ANALYSIS OF THE DUTIES OF THE ADMINISTRATORS OF COMMERCIAL COMPANIES FROM THE JURISPRUDENCE OF THE SUPERINTENDENCE OF COMMERCIAL COMPANIES IN COLOMBIA

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Acceptance date: November 12,2022; Publication date: December 30,2022

Abstract *–The purpose of this review article is to identify the subjects considered to be administrators within commercial companies in Colombia, analysing their duties and responsibilities. Through an exhaustive analysis of the jurisprudence issued by the Superintendence of Companies, it seeks to determine which are the main conducts that can generate civil liability for these administrators. In addition, the study aims to establish the legal actions available to the commercial company in the event that it suffers financial damage as a result of its actions.*

The approach of this research is based on an interpretative and qualitative paradigmatic approach, which allows for a deeper understanding of the regulations and dynamics that govern relations within commercial companies. The legal hermeneutic method is used, which facilitates the detailed analysis of the normative, doctrinal and jurisprudential sources, providing a robust theoretical framework for the interpretation of the obligations and responsibilities of the administrators, as well as the legal mechanisms available for the protection of the assets of commercial companies.

Keywords: *Responsibility, administrators, duties, superintendence of companies, commercial companies.*

INTRODUCTION

The directors of commercial companies play a very important role, both inside and outside the company. They are required to perform legal, administrative and economic functions in order to develop the corporate purpose set out in the articles of association. To this end, they may have representative, decision-making and management functions.

In this sense, it is relevant to determine who are considered administrators under Colombian law, and also to establish their duties, functions and responsibilities.

Corporate law in Colombia has provided for a special regime applicable to administrators, although it is true that this legislation has been contemplated since 1995 in Law 222, it was only until 2012, when the Delegation of Commercial Procedures of the Superintendence of Companies was created, that a real application and effectiveness of this regime began to be noticed.

In Colombia, within the Judicial Branch of public power, we do not have commercial judges, and civil judges are in charge of resolving commercial matters. As a result, we find that the civil jurisdiction in Colombia has high rates of congestion due to the number of processes that are filed daily compared to the number of processes that are finalised.

Thus, since the Colombian Political Constitution in Article 116, in development of the principle of harmonious collaboration, it was exceptionally allowed to attribute jurisdictional functions in specific matters to certain administrative authorities.

In the case of commercial or mercantile law, jurisdictional functions were attributed to authorities belonging to the executive branch such as the superintendence of industry and commerce, the superintendence of companies and the financial superintendence, and for the subject of corporate law

the competence is for the superintendence of companies.

The Superintendency of Companies, which is part of the executive branch of government, is a technical body attached to the Ministry of Commerce, Industry and Tourism, and is an entity with legal personality, administrative and financial autonomy, through which the President of the Republic exercises the inspection, supervision and control of commercial companies. Thus, in Colombia, the Superintendence of Companies has administrative and jurisdictional functions. As regards the former, they are initiated ex officio or at the request of the parties by means of a complaint and end with a sanctioning or acquittal resolution, and as regards the latter, they begin with a lawsuit and end with a judgement, and their functions are equivalent to those of a civil circuit judge.

The jurisdictional competencies of the Superintendence of Companies in corporate matters, and specifically in cases of administrator liability, are found in the General Code of Procedure, Article 24, numeral 5°, literal B, which stipulates: Article 24. EXERCISE OF JURISDICTIONAL FUNCTIONS BY ADMINISTRATIVE AUTHORITIES. The administrative authorities referred to in this article shall exercise jurisdictional functions in accordance with the following rules: 5. The Superintendency of Companies shall have jurisdictional powers in corporate matters, referring to: b) The resolution of corporate conflicts, the differences that occur between the shareholders, or between them and the company or between them and their administrators, in the development of the corporate contract or unilateral act.

The research problem that frames this study arises from the following question: What are the conducts of the administrators that generate civil liability according to the jurisprudence of the Superintendence of Companies?

1. Methodology

This article is part of the interpretative paradigm, which focuses on understanding reality in a dynamic and diverse way, with special emphasis on the meaning of human actions. Unlike approaches that seek to measure reality objectively, this paradigm prioritises the perception and interpretation of phenomena, as well as the analysis of social practice from a meaningful perspective. The methodological framework of this study follows a qualitative approach, which allows for a better understanding and contextualisation of the problem under investigation (Martínez et al., 2022). The legal hermeneutic method is used, which facilitates a detailed analysis of normative, doctrinal and jurisprudential sources, providing a solid theoretical framework for interpreting the obligations and responsibilities of administrators, as well as the legal mechanisms available for the asset protection of commercial companies. Data collection techniques and instruments include documentary and textual analysis.

