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SPEECH BY HON NICO SMIT ON THE FINANCIAL INTITUTIONS AND MARKETS BILL, 2019

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Hon Speaker, Hon members,

While it seems in order for me to felicitate the Hon Minister for tabling a piece of legislation which has been in the making for over ten years, I must admit to having certain serious reservations about this bill.

On the surface, it is a monumental accomplishment and the first attempt to consolidate and synchronise an extensive body of individual acts, many of which have become outdated, or were contradictory where it pertains to some specific legal definitions and applications.

However, you all need to ask yourself this question: in our current very negative economic situation, do we want legislation that makes the downswing worse, or do we need laws that promote economic growth?

In the light of this question, please allow me to point out and discuss the reservations to which I have referred. These include

- 1. the fact that the bill is clearly a means of providing an income for Namfisa at the expense of the various financial institutions;
- 2. the danger that when the regulator, Namfisa runs short of funds, the bill creates the ideal conditions for it to increase its revenue by wringing the funds it needs out of the private sector;
- 3 vast discretionary powers for the regulator that are explicitly conferred on the regulator without granting the affected company or individual any recourse;
- 4. the danger of the entire bill coming fully into operation on a single date and thereby causing chaos in financial markets;
- 5. the punitive and not market supportive approach of the FIM Bill;
- 6. the exponential increase in the reporting load on companies;
- 7 the many existing legal prescriptions on prudence, diligence, trust and governance that make the bill clearly redundant;

Hon Speaker, allow me then to start by turning my attention to Namfisa, the body that clearly stands to reap the greatest advantage from this new bill. In my opinion there is little or no advantage in it for the citizens of our country who make use of financial institutions.

As the principal agent behind the bill's drafting, I am sure Namfisa is eager for this bill to become law. It gives them wide powers and authority, and I counted no less than 128 clauses describing penalties, fines and even imprisonment, on top of the myriad fees and levies intended to support the regulatory machine. In fact, the cash-generating efficiency of the bill is so pervasive, on some pages I found as many as three different types of penalties or fines.

It is to be commended that upon tabling, the Minister specifically sold us the FIM Bill on the one over-arching principle that this novel piece of financial regulation has shifted from a rules-based approach to a risk-based assessment of liabilities and infringements. It may be a slight oversight on his side, but the bill itself rather testifies to a fees-based supervisory structure to effect whatever regulatory control the state may deem necessary.

As the incumbent regulator, with these new sweeping powers over the engine of the economy, Namfisa will now be in a position to override market principles, deciding who or what may participate in the market, and under what provisions. In effect, the FIM Bill gives them the power to determine the entire market, excluding the banking industry.

One of the first discrepancies in the formative phase of the bill that I picked up, is the honourable Minister's reference in his tabling speech to the input from international experts and technical assistance from the International Monetary Fund.

Namfisa, however, disputes this. In a response issued by the minister on 11 December 2018 on concerns raised by the industry, Namfisa stated that the bill was drafted locally and only reviewed by international experts. When I consider the content and the bill's vast scope, I am trying to match the regulator's in-house capacity to the output, and I come up short when it comes to local skills. It would be very enlightening if the Minister could inform us exactly which individuals/experts at Namfisa drafted this bill.

It must have been a huge embarrassment to both the Minister and Namfisa, that hardly a week before the bill was due to be discussed in parliament, Namfisa's office staff took to the streets, toy-toying and protesting, demanding an 8% salary increase, when every single person in that institution knows there is no public money available. Unfortunately for the regulator, this is not hearsay. I personally witnessed the incident in Independence Avenue on that Monday.

The audacity of this form of entitlement scares me since it testifies to an attitude that whatever the government cannot provide, the regulator will milk from the industry through the web of levies and fees to be found in this bill. And the danger is, once the regulator runs short of funds, the bill creates the ideal conditions that it can simply increase its revenue by going on a witch hunt to wring the funds it needs out of the private sector.

Industrial action at the regulator furthermore raises the unsettling suspicion that it is overstaffed, incompetent and at loggerheads with the private sector that it is supposed to regulate to the benefit of the economy, and for the protection of consumers. These are not just off-the-cuff remarks, they are based on what the FIM Bill blatantly advertises about the regulator and its inability to foster a conducive environment for financial services to grow.

Conditions and Suspensions

Digesting the entire bill is an arduous task but it is only by reading the whole document that one realises the enormity of the undertaking to consolidate the legislation for at least seven sub-sections in the broader financial services industry.

Since it is the bill's intention to consolidate the regulatory effort for every single aspect of financial services other than the formal banking industry, it is by nature repetitive. Fortunately the frequent repeating of similar conditions for different sub-sections also makes the bill relatively easy to understand.

What I noticed is that the first sections of every chapter usually start with restrictive conditions in the style that more conventional legislation typically does. This is then followed by a number of exclusions and suspensions, overriding the fairly strict conditions and in the process, establishing vast discretionary powers for the regulator. These powers are not implied, they are explicitly conferred on the regulator without granting recourse to the affected company or individual.

Of course, this makes one wonder, why the restrictive, almost dogmatic approach to each of the sub-sections in the first place, when these are relaxed only a page or two later? There is only one answer and that is to empower the regulator to be able to define and implement any action it deems necessary to ensure compliance, not with the bill, but with its own regulatory effort.

