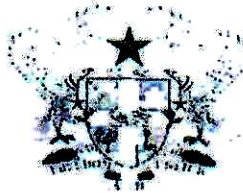


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OFFICE OF THE ATTORNEY GENERAL
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25th January, 2019

REPUBLIC OF GHANA

MR. KEN OFORI-ATTA
THE HONOURABLE MINISTER
MINISTRY OF FINANCE
MINISTRIES, ACCRA

25/1/19
pls forward to
Att. and
copy to
call me.

RE: SUIT NO. CM/RPC/0624/2018

NII AMANOR DODOO

VRS.

DR. KWABENA DUFFOUR & 16 OTHERS

NOTICE OF INTENTION TO JOIN THE ATTORNEY-GENERAL

Preliminary observations and request for comments

This Office is in receipt of a Notice of Intention to join the Attorney-General to the above-mentioned suit pending before the Commercial Division of the High Court, Accra.

The receiver of uniBank Ghana Ltd (uniBank) appointed by the Bank of Ghana pursuant to section 123 of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) instituted the case referred to above, seeking principally, an order for the refund of the remainder of the sum of GHC 5, 712, 623, 145 and an order for the return/transfer of some thirty-four properties among other reliefs.

The 8th, 10th and 14th defendants, i.e. *Dr Kwabena Duffour II, Prof. Newman Kwadwo Kusi and Boatemaa Kakra Duffour-Nyako*, in accordance with

section 10 of the **State Proceedings Act, 1998 (Act 555)**, have issued a notice of intention to join the Attorney-General, in pursuance of a counterclaim which seeks to raise issues against the Republic.

Inter alia, the 8th, 10th and 14th defendants counterclaimed for the following:

- i. A declaration that the entire procedure culminating in the purported appointment of KPMG as an Official Administrator is unlawful, illegal and contrary to the prevailing and acceptable practice and custom of the banking industry and sector;
- ii. A declaration that the entire procedure culminating in the purported appointment of the plaintiff as receiver is unlawful, illegal and contrary to the prevailing and acceptable practice of the banking industry and sector;
- iii. A further declaration that the purported expropriation and transfer of uniBank's "good assets" to the Ghana Consolidated Bank Limited is ineffectual, contrary to law, wholly devoid of legality and therefore ought to be set aside.

The Defendants make a number of allegations against the Ministry of Finance and the Bank of Ghana (BoG) particularly, that, the President of Ghana was misled about the relevant facts informing the impugned decisions culminating in the revocation of the licence of uniBank and the appointment of a receiver. The 8th, 10th and 14th defendants further allege that had the Government of Ghana been provided with adequate opportunity and information by the Bank of Ghana, it would have been aware that non-discharge of the Government's indebtedness in excess of GHC 1, 400, 000,00 contributed to the dire situation of uniBank.

Upon service of the Notice of Intention to sue, this Office by a letter dated *17th December, 2018*, requested the BoG for documents and information in order to assist us in our opinion. By a letter dated 19th December, 2018 signed by the Secretary, the BoG presented documents on the matter, with the exception of the Purchase and Assumption Agreement.

We have examined all the processes and documents so far filed by the various parties in the matter, as well as the documents received from BoG, and find the following facts as irrefutable and fundamental to an opinion on the legal issues arising in the suit:

