and options will be. If no independent body such as a shareholder committee or a regulator oversees the compensation of directors, this can easily lead to a conflict of interest with the company. In the case of ***Calma v. Templeton***"[114] "the Delaware Chancery Court in the United States allowed a claim that challenged the directors' stock compensation from going forward because it was considered" "excessive." "The compensation plan limited the number of shares to 1 million per year per participant, which represented a value of US$55 million at the time of the lawsuit". "The court determined that the entire decision process for compensation was unfair because the awards to the outside directors were decided by the recipients themselves".

In a 2013 Harvard Business Review article, "What CEOs really think of their boards," one CEO was quoted as saying, "They like their board seats – it gives them some prestige. They can be reluctant to consider recapitalization, going private, or merging –'Don't you know, we might lose our board positions!' I have been shocked by board members saying, 'that would be an interesting thing to do, but what about us?" "Another CEO was quoted as saying, "In one situation, we had a merger not go through because of who was going to get what number of board seats… It is still the most astounding conversation of my life." "Rather than steering the company toward long-term value creation, directors who are primarily focused on their own interests tend to lose their objective vision when it comes to making the right decisions for the company". "An exceptionally destructive scenario might consist of two stakeholder groups – the executive directors group vs. the independent directors group – leveraging their full control over the board and benefiting one another" by building an "I'll scratch your back if you scratch mine" "relationship with both groups continuing to add to their individual compensation at the expense of the company and other stakeholders".[115]

[114]*Calma v. Templeton C.A. No. 9579-CB (Del. Ch. Apr. 30, 2015) (Bouchard, C.)*
[115]*https://www.investopedia.com/ask/answers/05/shareholderinterest.asp*

It obvious that high compensation does not always have as positive an effect as it was intended to. The more compensation directors receive, the higher their individual desire to be elected again becomes, so they gradually focus on remaining on the board, enjoying their status and fame, boosting their compensation further, and obtaining more directorships on other boards.

The structure and level of directors' compensation varies internationally. "According to the German Corporate Governance code, the compensation of supervisory board directors consists of a combination of cash and shares and is linked to individual background and involvement in board and committee functions. At Deutsche Bank, 25% of the directors' compensation was converted into shares of the company based on the average share price during the last 10 trading days of the year".

In China, "not all board members receive compensation from the company they serve. For example, shareholder representatives working full time at the Industrial and Commercial Bank of China (ICBC) receive their compensation from China's sovereign wealth fund – China Investment Corporation (CIC). This means that state owners oversee the compensation of both executive directors and independent directors, which effectively eliminates the possibility of self-dealing". At ICBC, the modest pay still attracts high-quality independent members to the board, especially those with positive character traits such as conscientiousness, integrity, competence, judgment, focus, and dedication, which cannot be motivated or demotivated solely with money.

1. 2. 5. 3. Conflicts: Stakeholders vs. other stakeholders

"Directors on boards have another duty: exercising due diligence when making decisions. In Germany duty of care is a legal obligation. The law states that" "executive members have to exercise the care of an ordinary and conscientious business leader." "Directors have a fiduciary responsibility to the company from the moment they are recruited, and they are expected to display a high standard of expertise, care and diligence by gathering as much information as possible and considering all reasonable alternatives in order to make sensible decisions.

The trust placed in directors gives them maximum autonomy in decision making, and decisions are not questioned unless they are deemed irrational. This business judgment rule protects directors from potential liabilities, as their decisions are not tainted by personal interest”. Even though directors are not permitted to “act in their own interests, they can promote the interests of a particular stakeholder group against the company, or the interests of one group of stakeholders against another, or they can favor one subgroup over another within the same stakeholder group”. “It is up to directors to make wise decisions when stakeholders are in conflict”.

If a board is composed of attentive directors who are loyal to their stakeholders, then it is essential for stakeholder representatives to collaborate and find the reasonable coalition to address common interests. Directors on boards ought to keep in mind the interests of weak or distant stakeholders to ensure their interests are not overlooked.

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In a nutshell, a director is appointed to direct the company to the right direction “*the captain of the ship*.” Therefore, the crucial point is to and always exercise director’s powers for a proper purpose.

1. 2. 6. “Proper Purpose rule “

Eclairs Group Ltd v JKX Oil & Gas plc[116] “was a decision of the United Kingdom Supreme Court relating to the exercise of directors' powers for a proper purpose under English company law.The Supreme Court's decision was slightly unusual in that a minority (Lord Sumption and Lord Hodge) proposed refining the law in relation to the requirements for causation in relation to actions of the directors where the board had multiple purposes, some of which were improper and some of which were not”. “However, the majority, after initially supporting their position, then declined to express an opinion in the absence of oral argument on that particular point”. “Accordingly, the legal position in relation to what degree of causation is needed with respect to the improper purpose and the taking of the corporate action is left in a somewhat nebulous state”.

[116] *[2015] UKSC 71 (2 December 2015)*

1. 2. 6. 1. Judgment

The core question according to Lord Sumption, could be phrased as follows:

"*in bald summary, what are the proper purposes for which the board may restrict the exercise of rights attaching to shares, and in what circumstances can the restrictions be challenged on the ground that they were imposed for a collateral purpose?*[117] "

1. 2. 6. 2. History of the rule

"Lord Sumption noted that the proper purpose rule has its origin in the equitable doctrine which is known - misleadingly - as the doctrine" of "fraud on a power".[118] "For a number of different purposes, the early Court of Chancery in England attached the consequences of fraud to acts which were not actually fraudulent at all, but despite being honest and unexceptional were treated as unconscionable according to equitable principles. Most relevantly, the Court would set aside dispositions under powers conferred by trust deeds if they were outside the purpose for which it was conferred (even if they fell within the strict words of the power itself). Lord Sumption noted that the reported cases relating to the doctrine date back to the mid-1700s in ***Lane v Page"***[119] and ***Aleyn v Belchier***.[120]

"Lord Sumption endorsed the comments of Lord Parker in ***Vatcher v Paull***[121] where he said the doctrine" "does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."

The Supreme Court noted that, "a company director differs from an express trustee, but confirmed that a director is unquestionably a fiduciary with respect to his powers, and that accordingly the exercise of those powers is limited to the purpose for which they were conferred".[122]

[117] *Eclairs "Group Ltd v JKX Oil & Gas plc, at paragraph" 2.*
[118] *Eclairs "Group Ltd v JKX Oil & Gas plc, at paragraph 15"*
[119] *Lane v Page (1754) Amb 233*
[120] *Aleyn v Belchier (1758) 1 Eden 132*
[121] *Vatcher v Paull [1915] AC 372 at 378*
[122] *Eclairs Group Ltd v JKX Oil & Gas plc, at paragraph 16*

1. 2. 6. 3. Application of the proper purpose rule

The Supreme Court held that the proper purpose rule is concerned with abuse of power: a company director must not, subjectively, act for an improper reason. Under article 42 of the company's articles of association, the power to restrict the rights attaching to shares is ancillary to the statutory power to call for information under section 793 of the Companies Act. Article 42 has three closely related purposes: “to induce a shareholder to comply with a disclosure notice;

to protect the company and its shareholders against having to make decisions about their respective interests in ignorance of relevant information; andas a punitive sanction for a failure to comply with a disclosure notice”.

Seeking to influence the outcome of shareholders' resolutions or the company's general meetings is no part of those proper purposes. “The proper purpose rule applies to article 42. It was irrelevant whether Eclairs and Glengary could have averted the imposition of restrictions on their rights as shareholders by giving different answers to the questions”. The proper purpose rule is the principal means by which equity enforces directors' proper conduct, and is fundamental to the constitutional distinction between board and shareholder.

A challenge for control of the company is probably the context where the proper purpose rule has the most valuable part to play.[123] “Lord Sumption and Lord Hodge considered that where the directors have multiple concurrent purposes, the relevant purpose or purposes are those without which the decision would not have been made. If that purpose or those purposes are improper, the decision is ineffective”. Mann J had found as a fact that four of the six directors were concerned only with the effect of the restriction notices on the outcome of the general meeting, and accordingly, they had acted for an inappropriate purpose.

