



Company Director Duties, Appointment and Removal

The Case of Uganda

1. Introduction

Though a company is an artificial person, it cannot manage its own affairs. It is controlled and managed by two bodies of persons namely the shareholders and directors who superintend its affairs through the general and board meetings respectively. Directors are appointed to act on behalf of the shareholders to run the day to day affairs of the company. Acting through a board, directors make strategic and operational decisions to facilitate company objectives. Directors are therefore in a position of trust and the law requires them to exercise their mandate responsibly otherwise they would be in breach for which there are dire consequences. This publication gives an overview of director duties, appointment and removal in Uganda.

2. Director definition

Similar to other countries, the definition set out for directors in company legislation ("Companies Act 2012) is incomprehensive. It defines directors according to what they do rather than their actual job title.

The Companies Act 2012 defines a director to include any person occupying the position of a director by whatever name called including a shadow director. A shadow director is defined as a person in accordance with whose directions or instructions the directors of a company are accustomed to act but does not include a person who gives advice to the directors in a professional capacity. Calling someone a "director" does not necessarily make them a director for company law purposes. A person can be appointed as a director as provided by the company legislation or deemed one even though not formally appointed if they act as one or if they exercise requisite influence over the board.

Directors are either executive or non-executive though this distinction is unimportant at law. Executive directors are involved in the day to day running of the business while non-executive directors are not. Non-executive directors usually work part time, attend board meetings and spend time on specific projects.

There are other director classifications though again inconsequential because company law holds individuals accountable as directors regardless of the nomenclature

describing them. Alternate directors are appointed by substantive directors to act on their behalf in their absence. De facto directors may not have been formally or properly appointed as such, but act as directors. An individual can be described as a consultant but carrying out tasks synonymous with directorship.

Independent directors are non-executive directors free from any business or other relationships that can impair their independent exercise of duty. A managing director sometimes described as the Chief Executive Officer is an executive director but also has the ultimate authority to manage the organisation on a day-to-day basis. A nominee director is one who is appointed by a shareholder to represent their interests on the board.

3. Uganda Director duties

Director duties in Uganda are derived from both legislation and common law. In addition to other statutory obligations, the Companies Act 2012 codifies some common law director duties which generally remain enforceable even if not replicated in legislation.

3.1 Common law director duties

Common law director duties include:

3.1.1 Fiduciary duties

These are good faith duties and derive from the fact that directors need to act in good faith towards the company. Fiduciary duties are non-negotiable and cannot be waived. They include the following:

- a) Directors should act in the best interests of the company. In the English case of *Re Smith and Fawcett* with persuasive authority in Uganda, Lord Greene MR observed that the primary duty of a director imposed by the general law is that he should act in what he considers to be the best interest of the company, and not for any collateral purpose. That duty is a subjective one that depends on the directors exercising their discretionary powers bonafide in what they, and not the court, consider to be in the best interests of the company;
- b) Directors should not act beyond or exceed the limitations of powers or capacity which means directors should always act within the ambit of their authority;
- c) Directors should act within their powers and for a proper purpose. The duty to act for proper purposes is important because it is a flexible and useful tool which enables the court to review the directors' decisions. This means that they should act in the best interests of the company and in a manner that benefits the company as a whole and bonafide towards the company interests;
- d) Directors should exercise unfettered and independent discretion and judgement. This requires that directors exercise independent and unbiased judgement when reaching and making decisions for the company;
- e) Directors should not be in a position or should avoid a position of conflicts of interests. The personal interests should not conflict with those of the company and this also includes the duty to disclose any potential conflicts of interests. In *Aberdeen Railway Co v Blaikie Brothers*, [1854]

UKHL 1_Macqueen_461, the court 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 conflict of interest;

f) Directors should not make any secret profits or possible incidental profits at the expense of the company. This means that directors should disclose any personal interests in any contracts with the company;

g) Directors should not misappropriate corporate opportunities due to the company as well as improperly compete with the company.

