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The constitutional-legal dimensions of coalition politics and government in South Africa

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The South African constitution does not contain specific provisions regulating the formation and functioning of coalition governments in the national, provincial and local spheres of government. Neither does ordinary legislation contain such specific regulatory provisions. However, the constitution establishes a hybrid version of the system of parliamentary government,[1] which applies at the national, provincial and – with slight variations – local government level, and the choice of this system has important consequences for how coalition governments are formed and how they operate (Dodd, 2015: 4).

In a system of parliamentary government, executive power resides in the head of the executive and their cabinet (at the national level) or executive committee (at other levels). The cabinet or executive committee is usually appointed by the head of the executive from the members of the legislature. The cabinet or executive committee is

held accountable to and can be removed by the parliament, provincial legislature or municipal council. While the head of the executive and their cabinet or executive committee retain the confidence of the legislature, they wield considerable power (Dodd, 2015: 4).

Where support for the executive by the legislature is in doubt or vulnerable to sudden shifts in loyalty by legislators of different political parties, government tends to be less stable and less able to wield its power decisively. Because the head of the executive can be removed from office by the relevant elected legislative body, the system of parliamentary government impacts directly on how coalition governments are formed and how stable they are (Cheibub et al., 2004: 566). It has been claimed that 'the parliamentary system will give a country strong and efficient government only [in cases where] the majority consists of a single party' (Lowell, 2013: 70; Dodd, 2015: 7). While this overstates the case, parliamentary systems in which no party enjoys a legislative majority do tend to be more unstable and less long lasting than systems in which the head of the executive is separately elected (Dodd, 2015: 11).

In this chapter I explore this issue with reference to the South African version of parliamentary government, at a time when the electoral dominance of the governing party appears to be on the wane and the likelihood of no one party obtaining an absolute majority in the various legislative bodies at the national, provincial and especially local government level is increasing (Götz et al., 2016). As the life of the government in a parliamentary system of government is literally dependent on the will of the majority of elected representatives – but perhaps, to some extent, also on the will of the political party leaders (Dodd, 2015: 5) – a situation where no party obtains a majority of seats in the relevant legislature potentially leads to a more unstable government than in systems in which the head of the executive is directly elected by the electorate. This is because in hung legislatures more than one party will have to work together to elect the head of the executive, to pass legislation, and to ensure its long-term ability to govern effectively, and to survive. This suggests that the stability of the government will formally depend on the whims of the elected representatives of political parties in a legislative body, although, in fact,

it is more likely to depend on political party leaders who, for various reasons discussed in this chapter, retain considerable control over the conduct of their elected representatives. The situation in South Africa has, however, been clouded by two Constitutional Court judgments, which have the potential to weaken the grip of party leaders on their elected representatives in various legislative bodies, thus injecting a further element of uncertainty into the mix. This is because it can no longer be taken for granted that all the elected representatives of a party will always follow the instructions of party bosses on when to support legislative initiatives, or, more importantly, when to support a vote of no confidence in any of the incumbents.

I conclude that the current constitutional and legal architecture regulating the establishment and functioning of government in the national, provincial and local spheres in South Africa, read with the relevant Constitutional Court judgments, leave coalition or minority governments vulnerable, as they are at the mercy of the whims of elected representatives and political party leaders and, to a lesser extent, of the ambition and even the greed of individual elected representatives.[2] Taking the system of parliamentary government as a given (because it is unlikely that changes to the constitution could be effected), it is unclear – from a constitutional and legislative perspective – how much could be done to prevent this kind of instability in minority and coalition governments. I suggest, from a constitutional and legal perspective, that imposing an additional legal precondition for political parties to be entitled to form a coalition or minority government may reduce the problem at the local government level, at least, where this can be done without amending the constitution.

I now discuss the formal legal rules – contained in the Constitution and, to a lesser extent, in ordinary legislation – that establish the governance architecture within which coalition governments are formed and maintained. I then consider other constitutional and legal provisions and court judgments that may influence the functioning of various aspects of legislative government, and describe the impact these have on the formation and stable functioning of coalition governments.

PARLIAMENTARY GOVERNMENT AND ITS IMPACT ON COALITIONS IN SOUTH AFRICA

The constitutional and legislative framework that determines how coalition governments can be formed and how they may operate in the national and provincial spheres in South Africa differs from the constitutional and legislative framework applicable to local government. The national and provincial spheres are regulated largely by the relevant provisions in the South African constitution, while local government is regulated by ordinary legislation. While there are many similarities between the two systems (national and provincial versus local), there are also small but significant differences, which necessitate a separate discussion of the constitutional and legislative provisions applicable to the former and the latter.

Parliamentary government and coalitions at the national and provincial level

The South African constitution formally establishes the national assembly at the national level, and the provincial legislatures at the provincial level, as the directly elected legislatures in which political parties are represented by party representatives is proportional to the percentage of support they garnered at the ballot box (section 46(1) and section 105(1)).[3] The percentage of seats garnered by each party in the national assembly and in each provincial legislature has a profound impact on the identity of the president and premiers and their respective executives. This is because the national assembly elects both the speaker and the president from among its members 'at its first sitting after its election, and whenever necessary to fill a vacancy' (section 86(1) and section 52(1)), while provincial legislatures similarly elect the premiers of their provinces and the provincial speaker from among its members (section 128(1) and section 111(1)). When elected president, a person ceases to be a member of the national assembly (section 87). The president retains the right to attend and speak in the national assembly, subject to its rules and orders, but may not vote (section 54). The same is not true for people elected as premiers or mayors, who remain members of their respective legislative bodies. In

