REPORTABLE

CASE NO. SA 12/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

RALLY FOR DEMOCRACY AND PROGRESS	**1st Applicant /Appellant**
UNITED DEMOCRATIC FRONT OF NAMIBIA	**2nd Applicant /Appellant**
DEMOCRATIC TURNHALLE ALLIANCE	**3rd Applicant /Appellant**
CONGRESS OF DEMOCRATS	**4th Applicant /Appellant**
REPUBLICAN PARTY OF NAMIBIA	**5th Applicant /Appellant**
ALL PEOPLES PARTY	**6th Applicant /Appellant**
NATIONAL UNITY DEMOCRATIC ORGANISATION	**7th Applicant /Appellant**
NAMIBIA DEMOCRATIC MOVEMENT FOR CHANGE	**8th Applicant /Appellant**
DEMOCRATIC PARTY OF NAMIBIA	**9th Applicant /Appellant**

and

ELECTORAL COMMISSION OF NAMIBIA	**1st Respondent**
SWAPO PARTY OF NAMIBIA	**2nd Respondent**
MONITOR AKSIEGROEP	**3rd Respondent**
SOUTH WEST AFRICA NATIONAL UNION	**4th Respondent**
NATIONAL DEMOCRATIC PARTY	**5th Respondent**
COMMUNIST PARTY	**6th Respondent**

Coram: SHIVUTE CJ, MARITZ JA, MAINGA JA, CHOMBA AJA*et* MTAMBANENGWE AJA

Heard: 3 -5 October 2011

Delivered: 25 October 2012

APPEAL JUDGMENT

THE COURT:

A. Introduction

[1] The primarypurpose of the applicants is to seek an order setting aside the November 2009 general election for members of the National Assemblywhich, they claim, must be avoided on account of numerous corrupt, illegal, irregular and unprocedural electionpractices which resulted in an undue election or return.To that end, they profess to draw on – and ultimately seek to vindicate - the principle of democracyin which our Republic is constitutionally rooted.The first and second respondents oppose the applicationand, unsurprisingly, purport to do so in defence of the very same principle.They deny that the election was marred or its return affected by the alleged malpractices.Theycontend that the declared result reflectsthe political will of enfranchised Namibiansfreely exercised in an election fairly conducted. Neither the election nor its results, they maintain, should be set aside:Accedingto the applicants'unfounded and unproven assertions wouldsubvert the democratically ascertained constitutional and political mandate given by Namibians to their elected representatives in the National Assembly.

[2] With the notion of democracy at the core of the conflicting contentionsadvanced by the opposing partiesin this matter, it is apposite to briefly reflect at the outset on its constitutional significance and the importance of its

place in the adjudicationof the multiple issues presented to the Court in the course of this litigation.

[3] The principle of democracy is an immutable part of the constitutional bedrock upon which our country has been founded. It is historically, ideologicallyand socio-politically profoundly important to our character and constitution as a nation:It is the first mentioned of the interrelated, foundational triad of principles on which our State is constitutionally grounded.[1]Its scope and import are deepened and augmented by the other two equally importantprinciples proclaimed in the same constitutional breath:the rule of law and justice for all.Moreover, as a preceptfundamental to our values and aspirations as a nation, its import is repeatedly echoed throughout our Constitution, from thePreamble to the Schedules.Its purposeis articulated in the third paragraph of the Preamble:[2]to effectively maintain and protect the fundamental complementary values of human dignity, equality, freedom, justice and peace[3]and the right to life, liberty and the pursuit of happiness[4] 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. Its essence is captured in the founding provision of the Constitution that'(a)ll power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of

[1]See: Article 1(1) of the Namibian Constitution.
[2] Referring to the rights articulated in the first two paragraphs of the preamble, it reads: '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'.
[3]Enunciated in the first paragraph of the Preamble.
[4]Recorded in the second paragraph of the Preamble.

the State';[5]its protection isenduringly accorded to all Namibian citizens,[6]immutably entrenched as a fundamental right[7]and adherence to it is demanded for the legitimate composition of democratic institutions at all levels of State.[8]Respect for - and categorical adherence to the letter and spirit of - this principle is required in peremptory terms from all Namibians,institutions and agencies of State.[9]

[4] The essence of the democratic process by which the sovereignty and power of the Namibian people as a body politic aredemocratically converted into representative powers of State exercisable by its institutions under the Constitution was captured in an earlier discussion of the subject by this Court[10]:

> 'The right accorded to people on the basis of equal and universal adult suffrage to freely assert their political will in elections regularly held and fairly conducted is a fundamental and immutable premise for the legitimacy of government in any representative democracy. It is by secret ballot in elections otherwise transparently and accountably conducted that the socio-political will of individuals and, ultimately, that of all enfranchised citizens as a political collective, is transformed into representative government: a “government of the people, by the

[5]Article 1(2) of the Constitution.

[6]See: Article 17 of the Constitution and in particular Sub-Article (1) and (2) thereof which read:

'(1) All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and, subject to such modifications prescribed by law as are necessary in a Democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.

(2) Every citizen who has reached the age of eighteen (18) years shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein.'.

[7]Compare Article 131 of the Constitution which provides: 'No repeal or amendment of any of the provisions of Chapter 3 thereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.'

[8] See: Article 28 (Presidency); Articles 46(1)(*a*), 49 and 50 and Schedule 4 (National Assembly); Articles 69 and 70 (National Council); Article 106 (Regional Councils) and Article 111(3) of the Constitution (Local Authority Councils).

[9]Compare Article 5 of the Constitution.

[10] In para 1 of the judgment in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC).