3.1.2 Duty of skill, care and diligence

Directors are expected to display the same care as a reasonable person would in the conduct of his/her own affairs, or that degree of skill which may be reasonably expected from a person of his/her knowledge and experience. In *Re D'Jan of London Ltd* [1994] 1 BCLC 561, it was held that Mr. D'Jan owed a duty of care and skill as a director of his company. Without reading an insurance policy that had been erroneously filled by his insurance broker, Mr D'Jan signed off the same with its mistake and this was found to be a careless exercise of the duty of skill, care and diligence.

3.2 Statutory duties of directors

Director duties, primarily taken from common law, have been expanded upon or created anew and have been formalised into law under section 198 of the Companies Act 2012. They include but are not limited:

3.2.1 Acting in a manner that promotes the success of the business of the company

Directors must act in a manner that promotes the success of the company. Directors must act in the way they consider, in good faith, would most likely promote the success of the company for the benefit of its members as a whole. The success of the company should remain the paramount concern for directors.

3.2.2 Exercising a degree of skill and care as a reasonable person would do looking after their own business

There are practical difficulties in prescribing an appropriate and acceptable standard of care and skill for company directors mainly because directors are not members of a professional body. At common law, the courts exercised judicial restraint when assessing the directors' exercise of powers in running the company. However with changes in the corporate landscape across the world, directors' decisions are under constant scrutiny. A director who fails to observe his or her duties of care and skill to the company can be held liable for damages.

3.2.3 Acting in good faith in the interests of the company as a whole

The duty to act in good faith in the best interests of the company requires directors to act honestly, for the benefit

of all shareholders. If a director exercises their power for personal profit, they have typically acted for an improper purpose and failed to show good faith for the best interests of the company. Directors must treat all shareholders equally, avoiding conflicts of interest, declaring any conflicts of interest, not making personal profits at the company's expense, not accepting benefits that will compromise them and ensuring compliance with the Companies Act and any other law.

3.2.4 Other director statutory duties

These are several and include preparation of accounts, records, calling meetings and filing of statutory company documents and the promotion of a culture of proper corporate governance, among others.

4. Director appointment and removal in Uganda

Director appointment is generally guided by a company's constitutional documents unless the terms therein offend the provisions of the law. Section 21(1) of the Companies Act 2012, provides that subject to the Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and articles.

In the Nigerian case of *Yalaju Amaye v. A.R.E.C* (1994, NWLR, PT.357), court held that the memorandum and articles of the company bind the company.... for the documents constitute a contract between them. The court further observed that the power to appoint a director can only be exercised where there is an enabling provision in the articles.

Directors are commonly appointed in accordance with the company's constitutional documents as set out in the discussion below. Please note that section 228(5) of the Companies Act requires that any change in directorship is notified to the Registrar of Companies via company form 20 filed therewith providing the particulars of the new director within 14 days of the change. This form to be received at the Companies Registry must be accompanied by a statement of the consent of the appointed director to act as such as well as a relevant resolution to this effect

4.1 Director appointment in general meeting

Directors can be appointed pursuant to resolutions passed at a shareholders general meeting. The proceedings at the general meeting should conform strictly to the requirements in the company's constitutional documents and the Companies Act otherwise the resolutions can be challenged.

4.2 Director appointment by other directors

It is common for the company's constitutional documents to provide that any casual vacancy in the board of directors may be filled up by the directors.

4.3 Other issues

One may not be appointed a director if:

- Has been declared bankrupt or insolvent by court as per Section 200 of the Companies Act;
- Has been convicted by court due to their fraudulent dealings as per section 201.
- Fails to keep proper accounting records;
- Fails to prepare and file accounts;
- Fails to send returns to the Registrar;
- Fails to file tax returns and pay tax; or
- Allows a company to trade while insolvent.

