

# IMPACT OF THE COMPANIES ACT, 2015 ON THE POSITION OF DIRECTOR AND COMPANY SECRETARY

The Companies Act, 2015 has brought about several changes to the position of director and company secretary. Some of these changes are as follows.

## The Position of Director

### Number of Directors required for the operation of a company



In a departure from the provisions of the Companies Act Cap 486, a private company can now conduct its affairs with only one director. However, the Companies Act, 2015 prescribes that a public company must have at least two directors in order to operate within the law (Section 128).

It is further worth noting that although a company may have a legal entity such as another company appointed as its director, the Companies Act, 2015 provides that a company must have at least one director who is a living (natural) person.

A director appointed by the company members may be removed before the end of his term by ordinary resolution at a meeting. A special notice is required of the meeting at which such removal is to be discussed (Section 139).

### Some obligations placed on Directors

#### *Duty to declare interest in proposed or existing company transactions*

The Companies Act, 2015 imposes a duty on directors to make written declarations of interest where

directly or indirectly interested in a proposed transaction or arrangement with the company. This also applies to transactions or arrangements that have already been entered into by the company. In this regard, a director is required to declare the nature and extent of that interest to other directors of the company and in the case of a public company to the members of the company (Section 151).

Directors should give careful consideration to adherence to this duty as the law allows a company the option of avoiding and hence freeing the company from obligations arising from a transaction entered into in contravention of this duty [Section 36 (3)]. Any director who authorizes a transaction that contravenes this duty is also liable to account to the company for any gain such director may have made from the transaction in addition to indemnifying the company for any loss or damage resulting from the transaction [Section 36(4)].

#### *Duty not to accept benefit from third parties*

The Companies Act, 2015 further places a person who is a director under a duty not to accept a benefit from a third party if the benefit is attributable (a) to the fact that the person is a director of the company or (b) to any act or omission of the person as a director (Section 147). A person that contravenes this provision is liable on conviction to a fine not exceeding Ksh.1 million. In addition to the fine the benefit gained by the person or its equivalent is forfeited to the company [Section 147(5)].

It is noteworthy that under the Companies Act, 2015, even upon ceasing to be director a person continues to be subject to a duty not to accept benefits from third parties with regard to things done or omitted before the person ceased to be a director (Section 139).

The person also continues to be under a duty to avoid conflict of interest with regard to exploitation of any property, information or opportunity that the person became aware of while a director.

### *Duty to ensure amendments to Company Articles and pertinent company matters are sent to Registrar*

Where a company amends its memorandum or articles of association, it is required to lodge with the Registrar of companies for registration, a copy of the Articles as amended not later than 14 days after the resolution containing the amendment is passed (Section 24).

In the event of a failure to lodge the amended articles in accordance with the Act each officer of the company (directors) is liable to a fine of Ksh.200, 000 on conviction. If after conviction the default continues then on each day on which the failure continues an offence is committed for which each officer is liable to a fine not exceeding Ksh. 20,000 for each such offence

Under the Companies Act, 2015 a penalty for failure to lodge with the Registrar of companies' resolutions that are passed also applies to the following kinds of resolutions and agreements reached in relation to a company [Section 27(2)]:

- i. Any special resolution;
- ii. A resolution or agreement agreed to by all the members of the company or members of a class of shareholders;
- iii. A resolution or agreement that effectively binds all members of a class of shareholder though not agreed to by all those members;
- iv. A resolution to give, vary or revoke or renew authority relating to off market purchase of its own shares;
- v. A resolution conferring, varying or revoking or renewing authority following market purchase of companies own shares;
- vi. A resolution for voluntary liquidation;
- vii. A resolution passed regarding transfer of securities.

### **The Position of Company Secretary**

The Companies Act, 2015 makes it mandatory for all public companies incorporated under the Act to have

at least one Company Secretary. However, unlike the position in the Companies Act Cap 486, the Act provides that there will be a mandatory requirement for a private company to have a company secretary only if it has a paid up capital of five million Kenya shillings or more (Section 243).

The Companies Act, 2015 further states the qualifications that must be held by a person who is appointed as Company Secretary of a company with such person required to hold a practicing certificate issued under the Certified Public Secretaries of Kenya Act. A director who appoints a Company Secretary without adhering to the qualifications set out by statute for the position is, upon conviction, liable to pay a fine of Ksh. 200,000/- (Section 246).

### **Rationale for the above onerous obligations placed on Directors**

The above obligations that the law imposes on Directors can be justified when one looks at the immense powers Directors possess and using which they are able to bind a company through their actions. Indeed, the Companies Act, 2015 provides that where a person is dealing with a company in good faith the power of its directors to bind the company is free of any limitation contained in the company's Memorandum and Articles of Association [Section 34 (1)]. The Act further provides that the validity of an act or omission is not called into question on the ground of lack of capacity because of a provision in the Memorandum or Articles of Association of a company.

Although the law does not affect the right of a member to bring proceedings to restrain the doing of an act that is beyond the powers of the director, no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company (Section 33).