

**THE QUALIFICATIONS OF COMPANY DIRECTORS AND THE  
PERFORMANCE OF COMPANIES IN TANZANIA: CRITICAL ANALYSIS OF  
THE COMPANIES ACT, 2002**

**By**

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**A Dissertation Submitted in the Partial Fulfilment of the Requirement for the  
Award of Degree of Masters in Laws (LL.M-COMMERCIAL LAW) of Mzumbe  
University**

**2012**

## CERTIFICATION

We, the undersigned, certify that we have read and hereby recommend for acceptance by the Mzumbe University, a dissertation entitled, *The Qualifications of Company Directors and the Performance of Companies in Tanzania: Critical Analysis of the Companies Act, 2002*. In partial fulfilment of the requirement for award of the degree of Master in Laws (LL.M-Commercial Law) of Mzumbe University

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## DECLARATION AND COPYRIGHT

I, Luckness William Jangu, declare that this dissertation is my original work and that it has not been presented and will not be presented to any other university for a similar or any other degree award.

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## **DEDICATION**

This work is dedicated to my lovely parents: Mr. And Mrs William Jangu and to all people who wish for the best performance of the companies.

## **LIST OF ABBREVIATION**

AC	Appeal Cases
Act	The Companies Act, 2002
AIR	All Indian Law Report
A.M	Ante Meridiem
ASCR	Australian Company Law Reports
BLERA	Business Licensing and Registration Authority
CA	Court of Appeal
BC.CL	Butterworth's Company Law Cases
Cap	Chapter
Co.	Company
Ch. App	Chancery Appeal Cases
Ch	Chancery
Ch. D	Chancery Division
CLJ	Common Law Journal
CLR	Common Law Report
Edn.	Edition
Et. All	And others
Former Regime	The Companies Ordinance
HC	High Court
Ibid	Ibidem
J	Judge
LJ	Law Journal
LL.M	Lex Legum Magister
L R	Law Report
Ltd	Limited
Macq	Macqueen's Scotch Appeal Cases
MEMATS	Memorandum and Articles of Association

No.	Number
New	The Companies Act, 2002
New Regime	The Companies Act
Op.cit	Operacitato
Old	Companies Ordinance
Ordinance	The Companies Ordinance, Cap 212 [R.E 2002]
Pat	Paterson's Scotch Appeals House of Lords
P	Page
PP	Pages
P.M	Post Meridiem
R.E	Revised Edition
S	Section
SA	South Africa
Supra	Cited above
T	Tanzania
TANESCO	Tanzania Electric Supply Company
T.L.R	Tanzania Law Report
UK	United Kingdom
UN	United Nation
US	United States
Vol.	Volume
V	Versus
Z	Zanzibar

## **ABSTRACT**

A company is in the eyes of law an artificial person, with no physical existence; neither soul nor body of its own as such it cannot act on its own, it can do so through some human agency called the directors<sup>1</sup>. These directors are entrusted with the interest of others; they are not allowed to make the business an object of interest to themselves because from the frailty of nature, one who has power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is entrusted.<sup>2</sup>

This being the case the company needs to be in the proper hands of person who mans it, as the success of the company depends ultimately on the calibre of its directors and the effectiveness of the board. The law puts qualification for a person to be appointed as a director to make sure that the company is under control of a proper person who can be accountable for his own actions. Need for responsibility and accountability have impelled rules circumscribing the qualifications, conducts and responsibilities of company directors. The modern commercial world demands security and certainty when dealing with the corporate person.

The companies Act, 2002 provides for the qualification of a company director to include among others, share qualification if the articles of association of the company so require, age limit from 21 to 70 years, a person not discharged bankrupt or not convicted in any offence in relation to the management of the company, and signification of consent to the registrar of companies. This research looked at the qualification of the Company directors in the Companies Act, by making an analysis to see whether the said Act is adequate or not and if not whether the inadequacy has significance impacts on the performance of the companies.

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<sup>1</sup> Leonard's Carrying Co. Ltd v Wilson [1866]L.R 2 Ch. App 77

<sup>2</sup> York Building Co. v Mac Kenzie [1975] 13 Pat 378

In order to get precise materials for writing this work, the researcher employed two research techniques: documentary review and case study. In documentary review materials were gathered from legislations, policy documents newspapers and journal articles, textbooks, and case laws. In a case study the methods which were employed included direct interviews and use of questionnaires

The research conducted revealed that the Companies Act is inadequate in respect to the qualifications of the company directors, especially with respect of the professional qualification and experience, the issue of sound mind and in respect of the age of those aspiring to be company directors. The study further noted that the inadequacy in the law has significant impacts to the performance of the companies.

From the aforementioned findings, the researcher makes some recommendations that the Companies Act should be amended to cater for the professional qualifications, issue of sound mind to be expressly provided for in the statute that is, the issue of sound mind of a person aspiring to be a company director should not be implied in the law of Contract Act. The researcher further recommended that there should not be maximum age limit in respect of age qualification; rather the consideration should be whether that person is capable of working as a director and making rational decisions.

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*Nitin Coffee Estates Ltd & 4 Others v United Engineering Works Ltd & Another* [1988] T.L.R 203

*P.S.R (T) Ltd & Alhaj Said Rashid Kilahama v The Loans Advances Realization Trust*,  
Court of Appeal of Tanzania, Civil Appeal No.40 of 2002

*Yusuph Manji v Edward Masanja & Abdala Juma* [2006] T. L.R 127

### B: International Cases

*Aberdeen Railway Co. v Blaike Bros.* [1854] 1 Macq 461

*Bath v Standard Land Co* (1910) 2 Ch408

*Bishopsgate Investment Management Ltd v Maxwell<sup>l</sup> (No 2)* [1993] BCLC 1282

*Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty)* 2000 (3)SA 806

*Deloitte Haskin & Sells v National Mutual Life Nominees Ltd* (1991)5 N Z CLC 67

*Employee State Corp. Apex Engineering (P) Ltd.*1 CLJ 10

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*Ram Chand & Sons Sugar Mills v Kahayalal AIR* [1966] 2 L J 224

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## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.0 Background to the Problem

A Company is, be it public or private company is an artificial being, invisible, intangible and existing only in contemplation of the law,<sup>3</sup> it acts through natural persons<sup>4</sup> These persons are called directors, the body to which is delegated the duty of the general affairs of the company.<sup>5</sup> The directors therefore have all powers necessary for managing, directing and supervising the management of the business and affairs of the company.<sup>6</sup>

For the person to be appointed as a director of the Company he/she must meet the qualifications set out in the Companies Act<sup>7</sup>. The success of a company depends, to a very large extent, upon the competence and integrity of its directors. Thus it is necessary that the management of the company is in proper hands.<sup>8</sup>

The companies Act traces its origin from the Companies Ordinance of 1929, a British Colonial Legislation that remained in force without any significant changes until 2002<sup>9</sup>,

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<sup>3</sup> Singh, A., (2005), Company Law, (14<sup>th</sup> Edn.), Eastern Book Company. Lucknow, p 238

<sup>4</sup> Tesco Supermarkets Ltd. v. Nattrass [1977] AC 153 Lord Reid at p.170E said, "A living person has mind which can have knowledge or intention or be negligent and has hands to carry out his intentions. A corporation has none of these: it must act through living persons though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not act as the servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is guilty mind then that guilt is the guilt of the company."

<sup>5</sup> Lord Cranworth LC, In Aberdeen Railway Co. v Blaike Bros. [1854] 1 Macq 461

<sup>6</sup> The Companies Act, Act No. 12 of 2002 see Section 181

<sup>7</sup> See sections, 190, 191, 194, 196 and 197 of The Companies Act, Act No. 12 2002

<sup>8</sup> Singh A., (2005), op.cit p 248

<sup>9</sup> Luoga, F.D.A.M. (2006) A critical Analysis of the Tanzanian Companies Act, 2002. "The Tanzanian Lawyer Vol. 1 No. 3, 2007" p 1, sees also Krista van Winkelhof et. al, who commented that the Companies Ordinance regulated trading companies and other association including imposition of tax on nominal capital, regulation of dividends and surplus and related matters, the regulation remained in force for over 77 years which period covered not only the tail end of colonial period but also the period of state-

when the New Companies Act, Act No. 12 of 2002 was enacted and came into force on the first day of March, 2006. Despite several amendments to the Companies Ordinance of 1929,<sup>10</sup> the qualifications of company directors under the Companies Ordinance remained to be, signing and delivering to the registrar of companies consent in writing.<sup>11</sup> The Ordinance also provided a clause about share qualifications of the company directors whom by the articles of association are supposed to have the said share qualification.<sup>12</sup> Furthermore, The Ordinance restricted persons who are un-discharged bankrupts to act as directors of companies.<sup>13</sup>

The Companies Act, 2002 which came into force in 2006 adopted some qualifications provided under the Companies Ordinance and added some other qualification. Thus the qualifications of directors have remained among others to be consent in writing to the registrar of companies before the registration of articles and memorandum of association.<sup>14</sup> The Companies Act just like its predecessor also provides for share qualification. Thus, a director if so required by the articles of association should have a share qualification,<sup>15</sup> within a period of two months from his appointment as a company director.

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planned economy through to liberalization in the 1990s available at [vanwinkelhof@shadboltlaw.com](mailto:vanwinkelhof@shadboltlaw.com) accessed on 2<sup>nd</sup>, January 2012 at 14.00 PM

<sup>10</sup> Cap 212, [R.E 2002]

<sup>11</sup> See section 141 of the Companies Ordinance

<sup>12</sup> Section 142(1) of the Companies Ordinance provided that it shall be the duty of every director who is required to hold a specific share qualification, and who is not qualified, to obtain his qualification within two months after his appointment or such shorter time as may be fixed by the articles.

<sup>13</sup> Section 143 of the Companies Ordinance provided that if any person being an un-discharged bankrupt in the territory (Tanzania) or in any territory which is declared to be a reciprocating territory under section 147 of the Bankruptcy Ordinance acts as a director of, or directly or indirectly takes part in or is concerned in the management of any company except with the leave of the court by which he was adjudged bankrupt, he shall be liable on conviction on information to imprisonment with or without hard labour for a term not exceeding two years, or to a fine not exceeding ten thousand shillings or to both such imprisonment and fine.

<sup>14</sup> Section 190 of the Companies Act of 2002, provides that a person shall not be capable of being appointed director of by the articles unless, before the registration of articles or the publication of offer document as the case may be, he has by himself or by his agent authorized in writing signed and delivered to Registrar for the registration a consent in writing to act as such director.

<sup>15</sup> Section 191 of the Companies Act provides that it shall be the duty of every director who is by the articles of the company required to hold a specified share qualification, and who is not already qualified,

Although the Companies Ordinance was silent on the issue of age, the Companies Act enumerates the age qualification and limited age to minimum of 21 years and maximum of 70 years.<sup>16</sup> In other countries like UK where Tanzanian Companies Act originated, under section 156 of the UK Companies Act 2006, the director with more than 70 years can qualify to be a director provided he or she demonstrates competence. The Companies Act further provides a restriction to persons who are un-discharged bankrupt or insolvent to act as directors of companies unless a leave of a competent court is issued.<sup>17</sup>

With respect to professional expertise and experience, both the Company Ordinance and the Companies Act are silent. In other countries like United Kingdom since 1906 company directorship is regarded as a professional qualification.<sup>18</sup> That a person desiring to be a director of a company is supposed to have professional qualifications, and they are called the Chartered Directors.<sup>19</sup> Luoga views the absence of professional qualification as having an impact on the performance and decision making processes in a company. Thus the need of responsibility and accountability has impelled changes in the company laws to impose more rules circumscribing the qualification, conduct and responsibilities of directors.<sup>20</sup> The issue of professional qualification of directors is to ensure that the director, formulate a right policy for the development of a company and

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to obtain his qualification within two month after his appointment or such shorter time as may be fixed by the Articles

<sup>16</sup> Section 194(1) of the Companies Act provides that no person shall be capable of being appointed a director of accompany which is subject to this section if at any of his appointment he has not attained the age of twenty one or he has attained the age of seventy

<sup>17</sup> Section 196 of the Companies Act provides that if any person who has been declared bankruptcy or insolvent by a competent court in Tanzania or elsewhere and has received his discharge acts as a director of , or is directly or indirectly takes part in or is concerned in the management of, any body corporate except with the leave of the court, he shall be liable on conviction to imprisonment, or to a fine or to both.

<sup>18</sup> Chartered Directors: The Professional qualification for Director. Available at <http://www.yorker.ca/rleblancab/media/2010-LeblancJune-ICDarticle.pdf> visited on 28<sup>th</sup> August, 2011

<sup>19</sup> Keenan, D., (2005), Smith and Keenas' Company Law, 13<sup>th</sup> Edn., Pearsons, Longman

<sup>20</sup> Luoga F.D.A.M., (2007), op.cit p 3

ability to understand things in relation to the management of a company,<sup>21</sup> together with making sure that the directors of the company abide by the object to which the company is formed to undertake.

Furthermore, the Companies Act is silent on the issue of sound mind of the persons aspiring to company directors. All these may lead to failure of the company to achieve its objects as stated in the object clause of the company<sup>22</sup> thus leading to poor performance or total failure of the company. It is therefore against these backdrops that this research explores the adequacy of the companies Act on qualifications of company directors and analyses the inadequacy effect of the Act on qualification of company directors to the performance of the company.

### **1.1 Statement of the Problem**

The Companies Ordinance was noted for being inadequate in relation to the qualifications of company directors. The Companies Act reiterated almost all the qualifications of director under the defunct Ordinance and added some new qualifications like age qualification ranging from 21 to 70 years.<sup>23</sup> But still the issue of profession and experience as qualifications has not been taken on board by the New Act.<sup>24</sup> Furthermore the New Act is not categorical on the issue of sound mind for persons aspiring to be company directors. Therefore, on the onset of the New Act to replace the Companies Ordinance, bringing with it some changes in the area of

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<sup>21</sup> <http://www.erawan.listedcompany.com/misc/Qualification%20of%20Directors.pdf> visited on 18<sup>th</sup> August, 2011

<sup>22</sup> Section 4(1) of the Companies Act provides that the memorandum of every company shall state the object clause of the company. Further to this section 7 of the same Act provides that when the company's memorandum states that, the object of the company is to carry on business as a general commercial company a) the object of the company is to carry on any trade or business whatsoever and b) the company has power to do all such things as incidental or conducive to the carrying on of any trade or business by it.

<sup>23</sup> Section 194 of the Companies Act

<sup>24</sup> In other countries like UK company director ship is regarded as a professional post, see Binamungu C. S. M., (2002), Business Law Student Manual National Board of Accountants and Auditors, Tanzania, p 113, Keenan, D. (2005). Smith and Keenan's Company Law, ( 13<sup>th</sup> Edn.), Pearson Longman, England p 310 and see also Mbunda, L., (2008), Corporate Governance and the Law in Tanzania: A comparative Study, " Journal of African and International Law" Vol. 1 No. 2, 2008 p 135

qualification of company directors calls for a thorough research to determine the real impact of the New Provisions or law for the director's qualification needed to improve the company's performance. In other words to examine the adequacy of the New Law in providing the necessary qualifications required of a director in the modern era of corporate management.

Therefore, this research analyses the implementation of Companies Act, in respect of the qualifications of company directors, whether these qualifications are satisfactory in relation to the performance in companies.

### **1.2 Objectives of the Study**

The core objective of this research is to have a critical analysis of the Companies Act in relation to its provisions dealing with the qualification of the company directors. This entailed examining whether the Act is adequate or not in providing for the required qualifications of a company director in managing modern companies and the relationship between the directors qualifications and performance of a company.

### **1.3 Research Questions**

This research study was guided by the questions that:-

- a. What are the qualifications of companies directors provided for under the Companies Ordinance?
- b. What are the qualifications of company directors under the Companies Act, 2002?
- c. Is the Companies Act, 2002 adequate in providing for the necessary qualification of directors required in improving company's performance?

#### **1.4 Research Hypothesis**

This research study was based on the hypothesis that:-

- i. The Companies Act, Act No. 12 of 2002 is inadequate in describing the qualifications of company directors.
  
- ii. The inadequacy of the law on qualifications of Company directors has subsequent effects in the performance of companies

#### **1.5 Significance of the Study**

This study extends knowledge about the required qualification of company directors. Thus the research is viewed to add knowledge in relation to the issues of qualifications of Company directors generally to persons desiring to be company directors and those who are in the positions of company directorship. This study also extends knowledge to other persons including students, teachers and interested persons in the field of company law and corporate governance on the aspect of company directorship.

The research also provides new insights and ideas linking on qualifications of company directors and the performance of the company. Lacking qualified and competent directors create conditions for the inefficiencies and poor performance of company. This research therefore highlights the gaps and provides recommendations that can be applied in influencing changes in the law.

The research raises awareness to the policy makers, law makers and other institutions in the society about the existing law and its inadequacies on the qualifications of company directors. The research is directed to various stakeholders who directly and indirectly deal with issues of companies, for example the Registrar of companies, judges, and advocates. This research therefore in general terms raises awareness and influence

changes that can lead to the formulation of new policies or the amendments of the Companies Act specifically on the qualifications of company directors.

## **1.6 Literature Review**

There is a scarcity of literature which discusses the topic selected for this research. However, the researcher was able to come across some of the literatures that in one way or another had some aspects of the covered topic as discussed below.

**Binamungu, (2002)** in his book titled *Business Law, Student Manual*<sup>25</sup> discusses the required qualifications of directors as provided for under the Companies Ordinance.<sup>26</sup> The book sheds light on the then qualifications of directors. The writer points out the issue of share qualification, persons disqualified for being un-discharged bankrupt among others. The writer also contends that, the qualification as stipulated in the law encouraged incompetent people to accept the position of director because the law expected very little of them. The writer highlights that in the UK there was a move to make directorship a professional qualification. Further to this the writer contends that the issue of sound mind of person aspiring to be company directors is provided for under the general principles of contract law in the Law of Contract Act. The New Companies Act, Act No. 12 of 2002 was not in place when the author wrote his book. In other words, the writer used the old law in his discussion; this research intends to explore the qualifications of company directors using new Companies Act to view the relevance and improvements in the law in the area of qualifications of company directors and how this can impacts on the performance of the company.

**Luoga, (2007)** in his work entitled *A Critical Analysis of the Tanzanian Companies Act, 2002*,<sup>27</sup> provides for the analysis of the Companies Act, among other things on the issue

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<sup>25</sup> Binamungu, C. S. M., (2002), op.cit note 21p 113

<sup>26</sup> This was the Companies Ordinance Cap 212 R.E 2002, before the Enactment of the Companies Act, Act No. 12 of 2002, that is to say the Author was discussing the Companies Ordinance.

<sup>27</sup> Luoga, F.D.A.M.,(2007), op.cit note 9 p 2

of directorship. The author argues that in old days of company law any person could be a director. He contends that during that time corporate directorship was not a professional qualification thus it did not require any professional qualifications. The writer further contends that the modern commercial world demand certainty and security when dealing with corporate persons. This article is valuable as it shows the necessity of professional qualifications to the directors and issues of accountability of directors of company. However the article did not enumerate what could be the qualifications of directors as a whole in line with the Companies Act. Furthermore, the writer did not enumerate what would be the effect of unprofessional directors in the performance of the Company which this study explores.

**Mbunda, (2008)**<sup>28</sup> in the article, *Corporate Governance and the Law in Tanzania: a Comparative Study*, discusses the principles of corporate governance and their reflection in the Companies Act, 2002. He is of the view that, the Act is silent on the academic and professional qualifications and experiences of the persons aspiring to be directors. The writer pinpoints that the Act does not recognize that modern company directors are supposed to have acquired and asserted for themselves a professional status with professional skills. Despite this important analysis the writer said nothing on the qualifications of company directors in the Companies Act 2002; this study makes an analysis of the qualification of company directors Companies Act 2002 in relation to the performance of companies.

**Gower, (2003)** in the book named *Principles of Modern Company Law*,<sup>29</sup> sheds light on the qualification of company directors. Among others is that first directors should subscribe to the memorandum and articles of association. The book sheds light that subsequent director, are appointed in the manner as laid down in the articles of association. That is to say the issue of consent is vital upon appointment of a director.

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<sup>28</sup> Mbunda, L.,(2008), *Corporate Governance and the Law in Tanzania: A comparative Study*, op.cit p.135

<sup>29</sup> Davies, L. P., (2003), *Gower's and Davies Principles of Modern Company Law*,( 7<sup>th</sup> Edn.) Sweet and Maxwell London, p 308,

The writer however, dealt much with appointment of directors in relation to the position in the UK. The research explores or makes an analysis of the qualification of company directors the Tanzania Companies Act of 2002 and makes a linkage of the said qualification to the performance of the companies.

**Keenan, (2005)** in his book titled *Smith and Keenan,s Company Law*<sup>30</sup>, highlights important aspects in respect to the qualification of company directors in the United Kingdom. The writer among other qualifications elaborates that; directorship is a professional qualification. He notes that qualified directors must have done a professional and experience before being a director. Also directors need to undergo specific courses before they become directors. These courses will determine the eligibility of being appointed a company director. The institute of directors has the power to discipline directors who fails to keep up proper standards. The author contends that the purpose of qualified directors is to distinguish themselves from those lacking training or from those who run small companies, who may call themselves directors but who do not attend formal board meeting with agendas and formal procedures as would be required by big companies. The discussion in this book is based on the experience in the United Kingdom. This research makes an analysis of the qualifications of company directors under the Companies Act in Tanzania in relation to performance of the company.

**Sealy L. and Worthington S. (2008)** in their book, *Cases and Materials in Company Law*,<sup>31</sup> when speaking of Company directors, especially non-executive directors were of the view that, companies do not appoint non-executive directors without good reason, thus they are appointed or chosen from the specific expertise experience or business connections. Our Companies Act is silent on the issues of non-executive and executive directors. Furthermore, the Act does not speak even slightly about the issue of expertise,

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<sup>30</sup> Keenan, D.. (2005). op.cit p 310

<sup>31</sup> Sealy, L. and Worthington, S., (2008), Op.cit p 245

experience or business connection and how these relate to the performance on companies. The writers on the issue of Age enumerates that any person of the age of 16 to 70 or more may be appointed as a director. This person may be appointed and qualify to be a director for public company without members approval. This is provided for under S.157 of the UK Companies Act of 2006. Our Companies Act restricts the age qualifications from 21 to 70. This research looks into the qualification of the company directors under the Tanzanian Companies Act and the relationship that exists between the qualifications of company directors with the performance of companies.

**Abbott and Others, (2007)** in their book named *Business Law*<sup>32</sup> discusses the issue of company directors in terms of who may not be appointed as company directors, for example the issue of persons un-discharged bankrupt without the order of the court or any person disqualified by the order of the court. These authors despite this important light that they shed on qualification of company directors, they did not specifically discuss the qualifications of company directors. This document is relevant to this research study and is useful in exploring candidates who may not qualify to be company directors in Tanzania by making a reference and analysis of the Companies Act, 2002.

