CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 89/17

In the matter between:

UNITED DEMOCRATIC MOVEMENT	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB ZUMA	Second Respondent
AFRICAN NATIONAL CONGRESS	Third Respondent
DEMOCRATIC ALLIANCE	Fourth Respondent
ECONOMIC FREEDOM FIGHTERS	Fifth Respondent
INKATHA FREEDOM PARTY	Sixth Respondent
NATIONAL FREEDOM PARTY	Seventh Respondent
CONGRESS OF THE PEOPLE	Eighth Respondent
FREEDOM FRONT	Ninth Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	Tenth Respondent
AFRICAN INDEPENDENT PARTY	Eleventh Respondent
AGANG SOUTH AFRICA	Twelfth Respondent
PAN AFRICANIST CONGRESS OF AZANIA	Thirteenth Respondent
AFRICAN PEOPLE'S CONVENTION	Fourteenth Respondent
and	

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION First Amicus Curiae

UNEMPLOYED PEOPLES' MOVEMENT Second Amicus Curiae

INSTITUTE FOR SECURITY STUDIES Third Amicus Curiae

SHOSHOLOZA PROGRESSIVE PARTY Fourth Amicus Curiae

Neutral citation: *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J

Judgments: Mogoeng CJ (unanimous)

Heard on: 15 May 2017

Decided on: 22 June 2017

Summary: section 102 of the Constitution — motion of no confidence — voting — secret ballot — President — Speaker

section 42 of the Constitution — section 55 of the Constitution — accountability — section 57 of the Constitution — National Assembly — separation of powers

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ORDER

On application for exclusive jurisdiction or direct access the Court orders:

1. The United Democratic Movement is granted direct access.
2. It is declared that the Speaker of the National Assembly has the constitutional power to prescribe that voting in a motion of

no confidence in the President of the Republic of South Africa be conducted by secret ballot.

3. The Speaker's decision of 6 April 2017 that she does not have the power to prescribe that voting in the motion of no confidence in the President be conducted by secret ballot is set aside.

4. The United Democratic Movement's request for a motion of no confidence in the President to be decided by secret ballot is remitted to the Speaker for her to make a fresh decision.

5. The Speaker and the President must pay the costs of the United Democratic Movement, the Economic Freedom Fighters, the Inkatha Freedom Party and the Congress of the People, including costs of two counsel where applicable.

JUDGMENT

MOGOENG CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

Introduction

[1] South Africa is a constitutional democracy – a government of the people, by the people and for the people through the instrumentality of the Constitution. It is a system of governance that "we the people" consciously and purposefully opted for to create a truly free, just and united nation.[1] Central to this vision is the improvement of the quality of life of all citizens and the optimisation of the potential of each through good governance.

[1] The Preamble to the Constitution starts: "We, the people of South Africa".

[2] Since constitutions and good governance do not self-actualise, governance structures had to be created to breathe life into our collective aspirations. Hence the existence of the legislative, executive and judicial arms of the State. They each have specific roles to play and are enjoined to inter-relate as foreshadowed by the following principle that guided our constitution-making process:

> "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."[2]

[3] Knowing that it is not practical for all fifty five million of us to assume governance responsibilities and function effectively in these three arms of the State and its organs, "we the people" designated messengers or servants to run our constitutional errands for the common good of us all. These errands can only be run successfully by people who are unwaveringly loyal to the core constitutional values of accountability, responsiveness and openness. And this would explain why all have to swear obedience to the Constitution before the assumption of office.[3]

Essential context

[4] Unelected servants of the people serve in the Judiciary that comprises Judges and Magistrates. Judges are selected by a constitutional body which comprises Members of Parliament from the ruling and opposition parties, a few Judges, a Cabinet Member, a few legal practitioners, a university law teacher and the President's appointees.[4] Of the candidates who prove to be fit and proper for a judicial vacancy at the level applied for, one is then appointed by the President.[5] And like all other accountable servants of the people, their under-performance or

[2] Constitutional Principle VI in Schedule 4 to the interim Constitution. See also *Certification of the Constitution of Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*Certification* case) at para 45.

[3] Sections 48, 62, 87, 95 and 174 of the Constitution.

[4] Section 178 of the Constitution.

[5] Section 174 of the Constitution.

sanctionable conduct could result in their removal from office through an impeachment process if the Judiciary, Parliament and the President so decide.[6]

[5] The people's representatives in Parliament are chosen through an electoral process. Each citizen qualified to vote may participate in that process that is designed to deliver free and fair elections. Those who stand for public office and are elected[7] must attend the first sitting of the National Assembly.[8] It is at that first sitting that at least three things over which the Judiciary presides must happen. First, Members of the Assembly must be affirmed or sworn in.[9] Second, the Speaker of the Assembly must be elected by Members.[10] Third, Members of the Assembly must elect the President of the Republic.[11] Meaning, two arms of the State, the Judiciary and Parliament, each has a different but critical role to play in the process of electing the Head of State and Head of the Executive after general elections. Thereafter the President must be sworn in.[12] And that oath comes with serious obligations.[13]

[6] The President is an indispensable actor in the proper governance of our Republic and bears important constitutional responsibilities.[14] To enable him or her to discharge these obligations, he or she has a fairly free hand in assembling the service-delivery team – another set of servants comprising the Deputy President and a number of Ministers required to exercise the executive authority of the Republic.[15] As

[6] Section 177 of the Constitution.

[7] Sections 19 and 47 of the Constitution.

[8] Section 51 of the Constitution.

[9] Section 48 of the Constitution.

[10] Section 52 of the Constitution.

[11] Section 86 of the Constitution.

[12] Section 87 and Schedule 2 item 1 of the Constitution.

[13] Schedule 2 item 1 of the Constitution.

[14] Sections 83, 84 and 85 of the Constitution. See also *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at paras 20-2.

[15] Section 91 of the Constitution.

many Deputy Ministers as are deemed necessary may also be appointed.[16] Like Cabinet Ministers, they may be dismissed.[17]

[7] Public office, in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office-bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests. *Amandla awethu, mannda ndiashu, maatla ke a rona or matimba ya hina* (power belongs to us) and *mayibuye iAfrika* (restore Africa and its wealth) are much more than mere excitement-generating slogans. They convey a very profound reality that State power, the land and its wealth all belong to "we the people", united in our diversity. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people. Since State power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system.

[8] This is all designed to ensure that the trappings or prestige of high office do not defocus or derail the repositories of the people's power from their core mandate or errand. For this reason, public office-bearers, in all arms of the State, must regularly explain how they have lived up to the promises that inhere in the offices they occupy. And the objective is to arrest or address underperformance and abuse of public power and resources. Since this matter is essentially about executive accountability, that is where the focus will be.

