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Verified Hand Delivery

Hon. Maxwell Sisulu, MP
Speaker of the National Assembly

Re: Protection of State Information Bill, bill no B6B-2010,

Dear Mr. Speaker:

1. The above-referenced bill ["the Bill"], which is due to be debated in the National Assembly on Tuesday, 20th of September,
 - a. has been erroneously tagged as a section 75, and therefore cannot be proceeded with until it is correctly tagged as a section 76, and
 - b. contains provisions which are beyond the legislative competence of the National Assembly, and therefore cannot be proceeded with until amended to remove such provisions.
2. The Bill has been tagged as a section 75 bill. Section 76 bills are those in a matter in which a provincial legislature is competent to legislate. Section 76 bills include bills which contain both provisions which a provincial legislature is competent to legislate as well as provisions which a provincial legislature is not competent to legislate, the so-called mix bills. Mix bills cannot be tagged and dealt with as section 75 bills.
3. The Bill
 - a. at clause 1 defines "archives" to include "any archive established in terms of provincial law", which includes archives other than national archives;
 - b. at clause 33(4) makes the provisions of the Bill, including, *inter alia*, clauses 8, 9 and 46, applicable to documents contained in archives other than national archives, including the provision relating to valuable information, which is information which is neither classified nor sensitive, but merely information worth keeping, thereby dealing with a purely and quintessentially archival matter;

- c. in clause 54(1) gives the national Minister the power to make regulations on quintessentially archival matters regarding
 - i. the controls and measures required to effectively protect valuable information in archives other than national archives including the appropriate physical security, information and communication technology security, and technical surveillance, and
 - ii. procedure to be followed and the manner in which valuable information must be protected from alteration, destruction or loss; and
 - d. in clause 54(3) gives the national Minister the power to make regulations regarding the protection, transfer, destruction or alteration of valuable information contained in archives other than national archives, which is a purely and quintessentially archival matter.
4. Archives, as opposed to libraries, deal with state documentation. Archives other than national archives are a matter in respect of which provincial legislatures have exclusive legislative competence in terms of Schedule 5 of the Constitution. Therefore, the Bill cannot be tagged and proceeded with as a section 75 bill. As you know, in the case of the Communal Land Rights Act, a similar error in tagging led the Constitutional Court to declare that Act null and void
5. Section 44 of the Constitution prevents Parliament from legislating in respect of an exclusive provincial matter such as archives other than national archives, except in the very limited cases contemplated in section 44(2). The handling of “valuable” information by provincial and municipal archives information cannot fall within the scope of 44(2), as such information is neither sensitive nor classified. By definition and as matter of common sense, archives only deal with, and keep information and documents which are “valuable” this is the core purpose of their existence. Therefore, by giving provinces the exclusive legislative competence in respect of archives other than national archives, the Constitution cannot but have intended such competence to include the identification of what is to be kept in such archives and the manner in which such documents are to be kept. Accordingly, Parliament has no power to legislate on the matter.
6. I respectfully submit to you that it is your duty of office to identify that the Bill is out of order for the foregoing two separate and distinct reasons, and that you strike it from the Order Paper of the deliberations of the National Assembly until such flaws are corrected.

Very truly yours,

Mario GR Oriani-Ambrosini, MP