"REPORTABLE"

CASE NO.: A 01/2010

NO.2

IN THE HIGH COURT OF NAMIBIA

In the matter between:

RALLY FOR DEMOCRACY AND PROGRESS	**1ST APPLICANT**
UNITED DEMOCRATIC FRONT OF NAMIBIA	**2ND APPLICANT**
DEMOCRATIC TURNHALLE ALLIANCE	**3RD APPLICANT**
CONGRESS OF DEMOCRATS	**4TH APPLICANT**
REPUBLICAN PARTY OF NAMIBIA	**5TH APPLICANT**
ALL PEOPLES PARTY	**6TH APPLICANT**
NATIONAL UNITY DEMOCRATIC ORGANISATION	**7TH APPLICANT**
NAMIBIA DEMOCRATIC MOVEMENT FOR CHANGE	**8TH APPLICANT**
DEMOCRATIC PARTY OF NAMIBIA	**9TH APPLICANT**

and

ELECTORAL COMMISSION OF NAMIBIA	**1ST RESPONDENT**
SWAPO PARTY OF NAMIBIA	**2ND RESPONDENT**
MONITOR AKSIEGROEP	**3RD RESPONDENT**
SOUTHWEST AFRICA NATIONAL UNION	**4TH RESPONDENT**
NATIONAL DEMOCRACY PARTY	**5TH RESPONDENT**
COMMUNIST PARTY	**6TH RESPONDENT**

CORAM: DAMASEB, JP *et* PARKER J

Heard on: 2010 March 1st and 2nd: Reserved on 2010 September 20th.

Delivered on: 2011 February 14

THE COURT

NECESSARY INTRODUCTION: WHO ARE THE PARTIES AND WHAT IS IN DISPUTE BEFORE COURT AT THIS STAGE?

A: *The parties*

[1] After hearing oral arguments on 1 and 2 March 2010, the Court, (Damaseb JP *et* Parker J), initially reserved judgment on 2 March 2010. The Court heard full arguments on the points *in limine*, applications to strike out and the merits of an election application seeking to challenge the outcome of the Presidential and National Assembly (NA) elections held on 27 and 28 November 2009. On 4 March 2010 the Court handed down judgment ('the first judgment'), striking from the roll, with costs, the challenge against

both elections. In respect of the Presidential election, the challenge was struck from the roll on the ground that the applicants had failed to provide security for respondents' costs as required by law. With regard to the National Assembly elections, it was as a result of the application not being properly before Court as it had not been 'presented' to the registrar as required by sec.113 of the Electoral Act,1992 (Act No. 24 of 1992)('EA'), the principal Act, as amended, read with Rule 3 of the rules of the High Court, which requires process to be filed with the registrar on or before 15h00.[1]

[2] The unsuccessful applicants appealed to the Supreme Court only against the judgment and order in respect of the NA elections. On 9 September 2010 the Supreme Court handed down an order in the following terms:

> 'The appeal is allowed with costs, such costs to include the costs consequent upon the employment of one instructing and two instructed counsel and are to be paid by the first and second respondents jointly and severally, the one paying and the other to be absolved. The part of the order of the High Court dated 4 March 2010 in terms of which the National Assembly election application lodged on 4 January 2010 was struck off the roll with costs is set aside and the following order is substituted:
>
> The first and second respondent objected *in limine* that the applicants did not make out a case in the founding papers and that no exceptional circumstances, as provided for under rule 3 of the Rules of Court, existed for the registrar to accept the application outside the prescribed hours (9h00 am to 13h00 pm and from 14h00 pm to 15h00 pm). It was further argued that the applicants' time to present the application on 4 January 2010 expired at 15h00 on that day and that it falls to be struck with costs for want of

[1] Rule 3 states: 'Except on Saturdays, Sundays and public holidays, the offices of the registrar shall be open from 9 a.m. to 1 p.m. and from 2 p.m. to 4 p.m., save that, for purposes of issuing any process or filling any document, other than a notice of intention to defend, the office shall be open from 9 a.m. to 1 p.m. and from 2 p.m. to 3 p.m. and the registrar may in exceptional circumstances issue process and accept documents at any time, and shall do so when directed by the Court or a judge.'

compliance with the provisions of section 110 read with rule 3; the application be dismissed with costs, such costs to be inclusive of the costs consequent upon the employment of one instructing and two instructed counsel and are to be paid by the first and second respondent, jointly and severally, the one paying and the other to be absolved.'

3. The matter is remitted to the High Court for further adjudication.'[2]

[3] After the matter was remitted to this Court 'for further adjudication', we thought it prudent to hold a formal hearing in open Court on 20 September 2010 to ascertain the parties' understanding of 'for further adjudication'. The parties, although specifically invited to, if they so wished, had decided not to make any additional submissions in the wake of the Supreme Court judgment. We therefore reserved judgment on 20 September 2010 on the balance of the issues not covered in our separate judgments of 4 March 2010. This judgment deals with those issues.

[4] Since the challenge to the Presidential election had fallen away, it follows that the parties in respect of that purported election challenge (10th- 18th applicants: respectively – Hidipo L Hamutenya, Justus Garoeb, Katuutire Kaura, Benjamin Ulenga, Henry F Mudge, Ignatius N Shixwameni, Kuaima Riruako, Frans M Goagoseb and David S Isaacs; and 7th to 9th respondents: respectively, Hifikepunye Pohamba, Usutuaije Maamberua and Attie Beukes) are no longer parties and are excluded from the citation in this judgment. All factual allegations in the papers having a bearing on that election therefore also fall away.

[2] *Rally for Democracy & Progress v Electoral Commission of Namibia & Others* SA 6/2010, delivered on 6 September 2010

[5] The applicants seek no relief against the second to sixth respondents although costs are sought against any one of them who may oppose the application. In the event, the second respondent has, together with the first respondent, opposed the application. The issue of costs therefore remains a live one in relation to the first and second respondents.

B: *The case before court at this point in time*

[6] The election application 'presented' to the Registrar on 4 January 2010 in terms of sec. 110 of the principal Act, sought the following relief against the outcome of the NA elections:

'1. An order declaring the election for the National Assembly held on 27 and 28 November 2009 null and void and of no legal force and effect and that the said election be set aside.

2. Alternatively to prayer (1) above:

2.1. An order declaring the announcement of the election results for the National Assembly election held on 27 and 28 November 2009 made on 4 December 2009 and published in Government Notice No. 4397 dated 18 December 2009 null and void and of no legal force and effect.

2.2. Ordering the first respondent to recount in Windhoek the votes cast in the said election as provided for in the Act 24 of 1992 and to allow the applicants as well as the second to sixth respondents to exercise their rights in regard to such counting as provided for in the said Act.

3. Granting the applicants leave to supplement their papers and to amend their notice of motion, before the expiry of the 10 day period contemplated in section 113 of Act 24 of 1992, such 10 day period commencing on the date when the election application is presented to the Registrar of the High Court as contemplated in section 110 of the said Act, and to accept any supplementary affidavit (or amendment of the notice of motion) already delivered at the time of

the hearing of this application (and within the aforementioned 10 day period) as part of applicants' founding papers of record in this matter.

4. That insofar as it may be necessary non-compliance with the rules of Court regarding service of this application on 5th respondent is condoned.
5. Ordering the first respondent to pay the costs of this application including the costs consequent upon the employment of one instructing and two instructed counsel (and ordering any other respondents who may oppose this application to pay such costs together with the first respondent jointly and severally, the one paying the other to be absolved).
6. Further and/or alternative relief.'

[7] It is common cause that the election application was presented to the registrar on 4 January 2010. After the registrar had determined the security payable same was paid on 8 January 2010 and the election application was served on the respondents on 18 January 2010. On 14 January 2010 – before service on the respondents of the application presented to the registrar on 4 January as aforesaid – the applicants filed of record an 'amplified notice of motion' which, excluding the prayers that were sought in respect of the Presidential election which is no longer in issue, is in identical terms to that of 4 January, safe for the inclusion of prayer 7 in the following terms:

> '(7)That insofar as it may be necessary, condoning the applicants' non-compliance with the rules regarding service in respect of the 5th respondent and granting the applicants leave to have served these papers by way of electronic mail on the 5th respondent at a given e-mail address or in such other manner as may be necessary.'

[8] The papers filed on 14 January will be referred to as the 'amplified notice of motion' or 'amplified papers'. Although the amplified notice of motion was materially the same

as the one filed on 4 January, it was accompanied by a much augmented set of supporting affidavits which, in substance, enlarged the applicants' cause of action.

[9] The first and second respondents oppose the relief sought by the applicants. In their opposition to the election application, the two respondents raised several preliminary objections to aspects of the founding papers and the amplified papers. The preliminary issues relate to striking out and points *in limine* as follows:

Striking out:

[10] The first and second respondents seek to strike out the following from the founding papers:

a. Annexure B to the original founding affidavit of Mr. Libolly Haufiku .This is a report in *the Namibian* newspaper dated 7 December 2009, purporting to emanate from the first respondent and official results of the election allegedly announced by the first respondent. The objection is that it constitutes inadmissible hearsay.

b. Entire supporting affidavit of a witness of the applicants, one Alpha Gotz as well as a report attached thereto as AAG 2, as constituting inadmissible opinion evidence; for allegedly being predicated on inadmissible hearsay and for not being in compliance with the Computer Evidence Act (CEA) (infra). The affidavit is also objected to on the basis that it is an analysis of two voters' rolls which have no validity in terms of s. 26 (4) of the EA.

c. Paragraphs 84-90 of Haufiku's original founding affidavit as well as annexure LH8 and LH9 thereto on the ground that they are based on source documents contained in a file which had not been properly and clearly identified or produced; authenticated and paginated. It is claimed that the documents constitute inadmissible hearsay as the deponents who refer to them had not stated that they witnessed the inspection of the election material they refer to in their affidavits.

d. Annexure LH8, LH9, LH11 and LH14 to Haufiku's original founding affidavit for non-compliance with the Computer Evidence Act.

e. Lever arch file no.3 to Haufiku's affidavit consisting of 240 affidavits regarding the alleged non-posting of results at various polling stations.

Points *in limine*:

[11] In the light of this Court's judgment of 4 January and that of the Supreme Court of 4 March 2010, the remaining points *in limine* are:

a. alleged improper lodging of applicants' amplifying papers after 14 January 2010;

b. alleged improper or non-service of the election application on the fifth respondent;

c. alleged absence of security in respect of applicants' amplifying papers.

[12] Thus, in addition to the merits of the election application seeking the relief already set out in respect of the NA election, the Court is also required to deal with the applications to strike out and points *in limine* set out in **B.**

[13] Whether or not certain grounds challenging the NA elections are properly before this Court, requiring the Court to have regard thereto will depend on whether the objections referred to in **B** are upheld. The application to strike out the entire 'amplified papers' requires early disposal thereof because the status of those papers has a bearing on whether or not the Court should consider some of the remaining applications to strike and the points *in limine* . At this stage of the judgment, we will deal with those objections that are directed at narrowing the ambit of the election application, and will further deal with the other objections once we have fully set out the factual background to the application which explains them. The points *in limine* we will now deal with relate to the alleged impermissibility of the amplified papers and the failure to provide security in respect thereof.

Late service on fifth respondent

[14] The point is taken *in limine* by the first respondent that since service of the s.109 application on the fifth respondent only occurred on 22 January 2010, being 10 days after the expiry of the prescribed 10 days from the presentation of the application to the registrar as required by s.113 of the EA, there was fatal non-service and *that* constitutes a bar to the prosecution of the application. The applicants have explained quite fully the circumstances relating to the service of the application on the fifth respondent, including

the difficulties they experienced in effecting service on that respondent. Mr Johannes Jacobs, an officer of this Court deposed to an affidavit explaining those circumstances and makes clear that he had obtained the physical address of the fifth respondent from the website of the first respondent who is required to keep such information. Every attempt made to effect service is explained. It is clear on the papers that service could reasonably only take place on the fifth respondent on 22 January 2010. The fifth respondent, it is clear from the papers, became aware of the application before it was heard. They took a deliberate decision not to oppose the application and advised that they would abide the decision of the Court. No one, certainly none of the present respondents, has suffered any prejudice. The applicants say we should condone the late service of the application. In his separate judgment in the first judgment which dealt only with rule 3, Parker J dealt with this issue (at paras 9-10) and rejected the point *in limine*. We both endorse the rationale on which Parker J rejected that point *in limine*.

Dispute arising whether applicants entitled to 'amplify'

[15] The 'amplified papers' were filed by the applicants with the registrar on 14 January 2010. Those papers, together with the original application presented on 4 January, were served on the respondents on 18 January. The first and second respondents in their answering papers take issue with the 'amplification'. They say that such a thing is not competent in law and, therefore, not permissible and for that reason the Court should not allow the amplified papers filed on 14 January to stand. That would include not only the notice of motion but also the affidavits filed therewith and all annexures thereto. If this point *in limine* succeeds the applicants can only rely on the papers filed on 4

January and the reply limited to the respondents' answers to the 4 January papers. It is important therefore to dispose of that matter at this stage. In the 4 January application, Haufiku alleges that the impugned election was marred by irregularities during and subsequent to the election and while the ballots were being counted. According to him, these irregularities came to the applicants' knowledge and necessitated their bringing a sec. 93 (4)[3] application to ascertain if the 'complaints had substance'. Haufiku alleges that the irregularities perpetrated by either the first respondent or its officials implicate s. 95 or sec. 116 (4) (infra) of the EA.

[16] The first respondent's Director of Elections, Mr. Moses Ndjarakana, deposed to the main answering affidavit on behalf of the first respondent. In respect of the 'amplified papers' he states:

> '[N]ew allegations made after 4 January 2010 to supplement the election application that was presented on 4 January 2010, should be struck. The amended notice of motion and all supplementary documents (including purported affidavits and reports) attached thereto should be struck'.

He adds elsewhere that:

> 'The applicants are not entitled to amend or supplement papers presented on 4 January 2010, in an attempt to further strengthen and put more flesh to their case as it was at

[2] Section 93 (4) states: 'Subject to the provisions of subsection (5), no person shall open, or inspect the contents of the packets referred to in subsection (2), except by order of the Court, which may be granted on the Court being satisfied by evidence on oath that the inspection or production of any document contained in such packet is required for the purpose of instituting or maintaining a prosecution for an offence in relation to the election in question, and any such order may be made subject to such conditions as to persons and time, place and manner of inspection or production as that Court may deem fit'.

presentation. Such conduct shall amount to the circumvention of provisions of the Act, in particular the provisions of section 110.'

[17] The second respondent also deals with the amplified papers in its answering papers. Hon. Pendukeni Maria Iivula-Ithana, its Secretary General, deposed to the main affidavit in opposition to the relief sought by the applicants. She states as follows in her affidavit:

'I am advised further that the language employed in the Section 110(1) of the Act is peremptory. In the premises, the Applicants are not entitled to amplify the Notice of Motion and the papers attached thereto. In the premises, I respectfully submit that the further pleadings contained in the Amplified Notice of Motion and amplified papers attached thereto are not properly before this Honorable Court.'

[18] Both first and second respondents filed notices to strike out the entirety of the amplified papers. The second respondent in its notice to strike dated 25 February 2010 states:

'The entire amplified affidavit of Mr. L Haufiku filed on 14 January 2010 as well as the annexures thereto and confirmatory affidavits filed in support thereof should be struck on the basis that it does not comply with the provisions of the Electoral Act, more particularly that it was filed after a period of 30 days prescribed by the Electoral Act of 1992.'[4]

[4] The first respondent raises the same objection as follows: In the notice to strike it asks: 'The entire amplified founding affidavit of Mr. L Haufiku as well as the annexures thereto and confirmatory affidavits in support thereof, in general and new complaints introduced after 4 January 2010, namely complaints 13, 14, 15 and 16 for want of compliance with the provisions of section 110(1) and (3) (c) of the Electoral Act 24 of 1992.'

How was the 'amplification' justified by the applicants?

[19] The applicants rely for the right to amplify on prayer 3 of the notice of motion filed on 4 January which states:

> 'Granting the applicants leave to supplement their papers and to amend their notice of motion, before the expiry of the 10 day period contemplated in section 113 of Act 24 of 1992, such 10 day period commencing on the date when the election application is presented to the Registrar of the High Court as contemplated in section 110 of the said Act, and to accept any supplementary affidavit (or amendment of the notice of motion) already delivered at the time of the hearing of this application (and within the aforementioned 10 day period) as part of applicants' founding papers of record in this matter.'

[20] Haufiku, in the founding papers, alleges that after the applicants had obtained the order to access election material on 24 December 2009 from Parker J, the first respondent was obstructive in giving effect thereto and by so doing frustrated the applicants in meeting the statutory deadline of 4 January 2010 for the presentation of the election application. Haufiku alleges that because the applicants were frustrated by the first respondent, they were not able to gather all the information they needed during the inspection process to include it in the application that was presented to the registrar on 4 January. The relief sought in prayer 3, he alleges, was therefore necessitated by that fact.

Argument

[21] In terms of s. 110 of the EA:

> '110. (1) An election application shall be represented within 30 days after the day on which the result of the election in question has been declared as provided in this Act.
>
> (2) Presentation of the application shall be made by lodging it with the registrar of the court.
>
> (3) (a) At the time of the presentation of the application or within five days thereafter, security for the payment of all costs, charges and expenses that may become payable by the applicant –
>
> (i) to any person which may be summoned as witness on his or her behalf; and
>
> (ii) to the person, or, in the case of an election on party lists, the political party whose election or return is complained of (hereinafter referred to as the respondent) shall be furnished by or on behalf of the applicant.
>
> (b) *The security shall be for an amount determined by the registrar of the court and shall be furnished in money or by recognizance to the satisfaction of the said registrar*.
>
> (c) If the applicant complies with the provisions of paragraph (b), the application shall be deemed to be at issue, or, *if there is no such compliance, no further proceedings shall be had on the application*.'' [Our Emphasis]

[22] Section 113 of the EA states:

> 'Notice in writing of the presentation of an election application, accompanied by a copy of the application and a certificate of the registrar of the court stating that the amount determined by him or her as security has been paid or sufficient recognizance has been furnished in respect of that amount as contemplated in section 110(3), shall within ten

days after the presentation of the application, be served in accordance with the rules of the court on a respondent.'

[23] Counsel for the applicants, led by Mr. Totemeyer SC, argue in the heads of argument on behalf of the applicants – repeated in oral argument – that in resolving factual disputes on the preliminary issues (including the points *in limine*), the proper approach is that the version of the applicant must prevail. In paragraph 8 of the written heads counsel states:

> 'In considering the striking-out and the various *in limine* issues raised, it should be pointed out that in the case of factual disputes arising in these interlocutory matters, it is the version of the applicants which should prevail. *Webster v Mitchell,* 1948 (1) SA 1186 (W), 1189; *SOS Kinderhof International v Effie Lentin Architects*, 1992 NR 390 (HC), 399 B–C; *Hepute and Others v Minister of Mines and Energy*, 2007 (1) NR 124 (HC), 130 A-I'.

[24] We find this approach unpersuasive. In the first place, none of the cases applicants' counsel refer to support the proposition advanced: The two South African cases, at the pages cited, do not at all deal with the issue of how to resolve factual disputes when it comes to determining applications to strike out and points *in limine*. With regard to the Namibian cases, the first, *SOS Kinderhof*, is relevant in so far as it rejected the argument by counsel 'that in terms of *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234* and similar cases, the Court a quo was obliged to accept the respondent's version and could not have regard to the applicant's version. The Court in this case stated that:

> ‘There is no substance in this argument. The *Stellenvale* type of case relates to applications where the applicant is asking for final relief. In an application to set aside a default judgment, should the applicant be successful, the matter is not finally decided.’

[25] *Hepute* holds that in an ‘interlocutory procedure’ relating to whether or not security should be granted:

> ‘The *Plascon-Evans* rule does not apply and the Court should approach the ‘application’ and all the affidavits as a whole to ascertain whether the second respondent (as applicant in this rule 47 application) has made out a case for the order sought in terms of rule 47’. (Emphasis supplied)

Hepute is therefore clearly against the applicants’ argument.

[26] It is common cause that in the case before us, the applicants seek final relief to set aside the NA election. In respect of the points *in limine*, we are concerned with an ‘interlocutory issue’ as part of a substantive application in which final relief is sought. In that sense the substance of the case before us is not in the nature of an ‘interlocutory procedure’ as that phrase was used in *Hepute*. We see no reason in principle why the respondents’ version should be disregarded in the determination of preliminary points raised in the course of an application seeking final relief. That is not a path that leads to justice, which this court has a duty to uphold. In our view in the determination of the preliminary issues the *Plascon–Evans* rule applies and the respondent’s version must

be accepted unless it is farfetched or utterly untenable as to be capable of being rejected merely on the papers.[5]

[27] Mr. Totemeyer on behalf of the applicants argued as follows in respect of the notice to strike out the amplified papers: Firstly, that the respondents did not suffer (and failed to demonstrate) any trial prejudice because of the amplification as they received all the papers at the same time – and within the 10-day period – after presentation to the registrar. That, further, the respondents were not served with the amplified papers any later than would have been served on them in the normal course. Mr. Totemeyer also argued that the amplified papers filed on 14 January relate to the same challenge against the NA election result with only '*further grounds'*. Counsel maintained that if the applicants had first sought condonation for the amplification, it would have caused prejudice to all the parties involved and might have placed in jeopardy the 60-day time limit within which an election application must be completed, to the detriment of the public interest. While conceding that in December 2009 the applicants did not have enough 'material' to bring a s.109 application, Mr. Tötemeyer argued that this led to the applicants seeking an order of court in terms of s. 93 (4) to access electoral material in order to make out their case. In his view, the Court has the power to condone the manner in which the applicants proceeded with respect to the amplification, especially because there was no prejudice to the respondents who, in any event (he added), hampered the applicants in accessing electoral material after the Court's s. 93 (4) access order was granted. Mr. Tötemeyer argued that the Court has inherent power to regulate its procedure and that same should be so exercised to facilitate access to

[5] *Plascon-Evans v Van Riebeck Paints* 1984 (3) SA 623 (A).

Court: To the extent that s.110 (1) and (2) do not include a sanction for not presenting an election application within the 30-day period, contrasted from s. 110 (3) which says that an election application shall not be at issue unless security is paid, s. 110 (1) and (2) are directory and enables the Court in the interest of 'fair play and justice' to accept the amplified papers filed on 14 January even after the expiry of the 30-day period.

REMARKS

[28] Starting with the last line of argument, the difficulty which Mr. Tötemeyer faces is that in the scheme of the EA, the 'presentation' of an election application cannot be divorced from the determination and provision of security; the three aspects are inseparably intertwined. The determination and payment of security are jurisdictional facts for the prosecution of an application and it matters not whether after that had occurred none or only some of the respondents for whose benefit it is intended come on record to oppose the relief sought. Further, it is a misconception to assume that there is such a thing called an election application which is not accompanied by affidavits which support it. It is the affidavits that contain the evidence supporting the grounds of challenge ('the cause of action')[6] and that enable the registrar to determine what amount of security is payable. In the present case, as even Mr. Tötemeyer concedes, security for costs was determined on the basis of the papers filed on 4 January. The amplified papers filed on 14 January – we now know – add additional evidence and grounds for challenging the NA election: How could those additional grounds and

[6] 'The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim'; per Watermeyer J in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626, quoted with approval in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 at 838 E-H.

evidence possibly escape the security provision of the EA? The question only needs to be asked, to be answered! Once it is accepted (as it is in the present case) that the amplified papers contain additional and new grounds and evidence upon which the NA election could be set aside or a recount ordered, it constitutes a separate and distinct election application not dependent for its life on the one presented on 4 January 2010 and should therefore be subject to the 30-day limitation period and the determination and provision of security by an applicant.

[29] What is more, 'amplification' is not the language of the EA. The legislature punctiliously creates two separate and distinct stages in a s.109 election application: the first stage is the one after the announcement of the result of the election up to the stage of providing security for costs after an application has been presented to the registrar. The second stage commences with the service on the respondent(s) of the election application which had been presented to the registrar. The EA specifically regulates the first stage, while reserving the second stage to be governed by the Rules of Court. That much is common cause.

[30] In our practice relating to application proceedings, an applicant is allowed to file one set of founding papers and to file one set of replying papers after answering affidavits have been filed by a respondent. The respondent is allowed to file only one set of papers. Therefore, only three sets of papers are allowed in motion proceedings. No party is allowed to file further sets of papers except with leave of Court. Any further sets of papers (affidavits) can only be filed after such leave has been granted. The

admissibility of papers other than those the party is entitled to should be argued from the Bar and the registrar may not accept papers filed out of turn. There is no entitlement, as of right, to file additional papers simply because a party feels an opponent's conduct hampered it in the preparation of its founding papers. The only circumstance where the applicant has a right to 'amplify' founding papers is in Rule 53 (4) review proceedings where, after the record of the proceeding sought to be reviewed and set aside has been made available by the registrar to the applicant, the applicant has the right '*by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit'*. (Italicised for emphasis)

[31] Be that as it may, it is arguable that 'amplification' of affidavits already filed, and before the opponent has had the opportunity to answer thereto, is not alien to motion proceedings and could be done in a s.109 election application. As *Herbstein & van Winsen, supra*, state (at 434-435):

> 'If a party to an application files and serves certain affidavits and files additional affidavits before the other party has replied to them because there was not enough time to complete all of the affidavits before a fixed time or because new matter has been discovered or for any other good reason, a court will not reject the additional affidavits solely upon the basis of any alleged rule of practice against the filing of more than one set of affidavits. If there is an explanation that negatives mala fides or culpable remissness as the cause of the facts or information not being put before the court at an earlier stage, the court should incline towards allowing the affidavits to be filed. But there must be a proper and satisfactory explanation as to why it was not done earlier and, what is more important, the court must be satisfied that no prejudice is caused to the

opposite party that cannot be remedied by an appropriate order as to costs.'(Footnotes omitted).

