MOTIONS OF NO CONFIDENCE: PARLIAMENT'S EXECUTIVE CHECK *AND* CHECKMATE

Mazibuko v Sisulu 2013 6 SA 249 (CC)

1 *Introduction*

In the chess game that is multi-party politics a motion of no confidence is an important manoeuvre up the sleeve of any member of the legislature in most parliamentary systems. Not only the motion as such, but also the timing of the motion, may be used to the fullest advantage by opposition parties (and, of course, to the disadvantage of the government in power at the time). Recently there has been renewed interest in the mechanism of motions of no confidence following the constitutional court decision in *Mazibuko v Sisulu*. A motion of no confidence is an important feature of the parliamentary procedures of the British Westminster system and it is therefore also an important mechanism in many other parliamentary systems which have been modelled on the Westminster system, including South Africa. Usually a motion of no confidence may be introduced in parliament by any member of the legislature and it would then be debated and voted on by parliament. If the motion is adopted this usually entails that the head of government and his or her cabinet members have to resign, since the executive needs the support of the majority of members in parliament to remain in power. The importance of the mechanism of a motion of no confidence is therefore twofold. Firstly, it is one of the most important legislative control mechanisms to ensure accountability of the executive to the legislature. Secondly, it gives effect to the constitutional principle underlying most parliamentary systems that the executive remains in power only with the support of the majority of the members in the legislature. Unfortunately it seems as if the latter principle could be neglected in favour of the former – the *Mazibuko* judgment being a case in point.

After briefly exploring the historical development of motions of no confidence in British and South African law in order to illustrate the importance of majority

support in parliament for the executive as an underlying principle in these systems, the review relates the facts and findings in the *Mazibuko* case, before the judgment is discussed.

2 *Historical overview: from British to South African law*

Not all parliamentary systems provide for the removal of members of the national executive for political reasons by means of a motion of no confidence. Most systems do at least provide some form of procedure for the removal of members of the executive for non-political reasons, like in cases of a serious violation of the constitution or the law. Historically, the motion of no confidence in English law developed from the latter. In the United States of America, for example, the president cannot be removed via a motion of no confidence, although it is possible to impeach the president for contraventions of the law (Hattersley *A Short History of Democracy* (1930) 210; Rautenbach *Rautenbach-Malherbe Constitutional Law* (2012) 60 135; Tushnet *The Constitution of the United States of America: A Contextual Analysis* (2009) 80).

During the early history of the English parliament (particularly during the fourteenth century) the members of the "cabinet" (then called the permanent council) were only held individually accountable for their actions and could only be ousted for maladministration, corruption and other contraventions of the law through a procedure called impeachment (Prosser and Sharp *A Short Constitutional History of England* (1938) 103-104). This is because the principle of collective responsibility of the cabinet had not yet developed. The first instance in which the English parliament used the procedure of impeachment seems to be in 1376 during the reign of Edward III (Taswell-Langmead *English Constitutional History: From the Teutonic Conquest to the Present Time* (1905) (6th edition by Ashworth (1996)) 223). Though impeachment was extensively used throughout the fourteenth century, its use declined sharply during the fifteenth century and then lapsed completely until it was revived during the seventeenth century due to the renewed power struggle between the executive and parliament during the reign of the Stuarts (Prosser and Sharp 104 138-139; Taswell-Langmead 254 295). By the beginning of the eighteenth century, however, it became clear that merely holding cabinet ministers individually accountable was not enough to "bring the working of the executive into harmony with the will of the legislature" (Prosser and Sharp 171). Up until this time, the only remedy available to parliament against an unpopular government was to pursue a series of impeachments against several cabinet ministers. Parliament found the answer to this strenuous procedure in the principle that requires the king to select from parliament only ministers who enjoy the confidence of the majority in the house of commons. After the development of political parties this implied that the executive had to enjoy the support of the majority party in parliament. However, it was not until the next century that this constitutional principle found its way into constitutional practice and later all but replaced the individual responsibility of ministers (Prosser and Sharp 171).