[9] Accountability, responsiveness and openness[18] enjoin the President, Deputy President, Ministers and Deputy Ministers to report fully and regularly to

[16] Section 93 of the Constitution.

[17] Sections 91(2) and 93(1) of the Constitution.

[18] Section 1(d) of the Constitution.

Parliament on the execution of their obligations.[19] After all, Parliament "is elected to represent the people and to ensure government by the people under the Constitution".[20]

[10] It thus falls on Parliament to oversee the performance of the President and the rest of Cabinet and hold them accountable for the use of State power and the resources entrusted to them. And sight must never be lost that "all constitutional obligations must be performed diligently and without delay".[21] When all the regular checks and balances seem to be ineffective or a serious accountability breach is thought to have occurred, then the citizens' best interests could at times demand a resort to the ultimate accountability-ensuring mechanisms. Those measures range from being voted out of office by the electorate[22] to removal by Parliament through a motion of no confidence[23] or impeachment.[24] These are crucial accountability-enhancing instruments that forever remind the President and Cabinet of the worst repercussions that could be visited upon them, for a perceived or actual mismanagement of the people's best interests.

[11] Whether that time has come and how exactly to employ any of these instruments is the judgement call of the same Parliament that elected the President and to which he or she accounts. Some Parliamentarians believe that that time has come and have tabled a motion of no confidence in the President. They have themselves invited this Court to get involved and clarify the nature and extent of Parliament's power. Rightly so, because "[e]veryone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court".[25]

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[19] Sections 92(2), 92(3) and 93(2) of the Constitution.

[20] Section 42(3) of the Constitution.

[21] Section 237 of the Constitution.

[22] Section 19 of the Constitution. See also the *Certification* case above n 2 at paras 106 and 186.

[23] Section 102 of the Constitution.

[24] Section 89 of the Constitution.

[25] Section 34 of the Constitution.

[12] Implicit in this application is a deep-seated concern about just how effective Parliament's constitutionally-prescribed accountability-enforcing mechanisms are. Do they ensure that there is enforcement of consequences for failure to honour core constitutional obligations or is it easy to escape consequences by reason of the inefficacy of mechanisms? And does the Constitution read with the Rules of the National Assembly give the Speaker the power to prescribe voting by secret ballot in a motion of no confidence in the President?

Background

[13] What reportedly triggered the tabling of a motion of no confidence in the President, is that on 31 March 2017, invoking his constitutional powers,[26] the President dismissed the Finance Minister, Mr Pravin Gordhan, and his Deputy, Mr Mcebisi Jonas.[27] Very soon after their dismissal, our economy was downgraded to a sub-investment grade otherwise known as "junk status".

[14] And it was largely because of the economic downgrade that three of the political parties represented in the National Assembly, the United Democratic Movement (UDM), the Democratic Alliance (DA) and the Economic Freedom Fighters (EFF) asked the Speaker of the National Assembly to schedule a motion of no confidence in the President. She agreed and scheduled it for 18 April 2017.

[15] On 6 April 2017 the UDM wrote a letter to the Speaker. She was asked to prescribe a secret ballot as the voting procedure for the scheduled motion of no confidence in the President. In substantiation, the UDM cited what it termed the obvious importance of the matter, the public interest imperative that a truly democratic outcome be guaranteed and the high likelihood that the vote would otherwise be tainted by the perceived fear of adverse and career-limiting consequences, instead of being the free will of Members. The oath or affirmation

[26] Sections 91(2) and 93(1) of the Constitution.

[27] Other Cabinet Members were also replaced in the same reshuffle.

taken by Members and considerations of accountability were added in support of a secret ballot as the preferred voting procedure. While admitting that the Rules of the National Assembly do not make express provision for a secret ballot in that motion, the UDM contended that some direction could be found in sections 57 and 86(2) of the Constitution, read with item 6(a), Part A of Schedule 3 to the Constitution and rule 2 of the Rules of the National Assembly.

[16] The UDM argued that because none of these legal instruments prohibits a secret ballot, cumulatively they offer sufficient guidance for voting in secret. It contended that *Tlouamma*,[28] a decision of the High Court in the Western Cape, was distinguishable. The Court in this case had held that there was no implied or express constitutional requirement for voting by secret ballot on a motion of no confidence in the President. It had then dismissed an application for an order to compel the National Assembly to vote on a motion of no confidence by secret ballot. The UDM reiterated that the public interest dictated that the vote of no confidence be conducted by a secret ballot.

[17] In response, the Speaker said voting procedures in the Assembly are determined by the Constitution and the Rules of the National Assembly and that none of them provides for a vote on a motion of no confidence to be conducted by a secret ballot. She also placed reliance on *Tlouamma*.

[18] In conclusion, the Speaker said that she had no authority in law or in terms of the Rules to determine that voting on that motion be conducted by secret ballot. Also, she was entrusted with the responsibility to ensure that the House is at all times able to perform its constitutional functions in strict compliance with the Constitution, the Rules and Orders of the National Assembly. For these reasons, she concluded that the UDM's request could not be acceded to.

[28] *Tlouamma v Speaker of the National Assembly* [2015] ZAWCHC 140; 2016 (1) SA 534 (WCC).

[19] Aggrieved by that response, the UDM, supported by some of the political parties represented in the National Assembly[29] and friends of the court,[30] approached this Court to determine whether the Constitution and the Rules of the National Assembly require or permit or prohibit the Speaker to direct that a vote on a motion of no confidence in the President be conducted by secret ballot. It seeks an order in the following terms:

> "1 It is directed that the matter is to be dealt with as an urgent application and the applicant's non-compliance with the ordinary rules for service and time-periods is condoned.
>
> 2 It is declared that this Court has exclusive jurisdiction to determine the application, alternatively the applicant is granted direct access to this Court.
>
> 3 It is declared that:
>
> 3.1 The Constitution requires that motions of no confidence in terms of section 102 of the Constitution must be decided by secret ballot;
>
> 3.2 Alternatively to paragraph 3.1, it is declared that the Constitution permits motions of no confidence in terms of section 102 of the Constitution to be decided by secret ballot.
>
> 4 It is declared that:
>
> 4.1 The National Assembly Rules permit motions of no confidence in terms of section 102 of the Constitution to be decided by secret ballot;
>
> 4.2 Alternatively to paragraph 4.1, Rules 102 to 104 of the National Assembly Rules are unconstitutional and invalid to the extent that they preclude secret ballots being used for motions of no confidence.
>
> 5 The decision of the Speaker dated 6 April 2017 to refuse to allow the no confidence motions to be decided by secret ballot is reviewed and set aside and declared unconstitutional and invalid.
>
> 6 The Speaker is directed to make all the necessary arrangements to ensure that the motion of no confidence currently scheduled for 18 April 2017 is decided

[29] The EFF, the Inkatha Freedom Party and the Congress of the People, are cited as the fifth, sixth and eighth respondents in this matter. These respondents made common cause with the UDM and were, for all practical purposes, its co-applicants.

