

EISA ELECTION RESOURCE CENTER



A weekly review of the South African 2019 national and provincial elections

SPOTLIGHT ON THE IEC HEADING INTO THE 2019 NATIONAL AND PROVINCIAL ELECTIONS

WRITTEN BY MELANIE MEIROTTI

In this issue of the EISA Elections Resource Centre's weekly briefing, we take a closer look at the Independent Electoral Commission (IEC), its roles and responsibilities and the general perceptions about the commission going into the 2019 elections.

The IEC is a permanent body charged with managing elections at all levels of government in South Africa. Section 190 of the Constitution outlines the commission's duties, which include:

- managing elections of national, provincial and municipal legislative bodies
- ensuring that those elections are free and fair
- declaring the results of those elections. (IEC)

It is essential that any institution tasked with managing processes that result in the placement of persons into positions of political power is viewed as trustworthy and independent, particularly by all political parties that contest elections. In his article, Thembelani Mazibuko outlines how the independence of the IEC is secured through legislation, parliamentary funding and the manner in which IEC commissioners are appointed.

While the IEC remains a widely trusted and credible institution in the eyes of South Africans, the past electoral cycle included two issues that may have harmed that reputation for some:

*The Independent
Electoral
Commission*

**WHAT MAKES
THE IEC
INDEPENDENT?**

**HOW PANSY
TLAKULA'S
RESIGNATION
AFFECTED
THE IEC'S
REPUTATION**

**MEET THE
COMMISSIONERS**

**TLOKWE: A
MUNICIPAL BY-
ELECTION WITH
NATIONAL
IMPLICATIONS**

**EOMS AND
LESSONS
LEARNED**

- (1) the resignation of Pansy Tlakula as IEC Chairperson after findings of administrative overreach in a building lease; and
- (2) the manipulation of by-election results in the Tlokwe municipality and the subsequent findings against the IEC by the Constitutional Court.

Sandile Khuboni examines the impact of Pansy Tlakula's resignation on the IEC's reputation, reflecting on its impact and ramifications, while Nancy Hakizimana and Grant Masterson examine the way in which the Tlokwe by-elections have highlighted deficiencies in the voter's roll and verification of voters by the IEC, and continue to have an impact on the IEC's preparations for the 2019 elections.

The 2019 elections will be managed by a team of five commissioners under Mashinini's leadership. As these will be the first elections managed by this team, in this week's infographic, Qiqa Nkomo outlines who these commissioners are and their roles and responsibilities.

Election observer missions (EOMs) have generally found that South Africa's previous elections have been managed well and have met criteria to be regarded as "free and fair". However, elections and the environments in which they take place are constantly evolving. Maite Dithebe and Chido Dzinotyiwei unpack several "red flags" and recommendations identified by previous EOMs upon which South Africa, specifically the IEC, could improve.

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WHAT MAKES THE IEC INDEPENDENT?

WRITTEN BY THEMBELANI MAZIBUKO

The independence of any democratic country's electoral commission is crucial for maintaining the overall integrity and credibility of its elections. A lack of independence in commissions that oversee electoral processes often leads to situations where election outcomes are disputed, resulting in violence and unrest, and political instability. The past few elections in Kenya, for example, have been marred by violence, with the result of the country's latest elections being overturned by the Supreme Court of Kenya. In Zimbabwe's 2018 election, the conduct of the Zimbabwe Electoral Commission came under fierce attack from the opposition MDC (The Citizen, 2018) (Burke, 2017). In Nigeria, the People's Democratic Party branded the country's 2019 general elections a "sham", accusing the country's electoral commission, the INEC, of collusion with the ruling party (Mail & Guardian, 2019).

Against this trend in the rest of Africa, South Africa's electoral commission, the IEC, has developed a reputation for being independent. As such, the IEC is recognised as a credible election body and has gained the trust of stakeholders locally and internationally. How has the IEC managed to do this?

Legislative framework

Chapter 9 of the Constitution explicitly calls for the establishment of an electoral commission to "ensure free and fair elections". The Electoral Commission Act (1996) and the Electoral Act (1998) comprehensively detail all laws and regulations that govern elections in South Africa. Owing to South Africa's history of apartheid and exclusion, these laws and regulations take special care to ensure the

inclusion and participation of all citizens and political parties in the democratic process; and make provisions to enable a fair and robust electoral system.

