CASE NO.: A 387/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

REPUBLICAN PARTY OF NAMIBIA	**1ST APPLICANT**
CONGRESS OF DEMOCRATS	**2ND APPLICANT**

and

ELECTORAL COMMISSION OF NAMIBIA	**1ST RESPONDENT**
SWAPO PARTY OF NAMIBIA	**2ND RESPONDENT**
DTA OF NAMIBIA	**3RD RESPONDENT**
MONITOR ACTION GROUP	**4TH RESPONDENT**
NATIONAL UNITY DEMOCRATIC ORGANISATION OF NAMIBIA	**5TH RESPONDENT**
UNITED DEMOCRATIC FRONT OF NAMIBIA	**6TH RESPONDENT**
NAMIBIA DEMOCRATIC MOVEMENT FOR CHANGE	**7TH RESPONDENT**
SWANU OF NAMIBIA	**8TH RESPONDENT**

CORAM: DAMASEB, J.P., MARITZ, J. *et* MTAMBANENGWE, A.J.

Heard on: 2005-03-03, 04 and 07

Delivered on: 2005-04-26

REASONS FOR ORDER OF THE COURT: DAMASEB, J.P., MARITZ, J. *et* MTAMBANENGWE, A.J.: We have before us an election application ("the application") brought in terms of s 109 of the Electoral Act, No. 24 of 1992 ("the Act") in respect of the National Assembly election that took place on 15th and 16th November 2004

("the election'). The application has been brought by two political parties; namely Republican Party of Namibia and Congress of Democrats. Eight Respondents have been cited in the application. No relief is sought against the Second to Eighth Respondents – all of them political parties which took part in the election alongside the applicants.

The applicants seek the following relief in their Notice of Motion:

"1. An order declaring the election for the National Assembly held on 15th and 16th November 2004 null and void and of no force and effect and that the said election be set aside.

Alternatively to prayer 1 above

2. An order declaring the announcement of the results on 21st November 2004 of the National Assembly election held on 15th and 16th November 2004 null and void and of no force and effect.

3. Ordering the First Respondent to recount in Windhoek the votes cast in the said election as provided for in the Electoral Act No. 24 of 1992 (as amended) and to allow the Applicants and other Respondents to exercise their rights in regard to such counting as provided for in the said Electoral Act.

In any event

4. Ordering the First Respondent and any other Respondent(s) opposing this application to pay the costs thereof jointly and severally, the one to pay the other to be absolved.

5. Further and/or alternative relief."

The application is opposed by the First Respondent, the Electoral Commission of Namibia – established in terms of s 3 of the Act. Section 4(1) of the Act provides:

> "Subject to the provisions of this Act, the Namibian Constitution or any other law, the Commission shall be the exclusive authority to direct, supervise and control in a fair and impartial manner any elections under this Act." *[Our emphasis]*

At the conclusion of the hearing on 7th March 2005, we reserved judgment. With the date on which the term of the 3rd National Assembly of Namibia would expire in terms of Article 50 of the Constitution barely 2 weeks away, a considerable degree of constitutional urgency attached to the application, requiring expeditious determination of the application. However, given the wide front on which the validity of the election was being attacked; the diversity of the objections raised and the complexity of the factual and legal arguments advanced, the Court would not have done justice to the issues and contentions raised and advanced if it had to prepare its reasons in an overly hasty fashion. We, therefore, albeit with a considerable degree of reluctance in view of the importance of the matter, deemed it necessary to make known the result of our deliberations and considered conclusions and to hand down our

reasons for those conclusions in due course. Therefore, on 10th March 2005, we made an order refusing to avoid the election but declaring the announcement of the results thereof null and void and ordered the first respondent to cause a recount of the votes cast in accordance with the Act. We advised then that our reasons would follow. What now follow are those reasons.

In paragraph 4 of the Founding Affidavit deposed to by Anna Carola Engelbrecht for the applicants, the underlying thrust of the petition is set out thus:

> "The conduct of elections is governed by the Electoral Act No. 29 of 1992 (*sic*) (as amended) ... As will become apparent from what is stated hereinafter the provisions of the Act was as a rule rather disregarded than honoured. In fact so widespread was the disregard for the provisions of the Act that it is submitted that no election as envisaged in the Act took place." [*It must be Act 24 of 1992*]

Engelbrecht deposes that the applicants' respective Presidents sought certain documentation from the First Respondent in the aftermath of the election – in view of information that came to their knowledge (presumably about irregularities in the election). Because the First Respondent refused the information sought, she says, the applicants then brought an urgent application. The application was opposed, but Hoff J, on 16th December 2004, granted an order in the following terms:

"1. That a final mandatory interdict is granted ordering respondent not later than 14h00 on 16th December 2004 to make available and allow applicants to make copies of the following documents:

a) Those documents referred to in paragraphs 2(a) (i), 2(a) (ii), 2(a) (iii), 2(a) (iv) and 2(a) (v)[1] of applicants' notice of motion; and

b) Those documents referred to in paragraphs 2(b) (i) and 2(b) (iii)[2] of applicants' notice of motion.

2. That the respondent to pay the costs of this application which costs shall include the wasted costs occasioned by the postponement on 13th December 2004."

Armed with this order the applicants went to the offices of the First Respondent. For the reasons explained in her affidavit, Engelbrecht says, applicants decided "to focus on certain documentation only." These are the "Elect" 16, 17, 18, 30A and 30B forms devised and used by the first respondent in the election.

We will now proceed to summarise the complaints raised in respect of the election in the founding papers.

[1] These are returns in terms of ss 85(3), 87(2)(b), 93(2); and serial numbers of ballots in terms of s 74(2); and verification i.t.o s 87A(c) of the Act.
[2] These are announcements of returning officers i.t.o ss 88(1) and 89(1) of the Act.

Complaint 1: *Absence of serial numbers on ballot papers* _

The applicants aver that the ballot papers used in the election did not bear serial numbers as is, in their view, required by s 74(2) of the Act which provides as follows (in its amended form):

> "For the purposes of any election, the Director shall provide every political party taking part in such election with –
>
> **a)** a list containing the numbers allotted to the ballot boxes; and
> **b)** a list containing the serial numbers of the ballot papers,
>
> to be used at each polling station."

Engelbrecht avers that the fact that the ballot papers did not bear serial numbers was admitted by the Director of Elections of the First Respondent (Philemon Kanime) who, when this was put to him, stated that the Act does not require serial numbers on ballot papers and that the counterfoils bore the serial numbers in terms of regulations[3] issued by the first respondent. She then continues:

> "This means that ballot papers can be substituted by unscrupulous persons and this cannot be detected provided the substitutions equal the number of ballot papers removed." [*Our emphasis*]

[3] Regulations for Conduct of Elections, 1992, amended by Govt Notice 205 of 1994

Immediately after the passage quoted above, Engelbrecht continues:

> "This is not mere speculation as is evidenced by the ballot papers found near Okahandja which is currently the subject matter of a police probe. Ballot papers for the National Assembly election were found in a riverbed near Okahandja subsequent to the elections. It was clear that ballot papers had been burned. Of the 22 ballot papers still intact to the extent that one could ascertain in whose favour they were brought out all reflected votes in favour of opposition parties, i.e. parties other than Second Respondent."

She later concludes on this point:

> "The net effect of the ECN's non-compliance with the Act is that it is impossible to state with any certainty that the cast ballot papers in its possession consist only of ballot papers lawfully completed."

The first respondent's response to these allegations is contained in its answering affidavit deposed to by Mr Kanime in his capacity as Director of Elections of the First Respondent. We shall continue to refer to him as the "Director".

The first respondent admits that the actual ballot papers used in the election did not bear serial numbers but disputes that the law requires that serial numbers should be printed on ballot papers, considering that s 81(1), as read with s 130 of the Act, does not contain such a

requirement. The Director maintains that the form of a ballot paper prescribed in the Regulations by the first respondent in terms of s 130 of the Act, does not require that the actual ballot papers bear serial numbers and that what the first respondent instead prescribed in the Regulations is that the counterfoil of the ballot paper should bear a serial number. The Director concludes in respect of this complaint that:

> "…in the absence of an attack on the relevant provision of s 130 of the Act, the regulations and the specimen of the ballot paper and counterfoil prescribed therein, the applicant's claim are (sic) unfounded."

The Director also points out that the applicants did not present evidence to show instances were ballot papers were unlawfully substituted, and he denies it ever happened.

In reply, the applicants persist that the serial numbers must be printed on the ballot paper and not on the counterfoil. This issue, therefore, presents itself as a question of law to be determined with due regard to the provisions of the Act (most notably sections 74(2), 81(1) and 130) and the constitutional principles relating to an election of this nature. That question, we shall endeavour to answer later in this judgment.

Complaint 2: *Announcement of Contradictory of results*

Engelbrecht avers that the Director announced contradictory results of the election. She alleges that four different results were in fact announced on different occasions by the Director. She states that she made a note of the results as announced by the Director on 21st November 2004. She attaches those to her papers and it reflects the following:

" 1.	*Congress of Democrats*	*59, 454*
2.	*DTA of Namibia*	*41, 697*
3.	*Monitor Action Group*	*6, 919*
4.	*Namibia NMC*	*4, 143*
5.	*NUDO of Namibia*	*33, 857*
6.	*Republican Party of Namibia*	*15, 973*
7.	*SWANU of Namibia*	*3, 446*
8.	*SWAPO Party of Namibia*	*619, 066*
9.	*United Democratic Front of Namibia*	*29, 360"*

These results and tallies are identical to the ones announced by the Director in his media release on the occasion of the official announcement of the final results. The release also gives the following tallies:

Total votes cast: 825 376
Votes Spoiled: 11 421
Valid Votes: 813 955

These tallies, Engelbrecht says, differ from those previously announced by the Director.

The Director then gave the following seat allocations in the media release:

"1.	Congress of Democrats	5 seats
2.	DTA of Namibia	4 seats
3.	Monitor Action Group	1 seat
4.	Namibia DMC	0
5.	NUDO of Namibia	3 seats
6.	Republican Party of Namibia	1 seat
7.	SWANU of Namibia	0
8.	SWAPO PARTY of Namibia	55 seats
9.	United Democratic Front of Namibia	3 seats."

The Director answers to this complaint as follows: The ballots cast in the election were counted at the various counting centers by returning officers who in turn forwarded the results to the "Central Election Results Center" (the "Results Center") at the first respondent's offices in Windhoek. There, the results were unofficially published as soon as they were "verified". Eventually, the Results Center consolidated all the results received from the returning officers and the Director

officially announced the result of the election as required by s 89 of the Act.

The Director states that when he made the announcement on 21 November 2004, he mistakenly stated that the total votes cast were 838 447 when he should have stated them as 827 042. He explained that the total votes rejected country-wide were 11 405 and, instead of those being deducted from the total number of votes cast, they were mistakenly added – thus giving the incorrect total of 838 447 announced. The Director says that it was simply an error in arithmetic. He says that the final and official results were eventually published on 3 January 2005 in the Government Gazette as follows:

"COLUMN 1		COL. 2	COLUMN 3	COLUMN 4	COLUMN 5
Total number of votes	Rejected Ballot Papers	Quota	Political party	Number of votes recorded for political party	Number of seats for political party
827042	11405	11305	Congress of Democrats	59 465	5
			DTA of Namibia	41 714	4
			Monitor Action Group	6 920	1

			Namibia Democratic Movement for Change	4 138	0
			National Unity Democratic Organisation of Namibia	33 874	3
			Republican Party	15 965	1
				3 438	
			Swanu of Namibia	620 787	0
				29 336	
			SWAPO-Party of Namibia		55
			United Democratic Front of Namibia		3”

The Director concedes that when the results were announced as shown above, there were 1682 votes which had not yet been allocated to the participating political parties, but explains that it was because it was so agreed with the participating political parties and that, in any event, such omission did not make any difference to the number of seats allocated to the different political parties.

The applicants were unmoved by this explanation. They dispute the role which the Results Center played in the process - saying that, in terms of the Act, the returning officers ought to have sent results to

the Director and that the Results Centre had no business verifying results. They also make the point that in many cases the results forwarded by returning officers were changed after these were discussed with the Results Center. They also make the point that the political parties were not privy to the queries forwarded by or to the Results Center and were only allowed access to incomplete results after they had been verified by the Results Center – a statutory function which, they say, does not fall within the competence of the Results Center.

They also maintain that they cannot on face value accept the results announced because of the number of different results announced – a fact, they maintain, which justifies a recount at the very least as this may affect the number of seats allocated to participating parties.