terms of item 6 in schedule 3 of the constitution, these elections for president and premier are conducted by secret ballot. This means that if one party wins more than 50 per cent of the seats in the national assembly, that party's candidate is likely to be elected speaker of the national assembly, while the leader of that party (or another candidate nominated by the majority party) is likely to be elected president of the country. Similarly, when a party wins more than 50 per cent of the seats in a provincial legislature, that party's candidate for speaker is likely to be elected speaker of that legislature, while its candidate for premier is likely to be elected premier of that province. This power to elect the speaker is a significant power, as the speaker is the administrative head of the legislature (De Vos and Freedman, 2014: 133), and the rules bestow important powers on the speaker to control proceedings in the legislature and, if needed, to cast the deciding vote when there is a tie (*United Democratic Movement v Speaker of the National Assembly and Others*, 2017: para 86). While speakers are required to be impartial, and must make all decisions in a rational manner, in practice, control of the speakership provides a distinct advantage to the political party of which the speaker is a member, as speakers sometimes use their discretion to favour their party.[4]

The power to elect the president is even more significant, because the president is the head of state and the head of the national executive (section 83(a)), which means that the executive authority of the Republic is vested in him or her (section 85(1)). The president also has the power in terms of the constitution to appoint and dismiss the deputy president and ministers, and assign their powers and functions (section 91(2)). Similarly, the power to elect a premier is significant, as the executive authority of the province is vested in the premier (section 125(1)), which means this person has the power to appoint and dismiss the members of the executive council (MECs), and assign their powers and functions (section 132(2)). A party that wins an outright majority of seats in a legislature would be able to use its majority to take full control of both the legislature and the executive. This is likely to lead to a stable government that will be able to govern effectively, or at least as effectively as could be expected, given the quality of the party's representatives in the legislature and the executive, besides the nature of the party's policies.

However, if no party wins more than 50 per cent of the seats in the national assembly or in a particular provincial legislature, the election of the speaker and the president or premier will require support from the elected representatives of two or more parties. After an election, or after a vacancy occurs in the office of the president or a premier, the election of a new president or premier becomes a pressing concern. This is because the legislature has only 30 days to elect a new president or premier. If the national assembly fails to elect a new president within 30 days after the vacancy has occurred, the acting president must dissolve the national assembly (section 50(2)(b)), after which new elections for the national assembly would have to be held within 90 days (section 49(2)). Similar provisions apply to a failure of a provincial legislature to elect a premier within 30 days after a vacancy occurs in that office (section 109(2)(b) and section 108(2)). It is important to note that these provisions apply both to a situation where the legislature fails to elect the president or a premier within 30 days following an election, and when this failure occurs after the president or a premier resigns or is removed from office by the legislature. Where no party wins a majority of seats in the relevant legislature, the first order of business for each of the parties in the legislature would therefore be to try and reach an agreement with other parties in order to obtain majority support to secure the election of a chosen candidate as speaker and as president or premier, as the case may be.

After the election of a speaker, president or premier, the head of the executive will form a new government by appointing ministers or MECs. But this is not the end of the matter. Section 102(1) of the constitution allows the national assembly to pass a vote of no confidence in the cabinet, excluding the president, with a vote supported by a majority of its members (currently, that would be 201 MPs). If that happens, the cabinet (which includes the deputy president) is dissolved and the president is then required to 'reconstitute the cabinet'. This provision could be used to force the president to remove some cabinet ministers and replace them with others, with the implied threat that if he or she does not do so, the national assembly would remove the president from office in terms of section 102(2) of the constitution (Butler, 2013: 4). This section empowers the national assembly to remove the president

from office by passing a vote of no confidence in the president with a vote supported by a majority of 201 of its members.

This provision lies at the heart of the system of 'parliamentary government'. It signals that the government serves at the pleasure of the legislature (in this case, the national assembly).[5] Identical provisions provide for the removal of the provincial cabinet or premier by a vote of no confidence (section 141). The constitution similarly provides for the removal of the speaker in the national assembly and in provincial legislatures by a vote of no confidence supported by a majority of members of the legislature (section 52(4) and section 111(4)). These provisions are not applicable only to minority or coalition governments, as a party with an outright majority in the legislature may utilise them to remove the president, premier or speaker in which the majority party no longer has confidence (Butler, 2013: 4). However, the constitution's provisions for a vote of no confidence will become more important when no party obtains a majority of the seats in a legislature – especially where there is no formal arrangement to cooperate or support the coalition of minority government between parties who voted for the incumbent president or premier. This is because parties that wish to unseat the government could rely on this provision to remove the executive if they can manage to engineer a switch of allegiance by one or more smaller parties that voted for the incumbent.

Parliamentary government and coalitions at the local level

The constitution and other enabling legislation deal differently with governance at the local government level. In terms of section 151(2) of the constitution, both the executive and legislative authority of a municipality is vested in its municipal council. Section 160(1)(a) of the constitution confirms that the municipal council 'makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality'. However, section 160(1)(b) and (c) allow the municipal council to elect a chairperson and an 'executive committee and other committees, subject to national legislation'. The Local Government: Municipal Structures Act 117 of 1998[6] is the national legislation that was adopted to regulate this. Section 7 of the

Act allows for the establishment of different types of municipalities, and for present purposes much depends on what type of municipality is established (De Visser, 2009). In terms of this section the three most important systems for municipal government are:

The *collective executive system*, which allows for the exercise of executive authority through an executive committee, in which the executive leadership of the municipality is collectively vested (section 7(a)). This system provides for executive-arm power-sharing between parties proportional to the number of seats each party obtains in the municipal council election (section 43(2)).

