# IKIGO CY'IMISORO N'AMAHORO(RRA) v. ENGEN RWANDA Ltd

[Rwanda URUKIKO RW'IKIRENGA – RCOMA0027/12/CS (Mugenzi, P.J., Kanyange na Nyirinkwaya, J.) 13 Gicurasi 2016]

*Amategeko agenga amasosiyete – Igurisha ry'imigabane – Igurisha ry'umutungo wa sosiyete – Igurisha ry'imigabane ya sosiyete ntiryakwitiranywa n'igurisha ry'umutungo wayo kandi ryo ntirisoreshwa – Itegeko Nº6/1988 ryo kuwa 12/02/1988 rigenga amasosiyete y'ubucuruzi, ingingo ya 8.*

**Incamake y'ikibazo:** TOTAL RWANDA S.A.R.L yari sosiyete nyarwanda yaje guhindura izina iba ENGEN RWANDA Ltd. Yari igizwe n'abanyamigabane babiri aribo TOTAL OUTRE MER S.A yo mu gihugu cy'Ubufaransa yari ifite imigabane hafi ya yose n'undi witwa Momar Nguer wari ufite umugabane umwe yaje kwegurira TOTAL OUTRE MER S.A. Sosiyete TOTAL OUTRE MER SA yagurishije imigabane yayo yose yari ifite muri TOTAL RWANDA S.A.R.L na ENGEN INTERNATIONAL HOLDINGS (MAURITIUS Ltd) ku giciro cya 6.867.000USD.

Nyuma yaho inama rusange y'abanyamigabane yemeje ko izina rya TOTAL RWANDA SARL rihinduka ENGEN RWANDA Ltd, ibiherwa n'icyemezo cya Rwanda Development Board (RDB) kibigaragaza.

Ikigo cy'imisoro n'amahoro (RRA) cyaje kumenyesha TOTAL RWANDA S.A.R.L ko irimo umusoro ku nyungu n'umusoro ku nyongeragaciro ingana na 2.150.513.368Frw ariko nyuma y'ubujurire ENGEN RWANDA Ltd yashyikirije Komiseri Mukuru wa RRA, yemeje ko umusoro ugomba kwishyurwa ungana na 1.923.619.013Frw.

TOTAL RWANDA S.A.R.L/ENGEN RWANDA Ltd yaregeye Urukiko Rukuru rw'Ubucuruzi isaba kuvanirwaho uwo musoro kuberako TOTAL OUTRE MER yaragurishije imigabane yari ifite muri TOTAL RWANDA SARL, ibyo bikaba bitandukanye no kugurisha umutungo wa sosiyete ugizwe n'ibintu bitandukanye kandi icyo gikorwa kikaba kidasoreshwa. RRA ivuga ko habayeho igurisha ry'imutungo kuko imigabane itagizwe n'impapuro gusa ahubwo igizwe n'imitungo hamwe n'imyenda bya sosiyete, ko n'ubwo amasezerano yakozwe avuga ko ari igurisha ry'imigabane, mu ngingo yayo ya 2, agace ka mbere havugwamo ko ari imigabane n'ibijyanye nayo, bivuze ko n'imitungo yagurishijwe, kandi ibyo bikaba bisoreshwa.

Urukiko rwemeje ko nta musoro ENGEN RWANDA Ltd igomba kwishyura kuko nta gurisha ry'imutungo ryabayeho ko ahubwo ko ari iry'imigabane ryakozwe n'umunyamigabane wa TOTAL RWANDA S.A.R.L.

RRA yajuriye mu Rukiko rw'Ikirenga ivuga ko Urukiko rwirengagije ibimenyetso bigaragaza ko habayeho igurisha ry'imitungo.

ENGEN RWANDA Ltd ivuga ko ntacyo yagurishije cyatuma icibwa umusoro kubera ko uwagurishije ari TOTAL OUTRE MER kandi amasezerano y'igurisha yakozwe agaragaza neza ko icyagurishijwe ari imigabane kuko kugurisha uburenganzira bitandukanye no kugurisha umutungo wa sosiyete.

Inshuti y'urukiko (amicus curiae), yari yiyambajwe muri uru rubanza yatanze igitekerezo igaragaza ko ibikorwa byabaye ari uguhererekanya imigabane, bikaba bisonewe gutanga imisoro ku nyongeragaciro kuko bitandukanye n'ibikorwa by'ubucuruzi.

**Incamake y'icyemezo:** Kuba nta kindi kimenyetso RRA ishingiraho ivuga ko habaye igurisha ry'umutungo wa TOTAL RWANDA SARL, bituma hagomba gushingirwa ku bivugwa mu masezerano agaragaza ko icyakozwe ari igurisha ry'imigabane ryakozwe na TOTAL OUTRE MER. Ibi kandi bihura n'umwanzuro w'Inshuti y'Urukiko wagaragaje ko nyuma yo gusuzuma ibikorwa byabaye, icyabaye ari ihererekanya ry'imigabane.

**Ubujurire nta shingiro bufite.**
**Nta gihindutse ku mikirize y'urubanza rwaciwe n'urukiko rubanza.**
**Amagarama y'urubanza aherereye ku wareze.**

**Amategeko yashingiweho:**
Itegeko Nº21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 9.
Itegeko Nº6/1988 ryo kuwa 12/02/1988 rigenga amasosiyete y'ubucuruzi, ingingo ya 8.

**Imanza zifashishijwe:**
Frank Lyon co v United States, 435 U.S. 561 (1978)
Beauvallet v Naturana, Nº81-1372881-16259, 7 Mars 1984, Cour de cassation, chambre Commerciale.
Salomon v Salomon & Co Ltd [1896] UKHL 1 (16 November 1896).

