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**United Democratic Movement v Speaker of the National Assembly and
Others (CCT89/17) [2017] ZACC 21**

Tinenenji Banda

The Facts

On 31 March 2017, South African President Jacob Zuma, in exercise of his constitutional powers, dismissed the Minister of Finance, Pravin Gordhan, and his deputy, Mcebisi Jonas. The South African market reacted sharply to these dismissals, and an economic downgrade to junk status took effect shortly thereafter. In light of the economic downgrade, three opposition political parties, the United Democratic Movement (UDM), the Democratic Alliance, and the Economic Freedom Fighters (EFF) approached the Speaker of the National Assembly Baleka Mbete, requesting her to schedule a motion of no confidence in President Zuma. Mbete obliged, and scheduled the motion for the 18 April 2017.

Twelve days before the motion was to be tabled, the UDM wrote a letter to Mbete, asking that she mandate a secret ballot for the motion. In support of this request, the UDM asserted that the motion was of obviously high importance, and that the public interest necessitated the guarantee of a truly “democratic outcome”, which could only be achieved, it was argued, through a secret ballot. An open ballot would in the UDM’s view, limit the free will of members, since some members of the House, fearing career reprisals and other adverse repercussions, might be intimidated into voting against the motion.

In responding to the request, Mbete proffered that neither the Constitution nor the Rules of the National Assembly made provision for the prescribing of a secret ballot for a motion of no confidence vote. In arriving at her decision, she relied on the 2015 High Court Decision of *Tlouamma v Speaker of the National Assembly*. In *Tloumanna*, the High Court had held that the South African Constitution did not expressly or impliedly require a secret ballot for motions of no confidence in the President. On the strength of that case, and based on her interpretation of the Constitution and the National Assembly Rules, the Speaker concluded that she lacked the legal authority to prescribe a secret ballot for the motion.

Unpersuaded by the Speaker’s reasoning, the UDM petitioned the Constitutional Court of South Africa to determine whether the Constitution of the Republic and the Rules of the National Assembly did in fact bar the

Speaker from prescribing a secret ballot for a motion of no confidence in the President. If it was to be the Court's finding that the Speaker was not so proscribed, the UDM asked the court to mandate the Speaker to prescribe a secret ballot for the no confidence motion.

The Holding

The elegant, unanimous judgment, was delivered by Chief Justice Mogoeng Mogoeng. Justice Mogoeng began his judgment by underscoring the fact that as a constitutional democracy, the South African government was a government "of the people, by the people and for the people". He added that since constitutional democracies do not self-actualize, it was the responsibility of governmental institutions and structures to turn the aspirations of the people into a reality. Noting that fifty five million people cannot collectively govern the Republic, he acknowledged that governance "by the people" was a legal fiction, noting further that the impracticalities of collective governance compelled the people to assign governance functions to "servants" and "messengers" who, in the exercise of these functions, should have the welfare of all South Africans foremost in mind.

Justice Mogoeng then went on to observe that because public officials wield so much power, these agents must have an unwavering loyalty to the constitutional values of accountability and openness, and that those values were in part superintended by Parliament, to whom the President, Deputy President, Ministers and Deputy Ministers were enjoined to report. The responsibility of supervising the performance of the President and his cabinet, the Chief Justice pronounced, fell squarely on the National Assembly. Parliament's oversight function, according to the Court, was to ensure that the power and resources entrusted to the executive were used in a justifiable way.

The Court proceeded to suggest that there might come a time when "all the regular checks and balances seem to be ineffective", and that at such a time, the best interests of the nation may require resort to the use of the "ultimate accountability ensuring mechanisms" of which there are three: (i) the removal of office through the ballot box; (ii) 'impeachment'; and (iii) a successful motion of no confidence. The threat of these mechanisms and their severe repercussions, the Court opined, were intended to serve as constant reminders to the President and his cabinet, that mishandling of public power and resources might inflict severe repercussions on those who so offend.