The *mayoral executive system*, which allows for the exercise of executive authority through an executive mayor, in whom the executive leadership of the municipality is vested and who is assisted by a mayoral committee (section 7(b)). This system is a majoritarian system in which the municipal council is required to elect a mayor from among its members (section 55(1)), and the executive mayor must then appoint a mayoral committee from among the councillors to assist the executive mayor (if the municipal council has more than nine members (section 60(1)(a)).

The *plenary executive system*, which limits the exercise of executive authority to the municipal council itself (section 7(c)(c). This system is used only for very small municipalities.

For the purposes of studying coalition government, the focus here is on the mayoral executive system of government.[7] This system is similar to the system that applies at the national and provincial levels. Whether the system is a mayoral executive system or not, the first order of business at the first sitting of the council after its election, or after a vacancy occurs, is the election of a speaker from among the councillors (section 36(2)). The candidate who eventually receives the absolute majority of votes cast will be elected speaker (item 7, schedule 3). The speaker is designated the chairperson of the municipal council (section 36 (1) and (2)). The speaker may be removed from office by passing a resolution with a majority vote (section 40). As is the case with the speaker of the national assembly and of provincial legislatures, the speaker of a municipal council has considerable power – especially when no party holds a majority in that council – as he or she convenes

and presides over meetings of the municipal council (section 37), decides on the timing of votes (including votes of no confidence), and can influence proceedings with procedural rulings.

In a mayoral executive system, the municipal council, after electing the speaker, must elect an executive mayor with an absolute majority of the votes cast in the council within 14 days after the council's election (section 55(1)). When a vacancy occurs in the office of the executive mayor, a new election of the mayor must be held 'when necessary' (section 55(2)). The Local Government: Municipal Structures Act does not prescribe a specific period within which such a vacancy must be filled – which differs from the filling of a vacancy of a president or premier. The Act is also silent on what happens if the council fails to elect a speaker or an executive mayor at the first sitting after a local government election (which, as noted, must occur within 14 days after the council election) or if these positions are not filled within a reasonable period after a vacancy occurs. Section 24 of the Act merely states that the term of office of a municipal council is five years. The absence of a legal obligation requiring the election of a new speaker or mayor within a limited time period after the vacancy occurred, and the absence of any requirement that a new council election be held if the council fails to elect a speaker or mayor within a prescribed period, present potential difficulties, as it may incentivise parties whose preferred candidate is not likely to be elected as speaker or mayor to delay the election of a new speaker or mayor (*Democratic Alliance and Others v Premier for the Province of Gauteng and Others,* 2020: paras 7–12). This may lead to a situation in which a municipal council remains without a municipal government for many weeks or even months.

In terms of item 6 of schedule 3 of the Local Government: Municipal Structures Act, a vote for speaker or executive mayor must be conducted by secret ballot. The position of mayor is pivotal in an executive mayoral system because where a municipal council has more than nine members, the executive mayor is empowered to appoint a mayoral committee from among the councillors to assist the executive mayor, and may delegate specific responsibilities to each member of the committee, and may also dismiss a member of the mayoral committee

(section 60(1)). The mayoral committee consists of the deputy executive mayor (if any) and as many councillors as may be necessary for effective and efficient government, 'provided that no more than 20 per cent of the councillors or 10 councillors, whichever is the least, are appointed' (section 60(2)). The executive mayor's powers must be 'exercised and performed by the executive mayor together with the other members of the mayoral committee' (section 60(3)).

The executive mayor system is similar to the hybrid parliamentary government system that applies in the national and provincial sphere, as described above. The speaker and executive mayor therefore also need to retain the confidence of a majority of members of the municipal council. This is because the speaker (section 40) and the executive mayor (section 58) can be removed from office when the council passes a vote of no confidence in either. A simple majority of votes (not an absolute majority of members of the council) is needed for the vote to pass. These provisions are not only applicable to minority or coalition governments, as a party with an outright majority in the legislature may utilise them to remove the executive mayor or speaker from office if they lose the political support of their party's council members. However, politically it is more likely that a speaker or executive mayor will be voted out of office when no party enjoys an absolute majority on a council.

A further legal consideration that may impact on the stability of a coalition government at the local government level is the provisions in section 139(1)(c) of the constitution, which allow a provincial executive to dissolve a municipal council within that province and appoint an administrator. This is ultimately likely to lead to a fresh election within 90 days of the dissolution of the government. Section 139(1)(c) of the South African Constitution provides as follows:

> When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation,

> including: (c) Dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared, if exceptional circumstances warrant such a step.

The result of the dissolution decision is that the municipal council is immediately dissolved and an administrator takes over the functions of the council until fresh elections are held, which must occur within three months after the dissolution of the council (*Democratic Alliance and Others v Premier for the Province of Gauteng and Others*, 2020: para 9; *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others*, 2009: para 81). The appointment of an administrator is a stop-gap option that is meant to pave the way for a fresh election. However, as the Gauteng High Court noted, there is no guarantee that this move will resolve the impasse. Accordingly, the court warned that

> … an election as a result of the dissolution decision may in fact result in many of the same councillors returning to their positions again, resulting in a hung Municipal Council. There is no guarantee that a fresh election will resolve the relevant obligation. It is an option more reliant on hope than certainty and as such cannot, objectively, be viewed as capable of resolving the problem at hand (*Democratic Alliance and Others v Premier for the Province of Gauteng and Others*, 2020: para 89).

