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EVALUATION OF THE EXTENT OF LIABILITY OF DIRECTORS FOR BANK FAILURE IN NIGERIA

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Abstract

The pivotal role of banks to the development of the national economy is generally acknowledged. The banks play the role of financial intermediation, by which they mobilize surplus funds in form of deposits which are then channeled to entrepreneurs in form of loans and advances for business development, giving rise to employment, wealth creation and growth. Banks also promote trade and commerce both locally and internationally through the payment system, hence, banks are considered the engine room and live wire of the economy. That informed the robust legislation and regulatory standards imposed on banking business considering the fact that uncontrolled bank failure could be disastrous for the economy. The focus of the regulatory and supervisory framework however, seems to be skewed in favour of the protection of the depositors and the banking system. However, a key issue has been the extent to which those responsible for bank failure especially the directors have been held accountable. This paper examined the current legal framework to determine the extent to which directors are liable for bank failure. The evaluation revealed that while legal sanctions have been prescribed for breach of directors' civil duties and they could also be criminally liable for violations of extant laws which could have contributed to bank failure, there is no direct liability for bank failure per se. It is posited that given the acknowledged importance of banks and the dire consequences of their failure, directors should be held legally accountable for the failure of their banks.

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***Related declarations are provided in the final section of this article.*

1. INTRODUCTION

Following the introduction of the Structural Adjustment Programme [SAP] in Nigeria in 1985/86 as a major economic policy, along with the policy of deregulation, the financial services industry was liberalized. In line with free market economy, the banking sector was to be operated on 'free entry and free exit basis'. To mitigate the possible adverse consequences of the new policy on the banking public, especially depositors, a new financial safety net arrangement was instituted through the establishment of the Nigeria Deposit Insurance Corporation [NDIC] in 1988 . Furthermore, there are multifarious legislations, regulations and supervisory institutions in place aimed at providing a good level of protection to the banking system.

Indeed, as anticipated, with the introduction of the liberalization and deregulation policies, the number of banks increased since the establishment of the Nigeria Deposit Insurance Corporation in 1988 from 48 in 1988 to 120 in 1990. In the same vein bank failure not only resurfaced but increased rapidly as a result of the deregulation policy. Between 1994 [when the first set of bank closures in Nigeria's modern history occurred] and 2018, about 53 Universal banks, 325 Microfinance banks and 51 Primary mortgage banks had failed and currently under- going liquidation process with the Nigeria Deposit Insurance Corporation as the sole liquidator for all the closed banks.

Within a relatively short span of time, bank liquidation has emerged as the most dominant activity within the sphere of corporate insolvency practice in Nigeria. The volume of losses by depositors, creditors and ordinary shareholders from these bank failures have been very enormous and beyond the capacity of the financial safety net arrangements to deal with, which brings to the fore, the question of culpability for bank failure, especially on the part of the directors. This paper evaluates the current legal framework on the liability of bank directors for the failure of their banks.

The paper is structured into the following eight [8] major sections: the Introduction; Role/Importance of banks; Causes and Consequences of Bank Failure; Roles and Duties of Bank Directors; Causes and Consequences of Bank Failure; Roles/Duties of Bank Directors; Liability of Bank Directors; Liability of Directors for Bank Failure Per Se; Recommendations and Conclusions.

2.0 ROLE/IMPORTANCE OF BANKS

The financial Sector, especially banks play a significant role in economic development. Because the entire financial market converges with the banking system, the banks are regarded as the engine room or life blood of the economy. Banks play the following key roles:

[i] Financing risks that help fund economic growth [financial intermediation]

[ii] Plays central role in a Country's payment and settlement system

[iii] Development and implementation of monetary policy through financial institutions and markets to control inflation and fuel economic growth.

The importance of the financial system obviously underscores the need for effective framework that promotes its stability. According to the Bank of England, financial stability entails detecting and reducing threats to the financial system as a whole. Such threats are detected through the Banks surveillance and market intelligence functions. They are reduced by strengthening infrastructure, and by financial and other operations, at home and abroad, including, in exceptional circumstances, acting as lender of last resort…"

It is in recognition of the paramount importance of the banking system that financial safety nets are established to provide distinct layers of protection, primarily for depositors being the most critical stakeholders in the banking system with the ultimate objective of promoting public confidence which is paramount for maintaining financial system stability. For instance, as at 31st December, 2021, the total deposits liabilities of the banking industry in Nigeria stood at ₦38.423 trillion naira which represents 64.84% of the total share liabilities of 59.237 trillion naira , confirming that depositors are the most important stakeholders in the banking industry.

