

those respondents opposing the relief sought, I am of the view that the matter is clearly urgent and have accordingly entertained the application on that basis. The applicant's non-compliance with the usual provisions of the Rules of Court is accordingly condoned.

[2] The parties to the application are as follows. The applicant is the African National Congress, a duly registered political party with its regional offices for the Southern Cape at 89 Hibernia Street in George. The first respondent is the municipal manager of the George Local Municipality, the offices of which are situated at the Civic Centre in York Street, George. The office of municipal manager is currently held by Mr Cecil Africa. The second respondent is the George Local Municipality itself and the third respondent is Henry Johannes Jones, an adult male politician, who represented the Democratic Alliance as a ward councilor in the Municipality at the time of the resignation which is the subject of the dispute in this matter, on 26 March 2008.

[3] The fourth respondent is the Democratic Alliance, a duly registered political party, with its main offices at Ruskin House, Roeland Street, Cape Town. The fifth respondent is the Independent Electoral Commission and the sixth

respondent is the Minister for Local Government and Housing, Western Cape, who is at present Mr Qubele Richard Dyantyi.

5 [4] The notice of motion records that no relief is sought against the second to sixth respondents who were cited solely to the extent that they have an interest in the matter. No costs are sought against any of the respondents, save to the extent that they oppose the application. In the event the first to third respondents, 10 represented by Mr Rosenberg opposed the relief sought; whilst the sixth respondent, represented by Mr Moses, elected to abide the decision of the Court. Sixth respondent did file an affidavit in which he supported the hearing of the matter as one of urgency and in which he 15 made certain submissions concerning the interpretation of the relevant legislation.

[5] He also took issue with some unsubstantiated hearsay 20 allegations regarding himself and the Premier of the Western Cape. In this regard he caused a striking out application to be filed but at the hearing Mr Moses advised me that such was not being persisted with. Neither of the other parties represented before me 25 sought any costs order relative to the abandoned striking

out application and nothing more need be said concerning it.

[6] There is a massive conflict of fact between the applicant's account of relevant events and that of the first to third respondents. Mr Borgström, who appeared for the applicant, did not seek a referral to oral evidence and was content to argue the matter on the usual opposed motion basis.

The relevant facts so determined may be crisply stated. On 26 March 2008 the third respondent signed a letter (Annexure SK2 to the founding affidavit). It was addressed to the first respondent and read as follows:

“Geagte Heer,

Re: Bedanking as Raadslid

Hiermee dien ek my bedanking in as Raadslid van die George Stadsraad en Demokratiese Alliansie met onmiddellike effek.

By voorbaat dank.”

The letter was signed by the third respondent and below his signature was an indication that it was being copied to Flip de Swardt and to the Independent Electoral Commission. Mr de Swardt is the executive mayor of the George Local Municipality.

An envelope containing the letter was delivered to the first respondent's receptionist on 26 March 2008. She placed it, unopened, on the first respondent's desk. The first respondent did not immediately read the letter because, according to his affidavit, he was busy with other matters and did not regard it as that urgent. His receptionist had informed him that it was evidently a letter of resignation from the third respondent.

The following day on 27 March and prior to opening the envelope and ascertaining the content thereof, the first respondent received a telephone call in which he was informed that third respondent had withdrawn his resignation and was on his way to first respondent's offices to collect the letter. Shortly thereafter the third respondent arrived at the office and the first respondent handed back to him the unopened and unread letter. The first respondent states that he held the *bona fide* opinion that the third respondent was entitled to withdraw this letter of resignation.

As regards the letter itself, it had (according to the third respondent) been prepared for him by a certain Pastor Smart and an Inspector David Ryk. Ryk had presented it to him for signature on the morning of 26 March and he had signed it in Ryk's presence. Ryk had kept the letter

but had not been instructed to deliver it to the first respondent.

No copies of the letter were sent to either De Swardt or to the Independent Electoral Commission.

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[7] On these facts, Mr Borgström argued two propositions. Firstly, that in terms of section 27(1) of the Municipal Structures Act 117 of 1998 ("the Act") the seat held by the third applicant became vacant; and secondly in terms of clauses 3.5.1.1 and 3.5.1.3 of the fourth respondent's Federal Constitution, the third respondent's party membership came to an end in consequence whereof, in terms of section 1(2)(b) of Schedule 6B to the Constitution of the Republic of South Africa 1996 read with section 27 of the Act, the third respondent ceased to be a councillor and the seat in like manner fell vacant. I mention that the reference to section 1(2)(b) of Schedule 6B to the Constitution should have been, and was understood to be, a reference to section 1(2)(a).

