

**Déjà Vu FOR SOUTH AFRICA  
CONSTITUTIONAL DEMOCRACY: HAVE  
THE PRESIDENTIAL VOTE OF NO  
CONFIDENCE CHICKENS COME HOME TO  
ROOST?**

**By: Vuyani Ngalwana**

In 16 April 2017, a piece titled "**Zuma Must Fall. But At What Cost?**" was published in one of South Africa's national Sunday newspapers. It drew wide interest, I suspect more for its title than for its content.

I was the author.

I remember receiving a call from a senior member of the ruling party (now a "stalwart") and another from a prominent black businessman, both commending me for the piece. I listened with astonishment as each of them bemoaned the "state of the country" at the time (I think the "stalwart" was on the National Executive Committee of the ruling party; but I cannot be sure) thinking "*but you guys are in a far better position than I to turn the ship around with more than just broody articles in national Sunday newspapers.*"

The main theme of that piece was somewhat of a cautionary tale: Be careful of devising a special mechanism in Parliament just to get rid of one specific president, whatever his faults, lest that precedent comes back to bite you when rogues conspire to get rid of a much-loved president in future, using the same mechanism that was not meant for him.

It is now hardly 4 years since that warning, and we are back where we were then: a President facing a vote of no confidence tabled by a minority political party in Parliament for arguably impeachable infractions. It is reportedly scheduled for next week Thursday, 3 December 2020. *Déjà vu.*

The speaker of the National Assembly has already rejected the idea of a secret ballot in the

no confidence vote against this President. It's a decision that seems more like flexing than, as the Constitutional Court has ruled, appeals to rationality. After all, the party that has tabled this motion comprises all of only two seats in the National Assembly and does not seem to have done its homework. Will it seek succour in what should be the beckoning arms of the Constitutional Court early next week (if that court's decision in [United Democratic Movement v Speaker of the National Assembly and Others \(CCT89/17\) \[2017\] ZACC 21; 2017 \(8\) BCLR 1061 \(CC\); 2017 \(5\) SA 300 \(CC\) \(22 June 2017\)](#) ["**the Secret Ballot case**"] is any indication), or will it meekly succumb to being bullied by the ruling party in the form and shape of the Speaker of the National Assembly who should be impartial but whose impartiality in matters of this sort seems, at best, in doubt?

For the sake of testing the South African Constitutional Court's consistency, it is hoped that the African Transformation Movement (the minority party that has tabled the motion) does approach that court, and pleads a proper case. I want to see something. If it doesn't, it will have missed an opportunity either to strengthen our constitutional democracy or to expose its shallow foundations.

Because we've been here before, I thought it fitting to revisit the April 2017 piece as a reference point to what may, or may not, happen in the next week. Many will no doubt see no parallels. But those are probably people who would deny theft by their man even if they saw him walk into a bookshop, tell them he intends stealing a book, take the book and walk out without paying for it. "*He was just borrowing it*", they'd probably say in his defence. I am not too bothered by those. Rationality is my lodestar. Viewed objectively, the parallels between April 2017 and November 2020 are, in my assessment, inescapable.

Here is the piece. I invite you to make up your own mind about what happens next in a potential **ATM v Speaker** constitutional challenge. Later, I identify some of the relevant factors in votes of no confidence.

So, in April 2017, I wrote:

### **"Zuma Must Fall. But At What Cost?"**

*Let me make this absolutely clear as my point of departure. President Zuma Must Fall. His entire cabinet must fall, too. So, too, the ruling party. But at what cost? This is the question I seek to answer in this opinion piece.*

*Let me make another point crystal clear. I support none of the rumoured ruling party factions. I don't subscribe to the WMC narrative. I am not a Pravin Gordhan fan either. In fact, I welcome his dismissal as Finance Minister; whatever the motivation does not interest me.*

*I stand for the unapologetic Transformation of this economy. For me, Transformation means "change for the better", not substituting black monopoly capital for white monopoly capital. These are equally abhorrent to me. Change for the better means a more inclusive economy, where South Africans of all races and both genders who work hard and earn an honest living are afforded fair opportunities to realise their potential and thrive in their endeavours through their industry.*