[32] The above statement by the learned authors of *Herbstein & van Winsen* must perforce be read subject to sec.110 of the EA which has a peremptory limitation period of 30 days for the launching of an election application and in peremptory terms requires payment of security for costs before an election application can be said to be at issue. In the present case the applicants filed an election application to consummate a *cause of action* which was subject to a limitation period of 30 days and thereafter proceeded to file further papers to add to the cause of action without seeking the Court's leave. At the time that they filed the amplified papers the election application had, with its presentation to the registrar on 4 January, become at issue and they had no entitlement to file further papers.

[33] In opposition to the respondents' reliance on the alleged rule 3 non-compliance by the applicants, the applicants argued that it was open to the respondents to approach the Court on an urgent basis to review the registrar's acceptance of the application in breach of Rule 3. This line of reasoning found favour with the Supreme Court when it said the following:

'Had the second respondent been minded to challenge the validity of [the registrar's] decision …they could have sought reasons from her for her decision and brought an application for the urgent review thereof. The review application could have been enrolled before the same Court either before the election application or simultaneously with it'.

[34] *A fortiori*, like the proverbial double-edge sword, the essence of the Supreme Court decision on the point should, with the necessary modification by context, cut both ways because it is fair and just that the applicants, too, if they were minded to file amplified papers, should have approached this Court on urgent basis to be allowed to file the 'amplified' papers, relying on the alleged obstruction by the respondents in accessing electoral material. Additionally, the applicants should in advance of the hearing have sought condonation on urgent basis for the filing of the 'amplified' papers for the following reasons:

a. To afford the respondents the opportunity to deal upfront with the allegations of obstruction made against them – that would be fair and equitable.

b. To upfront resolve the issue whether the amplified papers were permissible so that if they were not accepted, argument at the main hearing was confined to the application filed on 4 January. As we now know, in view of the manner in which the applicants proceeded, the question of the admissibility of the amplified papers was dealt with together with the entire application and a substantial amount of time was spent in arguing that issue. Had they proceeded in the way that the Court now says they should have, that would have been dealt with as an interlocutory proceeding! We now know from what the Supreme Court has taught us that in the context of an election application under s.109, a substantive Rule 53 review application (which is not comparable to an interlocutory proceeding), is possible. The applicants'

version that the Court's time would have been wasted had they proceeded to bring an application for condonation, therefore, has no basis.

[35] The insurmountable difficulty facing the applicants is the clear intention on the part of the Legislature that security is determined on the basis of the election application 'presented' to the registrar. The determination of security payable must of necessity depend on the ambit of the application. In the situation created by the applicants, we are faced with a scenario where security was determined on the basis of the 4 January papers, while after *that* determination, the applicants proceeded to file an 'amplified' notice of motion and supporting affidavits in respect of which no security for costs determination had been made. When a respondent (excluding the first respondent) comes on record and files answering papers they incur costs, not only in respect of the original application presented to the registrar, but also in respect of the 'amplified' papers. The amplified application therefore cannot escape the peremptory provisions of s.110 of the EA, requiring payment of security.

[36] Even assuming that our reasoning is wrong on the question of the impermissibility of filing 'amplified' papers without leave and that the additional papers fall foul of the requirement of security, the basis on which the amplification is sought to be justified also merits consideration. The principles we must apply in deciding whether or not to let in the amplified papers are set out in the quotation from *Herbstein & van Winsen* above. It is not enough to say that the applicants did not have enough time before they filed the first application. They must demonstrate that the unavailability of information required to

support their cause of action was not on account of their remissness. Absence of prejudice to the respondents is an important – not the overriding – consideration. In an election application in terms of s. 109, there must be special circumstances for a Court to allow a party to file additional papers to the ones already presented, not least because it is important that election applications are not used as a means for fishing expeditions. In view of the statutory requirement that election applications be completed within 60 days from the date of presentation, speed is of the essence in such applications – and that calls for a streamlined pleadings process requiring tight control by the Court.

[37] The applicants' case is that they had no choice but to amplify because of, principally, the first respondent's alleged obstructive behaviour and because, secondly, accessing election material is necessary for the purpose of bringing a s. 109 election application. Haufiku makes the following allegations of obstruction: That after the applicants obtained the Court order allowing access to election materials, the first respondent was obstructive in giving effect to the access order and thus frustrated the applicants in meeting the statutory deadline for presenting the election application challenging the NA election. As a result, the applicants did not have all the facts by the deadline. It is clear from Haufiku's allegations that the need for amplification is premised on the alleged obstructive behaviour of the first respondent and, additionally, that access to, and inspection of, the electoral material was 'necessary' for the bringing of the election application. Haufiku appears to imply that amplification is a right enjoyed by an applicant in an election application when he states:

'I am advised and respectfully submit that *all that is required from the applicants* is to present their election application to the registrar of the High Court within 30 days from date when the results were announced. However the provisions of section 113 stipulate that *such application need only be served 10 days after it has been presented to the registrar* as aforesaid. *In the premises* I respectfully submit that none of the respondents would in any way be prejudiced if the applicants are afforded the opportunity to amplify their papers prior to the expiry of the 10 day period…Whereas it is clear that access to such documents is necessary for the bringing of an election application, the first respondent's delay in providing same can only be remedied by granting the applicants additional time to amplify their papers if necessary'. (Emphasis supplied)

[38] To recap, the applicants premise 'amplification' on the following:

a. First respondent's alleged obstructive behaviour;

b. Absence of prejudice to the respondents because the application only needed to be served 10 days after presentation to the registrar;

c. Necessity to have access to election material for bringing an election application.

[39] The allegations of obstruction are strenuously denied by the first and second respondents. Ndjarakana of the first respondent actually lays the blame on the applicants for not showing up for meetings in some cases; making unjustifiable demands for information already in their possession and having simply underestimated the size of the task in accessing electoral material. The following specific denials are critical: Ndjarakana denies on behalf of the first respondent that they breached the terms of the s. 93 (4) access order. He states that the access order was granted on 24 December, a day before Christmas and that it could not have been implemented on

Christmas day which is a public holiday. The following two days were Saturday and Sunday. The first working day after the order was granted was Monday, the 28 December. During the holiday period the first respondent commenced 'summoning all its concerned officials from different parts of the country as the inspection would practically not have been possible in the absence of such officials.'

[40] Ndjarakana then adds:

> 'I must point out further that: The *sheer volume of materials that the applicants wanted* and needed to inspect; the fact that the *applicants did not know exactly in respect of which constituencies, polling stations, and/or polling officials they wanted to investigate*; the fact that the *applicants were engaged in an extensive fishing expedition; logistical and security necessities to make sure that the records of the Electoral Commission were secured* and its integrity not be compromised; the fact that the applicants waited until 16 December 2009 to launch their application in terms of Section 93 *made it impossible for the applicants to be able to inspect all materials they wanted to within the time available and with the limited human resources they had*. I refer to both confirmatory affidavits of Messrs Shigwedha and Farmer. Initially the applicants wanted to go through electoral materials constituency by constituency, but later realized that they did not have sufficient time and capacity to go through all electoral materials. The applicants requested the first respondent's officials to only provide them with specific documents relating to specific constituencies and/or polling stations. *I emphasise that the court order could only be implemented from 28 December 2009* being the ensuing working day after the court order was granted. This being a holiday period, the Electoral Commission also had to *contact relevant election officials who were scattered outside Windhoek* for them to report to the Warehouse where the electoral materials were kept so that they could assist with disclosing the materials to the applicants. Finally I point out that *even though the applicants intended to challenge the elections,* even before the announcement of the results on 4 December 2009, they waited *until 16 December 2009 to launch* the section 93 application. This did not work in their favour as the application could only be heard on

24 December 2009 and the *ensuing court order could only be given effect to from 28 December 2009*. I refer to the confirmatory affidavits of Mr Shigwedha and Farmer.' (Our emphasis)

[41] In reply Haufiku goes to some length to dispute Ndjarakana's averments and places those averments in dispute. He states in part:

'I find it significant that the deponent now raises a number of excuses as a basis for alleging that the applicants were unable to conduct a proper inspection of the required electoral material. The deponent in making these statements loses sight of the fact that the presentation of this election application from the onset was a tremendous exercise which could only be properly executed with the proper and diligent assistance of the first respondent and its officials. To subsequently come and blame the applicants for not being able to gain access to all the documents in time only underscores the fact that the first respondent seemingly fails to appreciate the seriousness of the application and its role as a public entity to ensure transparency and accountability in a process such as this. What is more is that the first respondent, as already stated, unilaterally decided to terminate the inspection process on 3 January 2010, well-knowing at the time that the applicants still did not have access to all the documents concerned. It further follows that the issues raised by the deponent pertaining to the timing of the applicants' application launched in terms of section 93 and the fact that the matter was only heard on the 24th of December 2009 in all respects do not hold water and clearly only serve to illustrate and underscore the applicants' frustration with the way in which the first respondent conducted itself during these proceedings.'

[42] In reply Haufiku traverses each and every one of Ndjarakana's averments germane to who was at fault following the s. 93 order. All he really achieves is making it clear that there are monumental disputes of fact on about every issue on that score. We are bound to accept the first respondent's version that it did not obstruct the applicants during the process of the inspection of the election material. On careful examination of

the parties' affidavits, the applicants do not really undermine the assertion by the first respondent that they sought to obtain too much material and were ill-equipped to sift through it in good time; that the applicants underestimated the size of the task of inspecting the material to be obtained as a result of the Court order; that they ought to have been on time because the decision to challenge the election was taken very soon after it took place and that the first respondent began to cooperate with the applicants even before the Court order of 24 December. We do not see any unreasonableness in the first respondent summoning all responsible officials to Windhoek to facilitate applicants' access to the electoral material and taking such steps as were necessary to make sure that election material was 'not compromised'. If that delayed the applicants somewhat (and on the facts it seems very insignificant), the applicants must accept it as a necessary part of the order they obtained to access election material.

[43] Indeed, the s 93(4) access order was responsive to the need for a peaceful and an orderly process in the implementation of that order. The order reads in material part:

> 'The first respondent is authorized to call a meeting with the aforementioned applicants (or their aforementioned representatives) in order to discuss the modalities respecting the inspection or production of the aforementioned election materials, and such matters as the security and supervision of the process *so as to ensure an orderly and peaceful process'.* (Italicised for emphasis) (*Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793 at 802 G-H.)

[44] The danger of fishing expeditions is real if an applicant in a s. 109 election application is given *carte blanche* to 'amplify' in the way suggested by the applicants.

That danger is amply demonstrated by the way the present application was prosecuted. The last day of polling was 28 November 2009. The s. 109 application was presented to the registrar on 4 January 2010. The applicants' case is that it was an 'impossible task' to obtain affidavits from all party agents, for example in respect of the complaint that there was a failure to post election results. This over a month after the election had taken place? The information which is suggested to have been difficult to obtain over a period of a month all of a sudden became available in the space of about five days (if regard is had to the fact the amplified notice of motion was filed on 14 January 2010) following the presentation of the application, necessitating, as applicants' counsel in their heads of argument submit[7]:

> '…the applicants …substantially augment[ing] their papers with regards to this complaint and presented over 200 affidavits emanating from 7 regions and affecting 41 constituencies whereby it was stated that the results of a substantial number of the polling stations connected to these constituencies, were not posted at such polling stations'.

[45] In our view, this concession shows how substantially the applicants' cause of action metamorphosed since 4 January 2010. In the 4 January 2010 papers, as we will show presently, there are the voters' register irregularity; irregularity in the way the tendered ballots were handled, the unused ballot paper books with a different font; the fact that too many people voted using 'Elect 27' Forms; deceased persons appearing on the voters' roll; duplicate registrations; and the general complaints, which assumed a very central role in the election application brought by the applicants. But in the way the

[7] See paragraph 55 of the heads of argument filed on 22 February 2010.

case evolved since 'amplification' these complaints either disappeared or assumed a very minor role. We will demonstrate: In the heads of argument on behalf of the applicants there is not one word mentioned about the following complaints: unused ballot papers with a different font; and too many people voting using Elect 27 forms. In paragraph 118 (at p.76) of the heads of argument it is submitted on behalf of the applicants regarding the tendered vote complaint to which a great deal of space is devoted in the original founding papers, 'that the applicants are not dependent on this issue in order to obtain redress in this application'. On the contrary, the 'verification centers' issue was not accorded a specific 'complaint' amongst the 12 complaints in the 4 January papers, but after 'amplification' it is one of *the* main pillars on which the invalidation of the 2009 NA election rests. Finally, in respect of Gotz's evidence, the applicants in their heads of argument (para 6.2 at p. 5) make bold as to state: 'the evidence of…notably Arthur Gotz [has] little or no bearing on *the most fundamental complaints of the applicants'* – yet in the 4 January papers Gotz's evidence is the main foundation for four separately listed complaints and is the basis for the underlying theme of 'ballot stuffing' running through the application. This also demonstrates how the applicants' case transformed in the wake of 'amplification'. In all this we are reminded by the high authority of O'Linn AJA on the dangers attendant upon the court's failure to apply the law and rules. The learned Acting Judge of Appeal stated aptly in *Minister of Home Affairs, Minister Ekandjo v Van der Berg* 2008 (2) NR 548 (SC) at 561 *G* thus,

> 'if the Courts do not apply the rules and the laws, the rule of law will be abrogated and justice will be unattainable.'

[46] We are satisfied that the applicants do not make out a case that there are special circumstances justifying 'amplification' or that they were in any way frustrated by the first respondent in accessing election material. Therefore, assuming all else was in the applicants' favour and that success of amplification rested entirely on the existence of special circumstances caused by the obstruction by the first respondent, we are satisfied that the applicants failed on the papers to make out such a case.

[47] We assume that what the applicants mean by access to election material being 'necessary for the bringing of an election application' is premised on the facts of this case as pleaded and that it is not advanced as a general proposition of law based on the EA, that the bringing of an election application is only possible following access to election material. In our view, it is not the case that accessing electoral material is a precondition for bringing a s. 109 election application. Indeed, this reality of the law in the EA was pressed home to the applicants by the Court in the judgment respecting the s 93(4) application. *Rally for Democracy and Progress v Electoral Commission, supra* at 801 G-H. Nothing further needs to be said on this point.

[48] The respondents' objection against the filing of the 'amplified papers' on 14 January 2010 is a good one. It is therefore with firm confidence that we hold that those papers stand to be rejected in their entirety. Accordingly, the amplified notice of motion dated 14 January 2010, the amplified founding affidavit, the annexures and all supporting affidavits, together with all annexures thereto are struck from the record.

[49] The result is that the s. 109 election application challenging the NA election will be considered solely on the basis of the papers filed on 4 January 2010 – in respect of which the registrar had determined security for costs which was duly paid, as aforesaid.

[50] We proceed next to unpick the building blocks making up the applicants' case in an effort to set the stage for considering the election complaints and the remaining technical objections raised by the respondents.

[51] The main affidavit in support of the complaints relied on for the invalidation of the 2009 NA election was deposed to by Libolly Haufiku of the first applicant. The leaders of all the eight (applicant) political parties make common cause with Haufiku and confirm that they support the relief that he seeks. The application is largely based on information that the parties obtained from inspecting electoral material made available to them in the wake of the aforemention order of this Court ordering certain disclosures. On 24 December 2009, the applicants obtained an order from Parker J to access certain election material, as aforesaid.

[52] They proceeded to inspect the election materials and brought their s.109 application to Court based on what they say they had seen during that process. In a moment of inspiration, Haufiku states that this inspection yielded '*startling discoveries*.'(Italicized for emphasis) He states that upon consulting the election material obtained in terms of the court order and comparing it with what they had in their possession already, '*it became clear that the past National Assembly elections are*

fraught with irregularities and other material shortcomings which would merit the setting aside of the elections altogether'. (Italicized for emphasis). The main supporting affidavit in support of the election application 'presented' to the registrar is deposed to by Mr. Libolly Haufiku, as aforesaid, who is the Chief Administrator of the first applicant. He relies for much of the facts supporting the election application on information from others. Not that it was impermissible, but it sets the context for the raft of the fist respondent's application to strike out certain matters in Haufiku's affidavit.

[53] Haufiku relies specifically on the supporting affidavits of Mr. Johan Binneman Visser, a chartered accountant employed by the applicants and Mr. Arthur A Gotz who, according to Haufiku, '*conducted extensive research on the voters rolls given to the parties by the first respondent from time to time*'[8]. The gravamen of the case against the NA election is that the first respondent failed to conduct it in terms of Part V of the EA. We shall return to Gotz's evidence in due course.

The complaints:

[54] The applicants rely on 12 specific 'complaints' and a 13th set of complaints, which are referred to as 'general complaints', in order to pray for the invalidation of the 2009 NA elections. At the outset, Haufiku sets out the various statutory responsibilities of presiding officers and returning officers, placing emphasis on the following functions of each:

[8] It remains unclear whether this fact qualifies Gotz as some kind of expert. No such allegations are made. In any event, in the case of *R v Ramgobin* 1986 (4) SA 117 (N) 163-*164*, the quality of certain tape recordings was so bad that they were incomprehensible. The court was not prepared to accept that by listening to tapes for weeks, someone had qualified as an expert and was therefore able to interpret the tapes.

The Presiding officer

[55] Is responsible for the announcement of the result of the count at his or her polling station and posting it outside his or her polling station for all to see and for informing the returning officer of the result thus announced and posted; securing the electoral material after the announcement and sealing it and preparing an account of that material in prescribed form. The presiding officer is further responsible for the ballots cast at the polling station; all ballot boxes; breaking of seals of ballot boxes in the presence of political party agents; opening ballot boxes and counting the ballots cast in the presence of political party agents.

The Returning officer

[56] Heads the constituency and is responsible for the voting and counting of ballots upon receiving the return of the presiding officer in prescribed form. He opens it in the presence of party agents and verifies the correctness thereof and then prepares a report on the result (i.e. the verification); submits his report sealed and prepared 'as prescribed' and forwards it to the Director of Elections. This report must, upon request, be made available to a counting agent or a candidate; announce the result of a polling station irrespective of any discrepancies found in the returns forwarded to him by a presiding officer.

[57] Haufiku states further that the ultimate result announced by the first respondent in terms of s. 92(1) of the EA must be based on the result of the count made by presiding officers – and not of any 'verification process'. He relies for this submission on the

combined effect of s. 89 (1), read with s. 89 (2) and s. 85 (6), 88 (4) and 92 (1), of the EA. He adds that the results of polling stations '*ultimately translate to and make up the ultimate result of the entire election as contemplated by sec 92(1) of the Act and is gazetted as such'*.

[58] Haufiku concedes that the elections for the NA '*are not dependent for their results on the number of constituencies won*' and a voter is entitled to cast his or her vote at any polling station. He is adamant though that:

> 'On receipt of the ballot boxes by the respective returning officers, the tendered votes are separated from the other votes and sorted by the constituency and then added and counted in respect of the applicable constituency. I inter alia refer to sections 85(1) (b) and (c), 85(7) (a) and (c) 85 (9) (a) and 87(2) (a) (d) and (e) of the Act'.

[59] That allegation is predicated on the one he had made just before it in the following terms:

> '[W]here a voter…casts a vote outside his or her constituency, this is called a tendered vote. I refer to section 1 read with section 80(3) of the Act. Such voter is provided with an envelope indicating the voter's constituency. The ballot paper is then inserted in this envelope after the vote had been cast and the envelope is inserted into a ballot box.'

[60] The unmistakable implication of what Haufiku says is that tendered votes are not to be counted and announced by the presiding officer at the polling station where they are cast but that that process is done by the returning officer. It is for that reason that a

separate head of complaint is made in the form of irregularities in respect of tendered votes.

Complaint 1: Unrealistic high voter turnout

[61] Haufiku refers to a national voters register (LH 5) prepared by the first respondent and published in the Government Gazette on 9 November 2009. 'LH 5' on its face, purports to be a '*Notification of the Final National Voters' Register'* in terms of s. 26(3) of the EA, making known that '(a) *the national voters' register for every constituency of every region has been completed and certified; and (b) copies of the national voters' register for a constituency is available for inspection by the public during normal office hours at the place specified opposite that constituency, set out in the schedule, as well as at the head Office of the Electoral Commission,11 Goethe Street, Windhoek*'. The schedule then lists the constituencies.

[62] According to Haufiku, this national voters' register comprised '*approximately 1,181,835 voters*'. He then states that this total of registered voters was announced by the first respondent in the *New Era* newspaper dated 24 November 2009 (LH 6). Haufiku alleges that according to Gotz (infra) 'this list' was created on *13 November 2009*. According to Haufiku the first applicant 'was furnished with a voter's roll before the election to be used by the first respondent in administering the election consisting of only 822,344 voters'. He says that this voters' roll was made available by way of CD Rom.[9] Haufiku adds that '*it has also been discovered that this voters'* register was prepared on the 24th of November 2009 making it basically the final register given to

[9] It is not stated by whom and to whom this 'voters register' was given.

the parties prior to the election.' He relies for this assertion on Gotz. According to Haufiku, *'the affidavit of Mr. Arthur A. Gotz …demonstrates that the voters' register of 822 344 is, on all probability the correct register, if compared with the previous register compiled by the first respondent'.*

[63] Haufiku states that the '*affidavit of Mr. Arthur A Gotz is essential*[10] *in having regard to the complaints pertaining to the voters' register'*. Further, Haufiku relies on a report in *the Namibian* newspaper of 7 December 2009 as containing '*the official results of the election announced by the respondents* on 4 December 2009'. He says that *that* result proves that the first respondent '*did not use the official voters roll (LH 5) published in terms of section 26 (3) of the Electoral Act, but a different voter's register*'. According to Haufiku, because the first respondent used a voter's roll of 'only 822 344 (or for that matter 820 305) it gave rise to the most unusual (and indeed extra-ordinary) result that an overall voter percentage of some 98%-99% had been achieved'. He adds that Gotz's affidavit shows that a voter percentage of more than 100% was achieved.

The Gotz evidence

[64] Arthur Alexander Gotz says he is a 'technician' employed at Namibia Breweries. He gives no other details about his qualifications or experience. He confirms Haufiku's averments in so far as they relate to him. He states that in conducting an analysis of the voters' registers allegedly issued by the first respondent, he came upon numerous 'errors' pertaining, inter alia, to duplicate voters and deceased voters and that his

[10] The complaints pertaining to the voters register owes their viability and relevance to whether or not Gotz's evidence stands.

research and analysis contains 'in excess of 3800 pages which are contained on a memory stick' *which would be made available to the Court as well as to the respondents opposing the matter*. He then wishes to 'further refer to a copy of a written report prepared by myself (i.e. Gotz) annexed hereto marked "AAG1".'

AAG1

[65] On 3 January 2010, Arthur Alexander Gotz ('Gotz') prepared a document with the curious title 'TO WHOM IT MAY CONCERN: RE: INVESTIGATION INTO INACCURACIES CONTAINED IN THE NAMIBIAN VOTERS ROLL'. He states the 'summary of brief' as follows:

> 'The Namibian voters roll contains the following data fields: Voter registration number (VRN), Name, Surname , Gender, ID number or birth date, other ID number (marked with a 'sworn' if the voter's entry in the voters roll is based upon a sworn declaration of two other Namibians) and two address fields. Two additional columns list contents the meaning of which is not very clear to the auditor: A 'certificate No.' field and a 'Form No.' field. perhaps contains a reference to the original voting application form submitted by the prospective voter. The entire roll was to be checked for any form of error, especially duplication of voters, "ghost voters" and deceased voters.'

[66] The document purports to be considering 'three different voters rolls' which 'lack coherence and identification'. The document states that during 'the course of this investigation the author received three voters rolls, identified as VR1.16, VR1.18 and 2VR.08'. VR1.16 was received from the RDP Head Office on 14/12/2009 'printed on

roll': 6/10 to 10/10/2009 totaling 'corrected number of voters' of 1,167,340 after making a 'correction' to add 7,300 which he accounts for the incomplete information on Opuwo and Tsandi. The 'correction' for Opuwo and Tsandi is 'based on neighboring constituencies' causing them to 'assume that about 5, 800 names are missing for Tsandi and 1,500 for Opuwo. VR1.18 was received from RDP on 3/01/2010 'printed on roll' on the 7/11 to 13/11/2009. It states that there is missing information in respect of Linyanti, Etayi and Soweto. It adds 36, 550 voters for those constituencies 'based on VR1.18. It gives a total of 1,181,428 'corrected number of voters'. VR0.8 was also received from the RDP on 3/01/2010 is said to be 'complete' totaling 822,344 voters.

[67] It is stated in the document that VR1.16 was received first and 'scrutinized intensively'. This document, it is said, was received in '*Portable Document Format (PDF), which is not suitable for the integrity tests. The original PDF document is sorted alphabetically by surname and the issue version is not identified on the PDF (which in itself is a serious shortcoming). It was supposedly created between the 6th and 10th of October 2009. The roll is a dynamic document and by having different reports printed at different times means that we do not have a definitive snapshot of data'*.

[68] The document proceeds to give a '*summary of investigative results (VR1.16)*'. The document proclaims that the investigation established a total of 153, 844 *'errors*' to a degree of 80% accuracy in respect of duplicate voter registration number (328); duplicate ID numbers (8,699); Voters aged 110 and over (158); Insufficient identification

(106); incomplete identification number (98); Duplicate name, surname & DOB (20,518); Duplicate initial, surname & DOB (7000); Duplicate first name, 1st letter of surname & DOB (12,574); Duplicate first name, DOB and constituency (females only) 1,935); Duplicate first name, surname (switched around) & DOB (460); Total number of deceased voters found (based on Outjo Constituency) (96,05).

[69] Based on that, the Gotz report proclaims:

> 'The author is of the opinion that accuracy of the voter's register (less than 87.5%) is not sufficient to fulfill its primary register (sic) namely to identify eligible voters before the elections and prevent ineligible persons from voting. It does not prevent, but rather increases the possibility of ballot stuffing. There are not automatic checks and balances in place to prevent the entering of defective data'.

It is worth noting that it is these alleged errors that are the foundation stones for the raft of the election complaints in the s. 109 application before Court.

[70] Before the analysis begun, the document states '*the data was pumped into a Microsoft Access (MDB) database'*. It states that '*all defects are listed in the accompanying print-out'*. After dealing with each category of error constituting the alleged number of 153, 844 'errors', Gotz's document concludes:

'The results of this investigation are hair raising and the investigator claims that THE VOTERS REGISTER WAS DELIBERATELY INFLATED BY THE ECN TO ENABLE BALLOT STUFFING AND OTHER BALLOT TAMPERING.'