Most of the developments of the English cabinet government system took place during the eighteenth and nineteenth centuries. Cabinet government during this time was said to rely on three principles, namely that the cabinet should be composed of ministers who enjoy political unanimity; that the ministers should subordinate themselves to the prime minister; and that they should be collectively responsible to parliament (Prosser and Sharp 189). The last principle is particularly important for the purposes of this discussion. Once royal interference in parliament was finally excluded in the latter half of the eighteenth century, the way was open

for collective responsibility of ministers to come into its own and it seems to have become recognised in both constitutional principle and practice by 1801 (Prosser and Sharp 193). Prosser and Sharp therefore conclude with regard to the collective responsibility of ministers:

> "It will be seen that the convention that the whole Cabinet should retire when defeated in Parliament has, in effect, taken the place of the older and clumsier method of impeachment. No longer is it necessary to prosecute the authors of an unpopular policy; they tacitly assent, upon entering office, to surrender their power on what amounts to a resolution of 'No Confidence' if their measures are defeated in Parliament" (193).

The rationale behind this development is obvious: in the British parliamentary system, the executive can govern only in accordance with the measures approved by parliament. Should parliament lose confidence in the executive and rejects the measures proposed by the executive, the executive cannot continue to govern, and has no choice but to vacate office. In later years, governments losing majority support in parliament claimed the prerogative not to resign, but chose to advise the monarch to call an early election in order for the electorate to speak the final word. This seems to have become the practice during the twentieth century. The most recent examples of instances where the government suffered defeats on a no confidence motion were on 8 October 1924 and 28 March 1979. In both instances the government sought the dissolution of parliament for an election rather than resignation (Kelly and Powell *Confidence Motions*, House of Commons Standard Library, Standard Note SN/PC/2873 http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02873.pdf par 2.1 and 2.4 (3-12-2013); Alder *Constitutional and Administrative Law* (2011) 331-332). It should however be noted that since the enactment of the *Fixed-Term Parliaments Act* of 2011, motions of no confidence in British law are no longer regulated by convention. The act represents a major departure from the convention. Section 1 of the act provides for general elections at five-yearly intervals and therefore limits the prime minister's authority to seek the dissolution of parliament for an early election. The act sets out two exceptions to this rule: first, if a motion for an early election is adopted by at least a two-thirds majority in the house of commons; or, second, when a motion of no confidence has been passed and no alternative government has been confirmed by the house of commons within fourteen days by means of a confidence motion (section 2 of the act; Kelly and Powell par 1). It is therefore no longer possible for the government simply to choose between immediate resignation and dissolution of parliament for an election after suffering a successful motion of no confidence. The act more or less abolishes the traditional approach to motions of no confidence and adopts instead the notion of the so-called constructive motion of no confidence one finds in Germany.

A motion of no confidence may be moved and approved by the German *Bundestag*, but the government is not obliged to step down unless the motion of no confidence includes a motion of confidence in a new chancellor (head of government). In a multi-party system characterised by coalition governments, this makes perfect sense, because it avoids the possibility that the government loses majority support without a new coalition enjoying majority support being formed. This also ensures that the country is never without a chancellor in office to perform governmental tasks (Michalowski and Woods *German Constitutional Law: The Protection of Civil Liberties* (1999) 14). This measure is provided for under article 67 of the German constitution and is known as a constructive vote of no confidence. In terms of article 68 of the German constitution it is also possible for the chancellor to initiate a vote

of confidence himself (Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 117). A similar mechanism can be found in section 87 of the constitution of Lesotho of 1993, which provides that the removal of the prime minister by means of a motion of no confidence will be effective only if the national assembly proposes a name of a member of the assembly for the king to appoint as the new prime minister.

