

'A comedy of errors': Parliament's conduct in relation to the tabling of a motion of no-confidence in the President

Mazibuko v Sisulu 2013 6 SA 249; 2013 11 BCLR 1297 (CC)

Abstract

The Constitutional Court in the case of *Mazibuko v Sisulu* had to examine Parliament's conduct in relation to the tabling of the motion of no-confidence in the President. This case note examines the respective merits of and comments on both the majority and minority judgments of the Court. Although the minority judgment is a dissenting one, in a sense, as will be explained, it can be perceived as complementary to the main judgment, as well as raising certain interesting issues, for instance, the separation of powers and constitutional conventions.

1 Introduction

This case note examines the respective merits of and comments on both the majority and minority judgments of the Constitutional Court in the case of *Mazibuko v Sisulu*.¹ Although the minority judgment is a dissenting one, in a sense, as will be explained, it can be perceived as complementary to the main judgment, as well as raising certain interesting issues, such as the separation of powers and constitutional conventions.

In general, a vote or motion of no-confidence or censure is 'a vote on a motion put by the Opposition censuring an aspect of the Government's policy. If the motion is carried the Government is obliged to resign.' Therefore a *vote of no-confidence* is a vote in which members of a group are asked to indicate that they do not support the person or group in power, and which declares that a person in a superior position is no longer deemed fit to hold that position.²

¹2013 6 SA 249; 2013 11 BCLR 1297 (CC).

²'Vote of no confidence' (*s.d.*) in *Collins English Dictionary* available at <http://collinsdictionary.com/dictionary/english/vote-of-no-confidence> (accessed 2014-06-08). The explanation reads further 'A *vote of no-confidence* is a vote in which members of a group are asked to indicate that they do

Section 102 of the Constitution makes provision in general for motions of no-confidence. Section 102(1) provides in particular for a motion of no-confidence in the 'Cabinet excluding the President'. Complementary to this, section 102 (2) states:

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 other members of the Cabinet and any Deputy Ministers must resign.

On 8 November 2012, Ms Mazibuko, the erstwhile parliamentary leader of the Democratic Alliance (DA) and leader of the opposition in terms of section 57(2)(d) of the Constitution, gave notice of a motion of no-confidence in the President of South Africa, in terms of rule 98(1)(a) of the rules of the National Assembly. The motion was placed on the Assembly's order paper on Tuesday, 13 November 2012. The motion declared:

That the House –

- (1) Notes that under the leadership of President Jacob G Zuma –
 - (a) The justice system has been politicised and weakened;
 - (c) Corruption has spiralled out of control;
 - (d) Unemployment continues to increase;
 - (e) The economy is weakening;
 - (f) The right of access to quality education has been violated; and therefore
- (2) In terms of section 102(2) of the Constitution of the Republic of South Africa, 1996, pass a motion of no confidence in President Zuma.

2 Historical background

The practice of a motion of no-confidence has its origin in the Westminster system. The first successful motion of no-confidence in British parliamentary history occurred in 1782 at the end of the American Revolution, when as a result of the defeat of the British forces commanded by Lord Cornwallis at the battle of Yorktown, Parliament at Westminster voted that it 'no longer has confidence in the present ministers', which according to Adams,³ was preceded by 'many motions equivalent to a want of confidence carried against the ministry, before the king (George III) would yield, and at that moment only because Lord North (Prime Minister) peremptory [sic] resigned ...'

This did not however create a constitutional convention that a government defeated by a vote of no-confidence requires the dissolution of parliament and a general election. However, attempts by British prime ministers such as Robert

not support the person or group in power, usually the government'.

³*Constitutional history of England* (1956) 406.