It is partly for the above reason that there are robust legislative, regulatory and supervisory framework for banking that arguably makes the banking industry the most regulated sector of the entire economy. Some of the legislations that directly impacts on the banking system in Nigeria include:

1. The Companies and Allied Matters Act,
2. The Banks and Other Financial Institutions Act,
3. The Central Bank of Nigeria Act,
4. The Nigeria Deposit Insurance Corporation Act,
5. The Asset Management Corporation of Nigeria Act,
6. The Investment and Securities Act,
7. The Failed Banks [Recovery of Debts] and Financial Malpractices in Banks Act,
8. Criminal/Penal Codes,
9. Economic and Financial Crimes Commission Act,
10. Cybercrime Act,
11. Money laundering (Prohibition) Act
12. Proceeds of Crime (Recovery and Management)
13. Terrorism (Prevention & Prohibition) Act
14. Nigerian Financial Intelligence Unit Act, etc.

Not only do the above legislations provide a robust regulatory standard for banks and their officials, they also established supervisory institutions for the implementation and enforcement of the regulatory standards. The main banking supervisory institutions include the Central Bank of Nigeria as the Apex Supervisor, the Nigeria Deposit Insurance Corporation, Asset Management Corporation of Nigeria, Corporate Affairs Commission, National Insurance Commission, Securities and Exchange Commission, National Pension Commission, among others.

Ultimately, the accountability of bank directors for the failure of their banks will be discerned from the review of the above legislative, regulatory and institutional framework.

3.0 CAUSES AND CONSEQUENCES OF BANK FAILURE

3.1 Causes of Bank Failures

The causes of bank failure are diverse but it is generally acknowledged that bank failure in Nigeria is an expression of a complex web of causal factors. The causative factors could be divided into two categories; endogenous and exogenous factors. In summary, bank failures are generally caused by one or a combination of the following:

[a] Capital Inadequacy and Overtrading

Banks are required to have adequate capital in order to meet their financial commitments, generate profit and contribute meaningfully to the promotion of good financial system in the country. The CBN therefore recommends a minimum capital ratio which helps to protect depositors in case of business losses and promote stable and efficient financial system. This capital ratio is the percentage of a bank's capital to its risk-weighted assets. When the capital of a bank falls below the minimum ratio, and if the situation is not effectively addressed by stakeholders and management, it would result in bank distress and ultimate failure of the Bank.

As at 2002, the minimum paid-up share capital of banks was N2 billion. However, it was increased to 25billion in 2004 purposely to enable banks to absorb operational shocks or unexpected losses, sustain their level of business, operate profitably and contribute towards upholding a sound financial system.

[b] Inadequate disclosure and lack of transparency

Inadequate disclosure of the state of affairs of the bank is a major factor responsible for bank failures in Nigeria. Most reports by banks to the Central Bank of Nigeria, Nigeria Deposit Insurance Corporation, and other regulators are doctored thereby compromising effective supervision of the industry. Lack of transparency weakens the principles of good governance. Manipulation and window dressing of financial statements have resulted in lack of appropriate information by regulatory authorities. Such vital information would have provided the platform for regulators/supervisors to take adequate steps to prevent failure of the bank.

[c] Large Non-performing loans

Bank failures are bound to arise where banks have huge percentage of their loans as non-performing, especially when a large proportion of same are insider related. Many business owners and bank directors have misused their positions and violated their fiduciary duties to their companies by engaging in activities which are in conflict with the organizational goals. Some banks were involved in giving unsecured credit facilities to their directors and related companies in excess of their lending or single obligor limits, in violation of bank regulations which is a recipe for bank failure.

[d] Inadequate Regulation and Supervision

Inadequacy and weakness in supervision is another cause of bank failure. As rightly observed by Molokwu , the increase in the number of banks over a period of time was faster than the rate of

enhancement of the supervisory competence of the regulatory authorities. This laxity in enforcement of laws, regulations, and policies usually enables banks to engage in unsound and unsafe banking and other financial malpractices, resulting in failure.

[e] Poor Corporate Governance

Corporate Governance is simply the relationship between an enterprise and all stakeholders. It is the process, methods and approach adopted towards directing and overseeing the affairs of an entity. Good corporate governance plays a major role in the development of the banking sector because sound governance practices by organizations and banks result in higher firm's market value, lower cost of funds and higher profitability. Its absence results in distress and failure as is the case with the failure of most of the Nigerian banks.