As South African constitutional law, and especially the parliamentary structures and procedures, was greatly influenced by English constitutional law, the principle of collective responsibility and motions of no confidence were also introduced and retained in South Africa. In 1853 representative government was introduced in South Africa when a directly elected bicameral parliament was established in the British occupied Cape Colony. In 1872 the principle of responsible government was adopted in that members of the executive authority had to enjoy the support of the majority in parliament (Rautenbach 13-14). After the British parliament adopted the South Africa Act of 1909 and South Africa became a union in 1910, the principle that the cabinet needed the support of the majority in the house of assembly was retained and applied along with the existing British constitutional conventions on the relations between the monarch, the prime minister, the cabinet and the lower and upper houses of parliament (Rautenbach 14). When South Africa became a republic in 1961, the only real change that was introduced in terms of the Constitution of the Republic of South Africa Act 32 of 1961 was that the British monarch was replaced as head of state by a ceremonial State President – the functioning of parliament and the relations between the executive and the legislature were kept unchanged (Rautenbach 15). Under the Constitution of the Republic of South Africa Act 100 of 1983 the ceremonial office of state president and the office of prime minister were combined in one office of executive state president, but the principle of government through majority support in parliament was again retained (Rautenbach 16). Likewise, after South Africa became a democracy, the principle was retained in both the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) and the current Constitution of the Republic of South Africa, 1996. Section 102 of the present constitution provides:

> "(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."

It is not entirely clear why two separate provisions were deemed necessary. It seems rather improbable that the national assembly would adopt a motion of no confidence in the cabinet, but exclude from it the president, who chairs the cabinet and has appointed all the cabinet members. It is nevertheless clear from section 102 that in South African law, as in English law, a motion of no confidence not only acts as a check on the executive but is also the only way that the legislature can remove an unpopular government before its term expires.

3 *The judgment*

3.1 Facts

The facts of the case before the constitutional court are as follows. The leader of the opposition in the national assembly, Mazibuko, (the applicant), gave notice

on 8 November 2012 of a motion of no confidence in the president by tabling the motion in parliament in terms of rule 98(1)(*a*) of the rules of parliament (par 7, 96). Consideration of the motion was however made conditional to the motion being scheduled for debate by the programme committee, which is apparently a practice followed by the national assembly in respect of any motion but which is not provided for by the rules (par 96). Before referring the motion to the programme committee, however, it was first referred to the chief whips' forum, and after reaching no consensus on the scheduling of the motion for debate and a vote in the assembly, the forum referred the motion to the programme committee (par 8, 97). Again, the referral of the motion to the chief whips' forum is not provided for by the rules, but is the practice followed by the national assembly (par 97). The programme committee also failed to reach consensus on the scheduling of the motion – with the result that the motion was not scheduled for debate in the assembly (par 10). The applicant subsequently delivered a letter to the chief law advisor in parliament demanding that the speaker make a decision, in terms of rule 2(1) (which authorises the speaker to fill a *lacuna* in the rules – see par 3.2.1), as to the tabling of the motion and that the speaker should take all necessary steps to ensure that the motion be tabled for debate in parliament on or before 22 November 2012 (the last sitting day of parliament for that year) (par 11). The state attorney acting for the speaker informed the applicant that no response could be furnished on behalf of the speaker before 19 November 2012 (par 12). The applicant then brought an urgent application in the high court for "final interdictory relief" in the form of an order directing the speaker to take the steps necessary for the motion to be scheduled for debate and a vote in the assembly before or on 22 November 2012 (par 13). Although the high court conceded the importance of the applicant's right to move a motion of no confidence (*Mazibuko v Sisulu* 2013 4 SA 243 (WCC) 255), the court dismissed the application on the grounds that rule 2(1) did not confer on the speaker the power to schedule a debate of a motion of no confidence or to resolve a deadlock in the programme committee (par 16-17). The applicant subsequently brought an application in the constitutional court for leave to appeal directly against the judgment of the high court, or in the alternative, an application for direct access to the court for a declaratory order that the rules relating to the tabling of motions of no confidence are inconsistent with the constitution (par 5).