**Gulsham and Kapoor, (2008)** in the book named *Business Law Including Company Law*,<sup>33</sup> looks only the issue of qualifications of company directors in terms of the issue of share qualifications. The authors enumerates out that share qualifications of company directors is mandatory requirement to company director in companies whose articles of association has such a requirement. That as soon as the person is appointed a company director he should within two month obtain the share qualifications that failure so to do automatically such a director shall relinquish the position. The writers commented further that share qualifications are important only after a person is elected a company director not before. This research looked all the qualification of company directors in

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<sup>32</sup> Abott K. Et al, (2007), *Business Law*, ( 8<sup>th</sup> Edn.) , Thomson Learning at p.417

<sup>33</sup> Gulsham, S. S. and Kapoor, G.K., (2008), *Business Law Including Company Law*, New Ege International Publishers, Delhi p 473

Tanzania under the Companies Act and the linkage between the qualification of company directors and the performance of companies.

**Wild and Weinstein, (2009)** in the book entitled *Smith and Keenan's Company Law*,<sup>34</sup> the writers are of the views that there are no general qualifications that are required for a person to become a director of a company. The authors comment that company directorship is a professional carrier. The authors on the issue of share qualifications comment that it is the duty of every company directors to obtain the share qualification if the articles of association so requires. The purpose of share qualifications being that the directors should have a stake in a company to induce them to act diligently to ensure company progress. Although the authors shed some lights on qualifications of company director they did not however the ideal linkage between the qualification of company directors and the performance of companies, which the research at hand analysis.

**Bangia, (2006)** in his book named *Company Law*,<sup>35</sup> sheds an important light on qualifications of company directors, the author writes in relation to the Indian Company Act. The author among other qualifications discussed the issue of share qualifications, that failure to have share qualification is punishable with fine. The author further comments that the issue of share qualification is only available in public companies or its subsidiaries not to a private company. The author further elaborates that person of unsound mind, un-discharged insolvent and other person disqualified by the order of the court do not qualify to be appointed as company directors. Despite this significant analysis the author was looking at the Indian Companies Act which to some extent may be applied to my research on examining aspects within Indian Companies Act that have relevance in Tanzanian situation. This research however, goes father to look the issue of performance of companies in the light of the qualification of company directors,

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<sup>34</sup> Wild, C. and Weinstein S.,(2009), *Smith and Keenan's Company Law*, 14<sup>th</sup> Edn., Persons Longman, London pp 290 and 299

<sup>35</sup> Bangia, R.K. (2006). *Company Law*, 5<sup>th</sup> Edn. Allahabad Law Agency Law Publishers, Delhi pp 197-198

**Bagrial, (2007)** in the book titled *Company Law*,<sup>36</sup> speaks on qualification of directors partly on the issue of share qualifications. He contends that share qualification to company directors is a personal interest in the company; he states that by the articles of association a director of the company is supposed to have the share qualification he must then obtain them within a specified period. Further to that the author contends person of unsound mind, and other person disqualified by the court for example person undischarged bankrupt do not qualify to be directors of the company. The writer was discussing the qualifications of the company directors in relation to unqualified persons to act as company directors with respect to the Indian Companies Act which its provision may be akin to that of Tanzania, the study goes beyond to see this qualification and the performance of the company.

**Dine, (2005)** in the book named *Company Law*,<sup>37</sup> does not speak of any qualification of company directors. The writer speaks of appointment of company directors on how the first directors are appointed that is by person who are named in the statement signed by all subscribers and delivered such memorandum and articles of association with the registrar of companies or by the decision in the general meeting. On this appointment the writer did not spell out the qualification of a person who is eligible to be appointed as the company director.

**Ombella and Massawe, (2011)** in their book titled *Elementary Company Law in Tanzania, A Students' Hand Book*,<sup>38</sup> the authors discuss the qualifications of the company directors as stipulated in the Companies Act, 2002 to include, the age qualification that is minimum age of 21 and 70 being maximum age. The write also points out the issues of share qualification, that any directors if is required to have share

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<sup>36</sup> Bagrial A. K., (2007), *Company Law*, 12<sup>th</sup> Edn. Vikas Publishing House Pvt. Ltd, New Delhi p 276

<sup>37</sup> Dine J., (2005), *Company Law*, 5<sup>th</sup> Edn. Palgrave MacMillan Ltd, New York, p 154

<sup>38</sup> Ombella, J. S and Massawe, M. P., (2011), *Elementary Company Law in Tanzania, A Students' Hand Book*, Karljamer Print Technology, Dar es Salaam pp 101 -102

qualification by the articles of his company, must have such qualification within two months. Further to this, the authors speak about the issue of sound mind of persons aspiring to be director of the company. Despite this important analysis the writers did not go as far as to look whether the qualification of the company directors in the Companies Act is adequate enough to fit the contemporary commercial word. This research goes beyond the said qualification in the Companies Act to see as to whether the Act is adequate enough or not and what would be the effect to the performance of the companies.

**Mc. Laughlin, (2009)** in the book titled *Unlocking Company Law*,<sup>39</sup> discusses among others things: the concepts of directors, the rationale behind the reforms of duties of the directors, the issue of distinction between self interest duties and that of the company. The author also elaborates the power of the directors. The author did not discuss the issues of qualification of the company directors nor did the writer talk anything in relation to the performance of the companies. Furthermore, this writer is dealing with the issue of directorship in United Kingdom. The research at hand is centered on the qualifications of company directors in Tanzania and the performance of companies.

**Bakibinga, (2001)** in the book named *Company Law in Uganda*<sup>40</sup>, enunciates the issue of the position of company directors to the company, the manner of appointment of the company directors, and the issue of termination of directorship. In termination of directorship the writer writes that the office of directorship may be terminated on the reasons of fraud, or upon resignation. The writer also writes on the remuneration of the company directors and powers of directors among others. The author on the other hand did not discuss the issue of qualifications of company directors in the pursuit of the company reaching its objects. This research looks the qualification of directors and performance of the company in Tanzania.

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<sup>39</sup> Mc. Laughlin, S., (2009), *Unlocking Company Law*, Holder Education An Hachette UK Company, London pp 317-336

<sup>40</sup> Bakibinga, D. J., (2001), *Company Law in Uganda*, Kampala Fountain Publishers pp.105-120

**Saleemi and Opiyo, (1998)**<sup>41</sup> in their books among other things discuss the issues of company directors, their jurisdiction or powers, the meaning of the company director, and the types of directors. The writes also discussed the qualifications of company director in Kenya. The writers elaborate issues of share qualifications, the age of retirement, bankruptcy. The writers discussed this in respect of the Kenyan Companies Act. This research looks at the qualifications of the company directors in Tanzania by making an analysis of the Tanzanian Companies Act of 2002 to see whether the Act is a adequate or not in stipulating the qualifications of company directors in Tanzania. And to further see the effect on of the qualification in performance of the companies.

**Adams, (1996)** in the book named *Law for Business Students*,<sup>42</sup> speaks among others the manner of appointment of company directors, the types of the company directors, the powers, rights and duties of the company directors. However the writer did not deal with the qualifications of the company directors which the present research explores.

**C.G.F Research Institute (Pty) Ltd** an *Article tilled Directors Beware there is a new meaning to business rescue*,<sup>43</sup> comments on the South African Companies Act, 2008, that come into force 2011 May. The Act provides a mechanism of holding company directors responsible for their actions, specifically under section 129. The writer comments that directors of the board need to have mental agility when conducting the affairs of the business. Thus the directors need to have broadened their knowledge of prudent risk management otherwise they will be responsible under the law. This article enlightened us that directors should have professional knowledge in relation to the business management; this will help the Companies to have the Company directors

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<sup>41</sup> Saleemi., N. A. and Opiyo A. G, (1998), *Company Law Simplified*, A text Book for CPA and CPS Papers 12 and Company Law Paper of other Examining Bodies 1<sup>st</sup> Edn., Saleemi Publishers Ltd. pp 201-234, see also the Kenyan Companies Act, [Cap 486 Rev.2009] sections 186 on the issue of age qualification is similar to our Companies Act of 2002, share qualification under section 183 and restricted person are provided for under section 182 of the same Act.

<sup>42</sup> Adams, A., (1996), *Law for Business Students*, Pitman Publishing Company, London pp 311-317

<sup>43</sup> C.G.F Research Institute (Pty) Ltd, [www.cgf.co.za](http://www.cgf.co.za) accessed on 1<sup>st</sup> September 2011

responsible for their actions to companies. This is the position in South Africa; furthermore, the article did not enumerate the qualification of companies director as explained in the South African Companies Act. Despite all this the research at hand looks for the qualifications of company directors in Tanzania by making an analysis of the Companies Act of Tanzania, 2002 with the aim that to view whether the qualification are adequate enough to fit the competitive era of corporate government.

**Estanslao and Saldana, (2001)** In the Article titled, *The Role of the Board of Directors, pinpoint*,<sup>44</sup> the qualifications of company director among other qualifications a director of a company, for example a bank, must have at least a college graduate or have a five years experience in business or have undergone training in banking acceptable to the appropriate supervisor and examining department. This entails that a director depends on a type of a company must have professional qualification or experience of such type of the company, this research looks into the position of the Companies Act in Tanzania.

**Leblanc** in an Article titled, *UK, US and Australia Act to Address Director Competency, Diversity and Effectiveness*,<sup>45</sup> is of the view that the board of directors should consist of directors with the appropriate balance of skills, experience, independence and knowledge of the company to enable the board to discharge its functions, duties and the responsibility effectively. The writer was talking of the proposed changes to the UK Combined Code. This is not the case in Tanzania that is why this research is intended to look the qualification of the company directors in Tanzania by looking Companies Act, 2002 to see this gap in relation to the performance of the companies. So as to bring about these perspectives into the Companies Act, 2002 in order to increase efficiency in performance of the companies in Tanzania.

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<sup>44</sup> Estanslao, J. P. and Saldana, C., (2001), The Role of Board of Directors: ;Philippines Legal and Regulatory Framework and Practice, Third Asian Roundtable on Corporate Governance, Institute of Corporate Governance Philippines available at <http://www.oecd.org/dataoecd/6/56/1873206.pdf> visited on 27<sup>th</sup> August, 2011

<sup>45</sup> Leblanc R., UK, US and Australia Act to Address Directors, Diversity , Competency and Effectiveness, Available at <http://www.yorku.ca/rleblanc/media/2010-leblancJune-ICDarticle.pdf> visited on September 1st 2011

Article named, *The Chartered Directors: the Professional Qualification for Directors*,<sup>46</sup> the writer is of the considered opinion that modern business has changed. He went on to comment that there is now extra demand on directors. Thus it is vital that, as a business leader, you are up to date with best practice and current business thinking, hence learning and development toward a professional qualification is essential to improve the capability and the status as a director. The author states the advantages of professional directors as they are capable to appreciate and engage in business effectively and bring about sound corporate governance. Further, they improve board's effectiveness and their personal contribution to the company. That is why this research looked at the qualifications of Company directors in Tanzania under the Companies Act to see whether the Act is adequate or not.

**Winkelhof, (2006)** in the Article *Company Law Reform in Tanzania: the Companies Act 2002*,<sup>47</sup> comments that the Companies Act, 2002 has incorporated the principles of corporate government in respect with the duties of the company directors. Thus, the common law duties that were not present in the Companies Ordinance are now enshrined in the Companies Act, 2002, in his analysis however in respect of directors the writer did not point anything about the reforms with respect to the qualifications of the company directors from the old law the new Companies Act hence this study.

### **1.7 Research Methodology**

Research methodology shows the framework in which this research study was carried out. The empirical methodological approach for this study is informed by qualitative

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<sup>46</sup> Chartered Directors: The Professional Qualification For Directors, available at <http://www.gettingonboard.org/documents/charteddirectors2011.pdf> accessed on September 2<sup>nd</sup> 2011

<sup>47</sup> Winkelhof, Krista , (2006), Company Law Reforms in Tanzania: The Companies Act 2002, available at <http://www.lawworldwide.com/Company%20Law%20Tanzania.html> visited on 8<sup>th</sup> February 2012 at 12.00 Noon

research methods. The qualitative research is flexible with multi-method focus.<sup>48</sup> This part therefore tells about the research design, area of the study, population sample, sampling techniques, types of data, data collection methods, data collection tools and data analysis techniques.

### **1.7.1 Research Design**

This part of the research focuses on the structural aspect of the research. This aims at analyzing the way the study was organized to achieve the specific ends<sup>49</sup> Research design is the conceptual structure within which this research study is conducted, it constitute the blueprint for the collection, measurement and analysis of data. Research design facilitates the smooth sailing of the various research operations, thereby making research as efficient as possible yielding maximum information with minimum expenditure of efforts, time and money.<sup>50</sup> It is a grand research plan which determines what the researcher observed and analyzed in the in the selected companies, thus it focuses on issues that try to answer the two questions why and how. The research design of this study is be exploratory research design<sup>51</sup> which includes its literature survey<sup>52</sup>

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<sup>48</sup> Denzin, and Lincoln., (2000), Introduction: The Discipline and Practice of Qualitative Research, In N. Denzin and Y. Lincoln, (eds.), *Handbook of Qualitative Research*, Thousand Oaks, CA: SAGE pp1-28

<sup>49</sup> Milanzi, M.C., (2002), *Research Methods in Social Sciences: Theory, Philosophy, Methodology and Observation*, Institute of Public Administration, Mzumbe University, p.29

<sup>50</sup> Kothari, C. R., (1990), *Research Methodology, Methods & Techniques*, 2<sup>nd</sup> Edn., K.K. Gupter for New Age International (P) Ltd p.39, see also Rwegoshora, H. M. M. (2006). *A Guide to Social Research*, Mkuki and Nyota Publishers, Dar es Salaam p.83 where a research design is said to be an arrangement of the conditions for collection and analysis of data in a manner that aims to combine relevance to the research purpose with economy in procedure.

<sup>51</sup> Rwegoshora, H. M. M., (2006), (supra) defines exploratory research design as a design which is characterized by strong desire o discover the unknown, it is an adventure to expand human knowledge directed to a scientific discovery...it involves three methods namely survey concerning literature, experience survey and analysis of insights stimulating cases. Krishnaswami, O. R. and Ranganatham, M., (2005), *Methodologies of Research in Social Sciences*, (3<sup>rd</sup> Edn.), Himalaya Publishing House, Delhi p. 34 defines exploratory research to mean a preliminary study of unfamiliar problem which the research has little or has no knowledge, the purpose being among others to generate new idea, to increase researchers familiarity with the problem, together information for clarifying concepts.

<sup>52</sup> Krishnaswami, O. R. and Ranganatham, M., (2005), *ibid* p. 35, defines literature survey as a study of related and pertinent books, articles and reports turns up a number of leads and clues for further investigation that will advance the research. This involves literature pertaining to the problem, the literature that is connected with similar problems and seeking help from person who has already done a

(documentary review) and experience survey<sup>53</sup> (case study). All these are explained here below together with their significance.

### **1.7.1.1 Case Study**

This study involved a case study that is aimed at collecting raw or the primary data in natural settings. It is pointed out that case study employs various methods of data collection such as participant observation, interviews, and focus group discussions.<sup>54</sup> It is further contended that people's experiences are shaped by common established features, such as laws which are seen as natural for the purpose of creating accountability<sup>55</sup> this being the case therefore; the experiences of companies may be informed by the existing Act which is inadequate in its stipulation about the qualification of company director. To be able to explore, the experiences of such organizations, a case study approach was adopted.

It is further contended that social phenomena and nature of cases are situational and can reveal events in various ways, but they are shaped by many contexts which are either dynamic or complex. Any case study, is an empirical inquiry that investigates a social problem within its real life context, also it is a plan employed in a natural setting with the aim of understanding the nature of current processes in either an explored or understudied area, which is aimed at providing a holistic understanding of the social

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similar study.(in the study at hand it entails literature pertaining to the qualification of the company directors and company directorship as a whole in relation to the performance of companies )

<sup>53</sup> Krishnaswami, O. R. and Ranganatham, M.,(2005), *ibid*, experience survey includes interviews with persons experience in the area of the study; this helps the research in securing insights into the subject and its various facts. In selecting the person for this survey, representation to different facts of experience should be given. This therefore involved questioning or interviewing the people who had experience in the selected companies, the researcher also interviewed person who deal with the Companies Act indifferent aspects, this included academicians, advocates , judges and others to learn their experience in relation to the qualification of Company Directors and the performance of the companies.

<sup>54</sup> McCoy L. (2006)., *Keeping the Institution in View: Working with Interview Accounts Everyday Experience*. In Dorothy Smith (Edn.) *Institutional Ethnography as a Practice*, Lanham: Rowman and Littlefield , pp.109-125

<sup>55</sup> *Ibid*

problem.<sup>56</sup> Case studies for this research involved companies in Dar es Salaam including TANESCO, Mkurufuno General Trading Co. Ltd, 21<sup>ST</sup> Century Food & Packaging Ltd, Cargo Delivery Freighters Ltd and East Coast Oil & Fats Co. Ltd.

The case study is employed here for the purpose of allowing the exploration of the research problem in a natural setting so as to provide a whole and complex representation, description and explanation<sup>57</sup> about the qualification of companies' directors and the performance of Companies in relation to the Companies Act, 2002. The aim is to capture the views of directors/officers who are responsible in day to day management of the company working under these companies, in respect to the qualification of company directors as provided under the Companies Act.

#### **1.7.1.2 Documentary Review**

In order to understand the adequacy or otherwise the inadequacy of the Companies Act, 2002 on the qualification of the company directors, and the relationship between the qualification and performance of the company secondary data are imperative. Secondary data such as statutes books, journal, precedents, and articles related to the qualifications of company directors were examined. The information obtained from these documents were reviewed to study how qualifications of directors have been influenced by the Act and to what extent has the Act been or is used. Use of this approach helped to set a foundation for the study about the problem that is associated with the 2002 Companies Act about the qualification of company directors and the performance of companies.

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<sup>56</sup> Stake, R. E.,(2005), Qualitative Case Studies. In N. K. Denzin and Y.S. Lincoln. (3<sup>rd</sup> Edn.) And book of Qualitative Research Thousand Oaks, CA: Sage Publications. pp. 651-679, see also Rwegoshora, H. M. M., (2006), at p. 86, he comments that a case study or experience survey is aimed at obtaining an insight into the relationship between variables rather than to get an accurate picture of current practices. Social problems, as well as we all know are complicated affairs. The whole material about a particular problem is not collected from one place. Sometimes there are individuals who have earned experience through which they are able to understand and analyze the social reactions. These individuals are not able to record their experience in black and white, the researcher has to tackle them and take advantage of their experience. He has to establish a liaison with such individuals and groups of individuals. This public relation is very helpful for him. He has therefore to act in very intelligent manner.

<sup>57</sup> Creswell, J. W. (1998). Qualitative Inquiry and Research Design: Choosing among Five Traditions, Thousand Oaks, CA: Sage

In accordance with several writers, documents can act as functioning agents, which influence social relations<sup>58</sup> or documents can be viewed as social facts which are produced, shared, and used in various social ways<sup>59</sup> (for example The Companies Act regulates the social contract between the members of the company with the company, the outsiders with the company and members among them.<sup>60</sup> It is also important to understand the nature under which the documents are used. Materials from or information collected from the University of Dar es Salaam, Mzumbe University, Kampala University Dar es Salaam, Commercial Division of the High Court. The materials which were consulted included among others, books, reports, statutes, journals, articles published and unpublished materials relevant to this study.

### **1.7.2 Area of the Study**

The area of the study of this research is Dar es Salaam, Tanzania. This is because Dar es Salaam is a big city in Tanzania. In addition, the city is more populated than any other city in Tanzania. It is suggested that the city is the centre for industry, education and is a diversity of people from almost all the Tanzania regions, which makes its culture unique. Furthermore, Dar es Salaam is one of the international recognized cities because of the international airport and the sea port, which make it the most important city not only in terms of businesses but also economically as it provides about 60% of the national income.<sup>61</sup> Furthermore, most businesses, official and private have their headquarters in Dar es Salaam, and also it has the higher concentration of businesses and companies than any other region in Tanzania.<sup>62</sup>

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<sup>58</sup> Prior, L., (2004), Documents. In C. Seale et. al. (eds.), *Qualitative Research Practice*, London/Thousand Oaks: Sage Publications, pp. 345-360

<sup>59</sup> Atkinson, P. and Coffey, A., (1997), *Analysing Documentary Realities* in D. Silverman (Ed.), *Qualitative research: Theory, method and Practices*, London: Sage. pp. 45-62

<sup>60</sup> Section 18 of the Companies Act

<sup>61</sup> <sup>61</sup> Kithakye et al, (2009), *Tanzania Dar es Salaam City Profile* prepared by Human Settlements Programme- UN HABITAT. Nairobi UNONN, Publishing Services Section

<sup>62</sup> Ibid

The rationale of selecting the case study of companies in Dar es Salaam stems from reasons that include: First, it was easier for researcher to access the case under the study, given the availability of a number of companies available in the city. Second, it was also helpful as all the researchers secondary sources of data were to be obtained from most universities in Dar es Salaam. In other words it was easy and convenient in making quick references to the secondary data as needed. Third, the researcher's familiarity and work experiences and living experiences in the city of Dar es Salaam were helpful in accessing the field as well as participants as needed. Fourth, given lack of resources, such as funding of the research it could be very expensive to travel and conduct this research in other regions in Tanzania and lastly the Registrar of companies and the high court judges of the commercial division of the high court are all situated in Dar es Salaam. Therefore, it was from these reasons that the researcher selected all the companies from the city of Dar es Salaam.

### **1.7.3 Population Sample**

A total 63 respondents were recruited for this study. The population sample was based on the following categorization of respondents. The 5 companies namely TANESCO, Mkurufuno General Trading Co. Ltd, 21<sup>st</sup> Century Food & Packaging Ltd. Cargo Delivery Freighters Ltd and East Cost Oil & Fats Co. Ltd in which a total of 7 respondents were proposed but only 5 respondents responded, namely the Directors, Human Resources Managers, Company Secretaries and other officers with different capacities were interviewed. The researcher also conduct interviews and questionnaire with 20 advocates dealing with company law, 7 academician experts in Company Law, but only 4 responded, 3 high court judges of the Commercial Division where one judge and the registrar of High Court commercial Division was interrogated, 8 Magistrates from the resident magistrates of Dar es Salaam at Kisutu where only 7 responded, and other 16 lawyers, the researcher also interviewed 2 Registrars of companies from BRELA.