Problems may arise when one party governs the province and another party or coalition of parties govern the municipality, especially when those parties who wish to unseat the coalition government act in a way aimed at triggering the application of section 139 of the constitution. This is well illustrated by the High Court judgment in *Democratic Alliance and Others v Premier for the Province of Gauteng and Others*, which dealt with an attempt by the Gauteng government to invoke section 139(1)(c) to dissolve the Tshwane municipal council. At the time the DA governed the city as a minority government, as no party had won a majority of seats in the local government election of 2016. The ANC, which governs the province, attempted on more than one occasion to dislodge the DA from government. As a result, a situation

arose where the Tshwane municipal council found itself without a mayor, a mayoral committee or a municipal manager. The municipal council failed for months to elect a new mayor (Seleka, 2020; De Vos, 2020). The High Court ascribed this state of affairs to the inability of the municipal council 'to convene and run council meetings to transact and take necessary decisions in line with its responsibilities' and blamed the ANC and the EFF, which had staged disruptions and walkouts, 'thus depriving the Municipal Council of the necessary quorum' (*Democratic Alliance and Others v Premier for the Province of Gauteng and Others,* 2020: paras 7–8). Although the court did not make a finding on the motive of the ANC and EFF councillors, it did find that the dissolution of the city council was invalid because there was another, less drastic, way to solve the problem, namely for all councillors to attend council meetings and elect a new mayor. It thus ordered all councillors from the ANC and the EFF to attend and remain in attendance at all meetings of the City of Tshwane Metropolitan Municipality Council, unless they had a lawful reason to be absent (as they were required to do by the relevant code of conduct) (*Democratic Alliance and Others v Premier for the Province of Gauteng and Others*, 2020: para 109). The judgment highlights the power of political parties and their elected representatives to destabilise fragile coalition or minority governments. It also highlights the power of the courts to rectify perceived abuses.[8] It is not clear that the order made by the High Court in this case will ultimately address the political dysfunction in the Tshwane council. This raises question about what the limits of the law are in fixing essential political dysfunction (De Vos, 2020).

Irrespective, section 139(1)(c) of the constitution adds a further legal mechanism to resolve an impasse that may arise when a hung council is unable to elect a speaker or a mayor, or when a minority or coalition government is so weak or unstable that the municipal government is unable to fulfil its basic governance obligations. As discussed in more detail below, there is also a danger that the provision could be abused, when one party governs the province and another party or coalition of parties governs the municipality.

THE ROLE OF POLITICAL PARTIES IN FORMING AND MAINTAINING COALITION GOVERNMENTS

It is only possible to understand how the hybrid form of parliamentary government functions in practice by considering the role played by political parties and their leaders in the formation and maintenance of the executive authority. Political party leaders (whether national, provincial or regional) are often the hidden hand behind the actions of individual elected representatives, who normally adhere to strict party discipline. Decisions on who to support in an election as speaker, president, premier or executive mayor are therefore not necessarily taken exclusively by the elected representatives of a party, but are likely to be heavily influenced by the relevant party leaders (Southall, 2005: 71). Almost invariably the president – although not an MP after their election as president – is the leader of the governing party. Similarly, the national executive committee of the ANC has a decisive role in deciding the party's candidate for premier (and executive mayor). While this may be attributed partly to political culture, several constitutional and legal provisions enhance the power of political parties and their leaders vis-à-vis that party's elected representatives when deciding on candidates for president, premier and executive mayor.

First, the electoral system used at both the national and the provincial level, and to a slightly lesser extent at the local government level, enhances the power of party bosses vis-à-vis elected party representatives. Currently, in the national and provincial sphere, no person can serve in the national or any of the provincial legislatures without being a member of a political party and without having been chosen or selected by that political party to represent the interests of the political party in the respective legislatures.[9] This is because at the national and provincial level, political parties – and not individual candidates – contest elections, and voters cast their votes for the political party of their choice (*Ramakatsa v Magashule*, 2012: para 66). To get elected, candidates must be placed sufficiently high on the party's relevant electoral list, which is done according to criteria and in terms of a process determined by that political party (De Vos, 2015: 41). To be re-elected, an elected representative is incentivised to

act in a manner that will ensure that they retain a spot high up on the party's relevant electoral list. It must be noted that this system is meant to change, as the Constitutional Court held in June 2020 that the electoral system at the national and provincial level should be changed to allow independent candidates unaffiliated to a political party to stand for election to the national assembly and provincial legislatures (*New Nation Movement NPC and Others v President of the Republic of South Africa and Others*, 2020). The Constitutional Court gave parliament 24 months to amend the electoral system to allow for this, which means a new system must be adopted by June 2022. However, it is unclear at the time of writing what this system will entail and how it will impact on the power of political parties.

Given that party leaders retain influence over who appears on the party's electoral list and how high up they appear, representatives are unlikely to act in a manner that would defy the instructions of party bosses, unless intraparty considerations incentivise them to do so (Lodge and Scheidegger, 2006: 30–31). At the local government level, the mixed electoral system provides that 50 per cent of councillors are elected as ward councillors in terms of a plurality electoral system, with each winning candidate representing a ward, while 50 per cent are elected from a closed list on a proportional representation (PR) basis (section 22, Local Government: Municipal Structures Act). This means that a person could be elected to a municipal council via the ward councillor route without being a member of a political party. Ward councillors also do not have to worry about appearing sufficiently high up on their parties' relevant electoral lists. In practice, however, the hold of political parties over councillors remains strong, because party leaders in the national, provincial or regional sphere have a considerable say in who the party's ward councillor candidate will be.[10] This activates the same dynamic as described above regarding the accountability of elected representatives to party structures vis-à-vis accountability to the electorate.

Second, all elected representatives who were elected on a political party ticket to an elective body in the national, provincial or local government sphere must retain their membership of the party on whose ticket they were elected in order to remain in the relevant legislature.