3.2 Majority judgment

The constitutional court was divided on the issues, giving rise to a majority judgment supported by seven members of the court, and a minority judgment supported by four members. The four most important issues identified by the court were, firstly, whether the speaker had the power to schedule the motion of no confidence on his own authority in terms of rule 2(1) of the rules of parliament; secondly, whether the rules were inconsistent with the constitution to the extent that they did not fully provide for the consideration of motions of no confidence by the national assembly as envisaged in section 102(2); thirdly, whether it was necessary for the court to make a ruling at all in the light of the fact that the rules committee was in the process of reviewing the rules regarding motions of no confidence; and, fourthly, whether parliament's failure to provide rules for the moving, scheduling, debating and voting on motions of no confidence amounted to a failure to fulfil a constitutional obligation as envisaged by section 167(4) of the constitution (par 3).

3.2.1 Does the speaker have the residual power in terms of rule 2(1)?

The court argued that rule 2(1), which provides that the speaker may "give a ruling or frame a rule in respect of any eventuality for which the rules do not provide" (par 26), should not be interpreted to include the scheduling of motions as this issue is already extensively regulated by rules 187-190 and the task of scheduling already rests with another body in terms of the rules, namely the programme committee (par 28). Furthermore, the court said that the rule is permissive, and therefore does not oblige the speaker to take a decision in this regard (par 29). The court concluded that even if the speaker should take a decision in terms of rule 2(1), the assembly has the power to override this decision in terms of section 57(1) of the constitution, which determines that the assembly has the power to determine its own internal arrangements, proceedings and procedures and may make rules and orders concerning its business (par 31). The court accordingly held that on a proper reading of rule 2(1), the speaker does not have residual power to schedule a motion of no confidence in the president for debate and vote in the assembly (par 32).

3.2.2 The constitutional validity of the rules

The second issue before the court was whether the rules of parliament were inconsistent with the constitution to the extent that they did 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 debate and vote as a matter of urgency" (par 33). As quoted above, section 102(2) of the constitution provides that if the national assembly, by a majority vote, passes a motion of no confidence in the president, the president and the other members of the cabinet as well as the deputy ministers must resign. The court stated that the rules entrusted the programme committee with the authority to decide whether, if at all, a motion of no confidence should be scheduled for debate in the assembly (par 48). It should, however, be noted that this procedure is not expressly provided for by the rules, and that the referral of any motion to the programme committee (or the chief whips' forum for that matter) after it has been put on the order paper is likewise not a procedure provided for by the rules, but is an informal practice adopted by the assembly. Similarly, the decision-making procedure in the programme committee provided for by rule 129(2)(*d*), also differs from the procedure followed in practice. Rule 129(2)(*d*) provides that the committee takes decisions by majority vote, and in the event of an equality of votes, the chairperson has a casting vote. The procedure in practice, however, is that the committee takes decisions by consensus – therefore in practice there is no remedy when deliberation in the committee reaches a deadlock (par 50). The court, however, agreed with the high court that the inconsistency between the rules and the practice of the assembly is irrelevant, since both could still lead to results contrary to section 102(2) – the majority could either vote against the motion being scheduled, or the majority (or even the minority) could frustrate the reaching of consensus on whether or when the motion should be scheduled (par 51 and 57). Furthermore, the court stated that the importance of motions of no confidence entailed that such a motion "cannot be left to the whim of the majority or minority in the programme committee or any other committee of the assembly", that this would detract from the "vital purpose of section 102(2)" and that scheduling of the motion should therefore be decided by the assembly itself (par 57 and 58). The court also concluded that if the drafters of the constitution wanted a motion of no confidence to be conditional on political negotiation, lobbying or bargaining between the parties of the assembly, they could easily have included this in the constitution – which they did not do (par 57).