### **1.7.4 Sampling Techniques**

Choosing a study sample is an important step in any research project since it is rarely practical, efficient or ethical to study the whole population.<sup>63</sup> In obtaining the respondents, the researcher used a systematic sampling method and purposive sampling. Systematic sampling method requires that, the population be accurately listed in such a way that each element of the population can be uniquely identified by its order. It consists of the selection of the term from the list.<sup>64</sup> The advantage of systematic sampling is that the information obtained is reliable.<sup>65</sup> Purposive sampling enables the researcher chooses respondents because of certain criteria<sup>66</sup> it is a deliberate selection of sample units that conforms to some pre- determined criteria. This involves the selection of cases which we judge most appropriate ones for the given study.<sup>67</sup> That being the case therefore the selection of the respondents in this research is based on the reason that, the respondents must be well acquainted with company law, management skills and experience since the research at hand highly requires knowledge in company law and corporate management.

### **1.7.5 Types of Data, Data Collection Methods and Tools**

#### **1.7.5.1 Types of Data**

The word data is defined to mean and include all the information that the researcher collected and gathered for this study.<sup>68</sup> There are two types of data namely primary and

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<sup>63</sup> Mashall, M.N., (1996), Sampling for Qualitative Research , Family Practice, Oxford University Press, UK p.522

<sup>64</sup> Myneni, S. R. (2001). Legal Research Methodology, Allahabad Law Agency, Assian Offset Press p.226

<sup>65</sup> Ibid

<sup>66</sup> Dooley, D. (1995), Social Research Methods, (3<sup>rd</sup> Edn.), Prentice- Hall of India Private Limited, Delhi p. 136

<sup>67</sup> Krishnaswami, O. R. and Ranganatham, M., (2005), *ibid* p. 139 it is based on the judgment of the researcher or some experts, the chance that a particular case be selected for the sample depends on the subjective test of the researcher. The advantages being it is less costly and more convenient and it guarantee inclusion of relevant in the sample.

<sup>68</sup> Mugenda, O. M. and Mugenda, A.G., (2003), Research Methods: Quantitative and Qualitative Approaches, Acts Press Nairobi p. 64

secondary data. In this research, the researcher used both types of data: primary and secondary.

### **Primary Data**

Primary data is the original information collected for the first time. It is the information that is collected directly from the subjects. It is the information that is obtained from the persons who are directly affected by the problem or information that is obtained through observation.<sup>69</sup> In this research primary data were obtained from the companies namely TANESCO, Mkurufuno General Trading Co Ltd, 21<sup>st</sup> Century Food and Packaging Ltd, Cargo Delivery Freighters Ltd and East Cost Oil and Fats Co. The researcher managed to interview people likely to be affected by the problem namely the directors of the company and other officials of the company. In line with this the researcher also had responses from academicians, judges, advocates, lawyers and the Registrar of companies this happened to know the topic at hand.

### **Secondary Data**

Secondary data is the information that is obtained from published sources such as books, journals. Articles or from someone who worked on the subject.<sup>70</sup> This included reviewing of written materials including statutes, books journals, and case laws. Or it might be information from a person who had dealt with the problem at one point or the other for example through research however in this study none of this was available. This research employed secondary data from books, articles from internet sources and case laws. This is based on the footing that it enabled the researcher to know the research gapes and the extent in which the qualification of company directors has been underscored by other writers. It also helped the researcher to verify the findings on primary data.

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<sup>69</sup> Dr. Myneni, S. R., (2001), p.134

<sup>70</sup> Ibid

### **1.7.5.2 Data Collection Methods and Data Collection Tools**

In this research the primary data was obtained from a case study or experience survey by interviewing and questioning key participants who were in position to answer the question. In this study the following data collection tools were employed. Personal interviews and questionnaires survey were the main methods used in collecting primary data. Secondary data was collected by literature review. These are discussed herein below:-

#### **Interviews**

Interview as a method of data gathering, is a verbal method of securing data, it is a conversation with purpose.<sup>71</sup> It is a two way systematic conversation between the researcher and an informant initiated for obtaining information relevant to the study involves not only conversation but also learning the respondent's gesture, facial expression and pauses and his environment.<sup>72</sup> The researcher chose using interviews because the approach allowed the researcher to elaborate questions to the respondent, helps to gather relevant information to the respondents it is simple and also less time consuming.<sup>73</sup> Furthermore the researcher was able to verify the accuracy and dependability of answers given by the respondents through observation and probes. This being the case a set of pre-determined interview guide was prepared; these were used when interviewing respondents of different categories. In this study, the researcher used semi-structured and unstructured interviews. The interviews were aimed at gathering the first hand information relating to the research hypothesis and questions for what are happening in practice to the companies and other person who directly or i

#### **Questionnaire**

Questionnaire is another method that was used for collection of primary data in this study. Questionnaire is the method of investigation of social legal problems; it is used to

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<sup>71</sup> Ibid , p.186

<sup>72</sup>Krishnaswami, O.R. and Ranganatham, M. (2005), ibid p. 183

<sup>73</sup> Ibid p 188

collect data from large scatted population. It is a list of question to be answered by a group of people, especially to get facts or information about their view.<sup>74</sup> The advantage of questionnaire to this research was to the effect that it helped me to get the respondents who do not have time for the interview with the researcher following the availability and time they have in their official capacity. More specifically questionnaires were used to advocates and lawyers in this study. The researcher prepared a questionnaire guide.

### **Documentary Review**

Since the purpose of this research was to explore the qualifications of the company directors in Tanzania by making an analysis of the companies Act, 2002 in relation to the performance of the companies, Secondary data was collected by documentary review which involved reviewing job descriptions and advertisements for companies. Selected companies were contacted to provide their company profiles and job qualifications they have for their company's directorship. Other documents included statutes, books journals, and case laws to name a few. These documents were obtained from different libraries, such as the Mzumbe University Library, Tumaini University Library, The High Court Commercial Division Library, The University of Dar es Salaam Library, the Kampala University Dar es Salaam Library. The purpose of these documents was to provide some of the information that was useful in answering the research problem and in making a comparative analysis in other jurisdictions.

### **1.7.6 Data Analysis Techniques**

This research used qualitative data analysis, which is the process in which we move from the raw data that have been collected as part of the research study and use it to provide explanations, understanding and interpretation of the phenomena, people and situations which were under the study. The aim of analysing qualitative data is to

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<sup>74</sup> Ibid p197

examine the meaningful and symbolic content of that which is found within. What we are aiming for is to try to identify and understand such concepts, situations and ideas<sup>75</sup>

Qualitative research method involves the procedure in which the research question requires an understanding of the processes, events and relationships in the context of social and cultural situation. Qualitative research aims at producing factual description that is based on face to face knowledge of individual and social groups in their natural setting that is relevant to this study. It is useful for obtaining insights into situations and problems concerning which one may have little knowledge

It is argued that a qualitative method can be used for better understanding of phenomena which is not well known. It can also be used to gain new perspectives on the things or issues that are already known or to gain more in depth information that may be difficult to convey quantitatively.<sup>76</sup> With the research at hand it was imperative that qualitative method was used to analyze data to explain the problem.

The researcher used content analysis<sup>77</sup> with respect to documentary data which were obtained from the named libraries above from. In addition, the analysis of primary data included the tabulation and graphing of the said data to explain the problem at hand.

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<sup>75</sup> [http://www.researchproposalsforhealthprofessionals.com/qualitative\\_data\\_analysis1.htm](http://www.researchproposalsforhealthprofessionals.com/qualitative_data_analysis1.htm) accessed on 21 day of October 2012 at 19.15 PM

<sup>76</sup> Marie C. H., Choosing Qualitative Research: Primary for Technology Researchers, in Journal of Technology Education, Vol. 9 No.1 of 1997

<sup>77</sup> Krishnaswami, O. R. and Ranganatham, M., (2005), *ibid* pp 211-212 defines Content analysis is a research technique for making inferences by objectivity and systematically identifying certain specified characteristics of a content of a document. This is the method of data collection and data analysis. This is used for gathering data from archival records, documents, news paper. The content of the written material serves as a basis of inference. The analysis is made objectively and systematically. Objectively refers to making analysis on the basis explicit rules which enable different researchers to obtain the same results from the same document. Systematic analysis refers to making inclusion or exclusion of content of according to consistently applied criteria of selection; only materials relevant to the research design are examined.

## **1.8 Limitation of the study**

There are different kinds of companies that have various roles. Therefore one of the challenges is to identify a sample of respondents that will be representative of companies operating in Tanzania.

Again, the researcher encountered some problems such as getting the timely responses; some respondents did not have time for interview with the researcher; and some respondents did not respond to the questionnaire. Only few respondents responded to the questionnaires and some of them who respond did not answer all questions. However in some areas it was difficult to get the respondents because some of the people feared to provide information believing the researcher was the spy who was sent to acquire certain information; consequently the researcher had only one judge and the registrar of commercial Division instead of the proposed 3 judges. In the case study also the researcher could not get 2 respondents in the selected companies as it was proposed and 3 academicians.

The researcher also incurred additional costs when in making follow-ups of the respondents who in most cases were not available due to busy schedule on daily working activities in their respective offices. There was also a problem with the-time frame for completion of the dissertation compared to the multitude of the respondents selected and the nature of the problem particularly getting responses on time.

As noted in the previous section the challenges above were dealt using different approaches. For instance, the researcher had to remind the respondents particularly those who were given questionnaires that their opinions were vital in getting accurate information about the legal aspects governing directorship of the companies. Therefore, the researcher consulted the respondents by making phone calls, speaking to them and also seeking audience to speak with them. In some situation the researcher asked the respondents to fill the questionnaire in her presence. This helped approach as

respondents were able to get clarification on some questions appearing on the questionnaire.

Overcoming other problems such as getting information for the questions that were not answered by the respondents while responding to the questionnaire, the researcher had to ask the same questions when conducting interviews. This approach helped the researcher obtain information to all the questions appearing on the questionnaire.

The researcher had to assure all candidates that the purpose of the research was academic only and the research had nothing to do with espionage. In addition, the researcher assured the candidates that she was not a spy particularly for those who had fears about the purpose of the research. In many occasions the researcher had to show the research proposal to those respondents who were worried. This approach helped build confidence among respondents. Consequently the respondents were able to provide their opinions freely. In addition, the researcher assured participants that their names would not appear in the published document for privacy reasons.

Overcoming the problem of additional costs due to follow-ups, the researcher devised a mechanism in which initial contacts with respondents were made using phone calls and agreeing on dates and times for interviews. In addition, before meeting with the respondents, the researcher called the participants to confirm if there were ready for interviews.

All these mentioned problems in one way or another contributed to the delay of finishing the dissertation. However, every challenge encountered and progress made was directly reported to the supervisor and the guidance was given on how to address the challenges encountered.

## CHAPTER TWO

### THE COMPANY DIRECTORSHIP IN TANZANIA: GENERAL OVERVIEW

#### 2.0 Introduction

Although the company is an independent legal entity it needs human being to manage it.<sup>78</sup> The company being an artificial legal person can only act through its human legal representatives.<sup>79</sup> The key management figures are the directors. These directors are primarily responsible for the daily management of company and development of company policy.<sup>80</sup> They are shareholder's elected representative delegated with the powers to the business of the company; they thus exercise dominion and control over the company, hold the position of trust and confidence and determine the question of operating policy.<sup>81</sup>

The Companies Act, under Section 181, is in conformity to the above observation in that it entrust the management of the company to directors, who are vested with all powers necessary for managing, directing and supervising the management of the business and affairs of the company.<sup>82</sup>

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<sup>78</sup> Adams, A. (1996), op.cit p.311

<sup>79</sup> Sealy, L. and Worthington, S., (2007), op.cit, p. 241, Singh A., (2005) at p 238 exemplifies that, a corporation is a artificial being, invisible, intangible and existing only in the contemplation of law, it has no mind nor body of its own, a living person has a mind which can have knowledge or intention and he has hands to carry out his intention. A corporation has none of these, it must act through living persons, this makes it necessary that the company company's business should be entrusted to some human agents, hence the necessary of the directors

<sup>80</sup> In so doing Section 182 of the Companies Act, requires the directors of a company, when exercising or performing duties, must act in honestly and in good faith and in what the director believes to be the best interests of the company.

<sup>81</sup> Mann, R. A. and Roberts, B. S., (2000), Business Law and the Regulation of Business, 8<sup>th</sup> Edn., Sweet and Maxwell, London p 716

<sup>82</sup> The Companies Ordinance had no such provision, in essence section 181 of the Companies Act provides that, subject to any modifications, exceptions or limitations contained in the company's articles, the directors of a company have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of a company.

Among other things, this chapter deals with the concept of company directors, the types of the company directors, the mode of appointment of the company directors, number of the company directors and the legal position of company directors in the company

## 2.1 The Concept Company Directors

The Companies Act defines a director of the company as any person occupying the position of the director by whatever name called.<sup>83</sup> This means that a person who performs the duties of the director will be known as the director irrespective of the name which he is called.<sup>84</sup> The directors of the company collectively are known as the board of directors.

It is therefore, quite clear that the definition is not exhaustive. However Section 181 read together with the interpretation section, that is Section 2 of the Companies Act, provides a functional definition of who is a director. The two section together defines a company director, as the person who has full powers of managing, and for directing and supervising the management of, the business and affairs of the company, it matters not name he is called.

Several books and case laws have also defined the concept company director. For example **Paris and Randall**<sup>85</sup> define the company director as a person responsible for day to day management of the company who are responsible of conducting the company's business and the internal affairs of the company in accordance with the law, and the company's own memorandum and articles of association. **Singh** defines a

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<sup>83</sup> Section 2 of the Companies Act defines the company director to include any person occupying the position of a director by whatever name called.

<sup>84</sup> Bagrial A. K., (2007), op.cit p.268 also see the case of Re Forest Dean Coal Mining Co.(1878)10 Ch. D P 450, Jessel, M.R observed that it does not matter what you call them so long as you understand what their real position is, which is that they are really commercial men managing a trading a concern for the benefit of themselves and of all the shareholders

<sup>85</sup> Paris S. and Randall LLP, (2008), A Guide for Company Directors, Hampshire Premier Law Firm, Southampton, p.1

director as a professional man hired by the company to direct the affairs of the company.<sup>86</sup>

A company director may also be defined as an appointed or elected member of the board of a company who, with other directors, has the responsibility for determining and implement the company policy. This person does not need to be a shareholder or an employee of the company and may only hold office of director if he has all the qualifications required by the law. They are required to act on the basis of resolution made by all directors meeting and from the company's articles and memorandum of association.<sup>87</sup>

**Lord Cranworth** attempted to define the term company director in the case of *Aberdeen Railway Co.v Blaike Bros*<sup>88</sup> as follows

*A body to who is delegated the duty of managing the general affairs of the company. A corporate body can only act through agents, and it is of course the duty of those agents to so act as best as to promote the interest of the corporation whose affairs they are conducting.*

The case of *Bath v Standard Land Co.*<sup>89</sup> Defines directors in term of the whole management team as,

*The board of directors as the brain of the company which is the body and the company can and does act only through them.*

Hence one can define the company directors to mean the persons who directs, conduct, manage or superintend of the company affairs,<sup>90</sup> they are the one who check out the general policy of the company within the framework of the memorandum of association

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<sup>86</sup> Singh, A. (2004). Company Law, op.cit p408

<sup>87</sup> Company director available at <http://www.businessdictionary.com/definition/company-director.html> visited on 23<sup>rd</sup> January 2012 at 12.00 noon

<sup>88</sup> Aberdeen Railway Co. v Blaike Bros (1854) MACQ 461

<sup>89</sup> Nevil J in Bath v Standard Land Co (1910) 2 Ch 408

<sup>90</sup> Gulsham, S. S. and Kapoor G.K., (2008), op.cit p. 467

of the company.<sup>91</sup> It is immaterial the name these individuals are called as long as they perform the functions of the directors, they shall be directors of the company.

## **2.2 Types of Company Directors**

All company directors must possess reasonable depth of awareness about company laws relating to the company formation, various statutes the company has to observe, various provisions regarding the constitution and functioning of the board and the functions of directors among others.<sup>92</sup>

Legally, there is no distinction between executive and non-executive directors, both as directors and officers of the company; they all remain equally accountable for the proper conduct of the company affairs in the interest of the company. There is no such creatures in law as executive and non-executive directors, and they, along with the independent and shadow directors defined by the 2002 Kings Report of The United Kingdom (UK) on Corporate Governance, these are little more than creations of corporate governance literature. A director once appointed is just a director of the company.<sup>93</sup> This is quite true that even our Companies Act does not stipulate the types of a company director as far as the law is concern, someone is either a director or he/she is not. However, it is important to see the types of directors.

### **2.2.1 Executive Directors**

These are working directors of the company who are usually full time employees and have specified decision making role for example directors of finance, marketing or operation to name a few.<sup>94</sup> They are responsible for the day to day management of the company. Table A, Regulation 75 to the Schedule to the Companies Act recognize the

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<sup>91</sup> Ibid

<sup>92</sup> Kumar, S., (2010), Corporate Governance, Oxford University Press, New Delhi p.444

<sup>93</sup> Appointment, Qualification and Purpose of Directorships available from <http://www.gt.co.za/Publications/Effective-directors-guide/appointment.asp> retrieved on January 18, 2012 at 14.09 pm

<sup>94</sup> <http://www.businessdictionary.com/definition/executive-directors.html> accessed on January 24, 2012 at 15.30 p.m

existence of the executive director.<sup>95</sup> Executive directors work for the company full time and have expertise and experience relevant to the management of the company. They may be engaged by the company under the contract service provided that the articles do not state otherwise. In a small private company all directors will be full-time managers but will decide informally how much the company can afford to pay them.<sup>96</sup>

Executive directors can also be defined as directors who carry out functions in the company, as well as their duties as board members. They are usually employees of the company and also have rights and duties separate from those arising out of their position as directors. For example, although an executive director may not be entitled to compensation if dismissed as a director, if this dismissal also affects his or her employment contract (which is usually the case) he or she have rights under his or her service contract as well as rights under employment protection legislation.<sup>97</sup> However, a person who becomes a director of the company will not automatically become its employee, but may do so if he takes on responsibilities in addition to those assumed simply by being a board member. A director will do so if he or she enters into a service contract with the company.<sup>98</sup>

The standard of care which is required by the executive directors is much higher than what is required by the non-executive directors but both types are liable in case of

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<sup>95</sup> The regulation provides that directors may appoint one or more of their number to the office of the managing director or to any other executive office under the company and may enter into an agreement or arrangement with any director for his employment by the company or for the provision by him of any services outside the scope of the ordinary duties of a director...Any appointment of a director to an executive office shall terminate if he ceases to be a director, but without prejudice to any claim to damages for breach of contract of service between the director and the company.

<sup>96</sup> Adams, A., (1996), op.cit, p. 312

<sup>97</sup> Freshfields Bruckhaus Deringer. (2011), A Guide for Directors of UK Listed Companies p.15, available at [www.freshfields.com](http://www.freshfields.com) down loaded on 23<sup>rd</sup> March 2012 at 12.00 Noon

<sup>98</sup> Ibid p.16, see also in the case of Employee State Corp. Apex Engineering (P) Ltd.1 CLJ 10 it was held that a managing director has dual identity. A managing director perform duties over and above the duties of the ordinary director and therefore can as well be treated as an employee

mismanagement of the company.<sup>99</sup> These directors exercise their powers subject to the superintendence control and direction of the board of directors.<sup>100</sup>

### 2.2.2 Non Executive Directors

Non- executive directors are the directors who are not involved in day to day management of the company. They are appointed from outside the company. These are commonly found in large companies and have advisory and supervisory roles.<sup>101</sup> It is argued that the rationale behind the appointment of non executive directors is that, since they are not involved in the day to day management of the company, they can bring up independent opinion to the board of directors<sup>102</sup>. In case of *Equitable Life Assurance Society v. Bowley*<sup>103</sup> Langlay J has the following to say

*Company may reasonably at least, look for non executive directors for independence of judgment and supervision of the executive management.*

It is further commented that companies do appoint non-executive directors due to the experience and expertise or business connections.<sup>104</sup> Non-executive directors have the same statutory duties and liabilities as executive directors but they are not employees of the company and normally do not have the same involvement in the company day to day affairs.<sup>105</sup> In the case of *Deloitte Haskin & Sells v National Mutual Life Nominees Ltd*<sup>106</sup> the court did not accept that the a lower standard of care to be imposed on a non-executives director than executive directors. Thus they stand in the same footing as executive directors in case of accountability of their actions.

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<sup>99</sup> Adams, A.,(1996), op.cit, p. 312

<sup>100</sup> Gulsham , S. S. and Kapoor. G.K., (2008), Op.cit p.478

<sup>101</sup> Ombella, J. S. and Massawe, M. P. (2011). op.cit, p112

<sup>102</sup> Ibid

<sup>103</sup> *Equitable Life Assurance Society v. Bowley* [2003] WEHC 2263 at 41

<sup>104</sup> Sealy, L. and Worthington, S. (2008), op.cit, p.245

<sup>105</sup> Fresh fields Bruckhaus Deringer., (2011), op.cit

<sup>106</sup> *Deloitte Haskin & Sells v National Mutual Life Nominees Ltd* (1991)5 N Z CLC 67

The role of non executive directors to mention but a few among others is to provide an objective and independent advice to the board to enable it to make better decision in the interest of all shareholders, to monitor and challenge the performance of the executive directors and the management team to bring a genuine independent perspectives to enhance the decision making. They also have a role to provide value added input to the strategy and strategic development as well as to act in the best interest of the company as the whole rather than any one particular group of shareholders. Further roles include assisting the board on carrying on well their duties such as reviewing, approving and ongoing monitoring of the strategic plan, reviewing organizational capability in relation to the stated objectives of the company, reviewing financial targets against targets, raising the capital of the company, reviewing any change in the company, such as financial and organization structure.

