NATIONAL ASSEMBLY
QUESTION FOR WRITTEN REPLY
QUESTION NUMBER: 1664 [NW1876E]
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1664. **Mr D J Maynier (DA) to ask the Minister of Finance:**

(1) Whether, in light of his interview on PowerFM on 26 June 2016, he and/or any other person from the National Treasury has met with representatives of Oakbay Investments (Pty) Ltd; if not, why not; if so, (a) what is the name(s) of the person(s) who represented the specified company, (b) who requested each such meeting, (c) what was the purpose of each meeting and (d)(i) when and (ii) where did each meeting take place;

(2) whether each meeting reached any resolution and established a channel for communication with the specified company; if not, why not; if so, what are the relevant details;

(3) whether he will make a statement on any such meeting that took place?

NW1876E

REPLY:

(1) Yes, I as Minister of Finance met with the CEO of Oakbay Investments (Pty) Ltd, (hereafter referred to as 'Oakbay'), Mr Nazeem Howa on 24 May 2016. The meeting was at the request of Mr Howa in letters to me dated 8 and 17 April 2016. I am not aware of any other dedicated meetings between any person from the National Treasury and Oakbay. I will therefore only deal with the meeting with Mr Howa held on 24 May 2016.

I will not deal with the matter raised in the public statement made on 16 March 2016 by the Deputy Minister of Finance, Mr Mcebisi Jonas, detailing how he was approached by a shareholder of Oakbay who offered him the position of Minister of Finance to replace the then – Minister Nene.

(a) Mr Howa was accompanied by a member of Oakbay's finance department (name not known) who presumably reports to him. The Director-General (Mr Lungisa Fuzile) and three other officials, including the Treasury Legal Counsel, formed part of the Treasury delegation.

(b) The meeting was at the request of the CEO of Oakbay, Mr Nazeem Howa, who wrote to me on 8 and 17 April 2016 to request a meeting with him.

(c) The purpose of the meeting was to discuss Oakbay's request that the Minister of Finance intervene in its dispute with a number of banks so as to avoid possible job losses that

may arise as a result of the closure bank accounts held by Oakbay and its associated companies.

(d) (i) As stated above, the meeting took place on 24 May 2016.
(ii) The meeting took place at the National Treasury head office at 40 Church Square, Pretoria.

(2) The only purpose of the meeting was to hear the view of Oakbay on the closure of its accounts. The only decision out of this meeting was for Oakbay to provide the Treasury with any relevant information to support its allegations and to continue to engage in good faith.

I did take the opportunity to point out the legal framework operating for banks, and made the following points to Mr Howa:

(a) The banking sector is highly regulated, and any failure of our banks to comply with international regulatory standards could have devastating effects on the banking system, financial stability and the economy as a whole. Banks are subject to tough and intrusive international standards such as Basel III, 2003 United Nations Convention Against Corruption and anti-money laundering obligations. I attach the aide-memoire that I provided to Oakbay after our meeting, to explain the regulatory framework that applies to banks in South Africa (**Annexure A**).

(b) The Annexure explains that besides anti-money laundering and prudential objectives to make the financial sector more secure and resilient (following the 2008 Global Financial Crisis), banks are also expected to comply with market conduct standards, including treating customers fairly, financial inclusion and access objectives. The Memoire also references past cabinet decisions including Twin Peak reforms (Financial Sector Regulation Bill) approved by Cabinet and currently before Parliament for its consideration.

(c) There are legislative and regulatory impediments to any registered bank discussing client-related matters with the Minister of Finance or any third party. The Minister of Finance does not have the power to intervene in a bank-client relationship (and I pointed out that I am advised by legal opinion in this respect). The bank-client relationship imposes a duty on the bank to honour the confidentiality of the client.

(d) Oakbay (unlike banks) is free to provide to the Minister any reasons or information it has received from any bank when closing their accounts. Mr Howa stated that no bank had provided any reasons to Oakbay for the closure of their accounts. I requested copies of the letters from the banks to Oakbay from Mr Howa to verify whether reasons were provided or not, and to allow myself to take appropriate steps based on full and complete available information.