This approach is consistent with an earlier judgment of the court in *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* (2012 6 SA 588 (CC)), where Mogoeng CJ, writing for the majority on the validity of rules of the assembly that allegedly inhibited an individual member's power to initiate legislation, stated: "The validity of the Rules depends on whether they recognise and facilitate the exercise of the individual member's powers …" (par 66). The court concluded that the rules were indeed inconsistent with the constitution, and therefore invalid, to the extent that neither the rules, nor the actual practice followed by the programme committee, provided for effective decision-making or for deadlock-breaking mechanisms with regard to the scheduling of motions of no confidence (par 61-62). The absence of such mechanisms therefore infringed on the exercise of the powers of members of the assembly in relation to the scheduling, debating and voting on motions of no confidence (par 61-62). In the event, the court ordered that its declaration of invalidity be suspended for six months to allow the assembly to correct the *lacuna* in the rules (par 72).

3.2.3 Should the application have been refused because the assembly is supposed to be in the process of correcting the defect?

The speaker contended that because the assembly was in the process of amending the rules regarding motions of no confidence, the court need not make an order in this regard, since any determination by the court would then infringe on the separation of powers "in light of the ongoing negotiations within the assembly" (par 67). The court, however, indicated that more than three months before the trial the speaker was directed to furnish the court with a report on progress made with the negotiations and the amendment of the rules relating to motions of no confidence, and although two reports were furnished before the commencement of the trial it was clear from the reports that no consensus had been reached at that time as to the possible content of any revised rules (par 68). The court therefore found that because of this lack of consensus it was unlikely that the *lacuna* in the rules would be resolved if the court did not make a ruling in this regard (par 69-70). Furthermore, the court argued that a declaration of invalidity is not discretionary and that once the court has found that certain rules are indeed unconstitutional they must be declared invalid (par 70). The court also dismissed the speaker's contention that any ruling made by the court in this regard would infringe on the separation of powers doctrine, since the court would not be imposing rules on the assembly or interfering with the negotiation process within the assembly, but would rather only make an order requiring the assembly to correct the *lacuna* in its rules, which does not effectively vindicate a member's entitlement to move a motion of no confidence (par 71).

3.2.4 Has parliament failed to fulfil a constitutional obligation in terms of section 167(4) of the constitution?

Section 167(4) lists six instances with regard to which the constitutional court has exclusive jurisdiction. In terms of section 167(4)(*e*) the court has exclusive jurisdiction to determine whether parliament or the President has failed to fulfil a constitutional obligation. Section 167(4)(*e*) is described by Rautenbach (178) as "a rare example of poor draftsmanship in our constitution and the constitutional court has not yet succeeded in finding a plausible explanation for what it means in order to preclude unnecessary litigation". (See also *Women's Legal Centre Trust v President of the RSA* 2009 6 SA 94 (CC).) The court, again, steered away from

tackling section 167(4)(*e*) and expressly refrained from deciding whether section 102(2) placed a constitutional obligation, as envisaged by section 167(4)(*e*), on the assembly regarding the provision of rules to give effect to the moving, scheduling, debating and voting on motions of no confidence by members of the assembly. The court therefore ruled somewhat lamely that the determination of this issue "must wait for another day" (par 74).

3.3 Minority judgment

In the minority judgment Jafta J arrived at the opposite conclusion with regard to the validity of the parliamentary rules and proceeded by emphasising the need for political issues to "be resolved at a political level" (par 83). The minority indicated that the simple action of tabling the motion of no confidence triggered a "series of errors", primarily due to the assembly's "misapplication of one rule and its failure to apply another" (par 85). These "errors" refer to the referral of the motion first to the chief whips' forum and then to the programme committee, which was not provided for by the rules, and the subsequent deadlock in both bodies but without the assembly following the prescribed procedure to resolve such deadlock. The misapplication referred to by the minority could, however, be found in the fact that motions are tabled according to a procedure prescribed in rule 98. Rule 98 provides that "[w]hen giving a notice of motion a member shall – (a) read it aloud and deliver at the Table a signed copy of the notice; or (b) deliver to the Secretary a signed copy of the notice on any Parliamentary working day, for placing on the Order Paper" (par 93). Therefore, the minority judgment found that after the reading of the motion, or the delivery of the signed copy to the secretary, the motion is already on the order paper and there is therefore no point in referring the motion to the programme committee to debate whether to place it on the order paper or not (par 100).