### **2.2.3 Shadow Directors**

A shadow director is a person in accordance with whose direction or instruction the directors of the company are accustomed to act.<sup>107</sup> In *Ultraframe (UK) Ltd v Fielding and Other*,<sup>108</sup> The English Court held that a shadow director is that person at whose direction majority board of directors is accustomed to act. Thus a person is not deemed a shadow director, by a reason only that the directors act on advice given by him in a professional capacity. A shadow director does not purport to act as a director of the company but in the background behind controlling, the persons who are actual directors

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<sup>107</sup> Ferran, E., (2003), Company Law and Corporate Finance, Indian Edition, Oxford University Press p.156, however the Hong Kong Companies Act define a shadow director in relation to the company as, “a person in accordance with whose direction or instructions the directors or majority of the directors of the companies are accustomed to act”, the term majority of directors makes it clear that a person is a shadow director if he controls only all the directors or the majority of directors, but he is not a shadow director if he controls only one director of the company or the minority of the directors: available at <http://www.app.mof.govsg/data/cmsresources/public%20consultation/2011> visited on 23rd March, 2012 at 14.00 PM

<sup>108</sup> *Ultraframe (UK) Ltd v Fielding and Others* [2005] Ch. 1638

of the company.<sup>109</sup> They are persons who are not actual company directors but control the management of the company.<sup>110</sup>

Simply it can be concluded that a shadow director is any person other than a professional adviser, with whose instructions the directors of the company normally comply.<sup>111</sup> They are person who are not actually appointed directors but whose advice is followed by the actual directors in whole the management of the company. Shadow directors largely have the same obligations as any other director and should comply with all duties and obligation imposed on appointed directors.<sup>112</sup>

The implication of acting as the shadow director is that you can be treated as you were the director with all legal obligations and duties of the director. Thus the rule regarding the disclosure of interests and dealings in company shares applies as if the shadow director was a director as well as sanctions against insider dealing. For example if the company becomes insolvent and receivership or liquidation takes place then the shadow directors may also be covered by statutory restrictions and disqualification orders issued by the court.<sup>113</sup>

#### **2.2.4 Alternate Directors**

An alternate director is a director who is appointed by the director to represent him or her at the board meetings if he is an able to attend. This is done particularly if the articles of association of that company so allow and in practice it are usually exercised by the

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<sup>109</sup> Ferran, E. (2003), *op.cit*

<sup>110</sup> *Ibid* p 156, see also Morse G., (2005), *Charlesworth's Company Law*, 17<sup>th</sup> Edn., Sweet and Maxwell, London p.269 thus shadow directors are persons in accordance with whose instructions the directors are accustomed to act, excluding purely professional advice. They claim not to be directors but hide behind those who are.

<sup>111</sup> Ombella, J. .S and Massawe, M. P., (2011), *op.cit*, p 103

<sup>112</sup> Paris, S. and Randall, L. L.P., (2008), *A Guide for Company Directors*, Hampshire Premier Law Firm, Southampton, p.1

<sup>113</sup> Marry, F., (2007), *Responsibilities of Directors in Ireland, Your Question are Answered*, Irish Independent Best Companies To Work For Ireland, p 11

other directors.<sup>114</sup> Alternate directors are useful if the director has many commitments which may from time to time result in prolonged absences from the Board.

The appointment of the alternate director can solve the problem relating to the quorum and others. Actually there is no statutory authority for a director to appoint an alternate to act in his place in the event of his absence. They are appointed only if the articles of association of the company so allows.<sup>115</sup> An alternate director ceases to be an alternate director of his appointer ceases to be a director.<sup>116</sup> That is say the termination of the appointment of the director (principal) will *ipso facto* terminate the appointment of an alternate director. When serving in an alternate capacity, alternate directors have the same rights, duties and responsibilities as any other director and there is no distinction drawn in the law between the principal and an alternate director.<sup>117</sup>

### 2.2.5 De-facto Directors

Persons who act as if they were directors although they have never been appointed as such are called as de-facto directors.<sup>118</sup> Millet J, in the case of *Re Hydrodan (Corby) Ltd*<sup>119</sup> defined a defector director as

*A person who assumes to act as a director, he is held out as a director by the company, and claims and supposes to be a director, although never actually or validly been appointed as such. To establish that a person was a de-factor director of a company it is necessary to plead and prove that he under took functions in relation to the company which could properly*

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<sup>114</sup> Adams, A., (1996), op.cit, p. 312

<sup>115</sup> Keenan, D., (2005),op.cit, p. 311

<sup>116</sup> Keenan, D., (1999), Company Law for Students, 11th Edn., Financial Times Publishing Company. p 277, however if the director retires by rotation or otherwise but is reappointed or deemed to have been reappointed at the meeting at which he retire, any appointment of an alternate director made by him which was in force immediately prior to the appointment continues after his re appointment. Further that any appointment of an alternate director is by notice to the company signed by the director making the appointment or in any other manner approved by the directors.

<sup>117</sup> See section 182 of the Companies Act

<sup>118</sup> Morse, G., (2005), Charlesworths' Company Law, 17<sup>th</sup> Edn., Sweet and Maxwell, London p 267

<sup>119</sup> *Re Hydrodan (Corby) Ltd* [1994] 2 B.C.L.C 180

*be discharged by directors. It is not sufficient to show that he was concerned with the management of the company affairs or undertook tasks in relation to its business which cannot properly be performed by a manager below the board level.*

Also in the case of *Re Kaytech International Plc*<sup>120</sup> held that a de-facto director

*Must be a person who assumes the status and functions of a director so as to have openly exercised real influence in the corporate governance of the company.*

Therefore a defector director is a person who acts as a director without having been appointed validity. Many companies will give certain individuals a job title such as associate's director, despite the fact that this person is not actually a director of the company. Companies should be careful when doing this; however, as giving any one who is not a director, may allow a customer or supplier to claim that they believed they were dealing with a director of the company.<sup>121</sup>

### **2.3 Appointment of Company Directors**

The Companies Act provides that every company shall have at least two directors. This means that without exception both a private company and a public company should have at least two directors.<sup>122</sup> The mode of appointment of the company director depends on whether the directors are the first directors or subsequent directors or directors who cover casual vacancies in the company. It have been noted that although the company's shareholder are usually authorized by the articles of association to appoint directors, in practice the board of directors appoint most of directors. These appointments must then be confirmed at the Annual General Meeting after their appointment.<sup>123</sup> After

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<sup>120</sup> *Re Kaytech International Plc* [1999] 2 B C. CL. 351

<sup>121</sup> Paris S. and Randall LLP, (2008), op.cit

<sup>122</sup> Section 186 of the Companies Act

<sup>123</sup> <http://www.gt.co.za/Publications/Effective-directors-guide/appointment.asp> retrieved on January 18, 2012 at 14.09 pm also see Regulation 78 of the Schedule of Table A to the Companies Act.

appointment of the director he must sign consent to act as a director.<sup>124</sup> Directors may be appointed in the following ways.

### **2.3.1 The First Directors of the Company**

The first directors are usually named in the articles of association or alternatively the articles may provide that the number of directors and the names of the first directors shall be determined by the subscribers to the memorandum by majority of them.<sup>125</sup> If the articles does not contain the names of the directors or any provisions for appointment of the directors then persons who subscribed to the memorandum of association. However this is not effective until such directors have signed a statement of consent to be directors which consent is filled to the registrar for registration together with the memorandum and articles of association.<sup>126</sup> Any appointment by any article delivered with the memorandum of a person as director is void unless he is named as a director in the statement.

### **2.3.2 The Subsequent Directors**

The subsequent directors of the company are usually appointed in the general meeting of the company for example by an ordinary resolution. Retiring directors can be eligible for re-appointment if the articles so permits.<sup>127</sup> Section 192 of the Companies Act provides for the mode of the appointment of directors that is directors of the public company cannot be appointed by a single resolution unless a previous resolution authorizing this

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<sup>124</sup> Section 190 of the Companies Act provides that a person shall not be capable of being appointed a director of the company by the articles unless, before the registration of the articles or the publication of the offer document, as the case may be, he has by himself or by his agent authorized in writing signed and delivered to the Registrar for registration a consent in writing to act as such directors. Likewise after the appointment of the subsequent directors they must signify their consent to the Registrar of companies.

<sup>125</sup> Bagrial, A. K. (2007), op.cit, p.270 see also Table A Regulation 69 to the schedule to the Companies Act, provides that the number of directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association or a majority of them and until such determination the signatories to the memorandum of association shall be the first directors, unless otherwise determined by the ordinary resolution, the number of directors shall not be subject to any maximum but shall not be less than two

<sup>126</sup> Keenan, D., (2005), op.cit, p. 309 see also Abott, K. Et al, (2007), op.cit, pp 416-417, also see section 190 of the Companies Act.

<sup>127</sup> Abott, K. Et al, (2007) op.cit p 417

has been passed without any dissent, thus appointment of directors of public companies are supposed to be voted on individual bases or merits.

### **2.3.3 Casual Vacancies**

Appointment of directors to fill casual vacancies happens when there are casual vacancies such as, a vacancy caused by death, mental illness or any incapacitation of the director to the effect that he is unable to perform the functions of a director. This can also happen upon a resignation tendered by the director. In these cases the articles of association may allow the board of directors to appoint directors to fill such vacancies or may allow appointing additional directors.<sup>128</sup>

### **2.4 The Legal Position of Directors to the Company**

The position that directors occupy in a corporate enterprise is not easy to explain.<sup>129</sup> It is noted that directors are professional men hired by the company to direct the affairs and manage the company.<sup>130</sup> Case laws have demonstrated the position of directors in the company. The case of *Imperial Hydropathic Hotel v Hamson*<sup>131</sup> Bowen MR stated that;

*Directors have sometimes been called trustees, or and sometimes they have been called managing partners, but each of the expressions is used not as exhaustive of their powers and responsibilities, but as indicating useful points of view from which they may for the moment and for the particular purpose he considered.*

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<sup>128</sup> Ibid, also see Regulation 84 and 85 of the Schedule of Table A to the Companies Act, which provides that the company may by ordinary resolution appoint a person who is willing to act to be a director either to fill a vacancy or to be an additional director, the regulation further provides that the directors may appoint a person who is willing to act as a director, either to fill a casual vacancy or as an additional director, provided that the total number of directors does not exceed the number fixed by or in accordance with the articles. A director so appointed shall hold office only until the next following annual general meeting and shall be eligible for re-election.

<sup>129</sup> This was stated in the case of *Ram Chand & Sons Sugar Mills v Kahayalal*, AIR[1966] 2 L J 224

<sup>130</sup> Section 181 of the Companies Act provides that directors of the company have all powers necessary for managing, and for directing and supervising the management of , the business and affairs of the company

<sup>131</sup> *Imperial Hydropathic Hotel v Hamson* (1882) 23 Ch. D 1

In the case of *Forest Deen Coal Mining Co. Re*<sup>132</sup> Jessel MR stated that;

*Directors have sometimes been called as trustee, or commercial trustees and sometimes and sometimes they have been called managing partners, it does not who you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all other shareholders.*

Therefore directors of the company have been described to have various legal positions in respect with the company, that is, sometimes are deemed as trustees, sometimes as agents and sometimes as employees and sometimes managing partners of the company.<sup>133</sup>

#### **2.4.1 Directors as Agents of a Company**

Since a company is an artificial person, it acts through directors who are elected representatives of the shareholders. In the eyes of law directors are the agents of the company for which they act,<sup>134</sup> and the general principles of the law of agent and principal in most respect the relationship between the company and its directors.<sup>135</sup> In the case of *Ferguson v. Wilson*<sup>136</sup> it was stated that, the company has no person; it can act only through directors and the case is, as regards those directors, merely the ordinary case of principal and agent.<sup>137</sup>

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<sup>132</sup> *Forest Deen Coal Mining Co. Re*, (1878) 3 Ch D 450

<sup>133</sup> Kapoor, N. D., (2003), *Element of Mercantile Law*, 12<sup>th</sup> Edn., Sultan Chand & Sons, Educational Publihers New Delhi, p. 128

<sup>134</sup> *Ibid*

<sup>135</sup> In Tanzania the Law of Agent and Principal is provided for in the Law of Contract Act, Cap 345 [R.E 2002], see section 134- 189, in fact section 134 of the Law of Contract Act defines an agent a person employed to do any act for another or to represent another in dealing with the third persons and the person for whom such is done, section 138 provides that the authority of an agent may be express or implied, section 140(2) of the same act provides that an agent (in this case a director) having authority to carry on a business has the authority to do every lawful things necessary for the purpose, or usually done in the course of conducting business.

<sup>136</sup> <sup>136</sup> *Ferguson v. Wilson* (1866) 2 Ch. App 77

<sup>137</sup> Singh, A. (2005). *op.cit* at p.239 writes that, the general principles of agency, governs the relationship of directors with a company and persons dealing with the company through its directors. Where the

However, directors do not only act as agents of the company this is because directors in certain matters have independent powers in which they are not bound to consult the shareholders. Some powers may be exercised by the directors in accordance to the articles of association of such company.<sup>138</sup>

#### **2.4.2 Directors as Trustee of the Company**

Directors are the trustee of the company money and property. Thus they are bound to deal with the capital under their control as trustees. They must therefore act in good faith and exercise their powers in the interest of the company.<sup>139</sup> They have to refund the company any money or property which they have improperly paid away or transferred.<sup>140</sup> Similarly directors are also trustees in respect of the powers entrusted in them, they must exercise this powers bona fide in the interest of the company.<sup>141</sup> The case of *Great Eastern Railway Co. v Turner*<sup>142</sup> is the authority for the proposition that,

*Directors are trustees of the company's money and property in the sense that they must account for all the company's money and property to refund the company of its money or property which have improperly paid away or transferred*

Directors are also trustee of the power entrusted to them in the sense that they must exercise their powers honestly and in the interest of the company and shareholders and not to their own interest.<sup>143</sup> For example directors should have regard to te interest of

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director contract in the name and on behalf of the company, it is the company which is liable on it and not the directors.

<sup>138</sup> Saleemi, N. A. and Opiyo, A. G., (1998), Op.cit p. 212

<sup>139</sup> Bagrial A., (2007), Op.cit, p.283

<sup>140</sup> Kapoor, N. D. (2003), op.cit, p. 128

<sup>141</sup> Section 184 of the Companies Act requires a director to exercise his power for proper purpose

<sup>142</sup> *Great Eastern Railway Co. v Turner* [1872]L R 8 Ch. App. 149, see also in the case of *Cook v Deeks* (1916) AC 554

<sup>143</sup> *Percival v Wright* (1920)1 Ch 77

the company, in that they have to exercise their powers bonafide in the interest of the company, have regard to the shareholders and interest of the employees of the company.

Directors are however not trustees in the real sense of the word because they are not vested with the ownership of the companies property. It is only as regards some of their obligations to the company and certain powers that they are regarded as trustees of the company. In the case of *Re Lands Allotment Co.*<sup>144</sup> Lindley L. J. observed that,

*although directors are not, properly speaking, trustees, yet they have always been considered and treated as trustees of the money which comes in their hands or which is actually under their control; and ever since joint stock companies were invented, directors have been held liable to make good moneys which they have misapplied upon the same footing as they were trustees.*

However directors are not in any position trustees of individual shareholders.<sup>145</sup> They only occupy a fiduciary relationship only in relation to the company and not in relation to the individual shareholders.

### **2.4.3 Directors as Employees of the Company**

Although directors of the company are its agents, they are not employees or servants of the company for being entitled to privileges and benefits which are granted under the Companies Act to the employees. But they can be employees or servants of the company by virtue a special contract of service which a director may enter with a company.<sup>146</sup> Thus directors can be salaried employee of the company in addition to his directorship, which may, for the purposes, make him an employee<sup>147</sup> or a servant, and thus he can

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<sup>144</sup> Great Eastern Railway Co. v Turner [1872]L R 8 Ch. App. 149

<sup>145</sup> Percival v Wright (1920)1 Ch 77

<sup>146</sup> Kapoor N. D., (2003),op.cit 128

<sup>147</sup> Section 212 of the Companies Act provides that directors contract of employment.

enjoy any rights given to the employee as such but his directorship and his rights through that directorship are quite separate from his rights as an employee.<sup>148</sup>

#### **2.4.4 Directors as Managing Partners**

Directors of the company have been described as managing partners because, on one hand, they are entrusted with the management, supervision and control of the affairs of the company.<sup>149</sup> On the other hand, they are usually important shareholders of the company.<sup>150</sup> It is thus true to say that they are in the position of managing partners appointed to fill that post by mutual agreement between all the shareholders.<sup>151</sup> Section 181 of the Companies Act provides that directors are managing partners of the company as they are entrusted with the function of managing the business and the affairs of the company.

All in all the true position of the directors to the company is that of fiducially relationship. In the case of *Forest Dean Coal Mining Co. Re.*<sup>152</sup> Jessel MR observed that directors have sometimes been called as trustee or commercial trustee and they have been sometimes called managing partners; it does not matter much what you call them so long as you understand what their real position is; which is that they are real commercial men managing a trade concern for the benefit of themselves and of all the shareholders in it. *They stand in a fiducially position towards the company in respect of their powers and capital control.*<sup>153</sup>

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<sup>148</sup> Saleemi N. A and Opiyo A. G., (1998), Op.cit, pp. 212-213

<sup>149</sup> Section 181 of the Companies Act, see also Bagrial A., (2007) Op.ci, p.287

<sup>150</sup> Section 191 of the Companies Act, allow directors to have a share qualification this makes them shareholders of the company

<sup>151</sup> Bagria, I. A., (2007), Op.cit, p. 287

<sup>152</sup> supra

<sup>153</sup> This contention is supported by section 182 which provides that a director of the company, when exercising powers or performing the duties, must act honestly and in good faith and in what a director believes to be the best interest of the company.

## **CHAPTER THREE**

### **THE QUALIFICATION OF COMPANY DIRECTORS IN TANZANIA: THE LAW**

#### **3.0 Introduction**

The success of every company depends ultimately on the caliber of its directors and the effectiveness of its board. This stems out of the fact that the directors are the one who directs, supervise and manage the company business and its affairs.<sup>154</sup> The qualifications of company directors in Tanzania are stipulated in the former regime,<sup>155</sup> the new regime<sup>156</sup> and other laws. Before the enactment of the new Act the qualifications were stipulated in the former regime. This chapter discusses the qualifications of the company directors, with respect to the company's former law and the new law (CA) and the qualification of company directors following the general law of contract this is intended to see whether the new regime has improved the former regime or not.

#### **3.1 The Qualification of Company Directors under the Former Regime**

The qualifications of the Company Directors in the Companies Ordinance, was provided for in the provisions of sections 141 which speaks of restrictions on appointments of directors of a company, section 142 which stipulates the issue of share qualifications and section 143 provides for the disqualified persons in relation to persons un-discharged bankrupt. The former position of the law on the subject is as explained herein below.

##### **3.1.1 The Consent to the Registrar of Companies**

The Companies Ordinance provided for a qualification requirement that, all persons who were to be appointed or named in the articles of association could not act as directors of the said company unless they have signified consent in writing themselves or via their

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<sup>154</sup> Section 181 of the Companies Act

<sup>155</sup> The former regime in this context is the Companies Ordinance Cap 212 [ R.E 2002]

<sup>156</sup> The New Regime means the Companies Act, Act No 12 Of 2002 which come into force in 2006, this law under section 485 repealed the Companies Ordinance serve the subsidiary legislation which were named under section 484 of the Companies Act.

agents to the registrar of companies.<sup>157</sup> Consent in writing to the registrar could only be complete if one of the following criteria's were made by such person who desires to be a director of such company. These were that, he had signed the memorandum for a number of shares not less than his qualification<sup>158</sup> or have taken from the company paid or agreed to pay for his qualification shares if any,<sup>159</sup> or that person should have signed and delivered to the registrar an undertaking in writing that he/she aimed at taking from the company and paying for his qualification shares. Lastly he must have delivered to the registrar for registration a statutory declaration to the effect that a number of share, not less than his qualifications which are registered in his name.<sup>160</sup>

Though consent to the registrar of companies does not seem like a qualification of company directors however it implies qualification as without it a person could not be appointed a director to act in respect of such company he is so appointed

### **3.1.2 Share Qualifications**

The Companies Ordinance requires that every director should have share qualifications. This only is the duty to such persons who by the articles of association of their company are required to hold a share qualifications.<sup>161</sup> The law required that within two months after a person is appointed a director he was under duty by virtue of this section to obtain such share qualification, or in case the articles of association requires it to be done within the shorter time, then within that short time as stated in the articles of association.

In respect of share qualification the law stipulated that in default to obtain the said share qualification within two months or in a time prescribed in the articles of association of that company, such person has no remedy other than that of vacating the office of

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<sup>157</sup> Section 141(1)(a) of the Companies Ordinance.

<sup>158</sup> Section 141(1)(b)( i) Ibid

<sup>159</sup> Section 141(1)(b)( i) Ibid

<sup>160</sup> Section 141(1) (b)( iv) Ibid

<sup>161</sup> 142 (1) of the Companies Ordinances

directorship.<sup>162</sup> This section has a prospective effect in the manner that such person could not be re-appointed as a director in a company unless he has obtained such share qualification in the period so required.<sup>163</sup>

In relation to share qualification a person holding a share warrant in accordance with this law was deemed by the law to have the share qualification for the purpose of the company directorship in relation of his shares specified in the share warrant.<sup>164</sup> In a point a person acted as a director of the company without such qualification share, such person acted in default and upon proof that he so acted he was to be penalized to a default fine of one hundred shillings from a day he seized to be qualified.<sup>165</sup>

### **3.1.3 Un-discharged Bankrupt**

The law restricted a person who was adjudged bankrupt in the territory of Tanzania or in another territory which was declared to be a reciprocating territory by virtue of the Bankruptcy Ordinance to act as the director of the company<sup>166</sup> except where there was a leave of the court that adjudged him bankrupt.<sup>167</sup> In contravention of this provision such person who acted as directors while adjudged bankrupt and without the leave of the court of law that so adjudged, he was liable to a penal sanction<sup>168</sup> that is a conviction to imprisonment with or without hard labour for a term of not exceeding two years or to a fine not exceeding ten thousand shillings or he could suffer both, imprisonment and fine.<sup>169</sup>

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<sup>162</sup> Section 142(3) Ibid

<sup>163</sup> Section 142 (4)Ibid

<sup>164</sup> Section 142(2)Ibid

<sup>165</sup> Section 142(5)Ibid

<sup>166</sup> The expression company by virtue of Section 143(2) of the Companies Ordinance included, unregistered companies and incorporated outside Tanzania which has found the place of business in Tanzania,(the foreign companies), the section should be construed to mean that registered companies were inclusive in this issue

<sup>167</sup> Section 143 (1) of the Companies Ordinance

<sup>168</sup> The proviso to section 143(1) above has an exception to the effect that, a person could not be guilty of the said offence if he acted as a director or in the management of the company and has continuously so acted before the Company Ordinance come into force and the bankruptcy so stated was prior this Ordinance shall not be guilty of the said offence

<sup>169</sup> Ibid

An application for leave of the court to act as a director or to be in the management of the company to be given following a condition that, the applicant must have demonstrated by a notice of intention, which notice was to be served to the official receiver,<sup>170</sup> who was supposed to give his opinion whether such application could not affect public interest.<sup>171</sup> Thus if it could not affect public interest to allow the application and if could affect public interest to oppose such application on the hearing of such application.<sup>172</sup>

### **3.2 The Qualification of Company Directors under the New Regime**

The Companies Act provided several qualifications of the company directors, some of which were provided for in the Companies Ordinance and some of which were not in the Companies Ordinance. The following are the qualifications of the company directors in the Companies Act;

#### **3.2.1 The Consent to the Registrar of Companies**

The Companies Act, just like the Companies Ordinance provide for the consent in writing for a person desiring or aspiring to be a director of the company. Such consent should be delivered to the registrar of companies. The law requires that if by the articles of association of a particular company in which a person aspire to be a director of such company, that person or his authorized person should signify his consent in writing before the registration of the articles of association or the publication of the offered document, by delivering the consent in writing to the registrar of companies that he is willing to act as a company director. Then failure to do so, such person forfeits his right to act as the company director of such company.<sup>173</sup>

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<sup>170</sup> The term official receiver was not defined for this purpose

<sup>171</sup> The said public interest in this Ordinance however was never defined

<sup>172</sup> Section 143 (2) of the Ordinance

<sup>173</sup> Section 190 of the Companies Act

Section 190 of the Companies Act, however is different from section 141(1) b of the Companies Ordinance, which require that the consent to be delivered to the registrar of companies together with either of the following that he has signed the memorandum for a number of shares not less than his qualifications, or has taken from the company and paid or agreed to pay for his qualifications share if any or that he has signed and delivered to the registrar for the registration an undertaking in writing to take from the company and pay for his qualification shares. And lastly made and delivered to the registrar for registration a statutory declaration to the effect that the number of shares not less than his qualification, if any are registered in his name. The Companies Act in respect of the issue of consent in writing does not need to be accompanied with either of these four.