In the national and provincial spheres, a member of the legislature loses membership of a provincial legislature if he or she 'ceases to be a member of the party that nominated that person as a member of the legislature' (section 47(3) and section 106(3)). At the local government level, a councillor who was elected from a party list 'and ceases to be a member of the relevant party' automatically loses their seat in the municipal council (section 27(c) of the Local Government: Municipal Structures Act), while a ward councillor who was nominated by a party as a candidate in the ward election and ceases to be a member of that party also loses their seat automatically (section 27(f)(i)).[11] In the latter case, a by-election must be held in that ward and the councillor who lost their seat because of a loss or forfeiture of party membership, may stand in that election as an independent candidate (Russon, 2011: 76). The hold of political parties over ward councillors is thus somewhat weakened, as independent candidates who previously represented a political party as a councillor have in the past successfully defended that ward seat in a by-election (Russon, 2011: 85–86).

Nevertheless, the threat of expulsion from a political party remains a powerful weapon in the hands of political party bosses to keep elected representatives in check. This power is somewhat curtailed by the fact that political parties are constitutionally required to adhere to their own constitutions. These constitutions and rules of political parties must also be consistent with the constitution, which is the supreme law of the country (*Ramakatsa v Magashule*, 2012: para 72). This means elected representatives may be able to block their expulsion by challenging it in court for not having followed the procedures prescribed by its constitution. This is illustrated by the case of the former mayor of Cape Town, Patricia de Lille, who challenged the ruling by the DA that she had ceased to be a member of the party; she won the case (*De Lille v Democratic Alliance and Others*, 2018). This tactic, however, requires deep pockets and can postpone but not prevent the inevitable, as De Lille's ultimate agreement to leave the party illustrates.

Third, strict party discipline is imposed on elected representatives through the adoption of specific party policies and provisions in party constitutions which formalise the 'deployment' of party candidates

for certain important executive positions. As the Constitutional Court remarked in *United Democratic Movement v Speaker of the National Assembly and Others* (2017), a governing party has a great influence on, or dictates, who gets appointed or elected as senior office-bearers in parliament. (The same is true for the election of office bearers at the provincial and local government level.) The Court further suggested that 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' (*United Democratic Movement v Speaker of the National Assembly and Others,* 2017: para 76). A perusal of the policies and the constitutions of the two main political parties underscores this. For example, at the ANC's 52nd National Conference in 2007, the conference imposed specific deployment rules to regulate who the party's candidates for president and premierships should be. The rules instructed that, at the provincial government level, the provincial executive committee of the ANC in the respective provinces 'should recommend a pool of names of not more than three cadres in order of priority who should be considered for Premiership', after which the national executive committee of the ANC would 'make a final decision based on the pool of names submitted by the [provincial executive committee]'. At the national government level, the conference agreed that 'the ANC President shall be the candidate of the movement for President of the Republic' (ANC 52nd National Conference, 2007). Section 5.4 of the ANC constitution also requires all ANC members who hold elective office in any sphere of government at the national, provincial or local level 'to be members of the appropriate caucus, to function within its rules and to abide by its decisions under the general provisions of this Constitution and the constitutional structures of the ANC'. Similarly, section 2.5.4.7 of the DA constitution of 2018 states, 'Any member, including a public representative, is guilty of misconduct if he or she unreasonably fails to comply with or rejects decisions of the official formations of the Party', while section 9.3.5 of the constitution states, 'Members [of a legislative caucus] must at all times adhere to and support decisions of the relevant caucus and must not differ publicly from any decision once it has been taken except when it has been decided by the caucus that a

member may on a question of conscience exercise a free vote.' These provisions in political party constitutions give party leaders a powerful tool to keep individual elected representatives in check and to enforce party discipline. However, the grip of party leaders does not entail absolute control over elected representatives, especially when a party is riven by factional disputes. For example, in August 2020 a number of ANC councillors supported a vote of no confidence in Mangaung mayor Olly Mlamleli, thus ousting her from office (McCain, 2020; see also chapter 1).

The factors discussed above all bolster the power of political parties and their leaders vis-à-vis their elected representatives in national, provincial and municipal legislatures. This suggests that where the leaders of various political parties come to an agreement on forming a coalition, or on another arrangement to establish a minority government, the major factor that may lead to instability and inefficiency of a coalition government would be the behaviour and attitude of party leaders. In this view, the instability of some coalition governments should be blamed on the sometimes opportunistic cooperation between parties whose ideologies and programmes differ fundamentally, on the political immaturity of party leaders, and on the concomitant jostling for power and access to positions and other resources, which – at the local government level at least – often leads to the removal of speakers and executive mayors. But Constitutional Court jurisprudence in 2017 established two important principles which may weaken the hold of party leaders over their elected representatives.

LEGAL AND OTHER FACTORS THAT WEAKEN PARTY CONTROL OVER ELECTED REPRESENTATIVES

If, as argued above, parties are normally able to enforce strict party discipline on their elected representatives in part because of the vagaries of the current electoral system, the provision for the dismissal of representatives by expelling them from the party, and party constitutions that enforce caucus discipline, this would mean that the strength and stability of coalition governments depend to a large extent on the behaviour of extra-legislative party leaders who are

guided by political (and perhaps also financial) incentives (Mtyala 2011; Nicholson and Coetzee, 2014). This argument needs modifications in two distinct respects.

First, in two judgments handed down in 2017, both dealing with the rules governing the removal from office of a sitting president, the Constitutional Court pushed back against the notion that because members of the national assembly assume office through nomination by political parties, MPs can be expected at all times to pursue the interests of their respective political parties. While these judgments dealt with the MPs elected to the national assembly, the principle also applies to party representatives elected to provincial legislatures and, to a large extent, municipal councils. In *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (2017), the court had to decide whether the rules of the national assembly provided an appropriate procedure to be followed when considering removal (impeachment) of the president in terms of section 89 of the constitution. As section 89 only allows for impeachment of the president on the limited grounds that the president is guilty of a serious violation of the constitution or the law or serious misconduct, or because of an inability to perform the functions of office, the court held that the rules required a factual inquiry to be held on whether any of these grounds existed before the national assembly as a whole was permitted to make a political call on whether to support the president's impeachment (*Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*, 2017: para 176).

