

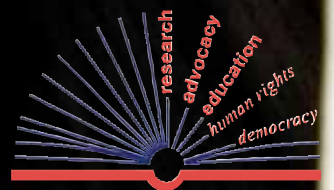
LOCAL GOVERNMENT BULLETIN

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Is this seat
taken?

Filling vacancies

DURING POLITICAL
CHANGE



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Is this seat taken?

FILLING VACANCIES DURING POLITICAL TURMOIL

It has not taken long for the political turbulence triggered by events at national and provincial level to reach the shores of local government. A wave of resignations and expulsions is breaking on the banks of local, district and metropolitan municipalities. Municipalities, political parties and the Independent Electoral Commission (IEC) face the formidable task of ensuring that the political changes heralded by the new movement led by Mosiuoa Lekota and others unfold in an orderly and lawful fashion.

This article outlines the rules dealing with the expulsion and resignation of councillors from their political parties. Central to these rules is the principle that a councillor must vacate office as a councillor when he or she ‘ceases to be a member of the political party’.

Electoral system

Local councils are usually made up of ward councillors and proportional representation (PR) councillors in equal proportions. District councils comprise PR councillors elected by the voters in the district (40%) and representatives of the local municipalities in the district (60%).

Ward councillors

There are two types of ward councillors. Party-aligned ward councillors must remain members of their parties throughout their terms if they want to retain their seats. Independent ward councillors, who won their wards without campaigning on a party ticket, may not join political parties during their terms if they want to retain their seats.

PR councillors

PR councillors are elected on a party list system. A party, having secured a certain number of seats on the council in the general local government election, fills those seats by nominating members through its party list. A PR councillor who is no longer a

member of the political party must make way for a new member nominated by the party.

District representatives

Local municipalities are represented on their district council. Each local municipality is entitled to send a delegation to the district. The delegation comprises ward councillors and/or PR councillors.

The size of the delegation depends on the number of registered voters in the local municipality. The composition of the delegation is not determined by an ordinary council resolution. The law prescribes that the council elects the delegation in terms of a PR system. Each party or councillor on the local council may submit a list of candidates to the IEC. Every councillor then votes for one of the lists. The percentage of votes cast for a particular list determines how many local councillors on that list will go to the district.

For example, let us say that party Y holds a majority of 70% of the seats on a local council and party X holds the remaining 30%. They both submit lists to compete for seats in the district. Party X obtains 30% of the votes and Party Y obtains 70%. The result of this election is that the delegation to the district will be constituted according to the same 70:30 split. This ensures that the composition of the delegation reflects the composition of the council and not just the will of the majority.

Losing a council seat

From the above, it is clear that membership of the party is an essential condition for party-aligned ward councillors and PR councillors to remain councillors. The loss of party membership results in the seat becoming vacant.

District representatives lose their seats on the district council when they lose their seats on the local council: someone who is no longer a local councillor may no longer represent that local council. A local council may also decide, by resolution, to recall all or some members of its delegation to the district.

How are vacant seats filled?

The law provides for procedures which the IEC uses to fill vacancies. No institution or organ other than the IEC may fill vacancies – not a political party, the municipal manager or even the municipal council. The filling of a vacancy is an election, and elections are managed by the IEC.

Ward councillors

A vacant ward seat can only be filled after a by-election. As soon as the ward seat becomes vacant, the municipal manager

KEY POINTS

- When a PR councillor loses his or her party membership, the seat becomes vacant.
- The IEC fills a PR vacancy with the next person on the party list.
- When a party-aligned ward councillor loses his or her party membership, the seat also becomes vacant.
- The IEC fills a ward vacancy with the winner of the by-election.
- A local municipality can recall, by resolution, its representative to the district.
- The local municipality cannot replace the district representative by resolution; the IEC fills the vacancy.
- Suspension from the party has no effect on council membership.
- Parties cannot expel members before giving them a fair hearing.
- When expelled members appeal, this usually postpones the decision.

must set a date for a by-election, after consulting the IEC. This by-election, managed by the IEC, must be held no later than 90 days after the vacancy occurred. Every party that is registered with the IEC to contest municipal elections in the municipality may participate in that election. This means that as soon as the recently launched Congress of the People (Cope) has been registered with the IEC, it may contest municipal by-elections.

Losing a ward seat to another party has no consequences for the number of PR seats that a party has on a council.

PR councillors

When the municipal manager becomes aware of a PR vacancy in the council, he or she must inform the IEC. This must be done within seven days after the councillor loses party membership. The IEC then allows the party 21 days in which it may change its party list. The party list contains the names of party members that are not yet on the council. After the 21 days have expired, the IEC declares the person named at the top of the party list elected as councillor.

District representatives

It is not important how the vacancy came about – ie whether the local council recalled the representative or whether the representative ceased to be a local councillor. In both instances,

the district municipal manager must inform the IEC within seven days. The IEC reverts to the lists that were submitted to it when the district delegation was elected in the local council (see above). It allows the party or councillor that submitted the list 21 days to make changes. After that, it declares the councillor at the top of that list elected as a representative to the district.

Importantly, the local council may not, by resolution, fill a vacancy in its district delegation. While it may, by resolution, decide to recall a representative, it does not fill the vacancy. This is left to the IEC, assisted by the municipal manager.

When is there a vacancy?

Even though the rule is clear – namely, loss of party membership results in a vacancy – it may be difficult to decide when a councillor is no longer a party member.

It is often assumed that the vacancy arises when the municipal manager ‘declares a vacancy’. This interpretation is wrong. The vacancy arises automatically, by law, at the moment when the councillor loses his or her party membership; the municipal manager’s notification to the IEC merely assists the IEC in its preparations to fill the vacancy. Should the municipal manager not fulfil this duty, there is nothing that prevents the IEC from filling the vacancy without having received the municipal manager’s notification.