# Urubanza

## I. IMITERERE Y'URUBANZA

[1] TOTAL RWANDA S.A.R.L ni sosiyete nyarwanda yari igizwe n'abanyamigabane babiri aribo TOTAL OUTRE MER S.A (de droit français) yari ifitemo imigabane hafi yose kuko undi munyamigabane, Didier Harel, yari afite umugabane umwe gusa yaje guha Momar Nguer. Kuwa 30/07/2008, hakozwe amasezerano hagati ya TOTAL OUTRE MER S.A, ENGEN INTERNATIONAL HOLDINGS (MAURITIUS) Ltd na ENGEN PETROLEUM LIMITED agamije igurisha n'igura ry'imigabane muri TOTALRWANDA S.A.R.L, naho kuwa 27/10/2008, inama rusange y'abanyamigabane yemeza itangwa ry'umugabane Momar Nguer yari afite muri TOTAL RWANDA SARL akawuha TOTAL OUTRE MER SA, n'itangwa ry'imigabane yose TOTAL OUTRE MER yari ifite muri TOTAL RWANDA S.A.R.L ikayiha ENGEN INTERNATIONAL HOLDINGS (MAURITIUS) Ltd, iyi nayo yishyura 6.867.000USD.

[2] ENGEN INTERNATIONAL HOLDINGS Ltd yari yaguze imigabane yose muri TOTAL RWANDA S.A.R.L, yahaye umugabane umwe Adama Soro, Umuyobozi mukuru wayo, naho kuwa 13/02/2009, inama rusange y'abanyamigabane yemeza ko izina rya sosiyete rihinduka rikaba ENGEN RWANDA Ltd inabiherwa icyemezo n'Umwanditsi Mukuru wa Rwanda Development Boad (RDB).

[3] Ikigo cy'imisoro n'amahoro (RRA) cyaje kumenyesha TOTAL RWANDA S.A.R.L ko irimo imisoro ingana na 2.150.513.368Frw, nyuma y'ubujurire hasigara umusoro ungana na 1.923.619.013Frw. TOTAL RWANDA S.A.R.L/ENGEN RWANDA Ltd yaregeye kuvanirwaho uwo musoro, Urukiko Rukuru rw'Ubucuruzi rusuzuma ikibazo kimwe kirebana no kumenya niba harabayeho igurisha ry'imigabane cyangwa igurisha ry'imitungo ya

TOTAL RWANDA S.A.R.L, rigomba gushingirwaho icibwa umusoro ku nyungu n'umusoro ku nyongeragaciro.

[4] Urukiko rwemeje ko ikirego cya TOTAL RWANDA S.A.R.L yahindutse ENGEN/RWANDA Ltd gifite ishingiro, ko nta musoro igomba gukurikiranwaho kuko nta mutungo yagurishije, rubishingiye ko TOTAL OUTRE MER SA yagurishije ENGEN INTERNATIONAL HOLDINGS Ltd imigabane yari ifite muri TOTAL/RWANDA S.A.R.L, ko ababuranyi n'urukiko bemeranya ko iyo sosiyete, ikoresheje imbaraga yahabwaga n'uko ari "actionnaire majoritaire", yahindutse ENGEN RWANDA Ltd, ko rero igikorwa TOTAL OUTRE MER SA yakoze ubwacyo kitaba ishingiro ry'umusoro ugomba gucibwa TOTAL RWANDA S.A.R.L kuko RRA itagaragaza ikimenyetso cy'uko hari umutungo ubwayo yagurishije, ko kandi n'ubwo imvugo yayo yahabwa agaciro, ntacyo TOTAL RWANDA S.A.R.L yabazwa kuko amasezerano agira agaciro hagati y'abayagiranye.

[5] Rwasobanuye kandi ko kuba imitungo ya TOTAL RWANDA S.A.R.L yaragaragaye muri ''états financiers'' za ENGEN RWANDA Ltd, RRA itabishingiraho ngo yemeze ko yagurishijwe kuko kwaba ari ukugenekereza mu mvugo gusa, ko no kuba RRA ivuga ko nyuma y'uko TOTAL OUTRE MER SA yegukanye imigabane yose ya TOTAL RWANDA SARL, iyi ya nyuma nta bushobozi yari igifite, cyane ko n'amategeko atateganyaga sosiyete y'umuntu umwe, iyo mpamvu itarengera RRA kuko bifashwe gutyo TOTAL OUTRE MER SA ariyo yagombye gukurikiranwa nk'iyakoze igikorwa RRA ishingiraho ica umusoro, ko kandi nubwo iyo mpamvu yakwemerwa, TOTAL RWANDA SARL itaregwa kuko yaba yarahise itakaza ububasha hashingiwe ku ngingo ya mbere y'itegeko ryagengaga amasosiyete. Rwavuze kandi ko hatagomba guteshwa agaciro ihame ry'uko sosiyete igira ubuzimagatozi butandukanye n'ubw'abayigize.

[6] Rwasanze ahubwo igurisha ry'imigabane no guhinduza izina rya sosiyete byarubahirijwe, na RRA yemera guha ENGEN RWANDA Ltd TIN yayo izi neza ko ariyo yahoze ari TOTAL RWANDA SARL, ikaba kandi itagaragaza ko icyo gikorwa cyari kigamije uburiganya bwo guhunga imisoro.

[7] RRA yajuririye Urukiko rw'Ikirenga, ivuga ko umucamanza wa mbere yirengagije ibimenyetso bigaragaza ko habayeho igurisha ry'imitungo ya TOTAL RWANDA S.A.R.L, ko atari igurisha ry'imigabane.