Peel to govern in the absence of a parliamentary majority were abortive, and by the middle of the 19th century, the convention had been firmly established, that a successful motion of no-confidence was sufficient to topple a government, dissolve Parliament and bring about a general election.⁴ What was then established was that 'on the confidence of the House of Commons it is immediately and vitally dependent. This confidence it must always possess, "either absolutely ...or relatively and conditionally".⁵ Altogether in the United Kingdom, there have been 11 prime ministers defeated through a no-confidence motion. Since 1925 there has been only one. This was in 1979, against the government of James Callaghan, carried by one vote (311-310), forcing the dissolution of Parliament and a subsequent general election, won by Margaret Thatcher.⁶

In South African parliamentary history, Kilpin (in *Parliamentary Procedure*⁷) states that in the Cape House of Assembly, Sprigg was defeated on direct no-confidence in 1881 and 1898, and three other Ministries were defeated in 1884, 1890 and 1904 respectively on other motions. In the Union of South Africa, in the House of Assembly, the Hertzog Ministry was defeated in 1939, involving the historic motion for participation in the war against Germany in 1939 (the Second World War). Parliament decided on 'an immediate declaration of war on Germany by 80 votes to 67, and General Hertzog, the Prime Minister, having been refused dissolution by the Governor-General, Sir Patrick Duncan, resigned'.⁸

3 Political background to the judgments of the High Court and the Constitutional Court

The litigation that was to take place in relation to this matter, relating to a motion of no-confidence in the Zuma government, had its genesis in the Chief Whips' Forum, which was consulted, but no consensus could be reached. As a result it was referred to the Programme Committee, chaired by the Speaker. No agreement could be reached in this committee either and as a consequence, the motion was not scheduled before the Committee for debate.⁹

⁴See (n 2) and the definition provided by *Collins' Dictionary. The Cambridge Dictionary* defines a motion of no-confidence as 'an occasion when most of the members of parliament or other organization say that they do not support the people in authority and that they disagree with their actions'.

⁵ Poole *Taswell-Langmead's constitutional history* (1919) 643-644.

⁶ Griffiths and Ryle *Parliament: Functions, practice and procedures* (1989) 344.

⁷(1950) 81.

⁸See Wilson and Thompson (eds) *The Oxford history of South Africa* (1978) 382 and Wiechers *VerLoren van Themaat staatsreg* (1981) 3rd ed 182.

⁹*Mazibuko* (n 1) paras 8-11.

On 15th November, the applicant, who, as indicated above, was leader of the opposition in terms of section 57(2)(d) of the Constitution, subsequently penned an urgent letter to the Chief Legal Advisor, demanding that the motion should be tabled in terms of rule 2(1) of the Assembly, to which there was no response. As a result, the applicant commenced proceedings in the High Court.¹⁰

4 The judgment of the High Court

The Speaker opposed the urgent application on several grounds, contending that he did not have the power to schedule a debate in the Assembly in the absence of consensus in the Programme Committee. He also contested the urgency of the application, and that it was premature, holding that the motion could be debated in the period up to the 22 November.¹¹

The Chief Whip also filed an opposing affidavit, contending, *inter alia*, that the matter should be raised in the relevant portfolio committee. In addition, the Chief Whip accused the applicant of harbouring an ulterior political motive by bringing the motion, well knowing that she could renew it the following year.¹²

The High Court (per Davis J), in dismissing the order with no order as to costs, held that the applicant had the right to move a motion of no-confidence and to have it debated. He held further that such a motion 'must contain the idea of inherent urgency' and should be treated as such.¹³ Also worthy of note is that the Court commented that '[i]t cannot be within the gift of the majority party to decide upon an issue of the timing of the motion'.¹⁴

However, the High Court held that the Speaker did not possess a residual power, under the rules of the Assembly, to break the deadlock or indeed to schedule a debate on the motion, acting on his own.¹⁵ Furthermore, the Court contended that it did not have the power to grant a *mandamus* directing the Speaker to exercise a power that he did not possess.¹⁶

In addition, this Court held further that there was a *lacuna* in the rules that prevented the vindication of the constitutional right to move a motion of no-confidence, concerning which the High Court as such did not possess the power to adjudicate on whether Parliament had failed to fulfil a constitutional obligation under section 167(4)(e) of the Constitution.¹⁷ According to the latter such power

¹⁰*Id para 13.*

¹¹*Id para 14.*

¹²*Id para 15.*

¹³*Mazibukuv Sisulu 2013 4 SA 243 (WCC) at 255B-C.*

¹⁴*Id 255 A-B.*

¹⁵*Id 259 I-J.*

¹⁶*Id 255- 256.*

¹⁷See (n 4) 1299.

vested exclusively with the jurisdiction of the Constitutional Court.¹⁸ This section states that only the Constitutional Court may 'decide that Parliament or the President has failed to fulfil a constitutional obligation'.