The minority also agreed with the high court and the judgment of the majority that rule 2(1) did not confer on the speaker the power to make a ruling or frame a rule with regard to motions of no confidence, since the tabling of motions was already extensively regulated by other parliamentary rules (par 106).

The minority, however, also considered whether parliament failed to fulfil a constitutional obligation in terms of section 167(4)(*e*) by not giving effect to section 102(2) as alleged by the applicant – an issue which the majority expressly refused to consider. The minority argued that section 102(2) only gives the assembly the authority to pass a motion of no confidence in the president, and does not impose an express duty on the assembly to perform a specific function or to act. Therefore, the minority concluded that this provision does not create any obligation on the legislature to facilitate an individual member's power to move a motion of no confidence (par 125).

As to the constitutionality of the rules the minority argued that the applicant did not properly identify the rules which she claims are unconstitutional and it was accordingly impossible for the court to determine the constitutionality of unidentified rules (par 138-141). According to the minority this "defect in the applicant's papers is fatal to the claim" (par 138). The minority therefore concluded that there was no *lacuna* in the rules, since the rules expressly provided for a deadlock-breaking mechanism which the programme committee chose not to follow, and that even this was wholly irrelevant since the motion should not have been referred to the committee in the first place (par 153-154).

4 *Discussion*

4.1 The majority judgment

Some observations may be made in respect of the *Mazibuko* judgment. With regard to the majority's argument on whether rule 2(1) gave the speaker the power to schedule a motion of no confidence or create a new rule where the rules did not make provision for a certain eventuality, it is unclear how the court could conclude that the speaker did not have the power to intervene in this case. If it is accepted, as the court indeed found, that there is a specific *lacuna* in the rules with regard to the scheduling of motions of no confidence, it does not make good sense that the court still concluded that the speaker did not have the power under rule 2(1) to create a rule for an eventuality for which the rules clearly do not make provision. The fact that the assembly may later override the speaker's rule is no indication that the speaker does not have such a power; instead it points to the temporary (even subordinate) nature of the speaker's rule made under rule 2(1), which is actually a confirmation of the speaker's power under this rule. If the national assembly would have wished to overrule the speaker's exercise of the rule 2(1) power, it would have entailed a motion to that effect and a subsequent debate in the national assembly, not only on the exercise of the speaker's power, but also by implication on the scheduling of the motion of no confidence – which would have been a good way of determining the mood of parliament regarding the motion of no confidence. The other reasons given by the court for its ruling on the rule 2(1) power are equally unconvincing. There is no rational basis for reading the word "any eventuality for which these rules do not provide" in rule 2(1) so narrowly that they exclude the possibility of a speaker's rule on dealing with motions simply because motions are already dealt with elsewhere in the rules. If it is then found, as the court did, that there is a *lacuna* in respect of those rules on motions, that surely constitutes "an eventuality for which these rules do not provide".

The court itself stated that "the rule [rule 2(1)] is meant to cover matters not dealt with in the rules". Surely a *lacuna* qualifies as a matter not dealt with in the rules. It is also immaterial that rule 2(1) confers on the speaker a discretionary power and not a duty. An order as requested in this case to perform a particular function falls squarely within the scope of section 8 of the Promotion of Administrative Justice Act, 2000, which provides inter alia that a functionary can be ordered by a court of law to perform a certain action or take a certain decision. In short, a mandamus can typically be employed to compel a functionary to exercise a power, not only to fulfil a duty. Refusing such an order in this case on the ground that rule 2(1) confers on the speaker a discretionary power and not a duty is therefore extremely thin and unconvincing. Given its reasons for its finding, it seems as if the court was unnecessarily protective of the speaker with respect to the rule 2(1) power.