[f] Mismanagement

Perhaps the most potent single factor that causes bank failure is mismanagement, considering the fact that all the exogenous factors that facilitates bank failure are general in nature affecting all other banks. The inability of some banks to overcome the risk factors resulting in their failure is the effect of bad management. Bank Mismanagement is characterized by; inadequate policies, lack of standard practices, poor lending, excessive risks taking, poor risk management practices, weak and ineffective internal control systems, poor/lack of strategic planning, insider abuse, keeping dividends constant on spurious earnings, fictitious collaterals, speculation, etc. Mismanagement is regarded as the major causes of bank failure following the dictum that the quality of Management and staff makes the difference between sound and unsound banks.

From the foregoing, it is submitted that the centre of gravity among all the causes of bank failure is mismanagement. Since the management of banks is mainly on the shoulders of the board of directors both collectively and individually, bank failure could be safely attributed to the conduct of the board of directors. Any discussion on the accountability for bank failure must therefore, necessarily focus on the bank directors.

No matter the reasons that accounted for their failure, the fact is that bank failure in Nigeria has become an unfortunate reality. As at 31st December, 2021, the NDIC being the sole liquidator of banks had in its books, 467 insured banks in-liquidation, comprising 49 Deposit Money Banks (DMBs), 367 Micro Finance Banks (MFBs) and 51 Primary Mortgage Banks (PMBs).

4.2 Consequences of Bank Failures

Bank failure has serious consequences. **In FRN v. Abubakar** the Special Appeal Tribunal stressed the importance of sound banking to the survival of a nation's economy, thus:

"We must remind ourselves that the banking industry can only thrive in an atmosphere where the public confidence in it is strong or, at least, unshaken. Sound banking is also indispensable to the survival of a nation's economy. The collapse of a bank is not only not good for a nation's economy, it brings in its wake untold hardship to its depositors who lose their money. Any act which brings or tends to bring about loss of public confidence in a Bank must be frowned at. Such acts are acts which affect or tend to affect adversely the liquidity of the Bank. Stealing of large sums of money, belonging to a bank, like in the instant case, is one of such acts. It is all the

reprehensible because it was committed by one to whom the money was entrusted for management."

One of the objectives of bank regulation and supervision is the protection of depositors with a view to sustaining public confidence in the banking system which is a pre-requisite for financial system stability. It is recognized that an uncontrolled bank failure will result in heavy depositors' losses, create panic and a run on banks leading to systemic crisis. A distressed banking sector is obviously a serious obstacle to economic activities as banks will be unable to lend which in turn impede the growth of the real sector of the economy. Furthermore, the payment system may be disrupted and financial transactions will be more difficult and expensive.

In Nigeria, there is no doubt that bank failure may have adverse effects on several groups of people including depositors, employees, borrowers and shareholders. Indeed, for the banks that failed and undergoing outright liquidation, the rate of reimbursement through the liquidation process is very low due to the acute distress level of the affected banks at the time they were closed, worsened by the fact that less than 30% of assets especially the loan assets of the banks have been recovered and very unlikely to be substantially recovered in the near future. Only 14 deposit money banks out of 53 have fully reimbursed depositors, five of which have settled other creditors and 3 have declared dividend to the shareholders. This means that depositors and other creditors will indeed suffer heavy financial losses.

It is with such adverse consequences of bank failure in mind that it becomes important to examine the culpability of those at fault. Given the pivotal role of bank directors, they should be first in line of accountability, which is the focus of this paper.

5.0 ROLES/DUTIES OF BANK DIRECTORS

A bank is first a company incorporated and registered under the companies and Allied Maters Act [CAMA] before it is issued a banking licence to operate as a bank, which then brings it under the purview of the Banks and Other Financial Institutions Act and other relevant banking legislations. Therefore, the common law, the provisions of CAMA, BOFIA, NDIC Act and numerous other legislations which imposes general or specific duties on bank directors combine together in regulating the conduct of bank directors and ultimately determine their liabilities when they fail in the discharge of the duties imposed on them. The duties of bank directors revolve around the fact that they are the persons duly appointed to direct and manage the business of the bank .

5.1 Directors Duties under CAMA

The duties of directors which originated at common law has been largely codified in statutes, notably the CAMA. Some of the statutory duties of directors provided under CAMA are as follows:

[a] Duty of Care and Skill

The directors of a bank are under obligation as directors of any other company to exercise **reasonable skill, diligence and care** in managing the affairs of the bank. The directors of a banking company would typically hold some degree of expertise in financial and business-related matters as well as possess knowledge of banking and regulatory matters as such a higher

standard of competence is expected of them in managing the affairs of the bank. A director must give adequate attention to the business of his bank and attend board meetings.