5 The judgment of the Constitutional Court

In its judgment the Constitutional Court had to interpret the rules of Parliament in 'light of the Constitution'.¹⁹ The importance of a motion of no-confidence to:

the proper functioning of a constitutional democracy cannot be gainsaid. The primary purpose of a motion of no-confidence is to ensure that the President and the national executive are 'accountable to the assembly made up of elected representatives'.²⁰

The majority judgment of the Constitutional Court was delivered by Moseneke DCJ, in which Froneman J, Khampepe J, Nkabinde J, Skweyiya J and van der Westhuizen J concurred. After careful consideration of all the relevant factors and the interpretation of rule 2(1), the Court held that the Speaker alone has no residual power to schedule a motion of no-confidence in the President for debate and vote in the Assembly.²¹

This was not, however, the end of the matter, as the applicant sought an order granting direct access for a declaration that the rules are inconsistent with the Constitution to the extent that they do not properly allow a member or party in the Assembly to vindicate the right to have a motion of no-confidence in the President scheduled for a debate and vote as a matter of urgency.²²

The Court came to the conclusion that a motion of no-confidence deserves the serious and prompt attention of the responsible committee and ultimately of the Assembly itself. Furthermore, the Constitutional Court held that the necessary steps must be taken to ensure that the motion is tabled and voted on without delay.²³

The next question that had to be considered was whether the rules of the Assembly were inconsistent with section 102(2) of the Constitution. The High Court had come to the conclusion that there was no mechanism in the rules to resolve a deadlock caused by the absence of consensus or a majority decision that refused to entertain a motion of no-confidence. This constituted a *lacuna* in the rules.²⁴

¹⁸*Id* 260 E-F.

¹⁹*Mazibuko* (n 1) para 36.

²⁰*Id* para 21.

²¹*Id* para 32.

²²*Id* para 33.

²³*Id* 47.

²⁴*Id* para 51.

It is submitted that the majority judgment was correct in concurring with the High Court in this regard and the applicant was therefore entitled to a declaratory order and that chapter 12 of the rules is inconsistent with section 102(2) of the Constitution. The declaration of invalidity was suspended for six months to allow the Assembly to remedy the defect in the rules.²⁵

6 The minority judgment

This judgment, delivered by Jafta J (Mogoeng CJ, Zondo J and Mhlanta AJ concurring), needs to be carefully considered, as it raises certain important questions. The judgment commences with the statement that '[p]olitical issues must be resolved at a political level'.²⁶ This argument, it is submitted, is the sentiment on which the entire minority judgment is premised, either directly or indirectly, as it influences the conclusion reached in relation to the questions of direct access and whether the Assembly's rules were unconstitutional. In a constitutional system where the Constitution is supreme and involves judicial review and the testing right of the courts, conflicts with serious political implications inevitably arise, as explained by Davis J in the High Court case as follows:

There is a danger in South Africa, however, of the politicisation of the judiciary, drawing the judiciary into every political dispute as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication. In the context of the dispute, judges cannot be expected to dictate to parliament when and how it should arrange its precise order of business matters. What the courts can do, however, is to say to parliament: 'you must operate within the constitutionally compatible framework, you must give content to section 102 of the Constitution: you cannot subvert this expressly formulated idea of a motion of no-confidence; however, how you allow that right to be vindicated is for you to do, not for the courts to determine'.²⁷

There is indeed always a very real danger of the 'politicisation' of the judiciary in a constitutional dispensation that involves judicial review both of a substantive and procedural nature, as is the position in contemporary South Africa and other countries such as the United States.²⁸ This danger should not prevent the courts from upholding the Constitution and its values. It is submitted that a far greater danger occurs should the courts adopt a timid or restrained approach and, out of excessive caution and fear of incurring the wrath of the executive or legislature,

²⁵*Id* para 72.