Complaint 3: *More votes cast than time would have allowed*

Next, Engelbrecht describes the procedure that took place in polling stations during the election and concludes that it took about 3 – 5 minutes for one voter to be authenticated and to vote. As she puts it:

> "As can be imagined, even without any hiccups this process took an average of at least between three and five minutes. Yet when the number of persons who voted is divided into time allowed for voting, it is clear that many more people had voted than was physically possible of doing so."

She then refers to a calculation done by Ms Schimming-Chase of the Second Applicant to buttress this allegation. This averment is based on a false premise: It assumes that only one voter was, or could be, in the polling station at any given time during the 3 – 5 minute period it was suggested it took for a voter to be processed. In reality though, several other voters could be in the polling station doing different activities associated with the voting process during the 3 – 5 minute period it would take one voter to vote. Such that, for example, when voter X was being issued with the ballot paper to vote (the last stage of the process), voter Y would be marked with "indelible" ink on one of his or her nails, and voter Z would be busy having his voter card certified, etc, etc. Mr Frank SC, appearing on behalf of the applicants, conceded this much during argument and that should dispose of the need for this Court to deal any further with this complaint.

Complaint 4: *"Elect 16" accounts and verifications either not made or not signed*

Engelbrecht next avers that "Elect 16" forms to which they (the applicants) gained access as a result of the order made by Hoff J - forms whose purpose is to account in terms of s 85(3) of the Act for ballot papers issued to presiding officers - were either not verified, or were inadequately verified, in conflict with s 87 of the Act. The forms on which specific reliance is placed for this allegation are attached to

the founding papers as “D1 to D49”; but in argument counsel also referred to “Elect 16” forms annexed in support of other complaints.

On the face of it “Elect 16” reads:

> “Covering Ballot Paper Account by Presiding officer (section 85(3) of the Electoral Amendment Act, 1994”.

[It then has the following provision towards the bottom:]

> “I, the undersigned, returning officer of the above mentioned constituency do hereby report that I have verified the ballot paper account handed to me by the presiding officer, and that the result of such verification is that the said account are correct, except for the following particulars:……
>
> Date: …… Place: …… Returning Officer: ……”

Of the 49 “Elect 16’s” relied on by the applicant, only 28 of them relate to the election in dispute. That much became common cause during argument. And of these 28, 17 are signed by a presiding officer only; 8 are not signed at all; 2 are signed by a returning officer only and only one has been signed by both a presiding officer and a returning officer. It falls to be mentioned that a number of the forms are part of a series of returns or substituted and corrected duplicates thereof. For purposes of further calculations and our deliberations on the merits of this complaint hereunder, we shall bear that in mind. The ones attached

under annexure “D” which we have taken into account relate to 10 197 ballot papers issued to the following constituencies: Kongola, Berseba, Ogongo, Engela and Gibeon.

Based on the allegations initially made, Engelbrecht states:

> “As is evident from the said annexure “D” hereto, the non-compliance was not an isolated case but widespread … In fact it would appear that this was a widespread disregard to the provisions of the Act.”

The respondent admits that some of the “Elect 16’s” had not been signed either by the presiding officers, or by returning officers. He avers that the majority of them consist either of draft working documents or pages removed from a bundle of documents originally properly arranged and stapled together, but selectively removed by the applicants and are now presented in a manner (in this application) that is misleading. He then proceeds to give specific examples and, bolstered by supporting affidavits, endeavours to explain some of the omissions away. As to the rest of the forms complained about, he says:

> “there were few instances where the returns were not properly completed by some of the presiding or returning officers. In those instances all the votes cast were properly accounted for… the incomplete returns did not violate the principles contemplated in Part 5 of the Act, in terms of which the first respondent and the Directorate of elections conducted the elections.”

The Director avers further that the applicants failed to show that the irregularities relied upon by them have or might have affected the results of the election and that their candidates, or those of other registered political parties would, or might have, been elected, had the irregularities not taken place. He concludes that the applicants failed to satisfy the requirements of sections 95 and 116 of the Act.

Replying to these explanations, the applicants deny that the instances of returns improperly completed are few and say that it was more the rule than the exception and maintain that such non-compliance affected the result of the election. Dismissing the Director's explanation that some of the documents were working documents, Engelbrecht points out that it is of some significance that the Director fails to provide the proper returns in his answer.

Complaint 5: *"Elect 16" forms not completed*

Engelbrecht alleges that 7 returns: (E1 – E7), relating to 3 100 ballot papers, are incomplete returns as none of the identifying details relating to polling stations, constituencies and regions are provided and that some are also not signed by the presiding officer, nor verified by a returning officer.

Whereas the Director admits that those details had not been entered on these annexures, he maintains that the first respondent was and still is able to allocate votes to constituencies in respect of certain polling stations whose returns had not been adequately verified. This, he says, was done by cross-referencing the ballot papers' serial numbers recorded in Elect 16, Elect 21 and Elect 22 forms.

He adds that those forms were in any event in envelopes and that they were clearly marked with the names of the polling stations where they had been used. He attaches photocopies of those envelopes as a bundle marked annexure "PK18".

The Director then continues that-

> "any genuine omission on the part of the returning officer to endorse the Elect 16 form as indicated by the Deponent, do not constitute a violation of any of the provisions of the Act."

As for annexures E1, E2 and E5 to E7 - being documents emanating from Tsaraxa-Aibes and DRC polling stations respectively according to the Director - the deponent Engelbrecht remarks in reply that the Director does not give any reasons for his view, considering that support for it is not so self-evident by looking at those documents. She points out that the Director failed to explain the origin of annexures E3

and E4. She then makes the point that it is not acceptable for the Director to simply say that they have in place a system of tracking ballots which only they know how as those participating in the election should also be able to do so and that in any event such system must comply with the provisions of the Act. The assertion that the first respondent could through a network of electoral forms track all sensitive electoral material is denied in any event by this deponent.

Complaint 6: *"Elect 16" incorrect accounting and verification of ballots*

Next Engelbrecht says:

> "Furthermore not in all cases where returns were done, albeit incompletely, the figures add up correctly. As examples I annex hereto Annexures "G1 to G5", copies of such returns which on their faces indicate that more ballots were counted than ballot papers issued."

It is now common cause that of these annexures, only 2 relate to the present election, and they account for 1500 ballot papers received and relate to the Karibib and Elim constituencies. Therefore, we shall only summarise the Director's response to those.

The Director disputes that annexure G1 is a "return" and avers that it is a scrap paper used by the presiding officer to calculate results which needed to be recorded on the Elect form. This much is confirmed by

the confirmatory affidavit of the presiding officer concerned – one Mondias Karimubue.

The Director admits the error on the face of the return marked “G2” and says that if the “accounted ballot papers” are added together it gives a total of 1000.

Complaint 7: *“Elect 16” omitting serial numbers*

Engelbrecht then deposes that returns from the Karasburg and Windhoek-West constituencies do not indicate serial numbers of ballot paper books. This, she says, makes it impossible to scrutinize and verify the results and “opened the door to undetected fraud.” These returns account for 8300 ballot papers received.

As regards the “Elect 16” returns from the Karasburg constituency, the Director says that they were not official returns but the working documents of one Isabella Meriam Swartbooi, a returning officer for the Aussenkehr polling station in that constituency. Those returns, as far as this election is concerned, relate to 5700 ballot papers and are indeed signed by Swartbooi in her capacity as returning officer. There is no signature of a presiding officer. It falls to be noted that Swartbooi does

not, with her confirmatory affidavit, include the actual return she submitted.

The “Elect 16” return from the Windhoek West Constituency relates to 2400 ballot papers. The Director does not explain why the serial numbers of those ballot papers have not been entered in this return and how it could have been signed by the presiding officer and verified by a returning officer in those circumstances.

Another of those returns has no identifying details and refers to 2 100 ballot papers received. It is not clear which election it relates to. Similarly, the last of those returns also does not indicate which election it relates to but is dated 16.11.04 (presiding officer) and 18.11.04 (returning officer) and relates to 1 200 ballot papers. The Director does not comment on these two returns – he does not even deny that they relate to the election.

Complaint 8: *Ballot paper books with more than 100 ballot papers*

Engelbrecht then avers that in the previous application the Director had deposed that ballot paper books contained 100 ballot papers each. This, Engelbrecht says, is incorrect because annexures J 1 to J 5

evidence ballot paper books containing ballot papers in excess of 100, contradicting the version of the Director.

The Director explains that through an inadvertent error of the printers, some ballot paper books had one or two more than 100 ballot papers but contends that this error did not affect the integrity or result of the electoral process.

Complaint 9: *Unsigned amendments of "Elect 16"*

Engelbrecht also complains that on a number of returns (annexures K 1 to K 6) changes were made without any signature "verifying or relating to such changes". These returns relate to 5 705 ballot papers. Annexures K 3 and K 5, it was later conceded, do not relate to the election. The remainder involve 5 002 ballot papers.

The Director does not take issue with the absence of verifying signatures on those documents, but points out that errors made had to be corrected. The officers, he says, are not lawyers accustomed to such formalities and the shortcomings, in any event, did not affect the outcome of the result of the election.

Complaint 10: *Fourfold accounting for tendered ballots at Anumalenge*

Next, Engelbrecht complains that in respect of the Anamulenge constituency, tendered ballots were accounted for four times. She points to “L 1 to L 5” to buttress this allegation. On this version 88 votes are involved. The Director denies this allegation, saying that what the applicants are relying on are simply 4 photocopies of the same document.

Complaint 11: *Double voting*

Engelbrecht then alleges that in some constituencies voters voted twice, once normally and once by tendered ballot. She annexes “M 1 to M 20” in support of this allegation. Those annexures are copies of “Elect 23” forms on which particulars of voters to whom tendered ballots had been issued, were recorded. If the entries made are to be believed, a number of tendered votes have been issued in certain constituencies to voters registered in those (not other) constituencies. On this version 410 votes are affected.

The Director denies the allegation. He says that the error committed by the presiding officers concerned is apparent: instead of writing the name of the constituency where the tendered ballots were cast at the top of the form, the polling officers wrote the names of the

constituencies where the voter casting the tendered ballot was registered. He says this can be verified from the voters' register.

Complaint 12: *Unsigned "Elect 22" forms*

Engelbrecht then alleges that ballot papers distributed to polling stations were not all allocated or signed for on receipt, making it impossible to ascertain whether any irregularities occurred. She annexes "N 1 to N 45" in support of this allegation. It must be noted in passing that no averment is made that the annexures relate to the election in dispute.

Complaint 13: *Unsigned "Elect 21" forms*

Engelbrecht then alleges that in a number of constituencies, as evidenced in her annexures "O 1 to O 13", presiding officers did not sign to acknowledge receipt of ballot paper books. She alleges that this raises the question whether those books were in fact received. She adds that without a cross reference to the returns in terms of sections 85 and 87, there was no way of knowing how the ballots

concerned were accounted for. Here too, no averment is made that the annexures relate to the election in dispute.

As for annexures “N1 to N45” and “O1 to O 13” (this and the previous complaint), the Director disputes they are forms required by statute. He says that they have been used to keep track of “all sensitive electoral material” and that the first respondent had systems in place for that purpose. The first respondent thus disputes the allegation that they were unable to reconcile electoral material. The Director specifically disputes that ballot papers used could not be accounted for even though the forms had not been signed.

Complaint 14: *Disregard of tendered votes cast abroad and elsewhere*

Engelbrecht next alleges that the results of the election were announced without taking into account the overseas votes; and that some tendered votes were only forwarded to the Director subsequent to the announcement of the results. These votes were thus not included in the final results announced on 21 November 2004. It is common cause that the overseas votes amount to 804, while the

tendered ballots referred to total 504 votes, thus giving a total of 1 308 votes.

The Director does not dispute that these votes were not included in the final result announced on 21 November 2004. He points out, however, that the applicants consented to the final results being announced without the 804 overseas votes, and that the 504 tendered votes did not affect those results. The outstanding foreign votes, the Director says, were discussed at a meeting with representatives of political parties and it was clear that these would not affect the allocation of the number of seats in the National Assembly. He persists that when the queries were finally replied to by the returning officers affected, and the foreign vote finally allocated, there was an *"overall difference of just 1 682 in respect of valid votes, and none of the political parties gained or lost a seat, as a result of this difference."*

The applicants dispute the Director's assertion that they agreed to the results being announced without the foreign vote and annex a letter dated 20 November 2004 showing first applicant did not agree with the course taken by first respondent. Engelbrecht says that the parties were not told that the foreign vote was still outstanding.

