STRANGERS IN THE HOUSE: A CONSIDERATION OF SECTION 129(1) OF THE CONSITUTION

March 2015

Executive Summary

Fractious nature of the main political parties in Zimbabwe since the July, 2013 elections has resulted in numerous suspensions and expulsions of party members and has meant that there has been frequent recourse to subsections 129(1)(k) and 129(1)(l) of the national Constitution. These subsections have been subject to a variety of interpretations and inconsistently implemented. This paper sets out the circumstances in which the subsections have had application post the 31st July, 2013 elections and considers some legal aspects pertaining to the provisions.

The subsections are as follows:

> *129(1)(k) The seat of a Member of Parliament becomes vacant if the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it.*
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> *129(1)(l) The seat of a Member of Parliament becomes vacant if the Member, not having been a member of a political party when he or she was elected to Parliament, becomes a member of a political party.*

At first glance the subsections appear straight forward enough. Enormous difficulties become apparent, however, if one is to consider how the subsections are to be implemented. The first point to note is that the Speaker of Parliament does not give effect to the provisions. The vacancy is triggered automatically by the national Constitution, once certain facts have come into being. The Speaker, however, may be required to make a declaration that the circumstances set out in the subsections have in fact come to pass. It is here that the problems arise.

Consider subsection 129(1)(k). There are two criteria to be met here: one; that the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament, and, two; the political party concerned, has written to the Speaker declaring that the Member has ceased to belong to it. The Speaker is thus required to make two findings of fact – has the member ceased to be a member of the political party to which he or she belonged when elected; and has a duly written letter confirming this fact been dispatched and received by him.

However, where a member of a party has ceased to belong to a political party, for example, on account of an expulsion, this fact may be difficult to determine. The expelled member of the party may strongly contest the expulsion, contend that the expulsion was procedurally flawed and institute appeal proceedings. How then is the Speaker to proceed? Has or has not the Member ceased to belong to the political party in question? A similar situation arises if there has been a schism in the party, with two groups both contending to be the "real" constituents of the split party. In this situation, it is difficult for the Speaker to determine both criteria. He may not be able to tell whether it is those in Group A or Group B who have ceased to be members of the party to which they belonged when elected. He may also be unable to determine whether a letter purportedly addressed to him in terms of subsection 129 is written by the party concerned, or by a splinter group which claims to be, but is not in fact the party concerned. It may also be contended by the affected Member that the letter was written by someone without due authority

to do so. Once, again, how should the Speaker proceed in such situations? Since a declaration of a vacancy has a profound effect upon the Member and upon the public generally (as a by-election must then be called) surely administrative fairness demands that the Member be heard before the Speaker makes his findings of fact and declares the vacancy? This then implies that the Speaker must convene a mini tribunal and essentially determine, for example, whether an expulsion is legitimate or not. Yet, by acting as a tribunal in such issues, the Speaker appears to be drawn into matters which are beyond his purview and possibly skills.

If a Member has brought the matter before the Courts, the Speaker may be rescued from this role, and hold back his declaration of a vacancy until the Courts have determined the issue. But in so doing, the Speaker risks a Constitutional violation. Recall that the vacancy occurs regardless of any declaration thereof, whether it is by the Speaker or a court. It occurs the moment the facts come into being. Thus if a court finds that a vacancy did occur, the Speaker would have failed in his obligation of notifying the state President of the vacancy and the constitutional requirement that by-elections take place within 90 days of the occurrence of the vacancy (and not its declaration). Matters may be even more complex where the Speaker declares the vacancy, and only then the Member appeals his expulsion from the party. There is now the risk of contradictory rulings by the Court and the Speaker.

Circumstances may thus be such that the Speaker is damned if he does declare the vacancy and damned if he does not. Perhaps his best course of action is not to declare the vacancy if there is any doubt. The aggrieved political party can always approach the Courts. If however, a vacancy is declared when it ought not to be, the results could be chaotic, as by-elections may be called which ought not to be, resulting in a plethora of legal challenges and the possibility of a seat being wrongfully lost never to be regained.

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INTRODUCTION

Fractious nature of the main political parties in Zimbabwe since the July, 2013 elections has resulted in numerous suspensions and expulsions of party members and has meant that there has been frequent recourse to subsections 129(1)(k) and 129(1)(l) of the national Constitution. These subsections have been subject to a variety of interpretations and inconsistently implemented. The absence of uniformity has quite clearly arisen in many instances because the provisions have been interpreted with a desired political outcome, rather than the law in mind. The varying interpretations by lawyers are probably mostly on account of the legal practitioners shooting from the hip when approached by journalists for comment on the issue and without careful consideration.

The subsections in question must not only be read extremely carefully to ensure that they are correctly applied, but can also lead one into extremely difficult jurisprudence. The subsections are as follows:

> *129(1)(k) The seat of a Member of Parliament becomes vacant if the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it.*
>
> *129(1)(l) The seat of a Member of Parliament becomes vacant if the Member, not having been a member of a political party when he or she was elected to Parliament, becomes a member of a political party.*

These subsections also do not take into account the complex situations which may arise in this regard and nor do they set out the procedural steps which ought to followed when the contemplated circumstances arise. These are serious lacunae in our Constitution.[1] The South African Constitution, for example, provides specific exemptions from these provisions in the case of mergers, splits and the renaming of parties.[2]

THE OPERATION OF THE SUBSECTIONS

For the sake of simplicity, only vacancies in the National Assembly will be discussed here. The position in the Senate is however identical. The most important immediate point to note is that a Member's seat becomes vacant the moment a certain set of facts comes into being. The occupancy of a seat is ***not*** contingent upon any action taken by the Speaker, who has no discretion in this regard. The vacancy occurs automatically by virtue of the operation of the terms of the Constitution.

The Speaker has no power to terminate membership of the House. However, a custom has arisen whereby it is regarded as a duty of the Speaker to declare a seat vacant when the circumstances set out in subsections 129(10(k) and 129(1)(l) have arisen. But this is a declaration of a pre-

[1] The procedures could be set out in the Standing Rules and Orders, but are not. The Rules only provide for the procedures under the previous Constitution for members convicted of a criminal offence of sufficient gravity as to trigger a vacancy. See Rule 85(1) of the Standing Rules and Orders.

[2] See Paragraph 6 of Schedule 6A and Paragraph 12 of Annexure A to Schedule 6.

existing situation (a vacancy) caused by the operation of the Constitution and not caused by the Speaker.[3] There is no specific provision requiring the Speaker to make this declaration. The provisions also do not specify who is to make the determination that circumstances have arisen which have caused a member to lose his seat. However, since the Speaker is invested with the authority to maintain order[4] and is constitutionally obliged[5] to act subject to the Rules and Orders of the House (even if the House has ultimate authority in this regard), and since it is the task of the Speaker to direct the removal of non-members from any part of the House reserved for Members,[6] the Speaker would be duty bound to declare a Member's seat vacant, and the former member a "stranger in the House". Any member may also draw the Speaker's attention to the presence of a "stranger in the House".