[71] It is said that there is hard evidence to support the claim in the form of the 'chronological order in which voters rolls where published ('from www.namibian.com.na'), respectively on 13/10/2009, 14/11/2009, 26/11/2009. The key allegations about this manipulation alleged by Gotz against the first respondent are repeated in Haufiku's affidavit to which extensive reference will be made.

Complaint 2: Voter percentages in excess of 100%

[72] Haufiku maintains that because of the above, the following voter percentages were achieved in the named constituencies:

'Eenhana - voter turnout: 130%

Epembe - voter turnout: 132%

Outapi - voter turnout: 118%

Ohangwena - voter turnout: 175%

Okatyali - voter turnout: 187%

Ompundja – voter turnout: 147%

Ondangwa – voter turnout: 130%

Ongwediwa – voter turnout: 133%

Oshakati West – voter turnout: 165%

Oshikango – voter turnout: 145%'.

[73] Haufiku discounts the possibility that the alleged high voter percentages were the result of tendered votes being counted together with the ordinary votes as the pattern of high voter percentages is pervasive and that there is no 'counterbalancing' especially between the rural constituencies and the urban constituencies. As proof of absence of 'counterbalancing' he refers to the alleged voter percentages of the following urban constituencies where allegedly more than 100% voter turnouts were recorded according to the applicants:

'Arandis 110%
Moses Garoeb 120%
Otjiwarongo 103%
Swakopmund 112%
Walvis Bay Urban 110%
Windhoek East 191%

The more than 100% voter turnout alleged by Haufiku rests on two pillars: (i) that the voters register for the 2009 NA election comprised 822 344 (or 820 305) voters; (ii) the official election results were those announced by *the Namibian* newspaper in its 7 December edition.

[74] Haufiku maintains that this allegedly high voter percentages 'aroused public suspicion' in the integrity and veracity of the voting process and refers to an article in *the Namibian* newspaper (LH 7) where one Phillip Ford, in a contribution entitled '*Fun in*

Numbers', says he had been 'using *IPPR's Election Watch site* for numbers' and applied 'a *bit of math* to the results of the whole exercise'. He states the following:

> 'Using the last official Voter's roll (on CD ROM) which listed 822 344 voters as per reports in The Namibian which I trust, against the Election Watch results, Namibia had a voter turnout of 98, 58 per cent.'

The evidential basis for Ford's analysis is not stated. Is it intended to establish that 98.58% was achieved in the 2009 NA elections? Is the 'bit of math' a scientific process? If not, it is not explained how it works.

[75] The remainder of the Ford article is in much the same vein and seeks to ridicule the election results allegedly announced by the first respondent, if regard is had to what he says was the voter's register of 822 344 voters in respect of the 2009 NA election.

[76] Complaint 2 amounts to this: the allegedly unrealistic high voter percentages, seen against the backdrop of a voter's register allegedly actually used for the NA election comprising 822 344 (or 820 305) voters and 'announced' in *the Namibian*, 'raises the grave concern that substantially more voters than as set out in the voter's register used by the respondent or that votes were cast in an illegal or corrupt fashion. This in turn places in question the entire voting process, particularly the verification of the identities of voters – as well as whether or not ballot papers were issued to persons who are indeed registered voters'.

Complaint 3: irregularity in tendered votes

[77] The complaint here is that the first respondent irregularly counted 'tendered votes' together with the ordinary constituency votes when the law requires that tendered votes be counted and be added to the result of the constituency in respect of which they were cast and where the voter casting it is registered. Ndjarakana's answer to the applicants' allegations in respect of the alleged irregularity concerning the tendered vote is terse. He states that Act No 7 of 2009 substantially amending the principal Act with regard to counting of votes requires tendered votes to be counted together with ordinary votes if regard is had to section 85(1) of the principal Act, as amended by s. 25 of Act No 7 of 2009. He adds: *'The applicants' misunderstanding of the Act accounts for much of the reasons why they decided to approach Court with this application'.*

Complaint 4: duplicate registrations

[78] Haufiku bases this complaint on work allegedly done by Gotz. He states that after scrutinizing three different voters' registers allegedly 'issued' by the first respondent 'it transpired … duplicate registrations, appear in respect of approximately 58 000 voters'. It is said that to arrive at this conclusion, Gotz 'checked the entire Register for any form of error, especially relating to duplication of voters, "ghost voters" and deceased voters'.

[79] Since Haufiku's allegation is that the voters' register used in the 2009 NA election is the one comprising of 822 344 voters, we assume that he never inspected or did not find such 'ghost voters' and deceased voters' on the register published in the

Government Gazette by the first respondent on 9 November 2009. Haufiku then makes the following statement:

> 'What is of further significance is the fact that comparing the *first two voters' registers*[11] with the one given just prior to the election containing significant less voters to wit 822 344 it is significant to note that *most of the duplications disappeared from the last mentioned list*. However *the first respondent insists* that this register is wrong and should not be considered at all'. (Emphasis supplied)

[80] In context, 'last mentioned list' can only refer to the register allegedly 'issued' by the first respondent prior to the election comprising of 822 344 voters and which he says was the one used in the 2009 NA election. Haufiku is therefore suggesting that the register allegedly given just before the election did not contain 'most of the duplications' complained of. There is further no suggestion as to the nature of these duplications that had 'disappeared'. Haufiku incongruously is now suggesting that 'more' of the duplications 'disappeared'. He however does not tell us how many 'duplications'.

Complaint 5: existence of deceased persons' names on voter's register

[81] The nub of this complaint is stated by Haufiku as follows:

> '[T]he voters' roll is insufficient to fulfill its primary objective namely to identify eligible voters before the elections and to prevent those not qualified to register or twice register as voters. It consequently does not prevent but rather increases the possibility of ballot stuffing… [T]here are no automatic or electronic checks and balances built into the system to prevent the entering of defective data'.

[11] The affidavit nowhere specifies the 'first two voter's registers'.

[82] The evidential basis for this assertion is the allegation by Gotz that he '*scrutinized the preliminary register'* and based on the Outjo constituency it became apparent that from a total of 7 653 registered voters, 632 were already deceased. Again we are not told what is meant by the 'preliminary register.' Based on what is stated previously, we again assume he is not referring to the voter's register published on 9 November 2009 by the first respondent. 'On a basis of average, this would account for approximately 90 950 voters in total in Namibia', the Gotz report says. According to Haufiku, the 'exercise' conducted at Outjo was then applied to the voters' register comprising 822 344 voters and the following conclusions were arrived at:

a. At the Outjo constituency, out of a total of 6016 registered voters, 297 names appearing on the voters' register were of persons deceased – representing 5% of the total registered voters for that constituency;

b. Based on the Outjo experience, the conclusion is advanced that the national voters' register on average consists of 'approximately 40, 000+' deceased voters. (There is no knowing if most of the duplications that disappeared are discounted in this tally).

[83] It is also stated that a '*spot check* done at Windhoek revealed the same result, i.e. that *there appears to be a substantial number* of voters still on the register who are deceased'. [Our emphasis]

[84] The following group of complaints are characterized by Haufiku as '*transgressions of the Act'*. They are prefaced by the following allegation which, principally because it is objected to as being 'vague and embarrassing', merits quoting in full:

> 'There appears to be numerous instances where the provisions of the Act were not followed. It consequently gave rise to various instances of irregularities and other complaints which affect the election on global scale *as will appear more clearly below*. In dealing with these I also refer to the supporting affidavit of Visser who principally oversaw the whole auditing process'. [Emphasis supplied]

[85] The above allegations make clear that (a) Haufiku relies for the allegations relating to the 'transgressions of the Act' on information by Visser and (b) that Visser bases his information on the 'auditing' of the election material discovered to the applicants following the s. 93(4) order by Parker J.

Complaint 6: No voter registration card numbers on counterfoils

[86] In support of this complaint Haufiku states that the applicants had access to counterfoils given to them by the first respondent. They found out during inspection that 16 357 of these counterfoils did not contain the required voter registration numbers on them in breach of s. 82(9) (a) of the EA[12]. This allegation, Haufiku says, is 'verified' in 'reports' contained in a file which contains *approximately 500 pages* and which shall be made available to the respondents opposing this application and will be filed with the

[12] As amended by Act No. 23 of 1994, s. 36(h) reads : 'When the voter has complied with the provisions of subsection (7), the presiding officer or the polling officer shall-

(a) enter the registration number of the voter in the ballot paper book on the counterfoil of a ballot paper which bears on the back thereof the official mark,'

Court. A copy of this report verifying this figure and compiled by Mr Visser is annexed to Haufiku's affidavit marked 'LH8'.

[87] The alleged absence of voter registration numbers on counterfoils examined is said to be a grave irregularity and the effect of it is that ballot box stuffing *can be done unabated* or ballot papers can be *substituted by unscrupulous persons undetected*. In fact, *this leaves the door wide open for 'stuffing' of ballot boxes* and election fraud of unlimited proportions. This aspect, *coupled with the excessive voter turnout* referred to above, *compounds the belief* that ballot box stuffing occurred (i.e. votes were 'cast' by persons who were not registered voters at all). Haufiku states that it is not possible, in view of this transgression, that cast ballot papers in the first respondent's possession consist only of ballot papers lawfully completed and that this is significant and *taints the overall result of the election* considering that 11 000 votes represent a seat in the NA, or even less considering the effect of the allocation of surplus votes needed to determine the last number of seats as required by Schedule 4 of the Namibian Constitution'. This irregularity, Haufiku maintains, cannot be cured by a recount of votes and only a re-election is the answer as serious doubt exists with regards the seats allocated in the NA.

Complaint 7: Elect 27 names not appearing on voters' register

[88] Haufiku holds the belief that 19 009 voters were allowed to vote although their names did not appear on the voter's register. He concedes – though – that is not impermissible, as long as the presiding officer completes an 'Elect 27 return' in respect

of the voter so voting, as proof that the voter is in possession of a 'valid and appropriate voter's registration card'. Haufiku says that applicants did not have access to 'Elect 27' Forms following the s. 93 (4) access order and that the information about the number of voters who voted in the manner described, was obtained by Visser from 'Elect 16' Forms and annexed to Haufiku's affidavit as 'LH 9'.

[89] The complaint is that too many people voted in this way – 'alarmingly high', Haufiku says and that this 'further compounds the statement and belief that, if added to the last given voters' register, the voter turnout would exceed 100%'.

Complaint 8: Unused ballot paper books of different printing

[90] Haufiku states that during the examination of the election material it was discovered, and that it was conceded by officials of the first respondent, that there were three unused ballot paper books with serial numbers that did not correspond to the rest of the ballot books used in the election, raising the inference that these books do not come from the same printer as the one used to print the ballot paper books used in the election.

[91] The complaint is: '*this obviously raises the suspicion that ballot books from other sources could also have been used. However this can only be verified once the ballot boxes are opened'*.[13]

[13] If the ballot boxes were ever opened at any stage before the case was heard in Court, we were not informed as to what the results were.

Complaint 9: 'Elect 16' late returns

[92] Haufiku asserts that each presiding officer is required, immediately after closing of polling stations and before counting begins, to – by completing an 'Elect 16' Form – account for all ballot boxes received, those used and those not used. Since the polling closed on 28 November it was 'reasonably expected' that such accounting for ballot boxes by completing 'Elect 16' would be completed 'at the very least on 28th November 2009'. He refers to a training manual ('LH 11') issued by the first respondent which directs presiding officers to complete the 'Elect 16' before counting commences. The part of the training manual annexed as 'Elect 16' states:

> 'CLOSING THE POLLING STATION (Second and final day of polling). The procedure for closing station on the final day of polling is the same as that on the first day except for the following-
>
> (a) The sealed ballot boxes, packets and envelopes shall then be transferred to the identified counting area for each polling station accompanied by the Presiding Officer and selected Polling Officers, Election Agent(s) and the Police officer(s) on duty-
>
> (b) The Presiding Officer shall then complete a return in which he or she shall account for the number of ballot papers entrusted to him or her (Elect 16)'.

[93] 'Elect 16', we will see presently, is designed to account for ballot paper books received, ballot papers used, spoilt ballot papers, and the unused ballot paper books. Relying on information by Visser prepared in a document annexed to the affidavit as 'LH 12', Haufiku alleges that some of the 'Elect 16' returns were completed as late as 2 December 2009.

[94] The complaint boils down to this: presiding officers, contrary to the first respondent's own training manual, failed to complete 'Elect 16' forms immediately after polling and before commencement of counting. The failure to follow this procedure '*opens the possibility* that ballot boxes *could have been added* to a particular polling station at any given time from the time that the polling station closed until when counting commenced'. This, it is said, opened the 'door for further election fraud and other discrepancies'.

Complaint 10: Elect 16 accounts and verifications either not made or not signed

[95] Haufiku states that s. 85 (3) of the EA requires that an account is rendered of ballot papers issued to presiding officers. That, he says, is done by the completion of an 'Elect 16' form. He states that 'some' of these forms were either not verified or were inadequately verified. Haufiku says *the evidence is to be found* 'in the file referred to hereinbefore'.

[96] The complaint is made that the 'incomplete return by some of the presiding or returning officers …is further indicative of the fact that the whole election process was conducted in a *very unprofessional manner*, tainted with irregularities on a wide front which obviously has a direct bearing upon the integrity of the election and its results in question'.

Complaint 11: Failure to post results at the polling stations

[97] Haufiku asserts that s. 85(6) of the EA, as amended by s. 25 of Act 7 of 2009, requires that results of polling stations must be posted at the relevant polling station, being a requirement introduced into our law to give effect to the SADC Protocol accepted by member States for the conduct of elections. He states that the result at the polling station is therefore the primary result of the whole election. Haufiku alleges that the failure to post results at polling station after counting had been completed was 'widespread in the whole election process'. This failure, he says, is tantamount to a failure of the whole election process. Haufiku refers to 'LH 13 (a) - LH13 (g)', being 'supporting affidavits deposed to by polling agents *confirming'* the failure to post results at polling stations and other irregularities.

[98] LH 13(a) is an affidavit by Klaudia Angombe, a female and a member of the first applicant, who says she was a duly appointed 'polling agent' at verification centre Oniipa and that she observed the elections procedure at Oniipa constituency since the election commenced. She avers that she observed that the results were not displayed at the centre; grey boxes came from polling stations with open number sealed; results were given without reconciling the ballot boxes and ballot papers. She says she therefore refused to endorse the results. The affidavit purports to have been commissioned on the 2 of December 2009 at the Namibian Police, Ondangwa charge-office.

[99] LH 13(b) is an affidavit by Heikky Kaholamwa Shilongo an adult male member of the RDP who says he was duly appointed polling agent at the Ongandjera Traditional Authority Office (TAO). He says that he observed the election procedure at Okahao, Omusati since the election commenced. The affidavit purports to have been commissioned at the Namibia Police, Katutura Police Station. No date is given when it was deposed to. Shilongo says he observed the following discrepancies: Verification of the Okahao constituency results were carried out while the counting process at most of the polling stations had not finished; and the results were not posted at the polling stations;[14] SWAPO councilor for the Okahao constituency, one Mr Kapenombili was allowed to enter the Okahao verification centre at the Ongandjera Traditional Authority offices and while sitting in the verification centre, he deliberately put a SWAPO Ndilimani song on his ring tone which kept on ringing loudly whenever a call came in.[15]

[100] LH 13(c) is an affidavit by Benat Benjamin, an adult male, member of the RDP who says he was a duly 'appointed polling' agent at Omapopo. He says he observed the election procedure at the polling station Nuvuthinga, and that, he says, he observed the following: Councilor Hamutenya Ndapa disrupted and brought confusion in the polling station (Omapopo) Uvudhiya constituency;[16] rejected spoiled ballot in respect of the second respondent (SWAPO) were counted; ECN closed polling station without counting or displaying the votes counted at the polling station. Benjamin's affidavit is

[14] Shilongo does not specify the polling station.
[15] Shilongo does not specify what section of the EA this is in breach of, neither does Haufiku: it is questionable whether a course of action is founded on a statutory provision – it must be pleaded specifically.
[16] See previous footnote.

purported to have been deposed to on 7 December 2009 at the Police Office, Ongwediva.

[101] LH 13(d) is an affidavit by John Hans who is the regional secretary of Transport and Logistics of the RDP. He says he was a duly appointed polling agent at the Youth Centre of Usakos and that he observed the election procedure at that polling station's verification centre since the election commenced. Hans says he noticed the following discrepancies: (a) documents of station 104 got lost in the hands of the returning officer; the result was not displayed on the notice board as the Act requires; a recount was not done well and verification was not done at all at the verification centre. Hans's affidavit was deposed on 3 December 2009, at the Karibib Namibia Police office. Immediately following Hans' affidavit is a document with the title 'Report on Election Irregularities for the Karibib constituency'. It purports to have been prepared on 2 December 2009 by one Mr. John Hans at Karibib constituency and a telephone no. is given and the document makes several allegations. The document is not referred to as being part of the affidavit of Hans of 3 December 2009, neither is it referred to in Haufiku's affidavit in specific terms.

[102] LH 13(e) is an affidavit by Josefina Kaukungwa who is a member of the RDP and was appointed as a 'polling agent' at Onanwenyo K D. He says he observed the election procedure at Onanwenyo of the Olukondo constituency and saw the following: (a) no results were displayed as stipulated by the Act; he was never asked to endorse

the results[17] and that he was informed that the final results will be given to them at the verification centre but that did not happen. Kaukungwa's affidavit was deposed to on the 2nd December 2009, at the Namibia Police charge office, Ondangwa.

[103] 'LH13(f)' is an affidavit by Tresia V. Shipanga, an adult female member of the RDP who was appointed polling agent at 'the following polling stations / verification centre, Haudano S.S.S 101'. She states that she observed the election procedure at the polling station / verification centre at Okalongo, Haudano S.S.S 101, since the election commenced. This affidavit is signed by a person who purports to be Tresia Shipanga but is not commissioned.

[104] 'LH13(g)' is an affidavit by Paulus Ndatiheeno Nguushi, an adult male member of the RDP who states that he was duly appointed polling agent at the verification centre, Omundaungilo, Okahenge Combined School. He states that he observed the election procedure there since the election commenced. His affidavit is deposed on 6 December 2009 before an ELCIN Pastor. He alleges that he observed the following:

'a) The grey boxes from Oshipala (106) polling station reached the verification centre unsealed.

b) The notice 304 did not counted tendered ballot papers.

c) The mobile team 301, presiding officer slept home with some casted ballots in envelopes. The results of the National Assembly received from SWAPO agent. Then all the results was not displayed at Omundaungilo, Okahenge Combined School team 101.

[17] He does not specify the statutory provision in terms of which he was entitled to endorse the results.

d) The SWAPO agents severally times went out of the verification centre even to reach the cucashop.'

Complaint 12: Reconciliation between 'Elect 20(b) and Elect 16'

[105] Haufiku states that the Elect 20(b) Form constitutes the election result by a presiding officer whereas 'Elect 16' reflects the number of ballots used. Therefore, he says 'Elect 16' and 'Elect 20(b)' Forms 'should reconcile'. A comparison of the two by Visser shows, Haufiku says, that 'Elect 20(b)' form contains a surplus of 2334 more ballots in comparison to the corresponding 'Elect 16' Forms whereas in other cases, the 'Elect 16' shows a surplus of 5613 ballots in comparison to the corresponding 'Elect 20 (b)' forms. This allegation is based on a report by Visser annexed as 'LH 14'.

[106] 'LH 14' is a three-page document and bears the title '*Conciliation between Elect 16 and 20'*. It lists various constituencies and breaks up Elect 16's and Elect 20's into '*used", 'spoiled', 'parties', 'rejected', 'E 20 more' and 'E 16 more'* categories. The inference sought to be drawn is that 'LH 14' shows that more votes were recorded than the ballot paper used at the polling station and that can only mean that there was ballot paper 'stuffing.'

General complaints

[107] Lastly, Haufiku makes what are referred to as 'general *complaints'*, none of which is supported by any confirmatory affidavit or reference to a specific person, date, place, constituency or polling station. He states:

‘In many cases the Act was violated in that: Votes were not counted at polling stations, but at the so called ‘verification centers’. No provision is made for so called verification centers in the Act; Public suspicion, tainting and undermining public confidence in the election process, was also caused as a result of the extra-ordinary delay by the respondent in counting and announcing the results for the election. Ultimately, these results were only announced late on 4 December 2009, some 7 days after the first votes were cast. In terms of a number of public announcements made by the respondent, this delay was caused as a result of counting having been done at various verification centers. As already indicated, such procedure is not sanctioned by the Act. On a number of occasions SWAPO supporters were allowed to vote on behalf of other persons. On occasion persons were asked to publicly demonstrate their political affiliation at the polling stations before they were allowed to vote. In the case of certain mobile polling stations, some ballot papers were not counted.

In some cases, sealed ballot boxes from the polling station arrived at verification centers instead of the polling stations assigned to those mobile Stations. Political parties and/or their representatives were allowed to campaign inside polling stations, talking to voters before they cast their votes. In certain cases voters were allowed to vote without their identities having been verified. In some cases voters were allowed to vote twice. In certain cases verification of votes were done without actually counting those votes. In some cases, presiding officers at polling stations took an active part in the voting process by accompanying people to the ballot boxes and assisting them with casting their votes. In some cases, party agents were not permitted in polling stations. In other cases, polling stations were closed, leaving unsealed ballot boxes behind in those polling stations. Certain irregularities also occurred regarding the books containing unused ballot papers. In other cases the votes announced in respect of polling stations did not accord with the figures of votes counted as recorded by party agents at those polling stations. The proper screening of the thumbs of voters (to which ink was applied in order to prevent persons from voting twice), did not take place properly. In some cases, ballots cast for the first applicant were added to votes cast for the SWAPO Party and counted as such in favour of the SWAPO Party. In certain cases, the votes announced by the respondent for certain constituencies changed when the final results were announced. In some cases, the computer system used (containing a voter Register) and which was used for voter verification, broke down, which rendered proper

verification impossible. In certain cases, persons who were not registered on the voters roll were allowed to vote. In other cases, persons were allowed to vote where their particulars differed from those set out on the voters register. The ink used to mark voter's thumbs could be washed off very easily allowing people to vote more than once, especially where they were registered under two names (i.e. Simon Petrus and Petrus Simon)'.

[108] Haufiku states that all the above complaints collectively and individually affected the result of the election if regard is had to the fact that the quota for a seat is 11 118 votes or less because of the way a quota for a seat is determined in the proportional representation system. A mere 271 votes had an impact on the allocation of a seat, he states.

[109] Haufiku alleges that the conduct complained of in the complaints stated above either constitute *ultra vires* action by the first respondent; alternatively amounts to corrupt or illegal conduct or irregularities; represents a failure on first respondent's part to apply its mind properly, or constitute a failure by the first respondent to act fairly, reasonably and transparently contrary to article 18 of the Namibian Constitution.[18]

FIRST RESPONDENT'S CASE

[110] The first respondent's Director of Elections is Mr. Moses Ndjarakana. He deposed to the main answering affidavit on behalf of the first respondent. In the first place, he takes issue with the manner of service of the application on the fifth respondent –

[18] Article 18 states: 'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or tribunal'.

maintaining that service of the application should have been done at the business address of the fifth respondent, or at the office of the authorized representative of the fifth respondent.

[111] According to Ndjarakana, the final (i.e. official) announcement of the results of the NA elections was done by the first respondent on 4 December 2009 and before that – the results were announced in the following way:

> (a) returning officers announced results as and when they became available; and
> (b) presiding officers announced results at polling stations before reporting to returning officers.

According to Ndjarakana, the official announcement of the results then took place on 4 December and although invited, the applicants did not attend.

[112] Ndjarakana states that on or about 3 December (i.e. before the official announcement of the results), the applicants had made media statements showing they had taken a decision not to accept the results. This, notwithstanding, they waited until 16 December to file a s. 93 (4) application. Ndjarakana avers that the first respondent had – as early as 22 December 2009, before the granting of the s. 93 (4) order by the Court – given the applicants access to electoral materials which they sought access to in the s. 93 (4) application and that – by the time the s. 93 (4) order was granted – the applicants were busy copying some of that material. Ndjarakana's allegation in this

respect is confirmed by first respondent's officials who attended the inspection: F Farmer, Ananias Elago and H. Shigwedha.

Some procedural objections

[113] Ndjarakana avers that in the founding affidavit, the applicants rely on inadmissible evidence to buttress the challenge to the NA elections. He identifies the evidence as follows:

a. Reports by Gotz and Visser are hearsay;

b. The electoral complaints are based on statements made by certain individuals well before the founding affidavit in support of the Notice of Motion seeking the present relief was deposed to.[19]

c. The respondents had been provided with a mass of documents in Vol. 2 Lever Arch File. These documents which are meant to support the complaints of irregularities are – according to Ndjarakana – not described, leaving it to the respondents to establish the reason and purpose of those documents. He states:

> 'The first respondent is extremely prejudiced by the approach adopted by the applicants, in that it is unable to meaningfully respond to the applicant's case.'

[19] The following affidavits are implicated by this allegation:
See 'LH13' to the founding affidavit of Hausiku.

Merits of challenge addressed: security measures to counter irregularities

[114] Ndjarakana alleges that as part of the first respondent's 'measures for accountability, transparency and security in managing elections in Namibia', the following was done by the first respondent which would make 'virtually impossible' any irregularities during voting.

[115] He states that in conjunction with the Namibia Police, the first respondent 'introduced various enhanced measures to further tighten security of election materials prior to and during the voting and counting process. The security arrangements during the conduct of the two aforesaid elections were of the nature and extent that any attempt by any person(s) to tamper with the election process would have been impossible'.

[116] Every fixed polling station was staffed with 8 polling officials while every mobile polling station was staffed by 6 polling officials. Each official's responsibilities were clearly defined according to a manual. The polling officials included: presiding officer, inker, ballot paper issuer and ballot box controller.