Complaint 15: *Failure to preserve original returns*

It is alleged that not all original returns are being preserved as evidenced by the documents annexed as “Q 1 to Q 5” found at the dump of the Government Garage.

The Director disputes the allegation on which this complaint is based and points out that the applicants have failed to show the circumstances in which these annexures were found. He also says that Engelbrecht fails to allege that she found the documents and for that purpose her complaint amounts to inadmissible hearsay. He also denies that the originals are not being preserved. Moreover, the Director also denies that it has been demonstrated that the documents referred to in any way affected the outcome of the election.

Complaint 16: *Failure to refer to voters’ register at Omusati Project polling station*

It is said that the Omusati Project polling station was so remote and isolated that it could not have had access to a computer to gain access to the electronic voters’ register. Yet, it is pointed out, that a high number of tendered votes had been cast there. The applicants complain that, in the absence of a computer there, the voters roll could

not be checked and, therefore, the inference must be drawn that either double voting took place or that the ballot boxes were stuffed by some unscrupulous person. The tendered votes referred to total 251.

The Director firstly denies that Omusati Project is isolated and, secondly, he says the allegations are speculative and have no factual basis.

Complaint 17: *Failure to record voters' registration numbers at Okalongo*

It is alleged that in the Okalongo constituency of the Omusati region, 71 voters were allowed to vote without voters' registration numbers being recorded.

The Director disputes that any voter voted without a registration card. He makes the point that voter registration cards are issued with serial numbers. He avers that although the presiding officer did not write down the voters' registration numbers on the Elect 23 form as he was required to do, he instead wrote down the names of the voters on that form. At the polls the registration numbers of those voters were in any event recorded on the counterfoils of the ballot papers issued to them and they could in turn be verified with the voters' register, which the

applicants have access to. The error is confirmed by the affidavit of the returning officer concerned.

Complaint 18: *Difference between reported and announced results*

It is complained that in the named constituencies, there is a difference between the tallies forwarded by returning officers and those announced by the first respondent. In respect of Ongwediva, it is alleged, the difference is 367 while in respect of Oshakati it is 6039.

As for Complaint 18, the Director avers that he does not know where Engelbrecht got the numbers she refers to and says that he stands by the results as announced and gazetted. The Director retorts that the applicants were aware that the results announced as an-ongoing-information-exercise during the counting process, were provisional and subject to change as queries from the first respondent to the counting centers were being replied to and that some of the responses were only received several hours or days later. This, he says, explains why results were sometimes different and contradictory and concludes his response on this complaint as follows:

> "Due to the low level and extent of inconsistencies and their statistical insignificance, the first respondent consulted with the political parties at the meeting held on 20th November 2004, and thereafter decided

that the announcement of the results be made, notwithstanding the outstanding queries."

Complaint 19: *Difference between account and verification at Walvis Bay*

It is complained that in the Walvis Bay Rural Constituency the return of the presiding officer gives a total of 2900 ballot papers, while the return of the returning officer totals 929 votes. It is alleged that this shows that between the polling station and the return to the first respondent, 1971 votes "went missing".

The Director disputes the calculations of the applicants and sets out the tally given by the returning officer in which the ballots, the votes cast, and those rejected, are set out. The Director admits though that the returning officer in error failed to record the 956 tendered votes (of which 6 were rejected) on the Elect 17 form but instead recorded that on the Elect 30(b) form. The tendered votes, he says, were in any event allocated to the political parties for whom the votes were cast. The form erroneously completed is annexed to the papers in substantiation of the explanation.

Complaint 20: *Voting percentages in excess of 100%*

An extract is then provided from a local daily, Republikein 2000, showing that the first respondent had issued results on the internet showing more than 100% votes recorded in 10 named constituencies. It is then alleged that in no constituency can more people vote than are registered. In the same vein, another reference is made to a report by a non-governmental organization known as “National Society for Human Rights” pointing to what are referred to as ‘ridiculous discrepancies’ in the final results allegedly published by the first respondent on its internet website.

In response to this complaint, the Director makes the point that applicants have failed to have regard to the fact that on account of tendered votes being cast in a constituency, and depending on the percentage turn-out of the local voters, there is the potential that the tendered votes may push the percentage of voters in a given constituency to more than the number of voters registered there. The Director denies what he characterizes as the “unsubstantiated” allegation that in the 10 named constituencies which at the time when the provisional results were announced showed more than a 100% voter turnout as shown on the website, did not in the final results show such a turnout. The Director attaches “PK 27”, which is an extract of the final result in respect of the Windhoek East Constituency (one of

the 10 referred to by the applicants), to show that it records a more than 100% percentage votes cast.

The Director dismisses as speculation the statements attributed to the National Society for Human Rights.

In reply, the applicants do not accept the Director's explanation of this phenomenon on the basis of the tendered votes cast and says that, in terms of the Act, tendered votes ought to have been accounted for in the constituencies where the voters casting them were registered. Furthermore, they maintain, no result of any constituency could have been announced before all votes, including tendered votes, could be accounted for in the constituency.

Complaint 21: *Difference between results released and returns rendered*

It is complained that in Anamulenge, Elim and Tsandi constituencies, the results released do not tally with the returns provided. The difference, taking together all those constituencies, is a total of 2769 votes. No supporting document is annexed to buttress this allegation. The Director disputes the allegations underpinning this complaint and provides Annexures "PK 28", "PK 29" and "PK 30" to gainsay the

discrepancies alleged by the applicants in respect of those constituencies.

Complaint 22: *Swakopmund irregularities*

Again reference is made to the internet website of the first respondent in relation to the Swakopmund constituency, which, it is alleged, indicates that 16016 ballots were cast, while the returns (Elect 17) indicate only 12549 valid votes, giving a discrepancy of 3457 votes. The further allegation is made in respect of Swakopmund that the valid votes cast (as per Elect 16) differs from that posted on the first respondent's website, by a margin of 1887 votes. It is also alleged that in Swakopmund the returns show that 8771 votes were cast as tendered votes, but that none of the returns in respect of such tendered votes is signed by the returning officer.

As regards this complaint, the Director avers that all ballot papers issued to Swakopmund are accounted for. The Director also attaches the confirmatory affidavit of the returning officer for that constituency, one Vilho Kaulinge, who says that the Elect 32(b)-forms in respect of the Swakopmund constituency represents the complete picture of the total number of ballots cast. We note in passing that the applicants' allegation that not a single return is signed, is not dealt with by the

Director. He however annexes a “Summary of Results of Ordinary and Tendered Votes” to show how the ordinary ballots, tendered ballots, ballots rejected, ballots counted were recorded. This “Summary” is however not signed by anyone.

Complaint 23: *“Stuffing” of ballot boxes and election fraud*

Many of the applicants’ complaints are presented either as the causes of or as the consequences of inferred ballot box-stuffing. As we shall soon show, they allege that first respondent’s failure to print serial numbers on the ballot papers allowed for unscrupulous persons to substitute ballot papers without any mechanism to detect such an irregularity. In support of the inference they seek to draw, they cite as examples the excessive number of ballots cast within the limited time allowed at certain polling stations; the excessive voting percentages in a number of constituencies, the Okahandja incident of discarded ballots cast in favour of minority parties, etc.

The first respondent firmly rejects these allegations as unfounded and speculative. The Director emphatically denies the suggestions of election fraud and widespread irregularities. To put the alleged mistakes and irregularities into perspective, the Director explains the manner in which the first respondent conducted the election and

makes reference to measures taken to ensure transparency and to assure that the election was fair.

In this regard he refers to the existence of a voters' roll to which all participating political parties have access. Participating political parties were able to know from the voters' roll, the details of all Namibian citizens registered as voters. The Director then refers to the fact that participating political parties, as registered political parties, were entitled to appoint electoral agents who in turn were entitled to attend, inspect and observe the premises where ballot papers were printed; the actual printing of the ballot papers (a process in fact observed by the political parties' agents, including those of the applicants); the emptying of all ballot boxes delivered at all polling stations 30 minutes before voting commenced; the inspection and sealing of ballot boxes at polling stations; voting when it takes place at polling stations; the sealing and placing of seals of their political parties when ballot boxes are full, and the sealing of packets containing all ballot paper books and other electoral material by presiding officers after voting had stopped.

The Director further avers that the participating political parties are also entitled to appoint counting agents who in turn are entitled to be present when ballot boxes are opened and to inspect seals affixed

thereon before the ballot boxes are opened for counting; observe the actual counting of ballot papers by returning officers and to request a recount of ballot papers whenever they are not satisfied with the initial counting.

The Director makes the point that the applicants were entitled to ensure that their counting agents attended counting stations and he then invites the applicants to indicate whether their counting agents attended counting stations, and if not, why they chose not to be present.

The Director points out that first respondent appointed presiding officers who were responsible for the control of voting at polling stations. Also appointed, were returning officers who were responsible for the receipt of ballot boxes and other election material and equipment from presiding officers after polling stations had been closed; and verification of returns submitted by returning officers. Crucially, such verification includes the number of ballot papers used and not used at polling stations; the counting of ballot papers and the rendering of returns and reports on the result of the election in constituencies.

The Director avers that all constituencies received, before voting commenced, ballot boxes and ballot paper books with ballot papers. The serial numbers of the counterfoils of ballot papers thus allocated were then recorded by the electoral logistics personnel on “Elect 21” forms. The Director avers that delivery of election material to polling stations was escorted by members of the Namibian Police and election agents of participating political parties were required to keep records of serial numbers of ballot paper books delivered to polling stations.

The Director avers that when voting commenced, there were instances where ballot papers ran out at some polling stations. In those cases, additional ballot paper books with ballot papers would be provided from reserves or from other polling stations which had more than enough ballot papers. In those cases, “Elect 21” and “Elect 31” forms would be completed.

The Director avers further that during polling, the Namibian Police secured the premises and election agents were also present as observers. After polling, ballot boxes were sealed by presiding officers and election agents or registered political parties present at polling stations were entitled to affix seals of their political parties on the ballot boxes containing ballot papers before these were transported to counting stations. The Namibian Police were present at every polling

station to safeguard election materials and equipment, particularly the ballot boxes with ballot papers.

The Director then avers that at the counting venues, no ballot box with ballot papers was opened until the presiding officer had reconciled the ballot papers in the ballot box, the unused ballot papers and the spoiled ballots. The reconciliation was recorded on the “Elect 17” form.

The Director points out that the counting of votes that commenced on 17 November 2004 was controlled by returning officers. Votes counted were recorded per political party on “Elect 17” forms. Counting agents were also informed about the final results before they were announced and before they were transmitted to the Results Centre in Windhoek.

At the end of counting, ballot boxes containing used and unused ballot papers were sealed by the returning officers, and by election agents who chose to do so. The above process, the Director avers, shows that the election was conducted in accordance with the principles in Part V of the Act. The involvement of the Namibian Police, it is alleged, displaces the allegation of systematic cheating and manipulation of ballot papers and stuffing of ballot boxes.

The Director says that “Elect” 21– 27 and 31 forms are administrative forms not required by law – in the sense that they are prescribed “returns”. They were, it is alleged, taken by the applicants contrary to the order of Hoff, J. All applicants were entitled to in terms of the Court’s order, the Director states, were official returns contemplated in s85 of the Act. The Director further avers that the applicants were given access to all statutorily required returns but that they refused to copy all of them and instead demanded access to other documents – presumably not covered by the order. The Director states that Elects 16, 17, 18, 19, 20, 20(a), 30(b), 31(a), 32(a), 32(b) “are all returns designed to provide accurate information as regards results sent from the counting centers all over the country and received at the first respondent’s Results Centre.”

He then says:

> “The 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.”

Referring to the “Results Centre” process, the Director states that:

> “It will require conspiracy on a grand scale to manipulate and rig elections in the way and manner alleged by the applicants.”

He also refers to the involvement of local and foreign observer missions, who, he says, effectively gave the election process a clean bill of health.

The Director concedes that in the conduct of the election “minor human errors” occurred but that these had no bearing on the number of seats allocated to the participating political parties. He states further that the applicants failed to make out a case that the totality of ballots cast and counted are more than the ballot papers lawfully issued to voters.

As far as the ballot papers found at Okahandja are concerned, the Director says that is now the subject of a police investigation. He refers to the various confirmatory affidavits on the issue which point to the fact that on 24th November 2004, some election material fell from a Government truck which was driving from Okahandja to Windhoek. This material turned out to be about 22 ballot papers cast in favour of only opposition parties. Suggestions are being made in some of these confirmatory affidavits that those who came to handle the ballot papers subsequent to them falling off the truck, deliberately burnt some of them in order to strengthen the case of having the election declared null and void. An official of the second applicant has been

implicated by one of the deponents to these confirmatory affidavits as the person who instigated the burning of the election material found in order to bolster the case, then impending, for the setting aside of the election.