1. 2. 6. 4. Multiple purposes

Lord Sumption was concerned the position where: "there are multiple purposes, all influential in different degrees but some proper and others not".[124] His favorite “solution (with which Lord Hodge agreed) was that a causation based” "but for" “test should be applied to whether the improper purpose caused the exercise of the power. In his view” "if there were proper reasons for exercising the power and it would still have been exercised for those reasons even

[123] *Eclairs Group Ltd v JKX Oil & Gas plc, at paragraph 37*
[124] *Eclairs Group Ltd v JKX Oil & Gas plc, at paragraph 17.*

in the absence of improper ones, it is difficult to see why justice should require the decision to be set aside."[125] “He cited with approval the Australian High Court's test that the improper purpose must be” "causative".[126] “He also drew support from obiter dictum of Lord Wilberforce in the leading case of ***Howard Smith Ltd v Ampol Petroleum Ltd”***.[127]

“Lord Neuberger, Lord Mance and Lord Clarke all agreed that the appeals should be allowed, but refused to express a concluded view on the application” of a "but for" “test to the proper purpose rule proposed by Lord Sumption and supported by Lodge Hodge. They felt that the previous settled law that the court should look to the” "primary purpose".[128] “This was not a matter on which the court should rule without the benefit of argument”. “Lord Mance was particularly concerned that after the Supreme Court had circulated its draft judgment to the parties, the appellants responded by stating that they had argued their case on the basis” that the "principal purpose" “test was not being challenged by the respondents, and the respondents had responded by arguing the proposed test on causation” was a "new development in the law" “and so the appeals should not be allowed and/or that there should be a further hearing on the issue of causation”.[129]

“Lord Sumption took note of their reservations, but stated that whilst oral argument had not been heard on that specific point, it had been canvassed in the parties' written submissions”. “In the event all five members of the Court agreed to allow the appeal, and Lord Sumption and Lord Mance have made clear their views on that particular point of law”.

1. 2. 6. 5. Obiter comments

“Lord Sumption mentioned that generally held (but not commonly stated) view that the shareholders do not owe a duty of loyalty to each other or to the company”.

“*Directors owe a duty of loyalty to the company, but shareholders owe no loyalty either to the company or its board. Within broad limits, derived for the most part from Part 30 of the Companies Act 2006 (Protection of Members against Unfair Prejudice) and the City Code on Takeovers and Mergers, they are entitled to exercise their rights in their own interest as they see it and to challenge the existing management for good reasons or bad*.”[130]

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[125] *Eclairs Group Ltd v JKX Oil & Gas plc, at paragraph 21.*
[126] *Whitehouse v Carlton House Pty (1987) 162 CLR 285 at 294, "[The exercise of a power] will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, 'the power would not have been exercised'." per Dixon J*
[127] *Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821*
[128] *Eclairs Group Ltd v JKX Oil & Gas plc, at paragraph 51.*
[129] *Eclairs Group Ltd v JKX Oil & Gas plc, at paragraph 49.*
[130] *Eclairs Group Ltd v JKX Oil & Gas plc, at paragraph 40*

1. 2. 6. 6. Commentary

One commentator noted that the case offers "valuable guidance" in relation to the proper purpose rule,[131] and another the case casts "considerable light" "on the key legal considerations, [132]including in particular discerning the proper purpose in relation to any particular matter, and the proper way for the courts to examine such board decisions". The Rwandan company law [133]prohibits conflicts of interest involving directors whereby a transaction entered into by the company in which a member of the Board of Directors of "the company is in any way interested may be avoided by the company within three (3) months of the transaction being disclosed to all the shareholders, whether by means of the Board of Directors' annual report or otherwise, unless the company receives fair value under the transaction". Besides, Subject to the incorporation documents of a company, a director who is interested in a "transaction entered into or to be entered into by the company does not vote on a directors' resolution. Where he/she votes, the vote is invalid".

The above "*Duty to act for proper purposes*"should also be adopted in Rwanda, so as to reduce the conflict of interests and this will help the possibility of implementation and balancing of the shareholders and directors' interests explained therein above.

[131]*Eclairs Group Ltd v JKX Oil & Gas plc, at paragraph 40*
[132] *"Supreme Court Decision in Eclairs v JKX on Proper Purpose". Erskine Chambers. 4 December 2015.*
[133] Art.166&167 of the *of the law governing companies,* Official Gazette n° Special of 18/04/2018

CHAPTER TWO: REGISTRAR GENERAL AND POWERS TO ENFORCE BALANCING OF INTERESTS

From the discussion above it has been established and indicated that shareholders and directors' interests exist which automatically need balancing and implementation. But this cannot only be doneby the company, shareholders and directors, because of how the company law is structured, the company law puts the powers to regulators and among theregulators we have the Registrar General who is "a public service executive in charge of granting legal personality to companies and monitoring the functioning of companies". Hence, the "GOD OF ALL COMPANIES IN RWANDA" therefore with powers to enforce the balancing of shareholders and directors' interests. As elaborated in this chapter. In Rwanda, the RG is the "god of all companies." This is in a way that the RG has the powers to create and wind-up all companies in Rwanda and this is created by the company law of Rwanda. Directly and indirectly, this is one of the genesiswhywhen discussing the implementation and balancing of interests in relation to companies RG is the focal person/office to be put test.

This chapter thus considers theconcept of Registrar General, duties and powers of the Registrar General under the company law with a focus on, among other aspects, possible duties and powers that enforce balancing shareholders and directors' interests. This will be analyzed to find out whether the duties and power of the RG have satisfied the need to balance of shareholders and directors' interests. However, prior to entertaining an in-depth discussion on the duties and powers of RG in relation to enforcing the balance of interests, it is vitally important to venture into what is the Office of the Registrar General and all other functions for the office of the Registrar General under the company law.

2. 1. Concept of the Registrar General

The "Office of the Registrar General (ORG) was established in 2008 to continue the functions of the Rwanda Commercial Registration Agency. The Office of the Registrar General is tasked with facilitating investment through developing and maintaining a world class efficient business register and promoting a business-friendly regulatory framework". In particular, the Office of the Registrar General has the duty to initiate, implement and follow up the activities relating to registering and striking from the register; businesses, secured transactions and among others.

In Rwanda, “Registration of a company in the Office of the Registrar General is compulsory. Where the Registrar General receives an application for registration that complies with the law governing companies, he/she does the following: register the application; register details relating to the company in the register of companies and businesses; issue a certificate of incorporation.A certificate of incorporation is a conclusive evidence that all the requirements of the law governing companies in respect of incorporation have been complied with; and that the company has been duly incorporated under the law governing companies on the date of incorporation stated in the certificate”.[134]

One may wonder why the RG and ORG exists in Rwanda, one of the reason is that the Registrar General keeps a register of a company, known as the "register of companies" into which are entered all the matters prescribed under the law governing companies in Rwanda and the commercial recovery law. This means “the Registrar General keeps: an up-to-date index of the names of companies, including against each name of each company, its registered number;an up-to-date index of the names of directors disqualified pursuant to the law governing companies in Rwanda (*Article 299*)”, “including against each name, the date of the disqualification order and its duration.The Registrar General keeps the register of companies and indices in any form, provided it is possible to inspect the information in them and to produce a copy of the information in legible form”.[135]

Thus, what happens when a party applies to RG for registration of a company in Rwanda is that on receipt of document for registration, “the Registrar General: marks the date and time of receipt of the document; registers the document. Then, not later than two (2) working days of receipt of the document, sends or gives to the company or other person who submitted the document any of the following in an appropriate way:written advice of the registration;a certificate of incorporation under *Article 24* of the law governing companies or a certificate of amalgamation under *Article 205* of the law governing companies in Rwanda; and an amended certificate of incorporation under *Article 253* of the law governing companies”.[136]
The other reason why we consider the RG as the “GOD of all companies in Rwanda” is that the RG has discretion to refuse or may refuse to register a company or documents submitted or the application made. Indeed, he is the “*GOD of all companies in Rwanda*”.

