

27 January 2009

Dear Madam Speaker

REFFERAL OF THE FILMS AND PUBLICATIONS AMENDMENT BILL, 2008 (THE BILL) TO THE NATIONAL ASSEMBLY

I have received the above Bill from the Secretary of Parliament for me to assent to and sign into law.

I have received submissions from interested and affected parties, who requested that I should not assent to nor sign the Bill, because of the perceived unconstitutionality of certain provisions of the Bill. The submissions are attached herewith for your information and consideration. The concerns raised in the submissions can be summarised as follows:

- Objection against the constitutional validity of clause 29 of the Bill, which inserts, amongst others, sections 24A(2) and (4) in the Films and Publications Act, 1996 (the Principal Act): it is submitted that subsection (2) of clause 24A has a “chilling effect” on constitutionally protected freedom of expression, and is thus inconsistent with section 16 of the Constitution of the Republic of South Africa, 1996 (the Constitution), in a manner which cannot be justified in terms of section 36 of the Constitution. It is argued that, clause 24A(4) of the Bill, improperly prohibits the right of freedom of expression contained in section 16(1) of the Constitution in a manner that is manifestly overbroad .

- Objection against the constitutional validity of clause 29 of the Bill, to the extent that it inserts section 24A(3) in the Principal Act : It is submitted that clause 24A(3) of the Bill, which prohibits, subject to certain exceptions, the exhibition, sale, hire or advertisement for sale or hire any film, game or publication which, although not classified, would have been classified as “X18”, had it been submitted for classification. It argued that the scope of prohibition in clause 24A(3) violates the rule of law, that requires a law to be certain, clear, stable, accessible and ascertainable in advance so as to be predicable.
- Objection against the constitutional validity of clause 29 of the Bill, to the extent that it inserts section 24B(2) in the Principal Act: it is submitted that this clause would arguably compel journalists engaged in legitimate activities to disclose or reveal sources of their information.
- Objection against the constitutional validity of section 29 of the Bill, to the extent that it insert section 24(2)(a) in the Principal Act: It is submitted that the subsection imposes upon internet service providers who operate chat-rooms accessible to children an obligation which is impossible to fulfil. It is contended that such an obligation will have a chilling effect on the fundamental rights of service providers to free expression.

I have also been favoured with a legal opinion which deals with the issues raised in the submissions. The legal opinion is also attached for your attention. The legal opinion concluded that, the provisions of the Bill that may not survive constitutional scrutiny are the following:

- Clause 29 of the Bill, in as far as it inserts sections 24(A)(2)(c) and 24A(3) in the Principal Act, which separately create prohibitions,

accompanied by criminal sanction, in a manner that is inconsistent with the rule law, and

- Clause 29 of the Bill, in as far as it inserts section 24A(4) in the Principal Act, which is irrational insofar as it creates a prohibition based on consideration which do not have any rational connection to the system of classification provided in clause 19 and 21 of the Bill.

I have perused the Bill accordingly, however, I am concerned that clause 29 of the of the Bill, may not survive constitutional scrutiny, in as far as it inserts sections 24A(2), 24A(3) and 24A(4) in the Principal Act.

The Constitution requires that the President must assent to and sign the Bill referred to him by National Assembly. However, in terms of section 79(1) of the Constitution, if the President has reservations about the constitutionality of the Bill, he may refer it back to the National Assembly for reconsideration.

In terms of section 79(1) of the Constitution, I hereby forward the attached Bill to the National Assembly for reconsideration.

Yours sincerely


KGALEMA MOTLANTHE

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cc Minister of Home Affairs
Leader of Government Business: Deputy President B Mbete