[30] Council for the Advancement of the South African Constitution, the Unemployed Peoples' Movement, the Institute for Security Studies and the Shosholoza Progressive Party.

> by secret ballot, including designating a new date for the motion to be debated and voted on no later than 25 April 2017.
>
> 7 The costs of this application are to be paid by the Speaker, jointly and severally with any other party opposing the relief sought."

[20] It is now common cause among the parties that this application is no longer immediately urgent.

Jurisdiction

[21] The jurisdiction of this Court is sought to be established on two alternative grounds – direct access and exclusive jurisdiction.

[22] Section 167(6) of the Constitution provides for direct access to this Court in the following terms:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

[23] The requirements for leave to bring an application or an appeal directly to this Court are fundamentally similar. For this reason, when in the case of a direct appeal the interests of justice requirement would be satisfied for purposes of granting leave when certain factors exist, similar factors ought to redound to the success of an application for direct access.[31] But direct access or direct appeal is certainly not available for the asking. Proof of exceptional circumstances, in the form of sufficient urgency or public importance and proof of prejudice to the public interest or the ends of justice and good governance, must demonstrably be established.[32]

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[31] *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 35; *Xolisile Zondi v Members of the Executive Council for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 12; and *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 7-9.

[32] *Mazibuko* id and *Bruce* id.

[24] In *Mazibuko*[33] this Court was seized with a dispute relating to a motion of no confidence in the President. Some of the issues to be resolved were: (a) whether the Speaker of the National Assembly had the power to schedule a motion of no confidence on his own authority; (b) whether the Rules were inconsistent with the Constitution to the extent that they did not provide for motions of no confidence in the President, as envisaged in section 102(2); and (c) whether Parliament had failed to fulfil a constitutional obligation in terms of section 167(4)(e) of the Constitution.[34]

[25] The application was brought in the form of a direct appeal from the High Court to this Court. In addressing the issues, this Court had regard to whether the interests of justice require that leave be granted and to the great significance of a motion of no confidence in our constitutional democracy. It also took into account that when and how to vindicate the power to initiate, debate and vote on a motion of no confidence under section 102 is an issue that deserves the attention of this Court. The primary purpose of this motion, which is to ensure that the President and the national Executive are held accountable, was also taken into account to undergird the proposition that the matter would in all likelihood end up in this Court.[35]

[26] All of the above led to the conclusion that a direct appeal had to be granted. As for the application for an order declaring that this Court has exclusive jurisdiction, the majority said:

> "Given the outcome of the direct access application, we expressly refrain from deciding whether the requirements of section 102(2) create an obligation on the assembly within the meaning of section 167(4)(e). Resolving that dispute must wait for another day."[36]

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[33] *Mazibuko* id at para 1.

[34] Id at para 3.

[35] Id at paras 20-2.

[36] Id at para 74.

[27] We would do well to leave the resolution of the question whether this Court has exclusive jurisdiction in this matter for another day. Here too, we embrace and reiterate the observations relating to the importance of a motion of no confidence in our constitutional democracy, its primary objective as an effective consequence-enforcement tool and the likelihood of the dispute ending up in this Court even if we were to direct that it be heard by the High Court first.

[28] A motion of no confidence in the Head of State and Head of the Executive is a very important matter. Good governance and public interest could at times haemorrhage quite profusely if that motion were to be left lingering on for a considerable period of time. It deserves to be prioritised for attention within a reasonable time.[37] The relative urgency of the guidance needed by Parliament from this Court is also an important factor to take into account. Consistent with the approach in *Mazibuko* in relation to an application for direct appeal, we too find it convenient to resolve the jurisdictional issue on the basis of direct access. Based on these factors, it is in the interests of justice to grant direct access.

The nature and purpose of a motion of no confidence

[29] The proper approach is one guided by this Court's jurisprudence on constitutional interpretation. In *Hyundai* we said:

> "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."[38]

[37] Id at para 66.

[38] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 21.

[30] In *Matatiele*, we also made the following observations in relation to the correct approach to adopt in construing our Constitution:

> "Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it 'has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.' Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole."[39]

[31] And this is the approach to be adopted in pursuit of the correct answer to the issues raised in this matter. The Preamble to our Constitution is a characteristically terse but profound recordal of where we come from, what aspirations we espouse and how we seek to realise them. Our public representatives are thus required never to forget the role of this vision as both the vehicle and directional points desperately needed for the successful navigation of the way towards the fulfilment of their constitutional obligations. Context, purpose, our values as well as the vision or spirit of transitioning from division, exclusion and neglect to a transformed, united and inclusive nation, led by accountable and responsive public office-bearers, must always guide us to the correct meaning of the provisions under consideration. Our entire constitutional enterprise would be best served by an approach to the provisions of our Constitution that recognises that they are inseparably interconnected. These provisions must thus be construed purposively and consistently with the entire Constitution.

[32] Although a motion of no confidence may be invoked in instances that are unrelated to the purpose of holding the President to account,[40] it is a potent tool

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[39] *Matatiele Municipality v President of the Republic of South Africa (2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele*) at para 36.

[40] See [75].

towards the achievement of that purpose. In that context, it is inextricably connected to the foundational values of accountability and responsiveness to the needs of the people. It is a mechanism at the disposal of the National Assembly to resort to, whenever necessary, for the enhancement of the effectiveness and efficiency of its constitutional obligation to hold the Executive accountable and oversee the performance of its constitutional duties.

[33] And accountability is necessitated by the reality that constitutional office-bearers occupy their positions of authority on behalf of and for the common good of all the people. It is the people who put them there, directly or indirectly, and they, therefore, have to account for the way they serve them.

[34] A motion of no confidence therefore exists to strengthen regular and less "fatal" accountability and oversight mechanisms. To understand how a motion of no confidence in the President enhances and fits into the broader accountability scheme, it is necessary to highlight some of the constitutional accountability provisions that apply to the Executive.

[35] Section 92 of the Constitution demands accountability from the Executive in these terms:

> **"Accountability and responsibilities**
>
> (1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.
>
> (2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
>
> (3) Members of the Cabinet must—
>
> (a) act in accordance with the Constitution; and
>
> (b) provide Parliament with full and regular reports concerning matters under their control."

And section 93(2) of the Constitution provides:

> "Deputy Ministers appointed in terms of subsection (1)(b) are accountable to Parliament for the exercise of their powers and the performance of their functions."