As the enforcer of the Rules of the House, the Speaker thus has the primary duty to determine whether the circumstances which give rise to a vacancy have arisen. It is worth spelling out these circumstances: In the case of subsection 129(1)(k) a seat automatically becomes vacant if:

1. the occupant is a member of Parliament
2. the member has ceased to belong to the political party
3. of which she was a member
4. when elected to parliament and
5. that political party has given notice
6. in writing
7. to the Speaker
8. that the member has ceased to belong to that party.[7]

In the case of subsection 129(1)(l)a seat automatically becomes vacant if:

1. the occupant is a member of Parliament
2. the member was not a member of a political party
3. when he or she was elected to Parliament
4. and after such election becomes a members of a political party.

The Case of Dr. Kereke

The first recourse to the subsections under discussion, after the elections of 31st July, 2013, occurred on 30th September, 2013 in relation to the seat for Bikita West[8] held by Dr. Munyaradzi Kereke. The relevant events relating to Dr. Kereke need to be considered in some detail in order to understand the proper application of the subsections 129(1)(k) and (l).

Dr. Kereke had stood in the ZANU PF primary elections against the express instructions of the Politburo, which had deemed him to be ineligible as not meeting the internal party criteria for

[3] An interpretation which appears to be supported by Justice Cheda's ruling in *Abednico Bhebhe and Others versus the Chairman National Disciplinary Committee (MDC-Party)* HCB 85/2009.
[4] See Rule 76 of the *Standing Rules and Orders*.
[5] Section 135 of the Constitution.
[6] Rule 183(1)(c)(ii) and Rule 184.
[7] Note the wording of the equivalent section in the immediately preceding Constitution "*was ceased to represent its interests*" – section 41(e).
[8] Bikita West is a safe ZANU PF seat. Dr. Kereke garnered 12 322 against the combined MDCs 4 278 in the July 2013 poll.

candidates; i.e. that he had not been a member of the party for at least five years. Notwithstanding the directive from the Politburo, Dr. Kereke not only won the primaries resoundingly against the Politburo's approved candidate,[9] but managed to secure the necessary signatures from designated ZANU PF officials as required in terms of the Electoral Act,[10] so that his papers were accepted by the Nomination Court on the 28th June, 2013. He was duly declared as a ZANU PF candidate for the constituency together with the Politburo approved candidate.[11] ZANU PF thus had two candidates for the same constituency in the July 2013 poll.

The Politburo immediately wrote to the Zimbabwe Election Commission asking that Dr. Kereke be removed as the ZANU PF candidate. The remarkable response[12] of the ZEC Chairperson was as follows:

> *I wish to advise that the contents of your said letter have been referred to Dr. Kereke who has declined to give his consent to the proposed change in his status as a Zanu PF candidate. In the absence of consent on the part of Dr. Kereke, I regret to advise that the Zimbabwe Electoral Commission lacks legal authority to effect the changes that you seek.*[13]

A heated Politburo meeting took place on the 10th July 2013 to discuss Dr. Kereke's defiance. An angry Mugabe moved the motion that he be expelled for insubordination, and vowed that even if Dr. Kereke won the seat, he would not be admitted back into the party.[14] The Politburo duly resolved that Dr. Kereke be expelled summarily from the party. Considerable pressure was then placed upon Dr. Kereke to withdraw his candidacy altogether. Kereke further infuriated Mugabe when he refused to do so. Touring Masvingo province, where the seat is located, about two weeks later, Mugabe reportedly described Dr. Kereke as *"irresponsible, disobedient, non-compliant and disrespectful*" adding:

> *We don't care whether you win or not, we will not accept you back into the party because you are disobedient.*[15]

Two months after the election, on 30th September 2013, presumably too embroiled in the business of forming the new government to act sooner, the party Secretary for Administration,

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[9] Elias Musakwa.

[10] Section 46(2) of the Electoral Act Chapter 2:13.

[11] The provisions of section 46(9) are worth noting. *If, on examining a nomination paper which specifies that the candidate concerned is to stand for or be sponsored by a political party, the nomination officer is doubtful that such fact is true, the nomination officer may require the candidate or his or her chief election agent to produce proof as to such fact.*

[12] The response was remarkable because it appears to suggest that ZANU PF had requested that Dr. Kereke be required to stand as an independent, and that ZEC would have granted this request had Dr. Kereke so consented. This would have been in violation of the Electoral Act. The papers Dr. Kereke would have submitted to the Nomination Court as an independent would have been different to those submitted as a candidate standing for, or sponsored by, ZANU PF. To change his status the Nomination Court would have had to consider these papers in contravention of the strict time limits imposed on candidates for the submission of papers.

[13] Reported in Kereke Defies ZANU PF *Newsday* 08.07.13.

[14] See ZANU PF Bigwigs Clash Over Kereke *The Independent* 12.07.13.

[15] Mugabe Buries Kereke *Daily News* 26.07.13 and see also Mugabe Lashes Out at Kereke *The Independent* 26.07.13.

Didymus Mutasa, wrote to the Speaker of Parliament, purportedly in terms of section 129(1)(k) in the following manner:

> *I write, Honourable Speaker, to advise that Honourable Dr Munyaradzi Kereke who stood as a Member of the House of Assembly for Bikita West Constituency, had ceased to be a member of Zanu PF on July 10 2013.*

On the 3rd October, 2013, the Speaker, Jacob Mudenda, again purportedly acting in terms of section 129(1)(k), declared the seat for Bikita West vacant. The declaration was clearly erroneous. The section requires that the member has ceased to belong to the political party of which he was a member *when he stood in the election*, and not, as Mutasa had stated, sometime before. It should be noted here that there is nothing to prevent a person who is not a member of a particular political party standing for or being sponsored by that party.[16] Dr. Kereke was not voted into parliament as an independent candidate but as one sponsored by ZANU PF,[17] and ZEC's returns noted the seat as won by ZANU PF. Accordingly, although Dr. Kereke was not a member of ZANU PF at the time of the election, he had stood as a candidate for ZANU PF and one sponsored by that party. The sponsorship given at the time of nomination could not be withdrawn.

Dr. Kereke thus challenged the declaration of the vacancy by the Speaker in the Constitutional Court and the matter was set for hearing on the 23rd October, 2013. However, ahead of the hearing, negotiations between Dr. Kereke, ZANU PF and the Speaker resulted in a Court Order by consent:

> *The* **termination** *of the membership of Parliament for the applicant by the first respondent (Speaker of National Assembly) dated October 3, 2013 is null and void and is hereby set aside. Applicant is a member of the National Assembly.* [emphasis added]

This Court Order was anomalous in several respects. As noted above, when a seat becomes vacant by operation of subsections 129(1)(k) or (l) the vacancy occurs automatically by virtue of the contingencies set out in the Constitution having come to pass. The occupation of the seat is not "terminated by the Speaker". It is also a question of fact as to whether the circumstances contemplated by the Constitution have eventuated or not. If those facts are extant, then *ipso facto*, the seat is vacant. The parties cannot reach an agreement on the issue. The seat either is or is not vacant and no negotiation by the parties can change the reality upon which the vacancy is contingent.