> people, for the people". It is through the electoral process that policies of governance are shaped and endorsed or rejected; that political representation in constitutional structures of governance is reaffirmed or rearranged and that the will of the people is demonstratively expressed and credibly ascertained.'*(footnotes omitted)*

[5] These and similar[11] considerations must have prevailed on Parliament's collective mind when it passed, andsubsequently amended,[12] the Electoral Act, 1992 (the 'Act')to establish structures, determine procedures and create mechanisms to facilitate democratic representation in those institutions of State.The Act essentially provides a statutory framework for the regular conduct of national and regional multi-party electionsin a free, fair, transparent and accountable manner.As this Court has previously noted in summary, the Act-

> 'regulates the registration of voters and political parties, the compilation of voters' registers, the nomination of candidates and the conduct of elections under the fair and impartial direction, supervision and control of an Electoral Commission.Its provisions seek to further trench the democratic principles on which Namibia was founded and to promote and secure the free and fair election of political office bearers in a transparent and accountable manner. To that end, the Act criminalises electoral fraud and malpractices in all their manifestations, including conduct intended to improperly manipulate the casting of votes, undermine the integrity and fairness of the electoral process and detract from the reliability of the results. These include corrupt and illegalpractices, infringements which compromise the secrecy of the ballot, wilful neglect of duties by election officials and any conduct

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[11]Such as those which, in respect of the 2009 amendment of the Electoral Act, 1992, found expression in the Southern African Development Community's '*Principles and Guidelines Governing Democratic Elections*' (adopted by the SADC Summit in Mauritius during August 2004). The SADC Principles and Guidelines, in turn, expressly refers to and draw on the '*OAU/AU Declaration on the Principles Governing Democratic Elections in Africa*' - AHG/DECL.1 (XXXVIII) approved by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) at its 38th Ordinary Session held in Durban, South Africa during 2002 and the '*Guidelines for African Union Electoral Observation and Monitoring Missions*' - EX/CL/35 (III) Annex II.

[12]Compare the Electoral Amendment Acts of 1994, 1998, 1999, 2003, 2006, 2009 and 2010 (Nos. 23 of 1994, 30 of 1998, 11 of 1999, 19 of 1999, 7 of 2003, 4 of 2006, 7 of 2009 and 11 of 2010).

which unlawfully interferes with the electoral mechanism, election officials, polling stations, polling equipment or the voting process in general.'[13]

[6] The Courts were invested with powers to preclude or punish election malpractices – whatever the manifestation thereof and irrespective of whether they have been initiated or perpetrated by voters, candidates, political parties, election officials,[14] institutions or by any other person or authority. Parliament also recognisedthe Courts' overarching judicial powers of constitutional supervision and review[15]and, regard being had to the proposition that the public process of free and fair elections is an intrinsic, indivisible and essential component of the democratic aspirations, principles, valuesand rights articulated in the Constitution,Parliament also entrustedthe Judiciary with the duty to adjudicate election disputes under the Act,[16] including complaints that an election return rendered or anelection itself isundue 'by reason of want of qualification, disqualification, corrupt and illegal practice, irregularity or by reason of any other cause whatsoever'.[17]This obligation casts an onerous responsibility on the Courts to scrupulously maintain and enforce the principle of a representative democracy in our constitutional society and to jealously guard against any infringement or erosion thereof.

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[13] See: *Rally for Democracy and Progress and 16 Others v Electoral Commission of Namibia and 7 Others, supra,* para [5].

[14]Including returning officers, presiding officers, polling officers, counting officers, staff member of the Directorate of Elections or member of the Electoral Commission.

[15]Compare the powers of the Superior Courts to 'interpret, implement and uphold' the Constitution in Articles 79(2) and 80(2). See also: Articles 5, 25 and 81 in this context.

[16]Compare, for example, sections 19 (appeals against refusals to register voters), 22 (the hearing of objections against the inclusion of names on the provisional voters' register), 23 (the statement of appeal cases pertaining to the enrolment of voters for decisions to a Judge of the High Court), 45 (appeals against decisions of the Commission regarding the registration of political parties) and the adjudication of election applications under Part VII of the Act.

[17]See s 109 of the Act. It provides as follows: 'An application complaining of an undue return or an undue election of any person to the office of President or as any member of the National Assembly or a regional council or local authority council by reason of want of qualification, disqualification, corrupt and illegal practice, irregularity or by reason of any other cause whatsoever, shall, subject to the provisions of this Part, be made to the court.'

[7] The Court a quo acknowledged this responsibility when it dealt in the following excerpt from its judgment with concerns proffered about the cost implications which an order setting aside the election might have[18]:

> 'We want to extend a clear warning though that if and when circumstances justify doing so, the Court will set aside an election whatever the cost to the public finances in doing so. That is what the Constitution demands: cost implications of setting aside an election must never become the ruse for a corrupt and fraudulent election, or one conducted in breach of the principles contained in Part V of the (Act).'

We endorse this view. This is also the approach which this Court must apply to the adjudication of the disputes before us. We need not be reminded that democracy in this country was attained through great sacrifice and suffering. The price thereof cannot be measured in currency and we cannot - and shall not - allow it to be surrendered or compromised for the sake thereof.This case falls to be adjudicated on proven facts and established principles of law only – not on the basis of economic or party-political considerations or conveniences.If, 'by reason of want of qualification, disqualification, corrupt and illegal practice, irregularity or by reason of any other cause whatsoever,'[19] the Court concludes that the election or a return thereof was undue; that a person or persons was/were not duly elected; that another person or persons should be declared duly elected or, for that matter, that no person was or is entitled to be declared duly elected- as the case may be - the Court is obliged to grant appropriate relief under the Constitution[20] and the Act to

[18]In paragraph 324 of the judgment.
[19] See s 109 of the Act.
[20] Including the common law retained under Art. 66(1) of the Constitution and the Courts' inherent and express powers contemplated in Articles 78(4), 79 and 80 thereof.

meet the specific complaint(s) established.[21]Although the specific causes for election complaints enumerated in s 109 contemplate different methods of illegal interference with or manipulation of an electionand may conveniently be considered as different manifestations of the wider concept of 'electoral fraud,'the phrase 'or by reason of any other cause whatsoever' in the section goes further: the view we take is that it also includes mistakes or non-compliance with the provisions of Part V of the Act as contemplated in s 95 (which may not always be accompanied by an illegal intent or improper motive)ifit appears to the Court that, as a result, the election was not conducted in accordance with the principles laid down in that Part.