5. Removal of directors in Uganda

The provisions in the company's constitutional documents with regard to director removal take precedence unless they offend the provisions of section 195 of the Companies Act, 2012. The court in *Omenka versus Morison Ind Corp.* (2001, 12NWLR PT.729), held that a director of a company can be removed from office. The mode of removing a director may however be spelt out in the articles concerned. In the absence of such provision in the articles of association concerned, resort may be had to the Companies and Allied Matters Act. To further emphasise the importance of articles of association on a company, it was observed in this case that the removal of a director of a company not in accordance with the memorandum and articles of association of a company was illegal.

Common means of director removal in Uganda are:

5.1 Director removal by ordinary resolution

In the event the articles and other company constitutional documents are silent on director removal, section 195 (1) of the Companies Act provides that a company may by ordinary resolution remove a director before the expiration of his or her period of office, notwithstanding anything in its articles or in any agreement between the company and the director but this subsection shall not in the case of a private company authorise the removal of a director holding office for life at the commencement of this Act whether or not subject to retirement under an age-limited by virtue of the articles or otherwise.

In the Ugandan case of *Technology Associates Ltd & 2 others V. Girisch Nair* Civil suit no. 72 OF 2012 UGCOMM 153, the court observed that the removal of a director must be done in accordance with the Companies Act such as; passing an ordinary resolution and giving the notices thereof,

If a director is removed by way of an ordinary resolution in a general meeting, the following are mandatory:

- Special notice is required of any resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he or she is removed.

Section 149(1) of the Companies Act provides that where by any provisions of the Act require special notice, the resolution shall not be effective unless notice of the

intention to move it has been given to the company not less than twenty eight days before the meeting at which it is moved.

Section 149(2) provides that the company shall give its members notice of a resolution under subsection (1) at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable shall give them notice either through any advertisement in a newspaper of wide circulation or in any other mode allowed by the articles, not less than twenty one days before the meeting.

Section 149(3) further provides that subject to subsection (1), if after notice of the intention to move the resolution has been given to the company, a meeting is called for a date twenty eight days or less after the notice has been given, the notice though not given within the time required by this section shall be taken to have been properly given for the specified purposes.

- On receipt of notice of an intended resolution to remove a director under this section, the company shall send a copy of the notice to the director concerned and the director whether or not he or she is a member of the company shall be entitled to be heard on the resolution at the meeting;

- Where notice is given of an intended resolution to remove a director under this section and the director concerned makes with respect to it representations in writing to the company in respect of the intended resolution and requests their notification to members of the company, the company shall as soon as practicable—

- o in any notice of the resolution given to members of the company state the fact of the representation having been made; and

- o send a copy of the representations to every member of the company to whom notice of the meeting is sent whether before or after receipt of the representations by the company. ■

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Prior to joining Cristal Advocates, he had worked as a Private Secretary to the President of the Republic of Uganda. During this time, he participated in several public and private sector engagements that included advising and coordinating activities relating to oil and gas as well as infrastructural projects of national significance. John had earlier worked with the Post Bank Uganda Limited and Shonubi Musoke and Co. Advocates.

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Dickens leads the oil and gas practice at Cristal Advocates. He has an in depth appreciation of Uganda's oil and gas sector having served as the maiden Company Secretary of the Uganda National Oil Company (UNOC) and the Uganda Refinery Holding Company Limited (URHC). UNOC represents the Government of Uganda commercial interests in the oil and gas sector while URHC represents government interests in the refinery project as well as managing the petrol based industrial park.

Dickens was instrumental in UNOC's formation and initial period of operation and also served as its head of Contracts, Negotiations and Advisory until May 2018. Prior to joining UNOC, Dickens was Legal Counsel at the Petroleum Directorate of the Ministry of Energy playing key legal advisory roles on the negotiation and implementation of PSAs, Joint venture and other oil and gas agreements. He was also part of the team that shepherded the process of enacting the current Ugandan oil and gas Legislations and Regulations including the local content requirements.

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