1. An official administrator, KPMG, was appointed by the Bank of Ghana for uniBank on 20th March, 2018 for a period of six (6) months effective the date of announcement (20th March, 2018). The mandate of the official administrator was stated in the press release by which the decision to appoint was communicated, as, to rehabilitate and return the bank to regulatory compliance and private ownership within a period of 6 months.
2. By a letter dated 22nd June, 2018, the official administrator notified the Ministry of Finance of overdue payments from Government and Government-related entities to uniBank as at 31st May, 2018, *in the sum of* GHC 868,973,599.10
3. By a letter dated 12th July, 2018, a Deputy Minister for Finance acknowledged receipt of the letter from the Official Administrator and indicated that the Ministry was validating the numbers with BoG.
4. BoG, by a letter dated 1st August, 2018, revoked the licence of uniBank.
5. On 1st August, 2018, a new bank, the Consolidated Bank Ghana Ltd (CBG) was incorporated.
6. CBG was issued with a certificate to commence business on 2nd August, 2018.
7. By a press release dated 1st August, 2018, BoG announced that it had granted "*a universal banking licence*" to CBG.
8. The press release stated further that BoG had transferred selected assets and liabilities of uniBank and four (4) other banks to CBG.

9. By a letter dated 1st August, 2018, BoG appointed Nii Amanor Dodoo of KPMG (previously the official administrator), as the receiver in respect of "*selected assets and liabilities*" of the five (5) banks.

10. BoG claimed that it had capitalised the CBG with an amount of GHC450 million for six (6) months effective the date of announcement (1st August, 2018).

11. These actions by BoG were in purported invocation of section 123 of Act 930 in support of these measures.

On the strength of the foregoing, we make the following preliminary observations on the matter and, invite your comments thereon:

- i. The foundation for the impugned decisions resulting in the appointment of a receiver for uniBank in respect of "*selected assets and liabilities*" and the transfer of selected assets and liabilities to an assuming bank, CBG, was the initial appointment of an official administrator for the bank under section 107 of Act 930. In the discharge of its obligations, the official administrator, KPMG, was bound by the provisions of sections 107 - 122 of Act 930. The validity of actions taken during the period of official administration of uniBank has to be measured against these provisions of the statute.

Section 114(3) requires an official administrator, not later than ninety (90) days of his appointment, to prepare and deliver to BoG a report on the financial condition and prospects of the bank or specialised deposit-taking institution. This is what KPMG sought to do by its report dated 20th June, 2018.

The statutory report to be prepared under section 114(3) of Act 930 should indicate (i) an assessment of the amount of assets likely to be realised in a liquidation of the bank and (ii) a proposal to make the bank carry out corrective measures in the nature of either a capital increase or measures to minimise disruption to depositors and preserve the stability of the bank.

Section 114(5) also requires an official administrator, KPMG in the instant case, to promptly provide any additional report or information requested by BoG. We have no information on any such additional report or information requested by the Bank of Ghana, and therefore consider the KPMG report of 20th June, 2018 as the report prepared pursuant to section 114(3).

- ii. The measures which KPMG with the approval of the Bank of Ghana, is authorised to institute in order to ensure capital increase and boost the stability of the bank, consequent on the delivery of its report and on the strength of same, are spelt out in:

section 115 - capital increase by existing shareholders;
section 116 - recapitalisation by new shareholders;
section 117 - mergers, sales and other restructuring like transfer of assets and liabilities to a bridge institution or asset management vehicle established by the Government;
section 118 - mandatory restricting of liabilities;
section 119 - removal of directors and key management personnel.

It is apparent from the foregoing that revocation of licence of a bank or specialised deposit-taking institution or the appointment of a receiver are not part of the actions that may be taken pursuant to a report prepared under section 114.

- iii. Section 122 of Act 930 enjoins official administration to continue until the expiry of the period specified in the decision to appoint the official administrator. In the instant case, the decision to appoint an

official administrator for uniBank, specified the period of administration as 6 months. It is beyond controversy that the period of administration in the uniBank matter terminated by 1st August, 2018, undoubtedly earlier than the statutorily prescribed period.

Section 122(2) specifies 4 circumstances within which official administration may validly terminate at an earlier time. This includes situations where the Bank of Ghana determines that the bank or specialised deposit-taking institution cannot be rehabilitated or finds circumstances necessitating a revocation of the licence of the bank under section 16 or liquidation of the bank in accordance with sections 123 to 139 of Act 930.