As to Parliament's specific oversight responsibilities, the Chief Justice focused on section 55(1) of the Constitution, which provides that:

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.

In specific reference to motions of no confidence, Mogoeng went on to cite Section 102 of the Constitution, which declares:

- (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.

Reiterating the severity of a motion of no confidence, the Chief Justice emphasized that a successful no confidence vote in the President was the most severe sanction that Parliament could impose on a sitting President, and as such, was the outer limit of Parliament's supervisory function.

The Court then went on to decide the question that triggered the case, namely, whether the Speaker of the National Assembly has power to prescribe a secret ballot. The Court noted that in light of section 57 which empowers the National Assembly to determine its own procedures and arrangements, the Constitution's failure to prescribe the conduct of a no confidence vote was deliberate. The Court held further that Parliament's freedom in this regard was limited only by the requirement that whatever rules and procedures Parliament puts in place, must support, in the Chief Justice's own words, the advancing of the "constitutional project."

The Court then examined the National Assembly Rules, focusing in particular on rule 104(1), which empowers the Speaker to prescribe the

voting procedure that must be used when a manual voting system is used. The import of Rule 104, the Court held, is that the procedure that the Speaker prescribes, will determine if a vote is conducted by secret ballot or not. In other words, the question of whether voting is conducted by secret or open ballot, is a discretionary decision that the Rules of Parliament empower the Speaker to make. In making this judgment call, the Court held that the Speaker should be guided by the outcome which best ensures that “members exercise their oversight powers most effectively.” Ultimately, the Court ruled, the Speaker was labouring under a misapprehension when she determined that she lacked the power to prescribe a secret vote.

After disposing of the first question, the Court then went on to determine the second issue: namely, whether the Court could compel the Speaker to prescribe a secret ballot for the no confidence vote against the President. The Court held that compelling the Speaker to prescribe a particular voting procedure would violate the separation of powers principle, since this is a power entrusted only to the Speaker, and the Speaker alone. The Court therefore left the decision of whether the motion of no confidence vote should be held by secret or open ballot in the hands of the Speaker.

Significance

In holding that the Speaker did in fact have the power to prescribe voting procedures, the Court, in one fell swoop, exercised a decisive check on both Parliament and the Executive. For Parliament, the check came in the form of this reminder: the supervisory powers bestowed on Parliament by the Republican Constitution, are not to be hollow and unrealizable. Instead, procedures that ensure that the “ultimate accountability ensuring mechanisms” can in fact actualize, should be put in place by those responsible for doing so. In this respect, the Court reminded the Speaker that the South African Constitution and the Rules of the National Assembly empower her to prescribe procedures that best enable Parliament to realize its oversight responsibility.

For the Executive, the check came in the form of this caution: when ordinary checks and balances fail to reign them in, the most fatal of sanctions will wield a lethal sword to curtail the abuse.

Of particular significance is the fact that even while acting as a check on others, the Court acknowledged that it too was constrained, and was therefore careful not to overstep its own boundaries. While the Court

stopped short of impinging on the domain of the Speaker, the Court did offer significant guidance on how the Speaker must go about determining parliamentary voting procedure, holding in part that: “[t]here 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” and further that “[d]ue regard must always be had to real possibilities of corruption as well as [whether] the prevailing circumstances...allow Members to exercise their vote in a manner that does not expose them to illegitimate hardships.” The Speaker, the Court held, must have regard to the prevailing atmosphere in Parliament, and whether the atmosphere is “peaceful”, “toxified” or “highly charged”, should all be relevant inputs in the decision-making process.

In *UDM v the Speaker*, the Court displayed in full force and with expert precision, the important oversight function that the judiciary plays in a constitutional democracy. While the primary recipient of that oversight function in this particular case was Parliament, the Executive was both cautioned and reminded, that when exercised on behalf of the people, public power must be exercised in a judicious, controlled, and justifiable manner.