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[8] Mr Borgström submitted that, in consequence, the applicant was entitled to the declaratory and review relief it sought in the following terms (which are as amended at the hearing):

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"1.2 Declaring that:

1.2.1 In terms of section 27(a) of the Structures Act, the Seat previously occupied by the third respondent was immediately vacated when he resigned as a councillor on 26 March 2008 by delivering a resignation letter to the municipal manager; and

1.2.2 in terms of clause 3.5.1.3 of the Federal Constitution of the DA and item 1 to Schedule 6B to the Constitution of the Republic of South Africa 1996, the Seat previously occupied by the third respondent was immediately vacated when he resigned as a member of the DA by declaring his intention to resign from the DA in his resignation letter to the first respondent on 26 March 2008.

1.3 Reviewing, correcting and setting aside the decision of the municipal manager on or about 28 March 2008, to hand back the third respondent's resignation letter to him and his subsequent decision on or about 31 March 2008 to treat the third respondent as if he remained a councillor;

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1.4 Reviewing, correcting and setting aside the failure by the municipal manager to exercise his power and duty in terms of section 25(3) of the Structures Act (after consulting with the IEC) give notice of a by-election to be held in the ward previously represented by the third respondent;

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1.6 directing the municipal manager to give notice of a by-election in the ward previously represented by the third respondent, such by-election to be held within 90 days after 26 March 2008; and

1.7 the costs are to be paid by the first to third respondents, jointly and severally.” (I mention that there appears to be a typographical error and there is no paragraph 1.5)

It will be seen that the relief claimed in prayers 1.3 to 1.6 is presaged on findings in terms of prayers 1.2.1 and 1.2.2, no alternative basis having been argued for the review and *mandamus* relief claimed in these prayers.

[9] I turn therefore to consider the first of the two declaratory orders sought by the applicant. Before doing so I think it appropriate to record that, in construing the

applicable legislation, I have held in mind that it has application in many differing personal and political circumstances and that the intention of the Legislature cannot be coloured by the somewhat Byzantine political manoeuvrings which have been revealed in these papers. On the contrary, the relevant legislative provisions were intended to find application in the principled and honourable behaviour of public representatives; in particular, the discredited system of floor-crossing cannot inform the interpretation of the relevant sections. Section 27(a) of the Act provides:

"27 Vacation of office

A councillor vacates office during a term of office if that councillor –
(a) resigns in writing".

Counsel were all agreed that the provision envisaged:

"An unqualified resignation either of immediate effect, or effective from a specified date;
the communication of the written resignation to the prescribed or proper party."

[10] Mr Rosenberg understandably conceded that there had undoubtedly been compliance with the first of these two elements. However, it was the second of the elements which produced debate amongst counsel, Mr Rosenberg arguing that the section envisaged more than the mere

delivery of a letter of resignation but required the actual reading thereof; whereas Mr Borgström (with whom Mr Moses associated himself) contended that delivery to the office of the appropriate official was sufficient.

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[11] It is clear that the resignation contemplated in section 27(a) must be written. That, presumably, is to put the terms of the resignation beyond question and also to provide both proof of such resignation and a lasting record thereof. The consequence of a resignation has public significance in that such creates a vacancy in the particular council with effect on various statutory provisions relating to *quora*, composition of committees, requisition of meetings and the like. In addition vacancies must be filled in accordance with the applicable legislative provisions.

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[12] Accordingly, it is in the wording of the resignation that the terms of and consequence of the resignation are to be found. In developing his argument, Mr Rosenberg argued strongly that the relevant person to whom the terms of the resignation had to become known was the Speaker, insofar as that functionary was required in terms of section 37 of the Act to preside at meetings of the council and to ensure that the meetings were

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conducted in accordance with the rules of the council. In contrast, the municipal manager's role was administrative in nature and, although he may advise the council, he is not a member thereof. It is more likely, argued Mr Rosenberg, that the Legislature intended the resignation to come to the attention of the Speaker in the first instance, being the presiding officer of the body from which the councillor was resigning.

[13] The argument is attractive and the Speaker is probably the more appropriate person to receive a councillor's resignation. The municipal manager would then attend to the administrative consequences flowing from that fact. However the Legislature has not specified a recipient for a letter of resignation in terms of section 27(a) and I cannot hold that notification to the municipal manager would not be an adequate communication of such resignation. In any event, on the view I take of the matter, the point need not be finally determined.

