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IEC Research Seminar
Safeguarding Electoral Democracy in the Age of Growing Mistrust
21 September 2022
Holiday Inn, Sandton

**Title: Municipal Managers vs Electoral Officials:
Striking an Effective Balance**

Introduction

Voters consider numerous factors when deciding whether they should vote, or which party to vote for. Central amongst those factors is the performance of government. Depending on their assessment of government performance, voters then contemplate whether it's worth voting. That is, whether their vote will make a difference at all. Deciding whether to vote, therefore, is not strictly a theoretical exercise. It also includes material and selfish aspects. "Will I benefit anything with this vote", is a question uppermost in the minds of voters.

Voters' evaluation of government's performance, in the preceding term, is paramount in determining levels of voter participation. For this reason, this paper focuses on activities of municipal councils, especially the area that involves the Independent Electoral Commission (IEC). Specifically, it looks at the IEC's role in the removal and replacement of councillors in council on the instruction of political parties. Internal party squabbles have triggered controversies that have led to the IEC being drawn to decide which councillor to remove, or appoint into council. Though seeming like a straight-forward matter, removal or replacement of a councillor can drag on for a considerable period of time to the detriment of the business of council.

Hung councils, whose government rests on coalitions, are particularly vulnerable to disruptions caused by lengthy stalemates over the legitimacy of decisions over the declaration and filling-in of vacancies in council. Given that these decisions tend to impact on the balance of power in council, which determines if the incumbent coalition government remains or falls, politicians

resort to all manner of trickery. This includes not convening council meetings. Government grinds to a halt, which manifest in the absence of services. Though at the centre, internal party squabbles are not the sole cause of municipal instability. At times, municipal managers too have been known to share the blame, either through calculated (in)actions or unwittingly.

Below, the paper provides a case-study to illustrate this problem. The case-study is drawn from the Nelson Mandela Bay (NMB) municipality, and involves incidents that have occurred in the last eight months. The key actors here are the Northern Alliance (NA), the African National Congress (ANC), the municipal manager, Noxolo Nqwazi and, of course, the IEC. Following the detailed account, the paper concludes with a proposal on how the IEC can limit the damage caused by internal party squabbles on the functioning of councils.

Party Ructions and Managerial Complicity

The NA is one of 13 parties represented in the NMB Council. The party was formed just before the 2021 elections, which did not produce an outright winner. Consequently, parties had to form a coalition government. With three seats to its name, the NA became part of the ANC-led coalition with a total of 60 seats. Gary Gary van Niekerk, president of the NA, became the speaker. In a 120 seat-size council, the ANC leads a precarious coalition. The opposition alliance, led by the Democratic Alliance (DA), has a total of 52 seats, and the Economic Freedom Fighters (EFF) occupies eight seats. The EFF is not attached to either grouping. Even though the ANC-led coalition commands the largest number of seats in council, it remains vulnerable to a motion of no confidence. All it takes for the coalition to fall is one, or two, of their partners not attending a council meeting, and the EFF voting with the DA.

The stalemate that plagued the NMB council, however, was not triggered by the opposing alliance, or the free-ranging EFF. It emanated from within the ANC-coalition, over the appointment of a permanent municipal manager. Coalition partners disagreed over the choice of the city managers. The disagreement surfaced at the council meeting of March 16, 2022, where the recommendation for appointment – i.e. Noxolo Nqwazi - was tabled for voting. Nqwazi was ANC's preferred candidates, whilst coalition partners preferred another candidate. Voting took place with 50 councillors supporting Nqwazi, but a dispute soon arose over whether

the meeting was quorate – i.e. 61 or more councillors present in council at the time of voting. Some members had walked out of the meeting. And, Van Niekerk, the speaker, ruled that the walk-out had left the meeting with less than 61 councillors present. On the contrary, the ANC insisted that the meeting was quorate. But, that was not their call to make. Only Van Niekerk could make the call. The ANC refused to accept the speaker's ruling and, their mayor, Eugen Johnson, went ahead with Nqwazi's appointment.

Nqwazi became a beneficiary of the ANC's misconduct. A court judgement would subsequently confirm Van Niekerk ruling's that the number of councillors present was actually 57, notably less than the requisite majority of 61. All was not lost though for those who opposed Nqwazi's appointment. The speaker could simply re-convene the meeting and table the item again for voting. That is exactly what the mayor and the municipal manager feared. And, of the two, Nqwazi was in a position to try to prevent it. Clinging onto a position she had assumed improperly, Nqwazi went on to remove Van Niekerk and two of his colleagues from council, taking advantage of internal squabbles within the NA.