[134] *Article 22 of the law governing companies in Rwanda*
[135] *Article 251 of the law governing companies in Rwanda*
[136] *Article 252 of the law governing companies in Rwanda*

The law crowns the RG by providing that:

"*If a document delivered to the Registrar General:is not in the prescribed form; has not been duly completed;is not accompanied by any consents or other documents required under the law governing companies; contains any matter that is not clearly legible;is not accompanied by the prescribed fee;the Registrar General may refuse to register the document and shall forthwith, and within two (2) working days of receipt of the document, send or give written notice of the refusal to the company or other person who submitted the document, giving reasons for such refusal.*"

It must be appreciated that whenever a document which the Registrar General refuses to register under as mentioned above is deemed not to have been duly delivered under the law governing companies. This limiting the chances of one to challenge the decision of the RG on refusing to register a company or documents that are submitted.

Additionally, in Rwanda it is stillthe RG to effect changes that may be done by or to a company, for example where a document is delivered to the Registrar General "showing that the company has changed its name, the Registrar General shall issue an amended certificate of incorporation stating the company's registered code, the company's date of incorporation, the amendment to the company's name and the date of the amendment".[137] Indeed, the "GOD of all companies in Rwanda"

In Rwanda, the RG also has the powers to remove any company from the register and we all know that a company ceases to exist when it is removed from the register. Indeed, the RG is the "GOD of all companies in Rwanda." This makes us wonder what could cause the RG to remove a company from the Register. This is also clearly discussed below.

It must be noted that the "Registrar General's duties relating to registration of documents may be carried out by the Registrar General's office".[138]This meaning the duties are no necessarily carried out by the RG him or herself but his office can assist him or her accordingly. This attracts us to discuss the powers and duties of the RG as provided by the law and we shall find out why they are not all exercised.

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[137] *Article 253 of the law governing companies in Rwanda*

[138] *Article 250 of the law governing companies*

2.2. RESPONSIBILITIES, DUTIES AND POWERS OF THE OFFICE OF REGISTRAR GENERAL HAS THE FOLLOWING:

The main responsibilities include: "Implement and develop the laws relating to companies, secured transactions, commercial recovery and settling of issues arising from insolvency; Monitor and supervise activities relating to commercial recovery and settling of issues arising from insolvency; Maintaining registers, data and all records of the Office of the Registrar General; Publicizing all information relating to business registration; Examining, on a regular basis the laws that need to be implemented by the Office of the Registrar General to determine areas for review and development; Designing training, information and sensitization programs for economic operators on regulations that govern them as provided for by the commercial laws".[139]

The current[140] Registrar General Counsel KAYIBANDA Richard mentions that:

"*Some of the services offered by ORG are the following: Registration of Individual Enterprises; Registration of Companies; Registration of additional business activities; De-registration of individual enterprises and companies; Issuing certificates of non-bankruptcy to traders and companies, Registration, administration and transferring security interests on movable and immovable property; Registration and protection of intellectual property rights.*"[141]

The company law is one of the main laws implemented by the Office of the Registrar General. The law creates the following duties and responsibilities for the RG.

2. 2. 1. Powers of the Registrar General where the company is unable to act

The Rwandan company law empowers the Registrar General to implement the interest of the company and shareholders by creating that the RG can convene a meeting of the company when the shareholders are unable to call for one and in the circumstances when the shareholder/s cannot attend, the RG has the powers to direct that one of the shareholder of the company to represented by proxy. The law governing companies provides that the "Registrar General may convene a meeting of the company for the following reasons: inability to call a meeting of shareholders in the manner prescribed by Law governing companies or the company's incorporation documents; in the opinion of the Registrar General, it is in the

[139] https://org.rdb.rw/
[140] *As of July 2019*
[141] https://org.rdb.rw/

interest of the company that the meeting be held. The Registrar General may, either on his or her own initiative or on request by shareholders or a director of the company, decide that a shareholders' meeting be called or conducted and that costs of the meeting be borne by the company. Where a decision to call a meeting is made, the Registrar General may make such ancillary or consequential directions as he/she it considers expedient; including a direction that one shareholder of the company present in person or by proxy be considered a participant to the meeting". When a meeting called, held and conducted in accordance with the above, "this is considered for all purposes a meeting of shareholders legally called, held and conducted", meaning it cannot be challenge on the basis that it was not called by the shareholders or the directors.[142]

2. 2. 2. Powers of the Registrar General to appoint a director

In my opinion "*A company without a director or BoD is like ship without a compass*" This means every company or at most, every company must have a director but what happens in Rwanda when a company has no director?

In Rwanda, when a company does not have a director, the law governing companies has provided that the Registrar General has the power to appoint a director. Whenever a director is appointed, automatically his/her interests are born. Therefore, in Rwanda the RG has the powers to a point a director who thereafter will pursue the company, shareholders and his or her interests. This directly and indirectly means the RG has the powers to appoint the director who then has interests.

The company law under *Article 223* provides that "in case there are no directors of a company or the number of directors is less than the quorum required for a directors' meeting and it is not possible to appoint directors in accordance with the company's incorporation documents or under the company law, a shareholder, a creditor or a director of the company may request the Registrar General to appoint one or more directors of the company, and he/she may appoint a director if he/she considers that it is in the best interests of the company, and on such terms and conditions as he/she considers appropriate".

The above clearly illustrates that the law gives the RG powers to implement and enforce the balancing of the shareholders, company and directors' interests as explained therein.

[142] *Article 222 of the law governing companies in Rwanda*

2. 2. 3. Powers of the Registrar General to amend incorporation documents

In cases when either the shareholder or director considers the incorporation documents of the company are not implementing and balancing the shareholders, company and director's interests. He or she can request the RG to amend the incorporation documents so that the shareholders. Company and directors' interests are implementable and balanced. The law governing companies provides that "where it is impossible to amend the incorporation documents of a company as set out under the company law or in the company's incorporation documents, a director or shareholder may request the Registrar General to amend the incorporation documents on such terms and conditions he/she considers appropriate".[143]

Nevertheless, with RG's powers mentioned above, the law also gives room and the right to the publicto inspect of registers and indices kept by the RG.[144] This is in a way that "any person, upon payment of the prescribed fee, may inspect the register of companies and the indices and may require: a copy authenticated by the Registrar General's official seal in a form as the Registrar General considers appropriate, of any information contained in that document; a certificate of the incorporation of a company in the prescribed form authenticated by the Registrar General's official seal". This right "extends to the originals of documents kept by the Registrar General only where the record kept by the Registrar General of the contents of the document is illegible or unavailable".

"A copy of, or extract from, a document kept by the Registrar General for the purposes of the law on companies, authenticated by the Registrar General's official seal is in all legal proceedings acceptable in evidence as of equal validity with the original document". However, there are charges payable to the trigger the following functions performed by the Registrar General: "the performance of the Registrar General's functions under the law governing companies,including fees for registering a document; the inspection of documents kept by the Registrar General; penalty fees for failure to deliver a document to the Registrar General within the time prescribed by the law governing companies".[145] This means the Registrar General might charge a fee for any services provided by him/her or in connection with the law regulating companies.

[143] *Article 224 of the law governing companies*
[144] *Article 254 of the law governing companies*
[145] *Article 255 of the law governing companies*

2. 2. 4. Powers to remove a company from the registry

Under the Rwandan law, “the Registrar General shall remove a company from the register if: the company is an amalgamating company other than an amalgamated company and, on the same day, the Registrar General issues a certificate of amalgamation; the Registrar General is satisfied that the company has ceased to carry on business; there is delivered to the Registrar General an application for removal of an insolvent company from register; a liquidator delivers to the Registrar General the final report and final accounts of the liquidationand the statement required by the law governing insolvency”.[146] However, the above is possible only when: “the Registrar General has given notice of intention to remove the company from the register; the Registrar General: is satisfied that no person has objected to the removal; if an objection to the removal has been received”.