[8] Urubanza rwaburanishije mu ruhame ku matariki atandukanye, RRA ihagarariwe na Me Kabibi Spéciose hamwe na Me Gasana Raoul, TOTAL/RWANDA SARL/ENGEN ihagarariwe na Me Nsengiyumva Abel, Me Kamanzi Désiré hamwe na Me Kabera Jean Claude, impande zombi zemeranya ko nta kibazo zifite ku byerekeye umusoro ku bihembo (TPR) waciwe TOTAL RWANDA/ENGEN RWANDA Ltd, ikibazo kigomba gusuzumwa kikaba gishingiye gusa ku kumenya niba harabayeho igurisha ry'umutungo cyangwa igurisha ry'imigabane.

[9] Mu isesengura ry'icyo kibazo, Urukiko rwasanze hakenewe impuguke yatanga ibitekerezo mu rwego rw'amategeko, rugena Bwana Habimana Pie umwarimu muri Kaminuza y'u Rwanda, nk'inshuti y'Urukiko (amicus curiae), watanze ibitekerezo bye mu nyandiko yagejejwe no ku baburanyi, bakaba barahawe umwanya wo kugira icyo bayivugaho mu iburanisha ryo kuwa 24/11/2015, n'inshuti y'urukiko ihari.

## II. IKIBAZO KIGIZE URUBANZA N'ISESENGURWA RYACYO

**Kumenya niba Urukiko Rukuru rw'Ubucuruzi rwaribeshye mu kwemeza ko hatabayeho igurisha ry'imitungo ya TOTAL RWANDA SARL.**

[10] Ababuranira RRAbavuga ko urukiko rwirengagije ibimenyetso bigaragaza ko habayeho igurisha ry'imutungo kuko imigabane itagizwe n'impapuro gusa ahubwo igizwe n'imitungo hamwe n'imyenda bya sosiyete, ko n'ubwo amasezerano yakozwe avuga ko ari igurisha ry'imigabane, mu ngingo yayo ya 2, agace ka mbere havugwamo ko ari imigabane n'ibijyanye nayo, bivuze ko n'imitungo yagurishijwe, kandi iyo mitungo ikaba yaravuye mu ibaruramari rya TOTAL RWANDA S.A.R.L ikajya mu rya ENGEN S.A.R.L, ko no mu gusaba ko imitungo yandikwa kuri ENGEN RWANDA, bavuze ko haguzwe imitungo n'imyenda (assets and liabilities) bya TOTAL RWANDA S.A.R.L.

[11] Basobanura ko ubwo urukiko rwemeje ko hagurishijwe imigabane yose, rwagombaga no kwemeza ko imitungo yose yagurishijwe, kuko uburenganzira umuntu afite ku migabane bungana n'ubwo afite ku mutungo, ko kandi kuba abo baburana bavuga ko uwagurishije imigabane ari TOTAL OUTRE MER, ntacyo byahindura kuko mu gihe iyo sosiyete yari "actionnaire majoritaire", ntakiyitandukanya na TOTAL RWANDA S.A.R.L. Bavuga ko ikindi gishimangira ko habaye igurisha ry'umutungo ari uko corporate income tax (CIT) declaration 2009 ya ENGEN RWANDA Ltd yerekanye ko imitungo ya TOTAL RWANDA SARL iri muri ''états financiers''z'iyo sosiyete ya mbere, ko rero hashingiwe ku ngingo ya 4 agace ka 11 y'Itegeko Nº16/2005 ryo kuwa 18/08/2005 rigena umusoro utaziguye ku musaruro ivuga ku nkomoko y'umusaruro, TOTAL RWANDA/ENGEN RWANDA igomba kwishyura umusoro yaciwe kuko iyo ngingo iteganya igikorwa cyose cyabyaye inyungu.

[12] Bavuga kandi ko umucamanza wa mbere yemeje ko nyuma y'uko TOTAL OUTRE MER yegukanye imigabane yose, TOTAL RWANDA S.A.R.L itashoboraga gusoreshwa kuko itari gukomeza gufatwa nka sosiyete hashingiwe ku ngingo ya mbere y'Itegeko ryagengaga amasosiyete, yirengagiza ariko ko hadasora sosiyete gusa kuko n'ibikora nkayo cyangwa amashyirahamwe, uko byaba biteye kose bisora, iyo bikora imirimo igomba kubyara inyungu nk'uko biteganywa n'ingingo ya 38.6 y'Itegeko Nº16/2005 ryo kuwa 18/08/2005 rigena umusoro utaziguye ku musaruro. Banavuga ko n'ubwo icyo gihe TOTAL RWANDA S.A.R.L itariho mu buryo bw'itegeko nk'uko umucamanza yabibonye, yitwaye nka sosiyete kuko yabonye inyungu kubyo yagurishije.

[13] Ababuranira RRA bavuga kandi ko, n`ubwo TOTAL RWANDA S.A.R.L yari igizwe n'abanyamigabane babiri, igihe cy`igurisha TOTAL OUTRE MER itavanguye imigabane, bivuze ko habaye igurisha rya sosiyete yose n`ibiyigize. Bongeraho ko Itegeko ryagengaga amasezerano ubwo igurisha ryabaga, ryateganyaga ko sosiyete yagombaga kuba igizwe nibura n'abanyamigabane babiri, ariko igihe cy'igurisha TOTAL OUTRE MER ikaba yari umunyamigabane umwe, bivuze ko ibyo yakoze bigomba gufatwa ko byakozwe na TOTAL RWANDA S.A.R.L kuko bari bamwe, ko rero imitungo yagurishijwe na TOTAL RWANDA S.A.R.L. Banavuga ko mu mategeko y`ibindi bihugu, hari "notion" ya "corporate veil" igamije kugaruza imisoro mu gihe sosiyete yihishe inyuma y`igikorwa igamije guhunga imisoro.