In the replying affidavit filed on their behalf by Engelbrecht, the applicants persist in their allegation of ballot stuffing and the underlying cause thereof. Although they have not taken issue with many of the material and essential features of the election as explained by the Director, they seem to suggest that some of the rights accorded to political parties to monitor and verify the election process were more illusive than real. Without saying why, Engelbrecht avers that in some polling stations party agents could not enter the premises where the voting took place and were not able to observe the voting. It is not clear to us if she is alleging that the first respondent or anyone prevented them from exercising their statutory rights. She also points out that lack of manpower and financial resources resulted in the applicants being unable to assign counting agents to all constituencies but that that did not absolve the first respondent from completing returns properly. It has to be said that she does not say at how many constituencies they were not represented by counting agents in order to place the matter in some perspective.

She also says that the consultative mechanism referred to by the respondent was not of any use and that no minutes were kept of meetings and all the suggestions which the applicants made were ignored. As for the elaborate process set out by the Director of the manner the election was conducted, we discern in the reply that the deponent says that most averments (it is not said which ones) are hearsay but that in so far as the averments are intended to convey how the process should have been conducted, it is not disputed.

Engelbrecht also denies that any of the material relied upon by them in their founding papers and obtained in consequence of the order of Hoff, J are internal documents as stated by the Director in respect of some of the material, but that even if they were only internal material, the irregularities apparent from such documents characterize the chaos and flaws associated with the process such that no reliance can be placed on the results announced by the first respondent.

The deponent says that the reports of the Observers constitutes inadmissible hearsay, and, by reference to what is stated in the reports of the observers, points out that they did not give an unqualified approval of the process.

She also disputes that the applicants went beyond the terms of the order made by Hoff J in obtaining documents from the first respondent and states that all documents they took were made available to them by officials of first respondent.

The deponent states that the absence of an electronic voters' register made it impossible for them, in the 5 days they had to check, whether the same voters' registration numbers or other personal details occurred twice.

It is evident from this summary of the applicants' complaints and the first respondent's answers thereto that the litigants have diverging views on an important question of law bearing on the interpretation of s 74(2) of the Act and that a large number of factual disputes have presented themselves. Mr Maleka SC, appearing on behalf of the first respondent, refers to the interpretation contended for by the applicants as "the centerpiece" of their case. It is indeed the sole basis of the 1st complaint concerning the serial numbers of ballot papers and the Court's finding in that regard will also impact on the validity of a number of other complaints, as we shall presently show. For this reason we find it expedient to firstly deal with this legal issue and to address the factual issues that the other complaints present on the papers later in this judgment.

Legal Issue: *Serial numbers of ballot papers and the interpretation of s74(2)*

Central to the applicants' contention that the election should be invalidated stands their interpretation of s 74(2)(b) of the Act. They contend that, properly construed, the provisions thereof require that the serial numbers of the ballot papers should have been printed on the ballot papers and not, as it were, on the counterfoils thereof. That interpretation constitutes the basis of a two-pronged attack: The failure to print the serial numbers on the ballot papers, they submit - (a) constitutes a "non-compliance" with the provisions of Part V of the Act on account of which the election should be avoided by the Court under s95 of the Act and (b) has also opened the door to the commission of an "irregularity" in the election process on account of which the Court should set the election aside as provided for in s 116(4) of the Act.

The "irregularity" complained of relates to the alleged fraudulent "stuffing" of ballot boxes alluded to under complaint 22: Without serial numbers printed on the face of the ballot papers, the applicants argue, unscrupulous persons intent on manipulating the results of the election could, without fear of discovery in the subsequent process of verification, remove ballots cast in favour of one or more political

parties from ballot boxes and substitute them for ballots marked in favour of another. In support of this contention, they rely mainly on 3 alleged occurrences: (i) that more votes were cast at certain polling stations than time would have allowed for (complaint 3); (ii) that more votes were cast in certain constituencies than the number of voters actually registered there (complaint 20) and (iii) the so-called “Okahandja-incident”.

Without serial numbers printed on the ballot papers, the applicants contend, it is not possible to relate them to a particular polling station, constituency or region. That, in turn, makes it virtually impossible to ascertain whether ballot papers have been removed from or added to ballot boxes and diminishes the mechanisms needed to effectively scrutinise and verify the election process in the interest of transparency.

It is with these submissions in mind that we shall analyze the merits of the applicants’ complaints and assess their individual or cumulative impact, if any, on “the result of the election” as contemplated in sections 95 and 116(4) of the Act.

The essence of those complaints, as we have pointed out earlier, lies in the interpretation of s 74(2) *supra* of the Act and we shall deal with that first.

Mr Frank submits on behalf of the applicants that, properly construed, the words “serial numbers of the ballot papers” used in paragraph (b) of that subsection require by necessary implication that each ballot paper must have a serial number printed on it. Whilst he readily concedes that serial numbers have been printed on the counterfoils of the ballot papers as prescribed by annexure 3 of the regulations, he contends that the regulations are, to the extend of their inconsistency with the Act, either *ultra vires* or tacitly repealed.

Mr Maleka takes issue with the construction contended for by the applicants. He submits that the applicants are seeking to read the phrase “serial numbers of the ballot papers” as “serial numbers on the ballot papers” and argues that the requirement contended for by the applicants is not one of those expressly prescribed in s 81(2) of the Act. That subsection is specifically designed to define the form and contents of ballot papers. It provides:

> “Every ballot paper shall be in the form as prescribed and shall contain –

(a) in the case of an election on party lists –

(i) the names, in alphabetical order, of the political parties taking part in the election;
(ii) the abbreviated name, if any, of each such political party;
(iii) the distinctive symbol, if any, of each such political party; and
(iv) the photo of the head of each such political party submitted in accordance with section 59(4) … and

(c) such other particulars as may be prescribed."

Mr Maleka reasons that, in the absence of any express requirement that the serial numbers of ballot papers should be printed on the face thereof, the first respondent was entitled to prescribe by regulation that they should be printed on the counterfoils thereof instead. In response to the applicants' contention that the regulations are invalid to the extent that they require the serial numbers to be printed on the counterfoils of the ballot papers and not on the ballot papers themselves, he states that they are precluded from raising that point in reply. If the first respondent had been alerted to such an attack in the notice of motion or founding affidavit, it could have made out a case in the answering affidavit that the Court should not strike it as *ultra vires* but to rather make an order in terms of Article 25(1)(a) of the Constitution.

We pause here to point out that when the regulations were promulgated in 1992 and amended in 1994, s 74(2) was not yet part of the Act in its current form. That subsection was initially repealed by section 30(b) of the Electoral Amendment Act, 1994 and only inserted in its current form by s 12(b) of the Electoral Amendment Act, 1998. The first respondent was therefore acting entirely within its *vires* when, in 1992 and 1994, it prescribed in annexure 3 of the regulations that the serial numbers should be printed on the counterfoils of ballot papers. What falls to be considered is the effect, if any, of the 1998 introduction of s 74(2)(b) on the contents of a ballot paper and the regulations which had been made in that regard.

Mr Frank contends that if the Legislature intended the serial numbers to be printed on the counterfoils, it would have used the words “serial numbers of the counterfoils of the ballot papers” instead of “serial numbers of the ballot papers”. He points to other provisions of the Act from which it is apparent that Parliament was clearly aware of the difference between a “ballot paper” and the “counterfoil of a ballot paper”. He refers, for example, to the wording of s 82(9) of the Act which requires of a presiding or polling officer to “enter the voter registration number of the voter in the ballot paper book on the counterfoil of a ballot paper” (see: par (a) thereof) and to “detach such ballot paper from its counterfoil and deliver it to the voter” (par (b)

thereof). Other similar examples are to be found in sections 83(c) and 85(1)(b)(iii). The first respondent was also aware of the statutory distinction: that much is clear from the different forms for ballot papers and their counterfoils prescribed in the regulations. In that context, it is of some significance that the regulations label the number to be printed on the counterfoil of the ballot paper as the "serial number of counterfoil" and does not refer to it as the "serial number of the ballot paper".

There is some authority for the contention that a difference in the phraseology employed by the Legislature in the same statute (e.g. between "ballot paper" and "counterfoil of the ballot paper") *prima facie* justifies an assumption that it imports a change in the intention of the Legislature (c.f. *Shalom Investments (Pty) Ltd and Others v Dan River Mills Incorporated, 1971 (1) SA 689 (A) at 701C; Port Elizabeth Municipal Council v. Port Elizabeth Electric Tramway Co. Ltd*., 1947 (2) SA 1269 (AD) at 1279, and *R. v. Sisilane*, 1959 (2) SA 448 (AD) at 453F).

This is, however, only one of the presumptions employed as an aid in the construction of statutes and, as Ogilvie Thompson JA said in *R v Shole*, 1960 (4) SA 781 (A) at 787B "...a change in wording does not always and inevitably denote a change of intention (see Craies Statute

Law, 5th ed. pp. 135 - 136)". Devenish, *Interpretation of Statutes*, (1st ed., 2nd imp., 1996) points out at p 218, correctly so in our view, that the decisive factor is, as always, the intention of the Legislature and that contextual interpretation takes precedence over the presumption of consistency in the construction of the same word in different parts of a statute (c.f. *S v ffrench-Beytagh (1),* 1971(4) SA 333 (T) at 334) and the converse of that presumption - on which Mr Frank relies.

When assessing the import of the distinction drawn in the statute between the phrases "ballot paper" and "counterfoil of the ballot paper", it is vital to consider the ordinary meaning of the word "counterfoil": it is defined in "*The Shorter Oxford English Dictionary on Historical Principles* " (Vol 1, 3rd ed., 1990 reprint) as "*a complimentary part of a bank cheque, receipt, or the like, containing the particulars of the principal part, to be retained by the person who gives out that part*". Three things characterise a counterfoil according to the definition: The counterfoil is a complimentary part of the principal document; it contains the particulars of the principal part and is to be retained by the person who gives out the principal part. From these characteristics, the function of a counterfoil is at once apparent: it is retained as a complimentary part of the principal document by the person who has issued the latter as a record containing particulars of the principal document. So, for example, in the case of bank cheques

issued, may it contain particulars of the cheque number, the date thereof, the name of the drawee and the amount for which it has been issued (c.f. *Law Society of the Cape of Good Hope v C*, 1986 (1) SA 616 (A) at 624H and 626B); in the case of a postal order counterfoil, it may contain the postal order number and amount thereof (c.f. *S v Williams*, 1965 (2) SA 567 (C) at 567G) and in the case of a driver's licence counterfoil, it may contain the driver's licence number and particulars of the person to whom it has been issued (c.f. *S v Jass*, 1965 (3) SA 248 (E) at 249F).

The complimentary nature of a counterfoil as part of a ballot paper becomes all the more clear when one considers the information to be printed (the serial number of the counterfoil, the nature of the election, the name of the constituency and the date of the election) and noted (the registration number of the voter) thereon in terms of Annexure 3 of the regulations.

The Legislature, it seems to us, was alert to the fact that, by definition, a counterfoil is a complimentary part of the principal document (in this case, the ballot paper). This much is apparent from the corrections brought about by s 36(h) of the Electoral Amendment Act, 1994 to the earlier formulation of s 82(9)(a) and (b) of the Act. Before their

amendment those paragraphs required of a presiding or polling officer to –

> "(a) enter the registration number of the voter on the counterfoil on the ballot paper book;
>
> (b) tear out a ballot paper from the ballot paper book marked on the back with the official stamp;"

The phrase "counterfoil on the ballot paper book" in paragraph (a) was, even on a beneficial construction, not a clear reference to the "counterfoil of the ballot paper". Similarly, it was not clear from para (b) whether the counterfoil, being a complimentary part of the ballot paper, should also be torn out of the ballot paper book. Hence, by the substitution of those paragraphs in 1994, the Legislature made it clear in paragraph (a) that the presiding or polling officer must "enter the voter registration number of the voter *in the ballot paper book on the counterfoil of a ballot paper*" and, in paragraph (b), that he or she must then "*detach such ballot paper from its counterfoil* and deliver it to the voter" *(our emphasis*). The words in italics (and in particular the use of the word "its" in paragraph (b)) make it clear that the counterfoils are, correctly so, considered by the Legislature as complimentary and detachable parts of the ballot papers in a ballot paper book.