Financing and oversight

One of the main reasons for the IEC's independence is that the executive has no power over its funding. The commission, like all Chapter 9 institutions, is funded directly by Parliament and is accountable only to Parliament. In addition, the IEC's financial records are audited by the Auditor-General of South Africa, another independent institution that is accountable only to Parliament. Financial independence, coupled with independent oversight, ensures that the IEC can operate effectively and exercise its powers without fear or favour.

Commissioners

As it is important for all commissioners to be seen to be credible by all represented political parties, the appointment of IEC commissioners is often contentious. The Electoral Commission Act (1996) states that commissioners shall "serve impartially and independently, and perform his or her functions as such in good faith and without fear, favour or prejudice". In South Africa, the appointment of commissioners starts with a recommendation of eight names by a panel comprising representatives from Chapter 9 institutions, chaired by the chief justice, to the relevant parliamentary committee. The parliamentary committee then sends a nominee to the president, who then makes the appointment based on the recommendations.

Conclusion

For the IEC to avoid similar challenges faced by election commissions in other African countries, maintaining its independence is of vital importance. To maintain this independence, it is necessary for the IEC to continue to be removed from the executive, as this will enable it to robustly exercise its duties without fear or favour, and, most importantly, with the full confidence of all stakeholders.

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HOW PANSY TLAKULA'S RESIGNATION AFFECTED THE IEC'S REPUTATION

WRITTEN BY SANDILE KHUBONI

The way in which the Independent Electoral Commission (IEC) has managed elections in the past has earned it a broad level of trust among South Africans. However, recent polls suggest a 31% decrease in this level of trust, with several issues appearing to have contributed to the decrease (AfroBarometer,

2018). One such issue was the resignation of the IEC's chief electoral officer and chairperson, Pansy Tlakula, in 2014 and the processes undertaken in the transitional period after her departure.

Tlakula resigned after a Public Protector finding and subsequent Electoral Court ruling on procurement irregularities in the IEC's head office lease agreement, which was valued at R320 million. The Public Protector found that Tlakula had an "unmanaged conflict of interest as a result of the separate and undisclosed business relationship with business associate Thaba Mafamadi" (Verashni, 2014). The Electoral Court recommended that she be replaced as chief electoral officer and IEC chairperson. Her resignation, which has been described as "the closing of a challenging and tumultuous period in the history of the IEC", was met with sympathy from the ANC and the DA, who argued her errors were administrative in nature and had no bearing on her integrity (Verashni, 2014), (Politics Web 2014).

This was the first time in South Africa's democratic history that a Chapter 9 institution was embroiled in a scandal involving a senior official. Tlakula's resignation also left the IEC in limbo as it was preparing for the 2016 local government elections.

The commission's deputy chairperson, Terry Tselane, acted in the role until then president Jacob Zuma appointed Glen Mashinini. Mashinini's appointment was seen by some opposition parties as an attempt by Zuma to bolster his personal and political interests rather than those of South Africans; Mashinini was at one point President Zuma's personal adviser. Opposition parties also viewed the appointment as an extension of the ANC's grip on power, while arguing that the IEC and its officers should enjoy the confidence of all parties (Mail & Guardian, 2015).

In spite of opposition concerns and criticism, the IEC has not exhibited any outright bias or political favouritism under Mashinini's leadership. The commission retained its independence and impartiality during the 2016 local government elections, with local and international observer groups broadly endorsing its management of the elections, which were Mashinini's first as head of the IEC. The exact extent to which the circumstances that led to Tlakula's resignation have harmed the reputation of the IEC is unclear. However, it is apparent that this was an unfortunate chapter in the IEC's history, which it should draw lessons from.

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Meet the IEC



Chairperson: Glen Mashinini

An HR practitioner and a sturdy institutional strategy and policy development expert, Mashinini is also a large-scale programme and project management specialist with experience in electoral management.

Vice-Chairperson: Janet Love

Love is committed to achieving and promoting human rights. She has drawn experience from working with organisations such as the Human Rights Commission and serving on a parliamentary committee for constitutional development in the early years of South Africa's democracy.



Commissioner: Dr Nomsa Masuku

An academic and advocate for educating people about democracy, Masuku has more than 10 years of experience working for the IEC on various programmes related to capacity building through voter education.

Commissioner: Mosotho Moepya

Moepya has been working for the IEC since 1998 and has since moved up the ranks to commissioner. Moepya holds a BCom degree and a diploma in Higher Education from the University of the North; and an honours degree in Business Administration and an MBA, both from University of Stellenbosch Business School.