²⁶*Id* para 83.

²⁷*Mazibuko NO v Sisulu* 2013 242 at 256E-H.

²⁸See, eg, *Brown v Board of Education* 347 US 483 (1954) and *Roe v Wade* 410 US 113 (1973).

fail to fulfil their obligation to 'protect, promote and fulfil' their curial obligations as far as the Constitution is concerned.

A similar argument can be made in relation to the separation of powers doctrine.²⁹ It is submitted that the doctrine of separation actually entails 'a government of separated institutions sharing powers'.³⁰ If Parliament fails to resolve a problematic issue in a constitutionally satisfactory manner, the courts are duty bound to intervene, bearing in mind that in no constitution is the separation absolute.

Jafta J referred to the judgment of the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,³¹ in which the Court explained in relation to separation of powers that:

It is a necessary component of the doctrine of separation of powers that the court has an obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power.³²

In this regard a judgment has to be made which is essentially a qualitative one and depends on what is in the interest of justice. In relation to such interest the majority and dissenting judgments reach different conclusions. Jafta J explains that '... all applications must fail, primarily because it is not in the interest of justice to grant them. The interest of justice is the standard applicable to applications for leave to appeal and direct access.'³³ It is submitted, however, that the interests of justice should not be judged merely by technical considerations but should be viewed substantively and holistically.

7 Confusion relating to rules and practices

Jafta J was at pains to point out that the process of dealing with the tabling of a motion of no-confidence in the National Assembly involved a decision that 'set in motion a series of errors'.³⁴ Indeed the process viewed as a whole was a 'comedy of errors', involving not only errors, but a futile attempt to muddle through and groping in the dark. This is clear from the following statement made by Jafta J in relation to the motion of no-confidence:

²⁹ *Mazibuko* (n 1) paras 134-136.

³⁰ Neustadt *Presidential power: The politics of leadership from FDR to Carter* (1980) 33-37.

³¹ 2010 5 BCLR 457 (CC).

³² *Id* paras 92-93.

³³ *Mazibuko* (n 1) para 87.

³⁴ *Id* para 85.

But its consideration was made subject to the motion being scheduled for debate by the programming committee. It is not clear in terms of which rule this procedure was adopted. However, it is apparent from the speaker's affidavit filed in the High Court that the Assembly followed a practice not provided for in the rules dealing with the motion.³⁵

This quotation illustrates confusion and the fact that the rules were misconstrued.³⁶

However compounding the problems of the errors relating to the motion of no-confidence was the situation that it depended on amending the rules. This could not be finalised according to Jafta J 'because members of the relevant committee failed to attend the last meeting scheduled to decide on amendments as a result the committee was inquorate'.³⁷

In the light of the above, it is surprising that Jafta J comes to the conclusion that 'all applications advanced by the applicant must fail, primarily because it is not in the interest of justice to grant them'.³⁸ It is submitted that a motion of no-confidence must be perceived as an integral part of accountable government which, according to section 1(d), is one of the fundamental values on which the Constitution as a whole, is premised, being a system of 'multi-party democratic government', required to ensure 'accountability, responsiveness and openness'. If Parliament was unable to address the issue because of confusion, misconstruction of the rules and inability to take quorate decisions, it is submitted that in the interest of justice the courts do have an obligation to intervene constructively but with circumspection.

Had the Constitutional Court failed to intervene, Parliament and its committees may not have been able to resolve the *impasse*, with negative consequences for accountable government, which the Constitutional Court is obliged to ensure, by virtue of section 7 of the Constitution, which requires it to 'respect, protect [and] promote' such accountable government. There is no guarantee that Parliament left to its own devices would have reached a satisfactory outcome. Leaving the matter entirely to Parliament and its committees, where errors and confusion reigned in relation to rules and practices, would be both unwise and disingenuous.