Some within the NA wanted their three councillors replaced in council. The only way they could do so was to either recall (on account of some misconduct) or expel them from the party. Haylee Gee, a member of the faction wanting the trio out, had actually written to Nqwazi earlier in January 2022, informing her that the three councillors were expelled from the party and, therefore, were no longer councillors. Nqwazi refused to act on the instruction and was emphatic:

that no further administrative actions can be undertaken by this Office until such time as the court application is finalized as the outcome will determine such actions. The municipality will abide to the decision of the court and this is necessary to ensure that the interests of the Municipality are protected.¹

Nqwazi had also copied the regional manager of the (IEC), Crosby Bacela, in her response to the letter. By including the IEC in the exchange, Nqwazi presumably intended to reassure Gee that her decision was above board. If it were not, then she would not have responded in such a transparent, including someone who would have objected if the decision were wrong.

¹Office of City Manager: N.L. Nqwazi. "Vacancies iro Vacancies Proportional Representation (PR) Councillors." 26 January 2022.

Hardly a month later, Nqwazi adopted a different stance. Reacting to a repeat of the same directive on March 21, 2022,² two days before a council meeting, Nqwazi complied. She wrote the IEC, the following day after receiving the letter, informing Bacela that the NA trio were no longer councillors and IEC needed to replace them.³ The IEC does replacements based on the order of names in the party's candidates list (which would have been submitted prior to the election that day of that term). The odd thing about Nqwazi's reaction was that circumstances had not changed from what they were when she initially declined the directive. The matter was still disputed in court, which she had earlier cited that as the basis for declining the instruction. She ignored the legal wrangling this time around. The difference now was that Nqwazi considered van Niekerk a nemesis in the way of her occupying the position of municipal manager.

The IEC's regional manager, Bacela, however, was circumspect in his response to Nqwazi's correspondence. Cognisant of parties' propensity towards in-fighting, the Commission does not act hastily on such matters. It allows for the possibility that what are communicated as party decisions, may actually be invalid or have arrived at improperly. The Commission is wary of being entangled in intra-party squabbles, thereby exposing itself to accusations of bias. For this reason, regulations grant the IEC 35 days within which to act on the directive to make replacements. During this period, the election management body does a background investigation to ascertain that the instruction is valid, and does not act whilst the decision is the subject of a legal dispute. And, so the IEC did not remove the trio from the party list as NA representative, which meant there were no vacancies to be filled.⁴

Nqwazi, however, was uninterested in the IEC's own processes. She went ahead to act as if the removal was already formalized. The day before the council meeting, and acting in unison with the municipal manager, the mayor's office issued a message purporting to have cancelled the meeting on account that van Niekerk was no longer speaker, and thus could not convene the meeting. On being that told that the lawyers of the NA trio had applied and were likely to secure interim interdict against her declaration of their removal, Nqwazi was defiant, dismissing the impending legal order as

²Hayley Gee: Secretary General – Northern Alliance: letter to The City Manager: Nelson Mandela Bay Municipality, Gqeberha. 21 March 2022.

³Noxolo Nqwazi: Office of City Manager. "Declaration of PR Vacancies Northern Alliance". 22 March 2022.

⁴ Conversation with Crosby Bacela, 31 March 2022.

Moot and unimplementable especially since I have already declared the vacancies of the three members (speaker and two other councillors) of the Northern Alliance yesterday, 22 March 2022, and received confirmation thereof from the IEC accordingly ... As such, the three former Northern Alliance members remain out of office and are no longer councillors, based on my declaration of their vacancies on 23 March 2022, and particularly in the absence of any other court order re-instating them to their former positions. Kindly ensure that the former speaker do not and cannot call any council meeting, since he, Gary van Niekerk, is no longer speaker of council.⁵

On the day of the (reconvened) council meeting, 23 March 2022, councillors even found the venue of the meeting locked. They were similarly unrelenting, and found an alternative venue. The council meeting not only resolved to rescind Nqwazi's dubious appointment, but also decided to suspend and subject her to a disciplinary process.

The council decision to discipline Nqwazi was informed by a report of the Special Investigation Unit (SIU). The corruption-bursting body had found that Nqwazi, whilst acting as municipal manager in 2020, had awarded a tender irregularly. The SIU recommended disciplinary measures against her. But, the ANC was not keen on taking any disciplinary measures against Nqwazi. Instead, the party proposed that council should apply to court to review the SIU report. Nqwazi and the ANC had common interests. The ANC was determined not only to protect Nqwazi from possible legal prosecution, but also to appoint her as municipal manager. It is not clear yet what Nqwazi has done for the ANC to have it act in the irrational manner that it did, to the point of even risking the collapse of its own coalition government.