[b] Fiduciary Duties

The fiduciary duties of directors include:

[i] To act in the best interest of the bank

A director is under obligation to act at all times in what he believes is in the best interest of the company as a whole so as to preserve its assets, further its business and promote the purpose for which it was formed.

[ii] To Exercise Unfettered Discretion

Directors are required to apply his best talents and judgment in the performance of his responsibilities. He can neither contract himself to vote in a pre-determined manner at Board and general meetings nor act on the direction of another.

[iii] To Exercise Power for a Proper Purpose

The powers vested in a director must be exercised for the purpose for which they were meant and not with any hidden agenda.

[iv] To Avoid Conflict of Interest

A director must not put himself in a situation where his personal interest conflicts or likely to conflict with the interest of his company [bank]. In the same vein a director must not make a secret profit or receive any undeserved benefit in the course of the performance of his duties.

5.2 Directors Duties under BOFIA

The BOFIA which contains a supremacy clause over CAMA in case of any inconsistency also imposes a number of duties on bank directors. Some of the duties that are noteworthy are:

[a] Duty of disclosure

Section 17[3] provides that every director of a bank who has any personal interest whether directly or indirectly in an advance loan or credit facility or proposed advance loan or credit facility from that bank must as soon as practicable declare the nature of his interest to the board of directors, except where his interest in the borrowing company is less than 5%. The duty to disclose also extends to any conflict of interest situation involving the director in relation to the bank.

[b] Duty to sign Code of Conduct for bank directors

Every bank director is required to sign a code of conduct which prescribes the ethical behavior expected of bank directors as prescribed by the banks' board of directors.

[c] Duty to Secure Compliance with the Provisions of BOFIA

The BOFIA imposes a duty on every Director of a bank must ensure full compliance with all the provisions of BOFIA . The implication is that it is the responsibility of the bank directors to ensure that all prudential regulations and rules prescribed for banks under the Act are complied

with including the keeping of proper books of account and compliance with various restrictions on lending and other activities specified in Section 17, 18,19 and 47 of BOFIA among others.

5.3 Duties of directors under the Failed Banks Act

Perhaps no other legislation has prescribed more stringent duties on bank directors than the Failed Banks [Recovery of Debts] and Financial Malpractices in Banks Act 1994 as amended. Some of the duties imposed on bank directors include:

[a] Duty with regard to securitization of loan facilities

The directors are under legal duty to ensure that loan assets have adequate collateral support duly perfected.

[b] Duty to comply with bank lending Policies

Directors are required to comply with other banking regulations including prudential limits to a single customer as well as compliance with all banks internal policies and procedures.

5.4 Duties under Other Statutes

Consequent upon the robust regulations to which banks are subject to, there are indeed many other legislations that impose some duties upon bank directors. Some of the additional statutes include, the EFCC Act, Investments and Securities Act, Bank Employees' Assets Declaration Act, Etc. It therefore suffices to state that very much responsibilities and powers have been conferred on bank directors and their conduct must have impact on the safety and soundness of the banks under their management. In other words, when banks fail, it will invariably mean that the directors either jointly or severally may have failed in their duties and the question as to their accountability becomes pertinent.

5.5 Duties of Directors under the Code of Corporate Governance for Banks

In addition to the statutory duties of directors discussed, every bank director in Nigeria is required to sign the code of corporate governance for banks which imposes a number of duties. Key among the duties are:

[a] To approve and review corporate strategy, major plans of action, annual budgets, business planet,

[b] To ensure that the institution has adequate systems of internal controls both operational and financial

[c] Ensure integrity of the institutions accounting and financial reporting system,

[d] Ensure that ethical standards are maintained,

[e] Set out acceptable risk management guidelines.

6.0 LIABILITY OF BANK DIRECTORS

We have noted the enormous duties and responsibilities placed on bank directors with regard to the management of the affairs of their banks. The issue at stake is the culpability of the directors when their banks fail. The 12th principle of the IADI Core Principles for Effective Deposit Insurance Systems states as follows;

The deposit insurer, or other relevant authority, should be provided with the power to seek legal redress against those parties at fault in a bank failure.