[117] The work of the above polling officials was overseen by several observers, political agents and by police officers. Ndjarakana says that rigging and ballot box stuffing was therefore not possible. He adds that at:

> 'all polling stations the participating political parties were always given the opportunity to express unhappiness on any particular matter, and in case of any

> incident that they claim to be in contravention of the Act, they were expected to alert presiding officers and police officers there and then … In fact polling agents are always advised before polling begins to report any irregularities to the police and/or presiding officers promptly.'

[118] Ndjarakana then states:

> 'In this case it appears that polling agents of the first applicant, while having been present at the concerned polling stations and having expressed happiness with the conduct of the elections, have now in an opportunistic fashion decided to make unfounded allegations in an effort to build the applicants' unfounded case.'

The role of electoral Forms as a further safeguard against irregularities

[119] According to Ndjarakana, electoral forms (called 'Elects') are designed to 'manage and administer a transparent and accountable electoral process'. He states that there are many types of 'Elects': those designed for administering the electoral process; those designed as official returns; those used to convey election results to the returning officers, the Director of Elections and its Chairman (i.e. of the first respondent) and those used as administrative aids to facilitate, convey and process data before such data is consolidated into final results.

[120] According to Ndjarakana, none of the 'Elects' work in isolation, such that even if there was a shortcoming regarding one or more Elect, 'the first respondent would still be able to conduct free and fair elections and render a result that reflects the votes cast. It therefore does not avail the applicants to simply catalogue alleged administrative

mistakes, which are of limited consequence and on that basis call for the setting aside of the elections, or for a recount.'

Further safeguard discussed

[121] Ndjarakana next recounts 'electoral steps' allegedly undertaken before polling, which steps are participated in by agents of registered political parties and candidates, (where applicable) who enjoy the right to object and to raise complaints in respect of each step taken or implemented by the first respondent:

Voter registration

[122] A supplementary voter registration process took place from 17-30 October 2009, culminating in the 'Provisional Voters' Register' announced in the Government Gazette on 9 October 2009. This lay for inspection from 6 to12 October 2009 at a number of places named in the Notice and was open for scrutiny and objection by interested individuals and political parties. Thereafter, notice of the certified voters' register was published in terms of s. 26(3) (a), as set out previously[20], of the EA on 9 November 2009. Ndjarakana states that the applicants waited until the announcement of the results to conduct their 'purported analysis of the Voters' Registers' which he says had in any event been rendered of no force and effect by the publication dated 9 November 2009 of the final voters' register in terms of s. 26(3) (a) of the EA.

[20] Section 26(1) should be read with (3) (a): 'The Director shall as soon as is practicable after the certification of he relevant voters' register forward a copy thereof to the Commission, whereupon the Commission shall-

(a) publish a notice in the Gazette to the effect that a relevant voter's register has been completed and certified, and specifying the places where copies thereof shall be kept for inspection by the public'.

[123] Ndjarakana distinguishes between ‘administrative Elects’ and statutory returns’ and the role and place of each in the conduct of an election. He proceeds to explain the purpose of the following Elects: 21-23, 27, and 31. He concludes that discussion by stating that ‘most of the ‘Elect’ Forms which the applicants referred to are administrative aids designed by the first respondent to complement the electoral process’. That is to say, they are not statutory requirements. He points out that Elects 21, 22, 23 and 27 are ‘working documents’ of the first respondent and ‘do not show results from returning officers to the Director of Elections or the Chairman of the first respondent’. In other words, these Forms are internal communication tools designed to exchange information and complement each other within the first respondent.

[124] Ndjarakana says that the following Elects constitute election returns as contemplated by the EA: 16, 17, 18, 19(b), 19, 20(b), 20, 30(aa), 30(a), 30(bb), 30(b), 31(aa), 31(a), 31(bb), 31(b), part B, 31(aa), 32(bb). That is to say, these are statutory requirements. He describes the purpose of each and says they are designed to provide information as regards results emanating from polling stations to the returning officers for verification purposes. Ndjarakana states in respect of these forms:

> ‘These forms were designed to provide a comprehensive, supplementary system of checks and balances, so that minor mistakes contained in one or other of them would be detectable from the remainder of the electoral forms.’

RESULT CENTERS

[125] Ndjarakana next discusses the 'Results-Centre Process'. Its 'core function', he says, 'was to receive results from the constituencies and to verify, tabulate, audit and present the provisional as well as the final election results.' Firstly, he states that political parties represented at the Results Centre were provided with computer facilities that gave them access to minute- by- minute update of the 'provisional results' as they were captured on computer.

[126] Candidly – in our view – Ndjarakana states further:

> 'This unfortunately included results that were queried due to certain anomalies that were detected, and on which replies were outstanding from certain constituencies. Some of the variations in the results were exactly as a result of the replies received from the constituencies in respect of the said queries.'

[127] Secondly, Ndjarakana gives a description of the functioning of the Results Centre and the various components making up that process. The tenor of his evidence is that the process was dedicated to verifying through 'audit and authentication' all incoming polling data received from the constituencies. Based on that he states:

> 'From the aforegoing, it is clear that *a substantial number of persons were involved and discharged different responsibilities*. *It will require conspiracy on a grand scale* to manipulate and rig elections in the way and manner alleged by the applicants. Such conspiracy can only survive in the fertile imagination of those who conceive it.' (Own emphasis)

NDJARAKANA'S REBUTTAL OF HAUFIKU'S SPECIFIC ALLEGATIONS

[128] First, Ndjarakana denies that Haufiku is personally acquainted with the facts he deposes to and pertinently states that Haufiku's allegations are founded on hearsay and on documents not properly authenticated or produced. He says some of the documents relied on by Haufiku as confirmatory affidavits are not properly commissioned, alternatively are not signed.

[129] Ndjarakana states that any reliance by Haufiku on annexures LH13 and Lever Arch File (3) is of no consequence as they are liable to be struck out. Ndjarakana states that although Haufiku's averments are founded on the inspection of electoral material which took place from 22 December–3 January 2010, he does not attach the relevant electoral materials upon which the applicant's case is based. He states that Haufiku also does not attach confirmatory affidavits of the applicants' agents who were present at the inspection and who can positively swear to the facts upon which the electoral complaints are based. Ndjarakana gives notice that he would object to all of Haufiku's evidence not based on his personal knowledge or not confirmed by persons who participated in the inspection.

Which results were announced?

[130] Ndjarakana states that the results announced by the returning officer concerned is 'the collection of the results announced by the presiding officers of the various polling stations, of the constituencies for which the returning officer is appointed.' He denies however that the results so announced 'are not of any verification process.' He states

that 'Elect 20(b)' is an announcement of the results by the presiding officer at the polling station, and reports to the returning officer, while 'Elect 20' is the form used by the returning officer to announce the results 'after verifying the results of all the polling stations of the constituency and consolidating such results into this single form, 'Elect 20'. *Thus the results announced by the presiding officer are the same results (subject to verification*), consolidated into 'Elect 20', announced by the returning officer.' He adds:

> 'For each constituency, one polling station was converted or was used as verification center, where the returning officer extended his function as per the provisions of section 87[21] of the Act. The verification centers were not secret as was made out in various newspaper reports. Party agents had access thereto. The applicants' polling agents at both polling stations and verification centers, were largely unprepared and in some cases their polling agents left polling stations and verification before counting and verification was respectively completed.'

[21] Section 87(2) of the principal Act as amended by the s.3 of Act No. 19 of 1999 reads:

> "(2) The returning officer, other than the returning officer for polling stations outside Namibia, shall –
>
> (a) open the sealed ballot boxes relating to a particular polling station received from the presiding officer in terms of section 85 and verify the correctness of the return furnished by the presiding officer in terms of subsection (3) of that section;
> (b) after such verification –
> (i) prepare a report on the result thereof;
> (ii) allow any counting agent or candidate to make a copy of the report; and
> (iii) cause the report to be delivered or transmitted to the Director;
> (c) open the packet referred to in section 80(2)(d), remove from the authorization envelopes the ballot papers and mix them, still folded, with the other ordinary ballot papers;
> (d) after ascertaining that each ordinary ballot paper bears on the back thereof the official mark referred to in section 82(2), count the votes recorded on such ballot papers –
> (i) in the case of an election on party lists, for each political party; or
> (ii) in the case of an election otherwise than on party lists, for each candidate; and
> (e) once the counting of the ordinary ballot papers in terms of paragraph (d) has been completed –
> (i) sort all the tendered vote envelopes according to the constituencies indicated thereon; and
> (ii) remove the ballot papers from such envelopes and, in respect of each constituency, count the votes recorded on those ballot papers in the manner contemplated in paragraph (d).".

[131] Ndjarakana also states that the first respondent had secured the services of the Namibian Police with instructions to address 'complaints by political parties, polling agents, observers or any person aggrieved by any other perceived irregularity.'

THE APPLICANTS' SPECIFIC COMPLAINTS ANSWERED OR TREATED BY NDJARAKANA

Voters' register: Complaints 1-3

[132] Ndjarakana maintains that the legally valid voters' register is that published on 9th November 2009 clearly advising any member of the public, including the applicants, of the fact that the National voters' register for constituencies was available for inspection at specified places. He states that the published voters' register was never challenged. As regards voters' registers released by the first respondent before the one of 9 November 2009, Ndjarakana quotes and relies on section 26(4) of the EA, as amended by Act No. 23 of 1994, which states:

> 'Upon the date of publication by the Commission of a notice referred to in paragraph (a) of subsection (3), every voters' list and every provisional voters' register shall cease to be of any force and effect, and thereupon the relevant voters' register shall be the voters' register for the respective constituencies …'

Ndjarakana therefore maintains that the applicants ought to have known that any list or register that, for 'one or other reason', may have 'landed' in their hands which is not the voters' register as published in terms of section 26(3)(a) should, be *ex lege* of no effect

as per section 26(4) of the EA (as amended by Act No. 23 of 1994) and the applicants were not under any obligation to accord such list(s) or register(s) any legal credence. Section 9(c) of Act No. 23 of 1994 provides:

> '(4) Upon the date of publication by the Commission of the notice referred to in paragraph (a) of subsection (3), every voters' list and every provisional voters' register shall cease to be of any force and effect, and thereupon, the relevant voters' register shall be that voters' register for the respective constituencies or local authority areas or, where such areas have been divided as contemplated in paragraph (b) of that subsection, for the respective wards.'

[133] Ndjarakana maintains that the report in *the Namibian* newspaper relied on by the applicants was 'misleading and incorrect as regards the number of voters registered as per constituency.' He also states that Haufiku's reliance on the report in *the Namibian* constitutes inadmissible hearsay and prays that it be struck. Ndjarakana states that when the first respondent announced the final results of the NA elections, it did not provide the number of voters registered per constituency and that the applicants relied on figures appearing in 'Annexure 'B'' to Haufiku's affidavit for their analysis regarding voter turnout per constituency. Ndjarakana maintains that the figures so relied on by the applicants are wrong. He states, the applicants accepted and admitted that the National Voters' Register comprises of approximately 1 181 835 voters, adding:

> 'With that in mind, I am at a loss as to why Mr Haufiku would opt to rely on the reports of the *New Era* of 24th of November 2009 concerning exact number of voters on the Voters' Register when he could simply have done so by inspecting the copies of the Voters' Register at the constituencies whilst voting was in progress. The applicants

having accepted that the number of voters on the Voters' Register as published was 1 181 835, it should follow, given the provisions of Section 26 (4), that other lists or registers other than the Voters' Register published by the first respondent (which is the Voters' Register eventually used on 27 and 28 November 2009 during voting) are of no force and effect. I refer to the confirmatory affidavits of Mr Farmer and Mr. Kafidi who also confirm that the voters' register used on 27 and 28 November 2009 was the Voters' Register as published, subject to some fluctuations that occurred after publication on 9 November 2009, due to corrections in terms of the provisions of the Act.'

[134] Ndjarakana denies Haufiku's allegation, which is based on the Gotz's report, that the first respondent created any voters list on 13 November 2009. Ndjarakana denies Gotz' allegations and adds that Gotz, who does not disclose a particular area of expertise (describing himself as a technician), had not accredited himself as an expert on matters he purportedly sought to express an expert opinion on.

[135] Ndjarakana denies that the first respondent furnished the first applicant with a 'voters register' to be used by the first respondent in administering the election consisting of only 822 344 voters, and that the applicants *were* in a position to confirm during voting that the register used on 27 and 28 November was the published register. He says that the applicants did not make out the case to confirm this. He adds: 'Should the applicants have accepted the first respondents' offer for them to make copies of the Voters' Register on 22 December 2009, the debate about the Voters' Register should have been a thing of the past as they would have seen that the Voters' Register comprises of over one million voters. I refer to the confirmatory affidavit of Mr Shafimana Ueitele who made the offer on behalf of the first respondent.'

[136] Ndjarakana states that the first respondent did not – in the 2009 NA election – use a register containing 822 344 voters or one comprising 820 305 voters. He states:

> 'The applicants opted to blindly embrace and accept the incorrect and unofficial figures in *the Namibian* newspaper of 7 December 2009 concerning the number of registered voters per each constituency. This unfortunate and yet reckless reliance on such a misleading report marks the total collapse of the applicant's case, as most of the complaints alleged are premised on the assumption that the figures extracted from *the Namibian* newspaper concerning the number of voters per constituency were correct. The applicants' case is therefore evidently, in monumental proportions, premised on and riddled with errors and material mistakes. The applicants knew or at least ought to have known that after the publication of the Voters' Register, save for obvious and expected minor upward or downward fluctuations, *there can never be another Voters' Register prepared after publication of the Voters' Register in terms of Section 26(3) of the Act. After all, it is a requirement that the Voters' Register should be, upon completion, certified. I have not certified other registers than the one published – which contains over one million voters.* Only an ignorant participant in the concerned elections would be so easily susceptible to believing that it is legally possible to prepare a new or another Voters' Register other than the one published in terms of Section 26(3) of the Act two days before elections when a publication as contemplated in term of Section 26(3) read with (4) has already been made.
>
> The allegation made by applicants is that first respondent did not use the Voters' Register published in terms of Section 26(3) but a different register. It shocks both common sense and logic as to why in the first instance the first respondent would not use the Voters' Register, and in the second instance why the applicants would rely on *the Namibian* newspaper's incorrect and unofficial report as their best available evidence in challenging the elections. The applicant's attempt in this regard is a misrepresentation of fact and a fatal misstep. As I have stated before*, I totally deny the allegations that a different Voters' Register than the one published was used*. The applicants *rely on the printed purported official results in the Namibian newspaper of the 7th of December 2009.* The said alleged official results publication is, with respect, not official and *did not originate from first respondent. It contains material mistakes* to the extent that any

reliance on the said newspaper report is fatal. *The first respondent did not at any point and in relation to the National Assembly* and Presidential election in question *provide the Namibian newspaper with the number of registered voters per each constituency. Having inspected the original and copies of the Voters' Register as published in terms of Section 26(3) and observed that the report in the Namibian newspaper in respect of the number of registered voters per constituency is misleading and completely incorrect. It is in fact false. The Applicants having relied on the incorrect number of registered voters per constituency, were inescapably bound to arrive at misleading conclusions in respect of the voter turn-out as the number of registered voters per constituencies as per the Namibian newspaper report are generally lower than the actual one of the registered voters as published in terms of Section 26(3) on 9 November 2009.'* (Our emphasis).

[137] Ndjarakana also questions Haufiku's competence to express the opinion – in absence of any details about his qualifications, experience and skill – that, in his knowledge, a big voter's turnout is virtually 'unheard of in any democracy'. In any event, he denies that the voters' turnout was such as is alleged by the applicants and provides what – according to the first respondent – are the numbers of voters registered in the listed constituencies as per the published Voters' Register of 9 November 2009 – including the percentages of voter turnout in respect of the constituencies specifically mentioned by Haufiku in the founding papers – which contradict the applicant's claim about an unusual voter turnout, as follows:

Constituency	Number of Registered Voters as per published Voters Register	Number of Total Votes cast as announced by the First Respondent	Ordinary Votes	Tendered Votes	%
EENHANA	10 047	8 157	6 062	2 032	60%
EPEMBE	7 969	6 372	4 057	2 200	50.9%
OUTAPI	18 342	15 203	12 031	3 037	63%
OHANGWENA	11 182	11 626	9 576	1 733	89%
OKATYALI	2 122	1 808	1 706	102	80.2%
OMPUNDJA	2 694	2 483	1 701	887	63%
ONDANGWA	20 515	16 292	10 557	5 462	51%
ONGWEDIVA	18 889	14 606	12 762	1 536	67%
OSHAKATI-WEST	14 027	12 355	7 454	4 472	53%
OSHIKANGO	15 076	13 119	9 246	3 750	61%

Constituency	Number of Registered Voters as per published Voters Register	Number of Total Votes cast as announced by the First Respondent	Ordinary Votes	Tendered Votes	%
ARANDIS	6 162	4 605	3 476	1 096	56%
MOSES GAROEB	27 183	17 849	10 512	6 915	38.6%
OTJIWARONGO	17 404	11 234	8 427	2 786	48%
SWAKOPMUND	23 115	17 260	12 914	4 241	48%
WALVIS BAY URBAN	21 377	16 576	8 294	8 071	38.8%
WHK-EAST	12 388	16 619	5 480	11 099	44%
WHK-WEST	28 386	18 898	10 450	8 383	36.8%

[138] Ndjarakana laments that there is '*no basis for the applicants to allege that voters could have cast their votes in an illegal or corrupt fashion. No serious attempt was made to put content to the allegations of corrupt or illegal votin*g.'

Complaints 4 & 5

[139] Firstly, Ndjarakana states that Gotz's analysis is based on the unofficial voters' register and that the analysis Gotz allegedly conducted to determine the alleged duplicate registration and deceased voters on the Voters' Register, is misleading. He states that Gotz's analysis is based on a roll/register published by *the Namibian* newspaper on its website and which is not the official voters' register.

[140] Ndjarakana also states that Gotz's 'so-called analysis' is suspect and therefore unreliable in view of political bias expressed by him about the elections as evidenced in a letter to *the Namibian* newspaper in which he expressed frustration with the second respondents' governance of Namibia; and his belief that his vote had in the past been 'stolen'. Ndjarakana also alleges that nowhere in Gotz's affidavit or to 'Who it may concern' note does Gotz say that in arriving at his conclusions he checked any 'register entirely', or that he checked the officially published register and that whatever register there may have existed (consulted by Gotz) had no legal force when the official one was published on 9 November 2009. Ndjarakana also states that in so far as Gotz seeks to extrapolate statistics based on Outjo's death register, his evidence is speculative and liable to be struck.

[141] Ndjarakana states that the phenomenon of deceased persons appearing on the voters' register is normal and that in terms of the law, the Director of Elections only removes a name from a voters' register when a person dies – upon being advised of the death by the Registrar of Deaths (s. 31 of EA)[22]. He also states that in light of the applicants' allegations, two officials were tasked to examine the Outjo register and found 263 names of deceased persons on that register. He concludes that the allegation about names of deceased persons being on the voters' register counts for nothing in the absence of any allegation, let alone proof of an incident in which names of deceased persons were used to commit electoral fraud.

Complaint 6: Counterfoils without voter registration numbers

[142] Ndjarakana states that the applicants did not attach copies of the counterfoils made available to them by the first respondent and denies that 16 357 counterfoils did not bear voter registration numbers. He says that Haufiku has no personal knowledge of the facts he alleges and that Visser who 'created the report' (LH8) does not allege in his confirmatory affidavit, or through Haufiku, that he personally investigated and inspected the counterfoils to enable him to arrive at the stated figure of counterfoils without voter registration numbers on them; and that accordingly it is hearsay.

[22] Section 31 states: 'Notwithstanding anything to the contrary contained in any law, any registrar of deaths or any other officer designated by him or her, shall not later than the fifteenth day of each month, transmit to the Director a return in which are furnished in respect of any person whose death during the preceding month was registered by or under any law governing the registration of deaths in Namibia, his or her last residential and postal address and such other particulars as may be determined by the director after consultation with the said registrar or officer'.

[143] Ndjarakana states further that even if through some human error any official did not record a voter registration number on a counterfoil, the control measures at polling stations were such as to exclude election fraud. He relies on the following in particular: The applicants were represented by party agents at each and every polling station; such party agents were provided with seals and were entitled to affix their own seals on the ballot boxes; the first respondent also had its own seals with which ballot boxes were sealed; each seal bears a unique number; the seals were removed in the presence of political party agents of the applicants; the ballot papers were at all times in the custody of and under guard by members of the Namibian police who were responsible to guard the ballot papers; Elect 16 Forms were used to reconcile the total number of ballot papers issued with the total number of votes cast; and the results were announced immediately after the count at each polling station.

[144] Ndjarakana concludes:

> 'In these circumstances stuffing of ballot boxes and election fraud was not possible at all. Further, an individual failure in respect of the above stated measures would not in itself and independently compromise the security, fairness and freedom during the election process. In any event, the applicants' perceived fear in relation to the alleged absence of voters registration numbers on counterfoils is unfounded as *whenever a particular voter enters a polling station his/her name is marked off on the hard copy of the Voters' register and in case of the electronic Voters' register, his/her name would likewise be marked off as having voted.'*

[145] Ndjarakana persists in his contention that there was no irregularity that had any effect on the number of seats allocated in the NA and that the results announced reflect the outcome of the NA elections conducted from 27-28 November 2009.

[146] Ndjarakana points out that Ford's letter to *the Namibian* constitutes inadmissible opinion evidence and is in any event irrelevant to the extent that it is tendered as proof of the allegations made in it.

Gotz

[147] Ndjarakana objects to Gotz's testimony as part of the present proceedings and states that no value can be attached to his evidence which is substantially relied on by Haufiku in support of certain alleged grounds for invalidating the NA election. Ndjarakana says so for the following reasons:

1. Gotz relies for the conclusions in 'LH 5' on voters' registers published in T*he Namibian*:
2. Gotz had before the election caused to be published in *the Namibian* an article expressing discontent with the governance of Namibia by the second respondent and suggesting that his vote had been 'stolen' in the past. Therefore, Ndjarakana states, the testimony of Gotz cannot be 'impartial, credible and unbiased.'
3. Ndjarakana avers that to the extent that the complaint about duplicate registration cards is founded on Gotz testimony, it was based on a source that had not been substantiated and that LH14 stands to be struck. He states that the allegation is bad because it is difficult to make out which of the more than one register referred to by Haufiku (in paragraph 74) it is based and that nowhere does Gotz allege that he checked any register entirely. Ndjarakana also states that Gotz nowhere alleges that in doing his 'scrutiny' he had regard to the register

gazzetted by the first respondent on 9 November 2009. He maintains that Gotz's 'report' shows that he considered only the provisional register which, after the publication of the final Voters' Register on 9 November 2009, 'became redundant and cannot therefore be used for any evidential purposes'.

[148] He states:

'It is difficult to comprehend why the applicants deemed it necessary to make checks on what they called the preliminary voters' register when the Voters' register published was available at constituencies as from 9 November 2009. I again submit that the figures produced by Mr Gotz are unofficial, incorrect and for all intends and purposes constitute inadmissible hearsay and fall to be struck. I wish to categorically deny that the first respondent produced a Voters' register two days before election, containing the number alleged by the applicants'.

Complaint 7: Alarmingly high number of voters using Elect 27

[149] The applicants complain that 19009 voters voted in the 2009 NA election using Elect 27 forms. The first respondent points to the fact that this is not an irregular procedure and that there are voters who were duly registered but whose names, at the time of the polling, did not appear on the voters' register because of a malfunctioning of the first respondent's scanners used for capturing date in the wake of the supplementary voter registration process.

[150] Ndjarakana explains that in the registration process the first respondent used a standard form with a detachable pro forma voters' registration card which is retained by the first respondent and contains the particulars of the registered voter. He avers that both the standard form and the pro forma voters' registration card have an identical serial number.

[151] He explains that given that voters' rolls are specific to a constituency[23], it was conceivable that persons who 'tendered' their votes outside their constituencies also voted using 'Elect 27's. 'Elect 27' is, according to Ndjarakana, designed to cater for the eventuality where a voter presents him or herself at a polling station with a valid voter registration card but his or her name does not appear on the voters' register.

[152] Ndjarakana maintains that it is immaterial that persons voted using 'Elect 27' Forms as the law allows for that. For that reason he asks to have 'LH 09' struck to the extent it purports to be a document that proves that 19,009 people, according to Visser, voted using 'Elect 27' Forms.

[153] Ndjarakana does not point to a specific statutory provision which sanctions the 'Elect 27' procedure.

Complaint 8: Unused ballot papers books with different font

[154] Ndjarakana points to the fact that ballot papers were printed by Renform CC who won the tender to print the ballot papers and that the serial numbers referred to by the applicants are the serial numbers of ballot books printed by Renform CC. He maintains that the ballot paper books referred to were received from Renform CC. He attaches to his affidavit a list of serial numbers sequence showing that the unused ballot books were printed by Renform.

[23] Section 26(3) (b)(i) of the EA (as amended by s.9(b) of Act No. 23 of 1994) requires that only the relevant part of the voters' register is provided to a particular constituency.

[155] Ndjarakana also states that ballot paper books have security features that cannot be tampered with. He expresses surprise at the complaint, considering that the applicants concede that the ballot paper books complained of were unused. Ndjarakana describes as speculative the applicants' allegation that the discovery of the unused ballot paper books suggests that 'foreign material' or fake ballot books could have been introduced in the 2009 NA election. He seeks to strike the allegation.

Complaint 9: Elect late returns

[156] Ndjarakana asserts that the counting of ballot papers can only commence after polls close and 'Elect 16' Forms cannot be completed before counting commences. He states that 'Elect 16' is a return by the presiding officer by means of which he or she accounts for the conduct of the elections at the polling station. It contains the number of ballot papers received, those used, spoiled ballot papers and unused ones. It also contains an account of the ballot boxes used and the number of packets prepared by the president officer.

[157] According to Ndjarakana, counting of ballots started immediately after the close of polls and continued until 4 December 2009. He therefore does not find it surprising that there were some 'Elect 16' Forms that were completed as late as the applicants point out. That is so, he says, as the Forms are used to give an account of all the ballot papers that were used, unused and those spoiled – a procedure that can only be done after counting had been completed.