### **3.2.2 Share Qualifications**

In respect of the share qualification, the Companies Act and the Companies Ordinance stands on the same footing except on the issue of penalty for acting a director of a company without a share qualification. The Companies Act under section 191 (1) provides that it is the duty of the company director who is required by the articles of association his company to obtain share qualifications within two month or within such a shorter period as may be prescribed the articles of association of his company.<sup>174</sup> However, holding a share warrant in respect of shares in the said company does not automatically make such person to have a qualification share as required by the articles of association of a company.<sup>175</sup>

If such person does not obtain the share qualification on the prescribed time which is two months or a shorter time from his appointment as required by the articles of association of his company, the office of directorship shall be vacated and she/he shall cease to act as the director of such company.<sup>176</sup> Further to this, such a person shall not be

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<sup>174</sup> Section 191(1) Ibid

<sup>175</sup> Section 191(2)Ibid

<sup>176</sup> Section 191(3) Ibid

re-appointed as the director of such company unless he has obtained the share qualification as required by this section.<sup>177</sup> These shares must be held by such director in his own right.<sup>178</sup>

Contrary to section 142 (5) of the Companies Ordinance, which stipulate that a director who acts without qualification share from the expiration of two month or for a short period as provided by the articles of association of that company, shall be liable to a fine of one hundred shillings from the day of his default, section 191(1) of the Companies Act on the other hand provides that such director shall be liable for a fine from the date of the default. However this Act does not state the amount of this fine.

### **3.2.3 Un-discharged Bankrupt**

The law under Section 196 of the Act, provides that if a person, who has been declared bankrupt or insolvent by the court in Tanzania or anywhere else, has not actually received a discharge order to act as the director of the body corporate<sup>179</sup> or who takes part either directly or indirectly in the management of the company without the leave of the court shall be liable to a conviction of imprisonment or fine or both.<sup>180</sup> The leave of the court to be discharged bankrupt shall not be granted by the court unless a notice intention to apply for leave there for has been served to the official receiver.<sup>181</sup> The official receiver shall have the duty to enter appearance for hearing of the application to oppose such application if he sees that it may affect public interest.<sup>182</sup>

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<sup>177</sup> Section 191(4)Ibid

<sup>178</sup> *Boschoek Proprietary Co. Ltd v Fuke* [1960] 1 Ch 148

<sup>179</sup> Section 197(3) of the Companies Act, defines a board corporate to include a board corporate formed outside Tanzania which has a place of business in Tanzania. However this section excludes the unregistered companies, but include all registered companies, the Companies Ordinance on the other hand included even the unregistered companies.

<sup>180</sup> Different from the Companies Ordinance, this Section does not specify the number years such director shall be punished on the amount of fine that he shall be liable to pay. Further to that the section does not mean that a leave to act as a director or a discharge order should be given by the court that declared that person bankrupt.

<sup>181</sup> The official receiver in this context means that official receiver in bankruptcy as provided under section 196(3) of the Companies Act

<sup>182</sup> Section 196(2) of the Companies Act

### 3.2.4 Age Qualification

The Companies Act under Section 194 provides for the age qualification.<sup>183</sup> The Act provides that no person shall be appointed to as the director of a company if he has not attained the age of twenty one years (21 years) at the time of his appointment.<sup>184</sup> The same section provides for the age limit of a person working as the director of the company, the said age limit is seventy years (70years),<sup>185</sup> the law is to the effect that a director shall vacate the office of directorship upon the time he attains the age of 70 years.<sup>186</sup> However if it is discovered that a director acted in contravention of the age qualification after his termination his acts done at the time he was a director shall remain valid.<sup>187</sup>

The law does not however prevent the appointment of any person of the age of 18 and above to be director of the company or to retire at any time, provided that his appointment is approved or was approved by the general meeting upon a special notice of a special resolution of approving or appointing such person to be a director has been given to the company and members of the company.<sup>188</sup>

The issue to make the age of a person who is appointed a director be known to the company is facilitated based on the reason that the law under section 195(1) has imposed a duty to the company directors to disclose their age to the company by giving notice to the company of his age.<sup>189</sup>

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<sup>183</sup> The Companies Ordinance was silence on the issue of age, so on this matter the Law of Contract Act regulated this issue in terms of capacity as provided for under section 11(1) of the Law of Contract Act, which provides among other thing that every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind a and who is not disqualified by any law.

<sup>184</sup> Section 194(1), Ibid

<sup>185</sup> Ibid

<sup>186</sup> Section 194(2) Ibid

<sup>187</sup> The proviso to section 194(2) Ibid

<sup>188</sup> Section 194 (5) Ibid

<sup>189</sup> Failure to disclose the age by issuing a notice to the company makes that director liable to a default fine by virtue of section 194(2)of the Companies Act

### 3.2.5 Disqualified Persons

The Companies Act provides for restriction of the persons to be appointed as directors of a company if they are disqualified in relation with different issues as stipulated in the law.<sup>190</sup> These include the following;

The person shall be disqualified to act as a director of the company if such person is convicted of any offence in connection to the promotion, formation or management of the company.<sup>191</sup> For example under section 114(1) and 2 of the Companies Act, director is liable to pay a default fine if that director commences business regardless of the enumerated proper procedures under the relevant law and regulation, for example in a public company starting a business without the certificate of commencement of the business. The example in case of management of the company is under section 50 of the Companies Act where a director is criminally responsible for untrue statement within the offer documents. During the times in the director is convicted in relation to the offence of promotion, formation and management of the company he shall be disqualified to act as a director. Further to that, section 198 of the companies Act provides for the liability of a director who acts in management of the company while he is disqualified so to act.

The law also disqualifies person to act as directors, who have persistently contravened the Companies Act relating to the issue of filling returns, account or any documents to the registrar of companies.<sup>192</sup> Examples of these are providing under section 128 of the companies Act that directors of the company are criminally liable for failure to file the annual returns to the registrar of companies in a prescribed time. Again person can be

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<sup>190</sup> Section 197(1) of the Companies Act, see also Table A regulation 63(a-e) to the Schedule to the Companies Act, which provides for the disqualification and the removal of company directors, which are if a person ceases to be a director by virtue of the provisions in the Companies Act or he become prohibited by law from being a director, becomes bankrupt, becomes of unsound mind

<sup>191</sup> Section 197(1)a, see also section 382 Ibid

<sup>192</sup> Section 197(b) Ibid

disqualified to act as directors if they were in persistent failure to present proper accounts to the registrar of companies<sup>193</sup> just to mention a few.

A person may also be disqualified to act as the director of the company if in the course of winding up it appears that a person is convicted of the offence under section 383 of the Companies Act, for example in course of winding up the person is found guilty of fraudulent trading, when such a person as an officer, liquidator or manager of the company has been guilty of fraud or breach of duty to the company.<sup>194</sup>

A person is also disqualified to act as a director of the company if the court has made a declaration that such person, due to the fact that in the course that person was the officer of the company, a liquidator, administrative receiver, has taken part in the promotion, formation or management of the company and has misapplied or retained has become accountable of some money or the property of the company and is guilty of misfeasance or is in breach of the fiduciary duty. Or in course of winding up he was in fraudulent trading or breach of the fiduciary duty.<sup>195</sup> Thus if there is a declaration of the competent court in this issues a person is disqualified to act as a company director.

### **3.3 Qualification of directors under other Laws**

Despite the fact that the Companies Act, regulate all matters concerning companies but it is not isolated from other laws. Since the company directors can be employed on the service contracts,<sup>196</sup> this will allow the application of the principles of the law of contract. Hence the Law of Contract Act can be another separate legislation to provide for other qualifications of the company directors. Although the Companies Act do not provide for the issue of sound mind, section 11 of the Law of Contract Act, provides that a person of unsound mind<sup>197</sup> has no capacity to contract, so a person who is of unsound

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<sup>193</sup> See section 154 Ibid

<sup>194</sup> See section 183(1) and (2) and section 197(1)(c) of the Companies Act

<sup>195</sup> See section 197(1)(d) together with sections 382, 383 and 384 of the companies Act.

<sup>196</sup> Section 212 of the Companies Act

<sup>197</sup> Cap 345 [R.E 2002]

mind cannot qualify to be appointed as the director of the company.<sup>198</sup> Under Section 9 of the Bankruptcy Act,<sup>199</sup> it is provided that a person disqualified by reason of the receiving order in bankruptcy lacks the capacity to contract and that is disqualified to be appointed as the director forthwith unless he is discharged bankruptcy under section 29 of the same Act.

### **3.4 The Rationale for Qualification of Company Directors**

The rationale for the qualification of company director may be summarized in the following manner. Since the general purpose of share qualification is said to be to manage the company affairs on behalf of the other shareholders, the directors should have a stake in it to induce them to act diligently to ensure the company's progress.<sup>200</sup> This will make a director to act for the best interest of the company because he will have a stake in the company in respect of the shares they have in that company.

The rationale of making statutory requirement of the qualification of company director may be based on the fact that, the company must be put in the effective management and must be run with person who can be accountable for the action. For example a minor director cannot be accountable for his action; a person of unsound mind is also not accountable for his action as well as a person who is un-discharge bankrupt. Therefore putting the qualification of company director is to make sure a person who wants to be a director is ready to face the consequences of his/her actions.<sup>201</sup>

The issue of consent of the company directors to be delivered to the registrar of companies, might have a significance that, it demonstrates willingness to act as a

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<sup>198</sup> Section 12 of the Law of Contract Act define a person of sound for the purpose of making contract as a person if at the time of making contract, when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

<sup>199</sup> Cap 25 [R.E 2002]

<sup>200</sup> Keenan D., (2005), op.cit pp319-340, however this might not be a good reason because it not possible to ensure that the directors have a beneficial interest in their share qualifications

<sup>201</sup> A Look at Cambodian Law: Legal Framework for Company Director Liability available at <http://www.dfdlmeking.com/easyblog/entry/a-look-at-cambodians-legal-framework-for-company-director.liability> accessed on February 10, 2012 at 10.41 AM

company director. This will show that, a person is not forced to act as a company director. Thus he acts as the company director out of free volition and will without being forced or compelled by any person.<sup>202</sup> This is aimed at making sure that the director is liable to any circumstances in relation to management of the company not to bring defenses that he was forced to act as a company director without his free consent.

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<sup>202</sup> See section 10 and 14 of the Law of Contract Act

## CHAPTER FOUR

### THE QUALIFICATION AND DUTIES OF COMPANY DIRECTORS

#### 4.0 Introduction

The director's duties are designed to promote good governance and to ensure that the directors act in the interest of the company including putting the company's interests ahead of their own.<sup>203</sup> This is because there is a value in asserting a reference to the success of the company since what is in view is not the individual interest of the members but their interests as members of an association with the purpose and the mutual arrangements embodied in the constitution; the objectives is to be achieved by the directors successfully managing the complex of relationships and the resources which comprises the company's undertaking.<sup>204</sup>

This part therefore looks into the duties of the company directors in the Act, whether there is a balance between the said duties and the qualification of the company directors as stipulated in the Act that is the relationship of the qualification of company directors and their duties.

#### 4.1 The Duties of the Company Directors under the Companies Act

It is pointed out that the Companies Act introduced significant reforms to Tanzanian Company Law. The Companies Act took consideration of the corporate governance and the directors duties. Directors previously had common law duties which have now been enshrined into the Companies Act, and are now statutory duties. With these duties in the Act the courts will have a greater degree of guidance from the Companies Act in

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<sup>203</sup> In the case of Theseus Exploration NL v Mining and Association Industries Ltd [1973] Q.D.R 81 an interim injunction to prevent the members of the company electing a certain person as a director because there was sufficient evidence that those persons intended to use the company's assets solely for benefit of the majority member.

<sup>204</sup> Sealy, L. and Worthington, S. (2008) Ibid p.293s

demining whether the directors have breached the duties or not.<sup>205</sup> Here under are some of the statutory duties of the company's directors under the Companies Act, to mention, but a few.

The director's duty to act in good faith; the directors has the duty to act *bonafide*, (in good faith) in the interest of the company as the whole. This duty is specifically stipulated under section 182 of the Companies Act.<sup>206</sup> The test as to whether this duty is complied with is a subjective test of honest or good faith as it was stated in the case of *Whitehouse Hotel v Carton Hotel Pty Ltd*.<sup>207</sup> Thus directors breach this duty where they fail subjectively to give proper consideration to the company's interests. This is what was also stated in the case of *Walker v Wimborne*.<sup>208</sup> This may occur, for example, where a director assumes the company's interest corresponds with their own interest, and do not consider its interest as a separate entity. In considering the company's interest the director should consider or have regard to the shareholders as a collective group.

Directors have a duty to exercise their powers with a degree of care and diligence of a reasonable person in a like situation or position would do in similar circumstances in a company. In this respect, when a director makes a business decision, he or she is taken to have discharged their duty of care and diligence if; the decision is made in good faith and for a proper purpose. They do not have a significant personal interest in the decision, they have informed themselves about the subject matter of the decision and they believe that the decision is in the best interests of the company<sup>209</sup>

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<sup>205</sup> Krista van Winkelhof, (2006), Company Law Reforms in Tanzania: The Companies Act, available at <http://www.lawworldwide.com/Company%20Law%20Tanzania.html> accessed on 31<sup>st</sup> March, 2012 at 11.47 AM

<sup>206</sup> The section provides that a director of the company, when exercising powers or performing duties, must act honestly and in good faith and in what he believes to be the best interest of the company.

<sup>207</sup> *Whitehouse Hotel v Carton Hotel Pty Ltd* (1987) 162 CLR 285

<sup>208</sup> *Walker v Wimborne* (1976) 137 CLR 1

<sup>209</sup> [www.smartsmallbusiness.qld.gov.au](http://www.smartsmallbusiness.qld.gov.au) accessed on 12 day of June 2012 at 12.00 noon

Duty to disclose interest in contracts; this duty is provided for under section 209 of the Companies Act. What is stated in this section corresponds with the settled principle which was stated in the case of *Aberdeen Railway Co. v Blaikie Bros.*<sup>210</sup> Directors cannot put themselves in a situation where they have or might have in future a personal interest which conflict or that may conflict in the future with the interest of the company, which they are bound to protect. The conflict of interest in this point can occur in the manner that it can either be direct or indirect.

Directors have a duty not to have personal interest in the transaction with the company. If there is such an interest the law under section 209 of the Companies Act, requires that director to declare and disclose the interest in the contract.<sup>211</sup> A director will be in breach of this duty if he does not disclose the interest in the said contracts or transaction if she enters into a contract with the company directly or indirectly by personally contracting with the company or by any indirect means. In the case of *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd*<sup>212</sup> it was held that clearly a director acts in breach of his fiduciary duty to the company where he sabotages the company's contractual opportunities for his own advantage, or where he uses confidential information to advance the interests of a rival concern or his own business to the prejudice of those of his company.

Consequently it is commented that director of a company who is in anyway interested, whether directly or indirectly, in a contract involving the company, shall not participate

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<sup>210</sup> *Aberdeen Railway Co. v Blaikie Bros* (1854) 1 Macq at p 471

<sup>211</sup> It is thus a duty of a director of a company where he or any connected person is in any way, whether directly or indirectly, interested in contract or proposed contract with the company to declare the nature of the interest that he have at the meeting of the directors of the company. The manner in which to declare such interest is stated under section 209 (1) and (2) of the Companies Act

<sup>212</sup> In the case of *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) 2000 (3)SA 806 (C)*

in any discussion pertaining to that contract. He shall only be counted to make up the quorum of the meeting.<sup>213</sup>

Duty to exercise care, skill and due diligence; it is the director's duty to exercise reasonable skills and care. This is provided for under section 185 of the Companies Act.<sup>214</sup> discussing the similar provision in the case of *Re City Equitable Fire Insurance*,<sup>215</sup> it was observed that a director of the company need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from someone of his knowledge or experience. In the case of *Statewide Tobacco Services Ltd v Morley*<sup>216</sup> the Court was of the view that the duty to exercise due diligence and skills is not diminished by delegating responsibility.

Therefore directors should question the information that is put before them to ensure that it is truly representative of the company's position and not just to accept what may be put to them by the employees of the company. The due diligence and care here refers to that care the reasonable person would exercise if they were a director or officer of the company in the circumstances and had the same responsibilities within the corporation as a director or officer. The reference of a reasonable person indicates objective standard of care, consistence with the development of the company, the foreseeable of risks of harms is balanced against the potential benefits that could reasonably have been in good faith for the interest of the company and a proper purpose.

Duty to exercise power for proper purposes; section 184 of the Act provides for this duty. This means that the directors should not use their position to gain advantage for

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<sup>213</sup> [http://www.bakermckenzie.com/files/Uploads/Documents/Type%202/WP/al\\_wongpartners\\_directorsdutiesandliabilities\\_dec10.pdf](http://www.bakermckenzie.com/files/Uploads/Documents/Type%202/WP/al_wongpartners_directorsdutiesandliabilities_dec10.pdf) retrieved on the 14<sup>th</sup> Day Of June 2012 at 13.04 PM

<sup>214</sup> Section 185(a-b) of the Companies Act provides that a director owes the company a duty to exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both the knowledge and experience that may be reasonably be expected of a person in the same position as the director, and any special knowledge and experience which the director has.

<sup>215</sup> *Re City Equitable Fire Insurance*(1925) Ch. 407

<sup>216</sup> *State-wide Tobacco Services Ltd v Morley* (1990)2 ACSR 405

themselves or someone else or cause a detriment to the company. This duty to exercise corporate powers is only for the purposes for which they were granted to directorships. This duty permits courts to invalidate decisions taken by directors whether motivating purpose is one which court interpreters beyond those for which the particular power may legitimately be exercised or is not to benefit the company generally.<sup>217</sup>

Some powers which the company directors may be vested with, may be specific powers and may be precisely expressed in the Act, other powers may be of generally character of the purposes for which they may be exercised cannot be more precisely defined other than by reference to a general corporate purposes or to the directors intention to benefit the company. Need to distinguish between the subject of good faith and the proper purpose requirements become important when the power in question is capable of more objective characterisation. In such cases, action taken by company directors may be purpose that a court considers improper.<sup>218</sup> Therefore a director must use his powers for the purpose other than the proper powers for which they were confined. That is to say the powers vested in them should in line with the object of the company is formed to achieve. Lord Hoffman LJ in the case of *Bishopsgate Investment Management Ltd v Maxwell*<sup>219</sup> stated that if a director chooses to participate in the management of the company and exercise powers on its behalf, he owes a duty to act bonafide in the interest of the company. He must exercise the power solely for the powers for which it was conferred

Duty to disclose age; section 195 of the companies Act provides for a duty for a director to disclose his or her age.<sup>220</sup> that any person who is appointed or to his knowledge proposed to be appointed director of a company subject to section 194 at a time before

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<sup>217</sup> <http://onlinelawyer.hubpages.com/hub/The-directors-duty-to-exercise-powers-for-a-proper-purpose>  
accessed on 16 day of JUNE 2012 at 14.08 PM

<sup>218</sup> Ibid

<sup>219</sup> *Bishopsgate Investment Management Ltd v Maxwell*<sup>219</sup> (No 2)[1993] BCLC 1282, p 1286.

<sup>220</sup> The section provides that any person who is appointed or to his knowledge proposed to be appointed director of a company subject to section 194 at a time before he has attained the age of twenty one or after he attained retiring age applicable to him as director either under this Act or under the company's articles shall give notice of his age to the company.

he has attained the age of twenty one or after he attained retiring age applicable to him as director. Other duties include duty of having regards to the interest of the company's employees as provided for under section 183 of the companies Act, that is duty to look for the interest of employee and members of the company such as the working environment of the employees, their remuneration and on the side of the members of the company to look for their shares and rights in respect of their shares in the company.<sup>221</sup> And lastly the duty of a director to disclose payment for the loss of office provided for under section 203 of the Act.

#### **4.2 Is there a Balance between the Qualification and the Duties of Company Directors**

Section 194 of the Companies Act, provides that for a person to act as the director of a company must have the age of 21 to 70 years old. On the other hand on the duties of director section 195 of the same Act provides for the duty to disclose the age. This duty is to the effect that a person who is appointed or who is to be appointed as a director of the company is required to disclose his age. Before he attained the age of 21 or after he attained the age of retirement he is supposed to give notice to the company. Failure to give such notice makes that director liable to a default fine.<sup>222</sup> This provision is intended to make sure that a person below the age of 21 or above the age of 70 is not appointed as a director of the company. This therefore makes the duty and qualification balance at this particular point.

Another balance between the qualification and the duties of the company directors in the Act is shown under sections 184, 209 and section 190 of same Act. Section 184 provides that a director has a duty to exercise power for proper purposes, this duty requires a director entrusted with the interest of others; not to allowed himself to make the business an object of interest to himself because from the frailty of nature, one who has power

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<sup>221</sup> Section 183 (1) of the Companies Act provides that the matters to which the directors of the company are to have regard in the performance of their functions include, in addition to the interest of the members, the interest of the company's employees

<sup>222</sup> Section 195 (2) of the Companies Act.

will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is entrusted. This duty corresponds with the qualification that every director appointed or who subscribed to the memorandum to signify his consent to act as director of the company under section 190 of the Act this means that he is willing to act as the director for the best interest of the company not for his own goal to the effect that the interest of the company comes first before his personal interests are realized, that is why he has to disclose personal contract that are likely to affect the interest of the company in accordance with section 209 of the same Act. In line with this a director must also have regards to the employee's interest of the company under section 183 of the Act since they are the production resources that his signification of consent to the registrar of companies binds him so to act in the best interest of the companies and his employees together with the shareholders of the company in the performance of his duties as a director of the company.