We do not know the basis upon which the Constitutional Court actually determined that the seat was not vacant. But, as a matter of law, it could only have done so on the ground that it was ignorant of the fact that, during the course of the negotiations, ZANU PF had agreed to set aside Dr. Kereke's expulsion as a member of ZANU PF and re-admit him into the party. The Court order must have been on the basis that Dr. Kereke was *not* a member of ZANU PF when he stood for election and thus section 129(1)(k) had no application in this instance. Had the Court been aware that Dr. Kereke had been readmitted into ZANU PF, it could not have issued an

[16] See section 46(1)(c) of the Electoral Act.
[17] Even though in practice he received no official support from the party.

order that the "*Applicant is a member of the National Assembly"*; for had Dr. Kereke been readmitted into ZANU PF, subsection 129(1)(l) would clearly have had operation. Recall that section provides that if a person, not having been a member of a political party when elected, becomes a member of a Political party, then the seat becomes vacant. This latter set of criteria, would clearly have applied to Dr. Kereke. He was not a member of ZANU PF at the time of his election, but, through the re-admission, subsequently became so. He thus would have lost his seat the moment he was readmitted into ZANU PF, as claimed during the negotiations.

However, subsequently justifying Dr. Kereke's retention of his seat, the Speaker claimed, Dr. Kereke had never ceased to be a member of ZANU PF. He was, he said, a member of ZANU PF when he stood for elections and remained so at the time Mutasa's letter was dispatched on 30th September 2013. Thus Mudenda:

> *Hon. Dr. Kereke was elected under the ZANU PF ballot, a reference of which is made in a document received by the Clerk of Parliament titled, "Zimbabwe Electoral Commission All Provinces National Assembly Results". In an out of court settlement, it was understood that Hon. Dr. Kereke had been sent a letter of purported dismissal by Cde. Mutasa on wrong allegations as Hon. Dr. Kereke's dismissal from ZANU PF Party had not followed the ZANU PF constitutional process. Accordingly, the Chair hereby rules that Hon. Dr. Kereke is a Member of the National Assembly, having been elected by the Bikita West Constituency under ZANU PF ticket and that he is a Member of the ZANU PF Party.*[18]

The Politburo had stated that Dr. Kereke had been expelled. Mugabe stated in Masvingo before the election that Kereke had been expelled, Dr. Kereke himself claimed in his application to the Constitutional Court that he had been expelled on the 10th July and had ceased to be a member of ZANU PF on that date. The Party's Secretary for Administration confirmed that Kereke had ceased to be a member on 10th July, 2013 and the Speaker himself believed that Kereke had ceased to be a member of ZANU PF when he (then erroneously) declared his seat vacant.

To the lay person, Mr. Mudenda's claim that the clear evidence of Dr. Kereke's expulsion could be airbrushed from history and treated as if it had never happened appears outlandish. He quite manifestly had been expelled. This is where the difficult jurisprudential issue of the question of "void or voidable" acts rears its head.

In broad terms, if a political party does not follow proper procedures when expelling a member, for example, if the expulsion was made by a body not authorised to do so in terms of the party's constitution, then the expulsion may be treated as void *ab initio*, that is right from the beginning, and thus treated as never having had any effect or as having happened. A finding that an expulsion is void has retroactive effect. Thus the seemingly magical ability of the law to remove what appears to be self-evident facts from history. If however, a properly and duly constituted body of a political party (such as a disciplinary committee), after affording the member the right under the party constitution and in terms of natural justice to be heard, had resolved to expel the

[18] Record of parliamentary proceedings quoted in Mudenda Says Kereke Cannot be Booted Out Because he was Elected on a ZANU-PF Ticket *The Insider* 06.02.15.

member, but did so on an erroneous view of the facts, or false evidence, the decision would be merely voidable.[19] In other words the expulsion could be set aside, but, until so set aside, the member would not be a member of the political party.

In short, if the expulsion of Dr Kereke was void, he never ceased to be a member of ZANU PF, and his seat could not become vacant in terms of section 129(1)(k). If however, the expulsion of Dr. Kereke was merely voidable, and Dr. Kereke was re-admitted into the party, Dr Kereke was not a member of ZANU PF when he stood for election, and thus lost his seat in terms of section 129(1)(l), the moment he became, once more, a member of the party. ZANU PF treated the expulsion as voidable and not as void. ZANU PF's 6th National Peoples' Congress resolved Dr. Kereke should be re-admitted into the party and he was so formally readmitted at a Politburo meeting on the 18th February 2015. One cannot be readmitted if one is already a member.

The question of whether Dr. Kereke's expulsion was void or voidable also needs to be viewed against the fact that Dr. Kereke, not only did not challenge the expulsion, but accepted the expulsion and insisted in his court papers that he had been expelled. With this approach he ran the risk of hoisting himself on his own petard. In an effort to avoid being caught by section 129(1)(k), he brought himself squarely within the ambit of section 129(1)(l). Similarly, the party itself had, through its Secretary for Administration, in writing to the Speaker in terms of section 129(1)(k), stated that the expulsion was valid.

Where an expelled member from an organisation accepts the expulsion and does not lodge any appeal, even if the expulsion is initially void as procedurally flawed, the acceptance may have the effect of rendering the expulsion voidable rather than void. It is unfortunate that no court ruling on the point was made. It was the Speaker who determined the issue and rescued Dr. Kereke from his insistence that he had been expelled. The Speaker implicitly ruled that the expulsion was void and that Dr. Kereke must be deemed at all material times to have been a member of ZANU PF.

The provisions, and this manner of applying them, whether right or wrong, could have chaotic results. It suggests an undesirable obligation upon the Speaker, in all such instances when a party writes to him in terms of section 129(1)(k), not only to investigate and adjudicate upon the validity of a member's expulsion from a political party in terms of that party's internal procedures, but also to determine whether the expulsion is void or voidable. But more importantly, the approach allows any party to reverse a declaration of vacancy at any time, simply by stating (despite prior assertions to the contrary) that the expulsion had been unprocedural. The result could be that a seat is declared vacant, a by-election takes place, the seat is lost to the opposition and the losing party announces that the process by which the member had ceased to be a member of the party was invalid, therefore there was no vacancy and therefore the by-election was unlawful and void also.

The Case of Mutasa and Mliswa.

Deep intra-party factionalism resulted in the expulsions of Didymus Mutasa and his nephew, Themba Mliswa, from ZANU PF at a Politburo meeting of the 18th February, 2015. The

[19] Mudenda and ZANU PF had however, covered both bases, claiming that the expulsion was unlawful as the allegations against were false – they do not appear to be, as Dr. Kereke had clearly been insubordinate – *and* that proper procedures had not been followed – a claim that appears correct. The Politburo had resolved to expel Dr. Kereke. No disciplinary proceedings had been held and Dr. Kereke was not heard.

Politburo stated that they were acting on a report by the National Disciplinary Committee. It needs to be noted that the Politburo and the National Disciplinary Committee made their determination without hearing either Mutasa or Mliswa. Furthermore, the party's Constitution clearly states that the National Disciplinary Committee is headed by the National Chairman.[20]

Party President, Robert Mugabe, who has the power and duty to appoint the National Chairman,[21] however, declared after the party's December 2014 Congress, when these appointment should be made, that he would not appoint anyone to this post and that one of the party's vice-presidents would carry out the functions of the National Chairman ad hoc.[22] It seems clear that for as long as this situation persists ZANU PF cannot convene a properly constituted National Disciplinary Committee.