In doing so, the majority of the court provided a radically different vision of the relationship between elected representatives and party leaders than the one described in the previous section. The court noted that the national assembly is elected 'to represent the people and to ensure government by the people under the Constitution', that 'the interests served and advanced by the exercise of its powers must be the collective interests of the people it represents', and that the powers of the national assembly 'must primarily be exercised to promote only the people's interests and the institutional objectives' of the national assembly (*Economic Freedom Fighters and Others v Speaker of the National Assembly and Another,* 2017: para 141). In a pivotal passage, the Constitutional Court argued that

> [t]he fact that members of the Assembly assume office through nomination by political parties ought to have a limited influence on how they exercise the institutional power of the Assembly. Where the interests of the political parties are inconsistent with the Assembly's objectives, members must exercise the Assembly's power for the achievement of the Assembly's objectives. For example, members may not frustrate the realisation of ensuring a government by the people if its attainment would harm their political party. If they were to do so, they would be using the institutional power of the Assembly for a purpose other than the one for which the power was conferred. This would be inconsistent with the Constitution (*Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*, 2017: para 144).

This judgment suggests that while elected representatives would normally be subject to party discipline to support the policies and programmes of the party, this would not be permitted if this is not believed to be in the interest of the public. The Constitutional Court judgment seems to impose an obligation on MPs in certain situations to follow the dictates of personal conscience, as guided by the provisions of the South African Constitution. This point was driven home by the Constitutional Court in *United Democratic Movement v Speaker of the National Assembly and Others* (2017), a case in which the court was asked to declare that the speaker of the national assembly was permitted to order that a vote of no confidence in the president be held via secret ballot. Holding that the constitution did permit the speaker to do so, the court pointed out that the constitution required MPs to swear or affirm faithfulness to the Republic and obedience to the constitution and law, not to their political parties. Thus, when a conflict arises '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' (*United Democratic Movement v Speaker of the National Assembly and Others*, 2017: para 79). The court argued, idealistically, that because the electoral commission publishes the electoral lists of each political party before every election,

voters would be aware 'which candidates are on that party's list and whether they can trust them'. Thus, according to the court, the loyalty of elected representatives to constitutional values should trump party loyalty because that is what voters voted for and what the constitution demands. For all the reasons set out in the previous section, in practice, it would be difficult for an individual MP (or elected representative in the provincial or local sphere) to follow their conscience against the strict instruction of party leaders – unless factional battles have weakened the party leadership and its authority to the extent that elected representatives believe that no action would be taken against them for defying the party line. It is therefore unclear what effect, if any, this judgment would have on the behaviour of individual elected representatives in times of high political drama, especially in cases where they are called on to vote for the party's candidate for speaker, president, premier or executive mayor, or where they are called on to vote for the removal of any incumbent. But given the increased judicialisation of politics – the tendency to revert to courts to resolve fundamentally political disputes (Le Roux and Davis, 2019: 5) – the likelihood that questions about the passing of votes of no confidence will end up in the court is not insignificant. When this happens, those challenging the removal from office will be able to rely on these passages in cases where the removal was demonstrably orchestrated for a nefarious or corrupt purpose or for some other reason not in line with the values of the constitution.

Second, in theory, the power of party leaders vis-à-vis elected representatives has been weakened by the ruling of the Constitutional Court in *United Democratic Movement v Speaker of the National Assembly and Others* (2017) allowing speakers to order voting by secret ballot when considering a no-confidence motion in a speaker, president, premier or executive mayor. Recall that a secret ballot is already required for the election of all these posts, but the constitution and, in the case of municipal councils, legislation, are silent about whether the speaker is permitted to allow a vote of no confidence to be conducted by secret ballot. Providing for a secret ballot would, in theory, allow individual elected representatives to vote for the candidate of their choice, and thus weaken party discipline and make the

outcome of elections – especially in hung legislatures – less predictable. On the other hand, where voting occurs by secret ballot it becomes difficult for political parties to hold individual elected representatives accountable. This may lead to legislators voting for impermissible reasons, most notably because the representative was persuaded to vote by offering him or her a position or a monetary incentive (which is widely known as a bribe). In dealing with this question in *United Democratic Movement v Speaker of the National Assembly and Others* (2017: para 60), the Constitutional Court struck a delicate balance, holding that nothing in the constitution prevented the speaker of the national assembly from scheduling a secret vote when a motion of no confidence is tabled in the national assembly, but that this would not always be required. The Constitutional Court decided the case at a time when various opposition parties were attempting to hold former president Jacob Zuma accountable for various alleged and proven misdeeds. Although the court dealt specifically with the question of whether the speaker of the national assembly was permitted to hold a secret ballot in a vote of no confidence against the president in terms of section 102(2) of the constitution, the principles established also apply in the provincial and local spheres.