[14] Bakomeza basobanura ko isesengura ry'amasezerano yavuzwe haruguru rigaragaza ko mu kugurisha imigabane hanagurishijwe imitungo ya sosiyete, ko mu ngingo ya 6.4.1 havugwa ko uwaguze azi uko imitungo imeze, ko kandi uwagurishije atazirengera

ibyagaragara nyuma, naho mu ngingo ya 5.1(a) TOTAL RWANDA S.A.R.L ikaba yarambuwe uburenganzira bwo kugurisha, gukodesha cyangwa gutanga imitungo itimukanwa (..), ibyo byose bikaba bigaragaza ko hagurishijwe imitungo aho kuba imigabane gusa.

[15] Batanze kandi urugero rw'urubanza rwaciwe n'Urukiko rw'Ikirenga muri Amerika (Frank Lyon co v United States), rwemeje ko uburenganzira bwa sosiyete bwo kugurisha imitungo yayo ari bwo buranga ba nyiri imitungo, ko na TOTAL RWANDA S.A.R.L itari kwemera kwamburwa uburenganzira ku mitungo yayo na ENGEN INTERNATIONAL iyo iyo mitungo iba ikiri iyayo, ahubwo ari icyemeza ko nayo yari yagurishijwe kandi bikaba bigaragarira mu ngingo ya 5.1.(b), (c), (d), (e),(f)… y'amasezerano.

[16] Basobanura kandi ko impamvu mu baregwa harimo ENGEN RWANDA Ltd,byatewe n`uko TOTAL RWANDA S.A.R.L yaburiwe irengero ahubwo haboneka ENGEN RWANDA, ko ariko n`ubwo yaburiwe irengerero mu buryo bw`impapuro, ibikorwa byayo bigihari, ikaba kandi yaragombaga kumenyesha RRA ko ihinduye statuts, igakorerwa igenzura nk'uko biteganywa n'ingingo ya 10 y'Itegeko Nº25/2005 ryavuzwe haruguru, ko kandi kuba mu rwego rw`amategeko TOTAL RWANDA ikiriho, kuko hari inshingano yasize itarangije kandi hari imitungo zarangirizwaho, itegeko rigenga umusoro ku nyongeragaciro (TVA) rikaba ryemera ko icibwa umusoro ujyanye n`igurisha ryakozwe.

[17] Ababuranira TOTAL RWANDA SARL /ENGEN RWANDA Ltdbavuga ko nta gishya RRA yazanye mu bujurire, kuko amasezerano yakozwe asobanura neza ko icyagurishijwe ari imigabane kandi n'Itegeko rigenga amasosiyete riteganya uburyo igurisha ry'imigabane rikorwa (art 75), TOTAL OUTRE MER ikaba yaragurishije uburenganzira yari ifite muri TOTAL RWANDA SARL, bitandukanye no kugurisha umutungo wa sosiyete ugizwe n'ibintu bitandukanye (amamodoka, ibibanza, ama konti, n'ibindi), ko Momar wari ufite umugabane umwe yemeye ko igurisha riba, sosiyete ikaba yarasigaye kuko imigabane itari iyayo, isigarana umutungo wayo ugizwe n`ibintu bitandukanye (ibibanza, amamodoka, biens réalisables, stock ya essence...), ko ahubwo bibaza icyo TOTAL RWANDA S.A.R.L yagurishije cyatuma icibwa umusoro mu gihe uwagurishije ari TOTAL OUTRE MER.

[18] Bavuga ko iyo haza kuba haragurishijwe umutungo wa TOTAL RWANDA S.A.R.L, RRA yari kubarira umusoro ku gaciro kawo kari karenze miliyari esheshatu z'amafaranga y'u Rwanda, ukaba utari kugurishwa miliyoni ebyiri zonyine, ko kandi igurisha ry'imigabane ryanabaye mu yandi masosiyete ariko akaba ataraciwe umusoro, RRA ikaba rero itagomba kwitiranya igurisha ry'imigabane n'iry'umutungo, kuko wo ari uwa sosiyete nkuko byemejwe mu rubanza rwaciwe n'Urukiko rw'Ikirenga rwo mu Bwongereza, haburana Macaura v Nothem Assurance company, ndetse no mu rubanza rwaciwe n'Urukiko Rusesa imanza rwo mu Bufaranga haburana sosiyete Beauvallet v sosiyete Naturana, ko n'ingingo ya 8 y'Itegeko ryagengaga amasezerano ubwo igurisha ryabaga nayo yateganyaga ko sosiyete igira umutungo wayo bwite.

[19] Basobanura kandi ko impamvu ENGEN RWANDA Ltd yasabye ko umutungo uyandikwaho byatewe n'uko izina rya sosiyete ryari ryahindutse nk'uko byari byemeranyijweho mu ngingo ya 4 y'amasezerano kuko, nka "propriété intellectuelle" ya TOTAL, iryo zina ritari mu byagurishijwe, bakanavuga ko TOTAL RWANDA S.A.R.L na ENGEN RWANDA Ltd zitigeze zibaho nka sosiyete ebyiri zitandukanye, kandi sosiyete imwe ikaba itakwigurishaho imitungo, ko ahubwo "états financiers" za ENGEN ari nazo za TOTAL RWANDA, yahindutse ENGEN.

[20] Ku birebana n'ingingo ya 6.4.1 y'amasezerano RRA iburanisha, bavuga ko n'ubwo sosiyete itandukanye n'abanyamigabane bayo ikanagira imitungo yayo, iyo abanyamigabane bemeje gushora imari muri sosiyete baba bagamije ko ikora ubucuruzi mu nyungu zabo (avoir des dividendes), ko rero na ENGEN INTERNATIONAL yagombaga kumenya uko sosiyete ihagaze n'ubwo itari igiye kugura imitungo yayo. Bavuga kandi ko kuba hari ibyo TOTAL RWANDA S.A.R.L yabujijwe gukora itabiherewe uburenganzira na ENGEN INTERNATIONAL, kwari ukugira ngo uko sosiyete ihagaze bidahinduka mu gihe ihererekanya ry'imigabane ritararangira. Basanga urubanza rwa Frank Lyon v United States ntacyo rwafasha kuko ikibazo kirimo gitandukanye n'icyo mu rubanza ruburanwa.

