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Corporate Governance Lapses at Indigenous Banks: The Case of Defunct UT Bank Ltd and Capital Bank Ltd

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Abstract **Review Article**

Indeed, the Ghanaian business community was saddened with news on August 14, 2017, that the licenses of two indigenous banks - UT Bank and Capital Bank have been revoked. This practically came as a surprise to me and the many ordinarily Ghanaian on the street who transacts business with these two banks. Additionally, the two banks had won numerous awards for performing well in the industry. The two banks were taken over by GCB Bank Ltd. In the 2011 Ghana Banking Awards, UT Bank was adjudged the Bank of the year. Capital Bank was also adjudged the Best Growing Bank, and Best Bank in Deposits & Savings in 2016. A press statement issued by Bank of Ghana (BoG) read in part as follows: "The Bank of Ghana has revoked the Licences of UT Bank Ltd and Capital Bank Ltd. This action has become necessary due to severe impairment of their capital. The two banks have high non-performing loans. UT Bank and Capital Bank were deeply insolvent, meaning that their liabilities exceeded their assets, putting them in a position not to be able to meet their obligations as and when they fell due". Interesting, one subject that came to the media front was the discussion on corporate governance in these two banks. The case was further compounded when one of the board Chairmen asserted that he had nothing to do with the daily activities of the bank; reason been that, he was then a non-executive board member. Was he right to make such a proclamation as the board chairman of the bank or it was just an ignorance on his part or his duties were ambiguous to him then? Maybe, I believe, in appointing him as the Chairman of the bank, they should had remembered what Habakkuk 2: 2 asserted (NIV): Then the LORD replied: "Write down the revelation and make it plain on tablets so that a herald may run with it". This paper assesses the corporate governance lapses in these two indigenous banks and way forward.

Keywords: Corporate governance, Capital Bank, UT Bank, Lapses, Bank of Ghana.

INTRODUCTION

The health of every economy's financial sector is of great concern to policymakers and practitioners. The Ghanaian business community was saddened with news on August 14, 2017 that the licenses of two indigenous banks - UT Bank and Capital Bank have been revoked. This practically came as a surprise to me and the many ordinarily Ghanaian on the street who transact business with these two banks. Additionally, the two banks had won numerous awards for performing well in the industry. The two banks were taken over by GCB Bank Ltd. In the 2011 Ghana Banking Awards, UT Bank was adjudged the Bank of the year. Capital Bank was also adjudged the Best Growing Bank, and Best Bank in Deposits & Savings in 2016. A press statement issued by Bank of Ghana (BoG) [3] read in part as follows: "The Bank of Ghana has revoked the Licences of UT Bank Ltd and Capital Bank Ltd. This action has become necessary due to severe impairment of their capital. The two banks have high non-performing loans. UT Bank and Capital Bank were deeply insolvent, meaning that their liabilities exceeded their assets, putting them in a position not to be able to meet their obligations as and when they fell due".

Swift action by Bank of Ghana (BOG)

The case of UT and Capital Bank ultimately engineered further actions by the Bank of Ghana to avert vulnerabilities in the financial sector. The regulator increases the minimum capital from GH¢120 million to GH¢400 million effective December 31, 2018 and a temporary freeze on issuance of new licenses in 2018. In July 2016, the Banks and Specialized Deposit-Taking Institutions Act, 2016 (Act 930) was passed by Parliament to tighten regulation of the banks. The Act limits the powers of Bank of Ghana in granting waivers to the banks, especially single obligor, which limits the risk of exposure to a single customer. Again, the Act imposes heavier sanctions for regulatory breaches.

To improve the quality of risk management, corporate governance and internal control practices in the banks, Bank of Ghana has issued directive to the banks to implement Basel II/III Capital Framework effective June 30, 2018. This imposes stringent requirements for capital measurement.

The failure of UT and Capital Bank brought corporate governance failures into the media limelight. Interesting, anecdotal evidence on social media heralded a very worrying trend. The board chairman of Capital Bank who happens to be a renowned Pastor in Ghana, asserted that he could not be blamed since he was not part of the day-day management of the bank. His comment further raises many eye brown as to whether board directors are aware of their obligations. This is disturbing, as it seems the gatekeepers of our savings and hard earned cash are not even aware of their fiduciary duties as board chairmen.

DISCUSSION

Corporate Governance: Case in UT and Capital Bank.

Interesting, one thing that the banking crisis revealed is the corporate governance lapses in the country. Interesting, one study conducted by Ebenezer Edward Arthur [4] on corporate governance and performance on Banks in Ghana showed a very weak, positive correlation between corporate governance and return on equity. There was also a very weak positive correlation between corporate governance and earnings per share and ultimately, Corporate governance was however found to be negatively correlated with return on assets. So the question is what is corporate governance?