[36] The President, Deputy President, Ministers and their Deputies are thus enjoined by the supreme law of the land to be "accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions". Not only are they responsible for the proper exercise of the powers and carrying out of the functions assigned to the Executive but they are also required to act in line with the Constitution. Additionally, they are obliged to "provide Parliament with full and regular reports concerning matters under their control".

[37] In anticipation of a President and this constitutionally envisaged team's possible remissness in the execution of their constitutional mandate, provision was made to minimise or address that possibility. Those who represent the people in Parliament have thus been given the constitutional responsibility of ensuring that Members of the Executive honour their obligations to the people. Parliament that elects the President and of which the Deputy President, Ministers and their Deputies are Members,[41] not only passes legislation but also bears the added and crucial responsibility of "scrutinising and overseeing executive action".[42]

[38] Members of Parliament have to ensure that the will or interests of the people find expression through what the State and its organs do. This is so because Parliament "is elected to represent the people and to ensure government by the people under the Constitution".[43] This it seeks to achieve by, among other things, passing legislation to facilitate quality service delivery to the people, appropriating budgets for discharging constitutional obligations and holding the Executive and organs of State accountable for the execution of their constitutional responsibilities.

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[41] In terms of sections 91(3)(c) and 93(1)(b), respectively, the President may also appoint up to two Ministers and up to two Deputy Ministers from outside the National Assembly.

[42] Section 42(3) of the Constitution.

[43] Section 42(3) of the Constitution.

[39] Parliament's scrutiny and oversight role blends well with the obligations imposed on the Executive by section 92. It is provided for in section 55 of the Constitution:

> "**Powers of National Assembly**
>
> . . .
>
> (2) The National Assembly must provide for mechanisms—
>
> (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
>
> (b) to maintain oversight of—
>
> (i) the exercise of national executive authority, including the implementation of legislation; and
>
> (ii) any organ of state."

[40] The National Assembly indeed has the obligation to hold Members of the Executive accountable, put effective mechanisms in place to achieve that objective and maintain oversight of their exercise of executive authority. There are parliamentary oversight and accountability mechanisms that are sufficiently notorious to be taken judicial notice of. Some of them are calling on Ministers to: regularly account to Portfolio Committees and *ad hoc* Committees; and avail themselves to respond to parliamentary questions as well as other question and answer sessions during a National Assembly sitting. It is also through the State of the Nation Address, Budget Speeches and question and answer sessions that the President and the rest of the Executive are held to account.

[41] These accountability and oversight mechanisms, are the regular or normal ones. There may come a time when these measures are not or appear not to be effective. That would be when the President and his or her team have, in the eyes of the elected representatives of the people to whom they are constitutionally obliged to account, disturbingly failed to fulfil their obligations. In other words, that stage would be reached where their apparent under-performance or disregard for their constitutional

obligations is viewed, by elected public representatives, as so concerning that serious or terminal consequences are thought to be most appropriate. And that takes the form of removal from office.

[42] The Constitution provides for two processes in terms of which the President may be removed from office. First, impeachment, which applies where there is a serious violation of the Constitution or the law, serious misconduct or an inability to perform the functions of the office.[44] Another related terminal consequence or supreme accountability tool, in-between general elections, is a motion of no confidence for which the Constitution provides as follows:

> "**102. Motions of no confidence**
>
> (1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.
>
> (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign."

[43] A motion of no confidence constitutes a threat of the ultimate sanction the National Assembly can impose on the President and Cabinet should they fail or be perceived to have failed to carry out their constitutional obligations. It is one of the most effective accountability or consequence-enforcement tools designed to continuously remind the President and Cabinet of what could happen should regular mechanisms prove or appear to be ineffective. This measure would ordinarily be resorted to when the people's representatives have, in a manner of speaking, virtually given up on the President or Cabinet. It constitutes one of the severest political consequences imaginable – a sword that hangs over the head of the President to force him or her to always do the right thing. But, that threat will remain virtually

[44] Section 89 of the Constitution.

inconsequential in the absence of an effective operationalising mechanism to give it the fatal bite, whenever necessary.

[44] It was with this appreciation of the invaluable role of a motion of no confidence in mind and the necessity for its efficacy that the following observations were made in *Mazibuko*:

> "A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinise and oversee executive action. . . . The ever present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President accountable to the Assembly which elects her or him."[45]

[45] A motion of no confidence is, in some respects, potentially more devastating than impeachment. It does not necessarily require any serious wrongdoing, though this is implied. It may be passed by an ordinary, as opposed to a two-thirds majority of Members of the National Assembly. Unlike an impeachment that targets only the President, a motion of no confidence does not spare the Deputy President, Ministers and Deputy Ministers of adverse consequences. And the Constitution does not say when or on what grounds it would be fitting to seek refuge in a motion of no confidence.

[46] As to when and why, a point could conceivably be reached where serious fault-lines in the area of accountability, good governance and objective suitability for the highest office have since become apparent. Those concerns might not necessarily rise to the level of grounds required for impeachment. But, the lingering expectation of the President delivering on the constitutional mandate entrusted to him or her might have become increasingly dim.

[45] *Mazibuko* above n 31 at para 43.

[47] In the final analysis, the mechanism of a motion of no confidence is all about ensuring that our constitutional project is well managed; is not imperilled; the best interests of the nation enjoy priority in whatever important step is taken; and our nation is governed only by those deserving of governance responsibilities. To determine, through a motion of no confidence, the continued suitability for office of those who govern, is a crucial consequence-management or good-governance issue. This is so because the needs of the people must never be allowed to be neglected without appropriate and most effective consequences. So, a motion of no confidence is fundamentally about guaranteeing or reinforcing the effectiveness of existing mechanisms, in-between the general elections, by allowing Members of Parliament as representatives of the people to express and act firmly on their dissatisfaction with the Executive's performance.

[48] When the stage is reached or a firm view is formed, by some Members of the National Assembly, that the possibility of removing the President or Cabinet from office through a motion of no confidence be explored, would it be constitutionally permissible for the Speaker, on behalf of the National Assembly, to prescribe a secret ballot as the voting procedure? On what bases may this Court conclude that the Speaker does have the power to order voting by secret ballot?

Does the Speaker have the power to prescribe a secret ballot?

[49] The Speaker[46] was asked by some Members of the Assembly to make a determination that voting in the motion of no confidence in the President be conducted by secret ballot. She holds the view that neither the Constitution nor any rule gives her that power. She cites *Tlouamma* as a further impediment to the option of a secret ballot. We are thus called upon to determine whether the Constitution and Rules of the National Assembly require, permit or prohibit that voting in a motion of no confidence in the President be by secret ballot.