ZANU PF's new Secretary for Administration (a post formerly held by Mutasa himself), Ignatius Chombo, then wrote to the Speaker on 19th February, 2015, in terms of section 129(1)(k) with a view to having the seats for Headlands (Mutasa) and Hurungwe West (Mliswa) declared vacant. Mutasa, however, also wrote[23] to the Speaker, contending that the entire ZANU PF leadership was illegitimate,[24] that Chombo was not a properly appointed Secretary for Administration and thus had no authority to communicate to the Speaker in terms of subsection 129(1)(k).

The Speaker did not act immediately upon Chombo's communication stating the next week that:

> *I confirm receiving letters from the two and I am now in the process of doing a due diligence on the matter before I make a ruling… I cannot say I will make a ruling as early as Tuesday as I have to follow due diligence.*[25]

However, on the 03.03.15 the Speaker then ruled:

> *I would like to inform the House that on the 19th of February 2015, I was notified by the Zimbabwe African National Union Patriotic Front ZANU PF, that both Honourable Didymus Noel Mutasa, Member of Parliament for Headlands and Hon. Temba Peter Mliswa, Member of Parliament for Hurungwe West have ceased to be members of ZANU PF party and therefore, no longer represent the interests of the party in Parliament.*[26] *….With regard to the same matter, I must also notify this House that I have received a letter from Mr. D. N. E Mutasa, in which he indicated that his expulsion from ZANU PF party was not warranted as due process was not followed in terms of the internal party democracy. This raises the issue pertaining to the expulsion of the Member, a matter that I do not have the mandate to pursue. It is vital that at this point, I mention that the notification to the Speaker by the party, that a member has ceased to represent its*

[20] Article 10 paragraph 63(1) of the ZANU PF Party Constitution – The paragraph numbering may have changed after the amendments to the ZANU PF Party Constitution purportedly made at the ZANU PF's December 2014 6th National People's Congress.

[21] Paragraph 32(1)(c) – see fn immediately above re paragraph numbering.

[22] VPs Appointed• Mnangagwa, Mphoko Land Posts • 33-Member Politburo Named *The Herald* 11.12.14.

[23] The date of the letter is uncertain, but the letter either shortly preceded or was simultaneous with that of Chombo.

[24] Quoted in Speaker Gives Mutasa, Mliswa New Lease of Life *Newsday* 28.02.15

[25] Quoted in Speaker Gives Mutasa, Mliswa New Lease of Life *ibid*.

[26] The phrase "has ceased to represent its interests in Parliament" is the used in the equivalent section of the old Constitution. While it may be a preferable formulation, it is not the criterion used in the current Constitution.

interest in the National Assembly and Parliament is all that is required at law to create a vacancy and for the Speaker to declare the seat vacant. The duty of the Speaker after receipt of the notification was clearly explained in the case of Abednico Bhebhe and others versus the Chairman of the National Disciplinary Committee (MDC- Party) HCB 85/2009 by Justice Cheda, that upon receipt of the notification, the Speaker of the National Assembly is constitutionally bound to declare the seat in question as vacant. Hon. Members, to that extent the position of the Constitution is unambiguous regarding the declaration of a vacant parliamentary seat. Consequently, vacancies have arisen in Headlands and Hurungwe West Constituencies by operation of the law. The necessary administrative measures will be taken to inform his Excellency, the President of the Republic of Zimbabwe and the Zimbabwe Electoral Commission (ZEC) of the existence of the vacancies in line with Section 39 (1) of the Electoral Act Chapter 2:13 as amended.[27]

The precise content of Mutasa's letter to the Speaker is not known. While the press report states that Mutasa had challenged the legitimacy of the offices of Chombo and the entire ZANU PF leadership, the Speaker states that the letter complained about a lack of due process in the expulsion process. The letter may have done both: which of the several versions is correct has considerable bearing on how the Speaker ought to have determined the matter. It may also be that the Speaker regarded the allegation by Mutasa that Chombo had not been properly appointed as party Secretary for Administration as a procedural irregularity – one of a failure to follow due process.

On the same day as the Speaker's determination, Mutasa filed an application with the High Court seeing to nullify ZANU PF's "*6th National People's Congress and the amendments made to the party constitution*."[28] Nullification of the Congress would include having appointments to the Party's Central Committee and Politburo and Presidium set aside. Then, on the 9th March, 2105 Mutasa and Mliswa filed an application with the Constitutional Court to have the declaration of their Parliamentary seats as vacant set aside, following this application with another on the 12th March, to have the Constitutional Court hear their application on an urgent basis.[29]

The Case of Jonathan Samukange[30]

Mr. Samukange stood as an independent in the July 2013 elections, after the provincial leadership of Mashonaland East apparently barred him from standing as a candidate in Mudzi South, "*because he did not meet the criteria set by the national elections directorate for aspiring candidates for primary elections*."[31] Then ZANU PF Political Commissar, Webster Shamu, announced publicly the day after the Nomination Courts had sat on 28th June, 2013, that, in terms of a long standing rule of ZANU PF, all those who stood as independents against ZANU PF, were automatically expelled from the party.

[27] Extract from the record of Parliamentary proceedings 03.03.14.
[28] See Mutasa Gumbo file Court Challenge *The Herald* 04.03.15.
[29] The application was granted and the matter set for hearing on 1st April, 2015.
[30] Sometimes spelled Samkange, and more frequently pronounced as such.
[31] See I Didn't Expel Samukange from Zanu PF: Kaukonde *The Daily News* 21.10.13.

> *Anyone standing as an independent has automatically expelled himself and herself from the party….Anyone contesting as an independent will not be accepted back in the party. Some are going around masquerading as if they have the blessings of the party to participate in the elections as independent candidates. It is not true. People should completely shun them.*[32]

As in the case of Dr. Kereke, Mr. Samukange (a prominent lawyer) did not challenge his suspension and made several statements indicating that he accepted the fact, although ruefully, that he had been expelled:

> *I am Zanu PF at heart and I am a de facto MP for the party but de jure independent MP. I have been a Zanu PF member for a long time. I hope that Zanu PF MPs will regard me as one of their own as I will be supporting Zanu PF in my debates in Parliament.*[33]

At a Politburo meeting on the 18th February, 2015, Mr. Samukange was formally readmitted back into ZANU PF.[34] The Politburo appears to have done so without any assertion that the expulsion had been wrongful or that due procedure had not been followed. At this point Mr. Samukange's seat immediately fell vacant.[35] However, the following day in Parliament, the Speaker of the National Assembly took no action and made no comment until MDC-T Chief Whip, Innocent Gonese, stated that Samukange had no right to be present in the House. The Speaker's apparently evasive response was that he had not received any written communication from ZANU PF in this regard.[36] However, it is obvious that only vacancies occurring in terms of subsection 129(1)(k) require a written communication from the party concerned and not the subsection which applies to Mr. Samukange, subsection 129(1)(1). Nothing further has been done about the matter.[37]