There are two ways in which a party member may lose his or her membership: resignation and expulsion. The constitution of the party will determine what the procedure is for resignation. The constitution of the African National Congress (ANC), for example, requires a written resignation. The date on which the party receives the letter will be the date on which the member has resigned. The municipal manager and the IEC will start counting the days mentioned above from this date.

It is more complex when a member loses membership against his or her will. Political parties are entitled to discipline their members, just like any other voluntary associations. The constitution of the party will provide for criteria, procedures and penalties applicable to these disciplinary processes. The ultimate penalty will be expulsion. For example, the constitution of the ANC provides for four penalties:

- a reprimand;
- payment of compensation and/or performance of useful tasks;
- suspension; and
- expulsion.

However, because political parties exercise public powers, they are not completely free in respect of how they may discipline

their members. A member who feels unfairly treated by his or her party may go to court and challenge the manner in which the party conducted itself. That court will not, however, second-guess the party’s reasons for disciplining that member. The fundamental right of freedom of association means that the party determines its own criteria, procedures and penalties. All the court will do is assess whether the disciplined member was given a fair hearing, ie a fair opportunity to state his or her case. The court will also assess whether the party acted rationally, ie whether it did indeed present arguments for disciplining that member. The court will not assess those arguments in detail.

It is therefore very important for political parties to discipline their members in ways that can stand the test of a ‘fair hearing’. If a party expels a member in his or her absence by simply sending a letter, it exposes itself to possible legal action. Similarly, expulsion without any reason exposes the party to possible legal action. If that member is a councillor, this kind of legal action also exposes the municipality to a prolonged period of uncertainty about the composition of its highest decision-making organ. This kind of uncertainty is often very damaging for the municipality’s mandate to deliver services and promote development.

‘Suspended from the party’ = ‘suspended as councillor’

As can be seen from the ANC’s constitution and from other party constitutions, suspension and expulsion are not the same. When a member is ‘suspended’ by a political party, it means that the member *temporarily* loses all party privileges. He or she may not vote or participate in any structures of the party. Clearly, the word ‘suspended’ means that the penalty is temporary. It is common for a member to be suspended for the duration of disciplinary proceedings. The outcome of the disciplinary proceedings determines whether the suspension is lifted or converted into a permanent expulsion.

Importantly, when a councillor is *suspended*, and not (yet) expelled from his or her party, this has no consequences for his or her membership of the council. If a political party seeks to ‘suspend a councillor from the council’, it wants to act outside of the law. Political parties may suspend their members, but they do not have any authority to suspend councillors. There is only one authority that may legally suspend council members, and that is the MEC for local government, who may do so in the event of a breach of the Code of Conduct for Councillors (after recommendation by the council).

The fact that the suspension of a councillor is temporary is the reason why political parties cannot expect a speaker or a municipal manager to temporarily ban a councillor from council meetings. A political party is not permitted to prevent a councillor from participating in the council while it investigates misconduct in terms of its internal rules. Councillors are essential for the running of a municipality; decision-making in council and committees cannot take place without them. It is not up to a political party to remove a councillor from the council while it conducts a disciplinary procedure, just to (possibly) put him or her back in the council whenever it has completed those procedures.

The only time a party's decision has an impact on the status of a councillor is when it decides to *expel* a member. The expulsion triggers the procedures to be followed by the municipal manager and the IEC. As shown above, these procedures are tightly regulated, predictable and result in the election of a new councillor within a specified period of time.

Consequences of appeal

Appeal to a higher organ in the party

When a member who has been expelled appeals against the decision, that obviously complicates matters. Political parties generally permit their members to appeal against a decision to discipline them. For example, the ANC constitution provides that "an appeal may be lodged by the charged person against whom a finding has been made or a penalty imposed by the Disciplinary Committee".

What is the status of the councillor during the appeal? Does the appeal postpone the expulsion and does the member therefore remain a councillor during the appeal? Or does the expulsion become effective immediately?

This depends on the party's constitution, which might provide explicitly that the decision is effective immediately. For example, the Independent Democrats' constitution provides that "the receipt of the appeal shall not be interpreted as a suspension of the sentence". This suggests that an expulsion is effective immediately, despite the fact that the member may appeal. If the party's constitution does not make any specific provision, the general rule is that the appeal postpones the penalty. The ANC constitution, for example, is silent on this issue. Therefore an ANC councillor who appeals to a higher ANC body against his or her expulsion remains a councillor during the appeal.



Litigation

Once the appeal body confirms the decision, there is no doubt that the decision is effective; the seat is vacant. If the disciplined member asks a court to review the party's decision, this does not automatically postpone the decision. Only a special order by the court could provide that the member remains a councillor for the duration of the court proceedings.

Role of the municipal manager

The municipal manager is positioned at the centre of these complexities. The duty to inform the IEC of a vacancy can be a very complicated process because it is not always clear whether there is, in fact, a vacancy – yet, at least. A municipal manager who receives a communication from a party about a vacancy would be well advised to consult that party on the following:

- Was the councillor *suspended* or *expelled*?
- Is the party certain that it took the decision after a fair hearing?
- Did the councillor appeal to a higher party organ?
- Does the party's constitution provide that the decision is effective immediately, despite the appeal?

Importantly, these questions do not imply that the municipal manager must judge the validity of the party's decision. In fact, such an approach would compromise the municipal manager's position. However, the municipal manager is best placed to conduct a sober conversation with the party structures to ensure that all stakeholders are clear about the rules that apply. This should go a long way towards ensuring that any political change takes place with minimal disruption.