[8] The only margin of tolerance permitted by the Act to the Court in the adjudication of an election complaint is to be found in ss 95 and 116(4) of the Act.In terms of s 95, a Court may not set aside the election by reason of a mistake or non-compliance with the provisions of Part V of the Act if it appears to the Court that the mistake or non-compliance did not affect the result of the election and that the election was conducted in accordance with the principles laid down in that Part. Likewise, in terms of s 116(4), an election shall not 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 the cause relied on in the election complaint did not affect the result of the election.

[21] These include the powers specifically conferred on it by s 116 of the Act.

[9] Electoral fraud – and even regulatory non-compliance[22] which subverts the principles of a free, fair and transparent election as contemplated in s 95 – invariably results in the corruption of democracy unless it is timeously detected, exposed and effectively addressed by all organs of State and the agencies of Governmentconcerned. Through a plethora of illegal devices and methods, the perpetrators of electoral fraud and their principals seek to subvert and erode the expressed political will of enfranchised citizens for their own gain and political motives.The more extensive the fraud, the greater the deleterious impact on the reliability of the results and, the higher the number of invalid votes included in the count, the more dilutive the effect of the fraud is on the power which eligible voters are constitutionally entitled to exercise through the democratic process.In our view, there is an irresistible public interest at stake to ensure that the principle of democracy is not compromised by illegitimate means and methods. We are a constitutional society and, as such, it is vital that the democratic institutions of State through which we are governed,legitimately reflect and accurately represent the powers and aspirations of the Namibian society as a political collectiveunder the Constitution. On these considerations, we regardthe observations by Sachs, J to be of particular relevance:

> 'Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship … regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of

[22] The label 'regulatory non-compliances' is not intended to be all inclusive but used in the judgment only for the sake of brevity. Subject to the interpretational *caveat* referred to earlier in the paragraph, we shall collectively refer to the other grounds for an election complaint as 'electoral fraud'.

> personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic...nation; that our destinies are intertwined in a single interactive polity.'[23]

Although made in another jurisdiction, these remarks sprung from a historical context of oppression, discrimination and disenfranchisement not dissimilar to ours and they echo with the same clarity and force some of the underlying reasons for democratic values and aspirations which we have constitutionally entrenched. Thus, the constitutional importance of these considerations should not only inform the Judiciary's deliberations and judgments on matters where the principle of democracy is at stake (as in this case) but, as guardians of the Constitution, the Courts are obliged to - and will - fearlessly uphold and strenuously defend. The applicants claim that the High Court has failed to do so in this case whereas the first and second respondents strenuously assert the converse. It is to those proceedingswe shall turn next.

B. The Proceedings in the High Court

[10] Except for the Electoral Commission (the 'Commission', cited here and a quoas the first respondent), all the applicants and respondents are registered political parties that participated in the 2009-general election for members of the National Assembly. Some of them also nominated candidates for the Presidential election which was held at the same time. In the battle for ballots, each sought to advance its own political manifesto and endeavoured to secure the election of as many of the candidates[24]nominated by them on party listsas the principle of

[23]In *August and Another v Electoral Commission and Another*, 1999 (3) SA 1 (CC) at para 17.
[24]They were nominated on party lists compiled and published in terms of sections 59 and 60 of the Act.

proportional representationwould allow for members of the National Assembly.[25]During the run-up to the Presidential and National Assembly elections,the applicants became concerned about the manner in which the National Voters' Register for the general election was compiled, certified, published and distributed. Their initial unease stemmed from the fact that the Register which was made available for inspection to the public on9 November 2009[26]comprised approximately 1,181,835 voters whereas later Registers distributed by the Commission shortly before the commencement of the election comprised of 822,344 and 820,305 voters respectively.These concerns triggered further investigations, most notably onedone at their behest by a certainMr Götzto assess the sufficiency of the Register to fulfil, what they assert, was its primary purpose: to identify eligible voters before the election, thereby creating the means to precludethe casting of illegitimate votes and prevent the fraudulent 'stuffing' of ballot boxes during the election.Already concerned, they were alarmed when,during the general Presidential and National Assembly elections on 27 and 28 November 2009 and the counting of ballots in the days that followed, they observed multiple claimed deviations from the prescriptive provisions of Part V of the Act which regulate the manner in which the elections had to be conducted. When, on 4 December 2009, the results of the elections were announced[27], they publicly protested the correctness of the returns and questioned the validity of the elections.

[25]As required by Art. 49 of the Constitution.
[26] In terms of section 26 (3) of the Act. Notice that the Register was available for inspection was published by Government Notice No. 225 in Government Gazette 4375 of 9 November 2009.
[27]Later published in Government Notice No. 4397 dated 18th of December 2009.