“In cases, where the Registrar General gives notice of an intention to remove a company from the register, any person may deliver to the Registrar General, not later than the date specified in the notice, an objection to the removal from the register on the grounds that”: “the company is still carrying on business; the company is a party to legal proceedings;the company is in receivership, liquidation or both; that the person is a creditor, a shareholder or any other person who has an undischarged claim against the company; that the person believes that he/she has a right of action to pursue under provisions of the law governing companies; that for any other reason it would not be just and equitable to remove the company from the register”. For the above purposes: “a claim by a creditor against the company is not an undischarged claim where: the claim has been paid; the claim has been paid in part under a compromise or by being otherwise compounded to the reasonable satisfaction of the creditor; the claim has been paid in full or in part by a receiver or a liquidator in the course of a completed receivership or liquidation; a receiver or liquidator has notified the creditor that the assets of the company are not sufficient to enable any payment to be made to the creditor;a claim by a shareholder or any other person is not undischarged where:payment has been made to the shareholder or that person in accordance with any right under the company's incorporation documents and the law governing companies to receive or share in any of the company's surplus assets;a receiver or liquidator has notified the shareholder or that person that the company has no surplus assets”.[147]

[146] *Article 257 of the law governing companies in Rwanda*
[147] *Article 259 of the law governing companies in Rwanda*

Where an objection to the removal of a company from the register is made, the Registrar General shall not proceed with the removal unless the Registrar General is satisfied that: the objection has been withdrawn;any facts on which the objection is based are not, or are no longer, correct;the objection is frivolous or vexatious. “The Registrar General also gives notice to the person objecting, unless is served on the Registrar General of his/her own notice of an application to the court by that person for an order:that the company be put into liquidation;the company not be removed from the register for grounds provided for in *Article 208* of the law governing companies”. “The Registrar General must be informed within thirty (30) working days following the receipt of notification if the Registrar General intends to proceed with the removal of the company from the register of companies”; if: “an application to the court is duly served on the Registrar General;on the hearing of the application, the court refuses to grant either an order putting the company into liquidation or an order that the company not be removed from the register of companies;the Registrar General proceeds with the removal of the company.The Registrar General sends to any person who delivered to him/her in accordance with the law governing companies or in case of a liquidator, the documents sent to the Registrar General which are referred to in the law governing companies,the following documents:a copy of any objection; a copy of any notice given or served on the Registrar General;if the company is removed from the register, notice of the removal”.[148]

According to *Article 261*of the law governing companies in Rwanda it is provided that: “immediately prior to the removal of a company from the register, any property vested in that company has not been distributed or disclaimed, the property is to be treated as unclaimed property and vested in the State upon removal of the company from the register”. Normally, “property of the former company includes leasehold property and all other rights vested in or held on trust for the former company, but does not include property held by the former company on trust for any other person. When the vesting of any property”, the “Registrar General immediately gives public notice of the vesting, setting out the name of the former company and particulars of the property vesting”. “The Registrar General may disclaim the State's title to any property vested in the State if the property is an onerous property”. “The Registrar General immediately gives public notice of any disclaimer.

[148] *Article 257 of the law governing companies*

Whether or not any property vesting in the State, any person who would have been entitled to receive all or part of the property or payment from the proceeds of its realization if it had been in the hands of the company immediately after its removal from the register, any person claiming for it may apply to the court for an order: vesting all or part of the property in that person; awarding that person an amount greater than the value of the property from the State". On an application, the court may: "decide any question concerning the value of the property vesting in the State, the entitlement of any applicant to the property or to compensation and the apportionment of any property or compensation among any two or more applicants; order that the hearing of any two or more applications be consolidated; order that any application be treated as an application on behalf of all persons, or all members of a class of persons, with an interest in the property; make any order to prevent further loss. Any compensation awarded shall be paid out of the Consolidated Fund without resort to the provisions of the law governing companies".

Normally, "the Registrar General may apply to the court if a company defaults in complying with a requirement in the law governing companies and fails to make good any such default within ten (10) working days after the service of a notice on the company requiring it to do so; or defaults in complying with any direction given to the company by the Minister under the law governing companies". On such an application the competent court may make an order guiding the company or any director or secretary of it to make good the default within such a time as may be specified in the order and may make such order as to costs as it deems fit.

2. 2. 5. Registrar General's power to convene shareholders' annual general meeting

Under *Article 105* of the law governing companies in Rwanda, it is enshrined that "if default is made in holding a shareholders' annual general meeting, in accordance with the law governing companies,the Registrar General may by written notice convene such a meeting and give such ancillary or consequential directions as he/she considers necessary, including a direction modifying or supplementing the company's incorporation documents or provisions of the law governing companies in relation to the calling, holding and conducting of the meeting". "Where a general meeting convened by the Registrar General is not held in the year in which the default in holding the shareholders' annual meeting occurred, the meeting is not to be considered as the annual general meeting for the year in which it is held unless the Registrar General so guides".

2. 3. MANDATORY INVESTIGATION ORDERED BY THE MINISTER

It is also crucial to note that under the Rwandan law, the Minister can issue instructions requesting the Registrar General to investigate into the business of a local company or of a foreign company having its branch in Rwanda where the Minister is satisfied that: “for the protection of the public, the shareholders or creditors of a company, it is desirable that the affairs of a company should be investigated; it is in the public interest that the affairs of a company should be investigated; in the case of a foreign company, the competent authorities of another country requests that an investigation be made in respect of the company”.[149]This means even in the implementation and balancing of the shareholders’ interests, it is not only the duty or responsibility of the RG because the Minister can initiate investigations for the purposes of protecting the shareholder as explained therein above.

With the rationale to safe guard the interests of the shareholders, the RG can appoint an inspector of business of the company.[150] “An inspector of the business of a company appointed by the Registrar General has the power to investigate the business of a company The appointed person must be a qualified, skilled and experienced professional manager”. The selected inspector makes a report basing on “the format and procedure required by the Registrar General. Fortunately, the expenses incurred in the monitoring and investigation of a company and the remuneration of the inspector are paid by the State”.

The Registrar General may: “in the case of a company having a share capital, on the application of: one shareholder or a group of shareholders holding at least one-tenth (1/10) of the issued shares in the company; debenture holders holding not less than one-fifth (1/5) in nominal value of the issued debentures; in the case of a company limited by guarantee, on the application of not less than one-fifth (1/5) in number of the persons on the share register;where he/she considers that the appointment of an inspector is necessary to safeguard the interests of shareholders or debenture shareholders or is necessary in the public interest, require an inspector to investigate the affairs of a company or such aspects of the affairs of a company as are specified in the instrument of appointment and in the case of a debenture agency deed, the conduct of the debenture holders’ representative and to make a report in such form and manner as the Registrar General may direct”.

[149] *Article 263 of the law governing companies in Rwanda*
[150] *Article 266 of the law governing companies in Rwanda*

However, important to note is that an application by “the company or shareholders referred to in the above, must be supported by such evidence as the Registrar General may require as to the reasons for the application and the grounds of the applicants in requiring the investigation. The Registrar General may, before appointing an inspector, require the applicants to give security in such amount as he/she deems fit for payment of the costs of the investigation”.[151] “A copy of the inspector's report is sent to the Registrar General, to those who requested for it and to the registered office of the company”. The Registrar General may, where he/she is of the opinion that it is necessary in the public interest to do so, ask the organ that requested for the investigation to cause the report to be published. On the conclusion of an investigation, the inspector shall submit resolutions in such a manner and to such relevant persons as approved by the general assembly. Where an inspector thinks it is necessary for the purposes of the investigation of the affairs of a company to investigate the affairs of a subsidiary company, he/she may, with the Registrar General's written consent, investigate the affairs of that subsidiary.

Important to be noted is that “a company, other than a declared company, may, by ordinary resolution, appoint an inspector to investigate its affairs. A foreign company with subsidiary companies in Rwanda may appoint inspectors for such subsidiary companies and the Registrar General shall be notified thereof”.

According to *Article 271* of the law governing companies it is provided that “where from a report of an inspector it appears to the Registrar General that in the management and administration of a company, there is a shareholder who, by virtue of his/her company, shares and voting rights deriving from the classes of such shares and other benefits, alters the decisions that were taken through the vote, causes mismanagement for him/her to maintain control and where the latter helps him/her to unfairly discriminate other shareholders, the Registrar General may lodge a case before the court in accordance with the law governing companies”.

It must also be appreciated that the “powers of an inspector making an investigation of a company’s business shall extend to the investigation of any circumstances which suggest the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of his/her investigation”.