With respect to the duty to exercise care, skill and diligence under Section 185 of the Act, it seems that there is no balance between the said duty and qualification of company directors as stipulated in the Act, this is based on the fact that the Companies Act is silence on qualification in respect of experience and skills or professional qualification of person aspiring to be the company directors of the company. The duty *inter lia* provides that a director of the company owes the company a duty to exercise care, skill and diligence which would be exercised in the same circumstance by a reasonable person having *both knowledge and experience that may reasonably be expected of a person in the same position as a director, and any special knowledge and experience which a director has.*<sup>223</sup>

In respect of experience and special skills of the director the Companies Act is said to have encouraged incompetent persons to take the position of company directorship without any special skills or knowledge, this is the vivid challenge that Companies Act

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<sup>223</sup> Section 185 (a and b) of the Companies Act.

have not adequately dealt with as it ought to have done. In respect to this it ought to have made general provision as to the minimum qualification required of any director.<sup>224</sup>

Lastly the provision of section 197 of the Companies Act in respect of disqualification orders cut across all the duties of the company directors, that they should have not had been liable in respect of management, default, person convicted for any offence in respect to the formation, management and promotion of the company, this is to make sure the company is in safe hands.

#### **4.3 The Relationship between qualification and duties of Company Directors**

Luoga<sup>225</sup> observes that the law on the duties of company directors was initially developed with the aim of protecting persons who accept to be directors of the companies. It was assumed that the director is always an individual, that corporate directorship is not a profession and thus does not require any qualifications. And that directorship is not full time job. Growing complicities in corporate management have relegated those assumptions into obsolescence. Need for responsibility and accountability have impelled changes in the company laws to impose more rules circumscribing the qualifications, conducts and responsibilities of company directors. The modern commercial word demands security and certainty when dealing with the corporate person.

That the moment he qualifies to be a company director and so appointed a director is expected to meet an increasing range of obligations amidst commercial and legal expectation of their actions as well as bound by the Act and the MEMARTS of the Company together with any rule whatsoever in respect of that company. That is to say if

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<sup>224</sup> Chapter five of this dissertation explains the issues of professional qualification in details. Further that the research demonstrated that there should be professional qualification relative to the object clause and the articles of association. For this point see Table A and Figure A, together with Table A1 and Figure A1 in Chapter five of this dissertation

<sup>225</sup> Luoga, F.D.A.M., A Critical Analysis of the Companies Act, 2002, in "The Tanzania Lawyer", Vol. 1, No.3. 2007

a person performs the duty of the director without qualification he is liable to the extent of such loss.

Section 198 of the Companies Act provides that a person is personally liable for the debts of a company if at any time in contravention of the disqualification order involves in the management of the company or a person who is involved in the management of the company, he acts or is willing to act on instruction given without the leave of the court by a person whom he knows at the time to be the subject matter of a disqualification order or to be undercharged bankrupt.<sup>226</sup> Section 198 (3) provides that for the purposes of this section a person is involved in the management of the company if he is a director of the company or if he is concerned whether directly or indirectly or takes part in the management of the company.

#### **4.4 The Company Director's Qualification and Performance of the Company**

As noted from section 181 of the Companies Act that directors are responsible for managing directing and supervising the management of the business and the affairs of the company, they thus provides the company with direction and advice, the director should also ensure that the company's overall policy objectives are reached.

Performance of the company depends ultimately on the object clause of the company. Thus performance is measured in terms of adhering to the objects the company is made to achieve, for failure to achieve the goals or objectives of the company, the company will have failed or may lead to poor performance For, that reason it is said that a good board of director include knowledgeable and .experienced business people<sup>227</sup> who are significant for formulation of policies and strategies vital for the better performance of the company directors also depends on the qualifications he/she has. The following paragraphs explain nexus in detail:-

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<sup>226</sup> Section 198(1) a and b of the Companies Act

<sup>227</sup> <http://www.wisegeek.com> accessed on 7<sup>th</sup> April at 12.00 Noon

A company director who is of unsound mind is obviously incapable of performance of any of his duties conferred under the law. This is because he has no mind to perform due to incapacity to form rational judgment hence the law declare him incapable of doing anything including directing and supervising the affairs of the company. Further to this a person who is un-discharged bankrupt and disqualified persons lacks the capacity manage the affairs of the company.

Performance of the company is also one to do with the employees who actually are involved in the production process. What the director is supposed to do here is to put the best staff possible and have a proper supervision together with making sure that he deals with the interest of company properly. Dealing with these resources requires a well skilled and trained person on issues of labuor laws, these calls for a professionalism and sort of experiences in the field. Also directors should have sound knowledge of their business in order to make sure that they perform their duties and implementation of policies of the company properly. The study revealed that organizations or companies owned or manned by non-professionals have a lot of problems which lead to poor performance and are more likely to suffer from problems such as work riots, organization being sued and paying compensation on account of unfair termination caused by decision of company directors. All these have significant impacts in terms of performance on human resources and loss of capital. Further issues of risk management in relation to the company depend on professionalism and a company may be liable on account of directors inefficient caused by lack of professionalism. For instance, lack of knowledge on contracts can cause liability the company as shown in the case of *Sasa Enterprises (Z) Ltd v Mohamed Zara Hussein Dharamsi*.<sup>228</sup> In this case the company was held liable to repay a loan on an act caused by one of the directors without an agreement with the other directors as required for failure to follow the internal procedure. Therefore performance of the company depends highly on the qualification that directors have. This is demonstrated under the provision of section 185 of the

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<sup>228</sup> *Sasa Enterprises (Z) Ltd v Mohamed Zara Hussein Dharamsi* [1989] T L R 79

Companies Act, where a director is required to exhibit special knowledge and experience which he has.

## **CHAPTER FIVE**

### **LEGAL CHALLENGES IN THE COMPANIES ACT WITH RESPECT TO THE QUALIFICATION OF COMPANY DIRECTORS AND THE PERFORMANCE OF COMPANIES**

#### **5.0 Introduction**

This chapter analyses the data which were collected in the conduct of the research study in respect of the qualification of company directors in relation to the performance of the company. The researcher was able to collect secondary and primary data. The primary data are explained using an inductive approach based on the response of specific groups, and then by the generalization of all respondents. Secondary data or information was analyzed using a content analysis approach.

The researcher recorded the following legal challenges in respect with the qualification of the company directors in the Companies Act, namely, the issues of professional qualification of a director and issue of experience, issue of age and the issue of sound mind on one hand. On the other it was noted that there is a nexus between the qualification of the company directors and the performance of the companies. The case study and documentary review of this depicted the following on respect of these issues which makes the Companies Act inadequate in respect of the qualifications of the company directors and that this has effects in terms of performance of the company.

#### **5.1 Professional Qualification and Experience for Person Aspiring for Directorship**

There is a divergent opinion in respect of professional qualification needed for a company director in Tanzania. In the course of research the researcher came across several opinions in respect to this issue of professional qualification. The opinion of one writer in respect to the qualification of company directors is to the effect that<sup>229</sup>

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<sup>229</sup> Binamungu, C.S.M., (2002) op.cit p133

directorship is a professional post as it is in UK and other common law countries. He opined that, the fact that the Companies Act is silent on the professional qualification or experience to company directors in Tanzania it encourages incompetent personnel to accept the directorship posts. He views this to have an impact in the performance of the company can even have an effect on the liability that a director may cause to the company. To him most of the companies' fails or declines because they have incompetent directors who are not informed about issues related to the company. To him managing companies by unqualified directors is putting the companies at risk of liability against persons or the companies transacting with it or in relation to the liability to the third persons.<sup>230</sup>

For the observation the case of *Sasa Enterprises (Z) Ltd v Mohamed Zara Hussein Dharamsi*<sup>231</sup> is a good example. In this case the company was held liable to repay a loan on an act caused by one of the directors who failed to follow the internal procedures and did not reach consensus with other directors.<sup>232</sup> This on the face of it is an issue of accountability caused by a director who is not professional and who is unaware of the affairs of the company he is running. As the case shows in this point the company was held liable on an account of failure to follow the procedure as required by the law.

The Companies Act is seen being inadequate for its failure to include academic and professional qualification and experience of those aspiring to be company directors. It is therefore termed to be unaware that modern company directorship is supposed to have acquired and asserted professional status with professional skills.<sup>233</sup> In respect of that it is imperative to prescribe standard for directors in order to enforce accountability in the management of corporate affairs. It is also recognized that corporate directorship has turned to professionalism, thus the law is lagging behind for not recognizing this fact of

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<sup>230</sup> This was spoken during the lecturer in investment and securities law, LL.M Commercial Law Mzumbe University, Morogoro second semester 2011

<sup>231</sup> *Sasa Enterprises (Z) Ltd v Mohamed Zara Hussein Dharamsi* [1989] T L R 79 (HC)

<sup>232</sup> The case relates to the Company Decree of Zanzibar but it is relevant at this point.

<sup>233</sup> Mbunda, (2008) op.cit p 135

professional qualifications needed for directors.<sup>234</sup> Other writers comment that companies do appoint non-executive directors due to the experience and expertise or business connections which mean that the Companies Act is inadequate in describing the expertise, and experience as qualification of persons aspiring to be company directors as it is silent.<sup>235</sup>

Another author whose work was reviewed recognize the issue of professional qualifications of directors as provided for by the institute of directors, they are termed as chartered directors they are trained are bound to have an experience before they act as directors of companies.<sup>236</sup> The object of professional qualification is to distinguish between qualified directors from those lacking training, or those who run smaller companies who may call themselves directors but who do not attend formal board meeting with agendas and formal procedures as would be required by large companies.<sup>237</sup> This demonstrates that professional qualification is essential because running companies requires formal procedure, which does not call for any person to act except those who are so qualified especially in big companies. This is supported by another author whose work was also reviewed by the researcher who is of the considered view that any person who wish to assume the position of a director on a company or anybody who aspire to be a director must have a reasonable depth of knowledge about the rules and regulation that binds them as well as a detailed knowledge about the operations of their company and reasonable knowledge of business together with the laws that relates to that company<sup>238</sup> This again calls for professionalism.

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<sup>234</sup> Luoga op.cit p 7

<sup>235</sup> Sealy L., and Worthington S., (2008), op.cit, p.245, see also Bagrial A.K op.cit p276

<sup>236</sup> Keenan D op.cit 290

<sup>237</sup> Ibid

<sup>238</sup> Kumar S., (2010), op.cit p 444

The case study came out with the responses that, in respect of professional qualifications: - the researcher managed to interview 5<sup>239</sup> among the targeted 7 respondents in the selected case study, the response was to the effect that four respondents opined that professional qualification of a company director is of significant importance depending on the type, nature of the company and what they direct. For example, a director of finance or marketing must be professionally capable of knowing financial issues and markets in his field. They opined that if a director has no professional qualification of managerial skills he cannot be able to manage the affairs of the company perfectly. Furthermore there are procedures that are enumerated in the law that requires every director to follow in respect of running the affairs of the company, thus professional skills are significant because it may lead to effective performance of the company through adherence to procedures.

They further opined that, lack of professional skills may cause the company to be liable for failure to abide by the duties and it may cost the company to employ personnel with professional skills as a manager with capacity to run or manage the affairs of the company, this cost the company in terms of capital or financially. The remaining respondent believes that, there is no need of professional qualification as the Companies Act provides for the duties of the director hence it is not necessary for educational profession to be a criterion especially in private companies where a person may wish to be a director because he has large or significant number of shares to safeguard her interests.

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<sup>239</sup> Managing Director of Mkurufuno General Trading Company Ltd was interviewed on 18<sup>th</sup> Day of April 2012, Managing Director of Cargo Delivery Freighters Ltd was interviewed on the 11<sup>th</sup> day of April 2012, A company Secretary of Tenesco (T) Co. Ltd was interviewed on 21<sup>st</sup> Day of April, 2002, A managing Director of 21<sup>st</sup> Century Food And Packaging Ltd was interviewed on the 24<sup>th</sup> Day of April and the one of the Directors of East Cost Oil & Co. Ltd was interviewed on 27<sup>th</sup> Day April 2002

In line with this opinion in respect of advocates<sup>240</sup> as the respondents was to the effect that 18 advocates among the interviewees or who filled questionnaire out of 20, were of the opinion that professional qualification is necessary because, the demands of today's world accompanied by financial crises requires directors with sound knowledge of management to make sure that the company is not prone to financial risks and property losses. The said least a basic knowledge in administration and the demonstration of maturity is required. A director who is not professional is also prone to poor formulation of strategic plan and that he is unable to meet the competitive world in dealing with sensitizing issues such as developing effective management strategy and dealing with risks. Unqualified directors can make unsound decision or policies that can impact affairs of the company. The respondents are of the view that professionalism and education is technical knowhow for the betterment of the company, and it allows professional directors to work effectively despite changes of global trends. There is the view that there should be a clear provision of professional and business qualification relative to the object of the company, especially in specialized companies. They are also of the view that the absence of professional qualification has the effect on the performance of the company because it reduces the level of understanding and one's approach toward dealing with the decision and policy making. This contention was supported by 15 among 16 of the lawyers who were interviewed and those who filled up questionnaires.

On the other hand two advocates and one lawyer thought that there was no need to have profession qualification of the director. Any person can act as the director of the company provided that he has experience in the business he is doing and if he is of sound mind. To them professional qualifications is irrelevant in respect of directors, and they think that time for training is sufficient for the director to manage the affairs of the

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<sup>240</sup> Most of the advocates who responded filled in questionnaires thus it was not easy for the researcher to have interview given the nature of their work and the time within which this research was to be concluded.

company. Magistrates<sup>241</sup> were also interviewed and they responded as follows 6 magistrates who were interviewed out of 8, were of the same view as the 18 advocates, they thought that professionalism is significant in the manner that it may reduce the establishment of companies that are used for sham business. That putting professional qualification will bar incompetent person from acting as director act as directors and that professional qualification is important in terms of formulation of policy and making strategies for the company. One of the magistrates was of the view that professional qualification is impossible in private companies especially when a person owning the company is not willing because he is not bared from employing professional persons to perform some functions that require skills.

The researcher intended to interview seven academicians,<sup>242</sup> however the researcher was able to interview only four of them who significantly supported the idea that professional qualification is necessary, and gave the same reasons as stated above regarding the need of having qualified and experienced directors. The researcher also planned to interview three judges of the High Court Commercial Division, unfortunately only one of the Judges and one registrar of the High Court Commercial Division to be interviewed. They opined that that given the development of corporate governance it was quite necessary to have a professional qualification in respect of specialized companies. This will save to eliminate incompetent person in directorship<sup>243</sup>

The Registrar of Companies<sup>244</sup> had varied opinions. One of them think that depending on the nature of the company some professional qualification should be put in The

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<sup>241</sup> These were interviewed on separate dates depending on one's time and availability, this was held at the resident magistrates of Dar es Salaam at Kisutu

<sup>242</sup> Academicians who respondents were interviewed on separate dates, and they were from Mzumbe University Dar es Salaam, Tumaini Univesity Dar es Salaam College and the Law School of Tanzania.

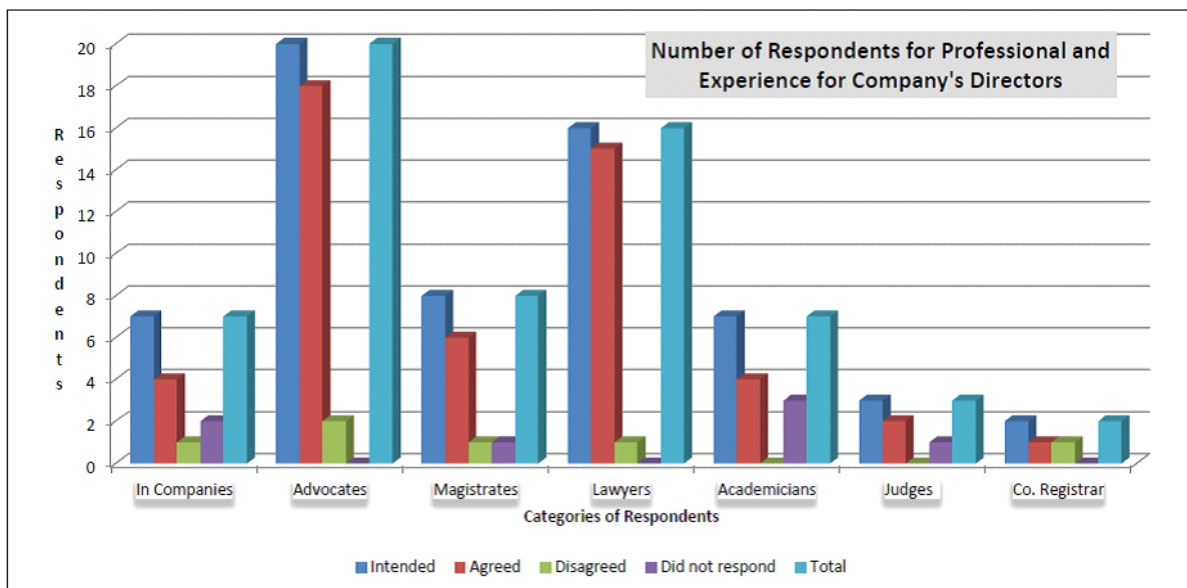
<sup>243</sup> An interview conducted on 6<sup>th</sup> day of May 2012 at the High Court of Tanzania, Commercial Division, where one judge responded together with the registrar of the High Court Commercial Division.

<sup>244</sup> An interview conducted with the Registrars of Companies, one Mkapa., A. B.W, A Deputy Registrar-Commercial Laws department, interview conducted on 24<sup>th</sup> Day of April 2012 and Mgonja., H.O Assistant Registrar, Intellectual Property Department who worked for more than 15 years in companies in different positions.

Company in general terms as it is in the issue of share qualification, that if the articles so require or calls for a particular profession then such directors must have those qualifications, despite the fact that these may be in the articles of association or in separate legislation. One of the registrars of companies opined that issue of professional or academic qualification is not significant, except that, such director should be a person who is conversant with the company tasks that he or she is supervising.

**Table A: Responses for Professional Qualifications and Experience for Company Directors**

Respondents	Intended	Agreed	Disagreed	Did not respond	Total
In Companies	7	4	1	2	7
Advocates	20	18	2	Nil	20
Magistrates	8	6	1	1	8
Lawyers	16	15	1	Nil	16
Academicians	7	4	Nil	3	7
Judges	3	2	Nil	1	3
Co. Registrar	2	1	1	Nil	2

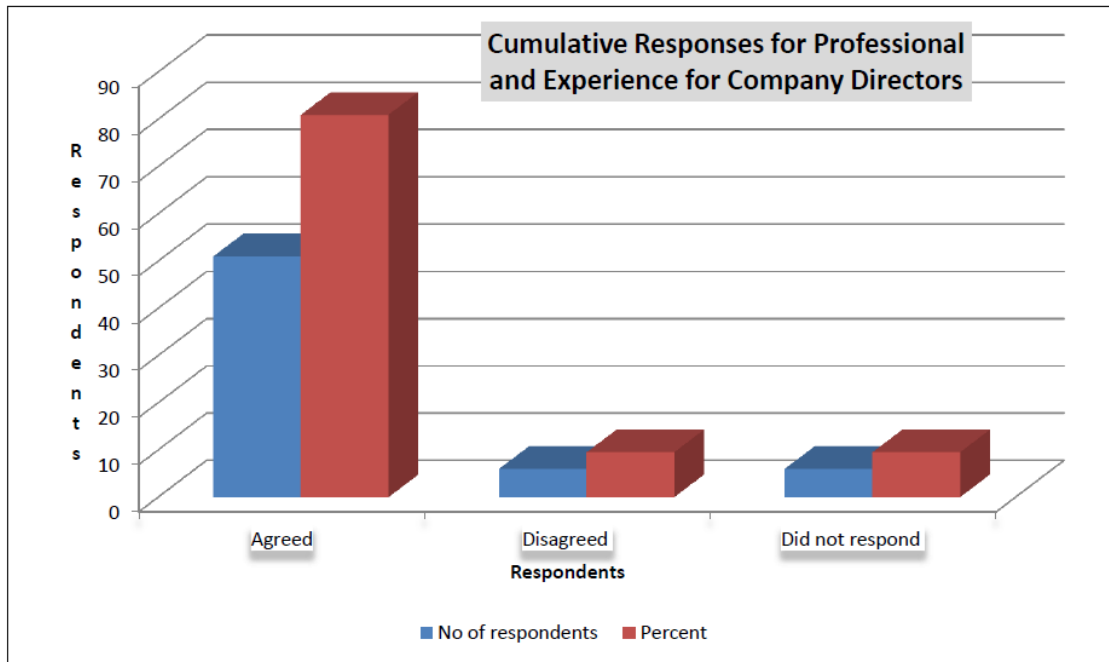


**Figure A. Number of Responses for professional and Experience for Company Directors**

Table A and Figure A above show the responses by the category of respondents in respect to the professional and experience for company directors. The response shows that the majority of the respondent thinks it is necessary that the Act should enumerate the professional qualification and experience for those aspiring to be directors. Table A1 Figure A1 shows cumulative responses in respect to professional qualification and experience for company directors.

**Table A1 showing cumulative responses for professional qualification and experience for company directors**

<b>Response</b>	<b>Number of Respondent</b>	<b>Percentage (%)</b>
Intended	63	<b>100</b>
Agreed	51	<b>80.95</b>
Disagreed	6	<b>9.52</b>
Did not respond	6	<b>9.52</b>



**Figure A1: Cumulative responses for Professional and Experience for Company Directors**

Table A1 and Figure A1 show that the majority of respondents overwhelmingly favor the idea of having qualified and experienced directors to govern companies. About (80.95%) of the intended respondents acknowledged performance of any company will depend on how the director is trained to plan, organize, and execute the tasks at hand. Respondents noted that the Act need also stipulate the importance of qualified company directors. Six respondents, about (9.52%) of the respondents did not provide their responses about the need of having professional and experienced company directors. About (9.52%) of the respondents indicated that it is not necessary for the companies to have qualified and experienced directors and therefore the Act does necessarily require provision describing the qualifications of the directors.

## 5.2 The Issue of Age

The Companies Act, 2002 194 of the Companies Act, provides for the age qualification to be 21 years and a maximum of 70 years. In addition, the reviewed literature

demonstrates that the UK Companies Act, 2006 under section 157 requires that a person may be appointed a director after he/she has attained the age of 16, the law do not provide for the age limit in respect maximum age limit.<sup>245</sup> Another writer<sup>246</sup> when speaking of the Tanzanian Companies Act, 2002 was of the view that the law has limited the age of the directors to a minimum age at 21 years and the maximum age of 70 years, beyond which a person cannot be a director of the company, he further noted that the law allows a director of 18 years subject to the resolution in the General meeting.<sup>247</sup>

Upon interviews with the respondents in the selected companies on these particular issues, 2 of the respondents viewed that, the minimum age limit should be 18 as a matter of right not subjected to an issue of resolution, their argument is based on the fact that 18 years is the age of majority and that now days a person of 18 have acquired diverse knowledge and is capable of understanding a lot of issues taking place in the society. Increasing the age to 21 denies several people the right to be appointed as directors. Three of the respondents thought that the minimum age of 21 years is good and they argued that at 21 years a person might have attained academic profession and his capacity to analyse issues in relation of the company is more significant and he might have had some experiences hence good performance than the person of the age of 18.