In the context of the descriptive research, the concept of ‘administrators’ was defined with the purpose of identifying the conducts that can generate civil liability within commercial companies in Colombia, calculated on the analysis of the jurisprudence issued by the Superintendence of Companies.

2. Results and discussion

2.1. Directors of commercial companies

In the legal systems of Roman-Germanic origin, there was the thesis of representation, where the administrator occupied the position of the representative of the legal person - the commercial company. Nowadays, however, we speak of the organicist theory, in which we see that the management of the company is carried out by the officers to whom the law or the contract grants this power.

The administrator is the one who carries out acts of management that are carried out within the company for the development of the social activities foreseen in the corporate purpose, and also carries out acts of representation that are related to the development of activities outside the company by virtue of which he manifests the will of the company through the conclusion of contracts or legal acts.

For the Superintendence of Companies, the Administrator is the one who acts as such and also the one who is vested with administrative powers (Superintendence of Companies, 2008, external circular 220-000006).

Thus, ‘the administration includes the conduction and execution of all the company's business, under a hierarchical system with concentration and delegation of decision-making powers and with its own responsibility’ (Acosta and Lara, 2003, p. 379).

In the Colombian legal system, by virtue of the provisions of Law 222 of 1995, ‘Administrators are the legal representative, the liquidator, the factor, the members of boards or boards of directors and those who, in accordance with the bylaws, exercise or hold these functions’.

2.1.2. **Legal representative.**

This is one or more natural or legal persons who act in the name and on behalf of the company. There may be plural representation. Art. 312 C.Co. or joint Art. 440 C.Co.

It is a permanent, remunerated figure whose appointment, according to the type of company, corresponds to the highest body, whether it is the general assembly of shareholders for capital companies or the board of partners for partnerships. In the Colombian Code of Commerce we find the regulations that regulate it in articles 163, 196, 198, and 199 C.Co, Art 26 law 1258 of 2008.

2.1.3. **Board of Directors.**

This is a consultative body that must be formed in public limited companies and limited joint-stock companies, chosen by the general meeting of shareholders.

It is a collegiate body, made up of at least three members and their alternates. Art. 434 C.Co.

Prohibitions. Art 435 C.Co; Restrictions Art 202 C.Co. and Election 436 C.Co.

2.1.4. **Liquidator.**

He is the legal representative of the dissolved company and the special administrator of its assets. Oficio DAL-32.528 of 17 December 1985 Superintendencia de Sociedades.

2.1.5. **Factor.**

This is the administrator of a commercial establishment, linked by means of a preposition contract. Articles 1332 to 1337 of the C.Co.

2.1.6. **The de facto administrator.**

A person who is not bound by an employment or service contract with the company as legal representative, member of the board of directors, liquidator or factor but who acts externally and internally as administrator, executing the corporate purpose of the company.

The importance of the figure of the de facto director, by virtue of which it is possible to apply the rules inherent to company directors to all those persons who, outside the scope of their legitimate powers within the company, behave as true managers of the company's affairs. By making certain duties demandable of such persons, as well as extending to them the responsibilities inherent to the position of administrator. Superintendency of Companies, ruling of 26 March 2019.

In the specialised doctrine, numerous judicial assessment criteria have been developed to identify such persons. These criteria include the following: (i) directing the actions of the other directors, (ii) obliging the company to assume substantial obligations, (iii) being explicitly recognised by the company as a director, (iv) appearing before third parties as a director and (v) adopting decisions that are transcendental for the operation of the company.

When some of these situations come together, there are strong indications that a person has exercised, de facto, functions inherent to the position of director'. Superintendency of companies ruling of 26 March 2019

The ruling of the Superintendence of Companies is analysed in the case of a simplified joint stock company SAS, with a sole shareholder, who dies, and one of his sons begins to perform the duties of administrator, without there being a process of succession of allocation of shares, or minutes of the general meeting of shareholders where this power is attributed to him, for the case there was the assumption of appearing before third parties as administrator and taking transcendental decisions for the company, since he decided the sale of real estate owned by the company. By means of a social action for liability, the other son requested that the sic declare his sister to be a de facto administrator and that she be declared liable for the sales made without legal authorisation to do so.

2.2. **Duties of the administrators of commercial companies from the jurisprudence of the Superintendence of Companies.**

Within the Superintendence of Companies there is a delegation of commercial procedures, on the subject of the administrators' regime, we find 69 sentences issued by the Superintendence of Companies, from 2013 to 2024.

2.2.1. **General duties:**

The general duties of directors in Colombia are contemplated in Article 23 of Law 222 of 1995, stating that directors must act in good faith, with loyalty and with the diligence of a good businessman. Their actions shall be carried out in the interests of the company, taking into account the interests of its members.