Section 122(6) stipulates that the decision to terminate is to be based on "*a recommendation by the official administrator and a detailed report prepared by the official administrator supporting the recommendation*". It is clear from section 122(6) that the report contemplated by that provision is not the same as the statutory report to be prepared by the official administration within 90 days of assuming office, stipulated by section 114(3).

We have not sighted any report prepared by KPMG other than the report of 20th June, 2018 in which a recommendation for an earlier termination of the official administration was made. Please furnish us with any such report if same is available.

iv. The opinion just expressed is anchored on 3 grounds.

Firstly, a scrutiny of the measures that the law permits an official administrator to take pursuant to the preparation of a report under section 114(3) - set out in sections 115, 116, 117, 118 and 119, will show that each of them is prefixed with the words "*on the basis of the report produced under section 114 ...*". This is conspicuously not the case for the detailed report required to be prepared by the official

administrator under section 122(6) recommending a termination of the official administration.

Secondly, it is beyond dispute that the official administration uniBank was placed under, terminated with the revocation of the licence of that bank and the appointment of a receiver for "*selected assets and liabilities*". It seems that these actions cannot be supported in terms of section 122(2) of Act 930. As observed above, section 122(2) stipulates 4 circumstances under which official administration may validly terminate at an earlier time, including a situation necessitating a revocation of the licence of the bank under section 16 or liquidation of the bank in accordance with sections 123 to 139 of Act 930.

Thus, based on the clear language of section 122(2), any revocation of licence pursuant to a recommendation of the official administrator under section 122 may be done in accordance with section 16 of Act 930. It is undeniable that a revocation of the licence of uniBank was not based on section 16 of Act 930, because this would have required compliance with the provisions of that section which further stipulates the provision of notice in writing to the bank, specification of the proposed action and the grant of at least thirty (30) days opportunity to the bank to make written representation. It therefore cannot be asserted that the termination of official administration was effected in accordance with section 122 of Act 930.

Thirdly, it is also not the case that uniBank has been liquidated in accordance with sections 123 to 139 of Act 930. Liquidation under sections 123 to 139 is a process involving recourse to the mandatory procedures prescribed to be undertaken by a receiver duly appointed in accordance with section 123. It is incontestable that the receiver did not pursue the gamut of mandatorily-prescribed actions in sections 123 to 139 before the assumption of the selected assets and liabilities of uniBank by CBG.

- v. Fourteen (14) days after the termination of official administration, the official administrator is required by section 122(7) of Act 930 to submit to the Bank of Ghana a final report and accounting of official administration. There is no evidence on record that this has been done. Please furnish us with information to that effect if same is available. A failure of KPMG to submit a final report on its administration of uniBank may constitute a violation of Act 930.
- vi. We observe that by the decision of 1st August, 2018, the Bank of Ghana revoked the licence of uniBank Ghana Ltd, appointed Nii Amanor Dodoo of KPMG as the receiver in respect of "*selected assets and liabilities*" of five (5) banks including uniBank. BoG directed the execution by the receiver of a Purchase and Assumption transaction with CBG for that bank to acquire and assume deposits, selected assets and liabilities of uniBank and 4 other banks. The appointment of a receiver for uniBank and the 4 other banks was done under section 123 of Act 930.

Our first comment is that, section 123(1) empowers BoG to appoint a receiver as a corollary to the determination by the BoG under section 122(2) of Act 930. It is therefore imperative that the processes required to be undertaken under section 122 be complied with before an appointment of a receiver under section 123 may be valid.

Secondly, section 123(3) provides thus:

"The receiver appointed under subsection (2), shall take possession and control of the assets and liabilities of the bank or specialised deposit-taking institution".