Implementation

I was greatly relieved to read that the bill itself makes provision for the gradual implementation of its various chapters. Were the bill to be enacted and promulgated all at once, it would lead to massive administrative disruption on the part of service providers. This would be particularly exacerbated during the first year after promulgation since the bill forces compliance with the prescribed registrations and this must all be done within twelve months after promulgation.

If it is this House's intention that the bill must be promulgated despite the concerns about its impact on the financial services industry, then I would at least recommend that it is done incrementally, staggering the enactment of the various chapters so that there will be a period of at least six months between any two enactments.

If the entire bill comes fully into operation on a single date, I share the industry's concerns that it will create a severe administrative bottleneck on Namfisa's part, which will have a material impact on the way service providers conduct their daily business, especially if the time allowed lapses and companies find themselves outside the law not due to anything they have done or omitted, but directly as a result of forced compliance.

Unbundling

It was a big relief to learn from the hon Minister that the FIM Bill is the result of an unbundling process of the first draft which still included the legislative frameworks for matters pertaining to Namfisa itself, financial institutions and intermediaries, the financial services adjudicator, usury and credit agreements.

I want to sincerely advise this House to urge the hon Minister to continue the unbundling process, devolving the current FIM Bill into seven distinct bills for the seven types of service providers, a separate bill to codify and regulate the role of administrators, to move chapter 9 on property in trusts to the existing legislation on trusts and to add chapters 10 and 11 to the Namfisa Bill proper which is currently also before this House.

In particular, I want to direct your attention to Part 5 of Chapter 10 of the FIM Bill which lists roughly 227 clauses authorising Namfisa to set supervisory standards. This is in addition to their other vast statutory powers to issue guidelines, bulletins, rules, directives and any other measure the regulator may deem necessary. Cementing Namfisa's statutory powers requires more than 19 pages of the entire bill, indicating without doubt that the FIM Bill's foundational approach is punitive and not market supportive.

Supervisory control

The FIM Bill suggests that its drafters realised the enormous consequences that will arise when the regulator fails in its mandate. For this reason, the bill is awash with clauses that superimpose regulatory compliance and its execution on private sector service providers.

This increases the reporting load on companies exponentially, which ultimately will lead to an increase in administrative costs. Given that all the regulated entities are custodians of their clients' or members' funds, it translates directly to an encumbering of available resources, thereby reducing the benefit to those people in whose interest the FIM Bill is supposed to work.

On top of the substantial increase in both number and value of the existing Namfisa levies, this increase in administrative costs constitutes an additional financial burden on service providers, which together with the standard levies and fees reduces the benefits for clients and members.

The FIM Bill does not take into consideration the cost of supervisory compliance. It unilaterally imposes a web of additional costs and potential penalties, all of which will have to be added to the operating costs of the service providers. The market for savings and insurance has a set size which will not change significantly under the current economic duress, clearly implying that all additional costs will be to the detriment of the ordinary man in the street.

Self-regulatory industry

It seems that the FIM Bill does not take into account that in essence Financial Services are a self-regulating industry. Given the many existing legal prescriptions on prudence, diligence, trust and governance, the redundancy of the bill is evident.

Financial services are further regulated by the principles of ~~the~~ trade. If service providers are not profitable, they go under and disappear from the financial landscape, usually with a transfer of assets to another institution that is better able to manage benefits on behalf of clients or members.

In the third instance, service providers are regulated by competition. If they overprice their products or their services, it leads to a siphoning away of their client base, thus essentially protecting the interest of the client. The industry does not need a regulator for any purpose other than to ensure that the playing field is level for all participants. This only requires a minimal form of regulation and not a punitive and restrictive framework that inhibits the ability of service providers to offer affordable products and services to the largest possible portion of the population.

Conclusion

I strongly advise this august House not to approve the FIM Bill as tabled. It needs to be unbundled further and it needs to take into consideration, as its primary concern, the longevity and vitality of the financial services industry.

Secondly, I want to advise the Hon Members that we also take a hard look at the tabled Namibia Financial Institutions Supervisory Bill so that the supervisory powers of the regulator are restricted and limited to critical issues that have an impact on the market, on financial stability, and on systemic risk.

Namibia is at a phase where it needs less regulation, not more. This was clearly stated by the IMF when it considered the parlous state of our economy a few weeks ago.

The markets are functioning well even if the government's finances are in shambles. The regulatory supervision on the banking system by the Bank of Namibia provides nearly all the supervision the industry needs since every transaction or contractual obligation that Namfisa intends to regulate, has to pass through a bank account at some point.

In the third instance, it is my considered opinion that the FIM Bill will do very little to protect the interest of the user of financial services, i.e. the consumer or the ordinary man in the street. Instead, it will add a substantial additional financial burden on all service providers without necessarily limiting or preventing any criminal activity that may be to the detriment of the client.

Finally, I believe that the FIM Bill in its current format will inhibit savings which essentially are the backbone on which the development of the Namibian economy depends. The Namibian economy is known for its high per capita level of savings, and any impediment, be it legislative or administrative, that reduces savings, constitutes another form of consumption but in this case, not helping the economy to grow, but rather slowing it down even more. Unless you work for Namfisa, of course.

In the light of the above arguments, Hon Speaker, Hon Members, I believe that there is more work to be done on this very restrictive bill if this august house wishes to protect the Namibian public from a further downswing in our economy.

I therefore urge the Hon Minister of Finance to withdraw this bill for further scrutiny and consideration.