[158] As regards the first respondents' Handbook relied on by Haufiku ('LH 11') in support of complaint 9, Ndjarakana states the purpose of the Handbook in relevant part is to instruct presiding officers to complete Elect 16 correctly and only to be submitted to the returning officer making sure that the ballot papers balance with the number of ballot papers received, used, spoiled and unused.

Complaint 10: Elect 16 accounts and verification either not made or not signed

[159] Section 85(3)[24] does not support the applicants' claim that forms intended to account for ballot papers issued to presiding officers were not verified or were inadequately verified. Ndjarakana therefore contends himself merely by stating that the section relied on does not support the applicants' allegation under complaint 10.

Complaint 11: Failure to post results

[160] Ndjarakana denies the alleged failure by presiding officers to post results at polling stations as required by s. 85(6) of the EA, as amended by s. 25 of Act No.7 of 2009. He complains that the applicants failed to name the polling stations where results were not posted.

[161] Ndjarakana relies on the evidence of 'the respective presiding and returning officers who did duty at the polling stations [MN 7(a) – MN 7(g)] referred to in [Haufiku's] 'LH 13(a)' to 'LH 13(g)', in support of the denial that results were not posted at polling

Section 85 (3), as amended by s.39 (b) of Act 23 of 1994, reads: 'The sealed ballot boxes and packets referred to in subsection (1) shall be accompanied by a return in which the presiding officer accounts for the number of ballot papers entrusted to him or her under the heads of ballot papers in the ballot boxes and unused and spoilt ballot papers'.

stations. In any event, he states that 'LH 13(a) to LH 13(g)' are not affidavits as they were not properly initialed or commissioned. He seeks to have them struck.

[162] The following affidavits are relied on by Ndjarakana to challenge the applicants' allegations of non-posting of results:

Thomas Hinyenguite:

[163] He was the returning officer for Oniipa constituency in Oshikoto Region. He refers to LH 13(a). He denies that the results were not displayed at the Oniipa Constituency verification centre. He says after he verified all the ballot paper accounts from 21 different polling stations under his supervision, he announced the results for the constituency to all present at the verification centre, including political party agents, observers from the Council of Churches in Namibia, presiding officers from all the polling stations in Oniipa constituency, the Assistant Regional Coordinator and police officers. He says he announced the results on the prescribed forms Elect 19 and 20. He says he made copies and posted the results on the wall outside the verification centre and gave copies of the results to political party agents who requested them. He then gives a rather long and detailed explanation to meet Klaudia Angombe's ('LH 13(a)') allegation that grey boxes came from polling stations while opened and not sealed. He also denies the allegation that he announced the results for Oniipa constituency without reconciling the ballot boxes and ballot papers. He says he also verified the ballot paper accounts of all the polling stations in the Oniipa constituency and satisfied himself of the reports provided to him by the presiding officer.

Immanuel Kanyeketela:

[164] He was the returning officer for the Okahao constituency in the Omusati region. He refers to LH 13(b) by Heikky Shilongo. He supervised 17 polling stations. He disputes Shilongo's allegation that no results were posted at the polling stations because – as Kanyeketela says – Shilongo could not know that because Shilongo could not have been at all polling stations at the same time. He says he never heard the phone of SWAPO Councilor Ndilimani ring as alleged. He also deals with Shilongo's allegation that he refused to endorse the results before the removal of ballot boxes from the polling station to the verification centre. He says his was not a polling station but a verification centre and no ballot boxes had to be removed from there to another verification centre.

Hoisan Shikongo:

[165] He was the presiding officer for fixed team 101, Omapopo polling station, Uuvudhiya constituency in the Oshana Region. He answers to 'LH 13(c)' (Benat). He denies the allegation that Councilor Hamutenya caused disruption at his polling station as Hamutenya was never there. His polling station also served as verification centre. He states that Benat was asleep during the verification process and had left before the process was completed. He denies the allegation that spoilt and rejected ballot papers were counted for SWAPO. He explains how he complied with s. 85(3). He denies that ECN closed polls without counting and without displaying the votes at the polling station. Since Benat was an RDP political agent at Omapopo Combined School polling station from 27-28 November 2009, this witness says Benat could not have observed

counting at other polling stations at the same time. For his polling station, he says, he announced the results of Omapopo Combined School polling station to all present on Form Elect 19(b) and 20(b) and posted the results.

Brunhilde Tsauses

[166] She was the returning officer for Karibib constituency in Erongo Region. She answers to 'LH 13(d)' (Hans). She says that Youth Centre at Usakos was not a polling station but a verification centre. She denies that the documents of station 104 got lost in her hands. She gives a full explanation for the denial. She also denies the allegation that the results were not displayed on the notice board. She says they were so displayed at the Karibib constituency immediately after announcement on 2 December 2009.

Joas Nekwaya

[167] He was the presiding officer for Onamwenyo Kindergarten (Onethindi), Olukonda constituency, Oshakati Region. He answers to Josefina Kaukungwa ('LH 13 (e)'). He denies her allegations. He says he closed his polling station at 21h10 on 28 November 2009 and started counting the ballot papers cast. There were observers from the African Union and Council of Churches, and party agents of SWAPO, RDP and COD. All party agents told him they were happy after he completed the count. He then announced the result and posted it. He says he told Kaugungwa that the final result for the constituency will be available at the verification centre.

Toivo L. Ndapwoita

[168] He was the presiding officer for Haudano Senior Secondary School, Fixed Polling Station No. 101 for Okalongo constituency in Omusati Region. He answers to 'LH 13(f)'. He denies her allegations that verification did not take place. He says he counted, announced and posted the results. He refers to the affidavit of Estella Heita. She was returning officer for Okalongo constituency. Haudano Senior Secondary School was both polling station and verification centre. She was present at counting at Fixed Team 101 at Haudano Secondary School. After counting, presiding officer announced the results to the people present. Present were agents of DTA, COD, RDP and SWAPO. There were also election observers. Heita says that Shipanga left Haudano Secondary School polling station immediately after the results were announced by the presiding officer. Ndapwoita announced the result and posted it. By then Shipanga had left. Therefore Shipanga cannot say that no verification took place. Heita also challenges, with full explanation, the allegation that party agents were refused to sleep where ballot boxes were kept and states nothing untoward happened. Ndapwoita also deals with each and every one of the allegations by Shipanga, denies them and gives a full explanation of his side of the story contradicting Shipanga.

Complaint **12: Non-reconciliation between Elect 20 (b)'s and Elect 16's**

[169] Ndjarakana asks for the striking out of 'LH 14' on the ground that it does not comply with the CEA. He then criticizes the mathematical formula employed by the applicants' Visser in coming to the conclusion that more people voted in the constituencies named in LH 14 than the number of ballots used. According to

Ndjarakana, Visser must have used a different formula than the one evident on the face of ‘LH 14.’ We will come back to this issue in due course.

[170] Ndjarakana also points to wrong voter tallies in ‘LH 14’ in respect of the following constituencies, pointing to the inherent unreliability of that document: Onkambo near Okaku and Morning Sun Kindergarten.

[171] Ndjarakana also states that the elections were not flawless and that there could be few discrepancies but that the totality of the process put in place by the first respondent was geared towards ensuring that the results announced by it are as accurate as possible.

General Complaints

[172] We have set out applicants’ entire ‘general complaints’ as they appear in Haufiku’s 4 January founding affidavit. Ndjarakana describes the allegations therein as inadmissible hearsay and irrelevant opinion evidence and asks that the complaints under that head be struck. In the notice to strike the general complaints are said to contain speculative and inadmissible opinion evidence.

[173] Ndjarakana also denies all allegations of improper conduct made under the rubric of general complaints. He states that the allegations are not supported by evidence.

SECOND REPONDENT'S CASE

[174] The main affidavit on behalf of the second respondent is deposed to by the Honourable Pendukeni Maria Iivula Ithana, the second respondent's Secretary General. In its answering papers the second respondent leaves the rebuttal of certain of the applicants' factual allegations underpinning the challenge to the NA election to the first respondent, and we have dealt with them above.

[175] In our summary of the second respondent's answers we will place emphasis on those allegations that are material to the resolution of the application and those which , in our view, raise disputes on the facts on the *Room Hire* test[25].

Complaints 1 and 2: Unrealistic high voter turnout and Voter percentages in excess of 100%

[176] The second respondent relies on two deponents to deal with these aspects. The first, Mr Phanuel Kaapama, being a political scientist and an academic at the University of Namibia, and the second, Mr Faniel Kisting, a chartered account and partner in the chartered accountant's firm Grand Namibia. Both provide their relevant qualifications and experience in the fields of specialization.

[25] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1166 (T).

[177] Kaapama deposes that he has extensive experience in Namibia's political and social environment and points to his experience as a political analyst and commentator and in election observation matters, locally and in the SADC region. In particular, he points out that he is knowledegable in Namibia's voter registration and election result trends from the pre-independence election of 1989 to the 2004 National Assembly and Presidential elections. Kapaama annexes to his papers the documents on which he bases his analysis.

[178] Kaapama then comes to the following conclusions, amongst others: if one uses the officially published voters' register of 9 November 2009, and the election results officially announced by the first respondent on 4 January 2011 (not the voters' register alleged by the applicants as the one used in the 2009 elections and not the results published by *the Namibian* newspaper on 7 December 2009) the voter turnout for the 2009 NA election was 68.64 per cent and is consistent with the trend of the nation's past three elections.

[179] Kisting's primary mandate was to critique the analysis done by Gotz on the voters' registers. Kisting refers to and attaches the documents that he had regard to. He comes to the following conclusion: Gotz came to the conclusion about the alleged unusual voter turnout for the 2009 election because he used as a measure a voters' register of 822, 344 and not the one gazetted by the first respondent on 9 November 2009, comprising 1,181, 835 names. Kisting also criticizes, just for an example, the approach

adopted by Gotz in coming to the conclusion that there were over 90 000 deceased persons on the voters' register.

[180] Kisting opines:

> 'The most significant error in terms of voters numbers pointed out by Mr A Gotz is the total number of deceased voters , which in both his reports is estimated in excess of 90 000 deceased voters. This comprises about 7.8% of the total error rate on the VR 1.18 report. The error rate is based on death rate in the Outjo constituency, which consists according to him of 822 334 (0,68% of the total voters in Namibia) voters and 627 deceased voters. Mr A Gotz then uses this rate as the official death rate in Namibia and estimates the number of deceased voters for the entire population. The question that could rightfully be asked is whether the 627 cases in a relatively small constituency could be used as a representative sample of the entire population. Surely a more appropriate way would have been to obtain the official death figures for persons over 18 years of age from the Ministry of Home Affairs. Our opinion is that by using such a small sample and applying it across the entire population it could increase the sampling risk, i.e. the applicants' conclusion, based on the sample, may be different from the conclusion reached if the entire population were subjected to the same test or procedure. It is therefore our opinion that the applicant should have tested more constituencies in the same way in order to fully substantiate the number of deceased voters estimated on the Voters Role (sic).'

[181] The second respondent's Iivula-Ithana also relies on the affidavits of several deponents (who are either voters or refer to people who voted) to make the point, (a) that time and expense went into participating in the elections sought to be impugned, (b) people had exercised their franchise, denied to them for long, (c) the election was seen

as reflecting the outcome of the will of the voters, and (d) setting aside the election would be unacceptable to those who supported and voted for the second respondent.

Complaint 3: Tendered votes

[182] In response to the tendered vote irregularity complaint, Iivula-Iithana states that the applicants have not established that after a tendered vote had been counted at the polling station at which it was cast, as should be the case in terms of s. 85 (1) of the principal Act (as amended by s. 25 of Act No 7 of 2009) , the count of such vote was also added to the count of votes at a polling station in a constituency where the voter concerned had been registered.

Complaint 4: Duplicate registrations

[183] Relying on Gotz's affidavit, Haufiku avers that duplicate registrations appear in respect of approximately 58, 000 voters on the voters' register. In answer, Iivula-Iithana states that the applicants ought to have produced the duplicates which they contend were double -counted; adding that it is improper for the applicants to merely say that IDs were duplicated without indicating which particular IDs were so duplicated. She further points out that the purpose of issuing a 'preliminary voters' register', which was later corrected and certified, is to enable persons to register objections, which the first respondent corrects before final certification; and so, according to the second

respondent, the 'preliminary voters' register' will not be identical to the 'final voters' register.

Complaint 5: Existence of deceased persons appearing on voter's registers

[184] The second respondent stresses that the applicants failed to produce credible evidence establishing that any deceased person apparently voted. It is further pointed out that it is improper and misleading for Gotz to use one constituency and to make wild and unintelligent extrapolations in order to make conclusions therefrom. Iivula-Iithana also points out that it has not been established at all that the so-called ghost voters voted in the election.

Complaint 7: 'Elect 27' names not appearing on the voter's register

[185] Relying on the supporting affidavit of Visser, Haufiku avers that, according to the report marked 'LH9', '*it appeared as if at least*' 19,009 voters were allowed to vote notwithstanding the fact that their names did not appear on the voters' register'. In response thereto, Iivula-Ithana states that the complaint is empty because the names of those voters are not provided; neither were the polling stations, which allegedly allowed these unregistered voters to vote, identified by Haufiku.

Complaint 10: Elect 16 accounts and verification either not made or not signed.

[186] Haufiku alleges that '*in several circumstances*', the forms whose purpose is to account, in terms of section 85(3) of the principal Act (as amended by s. 39 (b) of Act No. 23 of 1994), for ballot papers issued to presiding officers were either not verified or were inadequately verified. In response thereto, Iivula-Iithana states that it is improper for a party to refer to a bundle of documents without identifying which aspects of that bundle it specifically intends to rely on and for what purpose, in order to enable the respondents to address it.

Complaint 11: Failure to post results at polling stations

[187] Haufiku points out that the failure by *some* presiding officers to post the results at *some* polling stations is a contravention of the EA. He relies on certain affidavits by certain polling agents in respect of certain polling stations, marked 'LH13 (a) - LH13 (g)'. Iivula-Iithana states that such polling agents were obliged in terms of the first respondent's Handbook, to raise such alleged irregularities with the presiding officer concerned; and it is alarming that that was not done by the applicants' election agents, if what they allege has any substance.

General complaints:

[188] The second respondent also criticizes the vagueness of the general complaints and their lack of specifics. Iivula-Iithana maintains that no evidence is provided to support the allegations under general complaints.

APLICANTS' REPLIES

[189] The applicants filed extensive replying papers in respect of both respondents' answering papers. We are, in view of the earlier rejection of the amplified papers, now concerned only with the replies relative to the answers to applicants' 4 January 2010 founding papers. We have had regard to the allegations in reply and have considered the extent to which they add to, or only elucidate, the allegations previously made in the 4 January papers. Where the objection is taken that the applicants introduced new matter, we shall deal with the replies in the context of considering such objection. Above all, we are guided, in the consideration of the replies, by the *Plascon-Evans* rule that where there are genuine disputes on the facts raised by the respondents answers, their versions will stand and the applicants will only prevail on disputed facts where the respondents' versions are farfetched and so untenable as to warrant their rejection merely on the papers.

[190] Haufiku maintains that both respondents did not raise 'substantial factual disputes' and only dealt with the issues in general terms.

[191] Furthermore, in reply, Haufiku says that Gotz's findings have neither been attacked nor scrutinized to point out in which respects they fail to convey the truth. He makes the general point, in respect of the respondents' answers to allegations about transgression of the EA, that the statutory checks and balances would serve absolutely no purpose if they cannot be tested in a Court of law in cases where they have not been complied with such as was the case with the 2009 NA election.

[192] Haufiku replies that on the probabilities the voters' registers report in *the Namibian* and on the CD-Rom 'appear to be more correct than the alleged published version of the voter's registers' by the first respondent. Haufiku contends that whether or not any concerns were raised as the elections unfolded – as the respondents say it should have been – is irrelevant. The applicants in the end concede in reply that in terms of the electoral legislation, tendered votes are counted at the polling stations where they were cast.

Complaint 7: 'Elect 27' names not appearing on Voter's register

[193] Haufiku says in reply that the first respondent does not point to a law which allows a person with a voter registration card to vote when his or her name does not appear in the voters register.

THE COMPLAINTS CONSIDERED

General

The law:

[194] Section 95 of the EA states :

> '95. No election shall be set aside by the court by reason of any mistake or non-compliance with provisions of this Part, if it appears to that court that the election in question was conducted in accordance with the principles laid down therein and that such mistake or non compliance did not affect the result of that election.'

[195] Section 109 of the EA states:

> 'An application complaining of an undue return or an undue election of any person to the office of President or as any member of the National Assembly or a regional council or local authority council by reason of want of qualification, disqualification, corrupt and illegal practice, irregularity or by reason of any other cause whatsoever, shall, subject to the provisions of this Part, be made to the court.' (Our emphasis)

[196] In relevant part, section 116 of the EA states:

> '(4) No election referred to in section 109 shall be set aside by the court by reason of want of qualification, disqualification, corrupt and illegal practice, irregularity or by reason of any other cause if it appears to the court that any such want of qualification, disqualification, corrupt and illegal practice, irregularity or other cause did not affect the result of that election.
>
> (5) At the conclusion of the trial of any election application, the court shall determine whether the respondent was duly elected or whether any, and if so, what person other than the respondent was or is entitled to be declared duly elected.
>
> (6) If the court determines that the respondent was not duly elected, but that some other person was or is entitled to be declared duly elected, the respondent shall from the date of such determination be deemed to have vacated his or her office or seat, as the case may be, and the court shall forthwith certify as such its determination to the Commission and, in the case of the President or the National Assembly, to the Speaker of the National Assembly or, in the case of a regional council, to the chief regional officer of that council or, in the case of a local authority council, to the chief executive officer of that council, and the Commission shall thereupon, by notice in the Gazette, declare such other person duly elected from the date on which the respondent vacated his or her office or seat, as the case may be, and alter the announcement of the result of the election published in the Gazette, accordingly.
>
> (7) If the court determines that a respondent was not duly elected, and that no other person was or is entitled to be declared duly elected, the office or seat of the

respondent, as the case may be, shall be deemed vacant and the court shall certify as such its determination as provided in subsection (6), and the Commission shall, if satisfied that no appeal is being prosecuted against the determination of the court or that an appeal has failed, declare by notice in the Gazette that a vacancy has occurred, the cause of such vacancy and nature of such vacancy.

(8) When any allegation is made in an election application of any corrupt and illegal practice having been committed at the election to which the application refers, the court shall, in addition to the certificate aforesaid, at the same time and in the like manner report in writing-

(a) whether any corrupt and illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any political party or candidate at that election or by or with the knowledge and consent of its or his or her agents, and the nature of such corrupt and illegal practice;

(b) the names of all persons who have been proved at the trial to have been guilty of any corrupt and illegal practice;

(c) whether corrupt and illegal practices have, or whether there is reason to believe that corrupt and illegal practices have, extensively prevailed at the election in question.

(9) The court may at the same time make a special report as to any matter, arising in the course of the trial, an account of which ought in its judgment, to be submitted to the Commission or National Assembly or the regional council or local authority council in question, as the case may be.

(10) A copy of every certificate and report made by the court under this section shall, as soon as is practicable, be presented by the Speaker to the National Assembly or by the said chief regional officer to the regional council in question, or by the said chief executive officer to the local authority council in question, as the case may be.'

[197] The import of s. 109 has been authoritatively interpreted by a Full Bench[26] of this Court as follows (at page 49 – 50):

> 'The grounds on which an election may generally be avoided under 116 (4) notwithstanding, the Legislature deemed it necessary to differentiate between those arising from the conduct of the election which are within the competence, direction and control of the first respondent under Part V of the Act and those falling outside the scope thereof. Part V of the Act deals in great detail with the manner in which first respondent is required to direct, supervise and control elections under the Act – the consequences of any mistake under or non-compliance with that Part was afforded special attention and treatment by the legislature in s. 95 of the Act. [pp. 63 – 64].
>
> We are satisfied that the same interpretation given in other jurisdictions to identical or materially the same provisions holds true as far as onus is concerned in respect of s 95 of the Act. That is to say that, once the applicants establish a mistake or noncompliance with the provisions of Part V of the Act, the onus rests on the first respondent to prove that the election was conducted in accordance with the principles contained in Part V and that the proven mistakes or non-compliance have not affected the outcome of the election. (pp. 68- 69 and 93 – 94).'

[198] In *Scott & Others v Hanekom & Others*, 1980 (3) SA 1182 (C), Marais AJ (as he then was) interpreted a similar provision and adopted the following approach (at 1198 E – H):

> '(1) The onus of proving that a mistake or any noncompliance with the relevant legislative provisions occurred lies upon the party who challenges the validity of the election. Once he has discharged this onus, the onus rests upon those who would maintain the validity of the election to prove both that, despite the mistake

[26] *Republican Party of Namibia and Another v Electoral Commission of Namibia and Others*, Case No. A387/05 [2005] NAHC 2 (25 April 2005)

> or non-compliance, the election was conducted in accordance with the principles laid down in the legislation and that the mistake or non-compliance did not affect the result. Whether or not any particular mistake or noncompliance which may have occurred is a breach of principle which would render the curative provision inapplicable and make reliance upon it futile is a question of degree. (Footnotes omitted)

[199] An irregularity is not synonymous with a corrupt practice. The EA recognises though that either might be present in an election. After all, elections are conducted by human beings. What the EA frowns upon are irregularities and corrupt practices that affect the outcome of an election, that is to say, not any irregularity or corrupt practice imaginable under the sun: it is one that does violence to the principles contained in Part V of the EA. Granted, once such a practice is established by admissible evidence by the applicant, the first respondent has the onus to show – on the usual civil standard – that the proven conduct did not affect the outcome of the election. We have shown what the EA requires of the Court at the end of an election application. We have to show who is proven to have committed the prohibited conduct which affected the outcome and to refer the matter in terms of the aforementioned EA provisions. The legislature attaches great importance to that, presumably because the conduct of that person or party had occasioned a great deal of damage in wasted tax-payer resources in conducting an election. An allegation of an irregularity or corrupt practice affecting the outcome of an election is one therefore not to be taken lightly.

[200] It is trite that the more serious the allegation or its consequences, the stronger must be the evidence before a Court will find the allegation established; *Gates v Gates*

1939 AD 150 at 155; *R (N) v Mental Health Review Tribunal* [2006] QB 468; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 291, para 27.

[201] We propose at the outset to review the development of the electoral law since the passing of the EA (Act No. 24 of 1992), the principal Act. The purpose of the exercise in the present proceedings will become apparent in due course, but more particularly, it sheds light on the issues raised by Haufiku in his general treatment of the law and the responsibilities of various role players in an electoral process and the processes associated with actual voting, counting and announcement of results.

[202] Since the passing of the EA, there has been a series of amending legislation, starting with the Electoral Amendment Act, 1994 (Act No. 23 of 1994). This was followed by the Electoral Amendment Act, 1998 (Act No. 30 of 1998) and two amending Acts in 1999, namely, the Electoral Amendment Act, 1999 (Act No. 11 of 1999) and the Electoral Amendment Act, 1999 (Act No. 19 of 1999). The Electoral Amendment Act, 2003 (Act No. 7 of 2003) followed the passing of the last 1999 amendment. This was followed by the Electoral Amendment Act, 2006 (Act No. 4 of 2006), and thereafter by the Electoral Amendment Act, 2009 (Act No. 7 of 2009). The last amending legislation is the Electoral Amendment Act 2010 (Act No. 11 of 2010). As can be gathered from the long title of Act No. 11 of 2010, the purpose of this Act is merely to extend the term of office of the current members of the Electoral Commission (the first respondent) to 30 June 2011.

[203] Of all the amending statutes, as far as the present proceedings are concerned, apart from Act 23 of 1994 which introduced the process of 'tendered vote' and accompanying 'tendered vote envelope', it is Act No. 7 of 2009 that brought in far-reaching changes to the electoral law of Namibia. Act No. 7 of 2009 marked a watershed, not least because that Act takes into account the 'SADC Principles and Guidelines Governing Democratic Elections' ('the SADC Principles and Guidelines'). The SADC Principles and Guidelines are not only informed by the SADC legal policy instruments but also by the major principles and guidelines emanating from the 'OAU/AU Declaration on the Principles Governing Democratic Elections in Africa' – AHG/DECL.1 (XXXVIII) and the 'AU Guidelines for African Union Electoral Observation and Monitoring Missions' – EX/CL/35 (III) Annex II. The significant provisions in this regard are contained in s. 25 and s. 26 of Act No. 7 of 2009.

[204] We proceed to have a closer look at Act No. 23 of 1994. According to s. 80 of the principal Act, as amended by the addition of subsection (3) in terms of s. 34 (c) of Act No. 23 of 1994, a 'tendered vote' is defined as follows:

> '(3) Where, at an election for the President or members of the *National Assembly*, any voter is by reason of absence unable to attend on any polling day at a polling station at which he or she is in accordance with subsection (1) required to record his or her vote, the presiding officer of any other polling station, whether in or outside Namibia, shall at the request of such voter, permit such voter to record his or her vote by way of a tendered vote during the polling hours applicable to that polling station by virtue of the provisions of section 77: Provided that where at such an election the poll has been determined to take place over more than one day, a voter shall, at a polling station outside Namibia, be entitled

to so record his or her vote only on the first day of the polling days so determined.' (Our emphasis)

[205] The aforegoing tendered vote provision is accompanied by the provision on 'tendered vote envelope'. Section 82 (9) of the principal Act is amended by s. 36 of Act No. 23 of 1994 by the substitution for subsection (9) of the following subsection:

'(9) When the voter has complied with the provisions of subsection (7), the presiding officer or a polling officer shall –

(a) …

(b) …

(c) if the voter has requested to record his or her vote by way of a tendered vote envelope, deliver to such voter, together with the ballot paper, a tendered vote envelope on which the presiding officer or polling officer has endorsed the name of the constituency in respect of which the voter is registered …'

[206] Furthermore, according to s. 85 (1) (c) of the principal Act, as amended by s. 25 of Act No. 7 of 2009:

'(1) Every presiding officer at a polling station *in* or outside Namibia *shall* immediately after the close of the poll and in the presence of the persons entitled in terms of s. 78 (1) to attend at the polling station, as may be in attendance –

(a) take charge of all the ballot boxes and any voting machines at the polling station;
(b) open all the ballot boxes for ordinary ballot papers and remove there from the ordinary ballot papers;

(c) *open all ballot boxes for tendered vote envelopes, open such tendered vote envelopes and remove there from the tendered vote ballot papers*;

(d) ...