The Issue of the MDCs

On the 26th April, 2014, a group of MDC-T members which included Elton Mangoma, Tendai Biti, and Solomon Madzore, who had for sometime been reported as disaffected with the leadership of party President, Morgan Tsvangirai, purported to convene as the party's National Council at the Mandel Training Centre in Harare.[38] The meeting resolved to "suspend" the party's entire Standing Committee, including Morgan Tsvangirai.[39] The "suspended" members

[32] Quoted in ZANU PF, MDC Expel Rebels *The Herald* 30.06.13.
[33] Quoted in Independent MPs Seek to Re-join Zanu PF *The Weekend Post* 30.12.14.
[34] See ZANU PF Expels Mutasa, Mliswa *The Herald* 19.02.15.
[35] Of the 16,176 total valid votes cast in his constituency, Mr. Samukange secured the seat by garnering only 137 more votes than his ZANU PF rival.[35] However, if Mr. Samukange stands as the official ZANU PF candidate in any by-election he should have no difficulty in gaining re-election.
[36] See Samkange Seat should be Declared Vacant *NewsdzeZimbabwe* 12.03.15.
[37] The time of writing is 17.03.15.
[38] See Biti Faction Claims to Have Suspended Tsvangirai *Nehanda Radio* 26.04.14.
[39] The statement issued after the meeting was as follows: "*The MDC National Council also resolved today to suspend the following persons, Morgan Richard Tsvangirai (president), Thokozani Khupe (deputy president), Lovemore Moyo (national chairman), Morgen Komichi (deputy national chairman), Nelson Chamisa (organising secretary), Abednico Bhebhe (deputy organising secretary) and Douglas Mwonzora (information secretary*)."

dismissed the meeting and its resolutions as unprocedural, stating that the meeting had not been that of the National Council of the MDC-T and had been attended by non-members. [40]

However, in anticipation of action against them by Tsvangirai Group, on the 28th April, 2014, Tendai Biti wrote to the Speaker of Parliament on behalf of the Mandel Group an attempt to pre-empt any declaration for their withdrawal under section 129(1)(k). It is worth quoting extensively from that letter, as it expounds the position of the Mandel Group.

> *I write to you in my capacity as the Secretary-General of the Movement for Democratic Change. I confirm that on Saturday 26th of April, 2014, the National Council of the MDC met at Mandel Training Center and came up with a number of resolutions that included the following; the suspension in terms of Article 12 of the MDC constitution of Morgan Tsvangirai, Thokozani Khupe, Lovemore Moyo, Douglas Mwonzora, Nelson Chamisa, Abednico Bhebhe and Morgan Komichi. The party itself is now clearly divided between the faction of fascists led by the suspended Morgan Tsvangirai and the renewal democratic team that met at Mandel Training Center of the 26th of April 2014. Effectively, there are now two national councils and that none of these has more authority than the other one, if anything, the one with the Secretary-General is the superior. In this regard, I was instructed to inform you, Honourable Speaker, that: No one in the MDC other than the Secretary-General has a right to write to you on any issue with respect to our Members of Parliament particularly in terms of Section 129 of the Constitution….the MDC National Council on Saturday 26th April 2014 suspended Tsvangirai and his accomplices and placed the party under the curatorship of the Guardian Council. Thus anyone from this purporting to act on behalf of the party will have to seek a court order to reverse the legitimate council decision of Saturday 26 April 2014.*[41]

As Biti had anticipated, the following day, on the 29th April, 2014, a meeting of what was also claimed to be that of the National Council of the MDC-T, but obviously differently constituted from the meeting at Mandel and which included those purportedly suspended at the latter meeting, resolved that the Mandel meeting was:

> *illegal, unconstitutional and illegitimate and bogus. The National Council reaffirms that its resolutions are therefore not binding and are of no effect on the party and the party leadership.*

and that:

> *Tendai Biti, Solomon Madzore, and others having formed their own party have in terms of article 5.10.(a) , ceased to be members of the MDC T party. In addition and alternatively, the said persons have been summarily dismissed in terms of article 12 as read together with Article 5. 11. (A).*

The meeting further resolved that:

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[40] See MDC-T Dismiss Alleged Tsvangirai Suspension *Nehanda Radio* 27.04.14.
[41] Quoted in Defiant Biti Claims MDC Control, Writes to Speaker *New Zimbabwe* 28.04.14.

> *Consequently, in line with section 129(1)(k) of the national Constitution, the MDC (T) MPs who participated at the Mandel meeting will be withdrawn from Parliament.*[42]

The Mandel Group immediately declared the expulsions null and void, claiming that those who purported to do so no longer had such power and that the claimed National Council was improperly constituted.[43]

Nonetheless, in accordance with the resolutions, Morgan Tsvangirai, in the absence of "expelled" Secretary-General, Tendai Biti, on 2nd May, 2014, wrote to the Speaker in terms of section 129(1)(k) of the Constitution with the intention that the Speaker declare vacant the seats of 11 members who had contested the elections as members of the MDC-T and had been part of the Mandel meeting.[44]

The Speaker responded to the letters from the opposing MDC camps in a press statement issued on the 8th May, 2014. His determination was as follows:

> *As the Honourable Speaker of the National Assembly, I have studied the contents of the two similar letters addressed to me on the dates aforesaid. I have concluded that the letters contain no legal issues that require the Honourable President of the Senate or the Honourable Speaker of the National Assembly to determine or rule on whether or not to act pursuant to the provisions of section 129 (1)(k) of the Constitution of Zimbabwe. In any case, neither the Honourable President of the Senate nor the Honourable Speaker of the National Assembly has any authority and role to play in the internal disciplinary actions, disputes or differences within political parties, which matters may be appropriately dealt with by a competent court.*

This was not to be the end of the matter. The Tsvangirai Group had only been "suspended" by the Mandel Group pending a disciplinary hearing and not expelled. The Mandel Group went ahead with these proceedings and on the 7th June, 2014, set the 18th of the month as the date for Tsvangirai's disciplinary hearing, although it was clear that Tsvangirai had no intention of appearing at any tribunal established for this purpose. Tsvangirai was, however, summoned before the disciplinary tribunal, which had been delayed to the 27th June, 2014. Prior to this date, however, on the 23rd June 2014, the Tsvangirai Group filed an application in the High Court seeking to have the resolutions at the Mandel Training Centre by the Group, now referring to itself as the MDC Renewal Team, declared void. In order to deal with the impending disciplinary hearing, the day before the Tribunal was to sit Tsvangirai filed an urgent application with the High Court seeking to interdict the disciplinary proceedings. Controversially, at the moment the

[42] Resolutions set out in MDC-T Expel Biti, Madzore and 9 Other Legislators *Nehanda Radio* 29.04.14.
[43] See Biti Fired *The Chronicle* 30.04.14.
[44] The 11 were Hon. Tendai Biti, Harare East; Hon. Solomon Madzore, Dzivarisekwa ; Hon. Paul Madzore, Glen View South; Hon. Moses Manyengavana, Highfield West; Hon. Willas Madzimure, Kambuzuma; Hon. Samuel Siphepha Nkomo, Lobengula; Hon. Bekithemba Nyathi, Pelandaba Mpopoma; Hon. Evelyn Masaiti, Proportional representation; Sen. Watchy Sibanda, Mat. South; Hon. Settlement Chikwinya, Mbizo; Hon. Reggie, Moyo, Luveve

Court handed down the Order interdicting its proceedings, the Tribunal convened, claiming an entitlement to do so as at that time they had neither been served with the Court papers nor with the Court Order.[45] On 29th April, 2014 the Tribunal determined that Tsvangirai be expelled from the party.