[151] *Article 267 of the law governing companies in Rwanda*

Every person concerned must, “if required to do so by the inspector, produce to the latter every book in his/her custody, control or possession and give to theinspector all assistance which he/she is able to give for the investigation to be properly carried out”. “An inspector may by written notice require any person concerned to appear for examination on oath in relation to the business of a company and the notice may require the production of every book in the custody, control or possession of the person concerned. Where an inspector requires the production of a book in the custody, control or possession of a person concerned, the inspector: may take possession of those books; may retain those books for such time as he/she considers necessary for the purpose of the accomplishment of his/her mission; must, where those books are in his/her possession, permit the company to have access, at all reasonable times to the book.No relevant person shall refuse to answer a question which concerns the company during the investigation into the business of a company. An inspector may cause statements he/she came across during the investigation process to be recorded in written form and to be read to or by and signed by the person who makes such statements and the latter may be used as evidence in any legal proceedings against that person”. Any person who is convicted of an offence as a result of the investigation may be directed by the court to pay by way of reimbursement to the public resources, the applicant or the company, as the case may be, the expenses, either in whole or in part. The report by the inspector of a company is admissible in any legal proceedings as evidence.

Furthermore, the RG detains the power to sue litigants on behalf of the State as evidenced by the case Rcom 0175/011/TC/Nyge of 18/07/2011 opposing Rwandatel whereby the registrar general brought an action to court, requesting of the beginning of proceedings of insolvency of Rwandatel arguing that it was no longer able to meet its liabilities and to pay its debts. She was basing on its 2010 financial statement. She requested that meantime the court should appoint the acting administrator of Rwandatel. The court appointed the temporary administrator. He has been given the duty of assessing on behalf of the court whether the assets of Rwandatel S.A should be sold or if there is hope that it can continue operating. He was requested to present a report. The temporary administrator resented to the court the requested report and explained it in the hearings of 05/07/2011.[152]

[152] Rcom 0175/011/TC/Nyge of 18/07/2011, p.1.

CHAPTER THREE: SANCTIONS FOR BREACH OF BALANCE OF INTERESTS

This Chapter we shall consider what are the sanctions provided for by the company law for breach of balance of Interests. However, this will be discussed and analyzed in comparison with what other jurisdictions have as sanctions for breach of balancing of interests. First analyzing what penalties are provided for under the Rwandan company law will do this.

3. 1. PENALTIES UNDER RWANDAN LAW

According to *Article 284* of the company law, it is provided that a "company which fails to comply with obligations of the law governing companies as to getting registered in the relevant register of companies is liable to a fine of five (5) times the annual filing fee and every director of the company liable to a fine of between five hundred thousand Rwandan francs (FRW 500,000) and five million Rwandan francs (FRW 5,000,000)".

In Rwanda, acompany that fails to keep the books required under the law governing companiesis liable to a fine of five (5) times the annual filing fee.[153]
"Any company which defaults or delays to provide the Registrar General with the documents that are required by the law governing companies is responsible to a fine of five (5) times the annual filing fee".

Where the documents referred to are fraudulent or misleading, a company that intentionally provided them is liable to a fine of five (5) times the annual filing fee.[154]

A "recidivist company with regard to compliance faults referred to in the law governing companies is liable to a fine of twice (2) the fine that was provided for before the recidivism as provided for by" the law governing companies or be deprived of the trading licence.

The Rwanda law governing companies under Article 288 provides that "any person who is required to provide a document and who: knowingly makes, or authorises the making of, a statement that is false or misleading; deliberately omits or authorises the omission of, any matter whose omission makes the document false or misleading on an important matter; commits an offence and is liable to a fine of between five hundred Rwandan francs (FRW 500,000) and two million Rwandan francs (FRW 2,000,000)".

[153] *Article 255 of the law governing companies*
[154] *Article 256 of the law governing companies*

In Rwanda, “any director or employee of a company who deliberately makes or submits or authorizes the making or submission of, a untrue or deceptive statement or report with regard to”: “a director, employee, inspector, shareholder, debenture holder or trustee for debenture holder of the company; a liquidator, liquidation committee, receiver or manager of property of the company; a subsidiary, a director, employee or inspector of its holding company;a stock exchange or an officer of a stock exchange; commits a fault and is liable to a fine of one million Rwandan francs (FRW 1,000,000) to ten million Rwandan francs (FRW 10,000,000)”.

The law also provides “that if the directors of a company approve accounts which are false,every director who is a party to their approval and who knows that they do not comply or is reckless not to know whether they comply or not, is liable to a fine of between one million Rwandan francs (FRW 1,000,000) and ten million Rwandan francs (FRW 10,000,000). Every director of the company at the time the accounts are approved is taken to be a party to their approval unless he/she shows: that he/she did not know of and could not know of their approval; he/she took all steps to prevent their approval”. “If a copy of the yearly accounts which have not been duly signed as provided for by the law, are delivered, circulated or published, the company, its directors and secretary shall be liable to a fine of between one million Rwandan francs (FRW 1,000,000) and ten million Rwandan francs (FRW 10,000,000)”.

Article 291 of the law on companies states that a private company shall not: “offer to the public or any section of the public, whether for cash or otherwise any securities of the company of any movable property; allot or agree to allot, whether for cash or otherwise, any securities of the company’s movable property with a view to all or any of the securities being offered for sale to the public or any article of the public”. In case a company acts in infringement of the above, the company and every director of that “company are responsible to a fine of between two million Rwandan francs (FRW 2,000,000) and five million Rwandan francs (FRW 5,000,000)”.

The directors of a company ensure that “the company delivers to the Registrar General not later than seven (7) months after its accounting reference date in the case of a private company and four (4) months after its accounting reference date in the case of a public company:a copy of signed and approved annual accounts; a copy of the auditor's report on those accounts; a copy of the directors' report relating to the same accounting period as those annual accounts. If the directors fail to comply with the provisions of this article, the company shall be liable to a fine of one million Rwandan francs (FRW 1,000,000) to ten million Rwandan francs (FRW 10,000,000)”.[155]

The law enshrines that “any insolvent business person who: for his/her personal interest or for his/her family incurs excessive expenses; fails to pay, favors one of the creditors to the detriment of others; dissimulates his/her insolvency, purchases items which he/she sells at a lower price than the market price, indulges in taking loans, delivers cash value effects or any other way meant to cause bankruptcy, in pursuit of getting cash; forges expenses, losses incurred or does not justify all real assets inherent to trade which he/she might have obtained after the date on which he/she became insolvent or does not justify what he/she has used since his/her last audit; commits an offence of simple fraudulent bankruptcy and shall be liable to imprisonment for a term of six (6) months to two (2) years and a fine of five hundred thousand Rwandan francs (FRW 500,000)” “to three million Rwandan francs (FRW 3,000,000) or only one of these penalties”.[156]Acts “which qualify as simple fraudulent bankruptcy are any insolvent business person who: does not keep records or does not carry out lawful inventory”; “is found with irregular, incomplete books of accounts or written in a language other than the one prescribed by the law”; “is found with books of accounts not showing real assets and liabilities but without fraud; signs agreements which grant excessive credits, compared to his/her assets at the time of contracting the credit, with no security set aside; fraudulently causes bankruptcy to be ascribed to him/her while being actually not poor; after bankruptcy, does not observe obligations inherent to agreements with his/her creditors or the winding up arrangements have been pronounced against him/her; has not declared his/her insolvency under terms and conditions provided for by the “insolvency laws”; “without a legitimate reason, is absent or does not reply to the notification of the judge or the trustee in bankruptcy on having been summoned; commits an offence of simple fraudulent bankruptcy and shall liable to imprisonment for a term of six (6) months to two (2) years and a fine of five hundred thousand Rwanda francs (FRW 500,000) to three million Rwandan francs (FRW 3,000,000) or only one of these penalties”.

[155] *Article 292 of the law governing companies in Rwanda*
[156] *Article 293 of the law governing companies in Rwanda*

The company law under *Article 295* provides that "any insolvent business person who fraudulently: misappropriates, conceals all or part of his/her assets; accepts debts that he/she does not owe; conceals his/her books of accounts; commits an offence of grave fraudulent bankruptcy and shall be liable to imprisonment for a term of one (1) year to three (3) years and a fine of one hundred thousand Rwandan francs (FRW 100,000) to one million Rwandan francs (FRW 1,000,000)".