However, both agree that the maximum age of 70 should be amended to allow persons of more than 70 years to act as directors of the company as a matter of right. They are of the view that a person above that age has several experiences, and they proposed that there should not be maximum age limit especially in respect of private companies. They think that such persons are important to the performance of the company as long as they are capable of working with the capacity to form rational judgment. The contention of lowering the age limit is also supported by 5 advocates and 7 lawyers among 20 advocates and 16 lawyers respectively. They are of the same view that age should be

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<sup>245</sup> Keenan D op.cit 292

<sup>246</sup> Ombella et al op.cit op101

<sup>247</sup> See section 194 (6) of the Companies Act, 2002

followed as that in the Law of Majority Act<sup>248</sup> and the age as stipulated in the Constitution of the United Republic of Tanzania of 1977,<sup>249</sup> the reason they give is just like those of the 2 officials in the selected companies. 15 advocates and 9 lawyers are of the view that the minimum age limit is quite correct taking the nature of education in our society. They are of the view that the person of 18 years although he/she has the age of majority he is not well capable of forming rational judgment as comparing with one of 21 years and not even more exposed to complex situations, issues of forming strategy of the company together with the policy as among the duties of the company director could be difficult to them hence may lead to a company poor performance. In respect of the limit of maximum of age qualification 14 advocates and 11 lawyers think that the law should not restrict the age limit to 70, they are of the view that, there should not be age limit, what is significant is that such person should be able to form rational judgment and capable of running the company. They think a person of that age who is capable of working have an extensive experience in life and actually knows the trend of the society by his experience in the performance of the company. That is to say 6 advocates and 5 lawyers support the age limit of 70 years as maximum.

All the 6 magistrates who were interviewed supported the idea of the minimum age of 21 and they also think that the maximum age of 70 should be taken out only that such person should be capable of working and that their mind should still be capable of forming rational judgment. One of them is of the opinion that the minimum age limit should be 18 years, his reason being like those who support the age of 18 as minimum. Of these 4 magistrates think that there should not be maximum age limit while the 3 think the age limit of 70 years is necessary given the fact that at that age a person might be old and incapable of working properly.

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<sup>248</sup> Cap [R. E 2002]

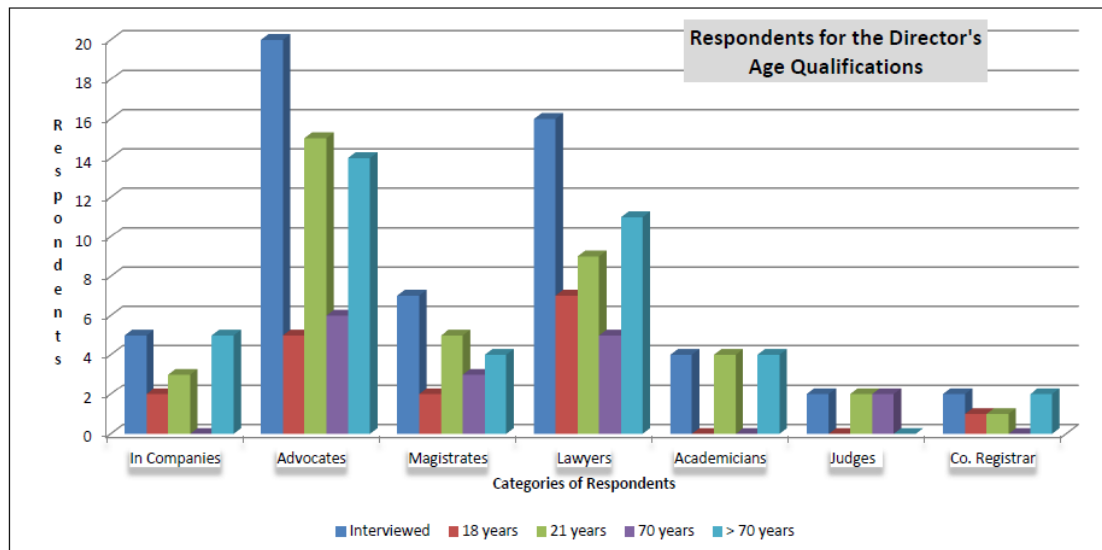
<sup>249</sup> Cap 2 [R.E 2002], which has been revised in 2008

The 4 academicians interviewed were of the considered opinion that the age limit should remain at 21 years, but maximum age should be left free to any person who has capacity of working. On the age limit of 70 years, respondents do not find the essence of the limit; they think there should not be age maximum limit as long as one is able to work perfectly.

The minimum age of 21 is supported by one Registrar of Companies at BRELLA. This registrar noted that the age should be lowered to 18, his reason being like those in support of 18. He also observed that the age of 70 is good because such person is old and his thinking capacity and memory would have started to deteriorate and the ability to make decisive decisions will be compromised. The Judge of the Commercial Division and the registrar of this court are in the same footing with the registrars of companies that the age of 70 is sufficient in terms of working and rationalizing capacity. They insisted that as the age increases over 70 the capacity to remember things and dealing with issues is reduced biologically or naturally. They also think 21 years of age is sufficient as minimum.

**Table B: Responses for Age Qualification.**

Respondents	Interrogated	18 years	21 years	70 years	70 and more
In Companies	5	2	3	None	5
Advocates	20	5	15	6	14
Magistrates	7	2	5	3	4
Lawyers	16	7	9	5	11
Academicians	4	None	4	None	4
Judges	2	None	2	2	None
Co. Registrar	2	1	1	None	2

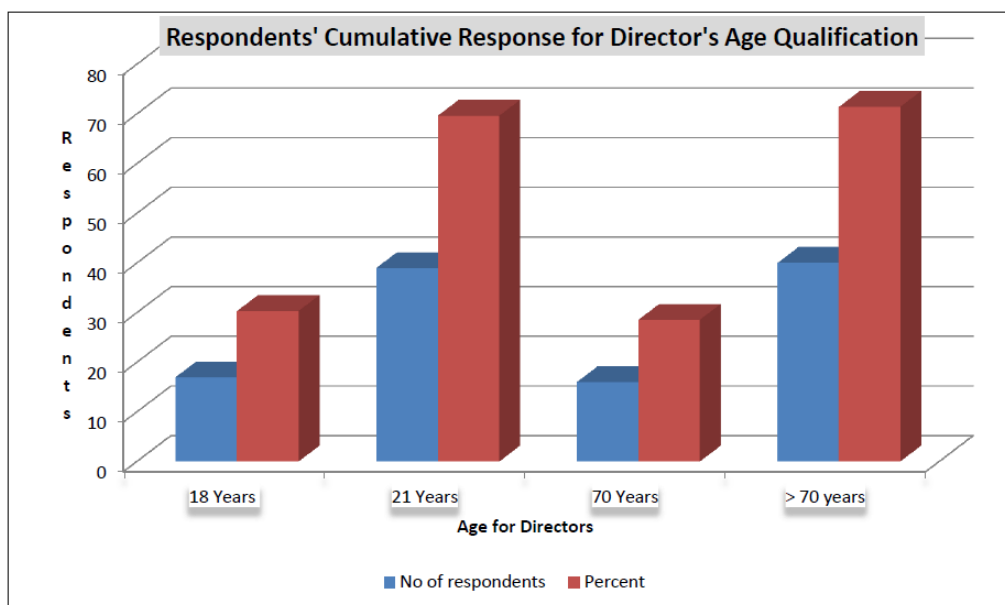


**Figure B: Responses for Age Qualification.**

Table B and Figure B show responses in respect of age qualifications by the different categories of the respondents. These responses generally show that most of the respondents think that there should not be limitation as to the maximum age. Some few people think the age of seventy should be the maximum limit. As to the minimum age most of the respondents agree with the age of 21 years and few others wish the age to be lowered to 18 years. Table B1 and Figure B1 show cumulative responses in respect to the Age Qualifications.

**Table B1 Showing Cumulative Response for age Qualification**

Response	Number of Respondent	Percentage (%)
18 Years	17	<b>30.35</b>
21 Years	39	<b>69.64</b>
70 Years	16	<b>28.57</b>
70 Years or more	40	<b>71.42</b>
Number respondents who responded	56	<b>100</b>



**Figure B1: Showing Cumulative Response for age Qualification**

Table B1 and Figure B1 shows that the majority of the respondents (69.64%) favor the idea of having directors at the age of 21 years and above. However, a reasonable percentage (30.35 percent of the respondents) did not see any problem of having directors at the age of 18 years and above. The respondents in this category felt that at the age of 18, people can have rational judgment and decisive decisions based on the company's affairs. The majority of the respondents felt that people above 70 years can still hold the directorship position and still perform well. The respondents challenged the idea of having the age limit of 70 for the directors.

### **5.3 The issue of Sound mind**

The Companies Act, 2002 is silent on the issues of sound mind of a director or a person aspiring to hold position as directors. This is not even provided for in the disqualifications order under Section 197 of the same Companies Act. On a pass through a documentary review the researcher, noted that under section 274 of the Companies Act 2006 of UK provides categorically that a person of unsound mind is barred from acting

as a director of the company.<sup>250</sup> Another writer<sup>251</sup> is of the view that the issue of sound mind of directors is provided in the general law of contract that is in the Law of Contract Act.<sup>252</sup> However in the Schedule to Table A, Regulation 83 and Table C Regulation 38 to The Companies Act provides that the office of the director shall be vacated when he or she becomes of unsound mind. This legislation clearly talks of directors who are already in office. This regulation does not talk about individuals who aspire to become directors.

Upon interviews with the respondents in the selected companies, the researcher was able to gather the following information with respect to the issue of sound mind of directors. Five respondents among the intended seven were of the opinion that there must be a provision in the Companies Act, to cater for such qualification since it is obviously that the person of unsound mind is incapable of forming rational judgment and that he/she can negatively affect the performance of the company. Therefore, he/she cannot manage, supervise or direct the affairs of the company since he/she is incapable even of dealing with his personal problems.

On the same issue 17 advocates and 14 lawyers in respect to this issue were of the opinion that there should be a specific provision in the companies Act, be it enumerated as a separate provision or put in disqualification orders, that a person of unsound mind cannot perform the function of directorship and should be disqualified to be appointed as a director of the company. These advocates and other lawyers are of the views that The law of Contract would regulate the Directors only in terms of perusing their duty especially when they want to enter into contract with other persons, be them natural person or legal entities. They contend that section 12 of the law of Contract is in respect of the contract, that a director is in no capacity to contract if he is of unsound mind, they substantiate this point by pointing the preamble to the Law of Contract which states ‘An

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<sup>250</sup> Singh, A op.cit p256, Bangia R. K., op.cit p197

<sup>251</sup> Binamungu, C.S.M., op.cit 113

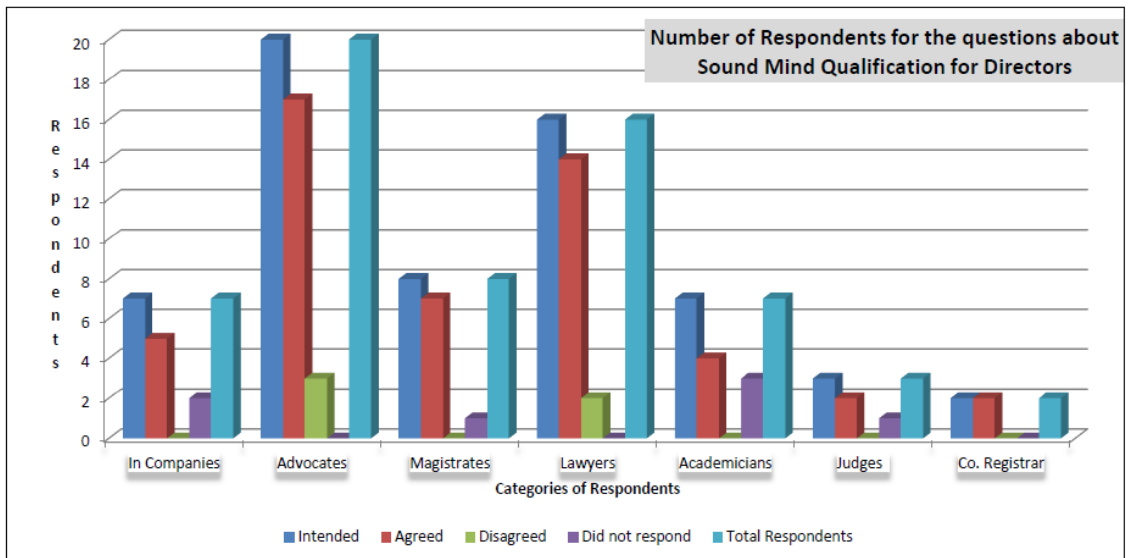
<sup>252</sup> Cap 245 [ R. E 2002] Section 12

Act to Provides for the Law relating to Contracts.’ Further to this they opined that the regulation in Table A and C to the Companies Act, applies only when a director is to be removed in office, that once he becomes of unsound mind his office automatically is vacated. Therefore it does not carter for the time during his appointment and hence the lacuna in the Companies Act.

The 3 advocates and 2 lawyers respectively are of the view that the law is sufficient as it is provided for in the Law of Contract Act and to the Schedule to the Companies Act. They think that enacting a section is inviting multiplicity of sections in the law. Upon interview with the magistrates, all 7 were of the opinion that the issues of sound mind is so vital to be among the qualification of the company director. They think that the law ought to have provided for to it during the appointment not after appointment. The academicians, judges and the registrar of companies at BRELA also supported the idea, noting that there must be a specific provision for certainty purposes. They opined that this existence of such a lacuna can cause poor performance in the company or even failure which can be a cause of company to fail.

**Table C: Responses on the issue of Sound mind**

Respondents	Intended	Agreed	Disagreed	Did not respond	Total
In Companies	7	5	Nil	2	7
Advocates	20	17	3	Nil	20
Magistrates	8	7	Nil	1	8
Lawyers	16	14	2	Nil	16
Academicians	7	4	Nil	3	7
Judges	3	2	Nil	1	3
Co. Registrar	2	2	Nil	Nil	2

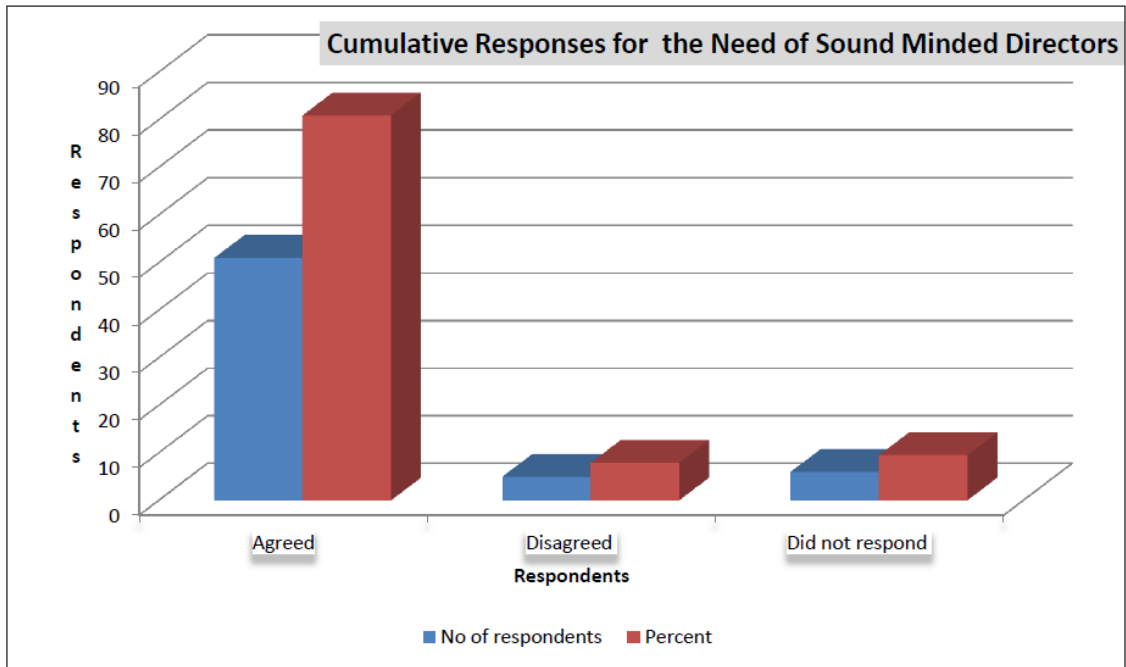


**Figure C: Responses for the issue of Sound mind**

Table C and Figure C, Shows individual responses for the categories of the respondents on the issue of sound mind, generally they show that most of the respondents thinks that there should be a specific provision in the Companies Act dealing with the issue of soundness of the mind. Table C1 and Figure C1, shows a cumulative response with respect to the issue of sound mind to be among the qualification of company Directors.

**Table C1: Cumulative Responses for the issue of Sound mind**

Response	Number of Respondent	Percentage (%)
Agreed	51	<b>80.95</b>
Disagreed	5	<b>7.94</b>
Did not respond	6	<b>9.52</b>
Intended (Total)	63	<b>100</b>



**Figure C1: Cumulative Responses for the issue of Sound mind**

Table C1 and Figure C1 above indicates that the majority of the respondents about (80.95%) overwhelmingly favor the idea of having competent directors who have sound mind in making decision about companies. The need of having sound minded directors is the acknowledgement that the position involves multitasking; making decision that will determine the fate of the company. Likewise, for companies to acquire competitive edge in business depends on how directors respond to the economic, political, and social changes. This role entails sound judgments and decisive recommendations by the directors. However, small percentage (7.94 %) of the respondents noted that the available provisions in the schedule and Law of Contract Act suffice or adequately accommodate the matter, thus no need of having multiplicity of sections.

#### **5.4 The New Regime and the Performance of the Company**

Noted from this chapter herein above it is revealed that the New Regime is inadequate in providing for the qualification of the company directors. The subsequent discussion is on whether the said inadequacy has any significant impacts to the performance of the

company. As noted herein above performance of the company depends on achieving the objects or the goals the company was formed to do. This is the duty that is vested in directors of the company to make sure that they act in the interest of the company. This entails putting forth the goal of the company and to avoid all risks that may cause the failure of the company attaining the objects of the company.

The researcher conducted documentary review and also examined the case study response and she was able to find out that there is a nexus between the qualification of company directors and the performance of the company. Thus the inadequacy of the new regime on the qualification of company directors can lead to poor performance of the company.

In respect to the performance of the company directors in the company it is pointed out that, directors with professionalism referred to as chartered directors in other countries, have the following benefits in relation to the performance of the company. They have effective business leadership and sound cooperate governance. They also improve the board's effectiveness and personal and that demonstrates to shareholders, client and customers that the organization is professional due to the resulting significant performance.<sup>253</sup> This helps the director to appreciate the company's mission and purpose, and loyalty to the interest of the company and its shareholders.<sup>254</sup> As a result the director will avoid putting the company purpose and mission together with the interest of shareholders at risk.

In line with this it is also noted by one writer that performance of the company is risked in terms of liability against persons or other companies transacting with it, if it is manned by the incompetent directors who are not informed of anything in relation of

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<sup>253</sup> Chartered Directors: The Professional Qualification for Directors, op.cit

<sup>254</sup> Directors Qualification Criteria and Independence Standards available at [http://www.internationalpaper.com/documents/EN/Gouvernement/Director\\_Qualification.pdf](http://www.internationalpaper.com/documents/EN/Gouvernement/Director_Qualification.pdf) visited on 8<sup>th</sup> Day of July 10, 2012 at 12.00 Noon.

managing the company.<sup>255</sup> The case of *Sasa Enterprises (Z) Ltd v Mohamed Zara Hussein Dharamsi (Supra)* can be a good example at this point. In this case the company was held liable for the acts of the director to repay the loan by the director who acted without the resolution from the board of directors. This demonstrates the fact that the performance of the company depends very much on the level of skills the director have together with the experience one has. This reconcile the fact that there should not be age maximum age limits for person aspiring to be company directors who are able to work, since their experience is needed very much for the development of the company. In the like case of *P.S.R (T) Ltd & Alhaj Said Rashid Kilahama v The Loans Advances Realization Trust*,<sup>256</sup> the director signed a document in acknowledgment of the debt as the result the company was wrongly held liable for the debt.

In relation to the performance of the company it is commented<sup>257</sup> that professional qualification and experience for the company directors is significant because there are several formal procedures to abide to by the directors in discharging their daily obligations competently. In the absence of these the directors are likely to act beyond the regulation, powers, and the MEMATS the fact that may affect the company transactions. The case of *Nitin Coffee Estates Ltd & 4 Others v United Engineering Works Ltd & Another*<sup>258</sup> the directors of the first and second appellants among others entered an agreement of sale of shares and all assets of the first and second appellants to one Manik the second respondent, in which case the price of the shares was not named and there is no means of ascertaining the price in individual shares. As the result the Court of Appeal held that, there was no contract due to uncertainty in the eyes of law in terms of section 29 of the Law of Contract Act. This demonstrates that performance of the company

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<sup>255</sup> Binamungu C. S. M., (2002) op.cit p 133

<sup>256</sup> *P.S.R (T) Ltd & Alhaj Said Rashid Kilahama v The Loans Advances Realization Trust* Civil Appeal No.40 of 2002 (CA)

<sup>257</sup> Keenan D., op.cit p 290 and Kumar S., (2010) op.cit p 444

<sup>258</sup> *Nitin Coffee Estates Ltd & 4 Others v United Engineering Works Ltd & Another* [1988] T.L.R 203 (CA)

depends on the qualification, special skill and experience the director has in dealing with formal procedures.