(e) ...

and after ascertaining that, in the case of ballot papers, each ballot paper bears the official mark on the back thereof, *count,* assisted by the counting officers concerned, *the votes recorded on such ballot papers* ...' [Our emphasis]

This provision admits of no exclusion of a tendered ballot in the counting process at the polling station where it was cast.

[207] What emerges clearly and unmistakably from the aforementioned s. 80 (3) of the principal Act, as amended by s. 34 (c) of Act No. 23 of 1994, s. 82 (9) of the principal Act, as amended by s. 36 (h) of Act No 23 of 1994, and s. 85 of the principal Act, as amended by s. 25 of Act No. 7 of 2009, is this: tendered votes are counted at the particular polling station at which those votes were cast. It follows inevitably, therefore, that the announcement of the result of the count of votes at a polling station by the presiding officer concerned and also posted by him or her at the polling station is the result about which such presiding officer informs the returning officer concerned; and this result, without a doubt, includes the result of the count of tendered votes involved.

[208] The most significant provisions relevant to the present proceedings are further contained in s. 25 and s. 26 thereof, which we now consider.

[209] Section 25 of Act No.7 of 2009 is a substitution for s. 85 of the principal Act, as amended by s. 39 of Act No. 23 of 1994. The amending s. 25 of Act No. 7 of 2009 is entitled 'Closing of poll at polling stations in or outside Namibia, counting of votes, sealing of ballot boxes and packets and ballot paper accounts'. And according to s. 18 (b) of Act No. 23 of 1994 the first respondent appoints a presiding officer for each polling station and the presiding officer is in control of the polling station. An important aspect of the responsibilities of a presiding officer that is relevant for our present purposes is contained in s. 85 (6) of the principal Act, as amended by s. 25 of Act No. 7 of 2009, which provides:

> 'The presiding officer shall, when the counting of votes have been completed, announce in the prescribed manner the result of such count and inform the returning officer thereof and post a copy of the results at the polling station concerned, but in the case of a mobile polling station the results of all the polling stations for that mobile polling station shall be posted at the polling station used at the closing of the poll where the votes are counted.'

[210] The crucial effect of s. 85 (6) of the principal Act, as amended by s. 26 of Act No. 7 of 2009, is the requirement that not only must the announcement of a result in question be made at the polling station concerned, but also such result must be posted at the polling station concerned *for all to see*. (Italicized for emphasis) This requirement is in line with the SADC Principles and Guidelines 4.1.8 which enjoins the counting of votes at polling stations.

[211] There was a further enabling mechanism in the armoury of a contestant during the conduct of the elections. According to s. 85 (5):

> 'An election agent may request a presiding officer to re-count the ballot papers and votes counted at a polling station until such time as he or she is satisfied of its accuracy: Provided that a presiding officer may refuse to do so if he or she is of the opinion that such request is at any time unreasonable.'

[212] In this regard, according to s. 52 (3) of the principal Act:

> 'An election agent for a polling station shall be entitled to attend at that polling station as the representative and observer of the political party or such candidate by whom he or she was appointed as such agent.'

[213] Thus, in terms of the above-quoted provisions, any election agent is entitled to request a presiding officer to re-count the ballot papers and votes counted at a polling station until such time as such election agent is satisfied of the accuracy of the count. However, the presiding officer may refuse to accede to such request; but only where, in the opinion of the presiding officer, such request is unreasonable. The crucial effect of this provision – and this is significant in the present proceedings – is that the result that the presiding officer announced and posted at polling stations would have been accepted by the election agents of the applicants in question.

[214] Another significant checks-and-balances mechanism in the electoral process, apart from the role of the aforementioned election agent, is the role of the counting agent. Act No. 23 of 1994 provides for the appointment of counting agents (referred to in s. 87 (2) (b) of the principal Act, as amended by Act No. 7 of 2009). Section 19 (b) of Act No. 23 of 1994, which is a substitution for subsection (5) of the principal Act provides:

> '(5) A political party or such candidate shall be entitled to be represented at any place where the determination of the result of the poll for an election occurs, as hereinafter provided, by such number of persons as may be prescribed, appointed, subject to subsection (8), by such political party or candidate not later than seven days before the election in question as counting agents.'

[215] Yet, another important development in the electoral law and practice relevant to the present proceedings is contained, as aforesaid, in s. 26 of Act No. 7 of 2009. Section 26 is a substitution for s. 87 of the principal Act, which dealt with 'Verification of ballot paper accounts by the returning officer and counting of votes at polling stations', as amended previously by s. 40 of the Electoral Amendment Act, 1994 (Act No. 23 of 1994) and s. 3 of the Electoral Amendment Act, 1999 (Act No. 11 of 1999). Section 87 of the principal Act, as amended by s. 26 of Act No. 7 of 2009, which is now entitled 'Verification of ballot paper accounts by returning officer', in material parts provides:

> '87. (1) Upon receipt by him or her of the sealed ballot boxes, sealed voting machines and sealed packets referred to in section 85, from a presiding officer, the retuning officer shall take charge of them and when all the ballot boxes, voting machines and packets have been received by him or her, he or she shall examine

whether the seals of the ballot boxes, voting machines and packets are in order *and afford any counting agents* and, in the case of an election other than an election on party lists in terms of this Act, any candidates who are present an opportunity to do the same, and shall thereafter open all the packets.

(2) The returning officer *shall* –

(a) open all the ballot boxes and sealed packets relating to a particular polling station received from the presiding officer in terms of section 85 *and remove there from* the counted, unused and spoilt ordinary ballot papers, the counted results of the poll in the case of voting machines *and the counted tendered vote ballot papers and counted ballot papers in the authorisation envelopes and verify the correctness of the return furnished by the presiding officer concerned* in terms of subsection (9) of that section;

(b) after such verification –

(i) prepare a report on the result thereof;

(ii) *allow any counting agent or candidate to make copy of the report;* and

(iii) cause the report to be delivered or transmitted to the Director.' (Our emphasis)

[216] It hardly need saying that the verb 'verify' or its noun derivative 'verification' is not defined, and so it is to the lexical or literal meaning of the verb and the noun that we shall turn for assistance. The verb 'verify' means 'make sure or demonstrate that something is true'; and the noun 'verification' means 'the process of verifying'. (*Concise Oxford Dictionary*, 11th edn) In our view, the plain, clear and unambiguous word 'verify' and its derivative 'verification' should be given their literal meaning, 'but literal meaning in total context'. (See *Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR

793 at 798A-B, and the textual and case law authorities cited there.) In this regard, we point out in parentheses that the clause 'verify the correctness of' is an inelegant formulation by the drafter, because the clause 'verify the correctness of' is tautologous: for the simple reason that if something is already correct, why would anyone need to make sure it is correct? Be that as it may, with due elimination of the inelegancy and having given the clause 'verify the correctness of' its literal meaning in context (*Rally for Democracy and Progress v Electoral Commission* supra *loc. cit.*) and having read all the provisions of Act No. 7 of 2009 intertextually and globally, as we should, we come to the following reasonable and inexorable conclusion; that is to say, in terms of s. 87 (1) (a) of the principal Act, as amended by s. 26 of Act No 7 of 2009, the returning officer concerned must make sure that 'the return' furnished to him or her by 'the presiding officer' is correct.

[217] The concomitant of the cumulative effect of the above-quoted provisions of s. 25 and s. 26 of Act No. 7 of 2009 is that the result referred to in the aforementioned s. 85 (6) (as amended by s.25 of Act No. 7 of 2009) is the result that the presiding officer must transmit to the relevant returning officer. Our understanding of the powers of the returning officer in terms of s. 87 (2) (a), concerning verification 'of the correctness of the return furnished by the presiding officer' is that such returning officer may only make sure that the totals of the returns are correct; that is, the returning officer may only check for patent arithmetical errors. It is, thus, not part of the powers of the returning officer to do anything more than that. What is more, such returning officer performs that function under the watchful eyes of the various election agents, as explained previously. Anything else would stultify the provisions of s. 85 (6) of the principal Act, as amended by s. 25 of Act No. 7 of

2009, requiring not only the announcement of a result in question but also posting such result at the polling station concerned *for all to see*. (Italicized for emphasis)

[218] The effect of s. 26 of Act No. 7 of 2009, as we see it, is that at the stage of the verification process, too, any counting agent and, in the case of an election other than an election on party lists in terms of this Act, any candidate who is present, must be given the opportunity to do all that the returning officer concerned would do in the carrying out of his or her functions under s. 87 (1) of the principal Act, as amended by s. 26 of Act No. 7 of 2009; e.g. examining whether the seals of the ballot boxes, voting machines and packets are in order, before opening all the packets. It hardly need saying, therefore, that s. 87 (1) of the principal Act (as amended) gave the applicants the opportunity to examine the election materials before the aforementioned verification exercise was carried out by the returning officer concerned. This is a transparent and fair avenue which any of the applicants was permitted by the electoral law to transverse in order to be satisfied that the returns received by the returning officer had not been tampered with. This conclusion takes us to the next level of the present enquiry.

[219] In our opinion, therefore, the report that the returning officer causes to be delivered or transmitted to the Director of Elections after completion of the verification process under Act No. 7 of 2009 must be a report of the results announced by the various presiding officers and posted at various polling stations and which are thereafter subjected to verification. It is such reports that counting agents and candidates are permitted to make

copies of, as aforesaid. Our view is buttressed firmly by s. 29 of Act No. 7 of 2009 which amended s. 89 of the principal Act by the substitution for subsection (1) thereof by the following subsection:

> '(1) At an election for members of the National Assembly a returning officer shall, when the counting of votes in accordance with section 85 has been completed, and *whether or not the return referred to in section 85 (9) was found to be correct*, announce in the prescribed manner the result of such count and inform the Director (of Elections) thereof.' [27]
>
> [Italicized for emphasis]

[220] Accompanying s. 87 (1) of the principal Act, as amended by s. 26 of Act No. 7 of 2009, another important aspect of the electoral process that protects the interests of political parties or candidates that participate in the election is that contained in s. 19 (b) of Act No. 23 of 1994. It is clear from this provision that a counting agent or candidate, as the case may be, is allowed – not after the event – by the returning officer concerned to make copies of the report on the results in terms of the aforementioned s. 87 (2) (b) of the principal Act, as amended by s. 26 of Act No. 7 of 2009, which the returning officer must prepare and deliver or submit to the Director of Elections because such counting agent or such candidate would have been present at any place where the determination of the

[27] In respect of the presidential election, a similar provision is found in s. 28 (a) of Act No. 7 of 2009 which amended s. 88 of the principal Act by the substitution of subsection (1) of the following subsection:

> '(1) At an election for the President a returning officer shall, when the counting of votes in accordance with section 85 has been completed, and *whether or not the return referred to in section 85 (9) was found to be correct*, announce in the prescribed manner the result of such count and inform the Chairperson of the Commission thereof.'

result of the poll for the election in question had occurred and verification of the returns had taken place, if such counting agent or such candidate was so minded to be so present, as it is such counting agent's or such candidate's entitlement to be so present in terms of the legislation.

[221] In the end, the returning officer concerned must announce the particular return and must inform the Director of Elections accordingly. It is the notice of any such announcement made that the Commission (first respondent) must deal with in accordance with s. 30 of Act No. 7 of 2009 which amended s. 92 of the principal Act. Section 30 provides:

> '(1) The Commission shall cause a notice of any announcement made and transmitted to it in terms of section 85(6), 88(4), 89(5), 90(3) or 91(3), as the case may be, and the particulars contained in that announcement, to be published in the *Gazette*, as soon as is practicable after having received it.'

[222] It is worth noting that the notice referred to in s. 85 (6) is made by presiding officers; the notice referred to in s. 88 (4) is made by the Chairperson of the first respondent in respect of election of a person as President[28]; and the notice referred to in s. 89 (5) is made by the Director in respect of the candidates of every political party elected as a member of the National Assembly in accordance with Schedule 4 of the Namibian Constitution. Section 90 (3) (which concerns regional council elections) and s. 91 (3)

[28] Not applicable in light of the challenge to the presidential election having fallen away.

(which concerns local authority council elections) are not applicable in the present proceedings.

[223] We have taken considerable space to have a very close and careful look at the interpretation and application of the relevant provisions of the principal Act and the plentiful subsequent amendments thereto for the purpose of showing the very wide powers and rights enjoyed by participating political parties in ensuring a free and fair election. Participants in elections are not merely at the mercy of the first respondent. They can demand the observance of certain standards in the conduct of elections. Those standards are justiciable and can be enforced in the High Court, through urgent relief, if necessary.

[224] It is clear that the aforementioned electoral Acts, particularly Act No. 7 of 2009, afforded the applicants unimpeded opportunity and access to take part fully in the entire electoral process, including the counting of ballot papers and votes cast in the election and also in the verification of returns given to returning officers by the various presiding officers.

[225] We wish to make the following significant observations: The philosophy at the core of the SADC Principles and Guidelines are two-fold: The first is that all political parties and independent candidates participating in any election in any SADC member State should be afforded maximum opportunity and reasonable access to participate in and have a say in

the entire electoral process, from the stage of voter registration to the stage of counting and announcement of the result. Second, the electorate should be satisfied that the result announced reflects their will as exercised by their voting in the election. The policy objectives are to, on the one hand, nib in the bud the phenomenon of 'stolen elections' and, on the other, to prevent politically charged yet unsubstantiated *ex post facto* objections to certain of the conduct of election officials and charges of 'stolen elections'.

The test for resolving factual disputes

[226] It was settled in the *Republican Party* case that in a section 109 application, which are motion proceedings, the *Plascon-Evans* rule applies (page 55-56)[29]. In *Mostert v The Minister of Justice* 2003 NR 11 (SC) at 21G-I, Strydom ACJ explained the rule thus:

> 'These allegations are denied by the Permanent Secretary and she explained in detail how it came about that the appellant was transferred from Gobabis to Oshakati. In my opinion a genuine dispute of fact was raised by the denial of the Permanent Secretary and, as the dispute was not referred to evidence, the principles, applied in cases such as *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (c) at 235E-G and *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), must be followed. It follows therefore that once a genuine dispute of fact was raised, which was not referred to evidence, *the Court is bound to accept the version of the respondent and facts admitted by the respondent*, *contained in the appellant's affidavit'. (*Our emphasis)

[29] *Plascon-Evans Paints (Ltd) v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623. *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 E-G; *Nqumba v The State President*, 1988 (4) SA 224 (A) at 259 C – 263 D).

[227] It was said by Corbett JA in the *Plascon-Evans* case, supra (at 634-635):

> 'In certain instances the denial by respondent of a fact alleged by applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under rule 6 (5) (g) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof.'

[228] How does a genuine dispute of fact arise? In the *Room Hire Co case,* supra at 1163, Murray AJP stated thus:

> 'It may be desirable to indicate the principal ways in which a dispute of fact arises. The clearest instance is, of course, (a) when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence viva voce if subpoenaed. There are however other cases to consider. The respondent may (b) admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Or (c) he may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting the applicant to the proof …''

These are the principles we will apply as we consider the various complaints raised by the applicants.

[229] Part V11 of the EA (commencing at s. 109 refers to 'election application': *vide* ss. 109 – 115), while in s. 116 (1) reference is made to 'trial'[30] of an election application. In some cases the legislature refers to the application being 'heard'[31] instead of being 'tried'. The question that arises is whether election disputes are brought and determined by way of notice of motion or by way of action. The debate is not merely an academic one – it has very serious implications and consequences. As the South African Supreme Court of Appeal recently said in *National Director of Public Prosecutions v Zuma*, 2009 (2) SA 277 (SCA):

> '[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's … affidavits, which have been admitted by the respondent …, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the [respondent's] version.' (Footnotes omitted).

[230] To the best of our knowledge, every s. 109 election application brought in this Court since the passage of the EA has been brought and determined as a 'motion' proceeding – and not as a trial action. That practice has now become firmly embedded in our practice and jurisprudence that it would be unwise to hold that because of the use

[30] Section 116(1) and (5).
[31] Section 116 (2), (3).

of the word ‘trial’ in s. 116 (1) and (5) what was intended was action proceedings where different rules would apply for the resolution of factual disputes. On the face of it, this conclusion sits uncomfortably with the approach adopted in the *Republican Party* case which determined factual disputes on the basis of both common cause facts and by resorting to ‘probabilities.’ In trial actions the Court determines disputes by resort to probabilities. We will in the present application seek to determine the case solely on the basis of the *Plascon-Evans* rule because it is incongruous to apply the two tests together. It must be said that had the Court in the *Republican Party* case properly addressed its mind to the issue it would have done the same thing.

[231] Section 116 (8) of the EA requires of the Court – at the end of an election application where corrupt or illegal practices are alleged – to state if anyone was proven to have committed the prohibited conduct which affected the outcome of the elections and to refer the matter as appropriate. The legislature attaches great importance to that, presumably because the conduct of that person or party had occasioned a great deal of damage in wasted tax-payer resources in conducting an election. An allegation of an irregularity or corrupt practice affecting the outcome of an election is one therefore not to be taken lightly. The policy behind that is very clear: In the *Republican Party* case the Full Bench cited with approval (at p 47) a *dictum* by Wessels JA in *De Villiers v Louw*, 1931 AD 241 at 268:

> ‘When, however, the election is sought to be set aside, the interest is as much that of the constituency as that of the parties to the election. If an election is set aside the whole electorate is affected, business is dislocated, expenses are incurred by the electors going to the poll, the business of hotels and public-houses is interfered with, and

generally speaking a large number of people are greatly inconvenienced. It has therefore been the policy of the law as shown in s. 61 (s.13 of the English Ballot Act), and has always been the practice of the English Courts not to disturb an election when it is clear that the persons who voted were entitled to vote[32], that no one entitled to vote has been debarred from voting, and that all the requirements of the Electoral Act have been *substantially* complied with.' (Our underlining for emphasis).

Voter's Register Irregularity allegation

[232] The reasoning by the applicants in respect of the Voters' Roll is rather self-serving. If we understand it properly it amounts to this: This Court must ignore the Voters' Register duly published in compliance with sec. 26 (3) of the EA and instead use as the yardstick for measuring the allegations of irregularity made in this application, *that* which comprises a total number of voters considerably less than what is contained in the gazetted register. It is common cause that the latter register, however obtained, supports the applicants' theory that there was ballot box stuffing and a suspiciously disproportionate voter turnout which, in turn, must show that there was rigging and ballot box stuffing. This approach is tendentious. It is interesting what the argument would have been if the converse was the case, i.e. that the voters' register published in compliance with the EA supported the applicants' theory of rigging while the unofficial one did not. Would the same argument hold?

[233] On principle, faced with two actions of an administrative body *that* which is done in compliance with the law should take precedence over that which has no legal status. That is consonant with the principle of legality and the Rule of Law. Ndjarakana for the

[32] The converse is equally true: persons not entitled to vote should not have voted.

first respondent, is vehement in his denial that (a) the first respondent was the source of the register being relied on by the applicants and (b) that the first respondent used the register being attributed to it by the applicants, and persists that what was used in the 2009 NA election was the duly gazetted register.

[234] The applicants say that on account of certain averments made by the first respondent's Ndjarakana in the s. 93(4) application – admitting that first respondent provided the disputed register – the 'probabilities' favour the applicants' version that the disputed register received from the first respondent shortly before the election, was the one used in the 2009 NA election. As has recently been reiterated in the *Zuma* case *supra (at 290, para [26]),* motion proceedings, which the s. 109 application is, as aforesaid, are designed for the determination of issues based on common cause facts and probabilities play no part. The respondent's version must be accepted unless it is far-fetched or is so untenable that it can be rejected on the papers.

[235] Ndjarakana's denial that the first respondent was the source of a register that comprised significantly less voters than the gazetted register is clearly untenable if regard is had to what he said in the s. 93 (4) application in the following terms:

> 'The statement that shortly before the election, first respondent furnished first applicant with a voters' register roll which contains only 822 344 voters is highly misleading and self serving. Deponent fails to take this Court into his confidence, by not telling the *complete story with regard to the CD Rom that contained the aforementioned figure and was distributed to political parties. The correct position with regard to the CD Rom is as follows*: After publishing the notice to inform the public that the voters' roll had been completed and certified*, I instructed staff members of my office to reproduce the voters'*

roll on a CD ROM in order to provide political parties contesting the elections with an electronic copy of the voters' roll. *The provision of a CD ROM to political parties was done in good faith* and In order to enhance transparency of the electoral process.' [Our emphasis]

[236] Accordingly, we accept the applicants' version that the first respondent provided the political parties with different sets of registers before the election. That, however, is not proof on any pan of scale that the first respondent used a register other than the officially gazetted one. In the s. 93 (4) application Ndjarakana explained the position thus:

'Shortly after the CD ROM was made available I received reports that the number of voters appearing on the voters' register, which was sent to political parties did not reconcile with the numbers that first respondent had announced publicly. This obviously came as a great surprise and an investigation into this anomaly was done. It revealed that the CD ROM that was sent to political parties contained various errors. The voters list for two constituencies were duplicated and three constituencies were omitted. I instructed my staff, responsible for information technology, to reproduce a correct CD ROM, containing the names of the voters which at that time stood at 1 181 803. On 24 November 2009 the corrected CD ROM was given to the political parties contesting the elections which contained 1 181 803. It will be noted that the figure on the corrected CD ROM is slightly lower to the one published on 9 November 2009. Minor fluctuations are to be expected, as people pass away, and as correctly conceded by applicants the register can be amended accordingly. A copy of the CD ROM ultimately given to applicants and other political parties will be made available to the Court at the hearing of this application.'

[237] In the absence of the setting aside of the register duly gazetted in terms of the EA, this Court must accept it as the official voters' register used in the 2009 NA election.

That accords with the principle of legality and the Rule of Law. Holding otherwise would open the door to abuse in that it could be used as a justification by election officials for relying on a voters' register that has not been properly executed under law. The applicants admit that the gazetted register comprises 181,835 voters. Had it been conceded by the first respondent that the registered voters' tally is different from the one reflected in that register, the position would have been different. But it is not. The tally in the official register accords with the voter turnout percentages given by Ndjarakana in opposition to those given by Haufiku relying on a register he suggests was actually used by the first respondent. The point we are making here is that a finding that the first respondent was the source of an unofficial register being relied on by the applicants does not equate to a finding that *that* was the register used. Naturally, that conduct by the first respondent is relevant, not as corroboration for the applicants' allegations of corruption in the elections, but as to whether it demonstrates special circumstances for an adverse costs order against the first respondent. We return to this matter later.

[238] It is apparent that Gotz had access to something that purports to be a voters' register provided to him by the first applicant. That is what he refers to as VR.1.16. It seems that was in electronic form. It contained an 'original number of voters' totaling 1,160,040. He added to that 'roll' the figure of 7,300 to include voters registered in respect of Opuwo and Tsandi which he says were not included in the 'original register'. He did that by looking at 'neighboring constituencies' which – curiously but significantly – he does not name. Having done that, he entered the information in a Microsoft database - which process revealed to him that there were irregularities on VR.1. 16 in

the various listed categories. These were, as he puts it, '*automated tests'* '*many*' of which were *'not definitive'* requiring manual checks which were not always possible due to serious lack of resources. The outcome of the exercise by Gotz was an '*accompanying print-out'* with 'datasets that are 'mutually inclusive. Once one defect is identified, that record is removed from the data pool and not counted again under a different integrity test'. He states further that the 'errors' he found are 80% accurate and that VR1.16 is less than 87.5% accurate.

[239] The image one gets from the above description of the process is that Gotz took information he believed was received from the first respondent containing a list of names he assumed represented registered voters. He then transferred that information into a computer in order to subject it to '*automated tests*' or in some cases '*manual'* tests. That process produced the 'errors' upon which the present application is based. On Gotz's version, embraced by the applicants, the key conclusions are that the 'errors' discovered in this way show the inadequacy of VR1.16 as a tool to prevent fraudulent voting in elections and, secondly, that in fact it was deliberately manipulated to facilitate ballot stuffing and ballot tampering.

[240] The case of the applicants, therefore, based as it is on Gotz's '*To whom it may concern*' document is that the first respondent, prior to the election on 27 and 28 November 2009, took a decision to, and in fact, manipulated the voters' register to include in it names of people who were not entitled to vote for the purpose of ballot

stuffing and ballot tampering. And so we are expected to find and to set aside the NA election that took place on 27-28 November 2009.

[241] The Court has not seen the 'memory stick', neither has it seen the 'accompanying print-out', yet it must come to the conclusion, not only that they exist, but that they support the case advanced based on them and that they are reliable both as to outcome and the processes that led to their creation. Above all, the Court must accept that the data on which they are based was received from the first respondent and was accurately fed into the computer for 'intensive scrutiny'. It requires a great leap of faith to do that. We would have to abandon every tenet of fairness and objectivity to give credence to such a procedure with such grave consequences for the public.

[242] The first hurdle the information relied on for the purpose of the applicants' case in the s. 109 application must overcome, is the objection by the respondents in relation to it, based on the Computer Evidence Act, No. 32 of 1985 ('the CEA'). The objection is predicated on the allegation that paragraph 2 of Gotz's supporting affidavit, annexure 'AAG1' thereto and the Report of Gotz do not comply with ss. 2 and 3 read with s.1 of the CEA.