The implementation of the above principle entails that the conduct of parties responsible for contributing to the failure of any bank [directors, officers, managers, owners] as well as the conduct of related parties and professional service providers [auditors, solicitors, accountants, valuers] should be subject to investigation, carried out by the deposit insurer, bank supervisor, regulator, law enforcement agencies or professional bodies.

The deposit insurer [or other relevant authority] should take the appropriate steps to pursue those parties that are identified as culpable for the failure of the bank. The culpable parties should be subject to sanction and/or redress. Sanction or redress may include personal or professional disciplinary measures (including fines or penalties), criminal prosecution and civil proceedings for damages. The extent to which this principle has been implemented in Nigeria with regard to bank directors would be considered in the context of three distinct heads of accountability/liability, namely administrative, civil and criminal.

6.1 Administrative Sanctions Against Directors

In the context of this presentation, administrative sanctions could be described as those penalties, liabilities or other enforcement measures that could be administered without recourse to litigation. Such sanctions must however, be provided by law and will include the following:

[a] Shareholders' power to appoint and remove directors

Although the first directors are appointed by the memo and articles of Association at incorporation, once incorporated, the Shareholders have the power to remove any director from office. Thus, any director that engaged in unsafe and unsound banking practice that could lead to failure of the bank could be removed by the Shareholders at their general meetings.

[b] Regulators/Supervisors' Administrative Sanctions

Both Central Bank of Nigeria and the Nigeria Deposit Insurance Corporation have statutory powers to sanction bank directors. The fit and proper person test allow the Central bank with consultation with other Supervisors to screen prospective directors being considered for appointment as Directors of banks and where there is evidence that any such nominated director had been involved in a failed bank, he is disqualified from appointment. A director who contributed to a bank failure cannot be trusted with similar roles again. Furthermore, even after appointment as bank director, there are provisions which allow the Central Bank suo motu and the NDIC in consultation with the Central Bank to remove directors from office. Also, the BOFIA and the NDIC Act have empowered the Central bank and the NDIC respectively, to compound violations of the provisions of the two statutes by imposing monetary penalties against the offending directors in lieu of prosecution.

6.2 Civil Liability of Bank Directors

It is important to note that civil liability of directors for bank failure entails the availability of a process of commencing civil legal proceedings before a court of law aimed at ensuring that

either all directors of failed banks or at least those of them responsible for the failure of their banks are made financially accountable for losses arising from the failure. If such a legal framework is indeed in place, it would surely serve as deterrence to serving directors of surviving banks against unsafe and unsound banking practices that cause bank failures thereby promoting financial system stability.

Furthermore, the enforcement of the civil liability of directors who cause or contributed to the failure of their banks would provide additional financial resources that could be deployed to the reimbursement of depositors and other creditors to whom the bank is liable, thereby going further to increase confidence in the banking system. The civil liability of bank directors could be classified into the following three segments, namely:

[a] Personal Liability of Directors under CAMA

Although the duties of directors under CAMA are owed to the banks as corporate institutions and not to the shareholders or depositors or other creditors, it is clear that directors can be held liable in damages for losses resulting from the breach of their statutory duties. A director is therefore required to exercise that degree of care, diligence and skill which a reasonable prudent director would exercise when managing a bank. Any director of a bank who fails to exercise that degree of care, diligence and skill which a reasonable prudent director would exercise is liable for negligence and breach of duty. It should however be noted that a director who acts within his powers may not be liable for loss to the company occasioned by imprudence or error of judgment [such as acting in reliance on officers of the bank whom the director is entitled to trust and whose reports and statements have misled them] By virtue of Section 305[9] of CAMA, it is the bank that has locus to institute action against directors in respect of the duty imposed under the said Section. However, where a bank has failed, the NDIC as the liquidator may institute civil action against a director for any breach of duty he may have committed.

Furthermore, Section 316 of CAMA provides for personal liability of directors where the Company borrows money for a specific purpose or receives funds or property for execution of a specific contract or project and with intent to defraud fails to apply the funds for the specific purpose, contract or project. It is therefore possible under this provision to hold a director of a failed bank personally liable to refund any improperly acquired wealth. Section 308 [3] makes each director liable for the actions of the board, notwithstanding that such director was absent during deliberations and the standard of care required of a director under the Act is the same for executive and non-executive directors.

It is also noteworthy that Section 314 of CAMA allows directors to have unlimited liability if so provided by the memorandum of the company, thereby removing the corporate veil and holding them accountable for the losses or debts of their companies. As will be noted shortly, it is my recommendation that this principle should be codified by statute without any element of discretion.