In respect of the so-called *lacuna* in the rules it seems the *lacuna* is located not so much in the absence of decision-making and deadlock-breaking procedures in the programme committee either in theory or in practice, but rather in the absence in the rules of any express procedures that should be followed when a motion of no confidence is moved by a member of the assembly. The reasons for this are twofold. Firstly, in light of the constitutional importance of motions of no confidence in the South African parliamentary system and the far-reaching consequences that it could have for the president and the cabinet, provision should expressly be made to regulate the scheduling, debating and voting in respect of such motions, as has been done in many other jurisdictions, rather than treating it like an ordinary motion. The court itself pointed out that the emphasis on the importance of motions

of no confidence is also consistent with the approach to these motions in many other jurisdictions, including India, Canada, Australia and the United Kingdom, all of which have express rules regarding such motions. In Australia, for example, motions of no confidence have priority over all other business of the house until they are disposed of (par 46 and footnote 34). In India, rule 251 of the Rules of Procedure of the Delhi Assembly provides that a motion of no confidence may be introduced only with the consent of the speaker. If the speaker is convinced that the motion is in order under the rules, he or she must read the motion to the house and must then request that the members who are in favour of debating the motion to rise in their places – if at least a fifth of the members are in favour of the motion the speaker may allot a day or days for the motion to be debated (Delhi Assembly commentary on rule 251 of the Rules of Procedure of the Delhi Assembly, http://delhiassembly.nic.in/NoConfidenceMontion htm, (3-12-2013)). Section 187 of the constitution of the Bolivarian Republic of Venezuela of 1999 provides that if a motion of censure is moved against the executive vice president and the ministers it must be debated two days after the motion has been submitted to the assembly.

Secondly, one should read the express authorisation in section 102(2) together with section 55(2)(*a*) of the constitution, which states that the assembly must provide for mechanisms to ensure that executive organs of state in the national sphere of government are accountable to it. This means that it is not optional for the assembly to create mechanisms relating to motions of no confidence as this is an extremely important check on the president and the members of the cabinet. When read together, these sections clearly impose a duty on the assembly to give effect to these provisions and this is the real reason why the rules are inconsistent with the constitution. Once it is accepted, though, that section 102(2) read together with section 55(2)(*a*) imposes this duty on parliament, it is a mystery why the court did not take the opportunity to pronounce on the question whether parliament in this case failed to fulfil a constitutional obligation in terms of section 167(4)(*e*) of the constitution.

Although the court emphasised the importance of motions of no confidence and described it as "the most important mechanism that may be employed by parliament to hold the executive to account, and to interrogate executive performance" (par 44), this checking function is only one of the functions of motions of no confidence. As indicated earlier, the second and possibly the main purpose of motions of no confidence developed from the principle in most parliamentary systems that the executive needs the support of the majority in the legislature to remain in power. It is therefore the only way of determining whether the executive still enjoys the support of the majority, and if not, of removing the executive before its term of office expires. There are many checks on the executive, motions of no confidence being one of those checks, but a motion of no confidence is the only political and constitutional mechanism by which a government's term may be terminated before the next election. Unfortunately, in the *Mazibuko* case the court missed an important opportunity to bring greater clarity on this, second, crucial constitutional function of motions of no confidence.

4.2 The minority judgment

One cannot readily agree with the minority's observation that the issue in this case was purely a political one and should therefore be dealt with at a political level, since the issue in this case was the correct interpretation, application and possible unconstitutionality of the rules of parliament regarding motions of no confidence

and not the timing or the merits of such motions. What the minority also apparently fails to grasp is that it is one thing for a member of parliament to place a matter on the order paper, but quite another to succeed in having the matter debated in the assembly. The mere fact that a matter has been placed on the order paper does not automatically mean that it will be scheduled for a debate in the assembly – someone still has to decide if and when that matter will ever be scheduled for a debate. The minority's attitude that "everything is fine and well because the motion of no confidence was placed on the order paper and will remain on the order paper until it lapses at the end of the session" is untenable. This may be acceptable for normal day-to-day government business, but not in the case of motions of no confidence.