[11] Their political differences notwithstanding, the applicants were unified in their claim that the entire electoral process was fraught with irregularities. Thus, they made common cause to continue with their investigations and, seeking to find documentary support for the alleged pervasive irregularities, they (and their respective nominees for the Presidential Election) jointly launched an urgent application in the High Court against the Commission[28]on 16 December 2009 to produce for their inspection a long list of election materials in the Commission's possession, including – but not limited to - all counted, unused, rejected and spoilt ballot papers in respect of both elections and the counterfoils thereof. They also sought an order allowing them to make copies of some of the material. The Commission opposed part of the relief sought, most notably, discovery of the ballot papers.The application was moved in the High Court on 24 December 2009 and the Court granted part of the opposed relief and, for the balance, issued an order by agreement between the parties. In summary, the court order facilitated a discussion of the modalities regarding the inspection and production of the election materials referred to in its order and enjoined the Commission to make discovery of those documents by no later than 28 December 2009. By then, the last of the 30 day period within which an election application had to be brought in terms of s110(1) of the Act[29] (i.e. 4 January 2010) was already looming large. To aggravate matters for the applicants, the auditing process did not commence in time and did not always proceed smoothly for reasons obscured by hotly contested accusations and counter assertions which we need not traverse in more detail at this stage. The applicants claim that they sought to expedite the auditing process by

[28]They also cited the other political parties and their presidential nominees who had participated in the elections but did not make common cause with their claims citing as co-respondents.
[29]We shall quote and refer to this section more extensively later in the judgment.

employing people in teams that worked in shifts around the clock in seeking to meet the statutorydeadline but that the 'co-operation on the part of the (Commission) was more in the fashion of dragging feet than in consideration for the applicants' need to have the application ready as required by the Act.' They allege that 'startling discoveries' were made during the auditing process and that, as a result of the delays- attributed by them to the Commission - they were not in a position to present the Court with all the facts in the election application.

[12] The election application, which related only to the National Assembly election,was presented to the registrar of the High Court between 16:00 and 16:30 on the last day of the 30 day period set by s110(1) of the Act. The essence of the application is captured in the first two paragraphs thereof. Given their importanceto the adjudication of this matter, it is appropriate that they be reproduced in full: The applicants sought -

> '1. An order declaring the election for the National Assembly held on 27 and 28 November 2009 null and void and of no legal force and effect and that the said election be set aside.
>
> 2. Alternatively to prayer 1 above –
>
> > 2.1 An order declaring the announcement of the election results for the National Assembly election … null and void and of no legal force and effect.
> >
> > 2.2 Ordering the first respondent to recount in Windhoek the votes casted in the said election as provided for in Act 24 of 1992 and to allow the applicants as well as the second to sixth respondents to

> exercise their rights in regard to such counting as provided for in the said Act.'

[13] In addition, the applicantsprayed for an order granting them 'leave to supplement their papers and to amend the notice of motion before the expiry of the 10 day period contemplated in s 113 of Act 24 of 1992 . . . and to accept any supplementary affidavit (or amendment of the notice of motion) already delivered at the time of the hearing of this application (and within the aforementioned 10 day period) as part of the applicants' founding papers of record in this matter.'The granting of this relief, the applicant maintained, would dispense with the need to bring further applications to extend the 30 day period contemplated in s 110 of the Act.

[14] On 14 January 2010, after the applicants had furnished security for the election application as determined by the registrar in terms of s 110(3) of the Act but before the expiry of the 10 day period within which it had to be served on the respondents in terms of s 113, the applicants lodged an 'Amplified Notice of Motion' with supporting affidavits. The facts deposed to in the amplified papers not only sought to substantially augment those presented in support of the initial application as envisaged in the relief initially sought, but also to broaden the substantive causes on which the applicants challenged the validity of the National Assembly election. In addition, the amplified notice of motion also widened the ambit of the applicants' attack to include a challenge to the validity and results of the Presidential election. To facilitate, what in effect constituted a further substantive election application, the applicants joined the individuals nominated by

some of them as candidates in the Presidential Election as co-applicants in the amplified application and cited the remainder of the presidential candidates in that election as co-respondents.

[15] Both the original and amplified applications were opposed by the Commission and the first respondent (the SWAPO Party of Namibia). Extensive answering affidavits were filed by them in support of their opposition to the applications. In those affidavits, they not only took issue with the substance of the facts on which the applicants founded their challengesbut also proffered evidence in rebuttal of those allegations and, in addition, raised a number of procedural objections *in limine.*These included, as regards the National Assembly election application presented on 4 January 2010, the point that, on a proper application of Rule 3 of the High Court Rules read in conjunction with s 110(1) of the Act, the application should be struck off the roll because the applicants did not make out a case in the founding papers that exceptional circumstances as required by Rule 3[30] existed for the registrar to accept the application outside his or her prescribed office hours. The application, they contend, was therefore submitted outside the permissible period prescribed by statute. In respect of the challenge to the validity and results of the Presidential Election, the Commission and second respondent contended *in limine* that, in substance, it was an election application separate and distinct from the election application earlier brought; that the applicants had failed to furnish security for the Presidential election application as required by s110(3)

[30]The Rule provides: 'Except on Saturdays, Sundays and Public Holidays, the offices of the registrar shall be open from 9 a.m. to 1 p.m. and from 2 p.m. to 4 p.m., save that, for the purpose of issuing any process or filing any document, other than a notice of intention to defend, the offices shall be open from 9 a.m. to 1 p.m. and from 2 p.m. to 3 p.m. and the registrar may in exceptional circumstances issue process and accept documents at any time, and shall do so when directed by the court or a judge.'

(a) of the Act and, as a result of that failure,'no further proceedings (could) be had on the application'according to s 110(3)(c) of the Act.