(e) I pointed out that the best, and only, course of action for any corporate client would be for the company to approach a competent court to seek the reasons for the closure of their accounts, and to establish its rights and to deal with any alleged transgressions of the law or of the Code of Banking Practice, which cover the process that banks have agreed to when closing accounts.

(f) I noted my concern for any loss of jobs at any time in our economy, be it at Oakbay, Exxaro or any other company;

(g) Oakbay agreed that attacks from individuals related to the company on the National Treasury were not helpful or in the national interest and should be avoided.

(h) Mr Howa also agreed to provide all the relevant information to my office, including the letters he received from banks when informing Oakbay of the closure of their accounts.

(3) My view that the only option available to Oakbay is to approach a competent court has subsequently been strengthened by what Mr Howa himself indicated on 19 June 2016 during an interview on Carte Blanche, where he confirms that one bank has in fact provided the following reason to Oakbay for the closure of its account:

"….. South Africa's Companies Act, Regulation 43, Prevention of Organised Crime Act, Prevention and Combating of Corrupt Activities Act and the Financial Intelligence Centre Act, as well as the USA's Foreign Corrupt Practices Act and UK's Bribery Act, prevent us from having dealings with any person or entity who a reasonably diligent (and vigilant) person would suspect that such dealings could directly or indirectly make us a party to or accessory to contraventions of that law. "

Mr Howa further indicated that the bank stated *"We have (conducted) enhance[d] due diligence of Oakbay entities and as required by the FICA and have concluded that continuing with any bank-customer relationship with them would increase our risk of exposure to contravention of the mentioned law to an unacceptable level."*

The reasons quoted by Mr Howa above are very serious, and it is in the interest of Oakbay that it goes to court if it has nothing to hide to correct any misperceptions that any bank may have about it, and to ensure it is being treated fairly. It should be borne in mind that the 2003 UN Convention Against Corruption requires banks in member countries like South Africa to take *preventive* action against corruption and money laundering, with the onus on all individuals and companies to explain any transactions that their banks may regard as suspicious.

Despite our agreement with Mr Howa to provide all relevant information and to continue to engage in good faith, Mr Howa has to date not provided me with the letter that he has quoted from.

So despite an exchange of further correspondence with Oakbay, it remains my view that I am unable to assist Oakbay in any way. I am advised that to do so would be legally impermissible. The best course of action would be for the company to approach a competent court so that it can establish the rights which it contends it has, rather than via a political or public media campaign. This will also allow banks to provide any reasons without transgressing their confidentiality obligations.

Annexure A

Aide Memoire

Background

1. This note arises from letters received on 8 and 17 April 2016 Oakbay addressed to the Minister of Finance, and subsequent communication[1].
2. The aim of the meeting was to clarify and explain the current global and national regulatory framework ; and what can and cannot be done by banks and bank clients, in terms of the regulatory framework.
3. We wish to state emphatically that we will contribute in whatever legally permissable way possible to save the jobs of workers.
4. It is therefore imperative that all parties, including Oakbay, abide by the law and regulatory framework summarised below.

OVERVIEW OF FINANCIAL REGULATORY FRAMEWORK FOR BANKS IN SOUTH AFRICA

1 Overview

Domestic banks are not only regulated by domestically, but also by overseas regulators in countries where such financial institutions have a presence or transact with other financial institutions based in that country. For this reason, financial institutions are regulated in terms of tough international standards like Basel III and Financial Action Task Force (FATF) recommendations on anti-money laundering and combating of financing of terrorism (anti-money laundering and counterfinancing terrorism), the latter endorsed by more than 180 countries. Failure to adhere to these standards would lead to our banks to being excluded from the global financial and payments system, which in turn will signficantly reduce economic growth and result in the loss of many jobs. For example, more than a million jobs were lost in 2008 as a result of a bank failure in the USA.

It is essential that South Africa's financial system remains part of the global financial system. Being part of the global financial system facilitates:

- Selling of government bonds to fund the budget deficit and infrastructure
- Funding of the country's current account deficit
- Foreign direct investment, and the generation of jobs
- Trade, both imports and exports, including financing for such trade.
- Access to global payments system, which enables payments for imports and exports., purchasing goods and serves on-line, and being able to use your credit cards overseas
- Insurance and remittances.