[46] The National Assembly has delegated its power to determine the appropriate procedure where express provision has not been made: see rules 6 and 26 of the Rules of the National Assembly.

[50] Section 102(2) provides that the National Assembly is to take a decision in a motion of no confidence through a vote. Neither the sections nor the rules relied on by the parties, to support the contention that a secret ballot is required, provide expressly for any voting procedure in a motion of no confidence.[47] A reflection on some constitutional provisions that provide for voting in line with the interpretative guidelines laid down by *Hyundai* and *Matatiele* is thus necessary.[48]

[51] Section 19(3)(a) of the Constitution provides that "[e]very adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret". Our Constitution has chosen a secret ballot as the voting procedure for the general elections.

[52] The President may, in terms of section 50(1) of the Constitution, dissolve the National Assembly if it has through a majority vote of its Members adopted a resolution for its dissolution. No provision is made for the voting procedure.

[53] Section 52 of the Constitution provides:

> "**Speaker and Deputy Speaker**
>
> (1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.
>
> . . .
>
> (3) The procedure set out in Part A of Schedule 3 applies to the election of the Speaker and the Deputy Speaker.
>
> (4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.

[47] Sections 102, 89, 42(3), 55(2) and 57 of the Constitution; see also rules 6, 26, 102, 103, and 104 of the Rules of the National Assembly.

[48] See [29] to [30].

(5) In terms of its rules and orders, the National Assembly may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker."

[54] This section is about the election of the Speaker and Deputy Speaker at the first sitting of the Assembly and whenever the need arises to do so. Focusing on voting, which is central to this application, it is required in three different instances. First, when the Speaker or Deputy is being elected. Second, implicitly when a resolution for the removal of the Speaker or Deputy Speaker is to be adopted. Third, when other presiding officers are being elected.

[55] No procedure is spelt out for the removal process. Similarly, the election of other presiding officers in terms of subsection 5 is simply required to take place in terms of the Rules and Orders of the Assembly but the voting mechanism is not expressly provided for. Section 52(3) does however prescribe the voting procedure set out in Part A of Schedule 3 for the election of the Speaker and Deputy. Similarly, section 86 of the Constitution prescribes the voting procedure in Part A of Schedule 3. This section provides for the election of the President as follows:

"(1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.

(2) . . . . The procedure set out in Part A of Schedule 3 applies to the election of the President."

[56] The relevant part of the Part A of Schedule 3 voting procedure reads:

"**Part A Election Procedures for Constitutional Office-Bearers**

Application

1. The procedure set out in this Schedule applies whenever—

(a) the National Assembly meets to elect the President, or the Speaker or Deputy Speaker of the Assembly;

(b) the National Council of Provinces meets to elect its Chairperson or a Deputy Chairperson; or

(c) a provincial legislature meets to elect the Premier of the province or the Speaker or Deputy Speaker of the legislature.

. . .

Election procedure

6. If more than one candidate is nominated—

(a) a vote must be taken at the meeting by secret ballot;

(b) each member present, or if it is a meeting of the National Council of Provinces, each province represented, at the meeting may cast one vote; and

(c) the person presiding must declare elected the candidate who receives a majority of the votes."

The election of the President and other constitutional office-bearers requires an ordinary majority of Members present and a secret ballot.

[57] Several important observations emerge from these sections that provide for voting. The procedure to be followed for the election of the President and several constitutional office-bearers has been specifically provided for. It is voting by secret ballot and whoever secures a majority of votes is to be declared elected. As regards the removal from office either through an impeachment[49] or a motion of no confidence,[50] the Constitution is silent on the procedure.

[49] Voting is also provided for in section 89 of the Constitution in these terms:

"Removal of President

(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of—

(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office.

(2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office."

[50] Section 102 of the Constitution.

[58] The Constitution could have provided for a vote by secret ballot or an open ballot. It did neither. Why did the Constitution leave the procedure open? Section 57(1) provides the answer:

> "The National Assembly may—
> (a) determine and control its internal arrangements, proceedings and procedures; and
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."

[59] To pass a motion of no confidence in the President requires a vote supported by a majority of National Assembly Members. Absent an expression of choice by the Constitution, the National Assembly is at large to exercise its section 57(1) powers to decide on the appropriate voting procedure in terms of which to decide the motion. And the choice lies between an open or secret ballot. The National Assembly therefore has the power to determine whether voting on a motion of no confidence would be by open ballot or secret ballot. The purpose for leaving the voting procedure open could only have been for the Assembly itself to determine, in terms of its section 57 powers, what would best advance our constitutional vision or project.

[60] Both possibilities of an open or secret ballot are constitutionally permissible. Otherwise, if Members always had to vote openly and in obedience to enforceable party instructions, provision would not have been made for a secret ballot when the President, Speaker, Chairperson of the National Council of Provinces and their Deputies are elected.[51] And the Constitution would have made it clear that voting would always be by open ballot.

[61] If the will of political parties were to always prevail, the Constitution would probably have required political parties to determine which way they want to vote on issues and through their Chief Whips signify support or opposition by submitting the

[51] Sections 86, 52 and 64 of the Constitution read with Part A of Schedule 3 to the Constitution.

list of Members who would be present when voting takes place. But, because it is individual Members who really have to vote, provisions are couched in the language that recognises the possibility of majorities supporting the removal of the President and the Speaker. Conceptually, those majorities could only be possible if Members of the ruling party are also at liberty to vote in a way that does not always have to be predetermined by their parties. And this of course assumes that the ruling party would generally be opposed to the removal of their own.

[62] Additionally, constitutions of comparable democracies prescribe a vote by secret ballot only for the general elections, the election of the President, the equivalent of the Speaker and her counterpart in the second House. As for the voting procedure to be followed for removal from office, no provision has been made.[52]

[63] What these legislative bodies have, however, done is to provide for a secret ballot either in legislation or their rules of procedure.[53] They did so because, just as our Parliament has the power to determine its procedures in terms of section 57, they have the power to decide whether the removal process ought to be by an open or secret ballot. Attempts to find any comparable constitutional democracy where a court of law has prescribed the removal voting procedure for the legislature drew a blank. Understandably so, because considerations of separation of powers demand an ever-abiding consciousness of the constitutionally-sanctioned division of labour among the arms and a refrain from impermissible intrusions.