[16] Both of these objections found favour with the High Court when the applications were comprehensively argued before Damaseb JP and Parker J on 1 and 2 March 2010. In the event, both applications were struck off the roll with costs.[31]The applicants abided the order of the Court in relation to the striking of the Presidential election application but appealed to this Court against the order made in respect of the National Assembly election. When the appeal was set down, this Court entertained argument within the limited scope of issues defined by a direction of the Court issued prior to the hearing[32] and, on 6 September 2010 allowed the appeal with costs; set aside the order of the High Court in terms of which the National Assembly election application had been struck and substituted it for an order dismissing the respondents' objection *in limine* with costs. Finally, it remitted the matter to the High Court for further adjudication of the numerous remaining issues in the application.[33]

[17] The election application was again set down for hearing in the High Court on 20 September 2010. The parties were specifically invited to make additional submissions on the remainingissues subject to further adjudication, should they be so minded or advised. They declined the opportunity and the Court therefore reserved judgment to consider those issues on the basis of the submissions made

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[31]The judgment has been reported as *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others,* 2009 (2) NR 793 (HC).
[32] They appear in para [20] of this Court's judgment in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*, *supra,* at 505H-506G.
[33]Ibid at 533E-I

during the comprehensive hearing on 1 and 2 March 2010.The judgment was handed down on 14 February 2011.[34]

[18] At the outset of the judgment the Courta quo(*per* Damaseb JP and Parker J) made it clear that it would read the papers in the amplified notice of motion down to exclude the parties, relief and allegations relating to the validity of the Presidential election (which, at the time, was no longer in issue). It proceeded to identify the affidavits and annexures which the respondents sought to be struck as inadmissible and the remaining points which were raised by the respondents for consideration by the Court *in limine.*The latter included the point taken by both respondents that it was not permissible for the applicants to lodge - and would not be competent for the Court to entertain - the amplified notice of motion and supporting papers presented after expiry of the 30 day period prescribed in s110(1) of the Act. After considering the nature and effect of the amplified papers and the scheme of the Act for the presentation of election applications, the Court concluded that it was not legally permissible for the applicants to lodge the amplified papers.[35] It continued to hold that, even if its conclusion was wrong as a matter of law, the applicants in any event had to show cause why they should be permitted to file papers in addition to those already presented. After an analysis of the evidence in point, the disputes regarding the alleged delays in the auditing process and the evidential approach to be adopted on those issues, the Court concluded that the applicants had failed to show that they had been obstructed by the first respondent to access the election material or that there had beenspecial

[34]See: *Rally for Democracy and Progress and 9 Others v Electoral Commission of Namibia and 5 Others (2*), as yet unreported judgment of the High Court dated 14th of February 2011 in Case No. 1/2010.
[35]*Ibid*para [35].

circumstances which justifiedthe amplification which they were seeking. Thus, the Court concluded 'with firm confidence' that those papers stood to be rejected in their entirety and, therefore,struck the amplified notice of motion and all the affidavits and annexures thereto.[36]

[19] Having made that order, the Court proceeded to consider the Applicants' challenge to the National Assembly election solely on the basis of the election application and documents presented on 4 January 2010.[37] It carefully restated the essence of the 12 specific complaints advanced by the applicants and, in relation to each one of them, summarised the supporting allegations made by the applicants, each respondent's answer thereto, the extensive reply by the applicants and the numerous documents relied on or referred to by the deponents in the affidavits submitted by them. With those complaints in mind, the Court commenced with its analysis of the evidence by referring to the provisions of the Act relevant to those complaints, the duties of election officials on all levels in that regard and the powers of the Court in the adjudication of election applications as contemplated by the Act; by noting the evolution of electoral laws brought about in this country by amendments to the Act; by restating the evidential approach to be adopted in deciding disputes of fact apparent from affidavits in motion proceedings; by summarising the relevant provisions of the Computer Evidence Act, 1985 and considering the burden of proof in applications of this nature.It proceeded to analyse and weigh the admissible evidence on each one of the complaints within the matrix of these legal considerations. For reasons apparent from the judgment, the Court concluded that the specified complaints were without

[36] *Ibid*para [48].
[37] *Ibid*para [49] and further.

substance and had to be dismissed.Except to the extent that some of those complaints are still alive in the case before us (which we shall consider later in the judgment), it will serve no useful purpose for us to deal with the reasoning or findings of the Court a quoon the substance of the other specified complaintsdisallowed.

[20] The Court a quoalso referred to a rack of 'general complaints' listed in the founding affidavit deposed to by Mr Haufikuon behalf of the applicants. These complaints, the Court recognised, were very serious in form but, it concluded, were lacking in substance.[38] Mr Haufikuproperly conceded at the outset that these complaints were based on reportsmade to him by polling agents and that he had no personal knowledge of their substance. He claimed that, due to time constraints, he was unable to obtain affidavits from the polling agents and expressed the hope that he would be able to file such affidavits in due course. On the approach which the Court a quo took to the admissibility of the amplifying papers, it pointed out that no person was connected by name to the conduct complained of; that no mention was made of the date on - or of the polling station at - which the alleged conduct occurred and that the grounds were so vague that they clearly embarrassed and prejudiced the respondents in responding to them. The Court therefore struck the general complaints off the record for being vague and irrelevant.[39] In conclusion on the merits, the Court remarked that there was not one jot or title of evidence which established that any election agent or counting agent of the applicants was prevented from carrying out his or her statutory functions. It expressed concern about the generalised and non-specific allegations

[38] *Ibid* para [302].
[39] *Ibid* para [303].

made on behalf of the applicants on which they sought the Court to infer the corrupt stuffing of ballot papers to influence the outcome of the election. It pointed out that there was not a single proven case of actual ballot stuffing. Finally, whilst recognising that costs should generally follow the event, the Court criticised the conduct of the Director of Elections and referred to a number of administrative lapses in the conduct of the electionwhich gave cause for suspicionand, for those reasons concluded that special circumstances were disclosed which justified an order depriving the Commission of its costs in opposing the application. In the event, the Court a quo made the following order:

> '(i) The application is dismissed.
> (ii) The second respondent is entitled to the costs of its opposition to the application, such costs to include one instructing counsel and two instructed counsel.
> (iii) The first respondent is denied its costs of opposing the application.'