The implications of being excluded from global markets would be catastrophic, with long term structural effects. Such an adverse impact can be seen in countries, such as the Islamic Republic of Iran, which have been at the receiving end of sanctions imposed by jurisdictions like the USA and EU.

[1] Corrected for typo in original Aide Memoire provided to Mr N. Howa (24 May 2016) as reflected in REPLY to Parliamentary Question: 1664. Original text read "This note arises from a letters 8 and 17 April 2016 Oakbay addressed to the Minister of Finance, and subsequent communication."

Cabinet has since the 2008 Global Financial Crisis adopted numerous decisions (all available on www.gov.za as part of post-Cabinet media statements) intended to protect the integrity of the South African financial system and introduce measures to make it safer and serve SA better. Cabinet has noted that it is in South Africa's best national interests to ensure that the domestic financial sector is regulated according to international standards in order to promote economic growth and reduce the risk to the national fiscus.

In addition to prudential and anti-money laundering and counter terrorism standards, banks are also expected to comply with market conduct standards, including treating customers fairly, and alternative dispute resolution through the ombuds system.

In addition, it was noted that are 35 deposit-taking banks, of which 17 are locally incorporated. Aside from the four or five banks named by Oakbay, It is not clear whether Oakbay has exhausted its all its options and applied to the other registered banks for banking facilities.

2. How is compliance monitored at an international level?

In order to ensure the consistent implementation of agreed international standards by all countries, all countries subject themselves to a number of assessments and peer reviews. These include, for example, reviews by the G20 on its members (through the Financial Stability Board and IMF's FSAP) and the FATF's Mutual Evaluation assessment process. The intensity of these reviews has been increased following the global financial crisis, with G20 countries and other major economies being evaluated more often under a revised more stringent methodology.

International banking standards prevent a country's government from intervening in the operations of a bank, for example obliging a bank to take on a customer who may pose risk to the bank. Such an intervention will expose South Africa to a negative peer review for undermining its own laws, and for interfering with the operational independence of financial institutions. Further, taxpayer funds will be liable for any damage suffered by banks for accepting such high-risk clients.

3. What could be the consequence of South African banks not complying?

Failure to comply with standards like Basel III and FATF standards exposes a country to punitive measures from overseas regulators. South African financial institutions may also lose or be refused correspondent banking relations with other foreign banks if they are of the view that they operate in, or are not subjected to, a regulatory environment which is not recognised as adequate in the fight against money laundering and terrorism finance. One of the key principles in all the different standards that apply to the financial sector is that of the operational independence of regulators and supervisors.

In 2014, the G20 (through the Financial Stability Board) agreed on a common toolkit available to overseas supervisors to deal with countries deemed to be "non cooperative jurisdictions". The Financial Stability Board describes in its report:

" …a list of measures that could be taken after a jurisdiction is listed as non-cooperative, to safeguard the global financial system and to apply additional pressure to improve the jurisdictions adherence"

These measures, as applied by overseas regulator to their banks, include:

i) Preventing South African banks from doing business with foreign banks;
ii) Banks will have increased regulatory requirements imposed on them by overseas regulators;
iii) International banks will be banned from doing business in South Africa; and
iv) Increased audit requirements.

In addition to these measures, most jurisdictions commonly impose massive fines for specific contraventions and for lapses in anti-money laundering and counterfinancing terrorism regulatory rules by their financial institutions. Such fines can be high, as can be seen by the $8.9 billion fine imposed on BNP Paribas by US Authorities, and could by themselves generate a financial crisis in a smaller economy like ours. SA banks have recently been fined lesser fines by UK and other authorities.

Cabinet has approved the strengthening of current anti-money laundering and counterfinancing terrorism legislation, as evidenced by the Financial Intelligence Amendment Bill currently before Parliament. When enacted, this Bill will require force greater disclosure by clients of banks with regard to beneficial ownership of entities and politically-influential persons who will be subject to enhanced due diligence by the banking sector.