"Any director, manager or liquidator but in other words not being in charge of the company's commercial recovery, who fraudulently": "misappropriates, conceals the company's assets in whole or in part; ascribes debts to the company which it does not owe; conceals records of the company; does not provide incorporation documents of the company or any modifications under terms and conditions provided for by the law governing companies;declares information contrary to incorporation documents of the company; causes bankruptcy of the company; due to the absence of a balance sheet or by means of a false balance sheet, allocates among shareholders dividends not drawn from real profits; favours one creditor to the detriment of other creditors;engages in overspending of the assets of the company; spends large amounts of money in games or any other transactions of pure chance; purchases and sells below market price or takes large amounts of loans, put negotiable instruments into circulation or adopts any other ruinous means of procuring funds;commits an offence". "Upon conviction of offences referred to above, he/she shall be liable to imprisonment for a term of one (1) year to three (3) years and a fine of five hundred thousand Rwandan francs (FRW 500,000) to five million Rwandan francs (FRW 5,000,000)".[157]

Article 297 enshrines that "an administrator, director, manager or liquidator in other words any representative but not dealer of a company in commercial recovery, who due to his/her fault, is found with: books of accounts with no entry posted in, prescribed accounting unexecuted or written in a language other than that which is prescribed by the law, account books that are notcompleted and do not show the exact profit or loss, without any fraud; omission of the declaration that the company was placed in commercial recovery under terms and conditions provided for by the law governing companies relating to the settling of issues arising from commercial recovery".

[157] *Article 296 of the law governing companies*

When convicted for having committed such an offense, “he/she shall be legally responsible to imprisonment for a term of six (6) months to two (2) years and a fine of two hundred thousand Rwandan francs (FRW 200,000) to three million Rwandan francs (FRW 3,000,000) or either of these penalties”.

When a company has been declared insolvent, “a representative of the company who does not provide information or who gives inaccurate information to a judge or trustees or does not respond in person to summons from authorities without reasonable cause, commits an offence.
Upon conviction, he/she is liable to imprisonment for a term of six (6) months to two (2) years and a fine of two hundred thousand Rwandan francs (FRW 200.000) to one million Rwandan francs (FRW 1,000,000) or only one of these penalties”.[158]

The company law under Article 299 provides that “any liquidator of the company or any person who directly or through a third party, administers, manages or liquidates a company on behalf of the legal representatives, who intentionally misappropriates the property or fraudulently makes him or herself a debtor for amounts not owed; commits an offence. Upon conviction, he/she shall be liable to imprisonment for a term of two (2) years to five (5) years and a fine of five hundred thousand Rwandan francs (FRW 500,000) to two million Rwandan francs (FRW 2,000,000)”.

In Rwanda, “any person who: in the interest of the bankrupt, removes, embezzles or conceals, all or part of assets; fraudulently presents oneself as a third party with fictitious debts; as the administrator, embezzles property entrusted to him/her; commits an offence. Upon conviction, he/she is liable to imprisonment for a term of one (1) year to three (3) years and a fine of five hundred thousand Rwandan francs (FRW 500,000) to two million Rwandan francs (FRW 2,000,000)”.[159]

In the same vein, “any person who deceitfully deals with a bankrupt or any other persons, intending to receive any gain emanating from making biased decisions in the bankrupt’s favour or engages in any special deal likely to end in an advantage to the detriment of the creditors commits an offence”.

[158] *Article 298 of the law governing companies*
[159] *Article 300 of the law governing companies in Rwanda*

When happen to be convicted, “he/she is legally responsible to imprisonment for a term of six (6) months to two (2) years and a fine of two hundred thousand Rwandan francs (FRW 200,000) to one million Rwandan francs (FRW 1,000,000) or either of mentioned penalties.(*see Article 301* of the law governing companies in Rwanda)”

The court may decide to make a disqualification order notwithstanding that the concerned person may be criminally responsible in respect of the matters on the basis of which the order is to be made. An application relating to a disqualification order may be made by: “a liquidator of the company; the Registrar General under the law governing companies.Any person who acts in contravention of a disqualification order commits an offence and he/she may be liable to imprisonment for a term of not less than six (6) months but not more than one (1) year”. Any person acting in breach of a disqualification order shall be personally liable to: “a liquidator of that company for every unpaid debt incurred by that company; any creditor of that company for any debt to that creditor incurred by that company while that person was so acting”. (*see Article 302* of the law governing companies in Rwanda)

Notwithstanding the provisions of the penal code, “any director, employee, or shareholder of a company who: fraudulently applies property of the company for his/her own use or benefit, or for a use or purpose other than the use or purpose of the company;fraudulently conceals or destroys any property of the company; commits an offence and shall be liable to a fine of one million Rwandan francs (FRW 1,000,000) to ten million Rwandan francs (FRW 10,000,000)”.

“Without prejudice to the provisions of the penal code, any person who deliberately is a party to a company carrying on business with intent to defraud creditors of the company or any other person; commits an offence and if so convicted, is liable to a fine of one million Rwandan francs (FRW 1,000,000) to ten million Rwandan francs (FRW 10,000,000)”.

Without prejudice to provisions of the penal code, any director who: by false pretences or other fraud induces a person to give credit to the company;with intent to defraud creditors of the company : gives, transfers, or causes a charge to be given on property of the company to another person; causes property to be given or transferred to any person; caused or was a party to an execution being levied against any property of the company; commits an offence and is liable to a fine of one million Rwandan francs (FRW 1,000,000) to ten million Rwandan francs (FRW 10,000,000). (*see Article 305* of the law governing companies in Rwanda)

According to *Article 306* of the law governing companies which provides that notwithstanding the provisions of the penal code, any person who: intentionally issues or makes use of a document or certificate kept or given under the law governing companies which does not comply with it; defaults to pay the required registration fee prescribed by the law governing companies; fails to do any act within the time required by the law governing companies; "fails to comply with a request, direction or order issued under the law governing companies by a court, the Registrar General or any other competent person; makes use of any name or title which he/she is not, under the law governing companies, authorized to use; divulges or makes use of any information obtained under the law governing companies which he/she is not otherwise authorized to disclose"; "impersonates a shareholder or debenture holder for the purpose of obtaining an advantage; uses the name and unique number or a seal of a company or issues any letter, bill or document relating to a company contrary to the provisions of the law governing companies;in the exercise of any powers or functions conferred upon him or her by the law governing companies or by any regulations made under the law governing companies, fails to act in accordance with the instrument which confers the function or power"; otherwise contravenes the law governing companies or any regulations made under the law governing companies; "commits an offence and shall be liable to a fine of five hundred thousand Rwandan francs (FRW 500,000) and two million Rwandan francs (FRW 2,000,000)".

"The law further provides that a shareholder or any other interested person may lodge a case against a director who fails to disclose his/her interest in a transaction". "The court which the action is referred to considers the action, and may order that: that director be disqualified from continuing to serve as a director of that company; such director be disqualified from representing or holding a position on the Board of Directors or management of a company for a period of at least one (1) year; such director, as well as other members of the board of Directors who improperly approved the transaction knowing of the interest, are liable to the company or the shareholders for damages caused to them resulting from such misconduct which is unfair or prejudicial to them". A director is responsible to repay profits received by such director as a result of the transaction.

According to the law provisions regarding the sanctions, it can be observed that the law does not directly provide for specific penalties regarding the implementation and balancing of shareholders, company and directors' interests. However, indirectly as seen therein above it can be appreciated that directors and shareholders that infringe the interests of the shareholders, the company and directors by committing fraud and prohibited acts are penalized accordingly. On the other hand,the RG who has the highest obligations and powers to safe the interests of the shareholders, the company and directors, unfortunately the law does not provide any sanction in case the RG fails to fulfill the duties and powers to implement and balance the interests of shareholder, the company and directors. This is one of the reason as to why the RG/ ORG has been reluctant to some extent of implementing and balancing od shareholders, the company and directors' interests.