C. The Appeals

[21] The applicants a quo noted an appeal to this Court on 9 March 2011 'against the whole of the judgment or order' of the High Court. The notice was withdrawn the next day and a Notice of Appeal in identical terms but excluding the 8th applicant a quoas an appellant was substituted.[40]Stung by the criticism underlying the special costs order made against it, the Commission also noted a cross-appeal against the part of the order disallowing the costs of its opposition to the election application.

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[40]It follows that the 8th applicant a quo did not join the other applicants in their appeal and that any reference in this judgment to the 'applicants' in proceedings before this Court after 10 March 2011 does not include a reference to the 8th applicant a quo, unless otherwise stated.

[22] The applicants' endeavour to prosecute their appeal to this Court was, to say the least, fraught with difficulties – most of which arose as a result of their failure to comply with the Rules of Court regulating civil appeals. In terms of Rule 5(4)(a),[41]the applicants' legal representativeswere required to lodge powers of attorney(authorising of them to prosecute the appeal on the applicants' behalf) within 21 days after the notice of appeal had been lodged. It is common cause that they failed to comply with this requirement. The powers of attorney were lodged together with the record of appeal with the registrar on 24 May 2011 –more than three months after the order appealed against had been made.

[23] More significantly, the applicants failed to lodge the record of appeal within the three month period prescribed by Rule 5(5)(b). In addition, they neither sought nor obtained the respondents consent in writing for an extension of that period as contemplated in paragraph (c) of the sub-rule.[42]The record was eventually only lodged on 24 May 2011 – 5 days out of time. As a result, the appeal lapsedby operation of law and could 'only be revived upon the appellant applying for - and the court granting - condonation for the non-compliance and reinstatement of the appeal'.[43]The assistant registrar of the Court notified the applicants accordingly on 27 May 2011 and,in response,the applicants immediately apprised the registrar

[41] Rule 5(4)(a) reads: 'If the notice of appeal or of cross-appeal is lodged by a legal practitioner, he or she shall within 21 days thereafter lodge with the registrar a power of attorney authorising him or her to prosecute the appeal …'.

[42] The relevant parts of Rule 5(5)(b) and (c) read: 'After an appeal has been noted in a civil case the appellant shall, subject to any special directions issued by the Chief Justice … within three months of the date of the judgment or order appealed against or … within such further period as may be agreed to in writing by the respondent, lodge with the registrar four copies of the record of the proceedings in the court appealed from, and deliver such number of copies to the respondent as may be considered necessary…'

[43]See *Ondjava Construction CC v HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC) at 288C, para [2] and the authorities referred to therein. Compare also: *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC) para 39 and *Namib Plains Farming & Tourism CC v Valencia Uranium (Pty) Ltd & Others* 2011 (2) NR 469 (SC) at 475H para 18

and the respondents of their intention to seek condonation and reinstatement of the appeal. We shall deal with this application and the application to condone the late filing of the applicants' powers of attorney later in this judgment under the heading: 'Application for Condonation and Reinstatement of the Appeal'.

[24] To make matters worse, the applicantswere alerted by an objection raisedin the Commission's heads of argument that the record of appeal was incomplete. The record did not include the respondents' notices to strike out portions of the applicants' affidavits in the election application. As a result, the applicants were constrained to bring an application for leave to supplement the record of appeal and for condonation of their omission to include those notices in the record. This application will be considered later in this judgment under the heading: 'Application for Condonation and Leave to Supplement the Record of Appeal'.

[25] Adding to the self-inflicted procedural challenges they already faced, the applicants failed to comply with a directive issued by the Chief Justice that their heads of argument had to be delivered before noon on 19 August 2011. Although the applicants' heads of argument on the merits of - and prospects of success in - the appeal were lodged timeously, their heads of argument on the application for condonation and reinstatement of the appeal were delivered one day late. This non-compliance necessitated yet a further application for condonation which we shall deal with under the heading: 'Application for Condonation: Late Delivery of Applicants' Heads of Argument'.

[26] Before we turn to consider these applications, we must briefly deal with - and dispose of - the Commission's cross-appeal. Rule 5(6) regulates the prosecution of cross-appeals in circumstances where, as has happened in this case, the main appeal has not been prosecuted within the contemplation of Rule 5(5). It reads:

> '(a) If an appellant who has withdrawn his or her appeal or has failed to lodge the record of the proceedings in the court appealed from, or, if an appellant is in terms of paragraph (b) deemed to have withdrawn his or her appeal, a respondent who has noted a cross-appeal may, within 21 days of the date of receipt by the respondent or his or her attorney of notice of withdrawal by the appellant or of the date upon which the appellant is so deemed to have withdrawn his or her appeal, as the case may be, notify the registrar in writing that he or she desires to prosecute the cross-appeal, and such respondent shall thereupon for the purposes of sub-rule (5) be deemed to be the appellant, and the periods prescribed in paragraphs (a) and (b) thereof shall be calculated as from the date on which the appellant withdrew his or her appeal or on which the appeal is so deemed to have been withdrawn.
>
> (b) If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his or her attorney for consent to an extension thereof and given notice to the registrar that he or she has so applied, he or she shall be deemed to have withdrawn his or her appeal.'