It is important to note that this judgment on the secret ballot is directly linked to the duty of the legislature to hold the president and the executive accountable, and did not speak directly to a situation where the vote of no confidence is conducted purely in an attempt to replace one governing coalition with another. Admittedly, it might sometimes be difficult to determine whether the ballot was conducted for the former or the latter reason, but if one studies the judgment carefully, it becomes clear that a secret ballot would be more appropriate in the former situation than in the latter. In the context of this case, dealing with attempts to remove former president Zuma from office, the Constitutional Court stated that a vote of no confidence was a powerful tool to hold the president accountable for his failure to carry out his constitutional obligations.[12] A vote of no confidence can be viewed as a last resort to which legislators would turn 'should regular mechanisms prove or appear to be ineffective' and when 'the people's representatives have, in a manner of speaking,

virtually given up on the President or Cabinet' (*United Democratic Movement v Speaker of the National Assembly and Others,* 2017: para 46). The Constitutional Court linked the vote of no confidence to the duty of elected representatives to put country before party in cases where the head of the government is acting against the interests of 'the people'. This is, of course, not the only possible reason why political parties would support a vote of no confidence, especially in a hung legislature in which support for a coalition or minority government is fluid, and such a vote could topple a government and pave the way for a new coalition to take control of the government. The danger here is that individual elected representatives could be persuaded to support a vote of no confidence conducted by secret ballot for reasons that have nothing to do with their conscience or with holding the executive accountable. In the United Democratic Movement case the Constitutional Court signalled an awareness of this potential problem, and warned that a secret ballot would not always be appropriate. The court warned that secrecy could diminish the individual accountability of elected representatives, and that a secret vote could undermine the requirement for elected representatives to act in an open and transparent manner. In many cases the electorate would be entitled 'to know how their representatives carry out even some of their most sensitive obligations, such as passing a motion of no confidence', and the speaker is obliged to take this into account when 'considering whether voting is to be by secret or open ballot' (*United Democratic Movement v Speaker of the National Assembly and Others*, 2017: para 80).

There is always a danger that an MP, provincial legislator or council member could be bribed or otherwise persuaded to support such a vote, and this should be taken into account by any speaker when considering whether to allow a secret ballot or not. The Court warned in United Democratic Movement that the speaker should not discount the possibility that dishonest legislators would be swayed by bribes or 'other illegitimate methods of gaining undeserved majorities'. It warned that 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' (*United Democratic Movement v*

Speaker of the National Assembly and Others, 2017: para 81). In short, while a secret ballot may be required in cases in which the president, premier or mayor is genuinely being held accountable, the speaker should not allow a secret ballot in a vote of no confidence if there is a real possibility that this will turn the voting process into 'a fear- or money-inspired sham' (*United Democratic Movement v Speaker of the National Assembly and Others,* 2017: para 82). It is not clear how a speaker would know that a specific vote of no confidence falls into the one or other category. The judgment invests speakers with a considerable responsibility, which is made even more difficult by the fact that speakers remain members of their respective political parties and may be pressured to make a decision that would favour their own party. On the other hand, speakers run the risk that their decision would be challenged in a court and overturned. Thus far, it appears that speakers have dealt with this conundrum by interpreting the Constitutional Court judgment not as *permitting* a vote by secret ballot, but *requiring* it.

Though debate is unfolding on this issue at the time of writing, all votes of no confidence conducted after the handing down of this judgment have been conducted by secret ballot. If speakers routinely decide to conduct votes of no confidence by secret ballot, it will render the outcome of votes of no confidence more unpredictable, and may potentially lead to less stable coalition governments. In legislatures when no one party enjoys an absolute majority or in which it enjoys a minimal majority, the danger is that no-confidence votes conducted by secret ballot may lead to pocketbook politics[13] and could increase practices of vote buying. If this happens, minority or coalition governments are less likely to be stable and well functioning.

COALITION AND CONFIDENCE-AND-SUPPLY AGREEMENTS

Due to the manner in which the parliamentary system of government is regulated by the constitution and other legislation, the only sine qua non for the establishment of a government at the national, provincial or local level is the election of a president, premier or executive mayor by the majority of members of a particular legislature. Where no party obtains a majority of seats in a particular legislature, this necessitates the formation of a minority or coalition government, whose stability will depend largely on the willingness and ability of the legislators of the relevant political parties (and the respective leaderships of those parties) to work together, and on how committed the legislators of smaller parties (and the leadership of those parties) involved in the coalition or minority governments are to the arrangement that led to the election of the president, premier or executive mayor. When a speaker decides that legislators vote by secret ballot on a no-confidence motion in the president, premier or executive mayor, there is also a possibility that individual legislators from parties that support the government would be persuaded by financial or other incentives to support a vote of no confidence. It is unlikely that the legislature will tamper with South Africa's current system of parliamentary government, as it would require major rewriting of parts of the constitution (at least to amend the governance system at the national and provincial level), and the adoption of amendments by at least two-thirds of the members of the national assembly. This means that the formation of government at all three levels of government will continue to hinge on the election of the president and premiers, and, to some extent at least, executive mayors, and that the stability of these governments will continue to be at the mercy of the legislators and leadership of the parties represented in a legislature.

Little can be done to address the potential problems that arise from secret-ballot, no-confidence votes, as the Constitutional Court judgment on the matter can be undone only through constitutional amendment.[14] On the face of it, a more promising avenue for change could be to impose additional requirements (over and above securing

the election of a preferred candidate as president, premier or executive mayor) for the formation of a coalition or minority government. Would it be possible to require that parties enter into formal coalition agreements, or confidence-and-supply agreements,[15] as a precondition for forming a government? This question is pertinent, as formal coalition agreements help to secure both intraparty and interparty commitment to the stability of the coalition or minority governments (Moury, 2011: 388). These kinds of agreements can be viewed as contracts through which parties commit themselves to cooperate in such a 'way that when they go through unpleasant situations, party leaders have a mechanism by which they can resist temptation or intra-party pressure to renege on their commitments' (Müller and Strøm, 2008: 165). As it is usually easier to get party regulars to approve concessions to coalition partners when they are included in a package deal, a coalition agreement may also reduce the potential destabilising impact of small 'kingmaker' parties (Müller and Strøm, 2008). Two types of agreements are of interest here. At one end of the spectrum, there is the formal coalition, in which the parties that form the coalition agree on a shared policy agenda, set out in a formal partnership agreement that includes how many and which executive posts would be held by which party (Hazell and Paun, 2009: 6). Such an agreement could include procedural safeguards, creating formal mechanisms to facilitate interparty consultation between coalition partners and resolve disputes between them (Hazell and Paun, 2009). Alternatively, the leading party could enter into a confidence-and-supply agreement with smaller parties. Such an agreement would ensure the support of smaller parties on crucial votes in exchange for policy or other concessions, an arrangement that can help preserve the identity of smaller parties (Hazell and Paun, 2009).