[21] Ku birebana n'amahame y'isoresha, bavuga ko RRA yatangiye ivuga ko hari inyungu zitamenyekanishijwe zavuye mu igurisha ry'imigabane, ko nyuma y'uko TOTAL RWANDA S.A.R.L iyisobanuriye ko imibane yagurishijwe itari iyayo ahubwo yari iya TOTAL OUTRE MER kandi nka sosiyete y'inyamahanga ikaba itarashoboraga gusoreshwa, RRA yahinduye ivuga ko ari umusoro ku mutungo wagurishijwe, bivuze ko yashatse uburyo bwose yabonamo umusoro.

[22] Basanga kandi "notion" ya "corporate veil" itashingirwaho, kuko itegeko aririyo rishyiraho umusoro nk'uko biteganywa n'ingingo ya 81 y'Itegeko Nshinga, hakaba hatanashingirwa ku ngingo ya 4 y'Itegeko Nº16/2005 ryo kuwa 18/08/2005 ryavuzwe haruguru kuko ivuga icyagurishijwe ku butaka bw'u Rwanda, usibye ko iyo iba ikemura ikibazo gihari, RRA itari gusaba ko hakoreshwa "notion" ya "corporate veil".

[23] Ku birebana n'imiterere ya TOTAL RWANDA S.A.R.L ubwo hakorwaga amasezerano y'igurisha kuwa 30/07/2008, abayiburanira bavuga ko nubwo ayo masezerano yashyizweho umukono kuri iyo tariki, hari ibindi byagombaga kuzuzwa kugira ngo igurisha ry'imigabane ribe ryuzuye nkuko biteganywa mu ngingo ya 4 y'ayo masezerano, harimo kuba abandi banyamigabane ba TOTAL RWANDA SARL baragombaga kwemera iryo gurisha, ko ibyo byakozwe mu nama y'abanyamigabane yo kuwa 27/10/2008 yemeje igurisha ry'imigabane, binemezwa burundu mu nama yo kuwa 13/02/2009, ko ku itariki ya 30/07/2008, TOTAL RWANDA SARL yari igizwe n'abanyamigabane babiri : TOTAL OUTRE MER SA yari ifite imigabane 25.749 na Momar Nguer wari ufite umugabane umwe.

[24] Inshuti y'Urukikonayo yatanze ibitekerezo ku kibazo kiri mu rubanza, aho yagaragaje, ishingiye ku ngingo za 4 na 37 z'Itegeko Nº16/2005 ryo kuwa 18/08/2005 rigena imisoro itaziguye ku musaruro, ko niba igikorwa cyakozwe ari icy'ubucuruzi cyabyaye inyungu ku musaruro ukomoka mu Rwanda, umusoro ku nyungu ugomba gutangwa, ko kandi igikorwa gifatwa nk'icy'ubucuruzi igihe gikozwe n'umuntu cyangwa sosiyete ku buryo bwa kinyamwuga, ku birebana na TOTAL RWANDA S.A.RL, akaba asanga ibikorwa byagiye bibaho ari uguhererekanya imigabane muri iyo sosiyete yaje guhinduka ENGEN RWANDA Ltd, ibyo kandi bikaba atari ibikorwa by'ubucuruzi kuko bitakozwe na sosiyete isanzwe ikora ibikorwa byo gucuruza imigabane mu rwego rwo gushaka inyungu, ko no guhindura izina atari igikorwa cy'ubucuruzi cyabyarira ugikoze inyungu, n'ubwo ibyo bitavanaho uburyozwe ku musoro TOTAL RWANDA S.A.R.L yaba ifite nka sosiyete y'ubucuruzi.

[25] Ku birebana n'umusoro ku nyongeragaciro, Inshuti y'Urukiko isobanura ko,harebwe igihe ibikorwa byabereye, asanga ingingo ya 2 y'Itegeko Nº06/2001 ryo kuwa 20/01/2001 rishyiraho umusoro ku nyogeragaciro (yahinduwe muri 2010), yarashyizeho umusoro wakwa ku bintu n'imirimo ikorerwa mu Rwanda no ku bintu, ibikoresho n'imirimo bitumizwa hanze y'Igihugu, naho ingingo ya 3 igasobanura byimbitse gutanga ikintu cyangwa gukora umurimo icyo aricyo, ikaba yumvikanisha ko gutanga ikintu cyangwa gukora umurimo

bicibwa umusoro ku nyongeragaciro iyo ibyo bintu cyangwa umurimo byatanzwe hagamijwe kubona ikiguzi. Avuga kandi ko hashingiwe ku ngingo ya 86 y'Itegeko Nº06/2001 ryo kuwa 20/01/2001 ryavuzwe haruguru, ihererekanya ry'imigabane risonewe gutanga imisoro.

[26] Asobanura kandi ko imigabane atari umutungo wa sosiyete ahubwo ari umutungo w'abanyamigabane kandi ko aribo bashobora kuyigurisha, naho imitungo ikaba ari iya sosiyete kandi mu gihe igurishijwe sosiyete ikaba ariyo yishyura imisoro, naho umusoro ku migabane ugatangwa na nyiri imigabane.

[27] Kuri ibyo bisobanuro by'Inshuti y'Urukiko, RRA ivuga ko bitahabwa agaciro kuko nta gishya bigaragaza cyarufasha, ko kandi kuvuga ko icyabaye ari ihererekanya ry'imigabane gusa atari ukuri, kuko ikigomba kurebwa ari uko hari inyungu y'ubucuruzi sosiyete ubwayo yabonye nk'uko bivugwa mu ngingo ya 16 y'Itegeko Nº16/2005 rigena umusoro utaziguye ku musaruro, iyo ngingo kandi ikaba igomba kureberwa hamwe n'iya 5 hamwe n'iya 37.