Martin Perez, in classifying the obligations of the administrator, indicates that we are in the presence of obligations to act that are imposed on him by both positive state legislation and the internal regulations of the company itself. These obligations fall not only in the sphere of administration (in terms of decision-making power), but also in the legal (rather than contractual) sphere, given that it implies the obligation to enforce the articles of association of the company; that is, to adapt and adhere to them and to the applicable rules of the positive law in force both internally and externally. Pérez Cázares, Martín Eduardo Administradores de las sociedades mercantiles, su trascendencia procesal Revista Perspectiva Empresarial, vol. 6, núm. 2, July-December, 2019, pp. 109-122 Fundación Universitaria CEIPA.

The duties of directors can be grouped into two broad categories: 'duties that are reflected in internal relations, i.e. towards the shareholders and the company, and duties that are reflected externally, towards creditors and the public in general' (Galindo, 2013, p. 311).

2.2.2 **Duty of loyalty**

Always act in the manner that best suits the interests of the company in an objective, integral, frank and faithful manner.

From the review of the jurisprudence of the Superintendence of Companies, the conducts that may imply the liability of the administrator for breach of his duty of loyalty, we find the conclusion of contracts in conflict of interest.

The Colombian legal system has not provided a legal definition to identify the configuration of a conflict of interest in the corporate sphere, - it will be up to the judges to determine when there are circumstances that may activate the rule of numeral 7 of article 23 of Law 222 of 1995. To this end, the judge's analysis will seek to establish whether the director has an interest that may cloud his objective judgement in the course of a given operation. In this way, it is necessary to prove that these circumstances -represent a real risk that the administrator's discernment may be compromised.

In this respect, the Superintendence of Companies has determined the assumptions that must be met for a conflict of interest to exist:

A. when the administrator or a person linked to this subject enters into transactions with the company in which the latter exercises his functions. B. When the same person is a director of two companies that contract with each other. D. There is even a conflict of interest in situations in which the director involved in a conflict does not participate, in any capacity, in the conclusion of the respective legal transaction and, even so, the latter may be vitiated by a conflict of interest because he or she has a significant economic interest in a given transaction. In this regard, it has been stated that -a conflict may arise when the director has an economic interest that is sufficiently significant to impair his or her ability to objectively fulfil the functions of his or her position.

The Superintendency has also ruled on the consequences of violating the rules in force on conflicts of interest. In the first place, the absolute nullity of operations entered into without complying with the provisions of numeral 7 of article 23 of Law 222 may be requested, as expressly recognised in Decree 1925 of 2009. Article 5 of this Decree provides that, except for the rights of third parties who have acted in good faith, once the nullity is declared, things will be restored to their previous state, which could include, among others, the reimbursement of the profits obtained from the sanctioned conduct. Secondly, the respective administrator may be held liable for the express violation of his legal duties.

2.2.3. **Duty of good faith**

This consists of acting with an honest conscience, without fraud or vices, with fairness, justice and complying with the requirements of social activity.

Duty to act with the diligence and care of a good businessman.

It implies a particular diligence, acting as a person knowledgeable in management techniques. It is a strict pattern of conduct, it entails a serious and informed assessment of decisions.

From the review of the jurisprudence of the Superintendence of Companies, the following list of conduct that may imply liability of the administrator for breach of his duty to act with diligence and care is presented, as follows:

A. Breach of the duty to call meetings of the general assembly of shareholders or shareholders' meeting.

B. Breach of the duty to register the amendments to the articles of association in the commercial register. Art. 29 Law 1258 of 2008.

C. Non-compliance with the duty to keep corporate books. Art. 195 C.Co.

D. Failure to comply with legal accounting provisions. Art 34 and 42 Law 222 of 1995.
E. Failure to comply with the duty to render accounts. Art 45 to 47 Law 222 of 1995.
F. Extralimitations of their functions.
G. Failure to update the business and judicial notification address.
H. Failure to file and pay the company's tax returns.
I. Failure to comply with the duty to respect the exercise of the right of inspection of shareholders
J. Failure to pay the labour obligations of the company's employees
K. Failure to comply with environmental regulations
L. Irregularities or non-payment of dividends

2.2.4. **Specific Duties:**

The specific duties of directors in Colombia are set out in Article 23 of Law 222 of 1995, stating:
1. To make all efforts conducive to the proper development of the corporate purpose.
2. To ensure strict compliance with the legal or statutory provisions.
3. To ensure that the functions entrusted to the statutory auditors are properly carried out.
4. To safeguard and protect the company's commercial and industrial reserves.
5. Refrain from making improper use of privileged information.
6. To treat all shareholders equally and to respect the exercise of the right of inspection of all shareholders.
7. Refrain from participating, either personally or through a third party, in activities that involve competition with the company or in acts in respect of which there is a conflict of interest, unless expressly authorised by the shareholders‘ meeting or general shareholders’ meeting.