One can also not readily agree with the minority's argument that section 102(2) does not impose a duty on the legislature to create rules that facilitate motions of no confidence. Many provisions in the constitution do not expressly describe the duties imposed by those provisions, but it cannot be said that these provisions do not create duties nonetheless. If the minority's argument were true it would mean that the constitution authorises the legislature to act as a check on the executive, but then does not require the creation of a procedure to facilitate, and even exercise, this control function – effectively leaving the executive unchecked. Constitutional provisions could not possibly be interpreted to give rise to unenforceable powers. Furthermore, if one reads section 102(2) with section 55(2)(*a*) it is clear that these provisions do indeed impose a duty on the legislature to create mechanisms to keep the national executive accountable to the legislature.

The minority's argument that the court could not determine the constitutionality of the rules because the applicant failed to identify the offending rules is incomprehensible. Since the unconstitutionality of the rules in this case relied on the *absence* of a rule to sufficiently provide for motions of no confidence and not on the *existence* thereof, it is difficult to see how the minority could require the applicant to identify a non-existent rule.

5 *Conclusion*

The majority judgment is correct in that the resolution of the main issue in the *Mazibuko* case lies in formulating an express provision to regulate the moving, scheduling, debating and voting on motions of no confidence in order to give effect to the powers of members of parliament in respect of motions of no confidence. In the second report that the speaker submitted to the court on the progress of the negotiations on the amendment of the rules, the latest draft of the rule formulated to regulate motions of no confidence already addressed some of the most problematic issues relating to these motions, although no consensus was reached on the draft at the time (par 115). The draft rule for instance provides that a motion of no confidence must be scheduled for debate and a vote within a reasonable time, but not later than twelve parliamentary working days from the scheduling of the motion and, if the motion cannot be scheduled before the last sitting day of the session, it must be scheduled for consideration as soon as possible in the next annual session (footnote 60). This is a mandatory provision. However, to avoid frivolous and vexatious motions, the speaker has a discretion to schedule another motion of no confidence in the same session after having considered whether during the same session a motion was brought on the same or materially similar grounds and was rejected by the assembly (footnote 60). This discretionary power of the speaker is obviously aimed at the prevention of any abuse of motions of no confidence by minority parties. A possibility that may also have some merit is to introduce a constructive motion of

no confidence in the South African system, as has been done in terms of the British *Fixed-Term Parliaments Act* of 2011. A requirement that a successful motion of no confidence only becomes effective if it is followed by a motion of confidence in a new government will surely also weed out frivolous motions of no confidence. Such an innovation, which probably requires an amendment to section 102 of the constitution, may, however, change the dynamics of the relationship between the legislature and the executive, causing motions of no confidence to lose some value as an imminent mechanism to keep the government accountable.

In the South African parliamentary system motions of no confidence are a special constitutional mechanism regulating the relationship between the legislature and the executive. Adoption of such a motion has serious implications for a government's staying in power. In order to give effect to the provisions of the constitution in this regard, motions of no confidence should neither be abused nor equated to mere ordinary motions and should rather be given their rightful recognition and constitutional protection – not only as a check on the executive but also as parliament's ultimate checkmate of the executive.

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***RELIGIO* – CONSCIENTIOUS EXACTNESS**

"Legal texts are like the Bible. You have to read and read them again" – Herman Cousy *Sharing Some Thoughts and Smiles* (2012) 26 noting the close relation between "religion", "religare" (to tie or to fasten behind) and "relegere" (to re-read or go over the text again).