

Removing elected councillors

WILL CREATE CHAOS

Widespread disgruntlement over allegations that candidates nominated by communities had been irregularly removed by the ANC led to a promise by President Jacob Zuma that any candidates found to have been nominated in an improper way would be removed after the May polls. This was seen as a desperate attempt to stop aggrieved communities from boycotting the local government elections.

A high-level ANC task team led by Home Affairs Minister Nkosazana Dlamini-Zuma was formed in May 2011 to investigate allegations that newly elected ANC councillors had cheated their way onto candidate lists. There were, moreover, suggestions that the ANC list could be amended after the investigation 'to ensure that people serving in our local, district and metropolitan municipalities are truly those who have been chosen with the participation of the communities'.

Over the years the ANC's nomination process for candidates has been a combination of a broadly consultative branch-level nomination process with a higher-level determination by the party's national executive council (NEC), whose role is to determine the criteria upon which the party's list is developed. Managing the party lists has always been the responsibility of the provincial and national list committees. These committees consolidate, validate and confirm the nominations received from local branches into a final national list, which is then approved by the national list committee and the NEC. Cosatu, the SACP and the South African National Civic Organisation (Sanco) are also consulted.

However, the Polokwane conference in 2007 resolved to strengthen the list guidelines and processes for nominating public representatives so as to enhance democratic participation. It was decided that, to ensure the selection and deployment of the best cadres for public office, the broader

community had to be involved in the selection processes. This approach was adopted in selecting candidates for the local government elections on 18 May 2011. For the first time, the ANC allowed communities to nominate election candidates.

However, this seems to have backfired. It created the expectation that communities, and not the ANC, would be the arbiters in selecting candidates. As a result, angry party members accused ANC leaders of tampering with the lists and removing their preferred candidates. Some also alleged that their preferred candidates had fallen victim to powerful cliques. Angry party members even took the ANC to court in some areas, including the Alfred Nzo, Amatole and Buffalo City regions in the Eastern Cape. In other areas, community members threatened to boycott the elections, and some embarked on mass protest, all of which have unsettled the ANC's election campaign.

In a last-minute rescue plan to prevent a boycott, President Jacob Zuma announced that the ANC would probe the allegation that the nomination process had been manipulated and would remove people if it was found that they had been nominated in an improper way. He said the party was prepared to hold by-elections soon after the municipal elections in areas or wards in which the party's preferred candidates had been fraudulently removed from the candidates' list. In the words of the President, 'Our honesty and track record will ensure that we *remove* non-preferred candidates and *replace* them with those who were wanted in the first place by our structures and our communities' (author's emphasis).

A task team has been charged with addressing the issue and started its work on 8 June in KwaZulu-Natal. It will also go to all the other provinces. SALGA seems to share the view of the ANC that it is possible to manipulate the list after elections, but before the IEC allocates seats in the municipal council.

The ANC and SALGA both appear to have overlooked the fact that a political party does not have the power to *remove* elected councillors and *replace* them with councillors of its choice. A councillor, once elected, can only be removed in

accordance with the rules of the electoral system – and these may seriously complicate the ANC’s rescue plan.

When does a councillor legally assume office?

A councillor legally assumes office from the date on which the IEC formally determines the result of the election in the municipality (see page 8 of this issue). In the case of this year’s local elections, the IEC made that declaration for all municipalities on 21 May.

Effects of removal

Once a candidate has been elected and has assumed office as a councillor, the party’s withdrawal of that candidate’s name from the party list has no consequences for his or her council membership. Once a candidate assumes office as a councillor, he or she holds that office for the duration of the council’s term. This means that any candidate on a current party list who has been elected to a council will remain a councillor for the next five years. The ANC’s probe, and such a councillor’s subsequent removal from the list by the party, will be a futile exercise unless that councillor vacates office in terms of circumstances regulated by section 27 of the Municipal Structures Act. This happens if the councillor

- resigns from the council in writing;
- is no longer qualified to be a councillor (eg is declared insolvent or convicted of a lengthy prison sentence);
- ceases to be a member of the party that nominated him or her; or
- is removed by the MEC for local government for contravening the Code of Conduct for Councillors.

Legal impediments to the plan

The point is that a party’s instruction to its councillor to step down is not recognised by the law as a reason for that seat becoming vacant. The ANC is therefore taking two gambles.

First, the ANC would have to persuade the councillors concerned to resign of their own accord in the name of organisational discipline. The resultant vacancy would then allow the ANC to put forward another candidate from the list submitted to the IEC before elections. The IEC would then declare such a candidate elected (unless it concerns a ward seat – see below). If the elected councillor refuses to resign, however, there is nothing the ANC can do except expel the councillor from the party. Aside from the political risk this involves, the legal risk is that the expelled councillor could challenge the

dismissal in court and claim that the expulsion was nothing but a political strategy. Peter Marais did this successfully in 2002 when the DA expelled him for not giving up his mayoral seat in Cape Town. The Cape High Court condemned the DA for adopting a ‘double-barrelled’ motion: resign from public office or face dismissal from the party. So it must follow that the ANC cannot expel a member for the mere reason that he or she refuses to resign as a councillor.

Second, if the councillor concerned is a ward councillor, the ANC cannot simply suggest another candidate: it would have to compete in a fresh by-election. This would give other parties and candidates a second opportunity to contest the seat, and those parties and candidates would gratefully take the opportunity offered to them by the ANC to campaign with renewed vigour for the contested seat and would brazenly mine the ANC’s internal problems.

In neither situation can the ANC simply remove a councillor and replace him or her with a councillor of its choice. In some cases, protracted court action and further chaos may follow.

Analysis

Aside from these legal risks, this move by the ANC might seriously damage local government if it is followed through. It looks as if the President is putting party interests above sound and stable municipal governance. The temporary absence of a small number of councillors, or even one, could be disastrous for the running of a municipality. Just ask the municipal manager of one of the smaller municipalities, where every councillor is needed for work in the communities and for voting on important resolutions, how difficult it is to deliver services when there is political turmoil. In some cases, the temporary absence of a councillor may even result in a takeover by another party or another faction, resulting in instability and administrative paralysis and leading to the municipality’s inability to deliver services.

The list probe by the ANC will result in multiple vacancies on councils across the country, and we can anticipate political instability, spilling over into administrative difficulties, in those municipalities. All this is being done to enable the ANC to deal with an internal party process gone wrong.

Surely this contradicts government’s Local Government Turnaround Strategy, which is premised on good governance and stability in municipalities?



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