[28] RRA isanga kandi kuvuga ko habaye ihererekanya ry'imigabane gusa binyuranye n'ibyo ababuranira TOTAL RWANDA bavuga ndetse n'ibimenyetso bihari byerekana ko ari imitungo yagurishijwe, ko ikibazo Inshuti y'Urukiko yagombaga gusesengura ari ukumenya niba haragurishijwe imigabane cyangwa umutungo, bitewe n'uko sosiyete yose yagurishijwe, hakibazwa niba muri icyo gihe n'imitungo yayo itaba igurishijwe, bityo umusoro ukaba wabarwa mu buryo bumwe n'ubw'inyungu z'umuntu ku giti cye, naho ku birebana na TVA hagashingirwa ku ngingo ya 3 y'Itegeko Nº06/2001 riyishyiraho, irebewe hamwe n'iya 4.1 hamwe n'iya 85.16 z'iryo tegeko, ko kandi kuba kugurisha imitungo atari ko kazi abaregwa basanzwe bakora bitabakuraho inshingano yo kwishyura TVA mu gihe hari ikiguzi babonye.

[29] Akomeza avuga ko ingingo ya 86.7.c, Inshuti y'Urukiko ishingiraho ivuga ko ihererekanya ry'imigabane risonewe TVA ntacyo yamara muri uru rubanza kuko iyo ngingo yongewemo umusoro uregerwa waravutse n'igenzura riri hafi kurangira kuko Itegeko ryasohotse kuwa 30/06/2010, byongeye kandi TVA ikaba itaraciwe ku igurisha ry'imigabane ahubwo yaraciwe ku kiguzi cy'igurisha ry'umutungo.

[30] Ababuranira TOTAL RWANDA/ENGEN RWANDA bavuga ko bemeranya n'ibyo Inshuti y'Urukiko yagaragaje ko nta gurisha ry'umutungo ryabayeho ahubwo habayeho igurisha ry'imigabane yise iherekanya ryayo, ko umuntu ucuruza asorera icyo yungutse adasorera umutungo we. Bakomeza bavuga ko ingingo ya 46 y'Itegeko Nº16/2005 ryerekeye TVA ikoresha amagambo abiri (umutungo n'imigabane), ariko kuba ayo magambo akoreshwa mu ngingo imwe bitavuze ko asobanura kimwe ku buryo yakwitiranwa, ko kandi RRA yagombye kwerekana andi masezerano arebana n'igurisha ry'umutungo wa TOTAL RWANDA S.A.R.L.

## UKO URUKIKO RUBIBONA

[31] Ikigomba gusuzumwa muri uru rubanza ari nacyo cyasuzumwe mu Rukiko Rukuru rw'Ubucuruzi, ni ukumenya niba harabaye igurisha ry'imitungo ya TOTAL RWANDA SARL ryagombaga guherwaho icibwa imisoro nk'uko yabazwe, kuko impande zombi zemeranyijwe kutajya impaka ku bijyanye n'ingano yayo nk'uko bigaragara mu mikirize y'urubanza rwajuririwe.

[32] Amasezerano yakozwe kuwa 30/07/2008, agaragaza ko ari ay'igurisha ry'imigabane (sale shares), RRA ikavuga ko ahishe igurisha ry'imitungo ya TOTAL RWANDA SARL. Ayo masezerano agaragaza ko uwagurishije ari TOTAL OUTRE MER S.A, umwe mu banyamigabane babiri bari bagize TOTAL RWANDA SARL, naho uwaguze akaba ENGEN INTERNATIONAL (Mauritius) Ltd.

[33] Ingingo ya 8 y'Itegeko N°06/1988 ryo kuwa 12/02/1988 ryagengaga amasosiyete y'ubucuruzi ubwo amasezerano yakorwaga, yateganyaga ko sosiyete igira umutungo wayo bwite, ingingo ya 122 y'iryo tegeko ikavuga ko imigabane ishobora guhabwa uwo ariwe wese mu gihe amategeko ya sosiyete atabiteganya ukundi, naho amategeko yagengaga TOTAL RWANDA S.A.R.L (statuts) nayo akaba ateganya mu ngingo ya 11, ko imigabane ishobora gutangwa ariko ubwo burenganzira bukabanza guhabwa abandi banyamigabane cyangwa sosiyete.

[34] Mu kugaragaza itandukaniro riri hagati y'igurisha ry'imigabane n'igurisha ry'imitungo, inyandiko z'ababisesenguye zigaragaza ko igurisha ry'imitungo riba hagati ya sosiyete n'ugura, mu gihe igurisha ry'imigabane riba hagati y'umunyamigabane n'ugura.[1] Bagaragaza kandi ingaruka iryo gurisha rigira, aho basobanura ko iyo hagurishijwe imigabane, sosiyete idahinduka ahubwo hahinduka gusa abayigize, mu gihe igurisha ry'imitungo ya sosiyete rigira ingaruka zikomeye ku buzima bwa sosiyete, ko muri icyo gihe havuka sosiyete nshya iyo mitungo ishyirwamo.[2]

[35] Basobanura kandi ko ku ruhande rw'ugura, kugura imigabane bivuze kugura ubucuruzi bwa sosiyete, iyo migabane ikava k'uwagurishije ikajya k'uwaguze ko kandi uguze imigabane adahitamo imitungo agura n'iyo atagura ahubwo muri rusange aba aguze ubucuruzi bwose (business).[3] Ku birebana n'uru rubanza, kuba amasezerano yagaragajwe yarabaye hagati ya TOTAL OUTRE MER (wari umunyamigabane wa TOTAL RWANDA SARL) na ENGEN INTERNATIONAL (Mauritius) Ltd, ntaho RRA yashingira yemeza ko hagurishijwe imitungo ya sosiyete, kuko iyo mitungo atari iy'umunyamigabane ku buryo yagira uburenganzira bwo kuyigurisha ahuwo ari iya sosiyete[4], cyane cyane ko sosiyete ifite

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[1]"La vente d'actifs s'effectue entre la société et l'aquéreur et elle engendre des conséquences fiscales différentes de celles dela vente des actions, laquelle s'effectue entre le vendeur (actionnaire (s)) et l'aquéreur": UT Avovats, Aspects fiscaux des achatset ventes d'entreprises, disponible en ligne sur http://www.ljt.ca/fr/ljt-domaines/fiscalite/Aspects-fiscaux-des-achats-et-desventes-d-entreprises.sn, consulté le 11/05/2016.