In light of the issue of sound mind and performance of the company and performance of the company it is obvious that, the person of unsound mind is incapable of performing any function what so ever. There is a lot of literature and this is also the law that a person of unsound mind is devoid of any legal capacity.<sup>259</sup>

The case study observed that, just like in Table A, A1 and Figure A and Figure A1, the five respondents in the company, four of them noted that the performance of the company depends on the level of professional skills and experience of those who manage it. Those unprofessional and inexperienced directors may not be able to abide by their duties. The remaining ones think that performance requires no professional or experienced of the director. 18 advocates opined that performance of the company is a matter of knowhow, that is, matter of skill and experience of the director to make sure the company is not prone to risks in terms of finance, strategy and mismanagement of the policies. This is based on the fact that unprofessional and unskilled directors has reduced level of understanding and implement policy considerations of the company for the benefit of the company and those directors may sometimes be a source of problems in the company for they are not aware of their duties, procedure for dealing with one another and putting forward the interest of the company first before their personal interest. This contention is supported by 15 advocates, 6 magistrates, 4 academicians and the High Court Judge and the Registrar of the High court Commercial division and the registrar of Companies. The following cases can be examples. In the case of *Yusuph Manji v Edward Masanja & Abdala Juma*<sup>260</sup> it was found that the managing director was concealing the assets and identity of the company for his own interest as a result he was held liable personally. This is not one among the duties of the director under the Act,

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<sup>259</sup> The Law of Contract Act (Supra)

<sup>260</sup> *Yusuph Manji v Edward Masanja & Abdala Juma* [2006] T. L.R 127 (CA)

this demonstrates unprofessionalism and mismanagement of the directorship, though the company may not be held liable. In another case of *Ernest Andrew Chitalika v Fransic Philip Temba*<sup>261</sup> the directors of the company lead to winding up of the company for the reason of just and equitable as they were not in speaking terms and each accused the other of fraud. This is a case that demonstrates that experience and skills are significant for the performance of the company as they help the company focus on the goals of the company and formal procedures in case there is a problem in the management of the company affairs.

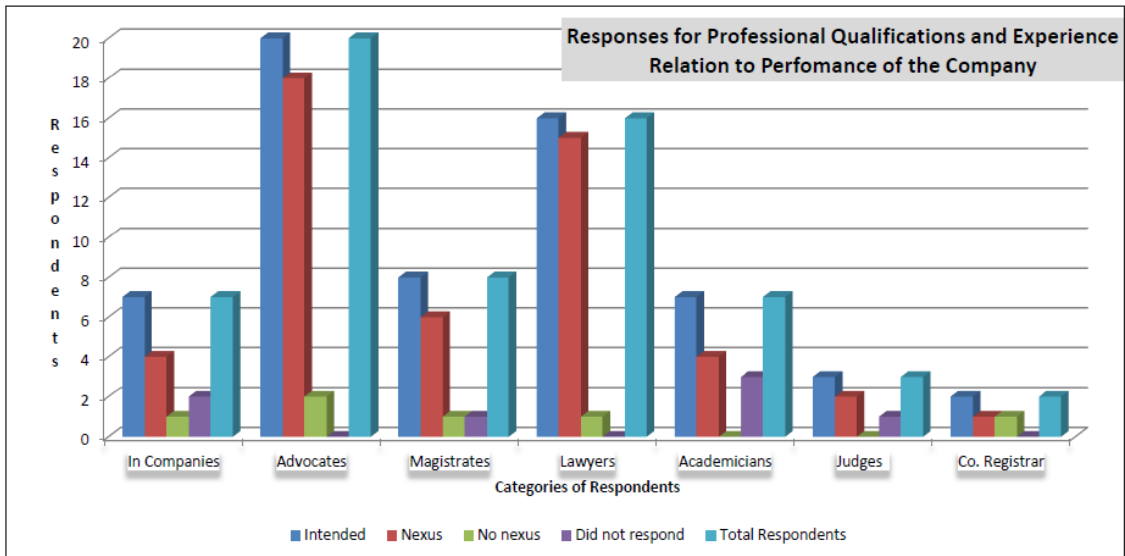
The 2 advocates, 1 lawyer 1 magistrate, and one registrar of companies think that performance has nothing to do with the professional qualification in terms of skills and experience of the person, since the company is not bared from employing competent persons or employees and that the director should only be conversant with the issue he is running.

**Table D: Responses for nexus between Professional Qualifications and Experience of directors and Performance of the Company**

Respondents	Intended	Nexus	No Nexus	Did not respond	Total
In Companies	7	4	1	2	7
Advocates	20	18	2	Nil	20
Magistrates	8	6	1	1	8
Lawyers	16	15	1	Nil	16
Academicians	7	4	Nil	3	7
Judges	3	2	Nil	1	3
Co. Registrar	2	1	1	Nil	2

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<sup>261</sup> Ernest Andrew Chitalika v Fransic Philip Temba [1996] T LR 287

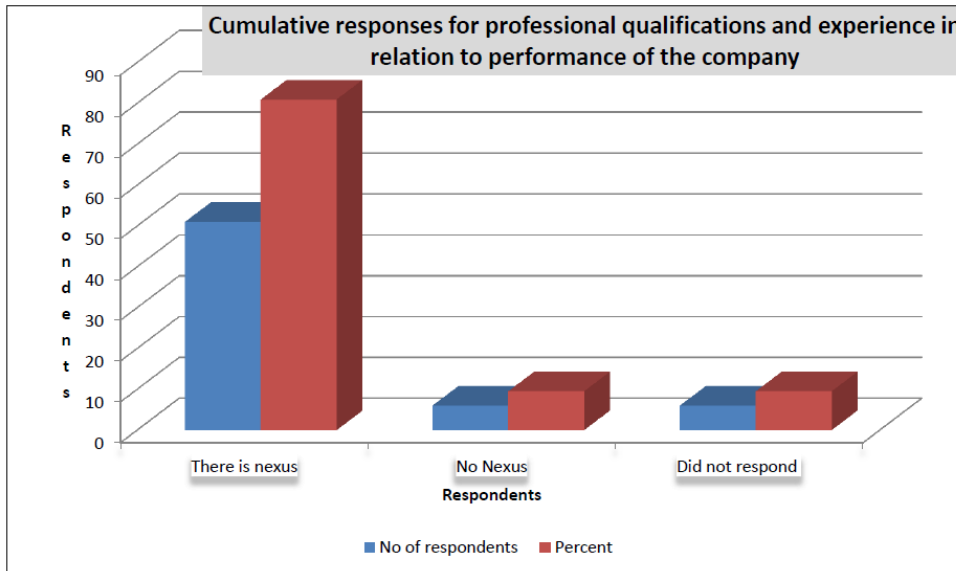


**Figure D: Responses for nexus between Professional Qualifications and Experience of directors and Performance of the Company**

Table D and Figure D, Shows individual responses for the categories of the respondents in professional qualifications and experience in relation to the performance of the company, generally they show that most of the respondents thinks that there is a nexus between professional qualification and experience to the performance of the company Table D1 and Figure D1, shows a cumulative response with respect to professional qualification and skills in relation to the performance of the company.

**Table D1 showing cumulative Responses for nexus between Professional Qualifications and Experience of directors and Performance of the Company**

Response	Number of Respondent	Percentage (%)
Intended	63	100
There is nexus	51	80.95
No nexus	6	9.52
Did not respond	6	9.52



**Figure D1 Cumulative responses for professional qualification and experience in relation to performance of the Company.**

Table D1 and Graph D1 show that majority of the respondents (80.95 percent) agrees that the qualification of the directors would determine the performance of the companies. Their argument is based on the idea that companies are in competition particularly in the free market economy. Therefore, directors have to direct and supervise production and market strategies and programs to grow through production and selling of quality products. In a situation like, it is difficult for selected directors

with unsound minds to perform effectively. The research observed this argument where almost every respondent as explained in previous section noted individuals with unsound mind should not be given responsibility of directing companies. However, there was a relatively small percentage (9.52 percent) of the respondents who had the opinion that the professional qualifications and experiences has no impact is incapable and cannot perform the any function what so ever. The same percentage (9.52 percent) did not provide their responses on the relationship between professional qualifications and the performance of the company.

## **CHAPTER SIX**

### **CONCLUSION AND RECOMMENDATIONS**

#### **6.0 Introduction**

The major concern of this dissertation was to have a critical analysis of the Companies Act, 2002 in relation to its provision touching the qualification of company directors, it was centered on analysis whether the Companies Act, is adequate or not in providing for required qualification of company directors, this went hand in hand evaluating the qualification of company directors in line with performances of companies. In the light of getting the relevant information the research used a documentary review and a case study in the selected companies where the researcher had an opportunity of interviewing the directors and other company officials. The researcher also interrogated other professionals who deal with the Companies, or matters relating to the Companies Act in one way or another including lawyers, advocates, judges, magistrates, academician and the registrar of companies.

#### **6.1 Conclusion**

The study was guided by several research assumptions and several research questions respectively. The first assumption was the Companies Act; Act No. 12 of 2002 is inadequate in describing the qualification of company directors. The second assumption was that the inadequacy of the law on the qualification of company directors has the subsequent effect in the performance of the company. The research was further guided by the following three research questions: i) what are the qualification of company directors that were provided for under the companies Ordinance? ii) What is the qualification of company directors under the Companies Act, 2002? And iii) is the Companies Act, 2002 adequate in providing for the necessary qualification of company director required in improving the company's performance? The assumptions and research questions above led the researcher to the following conclusion in respect to the qualification of the company directors in relation to the performance of the company.

The researcher found out that the Companies Act is inadequate for its failure to provide for the professional qualification of company directors and the issue of experiences to the person who is aspiring to become company directors. In other countries like UK directorship is regarded as a professional qualification. The law in Tanzania seems to be lagging behind thus inviting incompetent persons who are not informed about the needed qualification for the company directorship. The response on this particular point was based on the points that there should be a clear provision on professional and business qualification relative to the object clause of the company, particularly in specialized companies. The reason being that with the presence of professional qualification and business qualification stipulated in the Companies Act will give rise to wide scope in getting good and qualified people for appointment as director, it will also enable a director to become objective in the way he performs his duties.

The research study also revealed that the Companies Act is inadequate in relation to the qualification of the company director for being silent on the provision of the issue of soundness of mind of the director to be among the qualification of the company directors. The Companies Act has no specific provision that provides for the issue of sound mind and it is not even provided for in the disqualification orders of the company directors as provided for in the Companies Act under Section 197. The application of Section 12 of the Law of Contract Act was found to be a misnomer or a misconception as the said section applies only to the directors of the company at the time they wish to enter into the contract with other person or other legal entities. The said section do not cater for qualification of director at the time he is appointed.

Further to this, it was concluded that the application of Regulation 83 of Table A and Regulation 38 of Table C of the Schedule to the Companies Act. is limited only to the directors who are already acting as directors, thus the moment when he became of unsound mind he vacates the office. This regulation do not cater for the person aspiring

to become directors as a result it might be a loop hole for unsound mind directors to be appointed then later to be disqualified and to vacate the office. This will bring a lot of complications. Thus the law should state categorically that a person of unsound mind do not qualify to be appointed as the director. Thus the said regulation comes into place only when an appointed director becomes of unsound mind hence a lacuna.

The research also found out that the Companies Act is inadequate on the qualification of the company director as it restricted the age of the person to act as the company director to 70 years only. If a person wishes to be reappointed above that age there must be a notice and a resolution in the general meeting of the company. The research found out that the law ought not to put limitation of maximum age. The researcher found out that a person above that age would have significance experience that could be so significance to the performance of the company, thus there is no significance jurisprudence on the issue of limit of the age. It is argued that aged person are more conversant and have experience what is so significance to the company, further that they can impart knowledge to young people working at the company. So the criteria could only be that such person is able of working efficiently and capable of forming rational judgment despite his or her age. Thus the law should adopt the position in England where there is no maximum age limit, the criteria remains that such person must be able to form rational judgment and capacity to work

On the second that is, issue whether the inadequacy in the law have subsequence affecting the performance of the company. In this point it was concluded that managing a company involves the management of human resources, bargaining contracts and signing business contracts, business growth environmental scanning, understanding the nature of market, appreciation the concept of open system, none of these can be done by a non-profession person especially in the big companies. Hence the inadequate in the law, through the case study from the selected companies it was noted out that, if the directors are not professional, companies are engaged in more litigation caused by the

acts of the directors of the company. Further that there are misunderstands between the company with the resources, say employee, for example on instances of unfair termination making a company in more litigation than implanting the objects of the company for the performance of the company. It was further revealed by the Register of companies that, although it is difficult to tell exactly, they think that most of the company fails because of the fact that they are manned by unqualified individuals.

The researcher also found out that the Companies Act being inadequate in relation to the qualifications of company directors has a significant impact in the performance of the company. This was ascribed by the reason that professional qualification and experience together with the issue of sound mind, helps a company director raise the level of understanding and one's approach towards dealing with the decision for the company including the policy making and formulation of proper strategy of the company and making rational decision to which a person cannot be held liable.

Hence the inadequacy of the qualification in respect of the company directors has significant impact on the performance of the company thus it can cause the company to fail to achieve its objects for which it was formed. Failure to achieve the objects can be on the basis of winding up caused by director's inefficiency to follow the procedures required by law; it can be as a result of liability caused by the directors to the company or as a result of poor management below the standard for failure to attain the goal or profit for the company.

## **6.2 Recommendations**

The following are the recommended measures aimed at improving the Companies Act in relation to the qualification of those aspiring to be company directors.

Generally, Since the law is one governing comprehensively for all matters of companies, that law ought to have a relative clause for a director to have professional qualification or business qualification and experiences so that any person aspiring to be a director in such company must have such qualification for him to be appointed as the director of the company. These will carter most for cases of specialized companies and that the law will not encourage incompetent person to act as directors of the company. The level of education was found not to be of significance if a company does not require such qualified person.

The Act also should provide categorical for the issue of sound mind for person aspiring to become company directors. It could be by putting a separate provision or inserting it under section 197 which relates to the disqualification orders just like it is in the UK under section 274. In line with this, the law should, be to the effect that, there should not be maximum age limit for a person aspiring to be a company director, what should be looked at is whether he has relevant skills, experience and capacity in terms of forming rational judgment to hold the office of the director. In line with this general recommendation, the following are specific recommendations.

### **Policy makers**

The police makers particularly those in the cabinet in collaboration with the ministry of trade and industry, should formulate a policy that will require directors in specialized companies to have the qualification relative to the object clause of the company. The policy should also allow any person aged 21 years and above to work as a director as long as he is capable of working significantly. The policy further should contain a clause that directs for the qualification of the company director to be among them to be the issue of sound mind before his appointment. The current situation demonstrates that the law is not comprehensive in stipulating the ability of the appointed directors based on their soundness of the mind. The establishment of policy for company directors is essential to allow the government and its ministries to determine what the expectations

of people about different qualifications of the company directors. The policy will also provide mechanism on how companies should employ qualified directors. In addition, this policy will be used to influence the establishment of laws related to the company directors. Laws in this case are something to be enforced and will provide formalized procedures and principles related to the selection of directors.

### **Law makers**

The law should specifically provide for the professional qualification, business qualification and experiences of the company directors related to the object clause of the company. The law should therefore enact qualification requirements in respect to the specialized companies. The law should provide that to all directors must have certain qualification in order to become directors in a particular company. This provision is necessary in respect of companies that require a profession of a particular nature. In this way the law will not be said to encourage incompetent person to act as directors to the detriment of the company.

The law makers should also seek to include a provision that carter for the issues of sound mind as among the qualification of the company directors. The law should enact this provision to carter for the issue during the appointment of such director and at any time he/she becomes of sound mind that he is disqualified to act as a company director. Imputation of the law of Contract is improper as the same comes in during the contract stage and that not all directors are employed on the contract of service.

The law makers should also amend the provision of section 194 of the Companies Act in respect to the maximum age and allow any person to apply for a position of being a company director even if his age exceeds 70 years as long as he is capable of working effectively and can form rational judgment.

**To the stake holders**

Stake holders such as BRELA, since this organ works directly with the companies, they should be keen enough during the registration of the companies to inquire whether during the appointment of the company director in respect of the company to be formed or subsequent appointment the directors has mate all qualifications as required by law stipulation of the articles of association. This will help to reduce inculpatated and disqualified directors to act as company directors to the detriment of the companies they are appointed to work for.

And to the owners of the company be it private or public, must make sure that all the directors appointed have all the qualification set out in the articles of association and in the Companies Act. This will enhance the performance of the company in terms of policies and strategy formulation together with proper management.

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## APPENDICES

### QUESTIONNAIRE 1

#### For Academicians, Judges, Magistrates, Advocates and Lawyers

Dear Respondents, the holder of this questionnaire Miss Luckness William Jangu is a LL.M Candidate of Commercial Law at the Faculty of Law, Mzumbe University with the interest to research in the topic titled, “*The Qualifications of Company Directors and the Performance of Companies in Tanzania: An Analysis of the Companies Act, 2002*” for the year of study 2010/2012.

The success of this research depends highly on your appreciated assistance. Henceforth she kindly requests for your contribution toward that end by volunteering your precious and valuable limited time to respond to the questionnaire this by giving information that will make this research successful. She thus assures you that the information is only for academic purposes and that will remain confidential.

You’re therefore humbly requested to fill the questionnaire below. In case the provided space is not enough for your answer please feel free to use additional paper and please annex it to this questionnaire.

#### Part One: General Information

Name.....  
Gender.....  
Age.....  
Occupation.....  
Profession.....  
Address.....

#### Part two: Questions

1. The company is managed by (please tick the appropriate answer)
  - a. Directors
  - b. Shareholders
  - c. Officers
  
2. In your opinion, how can you define the term director?

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3. Do you happen to know the powers of the company directors in a company (please tick )

- a. Yes
- b. No

If yes what the powers of company directors in a company (please explain briefly).....

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4. Do you know the functions of company directors in a company (please tick )

- a. Yes
- b. No

If yes, kindly list down the functions you know

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5. The companies Act of 2002 provides for the qualifications of company directors to include

- a. Share qualification
- b. Age of 21-70 years
- c. Person not discharged bankrupt
- d. Consent of the person to act as the director,

5a. Were you aware of these qualifications? (Please tick the appropriate answer)

- a. Yes
- b. No

5b. given the development in corporate governance do you think these qualifications are adequate (please tick)

- a. Yes
- b. No

Kindly, give reasons for your answer.....

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6. Do you think there is a need for additional qualification requirement for company directors (please tick)

- a. Yes
- b. No

If yes what qualifications do you think should be added.....

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If no please give reasons.....

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7. Managing a company requires a good professional skilled and experienced director

- a. True
- b. Not true

Kindly give reasons for your answer above.....

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8. Should the issue of sound mind be among the qualification of company directors in the Companies Act,
- a. Yes
  - b. No

Kindly give reasons for your answer.....

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9. Should the issue of share qualification be categorical to binds to all types of company directors namely
- a. Executive directors
  - b. Non Executive Directors
  - c. Shadow director
  - d. Defacto- director
  - e. Alternate Directors
- a. Yes
  - b. No

Kindly, give reasons for your answer.....

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10. Should the issue of consent of directors to the registrar of Companies in the Companies Act be made to bind all the types of directors named above
- a. Yes
  - b. No

Kindly, give reasons for your answer.....  
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- 11. Should there be academic professional qualifications for Companies Directors in Tanzania
- a. Yes
- b. No

Kindly give reasons for your answer.....  
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- 12. Do you think the efficiency and performance of the company depends on the director's level of education and experience in the management of the company
- a. Yes
- b. No

Kindly give reasons for your answer.....  
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- 13. Do you think lack of professional qualification on company directors has an impact on performance of the company
- a. Yes
- b. No

Kindly give reasons for your answer.....  
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14. Have you dealt with any issue(s) or case(s) that relates to qualification of company director in your company (Please Tick)
- a. Yes
  - b. No

If Yes, please explain what aspect it involved and the outcome was

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*Thank you for your kindness*

## QUESTIONNAIRE 2

### For Directors/Managers and Other Officials From the selected companies

Dear Respondents, the holder of this questionnaire Miss Luckness William Jangu is a LL.M Candidate of Commercial Law at the Faculty of Law, Mzumbe University with the interest to research in the topic titled, “*The Qualifications of Company Directors and the Performance of Companies in Tanzania: An Analysis of the Companies Act, 2002*” for the year of study 2010/2012.

The success of this research depends highly on your appreciated assistance. Henceforth she kindly requests for your contribution toward that end by volunteering your precious and valuable limited time to respond to the questionnaire by giving information that will make this research successful. She thus assures you that the information is only for academic purposes and that will remain confidential.

You’re therefore humbly requested to fill the questionnaire below. In case the provided space is not enough for your answer please feel free enough to use additional paper and please annex it to this questionnaire.

#### Part one: General Information

Name.....  
Gender.....  
Age.....  
Occupation.....  
Profession.....  
Position in your company.....  
Address.....

#### Part two: Questions

1. How long have you been working as a director, manager or officer of this company? (please tick the appropriate answer)
  - c. Below five years
  - d. Between five years to ten
  - e. More than ten years

2. What experience do you have as a company director, manager or officer (please specify)

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3. Do you happen to know the powers of the company directors in a company (please tick )

- a. Yes
- b. No

If yes what the powers of company directors in a company (please explain briefly).....

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4. Do you know the functions of company directors in a company (please tick )

- a. Yes
- b. No

If Yes, kindly list down the functions you know

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5. Do you face any challenges in your position as a director, Secretary or officer of the company? (please tick )

- a. Yes

b. No

If yes can you please explain the challenges you are facing

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6. Do these challenges have a relationship with the qualifications that a company director is supposed to have? ( please tick)

- a. Yes
- b. No

If yes how they do relate to the qualification of company directors

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7. The companies Act of 2002 provides for the qualifications of company directors to include

- a. Share qualification
- b. Age of 21-70 years
- c. Person not discharged bankrupt
- d. Consent of the person to act as the director,

7a.Were you aware of these qualifications? (Please tick the appropriate answer)

- a. Yes
- b. No

7b. given the development in corporate governance do you think these qualifications are adequate (please tick)

- a. Yes
- b. No

Kindly, give reasons for your answer.....

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8. Do you think there is a need for additional qualification requirement for company directors (please tick)

- a. Yes
- b. No

If yes what qualifications do you think should be added.....

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If no please give reasons.....

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9. Managing a company requires a good professional skilled and experienced director

- a. True
- b. Not true

Kindly give reasons for your answer above.....

.....  
.....  
.....

10 Should the issue of sound mind be among the qualification of company directors in the Companies Act,

- a. Yes
- b. No

Kindly give reasons for your answer .....

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11. Should the issue of consent of directors to the registrar of Companies in the Companies Act be made to bind all the types of directors named above

- a. Yes
- b. No

Kindly, give reasons for your answer.....

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12. Should there be academic professional qualifications for Companies Directors in Tanzania

- a. Yes
- b. No

Kindly give reasons for answer.....

.....

.....

.....

.....

13. Do you think the efficiency and performance of the company depends on the director's level of education and experience in the management of the company

- a. Yes

b. No

Kindly give reasons for your answer.....  
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14. Do you think lack of professional qualification on company directors has an impact on performance of the company

- a. Yes
- b. No

Kindly give reasons for your answer.....  
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15. Have you dealt with any issue(s) or case(s) that relates to qualification of company director in your company (Please Tick)

- a. Yes
- b. No

If Yes, please explain what aspect it involved and the outcome was

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*Thank you for your kindness*