3. 2. OTHER JURISDICTIONS

3. 2. 1. United Kingdom

In the United Kingdom, any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void and Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or of an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void,[160]

The other difference is that the UK's companies law creates insurance for directors' liability[161], whereas in Rwanda, the companies law is still silent about directors' liability insurance

The results of a breach of a directors fiduciary duties can be harsh. A shareholder, creditor or the company can lodge a case against a director personally for a violation of such duties, provided loss or damage was caused as a result of such a breach.

In the UK, also the limited liability afforded by a limited liability company applies to its shareholders rather than its directors. Directors may be personally liable where they fail to meet their responsibilities, for instance: to the company for a breach of their general duties owed to the company, including to account to the company for profits made from transactions where they had a conflict of interest or did not declare an interest as required; for failing to comply with specific duties, for instance, making unlawful distributions; for false or misleading reporting where the company suffers a loss under insolvency law, for

[160] Section 232 of the United Kingdom Companies Act cap 46
[161] Section 233 of the United Kingdom Companies Act cap 46

instance, for fraudulent or wrongful trading; or if a contribution order is made against them in connection with disqualification proceedings.[162]

Breach of company law may be a criminal offence. For instance, breach of the company law requirements on corporate administration (for example, keeping company registers and making filings) may constitute an offence for which the company and every officer in default may be liable.

A court may disqualify a person from being a director of a company or in any way concerned in the promotion, formation or management of a company. Undertakings not to act as a director may be accepted in lieu. The possible grounds for disqualification are extensive, including persistent breach of company law (for example, to make requisite filings), fraudulent trading or, where the company has become insolvent, that the director is unfit to be concerned in the management of a company.

Stephen Downie published that[163] the "common law duty of reasonable care, skill and diligence pervades throughout all of the directors' decisions within the Company and if any breach of such decisions occurs then proceedings for a breach of his/her fiduciary duties may be bought by the person with whom the relationship of trust and confidence existed.Generally, proceedings for a breach of directors' fiduciary duties are bought by the company, usually on the instigation of the remaining directors in that company". In such situation a director may be fired from his position (either temporarily or permanently, dependent upon shareholder approval) and then pursued by the company for recovery of such monies. "However, there are other options available, should it appear that a Director is in breach of his/her fiduciary duties. For example, shareholders can bring proceedings under the Companies Act 2006 which derive their rights to sue that director in his personal capacity on behalf of the Company. This can be a complex litigation procedure but enables shareholders (including minority shareholders) to take action that would otherwise only be available to the company care of its directors (who may be colluding with the wrong doing director). Various rights also exist against Directors under the Companies Act 2006".[164]

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[162] *Section 463 of the United Kingdom Companies Act cap 46*

[163] *Stephen Downie on Consequences of a Breach of a Directors Fiduciary Duties.* *https://www.franciswilksandjones.co.uk/site/blog/directorsdutiespersonalrisk/consequences-of-a-breach-of-a-directors-fiduciary-duties*

[164] *United Kingdom Companies Act cap 46*

"The consequences of the penalty imposed upon Directors for a breach of their fiduciary directors is usually in damages representative of the director loss and (potentially) the prospective loss. This can be very severe and, in addition to any sum awarded for the loss and damage that the Company (or innocent parties) have suffered, can also include interest on any such sums retained and the Claimant's legal fees". It is not unusual for a director to be pursued individually, be fired from a company and that such proceedings lead to a loss of his residential home and ultimately, in the worst case scenario, becoming declared bankrupt directly as a result of these circumstances.

3. 2. 2. Delaware (USA)

Section 102(b)(6) of the Delaware law allows the inclusion of a provision in the certificate of incorporation imposing personal liability on stockholder but provides "otherwise, the stockholder of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts".

"In ***Gantler v. Stephens***, the Delaware Supreme Court expressly held that corporate officers owe fiduciary duties to the corporation identical to the fiduciary duties owed by directors.[165]Therefore, under the Court's holding, an officer would be personally liable for breaches of the same duties of care and loyalty that are owed by directors".[166] "While this was a major development in Delaware Corporate Law, the Court left open a number of vital questions. Most importantly, the Court did not discuss whether the protections of the deferential businessjudgment rule applied to corporate officers as it does to directors. Furthermore, the Court did not decide whether corporate officers could be exculpated for breaches of their duty of care under Delaware General Corporation Law Section 102(b)(7), which allows a corporation to limit or completely eliminate, in its certificate of incorporation, its directors' liability for breaches of their duty of care. Rather, the Court expressly left this decision to the Delaware legislature to resolve. The legislature's inaction following Gantler is likely a signal that the exculpation provisions of Section 102(b)(7) will not be extended to corporate officers. However, the business judgment rule issue still remains open for debate".[167]

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[165]*Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009).*
[166]*Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009).*
[167] *Kevin McCarthy, Corporate Officer Liability and the Applicable Standard of Review¬¬ Under Delaware Law and Agency Law (2017), Available at:* https://digitalcommons.law.msu.edu/king/256

"The other popular judicial ruling affecting corporate officer liability is found in ***Amalgamated Bank v. Yahoo! Inc***".[168] In this case, the Chancery Court reaffirmed the Delaware Supreme "Court's position in Gantler that officers owe fiduciary duties identical to those directors owe, but added that officers are also" "agents who report to the board of directors" and "have a duty to provide the board of directors with the information that the directors need to perform their statutory and fiduciary roles."[169] "Characterizing corporate officers as agents potentially has significant consequences for the fiduciary duties that officers owe corporations. As an agent of the corporation, an officer's fiduciary duties are likely not limited to the traditional duties of care and loyalty". "Rather, a corporate officer owes two additional duties to his principal, the corporation acting through the board, under common law agency principles: the duty of obedience and the duty to inform".

II. CONCLUSION

At the face of it the Rwandan law is pro implementation and balancing of shareholder and directors' interests. For instance, one of the genesis *Articles* of Rwanda's law governing companies provides for register of interests and defines it as:

"*a register used to record information on directors and majority shareholders whose interests conflict with the company's business*"[170]

However, that qualifies but it not absolute, as we have observed that the various provisions for implementation and balancing of interests of shareholders and directors' interests do exist but this is still more theoretical than practical because as many company are registered and exist in Rwanda, a few have implemented and balanced the shareholder and directors' interests, according to our analysis and findings,this is because of the following and we recommend the as discussed below respectively:

The Registrar General and Office of the Registrar General has been vested with a lot of duties and powers that cannot merely be exercised according to the intention of the law of making sure that all companies' shareholders and directors' interests are reasonably implemented and balanced, for example apart from the minister, courts and the public the law is silent on who can intervene in case the RG/ORG fails to fulfill his or duties and powers, more so there are no remedies in case the RG/ORG fails with his or her duties and

[168] *132 A.3d 752 (Del. Ct. Ch. 2016)*

[169] *"Amalgamated, 132 A.3d at 780-81 (it is important that the CEO of Yahoo was also sitting on the Yahoo board at the time of litigation, but was sued in her capacity as an officer)".*
"10 Deborah A. DeMott, Corporate Officers as Agents, 74 WASH. & LEE L. REV. (cite forthcoming) (2017)".

[170] *Article 2 of the law governing companies*

powers. This is one of the greatest loophole in the Rwandan company law in relation to the enforcing the implementation and balancing of the shareholders and directors' interest and it shouldn't be over looked because it has caused many companies in Rwanda fail to implement and balance the Shareholders and directors' interests. We are of a view and highly recommend that in case of reviewing the law governing the companies in Rwanda, the duties and powers of the RG/ORG should be shared with another existing organ or a creating of another specific organ to assist with the duties and powers of RG/ORG to address the need of the very many companies that exist in Rwanda and have failed to implement the balancing of the shareholders and directors' interests.

The other main issue with the implementation and balancing of shareholders and directors interest in Rwanda, is conflict of interests in the company's management platform and this has not been well talked by the existing company law. However, we are of the view and recommend that:

Even if ssociety and several stakeholders "put their trust in board directors to run companies and they hold them accountable for doing so". "Directors need to understand that a company cannot prosper if it is in conflict with society, and that since they have the power and authority to recruit, monitor and support management, they are on the front line when it comes to changing the company's culture from having a short-term focus to considering the long term when resolving potential conflicts between the company and society".