Inasmuch as the counterfoil is part of the ballot paper to which it is attached – albeit a complimentary and detachable part – the particulars to be printed and noted thereon are, according to the ordinary grammatical meaning of the word “counterfoil”, “particulars of the principal document”, i.e. the “principal document” being the detachable ballot paper to be handed over to the voter. It follows as a matter of logic that the serial numbers printed on counterfoils of ballot papers are therefore “the serial numbers of the ballot papers”. This phrase is the one used in s 74(2) of the Act and, for the reasons given, it was not necessary for the Legislature to use the phraseology suggested by the applicants.

What is more, we find strong support for this construction upon a contextual approach to the interpretation of the phrases “counterfoil of a ballot paper” and “ballot paper”.

It is not in issue that the secrecy with which every enfranchised voter should be allowed to cast his or her vote is one of the most fundamental principles of the election process written into the provisions of Part V of the Act. This is to be expected in any democratic society. The guaranteed and demonstrable secrecy of the ballot is an indispensable prerequisite for the free election of the people’s representatives in a democratic state. Without the knowledge that his

or her vote will be cast and kept in secret, the freedom with which a voter will exercise his or her fundamental democratic right to participate in the conduct of public affairs through elected representatives is likely to be compromised. Without the knowledge and guarantee of secrecy, real and imaginary fears of retribution, discrimination and rejection are likely to influence the political choices of enfranchised voters. Instead of the ballot being an instrument of political freedom, it may become one of oppression if the principle of secrecy is violated: thereby negating the very reason and essence of its existence.

After all, the historical context in which the word “ballot” found its way into the English language implies an element of secrecy in the vote cast. The history and meaning of the word was discussed by the Australian Federal Court in the matter of *Len Colbung; Dennis Eggington; Terrence Garlett; Robert Isaacs; John Kalin; Larry Kickett; John Mcquire; Jim Morrison; Frank Nannup; John Pell; Neil Phillips; Spencer Riley; Rob Riley; Jack Walley; Gloria Walley; Ted Wilkes; Laurel Winder and The Australian Electoral Commission NO.*, (1992) 107 ALR 514 at par [27]:

> “The word ‘ballot’ derives from the Italian ‘ballotta’ meaning a round bullet or little ball. Ballotta was used in mid 16th century Italy to designate a system of secret voting using coloured balls, beans or

> other objects - Fredman - The Australian Ballot: The Story of an American Reform (1968) Mich. State U.P. It also described the objects used in the system.
>
> In its original ordinary English meaning it imported the notion of secrecy being variously defined in the Oxford English Dictionary as ‘a small ball used for secret voting; hence by extension a ticket or paper so used’ and ‘the method or system of secret voting, originally by means of small balls placed in an urn or box; an application of this mode of voting; also the whole number of votes thus recorded’. The word ‘ballot’, it has been said, implies secrecy of voting although ‘sometimes used loosely and perhaps incorrectly - in a more general way as indicating a method of voting by written or printed slips of paper as contrasted with open voting’ - *The Maple Valley Case* (1926) 1 DLR 808 at 813”

One of the more profound lessons in democracy learnt from history is that a vote, other than by secret ballot, leaves itself open to abuse. Commenting on parliamentary elections conducted more than a century ago in Britain by poll whereby a voter's name, qualification and vote were recorded in a book open for public inspection, Lord Denning M.R. described the result thereof as follows in *Morgan v Simpson*, (1974) 3 All ER 722 at 726:

> “Such was the method of election at common law. It was open. Not by secret ballot. Being open, it was disgraced by abuses of every kind, especially at parliamentary elections. Bribery, corruption, treating, personation, were rampant.”

The freedom of choice which must permeate all procedures devised for the election of parliamentary representatives is also echoed in the preamble to the Constitution ("*Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary*") and entrenched in Article 17(1) ("*freely chosen representatives*") thereof. Without adequate balloting procedures to observe secrecy and a public awareness that the person or party voted for will remain an inviolable secret of every voter, an election is not truly free. Thus, the concept of secrecy - as far as the ballot paper is concerned - is pivotal to a free election and, as such, constitutes a principle which outweighs many - if not most - of the other contained in Part V of the Act.

That principle will be negated if the same serial number appears on both the ballot paper and its counterfoil: It will theoretically be possible to determine exactly how every voter has voted if regard is being had to the registration numbers of voters noted on the counterfoils. That much is common cause. Would it be different if s 74(2) of the Act falls to be interpreted - as the applicants contend – that the serial numbers must be printed on the ballot papers and not on the counterfoils? We think not.

Ballot papers are bound in ballot paper books. In the interest of transparency and accountability, the serial numbers of all the ballot papers in those books are recorded in relation to each polling station on lists provided to every political party taking part in the election (s 74(2)(b)); they are accounted for by the presiding officers receiving them at such polling stations (s 85(3)) and verified by returning officers at counting stations (s 87(2)(a)). Moreover, the registration number of each voter to which a ballot paper is issued, must be noted on the counterfoil of that ballot paper (s 82(9)(a)).

If the serial numbers of ballot papers are printed on the ballot papers, it will be easy to determine for which party the last voter at a particular polling station has voted, i.e. by simply looking at the number of the first remaining ballot paper in the book and finding the ballot paper in the ballot box with a serial number immediately preceding that one. So too, would it be possible to determine for which person the second last person had voted for …and the one before that … and, eventually, by a process of counting backwards, how every person had voted at a particular polling station. This is perhaps best illustrated by an example: If the first remaining ballot paper in a ballot paper book is numbered 1050, the registration number of the 49th last person who had voted would appear on the first counterfoil of the ballot paper book containing serial numbers 1001 – 1100 and the serial number on

the ballot paper issued to him or her would therefore be 1001; the voter's registration number of the second last person who had voted would appear on the second last counterfoil from which a ballot paper had been detached and the serial number of the detached ballot paper would be 1048, etc.

The determination of a voter's vote by the process of counting backwards and cross-referencing voter's registration numbers with the serial numbers of ballot papers will be so much easier if one bears in mind that each ballot paper book contains a specific number of ballot papers - with a few exceptions, all the ballot paper books used in this election contained 100 ballot papers – and that the serial numbers of the ballot papers in different books handed to presiding officers also follow in sequential order on one another (e.g. if 3 ballot paper books are handed over to a presiding officer, the serial numbers of the 300 ballot papers contained therein are likely to follow in sequential order, i.e. from 1001-1100, 1101-1200 and 1201-1300).

In short, a person in possession of a ballot paper book will be able to determine and note the serial number of each ballot paper on the counterfoil thereof and, by simply looking for the ballot paper with that serial number in the ballot box and comparing it with the voter's registration number on the counterfoil, will be able to determine the

identity of the voter from the voters' register and see which party he or she has voted for.

The interpretation contended for by the applicants therefore has the capacity to destroy the secrecy of the ballot and to undermine a principle which constitutes an essential element of a free election. As we have illustrated earlier, without adequate balloting procedures in place to observe and protect the secrecy of every vote cast, an election of this nature would not be free. To suggest that by the 1998 amendment of s 74(2) Parliament sought to destroy the principle of secrecy, which it has previously so carefully woven into the cloth of election procedures devised in Part V of the Act, is untenable. Such an unjust – if not absurd – result could not have been countenanced, much less intended, by Parliament.

In the premises, we reject the applicants' contention that s 74(2)(b) of the Act requires that the serial numbers of ballot papers must be printed on the face of ballot papers to be issued to voters. By causing the numbers of the ballot papers to be printed on their counterfoils, the first respondent acted both within the letter and "spirit" of the Act. It follows from this finding that the absence of printed serial numbers on the detached ballot papers issued to voters does not constitute a "mistake or non-compliance" on account of which the Court may set

aside the election under s 95 of the Act. The applicant's attack on the validity of the election brought on that premise must therefore fail. So too, must the applicant's contention that respondent's alleged "non-compliance" with s 74(2)(b) has allowed for the perpetration of an "irregularity" (such as the stuffing of ballot boxes) envisaged by s 116(4) of the Act.

What remains, however, is for the Court to consider whether, quite apart from the rejection of the applicants' contentions as regards the interpretation of s 74(2), any stuffing has been established as a matter of fact on the evidence and, if so, whether it constitutes an irregularity which affected the result of the election. That is but one of the many issues that arises from the affidavits that we shall shortly discuss. Before we do that though, we shall pause to reflect on the circumstances under which the Court may invalidate the election and the burden of proof which each of the parties bear in that regard. With that in mind, we shall turn to the approach which the Court will adopt in deciding the disputes of fact and analyze the merits of the applicants' complaints and their entitlement to the relief sought.

Election Applications and the Burden of Proof

Section 109 of the Act allows for an election application to be brought upon either one or both of the following complaints: in the case of 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 or in the case of an undue return in any of those elections. The factors which may give rise to the complaint, whether it is one about an undue election or one about an undue return, are the same, i.e. “by reason of want of qualification, disqualification, corrupt and illegal practice, irregularity or by reason of any other cause whatsoever”.

What is of significance though, is that in terms of s 116(4) of the Act, the Court may not set aside an election referred to in s 109 on account of any of those factors unless its impact – either singularly or collectively with others - is so substantial in the circumstances of the case that it can be said to “affect the result of the election”. As such, s 116(4) gives effect to the longstanding approach that an election of this nature is not inherently so fragile that it may be avoided for the slightest of reasons, but that it is robust enough to withstand attack unless shown to be so significantly flawed that its result is affected. Expounding the underlying reasons for this approach, Wessels JA said 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, 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."

With the phrase "result of the election" is meant, not the majority of any particular party or candidate, but the representation accorded to a person or party as a consequence of the election (See: *Mtoba and Others v Sebe and Others*, 1975 (4) SA 413 (OK) at 421H and the authorities referred to).

What constitutes a "qualification" or a "disqualification" is defined elsewhere in the Act (compare e.g. sections 54, 61, and 64 in respect of candidates for presidential elections, regional council elections and local authority elections; s13 in respect of persons entitled or disqualified to be registered as voters; s 39 dealing with the registration of political parties, etc.) So too, does the Act define a "corrupt and illegal practice" (c.f. sections 103 – 108 dealing with undue influence, bribery, impersonation, treating and the corrupt procurement or withdrawal of a candidature). Precisely which acts or

omissions will constitute an “irregularity” or “other cause” is left for the Court to determine, regard being had to the values articulated and the principles entrenched in the Constitution, the provisions of the Act, the dictates of the common law of Parliament relating to elections generally (c.f. *Mota en Andere v Moloantoa en Andere*, 1984 (4) SA 761 (O) at 803H-I) and the circumstances of each case. It is practically impossible to furnish an all-inclusive list thereof – lest we restrict by lack of foresight those which others wiser than us might have contemplated. It will be more prudent, it seems to us, to give content to those phrases by the careful development of case law around the requirements of free and fair elections in a democratic society. Where relevant, we shall refer to some of those irregularities or other causes later in this judgment.

One of them though, is pertinent to our discussion of the burden of proof in this application and we shall refer to it immediately. Section 95 contemplates in the clearest of terms that an election may be set aside “by reason of any mistake or non-compliance with the provisions of” Part V of the Act unless it appears to the 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”. A “mistake or non-compliance” of the nature and in the circumstances envisaged by s 95 would therefore fall within

the parameters of the phrase “or by reason of any other cause whatsoever” on account of which a person may complain of an undue election or undue return under s 109 and on account of which a Court may set aside an election under s 116(4) of the Act.

The interrelationship between sections 116(4) and 95 of the Act and the effect of its formulation on the question of *onus* is perhaps better understood by comparison between the two. Section 116(4) of the Act provides:

> "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”.

It is common cause between counsel for the litigants that the applicants bear the overall *onus* to satisfy all the requirements of s 116(4) on a preponderance of probabilities to be successful in the application. This approach accords with the fundamental principle governing the incidence of the onus: *semper necessitas probandi incumbit illi qui agit* (D. 22.3.21). It requires of a litigant claiming something from another to satisfy the Court that he or she is entitled to it (See: *Kunz v Swart and Others*, 1924 AD 618 at 662-3; *Pillay v Krishna and Another*, 1946 AD 946 at 951; *Mobil Oil Southern Africa*

(Pty) Ltd v Mechin 1965 (2) SA 706 (A) at 711E and *Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others*, 1994 (1) SA 708 (A) at 760H). Not only will the applicant in an election application under s 109 be required to adduce sufficiently credible and reliable evidence to establish on a balance of probabilities the "want of qualification, disqualification, corrupt and illegal practice, irregularity" or other cause relied on, but also that the impact of those factors have been so substantial in the circumstances that they affect the result of the election.