[2]"Dans le cas de vente des actions, l'entreprise ne subit pas de modifications car il ya seulement un changement d'actionnaires.Par conséquent, les créanciers ne perdent aucun droit, et peuvent poursuivre leurs relations avec la compagnie comme d'habitude(…) L'achat des actifs a un impact important sur la vie de l'entreprise, car l'entité juridique ne sera pas la même. Unenouvelle compagnie dans laquelle les actifs vont être transférés, va être créée'': Achat des actIons ou des actifs, les impacts áprendre en compte, disponible sur http://www.releve.qc.ca/quebec/, consulté le 27 avril 2015.

[3]"For the purchaser, buying the shares means that he or she buys the company which owns business…The shares of thecompany are transferred from the seller to the buyer. However, the buyer loses the ability to pick and choose among assets.Generally, he or she buys all of the business": TD Wealth,Structuring a transaction-share sale or asset sale, available online at http://advisors.tdwaterhouse.ca/public/projectiles/5fcf3b08-020c-47c6-a74b-a8c76487fa2f.pdf,consulté le 11/05/2016.

[4]"The assets of the company are owneby by the company. The members do not have a legal or equitable interest in them": Smith and Keenan'Company Law, Thirteenth edition, 2005, p.218.

ubuzimagatozi butandukanye n'ubw'abayigize[5] nk'uko n'urubanza rwajuririwe rwabigaragaje ruhereye ku rubanza Salomon v Salomon and co Ltd rwabaye icyitegererezo ku birebana n'iryo hame, iryo hame rikaba ryarengwaho mu gihe haba hagaragajwe ko ibyakoze bitari byemewe cyangwa bihishe ikindi gikorwa, ari nabyo RRA yaburanishije nka "piercing the corporate veil", iyo "notion" ikaba yaragiye ikoreshwa mu manza zimwe na zimwe zo mu bindi bihugu, hagamijwe kumenya ugomba kuryozwa igikorwa runaka hagati ya sosiyete n'abayigize cyangwa hagati ya sosiyete mbyeyi n'iyo yabyaye.

[36] Byongeye kandi, mu gihe habayeho igurisha ry'imigabane yo muri TOTAL RWANDA SARL, bivuze ko n'imitungo yagendeyemo kuko iri mu bigize imigabane, bitavuze ariko ko ariyo iba yagurishijwe ku buryo bwihariye kuko n'abahanga babisesenguye bavuga ko igurisha ry'imigabane ya sosiyete rijyana n'imitungo, imyenda n'inshingano byayo, mu gihe iyo ari imitungo yagurishijwe ugura ahitamo ibyo agura[6].

[37] Mu masezerano yo kuwa 30/07/2008, hateganyijwe mu ngingo ya 2.1, ko uguze azegukana imigabane yose hamwe n'inyungu zose zijyanye nayo,uburenganzira bwose, imyenda n'izindi nshingano zose zikomoka kuri iyo migabane (subject to the provisions of this agreement, the vendor shall sell and the purchaser shall purchase the sale shares free from encumbrances and together with all benefits, rights, libilities and obligations), bivuze ko igikorwa cyabaye ari igurisha ry'imigabane ya TOTAL OUTRE MER naho umutungo ukaba waragumye ari uwa TOTAL RWANDA SARL yahinduye izina ikitwa ENGEN INTERATIONAL Ltd nk'uko byari byemeranyijweho mu masezerano ko izina rya TOTAL ritazongera gukoreshwa, na RDB ikaba yarabyemeye nk'uko ENGEN RWANDA Ltd yabigaragaje, kandi inyandiko ziri muri dosiye zikaba zigaragaza ko iyo sosiyete yakomeje imirimo y'ubucuruzi yakorwaga na TOTAL RWANDA S.A.R.L (memorandum and articles of association yabaye hagati y'abanyamigabane bashya ba ENGEN RWANDA Ltd yahoze ari TOTAL RWANDA S.A.R.L).

[38] Ibisobanuro nk'ibi byanatanzwe mu rubanza rwaciwe n'Urukiko Rusesa imanza mu gihugu cy'Ubufaransa, ahagibwaga impaka ku kibazo cyo kumenya niba igurisha ry'imigabane yose ya sosiyete rikozwe n'abanyamigabane bayo, ryafatwa nk'igurisha ry'umutungo w'iyo sosiyete no kumenya niba uwo mutungo waraherewewho mu gushinga sosiyete nshya yari yaguze imigabane yo muri sosiyete ya mbere. Urwo Rukiko rwemeje ko nta gurisha ry'imitungo ryabayeho kuko sosiyete ya mbere yakomeje kubaho inafite ubuzimagatozi, ko kandi abanyamigabane badafite ububasha (qualité) bwo kugurisha umutungo wa sosiyete (Attendu qu'en statuant ainsi, alors que la société BAUVALLET n'ayant jamais cessé d'exister en tant que personne morale et les cédants des actions n'ayant pas qualité pour disposer de l'actif social, l'opération invoquée comme réelle par l'administration des impôts ne pouvait être retenue (…)[7].