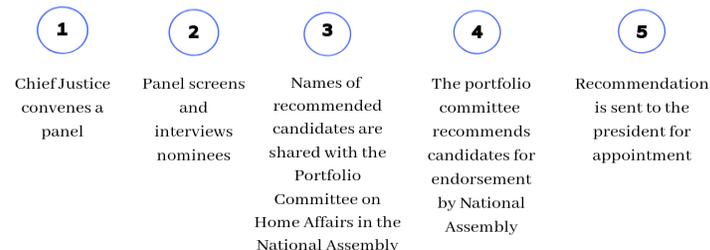
Commissioner: Judge Dhaya Pillay

With a legal career spanning more than 30 years, Pillay has experience serving as a labour court judge and holds the position of extraordinary professor at the University of Pretoria. She currently serves as a high court judge in Pietermaritzburg and Durban.

Functions of the IEC

- Manage elections and ensure that they are free and fair
- Compile and maintain voters' rolls by means of a system of registering eligible voters
- Declare any government election results within seven days after such elections
- Settle disputes that may arise from the organisation, administration or conducting of elections that are of an administrative nature

How is the commission appointed?



TLOKWE: A MUNICIPAL BY-ELECTION WITH NATIONAL IMPLICATIONS

WRITTEN BY NANCY HAKIZIMANA AND GRANT MASTERSON

Much controversy has surrounded the Independent Electoral Commission's (IEC's) management of municipal by-elections in Tlokwe, North West, which would ultimately have implications for future elections, including the 2019 national election. The commission's handling of the by-election revealed a procedural flaw in its systems that can and has been exploited to the advantage of specific candidates. Legal challenges in the case of the Tlokwe by-elections culminated in a case that went all the way to the Constitutional Court in 2015 in the case of *Xolile David Kham and Others v The Electoral Commission and Another*. This case would significantly impact future electoral administration in South African elections.

Section 190 of the Constitution and the Electoral Commission Act (1996) make the IEC responsible for strengthening South Africa's constitutional democracy through the administration of free and fair electoral processes.

After the by-election was held in the Tlokwe municipality in 2013, independent candidates challenged the credibility of the by-election at the Electoral Court, alleging that voters were bused into Tlokwe from other municipalities to vote. In addition, before the by-election, the IEC did not make the voters' roll available to the candidates. It is likely that the low voter registration in the area is what added to the electoral vulnerability, allowing for addresses of non-voters to be manipulated in favour of a particular party (in this case, the ANC).

Disgruntled candidates argued that these voters from other municipalities were able to vote in the Tlokwe by-election because there was an absence of addresses on the voters' roll and voters were registered in incorrect wards. However, the Electoral Court rejected the independent candidates' claims despite an investigation conducted by the IEC that found irregularities on the freeness and fairness of the by-election. The matter was taken to the Constitutional Court, which, on 30 November 2015, ruled in favour of the independent candidates and ordered the IEC to prepare a voters' roll with the correct addresses of voters who live in the area. The results of the 2013 Tlokwe by-election were set aside and new a new by-election was scheduled for 24 February 2016. However, in early 2016, before the rescheduled by-election, independent candidates argued that several thousand addresses were omitted from the voters' roll. The candidates then took the IEC to the Constitutional Court again in the case of *Kham v The Electoral Commission 2016*.

The Constitutional Court ruled that an incomplete voters' roll would undermine the notion of free and fair democratic elections. Based on Section 190 of the Constitution, the court highlighted four distinctive elements that determine if elections are free and fair, one of which is: "[I]n so far as the elections have a territorial component, as is the case in municipal elections where candidates are in the first place elected to represent particular wards, the registration of voters must be undertaken in such a way as to ensure that only voters in that particular area (ward) are registered and permitted to vote." (*Kham v Electoral Commission 2016 (2) SA 338 (CC)*). Inevitably, the court ruled that the Tlokwe case lacked the above component.

Nevertheless, the 2016 Tlokwe by-election was allowed to proceed without a complete voters' roll, however, the IEC was ordered to record all addresses by June 2018. Failing to meet this deadline, in 2018,

the IEC requested an extension from the Constitutional Court, arguing that they had made progress but could not get all the addresses. The court accepted the IEC's request and extended the deadline until November 2019.