It is clear that the manner in which the Assembly, the Speaker and the relevant committees attempted to address the issue of a motion of no-confidence indicated that metaphorically they were at sixes and sevens. This is spelled out by Jafta J in his dissenting judgment.³⁹ In this regard he comments '[i]t is not clear

³⁵ *Id* para 96.

³⁶ *Id* para 150.

³⁷ *Id* para 86.

³⁸ *Id* para 87.

³⁹ *Id* paras 99-102.

why two committees have to perform the same function, one committee after another'.⁴⁰ Also in this regard, in addition to the examples referred to above, the following quotation illustrates the extent of the confusion:

A simple process of tabling a motion for consideration in the assembly has triggered striking errors and ineptitude arising from misinterpretation and misapplication of the rules.⁴¹

This state of affairs set in motion a series of errors.⁴² Moreover, this serves to illustrate the misapplication of the rules in terms of which the motion had already been placed on the order paper.⁴³ What emerges from the reading of the evidence is that the parties did not have a good understanding of the rules under which they operate.⁴⁴

8 Rules, practices and conventions

Jafta J in his dissenting judgment is at pains to point out that both the rules and certain practices were applied to address the notice of motion concerned. So, for example, the judge stated that '[t]he source of this is a practice which is contrary to the rules'⁴⁵ and 't]he present record does not cast any light on why a mere practice was given precedence over the rules'.⁴⁶ It must in this regard be born in mind that in constitutional law, not only in the Westminster system, over time a practice can develop into a convention, which then acquires a normative character.⁴⁷ Although the Constitution of the Republic of South Africa 1996 does not preserve the conventions that operated in our previous constitutions, of 1909, 1961 and 1984 respectively, these may conceivably develop over a period of time. The question then arises as to why the so-called 'mere practice was given precedence over the rules'. Was this because it had acquired the force of a convention? In this regard Davis J in his judgment in the Western Cape High Court states 'I have not been told as to whether a convention exists which trumps my reading of the rule 48 provision, the express wording of the rule notwithstanding'.⁴⁸ Jafta J points out⁴⁹ that the Speaker's affidavit states: 'In the

⁴⁰*Id* para 99.

⁴¹*Id* para 84.

⁴²*Id* para 85.

⁴³*Id* para 100.

⁴⁴*Id* para 102.

⁴⁵*Id* para 101.

⁴⁶*Id* para 102.

⁴⁷See, eg, Wiechers (n 8) 172 in which it is stated that '[i]n Amerika met sy onbuigsame grondwet het daar ook belangrike konvensies ontwikkel ...'.

⁴⁸See *Mazibuko v Sisulu* 2013 4 SA 243 (WCC) para 13.

⁴⁹*Id* para 98.

ordinary course motions go to the programme committee for scheduling after the CWF (Chief Whips' Forum) has come to an agreement'. It can legitimately be asked whether this constitutes an embryonic convention? This is certainly an interesting question to which, at this juncture, no answer can be given and only time will tell, bearing in mind that our Constitution is a dynamic document.

What is however clear is that what Jafta J describes as a 'mere practice', which was 'given precedence over the rules'⁵⁰ was indeed, it is submitted, acting as an embryonic convention, and in so doing obstructed decision-making by the Assembly, thereby immobilising the process. This, it is submitted justified the intervention prescribed in the main judgment.

9 Deadlock and leave to appeal

Jafta J explains that steps were being taken to amend the Assembly's rules and that '[p]ossibly, if the rules committee were quorate on 20th March 2013, the amendments could have been adopted'.⁵¹ This is conjecture and it is submitted that the political will to resolve the problem was manifestly absent and therefore some form of intervention was justified. This was necessary to ensure the accountability of the President and the executive, which is essential for the operation of the Constitution.