Impact on Council and Administration

The turbulence in council derailed municipal administration. For approximately five months, from April to September 2022, councillors were bickering over whether Van Niekerk was still the speaker. The municipal manager decided not to pay the NA trio their salaries anymore and barred them entry into council premises. Relations within the ANC-led coalition deteriorated even further. The source of unhappiness for coalition partners had now gone beyond Nqwazi to include the ANC and its mayor, Johnson. They resolved to table a motion of no confidence in the mayor. With the DA pledging its support, the motion was likely to pass. This likelihood

⁵ Potgieter, J. 15 September 2022. High Court of South Africa – Gqeberha, Case No: 2452/2022, pp7.

made the mayor and municipal manager even more determined to thwart council meetings. Within that five months period, about four council meetings had to be rescheduled, because of the dispute. This meant that council could not approve or exercise oversight over municipal programmes aimed at service delivery. Residents even took to filling-up potholes themselves.

The desperation of the municipal duo – mayor and municipal manager – was such that they even ignored a court ruling nullifying the purported expulsion of the NA trio. The supposed expulsion was the basis upon which the municipal manager had taken the decision to replace the NA trio. The ruling, made on 7 June 2022, removed any basis for Nqwazi to seek the removal of the trio from council. But, she continued to oppose the application, submitted by the NA for the court to order Nqwazi to allow them back into council premises and resume their salary payments.

Instead of continuing to await a court sitting on their removal from council, scheduled for October 2022, the NA trio decided to petition the court for an urgent order to attend one council meeting on 30 August 2022. It is not clear why they decided to wait for so long before petitioning the court. One possible reason was lack of funds to procure legal service. Costs of legal representation at the High Court are exorbitant. In his verdict, Judge Potgieter granted the NA trio their request to return to council without any prohibitions from the municipal manager. The reasons the judge provided for granting the request also hinted that there were no valid basis, to start with, for barring the NA trio whilst their purported expulsion was still the subject of a legal dispute and was subsequently decided in their favour. Faced with the strong possibility of losing the case later in October 2022, the municipal manager withdrew her opposition to the application by the NA trio. The municipal manager possibly realised that she could be held personally liable for the legal costs, especially because her losing the case seemed imminent.

Mayoral and Managerial Collusion: Implications and Recommendations

The municipal manager's decision to bar the NA trio from council meetings was a blatant abuse of power. It was not only irregular, but also aimed at protecting herself and advancing the interest of the ANC and its mayor. It was these personal interests that blinded the municipal

manager from the frivolity of her actions. There was already precedence, as Judge Potgieter pointed out, on how municipal managers and IEC should handle instances such as the NA's.

In one of the authoritative rulings, delivered on 25 May 2018, Judge J Muller affirmed that municipal managers could not simply declare a vacancy without authenticating the instruction. Verifying the unauthenticity of the instruction entails the IEC finding out from both the person political parties designated to liaise with the Commission, and the concerned councillor(s). The key thing is to determine if the decision was taken properly and whether the concerned councillors are contesting the decision. In instances where the decision is contested in court, the IEC cannot remove the concerned councillors. It must await the resolution of that dispute.

The IEC acted properly on the NA matter. It adhered to proper procedures. This cannot be said in relation to the municipal manager, Nqwazi. And, she cannot claim ignorance of the proper procedures. In the rare case that she was ignorant, she would have certainly learnt from the IEC's regional manager, who repeatedly stated that the NA trio remain councillors so long as the legal dispute was unresolved. No doubt the municipal manager knowingly ignored the rules and the IEC, as the final arbiter on such matters, had no way of compelling her to act procedurally. And, the municipal manager was able to go rogue because of lack of immediate consequences for her misbehaviour. So long as council could not meet or councillors failed to make up the requisite majority to fire or suspend her, she could continue with her misbehaviour.

The result of the misconduct, on the part of the municipal manager, was the derailment of the municipality. This, in turn, reduces the level of confidence that people have in councillors. That councillors permitted the municipal manager to throw the council business into disarray makes lie of their claim that they prioritise the public good. This generates disillusionment, which, in turn, translates into lower turn-out at the polls.

All is not lost, however. There is clearly a loophole in the regulations. From the outline of the process of removal and replacement of councillors, and repeated affirmations by courts, it is obvious that the IEC is the final arbiter. The IEC should, therefore, propose that this is made emphatic in the regulations – that a municipal manager cannot bar councillors entry into council, unless and until she gets the final word from the IEC on the status of those councillors. Any actions on the contrary, on the part of a municipal manager, should be deemed as misconduct that warrants serious punishment.