[27] In the matter of *Channel Life Namibia (Pty) Ltd v Otto*[44] this Court had occasion to deal with the interpretation and application of this sub-rule. The reasoning in the judgmentfollows a line of authorities[45] on the interpretation of a

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[44]Supra, in paragraphs [27] – [41].

[45] Compare: *Santam Versekeringsmaatskappy Bpk v Pietersen,* 1970 (4) SA 215 (A) 217C – G; *Moraliswani v Mamili,* 1989 (4) SA 1 (A), *Court v Standard Bank of SA Ltd; Court v Bester NO and Others,* 1995 (3) SA 123 (A); *Mamabolo v Rustenburg Regional Local Council,* 2001 (1) SA 135 (SCA) and *Uitenhage Transitional Local Council v South African Revenue Service,* 2004 (1) SA 292 (SCA) ([2003] 4 All SA 37.

similarly worded sub-rule[46] which applied in South Africa (and in this Court[47]until its repeal by Rule 19 of the current Rules[48])and concluded[49]that paragraph (b) of the sub-rule'applies to regulate the period within which a cross-appeal is to be prosecuted and that it does not apply to the present instance where an appellant failed to deliver the record of appeal timeously as provided for by rule 5(5).'

[28] Well knowing that the applicants failed to lodge the record of appeal within the period prescribed by Rule 5(5)(b);that they did not within that period seek the respondents' consent to an extension of the time period or notified the registrar accordingly, the Commission must have appreciated that, for purposes of the prosecution of its cross-appealwithin the time periods prescribed under Rule 5(6)(a), the applicants' appeal was deemed to be withdrawn in terms of paragraph (b) of the sub-rule on 27 May 2011. Its knowledge of the deemed withdrawal notwithstanding, the Commission failed to notify the registrar in writing during the 21 days that followed that it intended to prosecute the cross-appeal. In the result, the Commission's cross-appeal also lapsed[50].

[29] Mr Tötemeyer, who (together with Mr Strydom) appeared for the applicants, submitted with reference to the sub-rule that the conclusion was inescapable. Moreover, relying on Rule 5(3), he submits that the notice of cross-appeal lacks particulars 'in respect of which the variation of the judgment or order of the court appealed from is sought' and that it wasin any event defective for that reason.

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[46] Rule 5(4)(bis)(a) and (b) of what was previously known as the Rules of the Appellate Division of the Supreme Court of South Africa.
[47]By virtue of the transitional provisions in Article 138 of the Constitution.
[48] By Government Notice No. 56 of 8 October 1990.
[49]*Per* Strydom AJ in para [39].
[50]See: *Ondjava Construction CC v HAW Retailers t/a Ark Trading*, *supra,* para [7].

Finally, he submitted that the cross-appeal was directed at an order of costs made by the High Court and that, in terms of s18 of the High Court Act, 1990, the order was not appealable without leave of the High Court or failing, leave of this Court – which had neither been sought nor obtained by the Commission.

[30] Counsel for the Commission, Mr Maleka SC (assisted by Mr Namandje), conceded without cavilthat there was no longer a cross-appeal before the Court.He confirmed that, even if the Court were to reinstate the applicants' appeal, the Commission would not seek to prosecute the cross-appeal.With that concession in mind, we do not find it necessary to deal with the other grounds on which Mr Tötemeyer is challenging the cross-appeal. We did not understand him to seek an order of costs on behalf of the applicants in respect of the cross-appeal and, therefore, we do not propose to make such an order. With the cross-appeal out of the way, we now turn to consider the applicants' condonation application for the late filing of their heads of argument on the application for condonation and reinstatement of their lapsed appeal.

D Application for Condonation:Late Delivery of Applicants' Heads of Argument

[31] The applicants are seeking condonation for the late delivery of the heads of argument advanced by them on the application for condonation and reinstatement of the appeal. Mr Louw, applicants' instructing counsel, explained that he had briefed instructed counsel to prepare and complete the applicants' heads of argument in good time to comply with a Directive of the Chief Justice to the effect that the applicants’ Heads had to be delivered by noon on 19 August 2011. Unbeknown to him, instructed counsel prepared two sets of Heads, the one

dealing with the application for condonation and reinstatement of the appeal and the other with the merits of the appeal (if reinstated). The latter set was e-mailed to his secretary shortly after the commencement of business on the morning of 19 August 2011, printed, copied and filed well in time. The Heads comprised some 118 pages and, due to the urgency which attended to the filing thereof, he had no time to peruseand inform himself of the matters addressed therein. Later that morning, a second set of heads was e-mailed to his secretary. Given her understanding of an earlier telephone conversation which she had with instructed counsel's secretary, she mistakenly thought that the attachment to the e-mail wasmerely a duplication of the Headspreviously mailed to her. Hence, she did not attend to it any further. She only realised her mistake on 22 August 2011 when instructed counselenquired about the second set of Heads during a telephone conversation. She immediately alerted Mr Louw who lost no time to print, process and file the heads of argument later the same day and to launch an application for condonation on the next day.

[32] Only the second respondent opposed the application for condonation. In an affidavit filed on its behalf, the second respondent claims that the applicants and their counsel were grossly negligent and alleges that they wilfully failed to comply with the Directive of the Chief Justice. It maintains that it was prejudiced because the delay necessitated the incorporation of amendments to the second respondent's heads of argument which were under preparation and had to be filed on 23 August 2011. It prayed that the application for condonation should be refused with costs, inclusive of the cost of one instructing and three instructed

counsel and contended that the applicants' application for condonation and reinstatement of the appeal should therefore also be struck off the roll.

