NATIONAL ASSEMBLY

QUESTION FOR WRITTEN REPLY

QUESTION NUMBER: 233 [NW236E]

233. Mr E M Buthelezi (IFP) to ask the Minister of Finance:

(1) Whether, with regard to the understanding that by law and due to precedent, financial institutions like banks have the right to unilaterally close customers' bank accounts without providing reasons to those customers beyond the perception of reputational damage, and that the only recourse for a customer is to approach the Financial Sector Conduct Authority, which in turn can elect not to compel reasons from the bank, he has found that there is a contradiction between this practice and the Code of Banking Practice whose foundational principles are fairness, transparency, accountability and reliability; if not, what is the position in this regard, if so,

(2) whether he has found that the protected prerogative is in line with the provisions of the Conduct of Financial Institutions Bill which seeks to protect financial customers, including via the promotion of fair treatment and protection of financial customers by financial institutions; if not, why not; if so, how does he foresee the remedying of the contradictions?

NW236E

REPLY:

Before I respond to the question, I would like to point out to the Honourable Member that it is not factually correct that "by law … banks have the right to unilaterally close customers' bank accounts without providing reasons to those customers". The contractual relationship between a bank and its customer is governed by the general prescripts of the law of contract. These prescripts only allow for the termination of a contract by agreement between the parties, or where one party has breached the terms of the contract in a manner that gives the other party the right to terminate that contract. In either of these circumstances, there will, of necessity, be an exchange between the parties before the termination of the contract. A unilateral termination of a contract by one of the contracting parties, without cause based on the conduct of the other party, would be contrary to these prescripts and would amount to a breach of contract. These

principles have been applied in the context of the banker-customer relationship in a number of cases, including the *Bredenkamp and Others v Standard Bank of SA Ltd* case, and more recently in the *Minister of Finance v Oakbay Investments (Pty) Ltd* case. Indeed, the latter case arose in relation to the closing of the accounts of the Gupta-related businesses in 2016-17.

(1) No, we do not see any material inconsistency or contradiction between the various laws dealing with the protection of customers of financial services and products, and the Code of Banking Practice. Whether Government has the legal power to intervene in bank-customer relationships has also been ventilated in the courts, as in the recent *Minister of Finance vs Oakbay Investments (Pty) Ltd* case, relating to the closing of the accounts of the Gupta-related businesses in 2016-17.

The Constitution of South Africa provides for the right to freedom of association - in practical terms, this right enables two parties to voluntarily enter into a contract, and in this context, a contract to render and receive banking services, and how and when each party can terminate such a contract. However, as with most rights in the Constitution, they are not absolute. In the financial services sector, it is widely recognised that most customers need to be protected further, given the asymmetric power between major financial institutions and their retail clients. This was the main rationale for establishing the Financial Sector Conduct Authority ("FSCA") when Government embarked on the radical Twin Peaks reform in 2011, to better regulate the financial sector, breaking new ground by expanding supervision to explicitly include the conduct of financial institutions and that they treat their customers fairly.

In addition to protecting financial services customers, Government also prioritises financial inclusion objectives, to ensure that poor communities and households are not excluded from services provided by financial institutions. We are also mindful that banks must cater for the specific needs of small businesses as their customers. In particular, Government believes that it is important for the banking sector to commit to the provision of basic banking services to all persons residing in our country.

For the above reasons, as the conduct supervisor, the FSCA published Conduct Standard 3 of 2020 on 3 July 2020 specifically for the banking sector. This is the first

step towards rolling out a comprehensive market conduct regulatory framework for the banking sector to ensure the fair treatment of bank customers.

(2) The Conduct of Financial Institutions Bill (COFI Bill) is still a draft bill, and therefore not in force. Even the last published version of the draft Bill will certainly also be amended as we need to revise it to incorporate public comments received before it is introduced in Parliament (expected to be later this year), and again after its introduction when Parliament considers and votes on the Bill.

The Conduct Standard published in 2020 includes requirements that banks must:

- conduct their business in a manner that prioritises the fair treatment of their customers.
- adopt and implement processes and procedures relating to withdrawal, termination or closure of a financial product or withdrawal or termination of a financial service in respect of a customer (Section 9 of the Conduct Standard, which will be effective 3 July 2021).
- provide reasonable notice of the intention to withdraw, terminate or close a financial product or withdraw a financial service, or close a bank account.
- provide reasons for the proposed withdrawal, termination or closure, except if the following circumstances prevail:
    - If the bank is compelled to do so by the law or
    - If the bank has reasonable suspicion that the financial product or financial service is being used for any illegal purpose and
    - If the bank has made the necessary reports to the appropriate authority.

The Conduct Standard furthermore provides that contractual agreements with financial customers must make provisions for types of circumstances in which the contractual agreement may be terminated or withdrawn by the bank. Section 9 of the Standard requires a bank to communicate its decision to withdraw bank account facilities and providing specific grounds and reasons for that decision, and to give the customer reasonable written notice of the intention to close the account, which provides the customer with an opportunity to engage the bank further or seek to establish a new bank

customer relationship with another bank. This implies that the closure, termination or withdrawal of a final product or service will not be done unilaterally, but as part of enforcing contractual obligations and breaches. The circumstances in which termination may occur must be disclosed to the customer in the contract. The *Bredenkamp* case deals specifically with the issue of reputation as a reason to close an account and the judgment suggests that when it comes to contractual matters, fairness applies to both contracting parties.

The FSCA advises me that it is already guiding banks on how to apply the principles contained in the Conduct Standard for banks, and interrogating their practices in this regard in anticipation of the provisions becoming fully effective this year. Engagement that has taken place between the FSCA and banks/other stakeholders has highlighted that there may be improvements needed to the Conduct Standard. This is to ensure that financial institutions have certainty regarding what is expected of them to comply with the Standard and that financial customers are suitably protected. I am further advised that the FSCA is working with the Financial Intelligence Centre in this regard. We also hope that these improvements will be further supported once the Conduct of Financial Institutions Bill has been enacted.

Aside from the regulatory framework, the FSCA also requires banks to have a credible complaints mechanism in place, as part of the Treating Customers Fairly principles, to deal with customer complaints. In addition, we have in place an ombud system which enables customers to complain about the treatment they encounter from financial institutions, that is also being strengthened as we implement the Twin Peaks system. It is important to note that aggrieved customers will always have the recourse of approaching the Banking Ombud and/or also seek relief from the Courts, especially in the case where customers are wealthy, or for those customers who are accused of indulging in suspicious and dubious transactions.