Then, after a Congress convened by the Tsvangirai Group from 31st October to 1st November 2014 confirmed the expulsions of the MDC Renewal Team MPs from "the MDC-T", Douglas Mwonzora, now the Secretary General of the Group, again wrote to the Speaker, seeking a declaration of vacancies, but this time for all Members in the MDC Renewal Team who had been elected on an MDC-T ticket. Biti again wrote to the Speaker reiterating his Group's position as set out in the 28th April, 2014, letter, and, in particular, that he was the Secretary-General of the MDC-T and not Mwonzora. Although Tsvangirai had, on 7th November, 2014, withdrawn the Court application seeking the nullity of the Mandel Resolutions, in order to foreclose the possibility of the Speaker refusing to act on the basis that the matter was before the courts, and thus *sub judice*,it seems the second case, possibly that pertaining to the disciplinary proceedings, remained. The Speaker ruled that nothing had changed, that the decision of Congress was not a judicial ruling on the dispute between the two camps and that the matter was still pending before the Courts.[46]

The following month, on 27th November, 2014 the MDC Renewal Group teamed up with the MDC Group led by Welshman Ncube[47]to form a coalition called the United MDC, (UMDC). Then, on 4th March 2015, the Tsvangirai Group, after withdrawing the remaining court application against the Renewal Group, once more wrote to the Speaker in terms of section 129(1)(k). ZANU PF Buhera West MP, Oliver Mandipaka, almost immediately, on 5th March 2015, raised the issue of the presence of the MDC Renewal members in Parliament, claiming that they were now members of a new political party, and thus not members of the party to which they belonged when elected. Tendai Biti found it prudent to address the Speaker by way of a letter dated 6th March, 2015, pointing out that there had been no change in circumstances, as had been alleged in the communication to the Speaker by the Tsvangirai Group, and that the Mandel Group still maintained their claim to be the MDC-T.

The Speaker ruled on the issue on the 17th March, 2015. He declared all 17 seats in the National Assembly held by MDC Renewal Members vacant.[48] His determination was based on a claim that he had deferred ruling on this issue previously only on the basis that the matter was *sub judice*. The withdrawal of both cases[49] had removed this constraint. The Speaker then went on to consider briefly the dispute between the groups, noting that:

[45] Tsvangirai Hearing: Biti Defies High Court *The Herald* 28.04.14.
[46] Speaker Throws Out MDC-T Application *The Herald* 15.11.15.
[47] This body had split from Tsvangirai in 2005, and likewise claimed to be the original MDC and retained the name – an issue which has never been resolved.
[48] Four seats in the Senate were also declared vacant.
[49] *Tamsanqa Mahlangu and 129 others v Tendai Biti and others* HC 4955/2014 and *Tamsanqa Mahlangu and 2 others v Tendai Biti and 3 others* HC 5303/14.

> *The resolution to recall the Members was reached at the MDC-T Congress held in November 2015. The MDC-T congress was widely advertised and the affected Members never sought at the material time to interdict the holding of that Congress nor challenge it in the Courts of Law in so far as the outcome of that Congress was concerned.*

One key circumstance had not in fact changed. In order to declare the seats vacant the Speaker was still required to make a finding as to which Group constituted the MDC-T. Notwithstanding the fact that it was the Tsvangirai Group that had withdrawn their Court proceedings (which the Renewal Group was entitled to believe would resolve the issue and thus making any court application on their part unnecessary), the Speaker held that since the Renewal Group had not challenged the Tsvangirai Group in the courts that that Group must be held to be the MDC-T.

THE SPEAKER'S RULINGS

A reading of the facts in each of the subsection 129(1) cases post the July 2013 elections indicates that the Speaker of Parliament has not proceeded on the basis of any clear principles or criteria when making his determinations. They thus appear to be ad hoc and inconsistent. This emerges clearly when statements made by the Speaker are juxtaposed.

In Dr. Kereke's case Mr. Mudenda stated:

> *In an out of court settlement, it was understood that Hon. Dr. Kereke had been sent a letter of purported dismissal by Cde. Mutasa on wrong allegations as Hon. Dr. Kereke's dismissal from ZANU PF Party had not followed the ZANU PF constitutional process. Accordingly, the Chair hereby rules that Hon. Dr. Kereke is a Member of the National Assembly, having been elected by the Bikita West Constituency under ZANU PF ticket and that he is a Member of the ZANU PF Party.*

Accordingly, in that instance the Speaker took into consideration the question whether the expulsion of Dr. Kereke from ZANU PF had followed due process.

Yet in the case of the dispute within the MDCs the Speaker ruled:

> *…neither the Honourable President of the Senate nor the Honourable Speaker of the National Assembly has any authority and role to play in the internal disciplinary actions, disputes or differences within political parties*

In the case of Mutasa and Mliswa the Speaker stated:

> *I have received a letter from Mr. D. N. E Mutasa, in which he indicated that his expulsion from ZANU PF party was not warranted as* ***due process*** *was not followed in terms of the internal party democracy.* ***This raises the issue pertaining to the expulsion of the member, a matter that I do not have the mandate to pursue****. It is vital that at this point, I mention that the notification to the Speaker by the party, that a member has ceased to represent its interest in the*

> *National Assembly and Parliament is all that is required at law to create a vacancy and for the Speaker to declare the seat vacant* [emphasis added].

In the case of Dr. Kereke the Speaker not only examined the issue of due process, and whether Dr. Kereke thus had been lawfully expelled by the party, but also determined that the expulsion was wrongful and that it should be regarded as void and treated as if it had never happened. In the case of Mutasa and Mliswa, he stated that he did not have the mandate to consider the issue of due process and in the case of the MDC that he could not investigate internal disciplinary actions.

Attempting to explain these apparent inconsistencies the Speaker stated:

> *In the case of MDC, there was a dispute of leadership; two groups were claiming the same name and subsequently they went to court and Mutasa only complained about due process, that was all I had. That's a huge difference.*[50]

Yet it seems that, in Mutasa's letter to the Speaker, he did, like Biti, raise the question of the authority of the author to write the Speaker in terms of subsection 129(1)(k). The explanation also did not indicate why due process had been considered in the case of Kereke and not Mutasa, and why nothing had been determined in the case of Samukange.