Jafta J in his judgment attempts to prove that the rules of the Assembly were not unconstitutional and that merely because the 'speaker has conceded that the rules contain a *lacuna* cannot be a basis for finding that the rules are inconsistent with the Constitution'.⁵² It is submitted that his arguments in this regard are technical and in actual fact there was a very real problem flowing from the confusion relating to the misapplication of the rules and use of certain practices, resulting in a *de facto* deadlock situation that was clearly unconstitutional and it is submitted, required intervention.

Jafta J⁵³ reached the conclusion that 'no purpose will be served by granting of leave ... and therefore it is not in the interests of justice to do so'.⁵⁴ In reaching this conclusion, he refers to *S v Boesak*.⁵⁵ In this last-mentioned case the Constitutional Court held:

⁵⁰ *Id* para 102.

⁵¹ *Id* para 116.

⁵² *Id* para 155.

⁵³ *Id* para 121.

⁵⁴ *Ibid*.

⁵⁵ 2001 1 BCLR 36.

[t]he decision to grant or refuse leave is a matter for the discretion of the Court and, in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the inquiry.⁵⁶

In the light of such reasoning it is surely in the interest of justice to resolve a deadlock in order to ensure that government is accountable. The judge in this regard pointed out that 'what was wrong was the decision to refer it to the programme committee'.⁵⁷ This resulted in the matter being caught up in a quagmire, which in effect constituted a failure on the part of the Assembly, its members and the Speaker to fulfil an obligation, which as indicated above necessitated curial intervention.

10 Conclusion

There was obviously a cogent political dimension to the bringing of a notice of motion by members of seven opposition parties.⁵⁸ The ANC was opposed to this and that is why consensus could not be reached in both the programme committees and the Chief Whips' Forum. It is surprising, therefore, to discover that the opposition parties in the Chief Whips' Forum 'whose majority membership comes from the opposition parties'⁵⁹ contributed, although obviously inadvertently, to the *impasse* since 'on the day the matter was considered by the committee, some members from opposition parties did not attend, even though their parties felt strongly about the motion. As a result the majority of members present were from the ruling party'.⁶⁰

The dissenting judgment of Jafta J catalogues a litany of errors that arose in relation to a 'simple process of tabling a motion of no-confidence for consideration'.⁶¹ Whether the Assembly, the Speaker and the relevant committees, left to their own devices, would have been able to resolve the problems relating to a notice of no-confidence in the President is therefore patently uncertain, and some kind of intervention from the Court can be justified and the arguments against this as set out in the dissenting judgment, regardless of their technical merit, appears to be wanting on pragmatic grounds. This applies to the arguments advanced in relation to the question of separation of powers⁶² and whether the Assembly's rules were unconstitutional.⁶³

⁵⁶ *Id* para 12.

⁵⁷ *Mazibuko* (n 1) para 125.

⁵⁸ *Id* (n 1) para 1.

⁵⁹ *Id* para 85

⁶⁰ *Ibid.*

⁶¹ *Id* para 85.

⁶² *Id* para 134.

⁶³ *Id* para 137 and further.

It is submitted that although the dissenting judgment does not reach the correct conclusion, it does shed light on certain manifest errors and misconceptions⁶⁴ that bedevilled the Assembly and the Speaker in construing and applying the rules in relation to the issues they were confronted with in the tabling of a motion of no-confidence in the President. This should be of considerable assistance to the Assembly in complying with the order contained in the majority judgment.⁶⁵

Lindiwe Mazibuko resigned as a Member of Parliament in April 2014 to take up a scholarship to study public administration in the United States at Harvard University, Boston. She was replaced to study public administration by Mmusi Maimane. After nearly two years in the making, the opposition motion of no-confidence in President Zuma as a leader was eventually brought in March 2015 the National Assembly. As was to be expected it was defeated by 221 to 113 votes.⁶⁶

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⁶⁴*Id* para 150.

⁶⁵*Id* para 84(4).

⁶⁶See 'Zuma survives no-confidence vote with ease' *Times Live* (2015-03-17) (accessed 2015-07-20).