Similarly, Section 506]1] CAMA empowers the official receiver or liquidator or any creditor or contributory of the company to apply to court if in the course of the winding up of the company, it appears that any business of the company has been carried out in a reckless manner or with intent to defraud the creditors of the company or creditors of any other person for any fraudulent

purpose, to declare any persons who were knowingly parties to the carrying on of the business in such manner personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct. Thus, personal liability can be attached on erstwhile directors of a bank who are found to have managed the bank recklessly, amongst other grounds, without limitation. One basis [amongst others] for establishing recklessness against directors could be where the bank is in violation of banking laws or regulations. In ***Nigeria Deposit Insurance Corporation vs City Express Bank Plc***, the NDIC as Petitioner filed a winding up petition to wind up the Respondent bank. at the Federal High Court. Braco Ventures Limited and Alhaji Saliu Iyiola Ibrahim being creditors of the respondent bank joined the petition as 1st and 2nd Applicants and brought an application under section 506[1] &[2] of CAMA for a declaration that the erstwhile directors of the respondent bank had from 11th June, 2004 to 17th January 2006 carried out the business of the bank in a reckless manner or with intent to defraud creditors of the bank by reason of the fact that the defunct bank during the said period issued a dud bank draft for ₦4 million to the 1st Applicant . The Court held the erstwhile directors of the respondent bank, namely; Prince Samuel Adedoyin, Mrs Sola Adeoti, Alh Gambo Magaji and Kayode Folounsho all personally liable to pay the sum of ₦44,694,424.00 to 1st Applicant.

Under Section 674 [1] of CAMA, the court on the application of the liquidator may order any director of a failed bank to repay or restore money or property of a failed bank with interest as compensation in respect of any misapplication or retainer of such money or property if found guilty of any misfeasance or breach of trust.

In another case, a director who signed various stock transfers whereby shares held by the company as trustees for a number of pension funds were transferred to another company of which he was also a director, without the authority of the board of directors, and as a result of the transfer the company suffered loss, was in breach of duty and liable to the company for the loss as he was exercising his powers for an improper purpose

[b] Liability in tort for Negligence

Although the common law duties of care owed by directors the breach of which could form the basis for liability for the tort of negligence have been largely codified as statutory duties, the codification of the duties has not removed the tort of negligence. Consequently, the option to hold bank directors liable in negligence for breach of duty of care still remain a possibility. In other words, a director will be liable for negligence if he fails to exercise such a degree of care as a reasonable person might be expected to take in the circumstances on his own behalf and the bank in consequence suffers loss.

[c] Liability for breach of statutory duties and banking regulations under BOFIA, Failed /banks Act, NDIC Act, etc.

The provisions of relevant banking statutes such as BOFIA and NDIC Act make directors of banks personally liable for compliance with the requirements of those statutes . Where a director is in violation of the provisions of those statutes, such a director would have breached the duty of care required or expected of him and could be held personally liable in civil proceedings as a consequence thereof.

The above also applies in relation to regulations made pursuant to the provisions of the relevant statute such as the Prudential Regulations. Directors of a bank could be held personally liable for non- compliance with Prudential Regulations issued pursuant to the BOFIA or for breach of a Guidelines or regulations such as the Code of Conduct for bank directors executed by that director in compliance with section 18[5] of BOFIA. Equally, a director who is in breach of the Code of Corporate Governance for bank directors issued by the CBN could be held personally liable.

[d] Other Civil Liabilities of Bank Directors

There are numerous other instances of directors' personal liability such as they agree to be held liable personally or where they exceed their authority; or as agents of the bank. Thus, a director of a bank would be held personally liable where he purchases property which the bank had no authority to purchase

6.3 Extent of Directors Civil Liability

The BOFIA, and the NDIC Act do not in express terms specify the extent or scope of the civil liability of directors of banks. This is in sharp contrast to the position under the Federal Deposit Insurance Corporation Act of the United States of America which not only expressly confers liability on directors of banks but goes further to specify the extent or scope of the damages payable. A director or officer of an insured depositary institution may be held personally liable for monetary damages in any civil action by or on behalf of, or at the request or direction of the FDIC, which action is prosecuted wholly or partially for the benefit of the FDIC for gross negligence including any similar conduct or conduct that demonstrates a greater disregard of a duty of care [than gross negligence] including intentional tortious conduct. , as such terms are defined and determined under applicable

The FDIC Act provides clarity with respect to the liability of directors for negligence or mismanagement of the bank which may lead to its failure. They offer ample and sufficient basis for holding directors liable for failure of their banks where there is proof that such directors have been negligent or in breach of the required diligence, skill and care resulting in the failure of their banks.