[5]"La cession de parts ou d'actions n'est pas assimilable à une vente du fonds de commerce parce qu'elle ne portepas sur les éléments composant le patrimoine social, mais sur les titres représentatifs du capital social, déciderautrement serait méconnaitre la notion de la personnalité morale'': J.P. Sortais, note sous arrêt de la Cour deCassation, Rev Soc.1974, p.323, cité dans le Mémoire de Sahar BADDOUR: Assimilation de la cession de droitssociauxà la cession du fonds de commerce exploité par la société.

[6] "If shares in a company are purchased, all its assets, liabilities and obligations are acquired … If only the assets are purchased then, only the assets (and liabilities) which the buyer agrees to obtain and which are identified in the sale agreement are acquired": Mark Gipson, Selling a business: Shares vs. assets, published on 28/02/2012 by the Birketts, available online at http://www.birketts.co.uk/resources/legal-updates/419/selling a business shares vs assets, consulted on 11/05/2016.

[7]Cour de Cassation, chambre commerciale, N° de pourvoi : 81-13728 81-16259 du 07 mars 1984.

[39] Igitekerezo cy'uko igurisha ry'imigabane yose ya sosiyete kitagomba gufatwa nk'igurisha ry'ibigize sosiyete cyanemejwe mu rundi rubanza rwaciwe n'Urukiko Rusesa Imanza mu Bufaransa (Atttendu que la Cour d'appel a retenu à bon droit qu'une cession de parts d'une société à responsabilité limitée, même si elle porte sur la totalité de ces parts, ne peut pas être assimilée à la cession du fonds de commerce constituant l'actif de la société)[8].

[40] Urukiko rurasanga kandi, kuba RRA ivuga ko TOTAL RWANDA SARL ariyo yaryozwa imisoro iburanwa ngo kuko igihe cy'amasezerano itashoboraga gutandukanywa na TOTAL OUTRE MER (ko byari bimwe) bitewe n'uko yari umunyamigabane rukumbi w'iyo sosiyete, nta shingiro bifite, kuko usibye kubivuga gusa, iyo ngaruka ntaho ishingiye mu rwego rw'amategeko, cyane cyane ko ihame ari uko sosiyete ifite ubuzimagatozi butandukanye n'ubw'abayigize. Nubwo kandi imvugo ya RRA yakwitabwaho, ingaruka yagombaga kuba iseswa rya sosiyete nkuko byateganywaga n'ingingo ya 45 y'itegeko N°06/1988 ryo kuwa 12/02/1988 ryagengaga amasosiyete y'ubucuruzi ubwo amasezerano y'igurisha yabaga, bivuze ko sosiyete yari kuba itakiriho. Abasesenguye icyo kibazo ahubwo bavuga ko muri icyo gihe umutungo wa sosiyete wegukanwa n'umunyamigabane usigaye, bigafatwa ko habaye igabana ry'umutungo kuko sosiyete iba itakiriho.[9] Bivuze rero ko muri icyo gihe, hari kuregwa TOTAL OUTRE MER nk'uwari wasigaranye umutungo wa sosiyete kuko, nkuko byagaragajwe ihame ari uko sosiyete igira ubuzimagatozi butandukanye n'ubw'abayigize ku buryo ibikorwa bya TOTAL OUTRE MER bitaryozwa TOTAL RWANDA S.A.R.L.

[41] Urukiko rurasanga rero, nta kintu kidasanzwe cyakozwe cyatuma hatekerezwa ko icyari kigamijwe ari igurisha ry'imitungo kuko n'ibyo RRA ivuga ko byirengagijwe n'Urukiko rwa mbere ari ingaruka zishingiye ku igurisha ry'imigabane, cyane cyane ko itabashije gutanga ibisobanuro byumvikana by'uburyo ikurikirana umusoro kuri TOTAL RWANDA SARL na ENGEN RWANDA Ltd mu gihe ihakana ko ENGEN RWANDA Ltd atariyo yahoze yitwa TOTAL RWANDA Ltd.

[42] Hashingiwe ku byasobanuwe byose haruguru no ku ngingo ya 9 y'Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko urega agomba kugaragaza ibimenyetso by'ibyo aregera yabiburaagatsindwa, Urukiko rusanga kuba nta kindi kimenyetso RRA ishingiraho ivuga ko habaye igurisha ry'umutungo wa TOTAL RWANDA SARL, bituma hagomba gushingirwa ku bivugwa mu masezerano agaragaza ko icyakozwe ari igurisha ry'imigabane ryakozwe na TOTAL OUTRE MER, uyu mwanzuro ukaba unahura n'uwo Inshuti y'Urukiko yagezeho, aho yagaragaje ko nyuma yo gusuzuma ibikorwa byabaye, icyabaye ari ihererekanya ry'imigabane, bityo imikirize y'urubanza RCOM0175/11/HCC rwajuririwe ikaba itagomba guhinduka.

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[8] Cour de cassation, chambre commerciale, N° de pourvoi: 88-15784 du 6 juin 1990.

[9] …. "l'associé unique se voit attribuer les biens de la société. Il reçoit alors tout le patrimoine de celle-ci, étantdonné que la société disparait sans laisser de titulaire de son patrimoine, il ya immédiatement substitution d'unepersonne à la personne morale à la tête du patrimoine social": E. Tyan, Droit commercial, Tome I, LibrairiesAntoine, 1968, p.352, cité dans le Mémoire de Sahar BADDOUR, op.cit.

## III. ICYEMEZO CY'URUKIKO

[43] Rwemeje ko ubujurire bwa RRA nta shingiro bufite;

[44] Rwemeje ko nta gihindutse ku mikirize y'urubanza RCOM0175/11/CS rwaciwe n'Urukiko Rukuru rw'Ubucuruzi kuwa 13/01/2012;

[45] Rutegetse RRA gutanga amagarama y'urubanza angana na 100.000Frw.