[243] The admissibility of evidence is a matter of law and not of discretion. Admissibility of evidence is governed either by statute or by the common law. The Court does not

choose itself what evidence to admit. The Legislature, through the CEA , has defined the conditions under which a computer print-out is admissible.[33]

[244] The Computer Evidence Act in relevant part states:

> Section 2: **Authentication of computer print-outs**
>
> (1) Subject to the other provisions of this section, a computer print-out may be authenticated for the purposes of this Act by means of an affidavit which shall-
>
> (a) identify the computer print-out in question and confirm that it is a computer print-out as defined in this Act which has been produced by a computer as likewise defined;
> (b) identify such copy, reproduction, transcription, translation or interpretation of information produced by the computer as the computer printout may comprise or contain, and confirm that it is a true copy, reproduction, transcription, translation or interpretation of such information;
> (c) describe in general terms the nature, extent and sources of the data and instructions supplied to the computer, and the purpose and effect of the processing of the data by the computer;
> (d) certify that the computer was
> (i) correctly and completely supplied with data and instructions appropriate to and sufficient for the purpose for which the information recorded in the computer print-out was produced;
> (ii) unaffected in its operation by any malfunction, interference, disturbance or interruption which might have had a bearing on such information or its reliability;

[33] In *Narlis v South African Bank of Athens* 1976 (2) SA 573 (A), the Court held that a computer printout could not be received under s.34 of the Civil Proceedings Evidence Act of 1965 (also applicable in Namibia). The Computer Evidence Act 1983, precursor to the 1985 Computer Evidence Act was passed to overcome that problem. See Hoffman LH and Zeffertt D. 1988, *The South African Law of Evidence* (4th Ed), Cape Town: Butterworth's, p 142.

(e) certify that no reason exists to doubt or suspect the truth or reliability of any information recorded in or result reflected by the computer print-out .'

Subsection (3): 'The deponent to an authenticating affidavit shall be some person who is qualified to give the testimony it contains by reason of-

(a) his knowledge and experience of computers and of the particular system by which the computer in question was operated at all relevant times; and
(b) his examination of all relevant records and facts which are to be had concerning the operation of the computer and the data and instructions supplied to it.

Subsection (4): The records and facts examined by the deponent to an authenticating affidavit in order to qualify himself for the testimony it contains shall-

(a) be verified in such affidavit by him if, at the time when he so examined them he had control of or access to them in the ordinary course of his business, employment, duties or activities;
(b) if he did not have such control or access, be verified in a supplementary affidavit by some other person who, at such time, had control of or access to them in the ordinary course of his business, employment, duties or activities.'

[245] Section 3 provides: **'Admissibility of authenticated computer print-out**

'(1) In any civil proceedings an authenticated computer print-out shall be admissible on its production as evidence of any fact recorded in it of which direct oral evidence would be admissible.
(2) It shall suffice for the purposes of subsection (1) if an affidavit which accompanies the computer print-out in question as contemplated in the definition of "authenticated computer print-out" in section 1(1), on the face of it complies with the provisions of section 2 which apply to an affidavit of the nature in question.'

Section 1 is the *definitions* section.

A “computer” ‘means any device or apparatus, whether commonly called a computer or not, which by electronic, electro-mechanical, mechanical or other means is capable of receiving or absorbing data and instructions supplied to it, of processing such data according to mathematical or logical rules and in compliance with such instructions, of storing such data before or after such processing and of producing information derived from such data as a result of such processing…’

A “*computer print-out”* ‘means the documentary form in which information is produced by a computer or a copy or reproduction of it, and includes, whenever any information needs to be transcribed, translated or interpreted after its production by the computer in order that it may take a documentary form and be intelligible to the court, a transcription, translation or interpretation of it which is calculated to have that effect…’

[246] The Court has not been shown any voters’ register by either party to these proceedings: It has not seen VR.1.16 or any of the other registers referred to in Gotz’s ‘*To whom it may concern*’ document. Nor has the Court seen the ‘computer print-out’ generated by Gotz after his ‘intensive’ analysis of the various voters’ registers. The applicants bear the evidential *onus*. The applicants, it appears to us, assumed that it was enough if Gotz said they existed; what he did with them and what results they came up with. Yet these are important items of evidence on which this Court must decide that the first respondent went about fraudulently creating voters’ registers to inflate voter

numbers and to set the stage for ballot stuffing and ballot tampering. Yet, this , the alleged source of the grandest electoral fraud ever alleged in this jurisdiction , we, as judges, who must decide whether or not the applicants' are justified in making so serious an allegation, have not seen.

[247] On either of two bases, Gotz's voter-roll-analysis-evidence stands to be rejected: it offends the rule against opinion evidence on the 'ultimate issue' and it was not presented in compliance with the CEA.

[248] Starting with the latter: A s. 109 application is a civil proceeding within the meaning of the CEA. The information relied on emanates from a computer used by Gotz – we cannot see in what form other than a print-out it could conceivably be presented to a court of law. It is relied on in these proceedings. Counsel acting for the applicants are proceeding from a wrong premise in suggesting that all Gotz is doing is rely on a roll provided by the first respondent. Without accepting that the situation would have been any different if that were in fact the case, the alleged 'errors' attributed to VR.1.16 are not suggested by either Haufiku or Gotz to appear on the face of VR 1.16 – whatever its source. Those 'errors' are the outcome of the 'automated' and 'manual' tests allegedly conducted by Gotz who then proceeded to generate an 'accompanying print-out' from a Microsoft database. On what basis does it escape the clear reach of the CEA? We are satisfied there is none.

[249] In the replying papers Haufiku states that Gotz's testimony was not presented as expert opinion. Then as what and for what purpose was it presented? We have already referred to the case of *S v Rangombin* 1986 (4) SA 117 (N) 163-*164.* In that case, in a dispute involving tape recordings, the court refused to accept the testimony of a person who said she listened to the record extensively and offered herself as knowledgeable on the issue. The court said it was in just as good a position to do that itself and that the typist's evidence was irrelevant and inadmissible.

[250] Opinion evidence is irrelevant and therefore inadmissible if it is not of 'appreciable help' to the court and if the court is in just as good a position to form the opinion as the witness. A witness is not permitted to give his opinion on the legal or general merits of the case – *Prophet v NDPP* 2007 (6) SA 169 (CC) at para. 43. Barring the above, although the Court is able to come to its own conclusion but would receive appreciable assistance from the opinion of an expert or of a knowledgeable layman, the opinion of such witness is relevant and the Court is entitled to receive it. The clearly expressed bias of Gotz, amongst others, denudes Gotz's statement the quality of being of appreciable assistance to the court. It is also inherently unreliable as correctly pointed out by Kisting in the passage from his affidavit relied on by the second respondent.

[251] Whether or not a voter's register was fraudulent is a question that we as judges are in just as good a position to decide if given the information on which it is based. We were not given that information. It is not open to Gotz to proffer his opinion on that. His

evidence as to the inflation of voters' numbers on VR 1.16, ballot stuffing and the alleged over 153 000 'errors' on it is irrelevant and inadmissible opinion evidence. We reject it.

Application to strike Ford's letter in the Namibian

[252] The respondents have objected to the inclusion of Ford's letter in *the Namibian* on the basis that it is irrelevant and, in any event, constitutes inadmissible opinion evidence. Surprisingly, the applicants sought to justify its inclusion as part of their case. We do not see any basis on which Ford's missive adds to the applicants' case for the invalidity of the 2009 NA election, or assists the court in arriving at such a conclusion. The letter is clearly self-serving, relying as it does, on an unofficial voters' register and election results the author says were published by a newspaper. We find it difficult to accept that someone can stubbornly hold on to the notion that results published in a newspaper constitute official results while there exist results announced and gazetted by a statutory body with the power to do so, and, above all, which is readily accessible and obtainable. This letter seeks to elevate suspicion aroused by perceived incompetence on the part of those who conducted the election, to the level of 'corrupt' or 'illegal' practices capable of invalidating the election. That is not possible and its use in an election application which should be devoted to a serious search for the truth borders on the abuse of the Court's process.

[253] Ford's comments may sound droll and provide much-needed amusement to those who seek a bit of excitement in Namibia's body politic, but the Courts of law are wrong fora for its ventilation. Its inclusion in the present s. 109 application calls for censure. It adds nothing to the resolution of the dispute before us except perhaps some comic relief. Accordingly, it is both inadmissible and irrelevant. As officers of the court all counsel have a duty to produce in evidence only that which is admissible and contributes to the resolution of the dispute before Court. Our view of this matter is strengthened by the fact that nowhere in the applicants' heads of argument is Ford's letter referred to as an important piece of evidence making up the applicants' case in the present proceedings. Ford's letter appearing in *the Namibian* Newspaper of December 11, 2009 (LH 7) is struck from the record. For all of the above reasons we also acede to the request to strike out from the record the alleged official results published in *the Namibian* of 7 December 2009 (LH 6B). The results published on 4 December 2009, none other, are the official results. Whether or not they should be set aside is the subject of the present application.

Complaints 1, 2, 4 and 5

[254] These complaints are dependant for sustenance on the acceptance of the allegation that the voters' register used in the NA election is not the one gazetted by the first respondent in terms of s. 26 (3), but the one provided by the first respondent to the political parties in CD-Rom disc before the election. We have rejected that argument; and that dissolves complaints 1, 2, 4 and 5.

[255] The role played by the Namibia Police in the provision of security during the election process, seen against the backdrop of the allegation that ballot stuffing had occurred, did not escape the attention of the Full Bench in the *Republican Party* case (at p.58) when that Court observed:

> 'The first respondent asserted that the presence of the Namibian Police at polling, counting points, during conveyance of election material; the fact that political parties were allowed to have agents present during polling and counting; the fact that political parties could place seals on ballot boxes after the ballots had been placed in the ballot boxes, all militate against the kind of vote rigging contended by the applicants. The fact that applicants say that due to manpower and resource constraints they could not fully take advantage of the safeguards worked into the law for participating political parties, does not really assist them; especially because it is not asserted, or established, that although they did not do so, others did not take advantage of those safeguards which clearly would make such rigging highly unlikely without being noticed.
>
> …
>
> Another aspect that has received scant attention in argument but which is nevertheless a powerful argument against the stuffing of ballot papers, is the official stamp which must be affixed by a presiding or polling officer on the back of every ballot paper when it is issued to a voter. The official stamp for the various polling stations is provided to the returning officers, who in turn issue them to presiding officers for use and safekeeping during the election. Without the official mark appearing on the back of a ballot paper, it will not be counted as a valid vote. Any stuffing would therefore require the persons involved to have access to or be in possession of the official stamp relating to the polling station in question and the ballot boxes thereof – in addition to being in possession of ballot papers with which to substitute or supplement those validly cast. Although not impossible, it would require a conspiracy involving a number of persons to execute such a fraudulent scheme and there is, as we have remarked earlier, no scintilla of direct evidence to that effect.'

[256] No specific person who had engaged in an illegal or corrupt practice is named or such an event proved by admissible evidence. The high-water mark of the applicants' case is that more people voted in the elections than were actually registered, without a single piece of eye-witness or physical evidence being offered to support even one case of ballot-stuffing in favour of a particular contestant. There is no specific mention about by whom and in whose favour the illegal and corrupt practice of ballot stuffing was perpetrated. To give credence to the applicants' very unspecific and generalized allegation of ballot-stuffing (which are corrupt and illegal practices) , this Court has to find that an invisible hand was at work, with clock-work accuracy coordinating lapses in the electoral administration process – and using those lapses to great effect and accuracy – to illegally place (without anyone at all noticing – not even party agents: for there is not one confirmatory affidavit by anyone who had seen something of the kind) ballot papers being corruptly placed in ballot boxes to the advantage of a contesting political party.

[257] We find very significant the undisputed allegation by the respondents about the involvement of foreign observers and – most importantly the oversight role of the Namibia police – in the electoral process. To uphold the applicants' allegations of ballot-stuffing as true this Court would in effect be saying that the Namibia police force was part of the invisible hand perpetrating the implied grand-scale corruption that allegedly occurred in the 2009 NA election and is said to have produced an 'extra-ordinary' high voter turn-out 'unheard of in a democracy' . We remind ourselves and the applicants

that this is a Court of law: Courts work on proven facts and not on conjecture, innuendo and unsubstantiated conspiracy theories.

Complaint 3: Complaint in respect of Tendered votes

[258] The entire rigging and ballot-box stuffing hypothesis is premised on the allegation that the voters' register to be accepted is that allegedly given to the first applicant, amongst others, and from that the inference is sought to be drawn that more people voted than were on the voters' register. Therefore, if tendered ballots were not properly accounted for, it raises the prospect that stuffing occurred, so the argument runs. There is not one iota of evidence presented that a person or persons engaged in any form of ballot stuffing. Absent any proof of such malpractice, the link between the so-called high voter turn-out, improper accounting of tendered ballots (if any) leading to ballot box-stuffing is simply not sustainable. Besides, while Haufiku made hue and cry that the first respondent – contrary to law – counted tendered votes together with the ordinary votes, in reply he completely abandons that stance and now states in reply:

> 'I agree that all tendered votes should be counted at the polling station where they were casted. Whether they should be announced in the format of one combined total is arguable and a matter of interpretation of the Act.'

[259] This stands in sharp contrast with the same deponent's allegation in the founding affidavit as follows:

> 'On receipt of the ballot boxes by the respective returning officers, the tendered votes are separated from the other votes and sorted by the constituency and then added and counted in respect of the applicable constituency.'

[260] The implication, according to Haufiku, is that tendered votes are not counted at the polling station where they were cast. That is clearly wrong and the reply concedes as much. Nothing further needs to be said about complaint 3 as the applicants concede that tendered votes are counted at the polling station where they were cast. NA elections are not constituency-based and the entire country, as conceded by Haufiku, is one constituency. We have already demonstrated that the law as it stands today, unlike the position in 2004[34], now requires tendered votes to be counted at the polling station where they were cast. That recognition must have accounted for the change in the law making it permissible for tendered votes to be counted where they are cast and not in the constituency where the voter casting it is registered.

[261] Our suspicion is that counsel for the applicants had not looked up the entire collection of the law before they embarked on this application. We have also already shown that counsel for the applicants submitted that the applicants do not rely on any improper accounting of tendered ballots for the relief sought.

[34] See Republican Party case, p 60-61.

Complaint 6: Absence of voter registration numbers on ballot paper counterfoils

[262] In the first place, the first respondent's Ndjarakana denies that there was non-compliance with s. 82 (9). He criticizes the fact that the applicants failed to produce in evidence the counterfoils on which the allegation of non-compliance with the EA is predicated, considering that Haufiku has no personal knowledge of the particular factual averment and that Visser does not say that he personally investigated the counterfoils on which he relies for his allegation of non-compliance with the EA. The applicants in reply say that it is unreasonable to expect of the applicants to have annexed to the papers the over 16000 implicated counterfoils and that such a requirement would make motion proceedings impossible.

[263] This is an important issue being raised and some guidance is required for the future: The first principle is that it is the Court, not a witness, which decides whether or not a breach of the EA has taken place. The Court cannot abdicate that responsibility to witnesses. Especially where a factual dispute arises, or is anticipated, litigants in motion proceedings must appreciate that, in much the same way that a matter can be referred to oral evidence to resolve such factual disputes, where physical evidence is the subject of the dispute and it is available, the Court may well itself have regard to that physical evidence to see which version accords more with the truth. Even if it was going to be unwieldy to attach all the counterfoils as the applicants suggest, they could, and should have, pleaded their case in such a way as to invite the Court to itself call for the material and to inspect it. We see no difference between that approach and the one adopted in the present proceedings where the applicants pleaded that in respect of the Voters'

register complaint, the CD ROM Disc containing the disputed Voters Roll will be made available to the Court for the purposes of the determination of the application. The Voters' register on which the applicants rely, we know, comprises 822 344 names. What then militated against documents comprising 16 357 names not being made available for inspection by the Court? What is unacceptable is the suggestion that the Court must, in respect of disputed facts, merely accept one party's allegation that a certain fact exists and that the opponent's version does not and should therefore be rejected. The Court should have been invited and would with great ease have been able to itself inspect the counterfoils, even on a random selection basis of such number of counterfoils as would constitute the number of votes required to fill a seat, or such number of votes as would be required for the allocation of the last available seat; and on that basis satisfy itself whether the first respondent's denial of the absence of voter registration numbers on the 16 357 counterfoils is untenable.

[264] The failure to produce the disputed counterfoils is decisive because, as a Court, we have not had sight of the counterfoils and are unable to assess if the denial by Ndjarakana is farfetched or so untenable as to be rejected merely on the papers. In the way 'LH 8' is constructed, the counterfoils in question are not stated with any particularity to have enabled the first respondent to do its own investigation and to comment thereon. To attract the criticism that the denial is a bare one and that it was incumbent on the first respondent to investigate the complaint and to lay the true position before Court, we must be satisfied that the case of the applicants was pleaded with sufficient particularity to enable the first respondent to do so. 'LH8' is a one-page

document with the title ‘No voter registration card numbers on counterfoils’. It lists 10 regions on the left-hand side and next to each such region lists names of places ostensibly in that region. The third column from the left has numbers with either “M” or ‘F’ before it. On the extreme right appear figures opposite to each of the ‘F’ or ‘M’ numbers with what appears to be a total of 16 357 given at the top of the figures appearing at the extreme right. We are satisfied that this is not sufficient detail to have enabled the first respondent to have undertaken the kind of independent investigation we refer to. Ought the first respondent have gone through each and every ballot paper book in the listed 10 regions to do so? That would be placing an unnecessary burden on the first respondent when the applicants, in respect of other complaints, state in their papers that they made copies of documents inspected and could therefore with great ease have invited the Court to inspect them and to come to its own conclusion, and have properly directed the first respondent’s attention to the particular counterfoils which we assume are numbered so that they could meaningfully reply thereto. Mr Tötemeyer is rather overstating the position by suggesting in the heads of argument that the one-page ‘LH8’ ‘contains a detailed analysis of the figures in cases where no voters’ registration numbers were entered on the counterfoils and in respect of 10 regions’. It does not give a detailed analysis!

[265] The first respondent’s Ndjarakana, relying on information given to him by Ueitele, a member of the first respondent (see annexure MN5 annexed to the first respondent’s answering affidavit), says that the applicants did not make copies of the counterfoils when they were given access to them. This evidence remains unchallenged; but more

important. It would have been an easy thing for Haufiku to copy samples of those counterfoils, particularly when the applicants had the authority of the s. 93 access Order to make copies of such documents.

[266] This is a case where a disputed fact had not been referred to oral evidence[35] while the inference sought to be relied on as constituting a ground for the invalidation of the NA election (which is final relief), is supported by what the applicants say was observed by Visser during the inspection of election material. Neither the respondents nor the Court have been shown the physical evidence during these proceedings. The applicants suggest that was not necessary. The first respondent denies the truth of what Visser states he observed. Had the dispute been referred to oral evidence , Visser would have had to produce the counterfoils he relies on for the conclusion put forward in 'LH 8' and the Court would have been able to form its own view whether it supports the applicants' version and whether the first respondent's denial is untenable. In view of the applicants' positive assertion and the first respondent's denial, 'LH 8' and the allegations supporting it in the applicants' papers are not the best evidence on the basis of which the Court can reasonably come to the conclusion that voter registration numbers do not appear on ballot paper counterfoils as alleged by the applicants.

[267] Visser's attempt in reply to state that he had personally investigated the ballot paper counterfoils in question invites two comments : (a) it is a recognition that he never made that allegation as part of the founding papers; and it is our view that he should

[35] See *Mostert v Magistrates Commisssion*, supra at 21 F- I.

have, and (b) whether or not he did is really immaterial because even if he did the source of the dispute between the parties, i.e that there was no such non-compliance as alleged, would still remain and the Court would have been in no better position to determine which version accorded with the truth.

[268] The *onus* rests on the applicants to prove non-compliance with a principle contained in Part V of the EA before the burden shifts to the first respondent to show that non-compliance did not affect the outcome of the election. The applicants have failed to prove that 16 357 ballot paper counterfoils did not bear voter registration numbers as required by law. That finding alone makes it unnecessary to consider the application to strike out 'LH 8' on any of the grounds stated by the respondents; but even if we were wrong on this, it is liable to be struck for violating the best evidence rule. Complaint 6 therefore stands to be rejected.

Complaint 7: Alarmingly high number of voters using elect 27

[269] It is common cause that the first respondent does allow a person with a valid voter registration card but whose name does not at the time of polling appear on the voter's register, to cast his or her vote by completing an 'Elect 27' Form by which he or she identifies himself or herself and satisfies the polling officer or official that he/she is duly registered. This procedure, it is clear on the papers, was known and accepted by all political parties, including the applicants, who participated in the 2009 elections. The legality of that procedure is not challenged by the applicants. Rather, the case made in the papers is that in the NA election the incidence of that was 'alarmingly high'. How this

could conceivably constitute a violation of the law is not apparent to us. As Mr Maleka for the first respondent submitted, the applicants concede that the presiding officers are obliged and entitled to complete 'Elect 27' when a particular voter is not on the Voters' register but does possess a valid voter registration card.

[270] In the applicants' heads of argument this matter is not raised and we are unable to understand the legal rationale underpinning it. No suggestion is made in the applicants' papers, nor is any admissible evidence offered, which suggests that the persons who voted in that way possessed fraudulent voter registration cards when in reality they were not registered voters. It is clear from Ndjarakana's answers that because of the first respondents' administrative lapses, names of persons who had been duly registered were not added to the voters' register. We cannot conceive on what basis such persons could legitimately have been denied the right to vote. As it happens, the applicants make no such case and do not assert that such voters should have been excluded from the voting process.

Complaint 7 is therefore not deserving of the Court's further consideration.

Complaint 8: Unused ballot paper books with different printing

[271] This is another complaint which is difficult to quantify. The suggestion is not that these ballot paper books, which it is common ground are unused, provide the link between the applicants' belief that there was ballot stuffing; and what was found. They are unused. The suggestion is that because the font on them is different from (we

assume) that of the others used in the election, and that there was a difference in the pattern of the serial numbers, fraudulent ballot papers must have been introduced in the NA election. At best, this allegation is speculative.

[272] The first respondent says that the serial numbering on these so-called 'suspect' ballot paper books is in synch with the rest of the ballot papers received and that apart from the difference in the font , the first respondent had received them from the corporation who was awarded the tender to print them.

[273] We accept the first respondent's contention that no 'foreign or illegitimate ballot books were used during the election', particularly the first respondent's evidence that the ballot books concerned have a number of security features that cannot be tempered with and that the applicants are aware of the security measures that were taken to maintain the integrity of the chain of possession of the ballot books, from the time they were printed to the time they were delivered to respective polling officials. Furthermore, at all stages, the Namibian police were in charge of the security of the ballot materials. More important, we accept the evidence of Ndjarakana that Haufiku, having been present at the printing of the ballot books, is aware of further security measures on the ballot papers which confirm that the books concerned are part of the books supplied by the corporation contracted to print the ballot paper books. In any case, we do not see the cause of the concern of the applicants when they say the books involved were unused. Unable to make out what breach the first respondent committed and in what way the particular unused ballot paper books represent the causal link between any

irregularity and or corrupt or illegal conduct in relation to the NA election, we are satisfied that complaint 8 constitutes no basis for invalidating that election.

Complaint 9: Late completion of election returns

[274] This complaint is inspired by the first respondent's own Handbook and Manual intended for its officials responsible for conducting elections. That manual, as we have shown, states that ballots received, those used, spoilt or unused must be reconciled before counting commences. The first respondent concedes that that may not have happened. The question is, does its failure to comply with its own manual constitute a breach of a principle of Part V of the EA? Even if not , did such failure compromise the outcome of the NA election?

[275] The applicants have not framed this complaint as constituting a breach of Part V of the EA but rather that the applicants had a legitimate expectation that the first respondent would comply with its own guidelines. There is no requirement in the EA for the kind of reconciliation provided for in the manual. It does not however detract from the reality that it is a standard set by the first respondent, probably because it represents good practice and promotes proper accountability. We have already explained the extent to which the 2009 amendments to the principal Act require transparency and bestows power and rights on political parties to observe, demand recounts and to ask for and be given copies of crucial information at both the polling station and during verification. The process is crowned off with the posting of the results at the polling station for all to see. During the voting process, i.e. from the point that a

voter enters the polling station, is given a ballot paper, casts the vote and places it in the sealed ballot box, followed by the opening of the ballot box in the presence of party agents and the counting and announcement of the results – party agents are present or, rather, are allowed by the law to be present and to observe.

[276] The scenario referred to by the applicants relates to the process after all these things had happened. The failure to comply with the manual therefore is a failure post-announcement of the results at the polling station and certainly does not support the allegation that there was ballot paper stuffing.

[277] We are satisfied that the first respondent has discharged the onus that the failure by its officials to comply with the manual did not affect the outcome of the election. That said, we want to make clear that the failure reflects very badly on the first respondent and constitutes the kind of reprehensible conduct that deserves censure through a special costs order.

Complaint 10: Elect 16 accounts and verification either not made or not signed

[278] As the law stood in 1994[36], s. 85 (3) read:

> 'The sealed ballot boxes and packets referred to in subsection(1) shall be accompanied by a return in which the presiding officer accounts for the number of ballot papers entrusted to him or her under the heads of ballot papers in the ballot box and unused and spoiled ballot papers'.

[36] See s. 39 of Act 23 of 1994.

The current s. 85 (3) (i.e. s. 25, Act No.7 of 2009) reads:

> 'The presiding officer shall not reject but shall count any ballot paper on which there is any writing or mark, by way of which a voter has clearly indicated his or her choice otherwise than by a cross on the ballot paper in question, and whether or not such writing or mark is recorded in the space provided for the marking of such ballot paper.''

We accept that the applicant erroneously relied on s. 85(3) instead of s. 85(7).

[279] The applicants' allegation is not supported by the provision of the law on which reliance was placed. Clearly, applicants' counsel relied on a repealed provision in support of the complaint which elicited from the first respondent a simple denial of the allegation. Because the first respondent answered in the way it did based on the applicants' reference to a wrong provision, it had not, in so far as the 4 January papers are concerned, factually dealt with complaint 10. In reply, the applicants' Haufiku states that the reference to s. 85 (3) is wrong and that it should have been s. 85(7).

[280] Be that as it may, the allegation that ballot paper accounts were not verified or inadequately verified is based on what are stated by Haufiku as copies 'of some of these forms signifying these shortcomings are contained in the file referred to hereinbefore'. In the matter of *Minister of Land Affairs and Agriculture v D & F Wevell Trust,* 2008(2) SA 184 it is stated that:

> 'In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through

lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'

[281] We are satisfied that the manner in which complaint 10 is pleaded is not permissible. The rule is that in motion proceedings parts of annexures being relied on must be stated precisely and the respondents are not expected to trawl through the mass of 'some of these forms' in order to ascertain which ones are relied on and for what purpose. Complaint 10 therefore has no basis in fact and stands to be rejected.