4. What has happened in other countries?

Given the serious and significant consequences of South Africa being found non-compliant with the international regulatory requirements and the large fines foreign regulators may impose, banks have a duty to monitor bank accounts and to take active steps to ensure that their actions meet the regulatory and international requirements. In this respect South Africa is not an outlier. In February, (2015) a leading US bank (J.P. Morgan Chase & Co.) closed more than 100,000 accounts through anti-money-laundering screening and cut ties with over 5,000 individuals that pose risks to the bank.

In the EU and UK, Deutsche Bank, Barclays and UBS, despite the assessed 'low risk' of their operating environment, have taken significant steps including account closures. The three lenders have closed the accounts of between 20,000 and 35,000 customers. The action by these leading European banks illustrate the increased seriousness and aggressiveness with which the world's biggest banks are closing client accounts which they consider too risky – either under anti-money laundering rules or from other regulatory requirements. Their actions also includes them withdrawing from countries they consider as not having sufficiently robust anti-money laundering and counterfinancing terrorism regulatory frameworks.

National Treasury has taken particular note of this as JP Morgan, Barclays and Deutsche Bank collectively account for about a third (31%), when other US and EU banks are included CitiBank, that number is as much as 50% of government debt auctions[2]. Therefore as much as half of the debt the government issued this year to support a variety of the social programmes of government requires

[2] Corrected for typo in original Aide Memoire provided to Mr N. Howa (24 May 2016) as reflected in REPLY to Parliamentary Question: 1664. Original text read "National Treasury has taken particular note of this as JP Morgan, Barclays and Deutsche Bank collectively account for about a third (31%), when other US and EU banks are included CitiBank, that number is as much as 50%."

fall outside the direct influence of domestic regulators and is maintained only through the 'mutual trust' of domestic regulatory arrangements.

5. Why would a bank close down the accounts of a client?

It should be noted that banks routinely close some accounts every year, where such a client has either not complied with domestic regulatory standards, or simply not adhered to contractual requirements. Hence the closure of accounts does not set a precedent, but can be regarded as an enforcement measure of last resort. Government policy on banking includes does financial inclusion, market conduct and financial integrity objectives to ensure no community or individual is financially excluded, but this does not apply to non-complying customers.

Banks have also signed up to a Code of Banking Practice. Clauses 7.1, 7.2 and 7.3 cover the process banks have agreed to when closing accounts. These commitments include reasonable prior notice; The responsibilities of the client, including the need for clients to inform banks of changes to the contact details and to their financial affairs; and the circumstances under which banks may close accounts, including if they are compelled to do so under law or international best practice, if the account has not been used for a significant period of time, or if there are reasons to believe the account is being used for illegal purposes.

6. What can affected customers do?

Customers[3] do have recourse when affected adversely by banks, via the ombuds system and the courts. Howver, such recourse needs to take into account the following:

- Relationships between banks and their clients are private and confidential.
- Government therefore has limited scope to intervene on behalf of specific clients, but must rather ensure that the regulatory framework governing these relationships is in accordance with the existing legal framework.
- Company clients however may approach the courts to provide relief over elements of the contractual terms of the relationship between themselves, their institution and the banks. Small businesses and individual customers can also approach the banking ombud.

In addition, it should be noted :

A. **Customers that are affected by such a closure can approach the courts, and seek for damages from their bank.** There is an established case law that provides for the circumstances under which the closure of accounts is not allowed.

B. The courts would be best suited to make an impartial judgement on the actions of the bank in relation to its customer.

[3] Corrected for typo in original Aide Memoire provided to Mr N. Howa (24 May 2016) as reflected in REPLY to Parliamentary Question: 1664. Original text read "Custumers"

C. To the best of our knowledge, Oakbay has not waived its customer rights to confidentiality to enable banks to report to their regulator on their reasons for closing their accounts.

D. If there is the willingness to make disclosure and provide full access to transactions, the banks and regulators might be able to respond more clearly and openly to the issues at hand.

E. In the circumstances, an approach to the courts remains an option. Any aggrieved customer or company has nothing to fear from such action, as long as it has adhered to the laws of the country.