The last ruling in the MDC-T case also is difficult to reconcile with an earlier ruling, which contained this statement:

> *neither the Honourable President of the Senate nor the Honourable Speaker of the National Assembly has any authority and role to play in the internal disciplinary actions, disputes or differences within political parties*

Yet the Speaker effectively gave a ruling on precisely the issue which had been pending before the Courts, that is, upon the validity of the expulsions and counter expulsions (and thus who constituted the MDC-T) determining the one set of expulsions to be valid and the other not - on this basis:

> *The resolution to recall the members was reached at the MDC-T Congress held in November 2015. The MDC-T congress was widely advertised and the affected members never sought at the material time to interdict the holding of that congress nor challenge it in the Courts of Law in so far as the outcome of that congress was concerned.*

SOME LEGAL POINTS IN RELATION TO 129(1)(K) AND (L)

The Law

There can be no doubt that where a member has been expelled from a political party or private voluntary organisation (including religious bodies) in violation of due process, that the member has recourse to the courts.[51] Also, in terms of general legal principle, a decision appealed against

[50] Mutasa Biti Recall Bids Different: Speaker *New Zimbabwe* 07.03.15.
[51] See, for example, *Chivese v Matanhire* HC-91/2003.

is suspended until the outcome of the appeal.[52] Thus if a person is expelled from a political party, the expulsion must, generally, be deemed suspended until the determination of the appeal – regardless of whether the appeal is made to an internal body of the party or to the country's courts.

In the absence of an immediate appeal against expulsion, the expulsion would be effective from the date it was ordered, until, and if, later set aside. Even if the expulsion were *ultra vires* (beyond the powers of the expelling body), or fatally defective on account of a procedural irregularity which rendered the expulsion null and void *ab initio*, the expulsion ought to be treated as merely voidable in the absence of any appeal, as the effected member would have behaved as if accepting the expulsion.

Furthermore, the task of the Speaker is to make a decision on each question of fact. Has the Member in question ceased to be a member of the party to which he or she belonged at the time of his election? Has that political party written to him or her to confirm that fact? In other words, have all criteria set out at the beginning of this paper been met? Without knowing whether a person who has dispatched a letter to him in terms of subsection 129(1)(k) was authorised to do so (Biti and Mutasa's cases), or whether the author was writing on behalf of the political party to which the relevant Member belonged at the time of his election (Biti's case), the Speaker cannot ascertain whether the facts which would trigger a vacancy of a seat have eventuated.

The Law and the Facts

In the cases of both Dr. Kereke and Jonathan Samukange, there can be no doubt that they were expelled from ZANU PF. Neither of the two appealed their expulsions. At the time, therefore, when both stood for election, neither of the two were members of ZANU PF. The expulsions could not also, on this account, be treated as void – as the Speaker purported to do in the case of Kereke and may well be contemplating in the case of Samukange. It does not appear, however, that ZANU PF treated the expulsions as neither void nor voidable, but simply readmitted the two into ZANU PF without setting aside the expulsion proceedings as defective. Whatever the precise situation, what *is* apparent, however, is that neither of the two were members of ZANU PF when they stood for the election, and both subsequently became so. As such subsection 129(1)(l) has clear application, and the seats occupied by the two are vacant.

In the case of Mutasa and Mliswa, these two members also did not, and have not, appealed their expulsion from ZANU PF. The Court Application subsequently filed by Mutasa (and Rugare Gumbo)[53] is reportedly a challenge to the lawfulness of ZANU PF's 6th National People's Congress and the appointments made (and not made) to the bodies established in terms of ZANU PF's Constitution, as required when the Congress is convened[54] – such as the Presidium, Politburo and Central Committee. The challenge to the expulsions only arises by necessary implication, because the failure to appoint a National Chairman, who heads the National

[52] This is not the case in criminal matters. It may be for this reason that the legislature found only it necessary to provide for suspension of the decision in respect of serious criminal matter. Thus subsection 129(1)(i) provides that a Member: *who has noted an appeal against his or her conviction may continue, until the final determination of the appeal, to exercise his or her functions as a Member and to receive remuneration as a Member.*

[53] On the same day that the Speaker declared the seats vacant. It is not known whether the Speaker knew of the application before making his declaration.

[54] The Congress meets in ordinary session once every five years.

Disciplinary Committee, means that Committee cannot be properly constituted, and thus cannot properly make a recommendation to the Politburo to expel the two. And the Politburo itself cannot act on such recommendation as the Politburo itself is not properly constituted.[55] However, in the absence of an appeal the Speaker is entitled, if all other criteria are met, to treat the expulsions as effective and the two no longer members of ZANU PF for the purposes of subsection 129(1)(k). The matter does not end there, however, as the authority of ZANU PF's Secretary for Administration to write to the Speaker in terms of the subsection was put into question by Mutasa, who claimed that the party Secretary had not been properly appointed to such post. Without knowing whether the Secretary for Administration had been duly appointed, the validity of the letter addressed to him under subsection 129(1)(k) was in doubt and the Speaker could not know whether one of the criteria of that subsection had been fulfilled – that the party had written to him as required by the subsection.

The Speaker's difficulty of ascertaining the correct factual situation replicated the Speaker's dilemma in the case of the MDC-T Members. Without knowing which of the two groupings is the "real" MDC-T,[56] the Speaker could not know whether the person addressing him in terms of subsection 129(1)(k) was a member of the relevant political party, that is, belonged to the same party as the members allegedly expelled. Similarly the Speaker could not know whether members of the Mandel Group had ceased to be members of the party to which they belonged at the time they were elected – the first criterion to be met for a seat to become vacant. This position has not changed, as alleged by one Member of the House,[57] on account of MDC Renewal joining forces with the Ncube's MDC as the UMDC. This is not only because the position of MDC Renewal is that the UMDC is a coalition of parties and not a new party, and thus the MDC Renewal, if it be MDC-T, remains intact as such. It is also because, even if the Renewal Group were now part of a new party, the Secretary-General[58] of the Tsvangirai Group could not write to the Speaker in terms of subsection 129(k)(l) as that Secretary-General could neither write on behalf of the MDC-T nor have any authority to do so unless he were part of the "real" MDC-T – a matter still undetermined.

If one were inclined to have any sympathy for the Speaker, these would be the circumstances in which to grant it. How is the Speaker to proceed when the factual criteria which trigger a vacancy in terms of section 129(1) are in dispute? Here it is worth repeating that the vacancy exists on account of the noumenal and not the phenomenal – that is, once the facts as they actually are in themselves (the noumenal) come into being, the vacancy is automatically triggered, regardless of any subjective perception of those facts (the phenomenal) by the Speaker.

There is a strong argument that a declaration of a vacancy by the Speaker constitutes administrative action and thus all the constitutional protections pertaining to administrative

[55] The disciplinary procedure is set out in Article 10 of the ZANU PF Constitution. There is no internal appeal when the body sits as a tribunal of first instance, unless Congress is in session and an ad hoc Committee has been established for this purpose.

[56] In the case of splits within a party the Courts normally determine the issue on the basis of which of the groups carries the majority with them. It is not determined on the basis, like a queen with flying ants, as which group contains the (erstwhile) secretary-general, as Biti seemed to imply.

[57] Oliver Mandipaka – see above.

[58] Douglas Mwonzora.

fairness[59] have application, and most particularly the right to be heard. It would seem therefore that the Speaker is required to consider submissions[60] from both the party and the Member before making a declaration.[61]

However, with or without hearing submissions from the member and party concerned, other questions remain: is the Speaker entitled to state that he does not know whether there is a stranger in the House or does not know whether a vacancy has occurred? Is he entitled to say that the matter is before the Courts (if it be), and the Courts must determine the factual position?