*But such Transformation cannot ignore the egregious effects of apartheid on black people in particular. Even our supreme law, the Constitution, acknowledges this and calls for legislative and other measures to be taken that are designed to protect and advance black people as they were disadvantaged by unfair discrimination.*

*The Constitutional Court has endorsed this Transformation jurisprudence in at least 5 judgments beginning in 2002.*

*With that hopefully cleared up, I have these past two weeks been wondering whether the very vocal people baying for this President's blood – almost at any cost – have any idea what they are asking for, and what they will do with it if they get it. Let me explain.*

I have learnt in the media that an opposition political party of a handful of members in the National Assembly has approached the Constitutional Court directly to seek an order directing the Speaker to decree that a vote of no-confidence in this President be done by secret ballot. The rumoured basis for this is that ruling party MPs may feel intimidated by their party and not vote freely in favour of the motion of no-confidence in their President.

If this is the relief that is sought from the Constitutional Court and it is granted, I believe that our constitutional edifice will be in grave peril. Here is why.

First, I know of no provision in the Constitution that confers upon a court the power to instruct Parliament on how to conduct its business. In fact, the Constitutional Court acknowledged this in unmistakable terms only last year [in 2016] in the Nkandla judgment when it said:

**“It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon. . . . Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil**

**responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.”**

[Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016) at para 93 ("EFF 1")

The rules of Parliament confer a discretion on the Speaker as regards the mechanics of how Parliament can go about fulfilling its constitutional obligations. So, if the Constitutional Court were to order a secret ballot as a mechanism for the vote of no-confidence in this president, would that not be an encroachment on the powers of the Speaker and, by extension, Parliament?

Second, it is reported that the Speaker's response to the application is that she has no discretion to allow a vote of no-confidence by secret ballot. That, in my view, appears to be an incorrect appreciation by the Speaker of her powers because rule 103 of the Parliamentary rules clearly confers that discretion upon her.

Third, it is one thing for a court to compel a decision-maker to exercise her discretion judiciously; it is quite another to compel her to exercise it in favour of the particular wishes of a litigant. The former is perfectly permissible and happens often. The latter seems to me impermissible as the court may as well make the decision for the decision-maker and be done with it all. That, in my view, would be the beginning of the end for separation of powers.

Fourth, many South Africans – some for honest and patriotic reasons, others for disingenuous and politically convenient reasons – want

President Zuma gone. I, too, want him gone because he is in my view not an ethical leader. But a vote of no-confidence in the president has failed at least twice or thrice in Parliament ostensibly because ruling party MPs are not keen to vote openly against their president – and themselves. So, the opposition runs to court to change the voting mechanism in the hope (and nothing more) that the result may be different this time around.

This, in my view, would be a corruption of our constitutional system. We should be careful of running to court to change the rules in order to remove one president. What happens when a good, ethical and well-loved president is under siege by his own party eager to remove him anonymously so that party apparatchiks can loot state resources without hindrance from a frugal president? Will we rush to court to have this judgment set aside as being inconvenient, arguing it was meant for Zuma?

Fifth, if Parliamentary rules or the empowering legislation or the Constitution is an impediment to the removal of a corruptly propped up president, does the appropriate remedy not lie in an amendment of the rules or the legislation or the constitution, instead of a scorched earth approach that potentially has constitutionally disastrous implications for short-term political gain?

Sixth, and on a pragmatic level, even assuming the Constitutional Court grants this order, the Constitution requires not only the president but also his entire cabinet and deputy ministers to resign in the event of a successful vote of no-confidence. Which of the 70-odd ministers and deputy ministers, and their hangers-on in Parliament, will vote themselves out of a job by secret or any form of ballot? Is the constitutionally questionable gambit worth the not-so-guaranteed prize?