6.4 Criminal Liability of Bank Directors

It must be acknowledged that there is currently a very wide scope of criminal liability on the part of bank directors for various infractions of laws directly or indirectly relating to banking. It must be noted that the conducts for which bank directors could be held criminally liable may not necessarily be for causing the failure of their banks but for commission of banking malpractices or financial crimes which may or may not have contributed to the failure of their banks.

Bank directors can be held criminally liable under the Banks and other Financial Institutions Act (BOFIA) for offences which include having personal interest and without disclosing interest in loans and bank facilities, or without disclosing interest in the borrowing company to the Bank's Board of Directors. This position was applied in FRN v. Dr. Zin Abule reads:

'Every director of a Bank who has any personal interest whether directly or indirectly in an advance, loan or credit facility or proposed advance, loan or credit facility from that bank shall

as soon as practicable declare the nature of his interest to the board of directors of the Bank and the Secretary of the Bank shall cause such declaration to be circulated forthwith to all directors.'

Section 19 of BOFIA places restrictions on the lending practices of banks including single compliance with obligor limit, restriction on granting of unsecured facilities and interest waivers on directors related facilities. Contravention of the restrictions exposes the directors to criminal prosecution and if convicted will be liable to a fine not exceeding ₦5,000,000.00 or imprisonment for a term of three years or both.

Failure by a Bank to keep proper books of accounts in respect of all transactions, forgery of books of account with intent to defraud and outright stealing of Bank's money by Bank Executives or officials are also some of the Bank related offences.

Section 49 of BOFIA provides that directors or managers of a bank, who fail to take all reasonable steps to secure compliance by the Bank with the requirements of this Act or take all reasonable steps to secure the correctness of any statement submitted under the provisions of this Act, is guilty of an offence and liable on conviction to a fine not exceeding N2,000,000.00 or imprisonment for a term of 3 years or both. Non-compliance with any of the provisions of the BOFIA or any regulations for which an offence or penalty is not expressly provided, is guilty of an offence and liable on conviction to a fine not exceeding N2000,000.00 .

Section 15(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks, provides for certain offences upon which bank directors could be held accountable. Under this Section any director who:

[a] Knowingly, recklessly, negligently, willfully or otherwise grants, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person without adequate security or with defective;

[b] Participates in sharing for personal gratification, any money, profit, property or pecuniary benefit towards or after the procurement of a loan, an advance, a guarantee or any other credit facility from any person whether or not that person is a customer of the bank; or

[c] Recklessly grants or approves a loan or an interest waiver where the borrower is known to have the ability to repay the loan and interest;

Several other statutes, including the Economic and Financial Crimes Commission Act, NDIC Act, Cyber Crime Act, Investment and Securities Act, etc. imposes certain duties on directors the breach of which exposes them to criminal liability.

The Central Bank of Nigeria and the NDIC had through the machinery of the failed banks tribunal prosecuted a number of bank directors for various violations of the law and have secured many convictions. The EFCC also have been active in the prosecution of directors and other Officers of banks for violations of law which in many cases had contributed to the failure of the banks.

Although there had been a measure of success in the prosecution of bank directors, the effectiveness of the process has been compromised by issues of delays in trial of criminal cases initiated against bank directors, officials and staff connected with insider related loans, granting

of loans without approval or collateral security, rendering of false monthly returns to CBN, NDIC and other regulators.

7.0 LIABILITY OF DIRECTORS FOR BANK FAILURE PER SE

It is evident from the foregoing that although, there are opportunities for holding bank directors personally liable in civil action for losses suffered by a bank arising from breach of directors' duty of care and skill, fiduciary duties as well as the breach of other statutory duties and regulations, there is a dearth of case law where the mere fact of bank failure was the basis of the civil liability claims against a bank director. This challenge could be due to the fact that the duties are really owed to the banks and the banks are the entities that should hold errant directors liable for their conducts. However, because the directors are themselves the culprits, taking action against themselves is not a likely occurrence. Shareholders are limited in addressing the issue of irresponsible directors as some of the key directors are either the majority shareholders or are backed by them. Moreover, the rule in Foss v Harbottle limits the power of the shareholders to sue. Although minority shareholders could institute derivative actions on behalf of the company and the Corporate Affairs Commission could also do so pursuant to the Provisions of CAMA , this option has proved to be ineffective.