It is arguable that declining to make a finding as to whether facts exist which have triggered a vacancy in terms of subsection 129(1) does not violate the Electoral Act. Section 39(1) of the Act provides:

> *In the event of a vacancy occurring among the constituency members of the National Assembly, otherwise than through a dissolution of Parliament, the Speaker shall notify the President and the Commission of the vacancy, in writing, as soon as possible after* ***he or she becomes aware of it****.*

The Speaker might be entitled to maintain that, not being certain of the facts, he is not aware of the vacancy.

However, declining to pronounce on the issue raises various constitutional points. The Speaker is not obliged to declare a vacancy in terms of subsection 129(1) and thus may decline to do so without violating the Constitution on this account. However, if the Speaker is required to make a ruling should a Member object to a "stranger in the House", since the Speaker is bound to act subject to the Standing Rules and Orders of the House, his failure to make a ruling on the point is arguably a breach of this constitutional stipulation.

A further problem for the Speaker is that the vacancy occurs regardless of his view of the facts. And the Constitution requires that once the vacancy has occurred, the by-election must take place within 90 days of such occurrence.[62] Perhaps the Constitution would be more happily worded if the time period were to be linked with the communication of the vacancy by the Speaker to the President?[63]

So how should the Speaker proceed? If the vacancy has occurred, but, in the Speaker's perception it has not, or he declines to rule on the point, the Constitution will be breached and the requisite by-election will not take place within ninety days (or perhaps at all). If the vacancy has

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[59] See *Max v Independent Democrats* 2006 (3) SA 112 at 117 C -118E where Davis J that a decision by a political party to expel a member who hold a seats in parliament is subject to the rules of administrative fairness due to the public implications of the action. The reasons would apply *a fortiori* to the decision by the Speaker to declare a seat vacant.

60 Although technically it is the Speaker that must hear both sides, if the matter has been referred to the courts, which have made a determination, this ought to be regarded as sufficient.

[61] *Abednico Bhebhe and others versus the Chairman of the National Disciplinary Committee (MDC- Party)* HCB 85/2009 is cited by the Speaker to suggest otherwise.

[62] Section 158(3).

[63] This might, however, defeat the intention of the drafters and legislature, who seemed to wish to remove any discretion from the Speaker or anyone else as to whether the by-election should take place. The effect of the provision, however, seems to give power in this regard to the political parties. On this, see below.

not occurred, but the Speaker rules that it has, a by-election may take place which ought not to, and once more the Constitution will be breached.[64] There is also the risk of the by-election being set aside or a wrongfully ejected Member of the House being unable to reclaim his seat.

A Possible Principle

One means of dealing with the conundrum would be for the Speaker to determine the issue on the basis of the response of the "expelled" party member. If the party member does not appeal the expulsion, the expulsion is effective from the date of the order, and subsections 129(1)(k) or (l) have effect, as the criteria are met, regardless of the fact that the expulsion could be set aside.

If the expulsion is appealed, then the expulsion is suspended and the Member remains within the political party concerned until and unless the appeal tribunal determines otherwise. This approach would prevent contradictory rulings by the Speaker and the tribunal and would remove the possibility of the party deciding to void the expulsion (as per Kereke) when the expulsion has had an outcome no longer held desirable by the expelling party.

Where the second criterion is at issue (the communication to the Speaker that the Member no longer belongs to the relevant political party) in the case of any plausible doubt, for example that the communication was duly made by a person authorised to do so, the better course of action would be for the Speaker to decline to find a stranger in the House. The matter could then be determined by Parliament itself and/or the party aggrieved by the outcome could, and ought, to bring the matter before the Courts. While this approach might result in a failure to hold a by-election within 90 days of the vacancy occurring, such an outcome is vastly preferable to a by-election being held when it ought not to be. Furthermore, such an approach construes section 129(1) more restrictively than declaring a vacancy, and for reasons which follow, is probably as intended by the legislature.

SOME COMMENTS ON THE SUBSECTIONS

Constituency-based elections in Zimbabwe suggest that the loyalty of a Member of the National Assembly ought to be primarily to his or her constituents and not to the party of which he or she is a member. In Zimbabwe, however, the political parties exercise an inordinate degree of control over which party members may contest a seat in a national election, as the facts relating to Jonathan Samukange and Dr. Kereke outlined above indicate. This encourages the loyalty of any Member who might be contemplating re-election. Furthermore, the party Whip system ensures, in most instances, that Members vote in accordance with the party-line rather than in accordance with their own consciences or for the benefit of their constituents. The present approach to the subsections under discussion exacerbate an already less than desirable situation. The letter of the subsections appears to permit a process whereby a party might expel a member for insubordination (for example failing to obey the party Whip), inform the Speaker of the expulsion and thus remove a Member from the House, thus giving political parties a power of recall over its members in Parliament. Yet, if this were the intention, why did the Constitution not simply provide for such power of recall?

As Tendai Biti states in his letter to the Speaker referred to above,[65] the spirit of the provisions is really intended to deal with the issue of "floor-crossing"; that is, where a Member voluntarily

[64] As the constitutional requirements for such by-election will not be extant.
[65] The statement is not included in the quoted portion however.

switches his or her allegiance from the party to which he belonged at the time of the election to another, and where a person stood as an independent and then joins a political party after the poll.

The idea is that where a person is elected to Parliament as a representative of party A and on the assumption that he or she will generally pursue that party's policies in the House, it is unfair to the constituents if the person then conducts him or herself as if a member of party B. In such an instance, there should be a return to the electorate to determine whether the conduct of the member is in accordance with the wishes of the constituents.

Unfortunately a technical and precise adherence to the letter of the subsections frequently yields a result precisely contrary to what may well be the spirit of the provisions. Such an approach may also result in pointless and expensive by-elections to achieve a technical (but most necessary) observance of the Constitution.

Thus, in the cases of Dr. Kereke and Jonathan Samukange, subsection 129(1)(l) is triggered on account of the fact that, technically, both departed from and were then readmitted into ZANU PF. From the point of view of the constituents, however, both clearly subscribed to the policies of ZANU PF when elected and would have remained members of the party were they able. Any by-election in the seats they occupy would, in every likelihood, result in the two standing for re-election on a ZANU PF party ticket and winning the seats by a large majority. There would be no change to the status quo and the application of section 129(1)(l) would have no practical effect. In the case of MDC Renewal, if it be the case that MDC Renewal is a new party at loggerheads with MDC-T, as is the general perception, if not the legal reality, then it would be wholly appropriate that constituents who voted for candidates on the basis that they belonged to MDC-T be given an opportunity to declare whether they now wish to continue to be represented by a candidate from MDC Renewal or the party which continues to call itself MDC-T.

CONCLUSION

In the result, it appears that strict adherence to the letter of the Constitution may result in an outcome which is precisely contrary to the spirit, at least in all the cases under consideration here. This suggests the need for legislative intervention in order to bring the letter of the law into line with the spirit. However, since the present phrasing of the provisions basically gives the political parties the right of recall, as evidenced by the cases of Mutasa and Mliswa, there may be cross-party support, not for the amendment of the subsection, but for retention in its present form. If this is so, the Speaker would be well advised to develop clear and transparent principles in this regard. In the absence thereof, the Speaker will be open to the charge that his rulings are made more on the basis of political expediency than the operation of the law.