We must face the truth and our own demons. The majority of us made this Zuma bed. We must now lie in it. We knew what president Zuma's shortcomings were when we voted for the ruling party knowing full-well he was to be

president. At that time many of us were eager to rid ourselves of a president we considered "aloof" and "arrogant" and "too clever". We got what we desired in his place, proudly pronouncing him an "unstoppable tsunami". Now that he lives up to our expectations, we want to drag the Constitutional Court into a political problem of our own creation to change the rules in order to remove him.

This is wrong. That it is targeted against a president with a phobia for Trevor Manuel's "**amorphous markets**" does not make it right."

That was in April 2017.

Two months later, the Constitutional Court declined to command the Speaker to order ballot by secret means. It ruled that the Speaker has a discretion to direct the conduct of the no-confidence vote in President Zuma by secret ballot, and that the discretion must be exercised rationally [[United Democratic Movement v Speaker of the National Assembly and Others \(CCT89/17\) \[2017\] ZACC 21; 2017 \(8\) BCLR 1061 \(CC\); 2017 \(5\) SA 300 \(CC\) \(22 June 2017\)](#)] ("**the Secret Ballot case**"). Now that we have a President who is yet to lose a case in our courts - in my view despite legal odds in some cases - will the Constitutional Court follow its own principles as laid down in its decision in the **Secret Ballot case**, or will it apply a different standard on the merits or avoid the difficult questions altogether?

The answer to these questions can only be triggered by a constitutional challenge to the Constitutional Court directly.

Some take-aways from the **Secret Ballot case** as regards applicable principles and relevant considerations for the Speaker in the exercise of her decision regarding whether a secret ballot is appropriate in the circumstances include the following:

- The voting procedure in no confidence votes 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 - **para 83**

- 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 - **para 88**
- 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 - **para 88**
- Whether the prevailing atmosphere is generally peaceful or toxified and highly charged, is one of the important aspects of that decision-making process - **para 88**
- Both possibilities of an open or secret ballot are constitutionally permissible in motions of no confidence. 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. And the Constitution would have made it clear that voting would always be by open ballot - **para 60**
- 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, the occasion on which 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 - **para 68**
- 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? - **para 75**

- The appropriateness of a voting procedure for a motion of no confidence 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 - **para 76**
- A political party virtually determines who goes to Parliament and who is no longer allowed to represent it in Parliament. 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 - **para 76**
- Almost invariably the President – although not a Member of Parliament – is the leader of the ruling party. 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 - **para 76**
- Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. 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 the people and do only what is in their best interests must prevail - **para 79**
- 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 - **para 80**

- Openness is one of our foundational values. And the National 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. 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 - **para 80**
- 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 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 - **para 81**
- 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 - **para 82**

All these principles are important. But the Constitutional Court's observations in paragraphs 81 and 82 – regarding **“money or oiled hands determining the voting outcome”**, and the voting process degenerating into a **“fear or money-inspired sham”** – are particularly chilling, especially with the ever-looming spectre of the firmly sealed records of donations to this President's 2017 election campaign in which records the names of many Members of Parliament – both those of his own party and those of opposition parties – could be featuring prominently, and likely to vote gratitude to the President for the largesse s/he may have received than conscience. At least two members of the second largest opposition party in the National Assembly have already be outed as having been recipients of the President's campaign donations largesse. Who else remains? We, the public, that these public representatives are supposed to be representing in the National Assembly do not know. And so the vote of no confidence in this President, if done openly, could degenerate into a **“fear or money-inspired sham”** as each MP beneficiary fears being seen breaking factional rank. This would be sacrilegious to a constitutional democracy.

It is hoped that the African Transformation Movement will approach the Constitutional Court with a properly pleaded challenge to the Speaker's petulant push-back against a secret ballot vote, so that South Africa can see, once and for all, whether the same set of laws in materially similar circumstances receives one interpretation in relation to one President, and another in relation to another.

That the motion will likely fail - whether by secret ballot or not - is not in doubt. The question for me is whether the Constitutional Court will dare overrule its own earlier judgments and interpretations, or avoid that collision by dismissing a direct access application, for the sake of one man. Whatever the Constitutional Court's approach - assuming the African Transformation Movement approaches it - THAT will tell us everything we need to know about the state of our constitutional democracy.