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[52] For example, the Constitution of the Republic of Korea requires a secret ballot for general elections for the National Assembly and the President explicitly in articles 41 and 67 respectively; however when it comes to impeachment of the President, article 65 is silent on the voting method and only requires it to be "approved by two thirds or more of the total members of the National Assembly", while it is article 130 of Chapter XI of the National Assembly Act of the Republic of Korea that indicates that "a secret vote shall be taken to determine whether a motion for impeachment is adopted". Similarly in Singapore, article 22L(4) of the Constitution of the Republic of Singapore, which deals with the impeachment of the President, only requires the motion to be adopted by "not less than half of the total number of Members of Parliament", but remains silent on the voting method. In Kenya, articles 144 and 145 of the Constitution which deal with the removal of the President on grounds of incapacity and by impeachment, both remain silent on the voting method. Further, in the German Basic Law, article 61 which deals with impeachment remains silent on the voting method and only says that "[a] decision to impeach requires a majority of two thirds of the members of the House of Representatives or of two thirds of the votes of the Senate". See also [72] regarding the voting system in the National Assembly of Zimbabwe.

[53] Id.

[64] It bears emphasis that the absence of a prior determination of the voting procedure by our Constitution for a motion of no confidence means that it neither prohibits nor prescribes an open ballot or a secret ballot. The effect of this is to leave it open to the National Assembly, when the time comes to vote on that motion, to decide on the appropriate voting procedure. This can only reinforce the conclusion that the Assembly has the power to make that determination. It is for it to decide on the voting procedure necessary for the efficiency and effectiveness of the institution in holding the Executive accountable. In sum, how best and in terms of which voting procedure to hold the President accountable in the particular instance is the responsibility constitutionally-allocated to the National Assembly.

[65] The Assembly has made rules in terms of its section 57 powers. Those rules make provision for the determination of the voting procedure for a motion of no confidence tabled at a particular time. Rule 102 says that "[u]nless the Constitution provides otherwise, voting takes place in accordance with Rules 103 or 104". Rule 103 provides:

> "(1) At a sitting of the House held in a Chamber where an electronic voting system is in operation, unless the presiding officer directs otherwise, questions are decided by the utilisation of such system in accordance with a procedure predetermined by the Speaker and directives as announced by the presiding officer.
> (2) Members may vote only from the seats allocated to them individually in the Chamber.
> (3) Members vote by pressing the 'Yes', 'No' or 'Abstain' button on the electronic consoles at their seats when directed by the presiding officer to cast their votes.
> (4) A member who is unable to cast his or her vote, must draw this to the attention of the Chair and may in person or through a whip of his or her party inform the Secretary at the Table of his or her vote.
> (5) When all members have cast their votes, the presiding officer must immediately announce the result of the division.
> (6) Members' names and votes must be printed in the Minutes of Proceedings."

[66] And rule 104 reads:

> "(1) Where no electronic voting system is in operation, a manual voting system may be used in accordance with a procedure predetermined by the Speaker and directives to be announced by the presiding officer.
>
> (2) When members' votes have been counted, the presiding officer must immediately announce the result of the division.
>
> (3) If the manual voting procedure *permits*, members' names and votes must be printed in the Minutes of Proceedings."

[67] These rules provide for a voting system and procedure that allows for details of a Member and how she voted to be known. So known that the Minutes of Proceedings would be able to capture the names and the exact vote of each Member. But, read together, sub-rules (1) and (3) of rule 104 empower the Speaker to predetermine a manual voting system that may not permit a recordal or disclosure of the names and votes of Members. That is an indiscriminate manual secret ballot procedure. Indiscriminate because it is not limited to the election of the President, Speaker or Deputy Speaker. It is not incident-specific and must thus apply just as well to any incident of voting for which the Speaker may prescribe a secret ballot including the removal of the President. The National Assembly has, through its Rules, in effect empowered the Speaker to decide how a particular motion of no confidence in the President is to be conducted.

[68] In sum, rule 104(1) and (3) empowers the Speaker to have even a motion of no confidence in the President voted on by secret ballot. But, when a secret ballot would be appropriate, is an eventuality that has not been expressly provided for and which then falls on the Speaker to determine. That is her judgement call to make, having due regard to what would be the best procedure to ensure that Members exercise their oversight powers most effectively. And that is something she may "predetermine" as envisaged in rule 104(1).

[69] Our decision that the power to prescribe the voting procedure in a motion of no confidence reposes in the Speaker, accords with the dictates of separation of powers. It affirms the functional independence of Parliament to freely exercise its section 57 powers.

The exercise of the power to determine the procedure

[70] The proper exercise of the power to prescribe a voting procedure in a motion of no confidence proceedings would partly depend on why the Constitution prescribes a secret ballot for the general elections and a contested election of the President and the Speaker.

[71] Beginning with European electoral instruments, article 5 of its Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States provides:

> "The Parties hereto proceed from the assumption that observance of the principle of secret balloting means exclusion of any control over voters' expression of will, provision for equal conditions for free choice."[54]

[72] In *Botswana Democratic Party* the Court of Appeal of the Republic of Botswana noted that the secret ballot voting system in Parliament—

> "is rather an arrangement put in place by the National Assembly for the *effective exercise of the Members' right to vote without outside influence or coercion which could render the right an empty one*."[55]

And this was also explained by the Supreme Court of Zimbabwe in these terms:

> "*The legislature chose the secret ballot for its optimum benefits* . . . . The prescription of *a secret ballot* as the method for the election of the Speaker [by members of the

[54] Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States, 7 October 2002.

[55] *Botswana Democratic Party v Umbrella for Democratic Change* Case No CACGB-114-14 at para 76.

> legislature] *is based on the acceptance of the principle that it promotes and protects freedom of expression of choice* of a preferred candidate *without undue influence, intimidation and fear of disapproval by others.*"[56]

[73] As is the case with general elections where a secret ballot is deemed necessary to enhance the freeness and fairness of the elections, so it is with the election of the President by the National Assembly. This allows Members to exercise their vote freely and effectively, in accordance with the conscience of each, without undue influence, intimidation or fear of disapproval by others.

[74] The frustration or disappointment of the losing presidential hopeful and his or her supporters could conceivably have a wide range of prejudicial consequences for Members who are known to have contributed to the loss. To allow Members of the National Assembly to vote with their conscience and choose who they truly believe to be the best presidential material for our country, without any fear of reprisals, a secret ballot has been identified as the best voting mechanism.

[75] Conversely, a Member of Parliament could be exposed to a range of reasonably foreseeable prejudicial consequences when called upon to pronounce through a vote on the President's accountability or continued suitability for the highest office. But of course that potential risk would also depend on the motivation for the motion of no confidence. Is it on grounds that impugn competence, faithfulness to the Republic or commitment to upholding constitutional obligations or on some fairly innocuous or less divisive or less sensitive grounds?