Neither the South African constitution nor legislation currently regulates coalition agreements, or such confidence-and-supply agreements. The constitution or ordinary legislation also does not impose any obligations on political parties to reach such agreements as a precondition for the establishment of governing coalitions or functional minority governments. There are also no firmly established political conventions in South Africa that require political parties

to enter into coalition agreements as a prerequisite for the forming of coalition or minority governments. The relevant provisions of the constitution and other legislation currently focus exclusively on discrete events – the election or removal of speaker and president, premier or executive mayor – and leave the actual functioning of the government that is formed after such an election up to the parties. I would argue that this laissez-faire approach, combined with other political factors beyond the scope of this chapter, have had a major impact on the stability of such governments in the local government sphere. Imposing a two-step process for the formation of a government could reduce instability of such governments. The first step would be that the relevant legislature elects the head of the executive (president, premier or executive mayor), as is currently required. The second step would require the aspiring government to demonstrate that it is likely to enjoy a working majority to pass important legislation and to function as a government, by submitting a formal coalition agreement reached between the parties that will constitute the coalition, or – where a minority government is formed – by submitting a confidence-and-supply agreement reached between the parties that support the election of the head of the executive. The institution or individual(s) to whom such agreement is to be submitted and the power of veto is here left open for further reflection. This, however, should be as simple as possible to prevent undue complications and should be handled in the political terrain (e.g. the speaker rather than the judiciary).

However, any legislation imposing additional requirements for the formation of a government in the national and provincial sphere will be unconstitutional and invalid. This is because it would amount to an indirect amendment of the constitutional procedures regulating the formation of a government. An indirect amendment of the constitution without following the prescribed procedure for constitutional amendment would be unconstitutional and invalid. At the national and provincial level, any change would require a constitutional amendment. Although such an amendment would be less drastic than the amendment of the provisions that establish a parliamentary system of government, and would have a slightly better chance of being adopted, it remains a long shot. At the local government level, ordinary

legislation regulates the formation of the municipal government, and it would therefore be far easier to adopt additional requirements for the formation of a government.[16]

CONCLUSION

South Africa opted for a slightly amended or hybrid version of a parliamentary system of government at the national, provincial and local level, instead of a system with a directly elected head of the executive, or a presidential system. The fundamental difference between the two systems is that under a presidential system the government cannot be replaced, even if a majority of the legislature so wishes. Because the government can be replaced in a legislative system of government if the majority of members of the legislature cease to support it, the position of the executive potentially becomes precarious when one party does not obtain a majority of seats in the legislature (Cheibub et al., 2004: 566). On the other hand, as the literature suggests, a parliamentary system generates more incentives for parties to form coalitions (Mainwaring, 1990; Huang, 1997: 138). This is more likely to happen when the policy differences between the dominant party, and some other parties that together constitute a legislative majority, are small. Where these differences are small, the dominant party would be able to make necessary policy concessions to the other parties and offer them enough incentives to hold the coalition together (Austen-Smith and Banks, 1988; Cheibub et al., 2004: 566).

In the hybrid parliamentary system operating in South Africa, however, when no party obtains an absolute majority in the legislature, parties will be forced to work together – whether formally or informally – to ensure the election of the head of the executive, which is a precondition for the formation of a government. This may lead to more unstable government. However, the parliamentary system of government is entrenched in the constitution, which can be amended only with the support of two-thirds of the members of the national assembly, as well as by six of the nine provincial delegations to the National Council of Provinces (Constitution of the Republic of South Africa, section 74(3)), and it is unlikely that such proposed amendments

would garner the requisite majority in the national assembly.

In the absence of such a radical overhaul of the system of government, other smaller changes could be effected for the benefit of more stable and efficient coalition government. The existing electoral system, strict party discipline, and provisions that require an elected representative to retain membership of the party on whose ticket they were elected to remain a member of the relevant legislative body, all tilt power away from individual elected representatives towards party leaders. Simultaneously, the 2017 Constitutional Court pushback, rhetorically at least, asserts the power of individual elected representatives to act according to their conscience and according to the dictates of the constitution in service of the electorate. It is unclear, however, to what extent these developments may have an influence on the stability of coalition governments or on their effectiveness.

Ensuring strong party control over elected representatives might look more promising. This is because in this system, party leaders enforcing strict discipline may help to stabilise a coalition by preventing rogue elected representatives from selling their vote to opposition parties trying to topple the government. But, as the Tshwane example illustrated, party leaders desperately trying to topple the incumbent coalition government and take power could become part of the problem if they cannot muster a majority but use their power of disruption (in the form of non-attendance of council meetings) to indirectly collapse the government.

The pessimistic conclusion is that the problem with coalition government in South Africa has thus far been political, not legal or constitutional. Where parties that work together have large policy differences, or where those parties are not animated primarily by their stated ideological commitments but rather by the urge to acquire government power and the access to resources and patronage that this presents, the normal ideological glue that may hold coalitions together is absent. Given this dynamic, imposing an additional legal requirement on parties that seek to form a governing coalition or enter into a confidence-and-supply arrangement to submit a formal coalition or confidence-and-supply agreement, might go some way to reduce the instability of a government when no party won an outright majority of seats in the legislature.

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