Complaint 11: **Failure to post results at Polling Stations**

[282] Several affidavits relied on by Haufiku in the founding affidavit were deposed before the original founding affidavit of Haufiku which was deposed to on 4 January 2010 and filed on the same date. The affidavits do not even suggest that they are intended to be the basis for any litigation, let alone to support the relief contained in the Notice of Motion filed of record in the present s. 109 application.

[283] The first respondent seeks to have them struck, together with the allegation in paragraph 106 of Haufiku's founding papers, on the basis they constitute inadmissible hearsay evidence. Paragraph 106 states:

'A failure on part of the presiding officers in this regard is tantamount to a failure of the election process as a whole, especially if the occurrence thereof is widespread. In this regard I respectfully refer the above honourable Court to various supporting affidavits deposed to by polling agents confirming this annexed hereto marked 'LH13(a)-'LH13(g)'.

[284] The following affidavits are implicated: 'LH13(a)' (Angombe) bears the date stamp of 2 December 2009 and makes no reference to impending legal proceedings. LH 13 (b) (Shilongo) bears no date and does not refer to any impending litigation. LH 13 (C) (Benjamin) bears the date of 7 December 2009 and does not refer to any impending litigation. LH 13 (d) (Hans) bears the date of 3 December 2009 and does not refer to any impending litigation. LH 13 (e) (Kaukungwa) bears the date of 2 December 2009 and does not refer to any impending litigation. LH 13 (F) (Shipanga) bears no date and is not commissioned. LH 13 (g) (Nghuushi) bears the date of 6 December 2009 and is commissioned by an ELCIN pastor but does not refer to any impending litigation. None of the above purported affidavits even pretend to be the basis for the allegations made by Haufiku in the founding papers.

[285] There is a sound reason in requiring that in motion proceedings the witness' statement supporting an allegation as to the existence or not of a fact in dispute in the proceeding must be prepared and deposed to contemporaneously with the affidavits forming the basis for, and in anticipation of, the impending court proceeding. That focuses the witnesses' mind to the solemnity of the occasion and makes him appreciate that what he deposes to would form the basis for the decision of the court and that because of that he is under a solemn legal duty to tell the truth. If for some reason that is not possible, it must be clear from the affidavit of a deponent who wishes to rely on a statement of a person made prior to the impending proceeding, that the supporting witness knew about the anticipated proceeding and the duty to be truthful towards the court and that although he was prepared to depose to an affidavit in connection with

that proceeding in support of the main deponent's version, they were not able to at the time the papers were drawn – owing to unavailability due to some exigency which must be properly, accurately and fully explained to enable the opponent to assess it and to place, if necessary, facts before Court to contradict same or to point to the unreliability of such testimony.

[286] The applicants' allegation that the first respondent's polling officials failed to post results at the respective polling stations has been denied. To support that denial the first respondent filed the affidavits of Hinyenginle, Kanyeketela, Shikongo, Tauses, Nekwaya, Ndapwoita and Heita – polling officials who are able to depose to the allegations made in LH 13 (a) to (g) to Haufiku's founding affidavit. There is therefore a complete and detailed rebuttal of the applicants' allegation in support of complaint 11. The first respondent also proceeds to offer positive evidence to gainsay the allegations made in annexures LH 13 (a) – (g) of the applicants' founding papers. Since the first respondent not only denies the allegation of the failure to post results, but also filed affidavits by the various polling officials to rebut the allegation and to put first respondent's side of the story, it has raised a genuine dispute of fact on the allegations that are foundational to applicants' complaint 11. (Compare the *Room Hire* case).

[287] The affidavits relied on by Haufiku under 'LH 13' are not demonstrated to have been intended for the present application. The authors do not draw any link to the founding affidavit of Haufiku. We have set out the details about each of them and the inherent unreliability of each to justify the relief sought. In the first place, they were

drawn at a time when, according to Haufiku, the results were not the subject of dispute by the applicants. Either no date appears, it is not commissioned or no specificity is given whether it relates to a polling station or a verification center. Above all, they fail to meet the safeguard which is provided by the contemporaneous preparation of confirmatory affidavits with the founding affidavit. They are therefore inherently unreliable to be the basis for granting final relief in a matter as grave as the present.

[288] The answering affidavit of Njarakana alleged:

> 'It is clear based on a press release on or before 3 December 2009 by applicants, that at that stage already, before the official announcement of the results, the applicants took a decision not to accept the outcome of the two elections result. The applicants, despite their early decision to challenge the elections, waited until around 16 December 2009 to file an application in terms of s. 93 of the EA.'

[289] In reply to this allegation, Haufiku states in reply:

> 'I deny that the applicants on or about the 3 December 2009 took a decision not to accept the outcome of the two election results.'

[290] This denial notwithstanding, by means of 'LH 13 (a) - (g), the applicants seek to challenge the outcome of the NA election based on affidavits which were deposed to at a time when no legal proceedings was contemplated. This must account for the fact

that none of the affidavits make any reference to impending legal proceedings. On what basis then are such affidavits admissible in motion proceedings?

[291] In any event , we are satisfied that there is a genuine dispute of fact raised by the first respondent's rebuttal of the allegation that there was no posting of results ,and since the applicants failed to refer the matter to oral evidence we are bound to accept the first respondent's version and accordingly complaint 11 must fail.

Complaint 12: Non-reconciliation between Elect 16's and Elect 27's

[292] Ndjarakana explains 'Elect 16' as follows:

> *'Elect 16* is used first to record data from Elect 22 as regards the *number of ballot* papers (ballot books) *received by presiding* officer of every polling station, fixed or mobile. *Elect 16 is also used to reconcile the total ballot papers used, unused and the spoiled,* as required in section 85(2)[37] of the Act. Through this form, one can determine the number of voters who cast their votes at a *particular polling station*.
>
> …
>
> Elect **20(b)** is used for the announcement of the results for the national assembly elections **per polling station**.
>
> …
>
> *Elect 20 is used by a returning officer* to announce the results in respect of election for members of the National Assembly ***per constituency****.' (*Our emphasis)

[37] Section 85(2) of the EA states: 'if the geographical location of the polling station or any other circumstances occasions that the presiding officer cannot deliver or cause to be delivered, such ballot box and packets, he or she shall place such ballot box and packets in safe custody until he or she can deliver it or cause it to be delivered to the returning officer concerned'.

[293] This version of the use of the 'Elects 16, 20(b) and 20 remains unchallenged. The conclusions which ineluctably follow are the following:

1. Elect 16 records the number of ballot paper books received by the presiding officer. It also records the used, the spoiled, as well as **unused** ballot papers.
2. Elect 20(b) is used to record the number of voters who cast their votes at a polling station.
3. Elect 20(b) is also used to announce the result of the NA election per polling station.
4. **Elect 20** is used by a *returning officer* to announce results of the NA election per constituency.

Clearly, therefore, Elect 20(b) serves a different purpose from Elect 20: One relates to a polling station and the other to a constituency.

[294] 'LH 14', which is said to be Visser's report comparing Forms 'Elect 16' and 'Elect 20(b)' , i.e. per polling station, purports to be concerned with constituencies because on it appears **Elect 20,** not **'Elect 20(b)**. The applicants' allegation is therefore not supported by 'LH 14'.

[295] As applicants' counsel submits in their heads of argument[38]:

(i) Elect 20(b) is used for the announcement of the results of the NA election per polling station;
(ii) The elect 20(b) forms studied by Visser, (a) contain a surplus of 2 334 more ballots in comparison to the corresponding Elect 16 forms; and
(iii) In other cases, the Elect 16 forms show a surplus of 5 613 ballots in comparison to the corresponding Elect 20(b) forms.

[296] How this can be possibly the case when the applicants' assertions are not supported by 'LH 14' on the face of it, is not explained in the applicants' papers. The only reasonable conclusion we can come to is that 'LH 14' is not the product of Visser's alleged 'detailed reconciliation between the 'Elect 20(b)' and 'Elect 16' Forms'.[39]

[297] Although this point is not raised by either respondent, it is so clear on the face of the record that this Court cannot ignore it. We can only grant final relief if the facts justify it.

[298] In any event, for the Court to come to the conclusion that more people voted than ballot papers used – based on Elect 20 which relates to the entire constituency – we would have required to see the Elect 20(b) for the respective constituencies to compare that with the Elect 20. The reason is simple. We do not think that a conclusion that there was no reconciliation between ballots used and votes actually cast is complete and accurate without, as Elect 20(b) requires, knowing what the total ballot papers

[38] Para 89.2 and 94
[39] Vide para 93 of the applicants' heads of argument.

received and ballot papers unused are - in addition to the used, spoiled and rejected ones. As is clear from 'LH 14' it does not contain a column for total ballots 'received' and total ballots 'unused' – no doubt because it ('LH 14') relates to a constituency and not a polling station. It is at the polling station, not the constituency, where actual polling takes place, and where votes are counted, announced and posted.

[299] In short, in the body of the affidavit , complaint 12 is sought to be justified on the basis of irregularities involving 'Elect 20 (b) whereas 'LH 14', which is said to be the proof of that, refers to 'Elect 20' which, on the common cause facts, serves a completely different purpose to 'Elect 20 (b)'.

[300] This finding makes it unnecessary for us to decide whether 'LH 14' falls foul of the CEA. Complaint 12 therefore stands to be rejected too.

General complaints:

[301] The respondents seek the striking out of the general complaints in their entirety. In the applicants' heads of argument, there is no mention made by applicants' counsel about these complaints and specifically the application to strike them. We are none the wiser if they are being persisted with. Be that as it may, an important test for deciding whether or not an allegation is irrelevant is whether it assists in the resolution of the dispute before Court. In this regard, the following is trite in the light of *Law Society of Namibia v Vaatz 1990 NR 332 (pp 334-335) :* Allegations are scandalous, even if they may be relevant, if they are so worded as to be abusive or defamatory; allegations are

vexations, even if relevant, if so worded as to convey an intention to harass or annoy; and allegations are irrelevant if they do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter. The test for irrelevance has also been stated in the same terms in the *Zuma* case, *supra,* at para 23.

[302] The 'general complaints' are very serious in form but are lacking in substance. It is difficult to see how a respondent confronted with the 'general complaints' is to answer to them. No specific person is named. No specific polling station or constituency or date on which the alleged conduct occurred, is given. The unfair situation in which a respondent is placed is accentuated by the fact that the Court is required at the end of the case to state against whom allegations of illegal or corrupt practices complained of are found to have been proved.

[303] Accordingly, the allegations covered in the 'general complaints' are vague – and clearly embarrass and prejudice the respondents in the present application. The general complaints therefore stand to be struck from the record for being vague and irrelevant; and we so order.

Verification

[304] Is there proof that first respondent announced results of polling stations other than those announced by presiding officers of polling stations after they completed their counts? Did presiding officers fail to post the results of votes cast at polling stations after they completed counting?

[305] If it is proved that the first respondent changed the results of counts announced and posted at the polling stations and instead announced results other than the sum total of the polling station results, that would violate s. 85 (6) (Part V) of the EA (as amended) and the results announced would be a nullity.

[306] The applicants take issue with the first respondents' use of the term 'verification centers' which, according to the applicants, is not in the electoral legislation. Section 26 of Act No. 7 of 2009 makes provision for verification of returns. In our view, the word 'centre', which is used by the first respondent and which the applicants take issue with, does not offend the legislation in any way. The first respondent could have chosen to use the word 'point' or 'station' to describe the place where the verification of returns concerned took place: it is a matter of semantics. We see the word 'centre' as a generic, and not specific, appellation to describe the place where verification of returns took place – an activity required by the EA.

[307] It is argued that the first respondent announced results other than those announced at polling stations by presiding officers. In applicants' heads of argument the point is repeatedly made either that it is common cause or that the first respondent had admitted that instead of the polling station results duly posted at the polling stations, the results announced by the first respondent were of the verification centres.

[308] The question that needs to be answered is this: which results were passed on to the Director of the first respondent by the returning officers, and which results did the first respondent announce? If the first respondent announced results other than those

announced by the presiding officers at the polling stations in the 107 constituencies, that would be in breach of the law.

[309] In its answer to the original application Ndjarakana deals with the allegation that it was the verification center results that were announced by the first respondent. Ndjarakana in his answer states that the results announced by the returning officer concerned is 'the collection of the results announced by the presiding officers of the various polling stations, of the constituencies for which the returning officer is appointed.' He denies however that the results so announced 'are not of any verification process.' He states that 'Elect 20 (b)' is an announcement of the results by the presiding officer at the polling station, and reports to the returning officer, while 'Elect 20' is the Form used by the returning officer to announce the results 'after verifying the results of all the polling stations of the constituency and consolidating such results into this single Form, 'Elect 20'.

[310] Thus the results announced by the presiding officer are the same results (subject to verification), consolidated into 'Elect 20', announced by the returning officer.' He adds:

> 'For each constituency, one polling station was converted or was used as verification center, where the returning officer extended his function as per the provisions of section 87[40] of the Act. The verification centers were not secret as was made out in various newspaper reports. Party agents had access thereto. The applicants' polling agents at both polling stations and verification centers, were largely unprepared and in some

[40] See section 87 quoted above.

cases their polling agents left polling stations and verification before counting and verification was respectively completed.'

[311] Ndjarakana also states that the first respondent had secured the services of the Namibian Police with instructions to address 'complaints by political parties, polling agents, observers or any person aggrieved by any other perceived irregularity.'

[312] From all of the above two things are apparent:

(a) Ndjarakana states positively that the results forwarded by the returning officers to the first respondent are the results announced by the presiding officers, and

(b) verification is conducted as required by law and at places to which all political parties had access.

Therefore, on the papers, there is no factual basis for the assertion that it is common cause that polling station results were altered during the process of verification.

[313] The starting point in considering this matter is the submission by the applicants' counsel in their heads of argument as follows when referring to the counting, announcement and posting of results at polling stations:

'It concerns the principle of transparency and the newly introduced requirement by Amendment Act, No. 7 of 2009 [section 85(6)] that the results should be posted at the polling stations, so as to enable all political parties – who were represented and actively involved in the counting process at such polling stations, as well as the public at large – to verify the results. It is important that those should be the results which make up the

> final results in respect of each constituency and ultimately make up the results on a national level. These were important measures introduced in order to ensure even greater transparency and accountability'

[314] In our view, this is acceptance of the new reality created by Act 7 of 2009, i.e. that the posting of results at polling stations introduced in 2009 by the Legislature is the all-important safeguard against ballot stuffing. Once results had been announced and posted at polling stations it means it is safe to assume that the election process had been properly conducted up to that point and that those with rights to object and demand recounts and information had exercised those rights. We do not find in the 4 January papers any admissible evidence that results announced at polling stations had been altered during verification and that such alteration formed the basis for the announcement of the national results.

[315] The object of the SADC Principles and Guidelines, as we have intimated previously, is to solve problems and put right any shortcomings on the spot so as to avoid post-election squabbles. And, *a fortiori*, because the applicants' agents did not, in the language of the applicants, have the concerns 'launched contemporaneously', the applicants are now faced with the stupendous task of having to place sufficient evidence before the Court in order to establish that the irregularities they complain about were committed, and as we have said more than once, in this, they have not succeeded.

[316] There is no substance to the suggestion either that it is common cause or that it is admitted by the first respondent that the first respondents' polling officials announced results in respect of the 2009 NA elections other than those results which were sourced from the various polling stations.

[317] We accordingly find that there is no merit in the alleged irregularity in respect of section 86(6) of the EA.

[318] The striking, and we regret to say - disturbing feature of the present election application is – in respect of several complaints – an attempt to set aside a national election in which hundreds of thousands of people participated to elect those to lead them, based on people's jaundiced opinions and analysis – not eyewitness or physical evidence – and asking the Court to make inferences as to the existence of corrupt stuffing of ballot papers to influence the outcome of the election without one single proven case of actual ballot stuffing. Haufiku hides behind generalizations and non-specific allegations such as 'raises concern', 'leads to the belief' and such like. Nowhere does he say in clear terms that such conduct actually occurred and who the beneficiary was of the irregularities and corrupt practices allegedly committed in the conduct of the 2009 NA election.

[319] Haufiku also does not say that there was a conspiracy between the first respondent and any party that participated in that election. To succeed he would have had to say so and also prove it. Not only that, he would have had to allege and prove a

grand conspiracy between the first respondent and any beneficiary of the alleged illegal practices and explain what role the officials and employees of the first respondent – all of them, including the Namibia police – played in that conspiracy. These allegations, in the way the applicants' case is run, should have been made and proved because without that we do not see how this Court could possibly find ballot stuffing that is said to have taken place.

[320] We find that there is not one jot or title of evidence establishing that any election agent or counting agent of any of the applicants was prevented from carrying out his or her aforementioned statutory functions, or exercise his or her statutory power, under the electoral legislation. In this regard, we find further that there is not an iota of evidence showing that any election agent representing any of the applicants made a request to any presiding officer in terms of s. 85 (5) of the principal Act (as amended by s. 25 of Act No. 7 of 2009) to re-count the ballot papers and votes counted at a polling station and that such request was refused unreasonably. We find further that there is no evidence tending to establish that any counting agent of any of the applicants was prevented from participating in the verification process in terms of s. 87 of the principal Act, as amended by s. 26 of Act No. 7 of 2009, and as explained previously.

[321] Additionally, we find that there is no evidence establishing that any returning officer did alter the result received from a particular presiding officer. In this regard, after completing the verification process, under – as we have said previously – the watchful eyes of counting agents in terms of Act No. 7 of 2009, the returning officer concerned must

prepare a report on the result and allow any counting agent or candidate to make a copy of any such report, and this is the selfsame report that the returning officer must deliver or transmit to the Director of Elections. There is no evidence placed before the Court that a particular returning officer failed to carry out his or her functions, or to exercise his or her power, under the legislation unreasonably or unfairly in that behalf; that is to say, no admissible evidence was placed before the Court capable of establishing that a result contained in a copy of a report received by a counting agent is different from the one announced and posted at the polling station by a particular presiding officer.

[322] Where it was possible to determine a particular complaint on a different basis than by resorting to the applications to strike, we did so. That made it unnecessary for us to in that event deal specifically with an application to strike out. That, unless we specifically said so, was in no way intended to suggest that the untreated application to strike is without merit.

[323] The second respondent devoted a great deal of space in its affidavit to explain what an injustice it will be to its members and those who voted for it if the elections were set aside. True, injustice would be occasioned, not only to its members who have no greater right than the rest of the public, if the elections were set aside without there being just cause for doing so.

[324] We want to extend a clear warning though that if and when circumstances justify doing so, the Court will set aside an election whatever the cost to the public finances in doing so. That is what the Constitution demands: cost implications of setting aside an election must never become the ruse for a corrupt and fraudulent election, or one conducted in breach of the principles contained in Part V of the EA. In the present case we are satisfied that it is not. In short, the first respondent's objection to the setting aside of the election on the basis that it will offend its supporters is neither here nor there.

The need for consolidation of the electoral legislation

[325] We have shown how in significant respects some of the allegations regarding irregularity in the conduct of the 2009 NA election were premised on provisions that no longer have the force of law. In fairness to the applicants and their counsel, that is attributable to the fact that the law is very scattered. We had ourselves to wade through a myriad of amendments to ascertain what the applicable provisions are. That is an unsatisfactory state of affairs and something must be done as a matter of urgency and before the next round of elections, to consolidate the electoral law of Namibia.

[326] We also pointed out the potential for confusion created by the use of the words 'trial' and 'application' in the EA and the implications involved depending whether what is truly intended in the s. 109 application is a 'trial' or an 'application' properly so called. It is important for the Legislature to remove this uncertainty as a matter of urgency.

COSTS

[327] The general rule is that costs follow the event. Therefore, if the general rule is to be applied, first and second respondents are entitled to their costs against the applicants jointly and severally – the one paying the other to be absolved. The general rule is however subject to the overarching principle that the award of costs is in the discretion of the Court and such discretion must be exercised judicially.[41] If the court is satisfied that a party has been guilty of reprehensible or discreditable conduct, it may mark its disapproval by means of a special costs order. Such reprehensible conduct may relate to or may have occurred in the course of the transaction upon which the litigation is based, or it may have arisen during the course of or in connection with the litigation itself.[42] If there are special circumstances justifying departure from the general rule, the Court is entitled to do so and to make a special costs award such as denying a successful party the costs it is otherwise entitled to. Each case will be considered on its facts. The general rule is to be departed from only where there are good grounds for doing so.[43]

[328] We are satisfied that in the present case, both as to the conduct of Ndjarakana in one respect in the averments he made in the affidavit, and the first respondent's conduct in some respects in connection with the conduct of the election, there is good reason why the first respondent should be denied their costs as a successful party.

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[41] *Kruger Bros and Wasserman v Ruskin* 1918 AD 63 at 69.
[42] Herbstein & van Winsen. 2009. *The Civil practice of the High Courts of South Africa* (5th Ed) Vol. 2, p 970.
[43] *Niewoudt v Joubert* 1988 (3) SA 84 (SE) 88H; *Joubert t/a Wilcon Beacman* 1996 (1) SA 500 (C) at 502 E.

[329] As demonstrated by the applicants, Ndjarakana contradicted himself on the question whether the first respondent provided a CD Rom Disc to the applicants which the applicants relied on in these proceedings. In the s. 93 proceedings Ndjarakana admitted doing so but in the present proceedings denied providing the CD Rom. The applicants contend that Ndjarakana's denial in the answering papers that the first respondent provided them with the CD Rom Disc comprising 822,344 voters, while in the s. 93 proceedings he admitted doing so, constitutes perjury. Although we do not wish to express any firm view if indeed that is so, it is a moot question - based on the common cause facts - that such denial amounts to a false declaration under oath. Section 300 (3) of the *Criminal Procedure Ordinance*, No. 34 of 1963 states:

> 'If a person has made any statement on oath whether orally or in writing , and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such firstmentioned statement, he shall be guilty of an offence and, may, on a charge alleging that he made the two statements , and upon proof of those two statements and without proof as to which of the said statements was false, be convicted on the evidence of one witness of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true'.

[330] We shall mark our disapproval of this conduct with an appropriate costs order against the first respondent. In the same vein, the first respondent has not satisfactorily explained in these proceedings why there was so much confusion about the Voters' Register preceding the 2009 NA election which aroused suspicion amongst the applicants.

[331] The conduct of the first respondent's Director in the litigation calls for special mention and censure. The word of the Director of Elections must be something that a Court should not lightly second-guess in contested litigation; and the public must have confidence in what he or she says and does in the conduct of public affairs. That is no small matter because as this election application has demonstrated, elections evoke a great deal of emotion and controversy. In paragraph 132 of this judgment, we referred to Ndjarakana's answer to the allegation that the first respondent provided applicants with the CD Rom Disc containing 822 344 voters. He states in answer that any voters' list which 'landed' in the hands of the applicants for 'one reason or another' is irrelevant in the light of the gazetted one of 9 November 2009. What the public is entitled to know is whether the first respondent provided such a list and if it did so, as it obviously did, a full explanation why and the effect thereof. The evasive answer we just referred to does not inspire public confidence. Once an election had taken place and is challenged, there is no place for hide and seek as the Full bench warned in the *Republican Party* case. The first respondent has the duty in respect of matters properly challenged by an applicant, to place all relevant facts before Court as truthfully and completely as possible in order to assist in the search for the truth. The public interest demands no less. Based on the findings in this case one can only hope that this matter will be given due attention by the Prosecutor General and the appointing authority. That something must be done admits of no doubt. Although the present challenge did not meet the test for the invalidation of the NA election, it raises fundamental issues about electoral governance in this country and the need to run electoral affairs in a manner that avoids unnecessary suspicion fuelled by confusion created by those who run elections.

[332] We are concerned about the following matters that have become apparent from the papers before us: the first is the confusion around the voters' register. The second is the timing of the reconciliation of 'Elect 16'. Although, against the weight of evidence, the first respondent denies that the reconciliation should have been done before counting commenced, its own manual suggests otherwise. If it is setting a impossible standard they ought to have changed it and informed all involved in good time so as to remove the potential for confusion and unnecessary suspicion. The presiding officers did not follow the first respondent's instruction as regards 'Elect 16'.

[333] These lapses are not Acts of God: They are perpetrated by human beings who must be made to account for their conduct in order to:

(a) restore the public's confidence in the system; and

(b) to prevent future lapses.

[334] The people who were responsible for these lapses must be identified. They must be made to explain their conduct and be disciplined if their explanations are unsatisfactory. It will be unfortunate if the people responsible for these lapses are allowed to participate in the conduct of elections and to unnecessarily put the country through the same controversy and suspicion that had charachterized the aftermath of the 2009 NA election. It will be a sad day indeed for this fledgeling democracy if, after this verdict, those who manage elections think they have been completely vindicated,

and therefore to continue with business as usual. These remarks are necessary to further support the special costs order that this Court intends to make.

[335] We are satisfied that in respect of the first respondent the facts of this case disclose special circumstances justifying departure from the normal rule that costs must follow the event . The same considerations do not however apply in respect of the second respondent.

[336] We make the following order:

(i) The application is dismissed.

(ii) The second respondent is entitled to the costs of its opposition to the application, such costs to include one instructing counsel and two instructed counsel.

(iii) The first respondent is denied its costs of opposing the application.

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DAMASEB, JP **PARKER, J**

ON BEHALF OF THE APPLICANTS:	Mr R Tötemeyer, SC Mr J A N Strydom Mr A S Van Vuuren
Instructed by:	Theunissen, Louw & Partners
ON BEHALF OF THE 1ST RESPONDENT:	Mr I V Maleka, SC Mr G S Hinda Mr G Narib Mr S Namandje
Instructed by:	Government-Attorney
ON BEHALF OF THE 2ND RESPONDENT:	Mr I Semenya, SC Dr S Akweenda
Instructed by:	Shikongo Law Chambers
3RD – 9TH RESPONDENTS:	No appearance