The grounds on which an election may generally be avoided under s 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 the first respondent is required to direct, supervise and control elections under the Act. It provides in broad terms for the nomination of candidates; the appointment of returning officers, presiding officers and counting officers; their powers, duties and obligations and the manner in which they are required to exercise them; the duties, powers and obligations of the Director in the conduct of elections under the Act; the provision of election material and equipment; the manner of

voting at polling stations; the determination and announcement of results and the like. These provisions are designed to give effect to a number of important principles incorporated in the statute to guarantee free and fair elections by secret ballot in accordance with transparent and verifiable procedures. The Legislature entrusted the first respondent with the power to direct, supervise and control every step of the elections either directly or indirectly (through the Director and the election officials appointed for that purpose). But the corollary of that power is the duty and responsibility to ensure compliance with the provisions of that Part of 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. It provides:

> "No election shall be set aside by the Court by reason of any mistake or non-compliance with the provisions of this Part if it appears to that Court that the election 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".

If compared to s 116(4), it is at once clear that not only does s 95 differ in its formulation, but also in the curative provisions contained therein. More important for purposes of this discussion though, is its legislative history and Parliament's deliberate re-enactment thereof in materially the same form as it appears in legislation interpreted and applied in other jurisdictions for more than a century.

As far as we have been able to establish the wording of the section finds its origin in 13 of the Ballot Act promulgated in England during 1872, which reads:

> "No election shall be declared invalid by reason of a non-compliance with the rules in the First Schedule to this Act, or any mistake in the use of the forms in the Second Schedule to this Act if it appears to the tribunal having cognizance of the question that he election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

It has since been copied without any material changes in such language as s 59 of Schedule II to the Transvaal Constitution Letters Patent, 1906 (quoted in *Nicholson v Van Niekerk*, 1915 TPD 581 at 600) and s 79 of Act 9 of 1892 (Cape). After South Africa had become a Union, it was again incorporated as s 61 of Act 12 of 1918 and then as s 91 of the Electoral Consolidation Act, 46 of 1946 in the following terms:

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

It will be noticed immediately that except for the use of the word “that” before the word “court” in the second line and the word “that” before the last word “election” in the section, it corresponds in all other respects with s 95 of the Act. Reading as it did at the time, the interpretation of s 91 of Act 49 of 1946 received judicial attention in the matter of *Putter v Tighy*, 1949 (2) SA 400 (A). After an analysis of English authorities on s 13 of the Ballot Act, most notably *Deans v Stevenson,* 19 S.L.R. 794 and *Woodward v Sarsons* (L.R. 10 C.P. 733 at 750 - 751), Tindall JA said at 408:

> "Reverting to our sec. 91, in my opinion, its true interpretation is that which I have indicated above, namely that where there has been a mistake, or even a non-compliance with Chapter III amounting to an infringement of a principle laid down by that chapter, the Court shall not set aside the election if it is satisfied (1) that the election as a whole was substantially conducted in accordance with the principles laid down in Chapter III and (2) that such non-compliance did not affect the result of the election. On this view of sec. 91 the question whether the mistake or non-compliance is sufficient to prevent the curative provision from operating becomes a matter of degree.”

and further on 410 when dealing specifically with the burden of proof:

> *“Passing to the onus of proof under sec. 91, it seems to me clear that, once it has been shown by the petitioner that a non-compliance with the provisions of Chapter III has occurred, the onus lies on the respondent to prove that both conditions mentioned in the curative section have been satisfied.*"

Section 91 was subsequently copied in s 36 of the Qwaqwa Election Proclamation R204 and discussed by Steyn J in *Mota en Andere v Moloantoa en Andere*, 1984 (4) SA 761 (O). At p 432E-F the learned

Judge approved the interpretation given to the similar formulation in the 1946-Act by Tindal JA in *Putter v Tighy* (supra). Section 91 was subsequently substituted by s 113 of Electoral Act, No. 45 of 1979. Referring to that section in *South West African Peoples Democratic United Front en 'n Ander v Administrateur-Generaal, Suidwes-Afrika, en Andere*, 1983 (1) SA 411 (A) at 432E-F in the context of a dispute arising from an election under the Party List Election Proclamation, AG 54 of 1980, Jansen JA again endorsed the interpretation in Tighy's-case. In considering the similarly worded provisions of Regulation 47 promulgated under the Community Councils Act, 125 of 1977 in *Scott and Others v Hanekom and Others*, 1980 (3) SA 1182 (C), Marais AJ first noted that it read identical to the curative provision in s 91 of the Electoral Act, No. 46 of 1946 considered in Tighy's-case and, pointing out that its scope and impact has been considered on a number of occasions by the Courts, he accepted that the following propositions must be regarded as settled law (at 1198E-H):

> "(1) The onus of proving that a mistake or any non-compliance with the relevant legislative provisions occurred lies upon the party who challenges the validity of the election.
>
> (2) 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 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.

(3) Whether or not any particular mistake or non-compliance 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. *Putter v Tighy* 1949 (2) SA 400 (A); *Mtoba and Others v Sebe and Others* 1975 (4) SA 413 (E) ; *Gerdener v Returning Officer and Another* 1976 (2) SA 663 (N) ; *Morgan v Simpson* (1974) 3 All ER 722 (CA).”

Compare also *Nkosi and Others v Khumalo and Others*, 1981 (1) SA 299 (W) at 304A-C.

Given the long line of authorities interpreting other similarly worded enactments over more than a century in other jurisdictions, the inclusion of s 95 in part V of the Act is not without significance and purpose: it is intended to maintain official accountability for due compliance with the statutory requirements of the election mechanisms and procedures whilst, at the same time, maintaining resistance against invalidation on unsubstantial grounds.

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 non compliance 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. In the result we reject Mr Maleka's contentions that the *Tighy* – interpretation should not be followed. He sought to rely on the interpretation given by Streatfeild J in *Re Kensington North Parliamentary Election* [1960] 2 All ER 150 (Election Court) at 152H - 153A on the differently worded provisions of s 16 of the Representation of the People Act, 1949 (UK).

It is common cause that the applicants'' complaints against the election go beyond mere mistake and non-compliance with the provisions of Part V. The case pleaded includes references to inferences of fraud, stuffing of ballot papers by unscrupulous persons, double voting and other irregularities. In dealing with the various grounds we shall, as we must, differentiate between those falling under s 95 and those under s 116(4) of the Act as far as the onus is concerned. We must also point out that a mistake or non-compliance contemplated in s 95 may also give rise to an irregularity or other ground referred to in s 116(4) and that it will be considered accordingly. But, given the substantial number of factual disputes, we must first consider the approach we shall adopt in considering the conflicting

evidence presented by the various parties when deciding on the merits of the various complaints.

Disputes of Fact: *the relevant approach*

It is trite law that where conflicts of fact exist in motion proceedings and there has been no resort to oral evidence, such conflicts of fact should be resolved on the admitted facts and the facts deposed to by or on behalf of the respondent. The facts set out in the respondent's papers are to be accepted unless the court considers them to be so far-fetched or clearly untenable that the court can safely reject them on the papers. (*Nqumba v The State President,* 1988 (4) SA 224 (A) at 259 C – 263 D*).* At home it was recently said by Strydom CJ in the unreported Supreme Court judgment of *Walter Mostert v The Minister of Justice* (Case No. SA 3/2002) at p. 18, as follows:

> " ... as the dispute was not referred to evidence, the principles, applied in cases such as Stellenbosch Farmers' Winery (Pty) Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 at p. 235 E-G and Plascon- Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd., 1984 (3) SA 623 (AD), 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 ..." [Our emphasis)

Generally: see *Plascon- Evans Paints v Van Riebeeck Paints 1984 (3) SA 623, and Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty)* Ltd 1957 (4) SA 234 (C) at 235 E-G.

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..."*

This is the approach we shall adopt in considering the evidence adduced in this application. With this in mind we now turn to the various complaints.

Stuffing: Complaints 1, 3, 20 and 23

There is dispute whether or not stuffing of ballot papers occurred, or could have occurred. There is not a scintilla of direct evidence that anyone, let alone first respondent, stuffed ballot papers in the ballot boxes in order to influence the outcome of the election. The applicants rely for the allegation that it did occur on inferences that it wants the Court to draw from the following facts: the absence of serial numbers

on ballot papers (Complaint 1); the fact that just too many people voted during the election than was physically possible (complaint 3); the fact that some constituencies recorded more votes than there were registered voters in those constituencies (complaint 20) and the Okahandja incident (complaint 23).

As we have shown earlier in this judgment, the first respondent was precluded by the principle of secrecy to print serial numbers on ballot papers and acted in accordance with law when it caused the serial numbers to be printed on the counterfoils of ballot papers. As we also demonstrated, the applicants' contention that more people voted in the election at certain polling stations than time allowed was based on the incorrect premise that only one voter had been allowed to be in a polling station at any given time. Counsel for the applicants conceded the mistaken premise and we did not understand him to pursue this complaint any further. The two central pillars upon which the allegation of stuffing rested therefore fell away.

The fact that the Okahandja ballots could not be traced back to a particular polling station does not really advance the applicants' case. To use the allegation that only ballots cast in favour of opposition parties were found burnt amongst the election material discovered near Okahandja in support of the assertion of rigging is not justified by

the evidence and is not the only inference that can be drawn from those facts. The affidavits submitted by the first respondent strongly suggest that the ballot papers might have fallen from a truck transporting ballot boxes. Such a possibility is not altogether untenable, because the material was not found hidden away but picked up next to a public road. Although the allegations that the first reported “discovery” and the later burning of those ballot papers have been fraudulently distorted and fabricated to give credence to the applicants’ intended challenge of the election are still the subject of a police inquiry, we do not find the version on behalf of the first respondent so far-fetched as to be rejected on the papers. Besides, there is nowhere in applicants papers even the remotest suggestion that the ballot papers found at Okahandja had not already been counted by the time they had been found.

Even if we were to accept that the ballot papers landed up next to the road as a consequence of some or other non-compliance with the provisions of Part V of the Act (such as the failure to properly seal a ballot box) and that, because of such non-compliance one of the principles contained in Part V of the Act had been violated, they are in any event too few in number (22 ballots) to have had any effect on the result of the election.

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 poling 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.

The remaining complaint is that more voters voted in certain constituencies than the number of registered voters on the voters' register for that constituency. These allegations are made in relation to the following constituencies (and the extent with which the number of votes counted exceeds the number of registered voters for that constituency is given in brackets): Katutura East (657), Windhoek east (4488), Windhoek Rural (1021), Windhoek West (2974), Amulenge (1082), Ompundja (132), Uuvudhiya (849), Olukonda (888), Onyaanya (959) and Omatako (835), i.e. a total of 13 885 votes.

Inasmuch as the explanation of the excessive voting percentages advanced by the Director constituted an acknowledged non-compliance with a number of sections falling under Part V of the Act, the first respondent shoulders the burden to prove that the election was nevertheless conducted in accordance with the principles laid

down in Part V and that the non-compliance did not affect the result of the election.

The first respondent does not contest the figures but proffers the following explanation: s 80(3) of the Act allows voters at an election for members of the National Assembly to vote by tendered vote at a polling station other than one in the constituency where he or she is registered. After such a person has voted, the ballot paper is placed in a tendered vote envelope, sealed and deposited in the ballot box for tendered vote envelopes (s 82(9)(d) and (e)(ii)). Although s 87(2)(c) of the Act requires that a retuning officer, after verification of the correctness of the presiding officers' returns, to replace all the tendered vote envelopes in a ballot box and cause it to be delivered to the Director of Elections to be sorted according to the constituencies indicated on the envelopes and to be counted and allocated to those constituencies (s. 87A(1)(c) and (d)), many returning officers failed to do that and mistakenly counted the tendered votes in the constituencies where they had been cast. This resulted in the excess number of votes in the constituencies mentioned by the applicants.

Whilst the purpose of sections ss 80(3) and 82(9)(d) and (e)(ii) is to allow as many registered voters as possible to vote in National Assembly and Presidential elections, sections 87(2)(c) and 87A(1)(c)

and (d) are designed to ensure that the process remains verifiable and transparent. If the latter provisions are not complied with and tendered votes are counted in the constituencies where they have been cast, the announced results per constituency will be incorrect and the integrity of the election may well be questioned – as the applicants have done in this case. Had the correct procedure been followed, it would not have been possible to record more votes than registered voters in a constituency and if it had happened, it would have constituted weighty evidence that something serious was amiss. The applicants expected and were entitled to assume that those procedures have been followed. It therefore comes as no surprise that they thought that the ballot boxes for those constituencies had been stuffed.