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[14] Mr Borgström argued that mere delivery of the letter was sufficient to occasion a vacancy in the council in terms of section 27. In argument, he refined this proposition in two respects. Firstly, he conceded that it would have to be delivery to an "appropriate" recipient and not merely,

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for example, to the postal clerk. Secondly, he sought to counter Mr Rosenberg's insistence that the content of the written communication, "reach the mind" of the intended recipient by relying on the allegation that the first respondent had been told that there was a letter of resignation awaiting his attention.

[15] As regards the first concession, I consider that it was correctly made. The delivery of a letter of resignation which never came to the attention of either the municipal manager or the Speaker could hardly trigger the results envisaged by the Legislature. Counsel were accordingly agreed that the letter of resignation would have to reach at the least the office of the intended recipient.

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[16] In this regard, Mr Moses (who argued before Mr Borgström had made the said concession in reply) had relied on the provisions of section 115(3) of the Municipal Systems Act 32 of 2000 for the proposition that the delivery of a letter of resignation to a person in attendance at the municipal manager's office would be sufficient. I do not think that the section is helpful. It is contained in another enactment and it deals with the service of legal process, a procedure which required an explanation of the nature and exigency of the

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documentation being served and which documentation cannot be in a sealed envelope. I am not called upon to consider in this matter whether the delivery of an open letter to the first respondent's receptionist would have constituted compliance with either the said section 115(3) or section 27(a) of the Act.

[17] The argument accordingly reduced itself into a debate as to whether the admitted delivery of the closed envelope to the first respondent constituted a resignation in writing for the purposes of section 27(a) or not. Although Mr Borgström presented an argument having considerable persuasive merit in this regard, on reflection I am of the view that Mr Rosenberg is correct and that the section presupposes that the writing be read by the appropriate recipient. The oral communication that a letter of resignation had been written but not yet sent would clearly not suffice for the purposes of this section and I can see no reason in principle why the situation is changed because the unread letter is within the municipal building or even in the intended recipient's in-tray. In my view, the resignation cannot become effective within the meaning of the section until the "writing" has been read by the intended recipient. Insofar as it is accepted by the applicant that the first respondent did not, in fact,

read the letter, it is unnecessary to decide the further point of whether such, having indeed been read, could still be withdrawn prior to the public announcement of such resignation or the municipal manager consulting the Electoral Commission in terms of section 25(3) of the Act.

[18] In the result, the applicant is not entitled to an order in terms of paragraph 1.2.1 of the revised prayer. I now turn to the alternative argument. In this regard the applicant relies on certain provisions of the fourth respondent's Federal Constitution (which I will refer to as the "Federal Constitution" to distinguish it from the Constitution of the Republic) a copy whereof was annexed to the founding affidavit as Annexure SK3. Section 3.5 of the Federal Constitution is headed "cessation of membership" and provides that:

"3.5.1 A member ceases to be a member of the party when he or she:

3.5.1.1 submits his or her written resignation from the party;

3.5.1.2 becomes or remains a member of another party other than one approved under this constitution;

3.5.1.1.3 declares his or her resignation or intention to resign from the party or intention to join another party;

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3.5.1.1.4 fails to renew his or her membership on or before the date stipulated;

3.5.1.1.5 canvasses other party members to resign from the party;

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3.5.1.1.6 canvasses other party members to join or support another party;

3.5.1.1.7 stands or accepts a nomination against an official candidate of the party in any public election;

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3.5.1.1.8 is found guilty of any offence listed in Schedule 6 of 7 of the Criminal Procedure Act;

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3.5.1.1.9 is in default of the payment of any compulsory public representative contribution for a period of two months

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after having been notified in writing that he or she is in arrears...”

5 [19] The applicant had initially relied on clause 3.5.1.1 insofar as Annexure SK2 recorded that it was being copied to Mr de Swardt. It being accepted that Mr de Swardt had not received such a letter, Mr Borgström did not persist with this ground of attack and the amended prayer 1.2.2 relies
10 solely on the provisions of clause 3.5.1.3 of the federal constitution.

[20] It is clear that the relationship between members of a political party, including its office bearers and public
15 representatives, and such party is contractual in nature and that the terms of the agreement are to be found in the governing constitution or other enactments of the voluntary association in question.