[76] The appropriateness of a voting procedure for that motion is particularly important since our electoral system is structured in such a way that it is, broadly speaking, a party but not a Member of Parliament that gets voted into Parliament. A political party virtually determines who goes to Parliament[57] and who is no longer

[56] *Moyo v Zvoma* Case No SC 28/10, quoted with approval in *Botswana Democratic Party* id at para 55.
[57] Section 27 of the Electoral Act 73 of 1998.

allowed to represent it in Parliament.[58] Members' fate or future in office depends largely on the party. The Deputy President, Ministers and Deputy Ministers who are also Members of Parliament, are presidential appointees. The ruling party has a great influence on, or dictates, who gets appointed or elected as senior office-bearers in Parliament. Almost invariably the President – although not a Member of Parliament – is the leader of the ruling party.[59] It would be quite surprising if the senior office-bearers in Parliament were not appointed or elected with a significant input by the President and other senior party officials. There are therefore institutional and other risks that Members, particularly of any ruling party, are likely to get exposed to when they openly question or challenge the suitability of their leader(s) for the position of President. I say leaders advisedly because the logical trend has been to give the highest positions in governance structures to most senior leaders.

[77] In the *Certification* case, this Court addressed the conflict that arises from some Members' continued membership of the National Assembly, after their appointment to Cabinet:

> "An objection was taken to various provisions of the [New Text] that are said to violate [Chapter] VI. This [Chapter] reads:
>
> > 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'
>
> The principal objection is directed at the provisions of the [New Text] which provide for members of executive government also to be members of legislatures at all three levels of government. It was further submitted that this failure to effect full separation of powers enhances the power of executive government (particularly in the case of the President and provincial Premier), thereby undercutting the representative basis of the democratic order.
>
> . . .

[58] Section 47(3) of the Constitution. This is not to suggest that a political party may remove a Member at whim.

[59] In fact, it was only for a very brief period since the dawn of our democracy that this was not the case.

> It was also contended that the requirements of accountability and responsiveness in [Chapter] VI were breached. The argument was that legislators would have to obey the instructions of the party leadership even if the party concerned had unequivocally abandoned its electoral manifesto and directed its [Members of Parliament] to vote, speak and act against the policies expressed in that manifesto; or if the party imposed the whip in relation to a policy which legislators sincerely and reasonably believed to be wrong. The end result, so it was further submitted, would amount to a subversion of the accountability and responsiveness of legislators to the electorate. We do not agree. Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy."[60]

[78] The most effective extra-parliamentary mechanism for holding the people's elected representatives accountable, is a general election. It is in this context that this Court said "it is parties that the electorate vote for and parties which must be accountable to the electorate". Also, that a party's unacceptable abandonment of its manifesto is likely to result in electoral defeat. A factor that is relevant to the Speaker's decision-making in relation to a democratically-permissible voting procedure is that "an individual member remains free to follow the dictates of personal conscience".

[79] Central to the freedom "to follow the dictates of personal conscience" is the oath of office. Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws.[61] Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve

[60] *Certification* case above n 2 at paras 106 and 186.

[61] Section 48 of the Constitution read with item 4 of Schedule 2.

the people and do only what is in their best interests must prevail. This is so not only because they were elected through their parties to represent the people, but also to enable the people to govern through them, in terms of the Constitution. The requirement that their names be submitted to the Electoral Commission before the elections is crucial.[62] The people vote for a particular party knowing in advance which candidates are on that party's list and whether they can trust them.

[80] When the risk that inheres in voting in defiance of the instructions of one's party is evaluated, it must be counter-balanced with the apparent difficulty of being removed from the Assembly. Openness is one of our foundational values.[63] And the Assembly's internal arrangements, proceedings and procedures must have due regard to the need to uphold the value of transparency in carrying out the business of the Assembly.[64] The electorate is at times entitled to know how their representatives carry out even some of their most sensitive obligations, such as passing a motion of no confidence. They are not supposed to always operate under the cover of secrecy. Considerations of transparency and openness sometimes demand a display of courage and the resoluteness to boldly advance the best interests of those they represent no matter the consequences, including the risk of dismissal for non-compliance with the party's instructions. These factors must also be reflected upon by the Speaker when considering whether voting is to be by secret or open ballot.

[81] Some consequences are adverse or injurious not so much to individuals, as they are to our constitutional democracy. Crass dishonesty, in the form of bribe-taking or other illegitimate methods of gaining undeserved majorities, must not be discounted from the Speaker's decision-making process. Anybody, including Members of Parliament or of the Judiciary anywhere in the world, could potentially be "bought". When that happens in a motion of no confidence, the outcome could betray the people's best interests. This possibility must not be lightly or naively taken out of the

[62] Section 57(A) of the Electoral Act.

[63] Section 1(d) of the Constitution.

[64] Section 57(1) of the Constitution.

equation as a necessarily far removed and negligible possibility when the stakes are too high. For, when money or oiled hands determine the voting outcome, particularly in a matter of such monumental importance, then no conscience or oath finds expression.

[82] The correct exercise of Parliament's powers in relation to a motion of no confidence in the President, must therefore have the effect of ensuring that the voting process is not a fear or money-inspired sham but a genuine motion for the effective enforcement of accountability. When that is so, the distant but real possibility of being removed from office for good reason would serve the original and essential purpose of encouraging public office-bearers to be accountable and fulfil their constitutional obligations.

[83] Each Member must, depending on the grounds and circumstances of the motion, be able to do what would in reality advance our constitutional project of improving the lives of all citizens, freeing their potential and generally ensuring accountability for the way things are done in their name and purportedly for their benefit. So, the centrality of accountability, good governance and the effectiveness of mechanisms created to effectuate this objective, must enjoy proper recognition in the determination of the appropriate voting procedure for a particular motion of no confidence in the President. That voting procedure is situation-specific. Some motions of no confidence might require a secret ballot but others not, depending on a conspectus of circumstances that ought reasonably and legitimately to dictate the appropriate procedure to follow in a particular situation.[65]

[84] What then is to be done to safeguard the responsibility of Members of Parliament to vote according to their conscience when it is necessary to enforce accountability effectively and properly, without undermining the need to let them toe the party line when it is undoubtedly appropriate to do so? A way must be found to

[65] This is the meaning that flows from a contextual and purposive interpretation envisaged in *Hyundai* and *Matatiele*.

draw a line between allowing voting according to Members' true conscience and the important responsibilities or obligations Members have to their parties, which would at times be in conflict.

[85] The power to decide whether a motion of no confidence is to be resolved through an open or secret ballot cannot be used illegitimately or in a manner that has no regard for the surrounding circumstances that ought to inform its exercise. It is neither for the benefit of the Speaker nor his or her party. This power must be exercised to achieve the purpose of a motion of no confidence which is primarily about guaranteeing the effectiveness of regular mechanisms. The purpose of that motion is also to enhance the enforcement of accountability by allowing Members of Parliament as representatives of the people to express and act firmly on their dissatisfaction about the Executive's performance in-between general elections. It is fundamentally for the advancement of good governance through quality service delivery, accountability, the strengthening of our democracy and the realisation of the aspirations of the people of South Africa. The exercise of the power to determine the voting procedure must thus always be geared at achieving the purpose for which that power exists. The procedure in terms of which the voting right is allowed to be exercised must brighten and enhance the prospects of the purpose for which it was given being better served or advanced.