2.3. Liability

The directors shall be jointly and severally and unlimitedly liable for the damages that their actions, due to fraud or negligence, cause to the company.
In cases of breach or exceeding of their functions, violation of the law or of the Articles of Association, the administrator's fault will be presumed. Article 24 of Law 222 of 1995.
In labour or service contracts with administrators, no clause may be established that restricts or excludes their liability; in the event that such clauses are established, they shall have no legal effect and shall be deemed not to have been written.
In order to impose liability on the company directors, the conditions foreseen in the general theory of civil liability must be met, i.e. the existence of an unlawful act, the presence of damage, a causal relationship between the unlawful act and the damage, and an imputation factor. The existence of an unlawful act presupposes, in the first place, voluntary conduct on the part of the company director, carried out with discernment, intention and freedom. Such an act must also be attributable to the company director, which is the case in the case of acts that are notoriously alien to the company's object; these are acts that are notoriously in excess of his powers and are acts of double attribution, i.e. their consequences must be borne by the company and also by the director. Finally, the act of the company director must be unlawful and is unlawful when it contravenes the provisions of the legal system and, among them, especially when this behaviour implies a breach of the manager's obligations, which, although not stipulated exhaustively, are at least delineated by legislation, doctrine and jurisprudence. Martin E. Abdala. La existencia de un acto antijurídico como presupuesto para imputar responsabilidad a los administradores societarios. https://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-68512013000100001

2.3. Actions against directors in breach of duty

2.3.1. Social action for liability

This is regulated in article 25 of Law 222 of 1995.
This action seeks to reconstitute the company's assets when these have been decimated by the action or omission of its administrators.
In order for it to proceed, the following must be taken into account:
A. It corresponds to the company, the main entitled party.
B. It requires a decision of the highest body adopted with the favourable vote of half plus one of the shares, quotas or parts of interest represented at the meeting.
C. It may be adopted at any ordinary or extraordinary meeting, even if it is not on the agenda.

D. In the absence of a call by the competent authorities, the meeting may be called by one or more shareholders representing at least 20% of the capital.
E. The decision taken by the assembly automatically implies the removal of the administrator.
F. If there is no demand within the following 3 months, the action may be brought by any administrator.
Pursuant to Article 35 of Law 222 of 1995,
Art. 235 of Law 222 of 1995, the social action of liability will prescribe in 5 years, counted from the facts that generated the liability.

2.3.2. **Criminal action for liability**

As far as the criminal action is concerned, where the immediate individualisation of the person or persons criminally responsible is required, it is not obtained from the simple examination of the fact, they are crimes carried out by the corporate body in the exercise of its functions and/or attributions, and are considered applicable to the company as such, a responsibility which, within the function of the administrator, is not easy to determine, so it is necessary to seek the individualisation of the criminally responsible person or persons on the basis of the effectiveness of the activity carried out, according to the department in charge of the company, It is not easy to determine, so it is necessary to seek the individualisation of the person criminally responsible based on the effectiveness of the activity carried out, in accordance with the distribution of tasks and competences of the modern company, which concentrates its attention on the natural person whose conduct is most closely linked to the criminal offence violated. Montiel de Henriquez, Mercedes; Finol de Navarro, Teresita La responsabilidad de los administradores de las sociedades anónimas Telos, vol. 9, núm. 1, 2007, pp. 42-53 Universidad Privada Dr. Rafael Belloso Chacín Maracaibo, Venezuela.
Some of the criminal offences in which administrators may incur are: Art. 289 C.P. Falsehood in private document. Art. 402 Failure to withhold withholding tax or value added tax VAT.Art 450 A Private corruption.Art 250 B. Unfair administration. Art. 258 Misuse of privileged information Violation of industrial confidentiality Art 308 Penal Code.

CONCLUSIONS

The administrators in Colombia are the legal representative, the members of the board of directors, the liquidator and the factor, and whoever acts as de facto administrator. Among their general duties are the duty of loyalty, the duty to act in good faith and the duty to act with the diligence and care of a good businessman.
In the event of non-compliance with the general or specific duties, a social liability action may be brought, with the purpose of holding the administrator jointly and severally liable for the damages caused to the commercial company.
The social action of liability is filed before the Superintendence of Companies in use of its jurisdictional faculties, the company that suffered the damage has the legal standing to bring the action, the filing of the action must be submitted to the authorisation of the highest corporate body and must be approved by half plus one of the shares, quotas or parts of interest present at the meeting, once approved, there is a period of 3 months to file the lawsuit.

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