20 [21] Mr Rosenberg argued that it is accordingly for the fourth respondent, within its applicable structures, to determine the fact of a “triggering event” under clause 3.5.1 and to determine in consequence the membership status of the individual. A mere allegation, for example, could never
25 result in the automatic loss of membership of a party by a

public representative, with the public law consequences that would flow there from. In particular, he argued that it was not open to the applicant to seek to interpret the terms of the fourth respondent's constitution for it. In addition, he pointed out that any action taken against the public representative by a political party would be susceptible to review.

[22] Mr Borgström relied strongly on the judgment of Veldhuizen, J in this Division in the unreported matter of Henderson v Democratic Alliance & Others (judgment delivered on 4 December 2007). In that matter the applicant, a former party representative, sought relief because he had not been afforded a full disciplinary enquiry by his party. He was expelled by the party, and the relevant council informed of his loss of membership thereof, by virtue of having been found guilty of an offence listed in Schedule 6 or 7 of the Criminal Procedure Act.

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[23] What the learned Judge held, was that – once the disciplinary committee had established that Henderson had indeed been convicted of a crime such as is envisaged in the federal constitution – there was no need for further investigation since, *ipso facto*, the party was

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entitled to terminate his membership by virtue of that fact. It seems to me that the circumstances of that matter are a far cry from the argument that Mr Borgström advanced that the termination of membership and the resultant ward vacancy in George which would result there from, occurred "*ex lege*". It is clear that it still requires a determination by the relevant political party concerned and the communication by that party of the determination of membership to the relevant council and to the Electoral Commission.

[24] What is relied on is a "declaration" by the third respondent and that "declaration" is said to reside in Annexure SK2. On the facts, the only person who saw the content of SK2, other than the third respondent himself, was Ryk. (Mr Borgström relied faintly on an allegation that there were widespread rumours that the third respondent was going to resign from the fourth respondent, but such could hardly constitute a declaration and he understandably did not press the argument).

[25] Can the sharing of the content of the letter of resignation, in private, with Ryk constitute a declaration? It becomes necessary to decide what is meant by the

verb “declare”. The Concise Oxford Dictionary defines the verb as “to announce openly or formally”. Other usages of “declare” include the acknowledgement of goods or income, the voluntary closure of a cricket innings, the naming of the trump suit in card games and the taking of sides in an international dispute. All of these subsidiary meanings also have the connotation of an open public announcement. It is difficult to see that the private communication of his intention, in the rather conspiratorial and secretive dealings with Ryk, as constituting a “declaration” for purposes of the provision; and it is equally difficult to reconcile the third respondent urgently preventing the opening of his letter of resignation with an intention to “declare”. It is not the contemplation of resignation, nor even the formulation of an intention to resign, that triggers the provision; it is the declaration of such intention.

[26] It is true that the letter of resignation subsequently came to the knowledge of Mr de Swardt. At the time that the content of the letter came to his knowledge, however, he had already been informed by the third respondent that he no longer intended to resign and wished to remain a member of the party. Accordingly, at the time that Mr de Swardt became aware of the content of the letter, it was

no longer an intention to resign but rather the unexecuted memorial of what had been an intention to resign.

5 [27] If I am wrong in this however, there is another basis upon which the applicant cannot succeed in obtaining the declaratur sought in prayer 1.2.2. The prayer seeks a declaratur that the seat occupied by the third respondent was vacated when he resigned as a member of the fourth respondent but that is not a declaration as to rights but as to fact. This Court is competent to issue a declaration as to rights in terms of the provisions of section 19(1)(a)(ii) of the Supreme Court Act 59 of 1959. This power is further reflected in section 8(d) of the Promotion of Administrative Justice Act, 3 of 2000 which empowers a court in administrative proceedings to make orders “declaring the rights of the parties”.

15 [28] The only right which is in dispute is in fact whether the third respondent is entitled to continuing membership of the fourth respondent. It is not open to a litigant who is not a party to a contract to seek a declaration in respect of the rights and duties flowing from such contract. (See in this regard Preston v Vredendal Cooperative Winery

Ltd & Another 2001(1) SA 244 (ECD) at 249E-F and
250G-H)

[29] I accordingly find that the applicant has not made out a
5 case for the relief claimed in prayer 1.2.2 either. It
follows that the application falls to be dismissed with
costs and it is so ordered.

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A handwritten signature in black ink, appearing to read 'A.J. Irish', is written over a horizontal line.

IRISH, AJ