Furthermore, although, the scope of criminal liability for bank directors' violations of laws and regulations is quite extensive encompassing a multitude of statutes, the liability is not primarily for the failure of their banks. Rather the liability is hinged on violations of specific codes and its immaterial if the infractions actually were or were not responsible for the bank failure. In other words, the connection between the conducts of the bank directors being sanctioned and the failure of the bank is at best indirect. Perhaps, the only statute whose provisions are more directly connected to bank failure is the Failed Banks Act. Even at that, its prescriptions are linked to specific conducts which though more often leads to bank failure, it does not prescribe liability for bank failure per se. This leads to a conclusion that there is no criminal liability for bank directors merely for bank failure, although its more probable that the infractions could have at least indirectly contributed to the eventual failure of the banks especially credit related malpractices. Criminal liability on the part of bank directors currently, seem to target the causative factors for bank failure and perhaps could be categorized as preventive measures, it is contended that reforms should be introduced which should focus on the aftermath of bank failure and liability should be compensatory for the losses arising from the failure.

The responsibility to hold the directors liable for bank failure whether under the purview of criminal prosecution or through civil action for breach of duties is on the liquidator. However, this option has been effective only in respect of outright fraud, theft of banks assets and other grievous financial malpractices. The defunct failed banks tribunal was effective in this process before they were scrapped. The EFCC has recorded some measure of success in enforcing the criminal liability for specific violations with huge financial implications.

It will appear that the reluctance to hold bank directors directly liable for bank failure both criminally and or through civil proceedings could be the combined effect of the concept of corporate personality and limited liability in company law jurisprudence. The Principle of corporate personality postulate that a company once incorporated becomes a legal entity in its

own right and is distinct and separate from its shareholders and directors. Similarly, the concept of limited liability establishes that shareholders cannot be held accountable for liabilities of their company beyond the value of unpaid shares allotted to them, even though their appointment and poor oversight of the directors of the company may have contributed to the banks' failure and the resultant losses. However, despite the above fundamental principles of company law, even at common law, the corporate personality concept was not considered as absolute as exceptions were allowed where the veil of incorporation could be lifted or pierced so as to hold the directors liable for their conducts. Furthermore, statutory provisions some of which had been referred to above had expanded the scope of directors' personal liability for their roles as directors which could be described as statutory lifting of corporate veil and also in a way tinkering with the limited liability concept.

8.0 RECOMMENDATIONS

It is contended that more reform is required with regard to the liability of directors of banks. Given the acknowledged importance of banking and strategic influence of the directors who have control over huge volume of depositors' funds, there should be greater personal accountability for bank failure.

[a] In the area of criminal liability, there should be specific provisions for pecuniary liability for losses arising from the failure, as the current focus is on punishment by imposing monetary fine or a term of imprisonment without addressing the huge losses occasioned by the violations.

[b] In the area of civil liability, the courts should be prepared to presume negligence and or breach of duties from the mere fact of bank failure, by applying the principle of res ipsa loquitur. In other words, there should be a presumption that a bank cannot just fail unless the directors were negligent or in breach of their duties. The onus will then shift to each individual director to exonerate himself, by providing evidence that he or she had exercised reasonable duty of care and skill in the performance of director's duties and had no role in the failure of the bank.

[c] As an alternative, a new legislative reform should be introduced which should adopt a regime of strict liability on the part of bank directors for bank failure.

9.0 CONCLUSION

In the foregoing discourse, the pivotal role of banks in the economy was highlighted, which informed the robust legislative, regulatory, and institutional framework for their operations. The primary objectives of regulation and supervision are the protection of depositors and the promotion of financial system stability. However, the reality is that despite the best of supervisory oversight by Bank Regulators and Supervisors, bank failure has become a recurring phenomenon in Nigeria causing enormous losses to many stakeholders especially depositors. Although international best practice demands that all parties at fault in bank failure especially the directors should be held accountable, the legal framework for same in Nigeria had been very weak and largely ineffective as depositors and other stakeholder continue to count their losses. The legal regime for civil and criminal liability of directors reflected in the various statutory provisions and common law principles do not directly target bank failure as the basis of liability. Perhaps, the lack of direct liability on bank directors for the failure of their banks maybe partly responsible for the incessant bank failures due to lack of effective deterrence regime.

It is therefore advocated that the frontiers of criminal and civil criminal liability of bank directors should be expanded to focus on bank failure per se as a key basis of liability.

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