The first respondent's failure to observe the tendered-vote procedures prescribed in sections 87(2)(c) and 87A (1)(c) and (d) of the Act falls to be criticised; more so because the announced results created a distorted and patently incorrect – even ridiculous – impression in the minds of local and international observers who were entitled to assume that the prescribed procedures have been followed. It brought disrepute to the process which Parliament with so much effort tailored to be free and fair.

Verifiable transparency in the election procedures by a process of scrutiny is, in our view, one of the principles around which Parliament constructed many of the provisions contained in Part V, including sections 87(2)(c) and 87A(1)(c) and (d) of the Act. Without due compliance with those sections, the statutory imperative that National Assembly elections should be constituency-based may just as well be scrapped. Whatever the other consequences thereof may be, it will certainly make it more difficult to detect irregular practices such as stuffing. Moreover, it makes the process of verification difficult, if not impossible if those provisions are not complied with. We are therefore satisfied that the non-compliance with those sections constitutes a breach of one of the principles contained in Part V of the Act.

But what, if any, was the effect thereof on the result of the election? Although the election is conducted on the basis of constituencies, candidates do not stand and are not elected in the respective constituencies. The polling results in all the constituencies are eventually collated and, on the basis of proportional representation prescribed in Schedule 4 of the Constitution, seats are allocated to political parties and filled from party lists submitted under s 59 of the act. Purely for the purposes of such calculation, it matters not if a voters' ballot paper has erroneously been counted in constituency A rather than in constituency B to which it should have been allocated.

The first respondent has therefore shown that the non-compliance did not affect the result of the election as contemplated by s 95 of the Act.

The applicants did not ask that the issue relating to the excessive voting percentages be determined by reference to oral evidence. The explanation given by the first respondent for the excessive voting percentages in some constituencies cannot be dismissed as “far-fetched or clearly untenable” and, on the *Plascon–Evans* approach, falls to be accepted for purposes of this application. With that, the inference of stuffing drawn by the applicants on account of the excessive voting percentages falls away. We must therefore also conclude, as we do, that the applicants have failed to prove that the excessive voting percentages at some polling stations was the result of stuffing - which would have constituted an “irregularity” or “other cause” contemplated in s 116(4) of the Act. Serious as this complaint may be, and whatever criticism the first respondent’s non-compliance may justifiably attract, it does not affect the result of the election. On the approach we have adopted to evaluation of the evidence as a whole and the factual disputes in particular, we must also conclude that it does not support the suggestions of stuffing. We must note, however, that although we also do not consider this ground as a reason to order a recount, the incorrect allocation of tendered ballots may be corrected in a recounting process and, if that is possible, a more

accurate (and probably more acceptable) picture may emerge about the voting percentages in constituencies all over the country.

Voting material: *Complaints 12, 13, 15*

The applicants complain that a number of Elect 21 and Elect 22 forms listing particulars of ballot papers distributed to a number of constituencies and polling stations were not signed by the election officials who had received them (complaints 12 and 13). We have already pointed out that it is not apparent from these forms that they related to election material bearing on the National Assembly-election. Mr Frank indicated on behalf of the applicants that in the absence of an allegation to that effect, the applicants do not place much reliance on them except to the extent that they are but a further example of the many respects in which the respondent failed to conduct the elections in a regular and verifiable manner.

Although we accept the Director's explanation that these forms are not prescribed by any provision in the Act itself, he nevertheless admitted that they had been designed to keep track of all sensitive election material – and for that the first respondent must be commended. It seems to us though, that these good intentions will come to nothing if the forms are not used for the purpose of their design. We do not

accept the Director's attempt to play down the importance of these controlling mechanisms implemented by the First Respondent. Moreover, the first respondent may do well in reminding itself that an election of this nature is not a game of hide and seek: with the first respondent trying to hide irregularities and the affected parties having to seek for them. It is an all-important process in the attainment of the democratic ideals articulated in the Constitution. Transparency – by, for example, leaving a verifiable paper trail of every ballot paper from the moment it is printed until it is eventually destroyed in accordance with law – enable scrutiny and verification, thereby giving credence to the integrity of the process and confidence in its result.

The applicants also complain that the first respondent has failed to adequately preserve all records relating to the election. In support of the complaint, they refer to 5 documents found at a dump. These documents, we hasten to say, are not ballot papers. One, for example, is clearly a partly completed document apparently discarded by its author because ink had been spilled on it. Another relates to Regional Council elections and it is not clear from any of the other whether they relate to the election in question.

Whilst we consider the Director's response to these complaints to be rather inadequate, we accept that the failure to obtain a signature on

the Elect 21 and 22 forms does not constitute a mistake or non-compliance with the provisions of Part V of the Act. In the absence of any referral to oral evidence to canvas this aspect more fully, we are also not able to conclude that these forms relate to the election in question or that the Director's denial that those ballot papers have otherwise been accounted for can be dismissed without more. The same applies to the documents referred to in complaint 15. Hence, we must find that these complaints do not take the applicants' entitlement to the relief prayed for any further.

Voting: *Complaints 11, 16, 17*

The allegation of double voting (complaint 11) is based on entries made in a number of Elect 23 forms relating to tendered ballots issued at certain polling stations. Virtually all the entries made create the impression that the voters were registered in the same constituency as the one in which they cast their votes. From those entries the applicants seek to draw the inference that the voters concerned voted both by tendered vote and by ordinary vote. There is no direct evidence that double voting had occurred; for example, that the registration number of a particular voter to whom a tendered vote had been issued appears twice on the counterfoils of a ballot book.

The Director acknowledges that the forms have been completed incorrectly: the polling officers in question wrote the name of the constituency where the voters in question were registered on the heading to the form instead of the name of the constituency where the vote was being cast. This explanation, it seems to us is not only reasonable, but it is in most instances supported by particulars of the polling stations written on the documents. The polling stations referred to in the forms do not fall within the area of the constituencies mentioned therein and sometimes the names of the constituencies do not fall within the regions to which those forms relate – a clear indication that the name of the incorrect constituency was recorded in all instances. So, for example, will a form indicate that at the Malaika Shopping Centre - Oshifo polling station in the Oneshi constituency and Omusati region a tendered ballot was issued to a voter bearing registration card number 20569982 registered in the Oneshi constituency. Geographically though, the Malaika Shopping Centre – Oshifo polling station is situated in the Ruakana constituency in the Omusati region and not in the Oneshi constituency – the latter constituency does not even fall within the Omusati region. At some polling stations the mistake was later realised and the erroneously completed Elect 23 forms cancelled and substituted with forms containing the corrected entries. In the circumstances, we are satisfied

that the mistake has been adequately explained by the first respondent and that the applicants' complaint must be rejected.

The applicant's complaints that the polling officers did not refer to the voters' register at the Omusati Project polling station when they issued tendered votes to a number of voters (Complaint 16) is, at best, speculative and falls to be dismissed without more. No evidential basis has been provided for those allegations.

The last complaint about the voting procedures focuses on the failure of a presiding officer in the Okalongo constituency to note the registration numbers of voters to whom tendered ballots had been issued on the Elect 23 form – he noted the names of those voters instead. The applicants' suggestion that they had been allowed to vote without registration cards is not supported by any real evidence. They could easily have established from the voters' register whether or not those persons had been registered. In any event, given the approach to the evidence we have to apply in the absence of gainsaying oral evidence, we must accept that none of those voters would have been allowed to vote without a registration card and that their registration numbers have been noted on the counterfoils of the ballot papers. This complaint must therefore also fail.

Accounting and verification: *Complaints 4, 5, 6, 7, 8, 9, 19*

These complaints all relate to the failure of presiding officers to properly account for the number of ballot papers received by them as required by s 85(3) of the Act and the failure of returning officers to properly verify those accounts in terms of s 87(2) of the Act. In terms of those subsections, presiding officers are required to account in writing "for the number of ballot papers entrusted to them under the heads of ballot papers in the ballot box and unused and spoilt ballot papers." That return must accompany the sealed ballot boxes and separate packets of all unused ballot papers, spoilt ballot papers, counterfoils of used and spoilt ballot papers, marked copies of the relevant voter's register, the official stamp used at the polling station and other prescribed equipment or documents. They are all handed by the presiding officer to the returning officer immediately after the close of the poll, who then takes charge of them. The returning officer is required to inspect the seals of the ballot boxes and the packets before opening them for purposes of verification and counting. The contents of the ballot boxes and packets are compared with returns submitted by the presiding officers and the returning officers are required to prepare a report on the results of the verifications. The form used by presiding and returning officers for purposes of accounting and verification are known as Elect 16 forms.

The first respondent admits that the returns submitted in a number of constituencies do not give proper account of the ballot papers and/or that the accounts given have not been verified. That much is apparent from a number of the documents annexed to the applicants' founding affidavits. Based on those documents, the applicants complain that the accounts and/or verifications have not been made or signed (Complaint 4); that the forms have not otherwise been completed by the insertion of important information (Complaint 5); that some of those forms contain incorrect calculations and erroneous entries (Complaint 6) that the particulars of serial numbers have been omitted on some (Complaint 7); that some ballot books had more than 100 ballot papers (Complaint 8); that corrections on some of the returns have not been initialed (Complaint 9); that in the Anumalenge constituency tendered votes had been accounted for four times (Complaint 10) and that there is a difference between the account given and the verification in the Walvis Bay Rural Constituency (Complaint 19).

We must immediately say that a number of these complaints have proved to be without substance and/or weight: the fact that some ballot paper books had more than 100 ballot papers in them, is of no consequence as long as the ballot papers have been accounted for by

reference to their serial numbers, and the so-called fourfold accounting for the same tendered ballot papers proved to be all duplicates of the same document. Moreover, many mistakes appearing on a reading of those returns have been explained away by the Director, sometimes by annexing supporting documents and at other times by annexing corroborative affidavits of election officials. We do not deem it necessary to repeat all of those explanations summarised earlier in this judgment. Suffice it to say that, even if we accept the explanations given in relation to these documents and focus on complaint 4 only, the picture we are left with is a disturbing one: As the table below shows, 1 800 (plus potentially a further 1 600) ballots received by presiding officers have not been accounted for by them under their signatures and 13 998 (plus potentially a further 11 899) ballots received of which 9 926 (plus potentially a further 7 125) ballots cast have not been verified by the responsible accounting officers.

List of ballots not accompanied by signed return of Presiding Officer (s. 85(3))

Annexure Numbers	Constituency	National Assembly election		Uncertain whether Presidential or National Assembly election	
		Ballots received	**Ballots cast**	**Ballots received**	**Ballots cast**
D35-36	Anamulenge	800	695		
E3	Unknown			400	271
G2	Elim	1000	520		
H6	Karasburg			1200	
		1800	**1215**	**1600**	**271**

List of ballots not verified by Returning Officer (s.87(2))

Annexure Numbers	Constituency	National Assembly election			Uncertain whether Presidential or National Assembly election	
		Ballots received	Ballots cast		Ballots received	Ballots cast
D4	Katima Rural			(1)	400	336
D5	Kongola			(2)	800	396
D6	Kongola	800	395	(3)		
D8	Berseba	500	261			
D10	Ogongo	1000	498	(4)		
D12-13	Ogongo	1000	714			
D15	Engela	800	661			
D18-19	Engela	800	702			
D20	Engela	500				
D21-26	Engela	1100	990			
D29-30	Engela	897	737			
D41-43	Engela	1600	1436			
D49	Gibeon	1200	671			
E3	(unknown)				400	271
E4	(unknown)				1200	1128
F1-2	Ondangwa				1500	800
F3-4	Ondangwa				1500	549
F5-6	Ondangwa				1499	1131
F12	Epupa				300	273
F13-14	Epupa				600	280
F20	Opuwo				900	771
J4	Karibib	1401	964			
Q1	Outapi				2800	1190
U1-5	W'Bay Rural	2400	1897			
		13998	**9926**		**11899**	**7125**

Notes:

(1) The figures have been adjusted to adjust the entries mistakenly made

(2) The figures have been adjusted to take the unused ballots into consideration in correcting the entries mistakenly made.

(3) The figures have been adjusted to take the unused ballots into consideration in correcting the entries mistakenly made

(4) The figure of 100 has been adjusted to 1000 in accordance with the serial numbers of ballots received and accounted for.