Various definitions have been given to corporate governance by different authors and bodies. Perhaps one of the simplest is the one given by the Cadbury Committee in UK. They define corporate governance as the system by which companies are directed and controlled [1].

Some Lapses from UT and Capital Bank

From what was presented from the regulators in the case of UT and Capital Bank and anecdotal evidence. Some of the lapses one could deduce are outline below:

I. Conflict of interest and lack of independence issues were at the ‘central nervous system’ of these two banks. For instance, The BoG cited several related party transactions that were performed with inadequate safeguards. Shareholders and directors were accused of using depositors’ funds to invest in other business interests or finance personal expenditures in the name of loans that were not properly contracted. The so-called independent and non-executive directors of some of the banks had compromised their independence and fiduciary duties and were thus unable to serve as effective checks on the management. Independence was traded with rewards. Also, the management oversight function of executive directors was weakened by the interference of non-executive directors in day-to-day administration of the banks. Other conflict of interest situations arose from activities of some independent directors who were also serving as consultants for the banks with no specific mandate.

II. Lack of control and supervision, whether in the form of lack of internal and external controls, and breakdown in accountability at all levels of the company is perhaps one of the major underlying governance weaknesses identified at the heart of almost all corporate failures. Many commentators pointed their fingers at the directors of the failed banks and the central bank for failing in their supervisory duties. The issues necessitating the collapse did not happen over-night, it was therefore a matter of the regulator not playing its statutory watchdog role.

III. Board of directors appeared to lack the necessary technical knowledge to review and objectively question CEOs and other senior executives. Directors seemed not to understand the nature of related party transactions they were approving. They also accepted the existence of weak internal controls in times when they should have placed greater emphasis on strengthening these controls. This was evident from anecdotal evidence circulated via the media attached to the Board Chair of Capital Bank.

Interesting, in law, running a company down into insolvency is not an automatic act of illegality. This was demonstrated in the landmark case of *Salomon vs Salomon, [2] UKHL 1, [2] AC 22*, where it was established that the shareholders of a company cannot be held personally liable for the failings of the company; a corporate entity has a separate legal personality, independent from its shareholders’ identity. This principle makes it difficult to hold accountable and prosecute business actors whose actions result in the collapse of their businesses. Nevertheless, many are of the opinion that the corporate veil should be removed and that decision makers found culpable should be prosecuted for the criminality of their actions. The prosecution of such persons, even if they are seen as scapegoats, is believed to be enough to mitigate public discontent. Punitive actions taken against those found culpable, whether they are directors, senior executives or regulatory officials, will restore trust in the financial system. After all, criminal law is premised on punishing the wrongdoer for his wrongdoing [5].

Recommendation and Lessons from UT and Capital Bank

Corporate governance directive

The Corporate Governance Directive is intended to ensure strict adherence to best global practice on corporate governance. Although imperative to bring sanity to the banking sector and the financial services sector, some issues persist which if not addressed swiftly, may lead to redundancies in the implementation of the directive and may be counter-intuitive according to bank executives per PWC, 2019 report:

I. Fixed term on key appointment requirement mandates all bank CEOs/MDs, Non-Executive Directors and Board Chairpersons to have a tenure not exceeding 12 years, 9 years and 6 years respectively. Although this is expected to be in line with best practices in good corporate governance, the major issue as noted by the banks is that most of these appointees are either shareholders in the banks or have a requisite and sometimes unique set of skills needed by the bank. As such, replacing them frequently is costly and undesirable.

II. Restricting the participation of bank executives in corporate governance programmes to the National Banking College (NBC) is viewed as somewhat problematic. For example, some multinational banks noted that they have credible global and/or regional partners who provide such programmes for their executives frequently and would like the flexibility for such programmes to be recognized by the BoG. However, the requirement that mandates banks to appoint an independent board chairperson is welcoming according to the banks and in accordance with good corporate governance practices globally.

CONCLUSION AND TAKE HOME

The skills, knowledge and ethical competence of board members are critical otherwise, the best system of corporate governance will still appear frivolous and ineffective. There should be code of ethics and ethical charters on stakeholder conduct with ethical committees at the board level to monitor and control the implementation. In corporate governance, the board is therefore considered as the 'DNA' especially in the public sector or listed companies. Corporate governance therefore revolves around the board as the axis. The term "director" as defined by law in the amended section 179 of the company's code, 1963 clarifies that: *"directors" means those persons, by whatever name called, who are appointed to direct and administer the business of the company".* The author of this paper from his research on corporate governance finally concludes that: *Corporate governance is the 'constitution' of every entity to achieve its objectives and embedded with the principle of constitutionalism. It is therefore akin to the vehicle embedded with accelerator to move; and that same vehicle, is also embedded with breaks to avert it from causing any accident or harm. Hence, a well-defined corporate governance structure in an entity acts as a watchdog and not a predator.*

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