The law enjoins a receiver duly appointed under section 123 to be vested with all assets and liabilities of the bank, and indeed places the receiver in the same position as the shareholders, directors and key management personnel of the bank. The receiver is vested with

the collective rights and powers of the shareholders, directors and key management personnel of the bank. There is no provision in Act 930 for a receiver appointed pursuant to section 123, to be vested only with "*selected assets and liabilities*", as stated in the letter appointing the receiver. The thrust of that letter together with statements contained in the official public announcements by the Bank of Ghana all dated 1st August, 2018, confirm that the effect of decisions taken on 1st August, 2018 was to transfer the "*good assets and liabilities*" to another institution other than the receiver.

The receiver, after complying with the provisions of section 125 of Act 930, upon appointment, manages the entire assets and liabilities of the bank under receivership and is required to control same through an exercise of the powers stipulated in sections 129, 130, 131, 132, 135 and 136 of Act 930. From the decisions taken by BoG on 1st August, 2018, it is apparent that the mandatory duties of a receiver, such as publication and registration of notice of receivership and taking of an inventory of the assets and property of uniBank and publication of same in two daily newspapers of national circulation, were not done before the receiver entered into a Purchase and Assumption transaction with CBG.

- vii. It appears that the decision to vest the receiver only with the "*bad loan assets*" of uniBank and transfer the "*good assets and liabilities*" to CBG stems from a failure to distinguish the provisions of section 117 from those of section 123, which fundamentally differ.

A receiver appointed under section 123 does not derive his appointment from the power of the official administrator under section 117 of Act 930. His mandate, powers and scope of duties are set out in a separate part of Act 930, i.e. sections 123 to 139.

Further, the decision to appoint a receiver was not made under section 117 and therefore, his mandate cannot be limited under section 117.

The compartmentalization of “good assets and liabilities” and “bad loan assets” of uniBank is thus, unknown to section 123 of Act 930.

It is the opinion of this office that a receiver appointed under section 123 ought to be given the opportunity to exercise his full powers in relation to the affected bank as set out in sections 123 to 139 of Act 930, before ultimately pursuing any of the measures which may result in a winding up or disposal of the assets and liabilities of a bank or specialized deposit-taking institution.

- viii. We note that CBG was incorporated on 1st August, 2018 and a certificate to commence business was issued to that bank on 2nd August, 2018. We also observe that selected assets and liabilities of the 5 banks were transferred to uniBank on 1st August, 2018 via a Purchase and Assumption transaction, before the grant of a certificate to commence business. Section 27 of the Companies Act, 1963 (Act 179) prohibits a company incorporated in Ghana from transacting a business until it has satisfied the provisions therein and has been issued with a certificate to commence business. A violation of this provision constitutes a criminal offence for which the company and every officer of the company shall suffer a penalty prescribed by section 29 of Act 179.

The transfer of selected assets and liabilities of uniBank on 1st August, 2018 is business, which CBG was not authorised by law to engage in as at 1st August, 2018.

Section 9 of Act 930 also sets out the conditions for the grant of a banking licence to a company incorporated in Ghana to carry out the business of banking. Sections 10 and 12 provide for how a provisional banking licence and final banking licence respectively, may be granted to a bank. Please indicate if these conditions were satisfied by CBG before 1st August, 2018, when a Class 1 Banking Licence was issued to CBG. We make this request because Act 930

applies to all banks and specialised deposit-taking institutions operating in Ghana. There is no provision for an exemption, save as is stated in section 1(2).

We have presented these preliminary observations in order for the Government to have a proper appreciation of the circumstances of the suit to which the defendants seek to join the Attorney-General, and to enable us determine within the framework of the report prepared by KPMG pursuant to section 114 of Act 930, the measures and options that may be competently explored. Further, the provision of information requested in the foregoing paragraphs will assist this office in addressing the concerns expressed above.

Thank you.

Yours faithfully,



GODFRED YEBOAH DAME

**DEPUTY ATTORNEY-GENERAL AND
DEPUTY MINISTER FOR JUSTICE
For: ATTORNEY-GENERAL AND
MINISTER FOR JUSTICE**

Keep under wraps