While the IEC works towards adhering to the Constitutional Court's order to verify addresses on voters' rolls, it needs to deal with the perceptions of procedural unfairness that have been created through the Tlokwe case. However, it is unlikely that such an issue will manifest in the 2019 national election, which takes place on May 8. Unlike local government elections, where ward councillors are elected based on voter residency, addresses are less important for national and provincial elections as citizens can vote anywhere as long as they are registered and have a South African ID.

The Constitutional Court's intervention into an electoral administration process is a situation the IEC and the court itself would like to avoid to maintain the separation of powers between different institutions of the state. With the IEC having to report back to the court on its progress every two months, this situation will persist beyond the 2019 elections and has undeniably changed the nature of South Africa's elections.

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REFLECTING ON PAST ELECTIONS

WRITTEN BY MAITE DITHEBE AND CHIDO DZINOTYIWEI

Since its inception, the IEC has invited various election observer missions as well as various international non-governmental organisations, to observe and report on the electoral process. Observer missions are important for elections as they help improve the quality of elections, build public confidence in electoral processes, and promote and protect the civil and political rights of participants in elections, which leads to changes and improvements in national law and practice (African Union, 2007). Observer missions usually produce public reports on elections, in which they provide recommendations for future improvements. As South Africa finalises its preparations for the 2019 elections, we take a look at some observer recommendations from previous elections.

The 2014 national and provincial elections

Based on the various reports presented by observers, the 2014 elections were considered free and fair. The various stakeholders adhered to the law and electoral regulations to ensure free campaigning and

tolerance. Observers noted that the political and electoral environment was generally peaceful across the country, with voters being able to exercise their right to vote. There was also a high level of tolerance between opposition parties and their supporters. The IEC's personnel were adequately trained in all aspects of the electoral process and demonstrated high levels of professionalism, competence and understanding of their roles and responsibilities (Brand South Africa, 2014). The participation of women and youth in the elections demonstrated that South Africans are overcoming the barriers of previous discrimination (Commonwealth, 2014). Preferential treatment for pregnant women and disabled individuals at voting stations illustrated democratic inclusivity.

The 2016 local elections

According to IEC vice-chairperson Terry Tselane, the 2016 local elections were the most difficult as the IEC had experienced problems with voters' rolls, and there had been politically motivated killings due to intra-party conflicts (Evans, 2016). The IEC took precautionary measures to maintain peace by making police available at voting stations and meeting IEC officials every morning. 12 conflict-management mediation panellists were deployed at different voting stations and an Electoral Code of Conduct was instituted (Evans, 2016). Despite these challenges, the IEC managed to deliver local elections that were considered free and fair by observers (EISA, 2016).

Red flags and recommendations

Ballot boxes: In the 2014 elections ballot boxes were often not clearly marked to indicate whether they related to national or provincial elections. This confused voters in identifying which box was correct for which vote, and this confusion extended to the colours of ballot sheets, which, when folded, became difficult to distinguish (Commonwealth, 2014:17). It was recommended that ballot boxes be clearly marked to designate whether they relate to national or provincial elections, and that the colours of the boxes and the ballot sheets be coordinated.

Voter education and procedure: The Commonwealth EOM (2014) found that voters took time to cast their votes. In their report they recommended that presiding officers and election officers should explain the voting process to voters by showing how to mark and fold ballot sheets. It was also recommended that IEC staff be educated on who is permitted to vote, as well as the procedure for special voting (LSSA, 2016).

Voters' rolls: The voters' roll contains all relevant information of voters in the country. In 2016, the Constitutional Court handed down a ruling that the voters' roll be updated to include missing information and personal particulars of voters such as physical addresses. The ruling came after independent candidates in the Tlokwe municipality's 2013 by-election alleged that due to inaccuracies in the voters' roll, the ruling party was able to manipulate the election process to its advantage (EISA, 2016).

Election-related violence: While elections in South Africa have generally been peaceful, there have been several isolated incidents of violence around elections, particularly in KwaZulu-Natal, where an ANC agent was shot and killed at the party's desk outside a polling station (Commonwealth, 2014). It was recommended that regulations permitting political parties to establish party desks outside the immediate boundaries of voting stations be reviewed so as to minimise the risk of voter intimidation and violence. It was also recommended that the Electoral Code of Conduct be reviewed so that the IEC could be made aware of intra-party conflicts as they arise (Evans, 2016).

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