In compiling this table we have omitted those returns in respect of which the Director (or the first respondent's counsel in the course of argument) gave an adequate explanation – such as that a particular document is not to be considered in isolation but as part of a bundle or series of documents; that some should be disregarded because they relate to the Presidential election or to the Regional Counsel election; that others were working documents and the like.

As will be seen from this table, by far the most ballot papers are affected by the absence of verification. Without verification, there is, for instance, no way of knowing that the ballots cast (according to the presiding officer's account) were found in the ballot box at the counting station and included in the results ultimately announced. Without such verification, those ballots may, for all we know, not have been counted at all. The converse holds equally true: without the verification that only the number of ballots cast as accounted for were found in the ballot boxes, any number could have been in there. This, again, leaves the door for stuffing and other forms of election fraud wide open.

Having shown that the presiding and accounting officers responsible for the due completion of those returns mentioned in the table have failed to account for the ballot papers or to verify those accounts as required by sections 85(3) and 87(2) of the Act, the first respondent

had to show that the election was nevertheless conducted in accordance with the principles laid down in Part V of the Act and that the non-compliance did not affect the result of the election.

Can it be said that, notwithstanding the absence of accounts and verification affecting so many ballot papers, the election was nevertheless conducted in accordance with the principles contained in part V of the Act? We think not. The purpose of the process of accounting and verification in terms of sections 85(3) and 87(2) lies at the heart of the principles of transparency and accountability built into the election process under Part V of the Act. Without that, the door would be wide open for stuffing and election fraud of virtually unlimited proportions and, instead of being one of the greatest aids in the attainment of a democratic dispensation, elections may become its greatest hurdle. There are, in our view, few enemies more destructive of the democratic values in any society than manipulated elections masquerading as ones freely and fairly conducted. It is for these reasons that we have deemed it appropriate to take a serious view on the failure to comply with the statutory requirements of transparency, accountability and verification.

According to the announced results (the one corresponding with the published results) 67 of the 72 seats in the National Assembly were

allocated to various political parties by dividing the number of votes gained by each with the quota of votes per seat determined in terms of paragraph (1) of Schedule 4 of the Constitution. The remaining 5 seats were allocated in sequence of the highest surplus of the remaining votes as provided for in paragraphs (2) and (3) of the Schedule. According to the first respondent's calculations the SWAPO party had the fifth highest surplus ("overhang") with 9 059 votes and was thus awarded the last available seat. The first applicant had the sixth highest surplus (4637 votes) and therefore missed out on the additional allocation. The difference between the surplus of those two parties is therefore about 4 422 votes. If one were to consider this difference in the context of 9 926 (plus potentially a further 7 125, i.e. 17 051) ballots cast without being verified and 1 800 (plus potentially a further 1 600, i.e. 3 400) unaccounted ballots received, it is immediately apparent that the first respondent faced an insurmountable obstacle in discharging the onus cast on its shoulders by s 95 of the Act. Of course, it may be that all the unaccounted for or unverified votes - and no other - have been counted and included in the announced results. But we do not know that and we cannot speculate about it. What we do find though, is that the first respondent has failed to adduce sufficient reliable and credible evidence to that effect or to show that the result of the election would not have been different if there had been due compliance. Having failed to do so, the

first respondent must bear the responsibility for it's (and its Director's and officers') failures.

If we consider some of the other complaints about the returns, the picture may become even darker for the first respondent. So, for example, was no explanation proffered for some of the returns rendered without reflecting the serial numbers of the ballot papers. It is, however, not necessary for us to deal with the merits of the other complaints bearing on the "defective" returns in view of the conclusion we have already arrived at.

The Results: *Compilation and Announcement (Complaints 2, 14, 18, 21)*

It is common cause that the first respondent announced different results at different stages and thus causing a great deal of confusion (Complaint 2). By itself this may not be sufficient reason to avoid the election but it raises a number of serious questions about the care and competency with which that important function has been discharged.

We have already referred to the incorrect results caused by the incorrect allocation of a large number of tendered ballots in a number of constituencies. What is worse, though, is the Director's decision not

to include in the final result about 504 votes cast by means of tendered ballots and 804 votes cast outside Namibia (Complaint 14). This constitutes a clear and deliberate breach of s 89 of the Act. We do not accept the Director's timid excuse that it had been agreed with political parties to follow such a course. No agreement made for the sake of convenience – even expediency – may detract from what the Act clearly requires. Having done what he did, the Director in effect disenfranchised those voters and made a mockery of the arrangements made and expenses incurred to make it possible for Namibians abroad to have their votes cast and counted. The disregard of these votes (1 308 in number) must be added to those we have mentioned earlier and serve to compound the difficulties faced by the first respondent to prove that the collective effect of the various ways in which the Act has been disregarded does not affect the outcome of the election.

We accept the explanation given by the Director about the Anamulenge, Elim and Tsandi constituencies (Complaint 21) and why there may be differences between the provisional results displayed or provided by the first respondent and those finally announced (Complaint 18). However, the point has pertinently been made by the applicants that the Results Centre had no competence to, as it were, vet the results forwarded by returning officers to the Director. On the Director's own admission, he only announced results after the Results

Centre had cleared them for him. It is not clear, and the first respondent does not show otherwise, that the Director did not abdicate responsibility in receiving and acting on the returns from the returning officers. The first respondent has therefore failed to establish that the results announced are those that the Director received from the returning officers.

Conclusion

The applicants have established that the first respondent failed to comply with several of the provisions contained in Part V of the Act. That, as we have found, triggers the curative provisions in s 95 (4) of the Act. The first respondent therefore bore the onus of showing that the election was nevertheless conducted in accordance with the principles contained in Part V and that those failures did not affect the outcome of the election.

The extent of the non-compliance takes the form, principally but not exclusively - as we have shown - of defective returns. The *prima facie* failure to properly account for and to verify the accounts relating to ballot papers received and ballots cast called for an answer by the first respondent. Why the returning officers did not depose to affidavits to explain their apparent failures was left unexplained and, we must add in passing, that we do not find as credible the respondent’s version

that they had in place during the election an alternative system of tracking all election material in the way that it is suggested in the papers.

With only a difference of 4 422 votes between the surplus of the Swapo Party (9 059) and that of the Republican Party (4 637), the number of ballots affected by the extent of the non-compliance we have found to exist becomes so significant that we cannot allow the announced results to remain: firstly because it admittedly does not include the 1308 tendered ballots and those cast outside Namibia, secondly and most importantly, because of the effect of the further 11 141 (plus the further possible 7 398) votes that have not been accounted for and/or verified. With substantially more than 20 000 votes bearing one way or another on the results of the election, we must conclude that the first respondent failed to discharge the onus it had. But even if the Applicant had the duty to show that it affected the results, our conclusion would not have been any different given the margins we have referred to earlier.

It will be noted though, that none of the failures on the part of the first respondent or those working under its supervision relate to any stage in the election prior to the closing of the polls. All difficulties giving rise to the justifiable complaints have arisen in the course of the

subsequent procedures – the preparation of returns by presiding officers required immediately after the polls had closed; the verification of those accounts prior to the commencement of counting at counting stations; the failure to exclude tendered votes in the constituencies where they had been cast and to forward them to the Director for allocation to the constituencies in respect of which they have been cast; the exclusion of certain tendered votes from the final results announced and the exclusion of the votes cast outside Namibia from those results.

We must bear in mind that an election is an expensive, albeit necessary, exercise in democracy. It is organized at great expense to the taxpayer and not without substantial inconvenience to the public and many other persons who do duty as election officers. To avoid the election as a whole and order that the election process should start *de novo* is not justified under these circumstances. All of these deficiencies found to exist may be properly addressed if we ordered a recount. The applicants anticipated that this may well be the appropriate relief in the circumstances of this case and sought such relief in the alternative.

Costs

What remains, is for the Court to give its reasons for the order of costs made. In applications of this nature an order as to costs will normally follow the result of the event (see: *Union Government v Gass*, 1959 (4) SA 401 (A) at 413C), but the Court nevertheless retains a wide discretion to deviate from that approach in the case of special circumstances (See: *Kathrada v Arbitration Tribunal and Another*, 1975 (2) SA 673 (A) at 680C). What would constitute such circumstances depends on the nature of each case but, in the case of election applications, include those mentioned in s 120(1) of the Act, which provides as follows:

> "All costs, charges and expenses of and incidental to the presentation of an election application and the proceedings consequent thereon, shall be defrayed by the parties to the application in such manner, and in such proportions, as the court may determine, regard being had to the disallowance of any costs, charges or expenses which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part either of the applicant or the respondent, and to the discouragement of needless expense by throwing the burden of defraying it on the parties by whom it has been caused, whether such parties are or are not on the whole successful."

Although the applicants have not been successful in moving an order to set aside the election, they have obtained the alternative relief sought. As such, they have been substantially successful in the event. The greater part of the allegations unsuccessfully tendered to invalidate the election, was also relevant to the alternative prayer of a

recount. We do not find any suggestion of vexatious conduct and none has been suggested. In some instances where we found an allegation to be unfounded (such as the inference of stuffing based on voting returns in excess of 100%), it is the first respondent and those working under its control who must be blamed (i.e. by failing to comply in all instances with the statutory provisions relating to the allocation of tendered votes). Whilst the Court rejected some of the objections raised by the applicants (the principal one being that the serial numbers of ballot papers should not have been printed on their counterfoils), those objections were not spurious. So, for example, did Mr Maleka concede that the provisions of s 74(2)(b) were ambiguous and that the interpretation which the applicants sought to place on them presented a reasonable reading of the section. It can also not be said that the manner in which the applicants framed the application and pursued it in argument gave rise to any needless expense. Without the benefit of an explanation, the applicants were, it seems, entitled to frame their application the way they did. Whenever the first respondent adequately responded to a particular concern or incident, that issue was not pressed either in reply or in argument.

Even if there were instances where the court would have been entitled to deprive the applicants of a portion of the costs awarded to them, they are not so significant as to justify a departure of the order we

made. Moreover, given the extent of the first respondent's many failures to cause due compliance with the important statutory responsibilities entrusted to it by Parliament, the disrepute those failures brought to the integrity of the process and the additional burden on taxpayers and substantial inconvenience that will result from them, this Court would have declined to make an order of costs favourable to the first respondent in those instances as a mark of its displeasure. If the public get the impression that those put in charge of it can with impunity disregard the rules that govern elections, or that their votes may very well be ignored because someone in charge of the process feels it counts for nothing, voter apathy will set in and seriously undermine the legitimacy of those chosen to run the affairs of the nation. The right to participate in the affairs of State through elected representatives has been denied for the vast majority of Namibians for too long. That right has been hard won through the sacrifices and endeavours of many. Therefore, the Founding Fathers of the Constitution ordained that those who wish to preside in governance over this nation must be chosen at regular intervals through a universal adult suffrage. The process through which the suffrage is to be exercised must not only be free and fair, but must also reflect the wishes and choices of all the voters who participate in it by ensuring a counting and ballot accounting process that is credible and complete.

The first respondent had to direct, control and supervise it according to law. It failed in some significant respects.

In conclusion, we must point out that due to the incomplete and misleading manner in which Government Notices 3 and 4/2005 dated 3 January 2005 were presented to us as an annexure to the first respondent's affidavit, we inadvertently referred to GN 3/2005 instead of GN4/2005 in the order we made in the following terms:

1. "That the relief sought in prayer 1 of the Notice of Motion (i.e. to declare the National Assembly election held on 15th and 16th November 2004 null and void and of no force and effect and to set it aside) is refused.

2. That the announcement of the results of the National Assembly election held on 15th and 16th November 2004, made on 21st November 2004 and published in Government Notice No. 3 dated 3rd January 2005, is declared null and void and of no force and effect;

3. That the First Respondent –

    3.1 cause the recount of the votes cast in that election as provided for, and in accordance with the provisions of, the Electoral Act, 1992 (and without derogating from the generality thereof, in particular also with the provisions of sections 87 and 87A of that Act as amended) at a secure and convenient place determined by it in Windhoek;

3.2 cause such recount to commence not later than 5 calendar days from the date of this order and to be concluded as soon as is reasonable thereafter but not later than 10 calendar days from the date of this order;

3.3 allow the applicants and the other respondents to exercise their rights in regard to such counting as provided for in the Electoral Act, 1992;

3.4 cause the results of the election determined in such recount to be announced in terms of section 89 of the Electoral Act, 1992;

4. That the First Respondent pays the costs of the First and Second Applicants, such costs to include the costs consequent upon the employment of two instructed counsel."

DAMASEB, JP	**MARITZ, J**	**MTAMBANENGWE,AJ**