[86] More importantly, the power that vests in the Speaker to determine the voting procedure in a motion of no confidence, belongs to the people and must thus not be exercised arbitrarily or whimsically. Nor is it open-ended and unguided. It is exercisable subject to constraints. The primary constraint being that it must be used for the purpose it was given to the Speaker – facilitation of the effectiveness of Parliament's accountability mechanisms. Other constraints include the need to allow Members to honour their constitutional obligations, regard being had to their sworn faithfulness to the Republic and irrevocable commitment to do what the Constitution and the laws require of them, for the common good of all South Africans.

[87] The Speaker is chosen from amongst Members of the National Assembly.[66] That gives rise to the same responsibility to balance party interests with those of the people. It is as difficult and onerous a dual responsibility as it is for Members, perhaps even more so, given the independence and impartiality the position requires. But Parliament's efficacy in its constitutional oversight of the Executive vitally depends on the Speaker's proper exercise of this enormous responsibility. The Speaker must thus ensure that his or her decision strengthens that particular tenet of our democracy and does not undermine it.

[88] There must always be a proper and rational basis for whatever choice the Speaker makes in the exercise of the constitutional power to determine the voting procedure. Due regard must always be had to real possibilities of corruption as well as the prevailing circumstances and whether they allow Members to exercise their vote in a manner that does not expose them to illegitimate hardships. Whether the prevailing atmosphere is generally peaceful or toxified and highly charged, is one of the important aspects of that decision-making process.

Conclusion

[89] In conclusion, when approached by the UDM to have the motion of no confidence in the President voted on by secret ballot, the Speaker said that neither the Constitution nor the Rules of the National Assembly allow her to authorise a vote by secret ballot. To this extent she was mistaken. The only real constraint that stood in her way was the *Tlouamma* decision.

[90] Our interpretation of the relevant provisions of the Constitution and the rules makes it clear that the Speaker does have the power to authorise a vote by a secret ballot in motion of no confidence proceedings against the President, in appropriate circumstances. The exercise of that power must be duly guided by the

[66] Section 52(1) of the Constitution.

need to enable effective accountability, what is in the best interests of the people and obedience to the Constitution.

[91] To the extent that *Tlouamma* might have been understood to have held that a secret ballot procedure is not at all constitutionally permissible, that understanding is incorrect. The Speaker's decision was invalid and must be set aside.

Remedy

[92] This Court has been asked to direct the Speaker "to make all the necessary arrangements to ensure that the motion of no confidence . . . is decided by secret ballot, including designating a new date for the motion to be debated". But no legal basis exists for that radical and separation of powers-insensitive move. The Speaker has made it abundantly clear that she is not averse to a motion of no confidence in the President being decided upon by a secret ballot. She only lamented the perceived constitutional and regulatory reality that she lacked the power to authorise voting by secret ballot. Meaning, now that it has been explained that she has the power to do that which she is not averse to, she has the properly-guided latitude to prescribe what she considers to be the appropriate voting procedure in the circumstances.

[93] It may be necessary to add that her counsel reiterated during the hearing that the Speaker is not really opposed to a secret ballot. The President's counsel also said that the Constitution neither requires nor prohibits but in reality permits a secret ballot. He went on to say a secret ballot does not necessarily hold adverse consequences for the President. It would thus be most inappropriate to order the Speaker to have the motion of no confidence in the President conducted by secret ballot, as if she ever said that she would not do so even if she had the power to do so and circumstances plainly cry out for it. To order a secret ballot would trench separation of powers.

[94] Whether the proceedings are to be by secret ballot is a power that rests firmly in the hands of the Speaker, but exercisable subject to crucial factors that are appropriately seasoned with considerations of rationality. This Court cannot assume that she will not act in line with the legal position and conditionalities as now clarified by this Court. No legal or proper basis exists for that.

[95] The Speaker's decision that she lacks the constitutional power to prescribe a secret ballot in a motion of no confidence in the President is to be set aside. The UDM's prayer for the order that prescribes a secret ballot as the voting procedure will be referred back to the Speaker to decide.

Costs

[96] All parties to this application have recorded success against the Speaker and the President. The unsuccessful parties are therefore to pay the costs of the applicant and all other participating respondents.

Order

[97] In the result the following order is made:

1. The United Democratic Movement is granted direct access.
2. It is declared that the Speaker of the National Assembly has the constitutional power to prescribe that voting in a motion of no confidence in the President of the Republic of South Africa be conducted by secret ballot.
3. The Speaker's decision of 6 April 2017 that she does not have the power to prescribe that voting in the motion of no confidence in the President be conducted by secret ballot is set aside.
4. The United Democratic Movement's request for a motion of no confidence in the President to be decided by secret ballot is remitted to the Speaker for her to make a fresh decision.

5. The Speaker and the President must pay the costs of the United Democratic Movement, the Economic Freedom Fighters, the Inkatha Freedom Party and the Congress of the People, including costs of two counsel where applicable.

For the Applicant:	D Mpofu SC, K Pillay SC, S Budlender and N Muvangua instructed by Mabuza Attorneys
For the First Respondent:	M T K Moerane SC and R T Tshetlo instructed by the State Attorney
For the Second Respondent:	I A M Semenya SC, M Sikhakhane SC and M Sello instructed by the State Attorney
For the Fifth Respondent:	T Ngcukaitobi, F Hobden and J Mnisi instructed by Kwinana & Partners Inc
For the Sixth Respondent:	A Katz SC and S Pudifin-Jones instructed by Laurens De Klerk Attorneys
For the Eighth Respondent:	L H Adams instructed by Mabuza Attorneys
For the First Amicus Curiae (Council for the Advancement of the South African Constitution):	G Budlender SC, M Adhikari and M Mbikiwa instructed by the Legal Resources Centre
For the Second Amicus Curiae (Unemployed Peoples' Movement):	N Bawa SC and M Bishop instructed by the Legal Resources Centre
For the Third Amicus Curiae (Institute for Security Studies):	N H Maenetje SC, R Tulk and Y S Ntloko instructed by Webber Wentzel Attorneys
For the Fourth Amicus Curiae (Shosholoza Progressive Party):	D Unterhalter SC, M Musandiwa and M Finn instructed by Irene Rome Attorneys & Conveyancers