"A company is the nexus that links the interests of each stakeholder group within its ecosystem". "The board is the decision-making body and its successes and failures are determined by the ability of its board directors to understand and manage the interests of key stakeholder groups". "It is not an easy task to balance the interest of different stakeholders when shareholders are the ones who put money and often more visible and demanding". There is no "one size fits all" "solution to corporate governance issues, and there is no straightforward answers to manage all the conflicts of interest given the unpredictable nature of firm and business environment contexts, boardroom dynamics and human behaviors. In principle, decisions at the board level should be ethical and reasonably balanced";

"Boards need to have a specific policy in place for dealing with conflicts of interest between individual directors and the company". "This policy needs to specify processes for dealing with major actual and potential conflicts, such as misappropriation of assets; insufficient effort, focus and dedication to board work; self-dealing and related transactions; insider trading; and taking advantage of corporate opportunities in an open and transparent way. If possible, the policy should be signed by all directors and updated regularly, and conflicts of interest should be declared at each board meeting”. “The control mechanisms could be institutionalized. ICBC’s supervisory board is composed of five to seven stakeholder professionals and some of them are full-time on-site supervisors. By attending board meetings as non-voting delegates, ICBC’s board of supervisors is able to monitor the performance of directors and senior management, auditing processes, and overall activities and decisions that affect the company in the short and long term. Monitoring is based on several criteria, such as work attitude, behavior, capacity to fulfill duties, contribution, and so on. In addition, retiring and leaving directors, presidents and other senior management members have to undergo an auditing process by the board of supervisors”. “This type of institution is rarely seen in Western countries, so a similar and feasible solution is to allow external auditors to play a role here”;

To deal with conflicts, “directors need to disclose their relationship with stakeholders. This gives them an opportunity to declare in advance who they represent. Even if the law requires all directors to represent the interests of the company, identifying their connections with specific stakeholder groups improves transparency and avoids the risk of conflicts of interest. It is also crucial to specify who nominates new directors, who decides on directors’ compensation, how the pay structure and level are determined, and how pay is linked to performance and function”. “In carrying out their duties, directors ought to put aside their selfish interest, follow rules in discussions, respect others, and avoid toxic behavior in the boardroom”. “Coalitions can be beneficial when they are aimed at acting in the best interest of the company, but they can be harmful when they are formed with the aim of dominating the board or benefitting a particular stakeholder group”.

“Conflicts of interest can be minimized when directors and boards” “slice the company pie” “properly in an effort to support cooperation and avoid inducing sabotage, riots, retaliation, fines, in-fights or legal actions”. “Wise decision making requires understanding deep-rooted conflicts between stakeholders and the company, between different stakeholder groups, and between subgroups of one stakeholder group”.

“No company can survive without the input of each stakeholder group: responsible shareholders, understanding debt holders, innovative employees, satisfied customers, happy suppliers, great products and services, friendly communities as well as effective and efficient government”;

Conflicts between the company and society are philosophical. Adressing them requires directors to act as moral agents and be able to wisely and honestly deal with any matter that may arise.

The lack of exposure and ignorance among the management of companies is also another factor that cannot be left out when discussing the enforcement of the implementation and balancing of the shareholders and directors' interests. The law is still not well detailed nor specific on who is to manage a company. Currently, a company can appoint any natural person as a member of the Board of Directors. So long as he or she is above "the age of sixteen (16) years; is not an undischarged bankrupt; in the case of a public limited company, is not over seventy five (75) years of age; is not subject to a disqualification by a court's order; has not been sentenced in the immediately preceding five (5) years to a penalty under the law governing companies in Rwanda, and does comply with any qualification for members of the Board of Directors contained in the company's incorporation documents"; or does not have a mental disability as certified by a board of recognized medical doctors.[171] Many natural persons fulfill the above requirements and have become appointed to the management of various companies in Rwanda but unfortunately, as many as they are the lack exposure to the necessary knowledge regarding the management of companies for example the rationales why the enforcement of the implementation and balance of the shareholders and directors' interests is very necessary. We are of a view and recommend that the qualifications to engage in the management of companies should be more broadened to attract more exposed and knowledgeable natural persons that will be able to implement and balance the shareholders and directors' interests.In ***Re Barings plc (No 5)***[172] is a leading UK company law case, concerning directors' duties of care and skill. Jonathan Parker J held that "the three directors should be disqualified. Unfitness was determined by the objective standard that should ordinarily be expected of people fit to be directors of companies. Directors must inform themselves of company affairs and join in with other directors to supervise those affairs. Having no adequate system of monitoring was therefore a breach of this standard. Directors may delegate functions, but they nevertheless remain responsible for those functions being carried out. Furthermore, the degree of a director's remuneration will be a relevant factor in determining the degree of responsibility with which a director must reckon". At Court of Appeal, Morritt LJ, Waller LJ and Mummery LJ upheld Jonathan Parker J's decision in full. Morritt LJ delivered judgment for the whole court.

[171] *Article 154 of the law governing companies in Rwanda*
[172] *Re Barings plc (No 5) [2000] 1 BCLC 523*

The above has also already been incorporated in the law governing companies for example under the law governing companies for the UK. The law provides that a director of a company must exercise reasonable care, skill and diligence.This means the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and the general knowledge, skill and experience that the director has.[173]. “Directors must display the care, skill and competence that is reasonable for somebody carrying out the functions of the office, and if a director has any special qualifications an even higher standard will be expected. However, under section 1157 courts may, if directors are negligent but found to be honest and ought to be excused, relieve directors from paying compensation”. The "objective plus subjective" “standard was first introduced in the wrongful trading provision from the Insolvency Act 1986”,[174] and applied in Re D'Jan of London Ltd.[175] “The liquidator sought to recover compensation from MrD'Jan, who failing to read an insurance policy form, did not disclose he was previously the director of an insolvent company. The policy was void when the company's warehouse burnt down. Hoffmann LJ held MrD'Jan's failure was negligent, but exercised discretion to relieve liability on the ground that he owned almost all of his small business and had only put his own money at risk. The courts emphasise that they will not judge business decisions unfavourably with the benefit of hindsight”,[176] “however simple procedural failures of judgment will be vulnerable. Cases under the Company Director Disqualification Act 1986, such as Re Barings plc (No 5)”[177] “show that directors will also be liable for failing to adequately supervise employees or have effective risk management systems, as where the London directors ignored a warning report about the derivatives business in Singapore, where a rogue trader caused losses so massive that they brought the whole bank into insolvency”.

In carrying out their responsibilities, directors must exercise reasonable care, skill and diligence. This involves a minimum objective standard of what would reasonably be expected generally of someone performing the director’s functions. This is supplemented and raised by a subjective standard that takes into account the general knowledge, skill and

[173] *Section 174 of UK’s Companies Act 2006*

[174] *“For the old and abandoned approach of the pure subjective standard, see Re Cardiff Savings Bank [1892] 2 Ch 100; In re Brazilian Rubber Plantations and Estates Ltd [1911] 1 Ch 425; Re City Equitable Fire Insurance Co [1925] Ch 407”*

[175] *[1994] 1 “BCLC 561”*

[176] *“See Lord Hardwicke LC in The Charitable Corporation v Sutton (1742) 26 ER 642 and Lord Wilberforce in Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821”*

[177] *[1999] 1 “BCLC 433”*

experience that the director actually has. Under the objective test, more might be expected of a director with an executive function (particularly a specific function such as finance director). Under the subjective test, more could be expected of a director having specific relevant knowledge, skills and experience.

Directors should be sufficiently familiar with the company's affairs, including its financial position, to meet their responsibilities for the management of the company's business and should ensure that they have relevant information for this purpose. The amount of time that directors may be expected to devote to the company will depend upon the circumstances, for instance, whether directors are executive directors or non-executive directors.

Good governance begins with the honesty and good morals of everyone on the management platform of a company director on every board. Board of directors are under duty "not to take advantage of the company, but to be loyal to the company, make fair decisions, counteract conflicts among stakeholders", and act in a reasonable way with the intent of providing their respective companies with fairer services and ensure sound welfare to the surrounding community as well. "An ethical board sets the purpose of the company, which in turn influences all dealings with stakeholders".[178]

[178] *https://www.imd.org/research-knowledge/articles/the-four-tiers-of-conflict-of-interest-faced-by-board-directors/*

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