[33] The objection first raised on affidavit was subsequently pursued in the second respondents heads of argument with reference to the authority in *Johnson v Indingo Sky Gems (Pty) Ltd*[51]where the High Court (*per* Gibson J)held as follows:

> 'Today at the hearing, argument has turned substantially on the fact that the delay was minimal, that no prejudice was occasioned to the respondent by the delay. Even if I accept that the delay may not have resulted in a great deal of prejudice to the respondent, what has been of concern to me in this application is whether or not given that minimal delay (if it is the case, and I do not so find), the applicant's legal practitioners would have been entitled simply to sit back and ignore the Rules which he well knew he should have followed.' (at 240G-H) and
> 'The crux of the matter is that there appears to have been a flagrant breach of the Rules of Court. Given that course of conduct, my attitude is that the Court can only ignore such attitude at its peril and to its own prejudice in the running and administration of the Court's business. Thus my view is that such failure cannot be overlooked in the circumstances of this case because to do so would be to encourage laxity in the preparation of Court pleadings. The orderly arrangement of Court proceedings as presently known, will be a thing of the past. If rules are only to be followed when a legal practitioner sees fit to do so, then the Rules may as well be torn up.' (at 241G-H)

[34] The 'flagrant breach of the Rules of Court'which was discussed in this judgment related to the failure of the applicant,who knew full, well that its heads of argument were filed out of time, to bring 'a proper application for condonation'timeously or at all as required by a Practice Directive of the High Court. Instead of following the prescribed procedure, the applicant’s counsel

[51]1997 NR 239 (HC]

sought to move condonation from the Bar. It must immediately be apparent that the level and type of disregard of procedure which concerned the High Court in *Johnson's* case is entirely different and distinguishable from the circumstances which pertain to the application at hand.Given the extensive explanation of Mr Louw for the misunderstanding and the supporting documents and affidavits referred to by him, the second respondent's characterisation of his(and applicants) conduct as 'wilful non-compliance' with the Directive and 'grossly negligent'oversight occasioned by a 'lack of diligence and a laid-back approach'is entirely unjustified and, to say the least, adisparaging exaggeration of the events.

[35] Moreover, there is no evidence that the applicants knew of - or could conceivably be blamed for- the administrative mistake attributable to their counsel and, if the short period of the delay occasioned by it is considered, the dilatory effect of the non-compliance on the preparation and finalisation of the second respondent's heads of argument must have been minimal. It is probably for these reasons that, when the application was moved on behalf of the applicantsduring argument, the second respondent's counsel informed the Court that, although the objection had been taken on the papers and in the heads of argument, the second respondent no longer intended to 'press the point'.

[36] We are satisfied that the applicants have given an adequate explanation for the delay and have shown sufficient cause for the non-compliance to be condoned underRule 18. In our view, such an order must follow.

[37] The applicants'notice of motion contains a tender for the costs of the applicationfor condonation but only if it is not opposed. It gave notice that, if opposed, the applicants would pray for the costs occasioned by the opposition. For the reasons given, we regard the second respondent's initial opposition to the application to be unreasonable under the circumstances. Moreover, the overly severe, unsubstantiated and injuriousexaggeration of applicants' counsel's conduct, we regret to note, is an example of the unreasonably unyielding and uncompromising attitudes exhibited by some of the litigants in the conduct of this litigation. We understand that such intransigent attitudes may well be appropriate or even necessary for survival in the cauldron of political contests. But, once the contest moves from a political to a legal forum, the rules of engagement are different;the adjudication of their disputes is informed by legal – not political – considerations and unreasonable intransigence hinders rather than facilitates, the judicial process to resolve them.

[38] Given the costs occasioned by the second respondent's unreasonable opposition to the application – underscored by the belated abandonment thereof in argument - we are of the view that the second respondent should bear the costs occasioned by its opposition. All other costs attendant to the application for condonation must be borne by the applicants.

E Application for Condonation and Reinstatement of the Appeal

[39] The applicants' appeal against the order of the High Court dismissing the election application lapsed as a result of their failure to lodge the record of appeal within the time period prescribed by Rule 5(5)(b). Without reinstatement of the

appeal, no further consideration may be given to it. In addition, the applicantsadmit that their legal representatives failed to timeously lodge with the registrar the powers of attorney authorising them to represent the applicants. In seeking to redress the consequences of their non-compliance, the applicants brought an application in which they are seeking orders in the following terms:

> '1. Condoning the appellants' non-compliance with Rule 5(4)(a) … pertaining to the late filing of the appellants' Powers of Attorney.
> 2. Condoning the appellants' non-compliance with Rule 5(6), alternatively Rule 5(5) … pertaining to the late lodging of the record of proceedings in the Court a quo.
> 3. Directing and ordering that the appellants' appeal under Case No. SA12/2011 be reinstated.
> 4. Costs of the application (only in the event of it being opposed by any of the respondents).'

[40] The application is founded on an affidavit deposed to by Mr Haufiku, the Secretary for International Relations of the first applicant, and supported by the affidavit of Mr Louw, the applicants' instructing counsel. The application is opposed by the respondents. In addition to the respondents’numerous challenges to the merits of the application, theyhave also noted a number of objections that must be decided at the outset.

[41] The first point raised *in limine* is that Mr Haufikulacked authority to institute and prosecute the application on behalf of all the applicants. On this issue, the respondents launched a two pronged attack: the first is that the resolutions of the applicants relied on, authorise the noting of an appeal butfall short of the authority required to bring an application for condonation and reinstatement once the appeal

has lapsed. The second is that those resolutions do not suffice as authority for Mr Haufiku to launch the application on behalf of the applicants because, on the face thereof, the resolutionsauthorisednamed individuals other than Mr Haufiku to sign the necessary documents and affidavits on applicants' behalf. In what follows, we shall briefly reflect on the general principle that an individual must be authorised to act on behalf of juristic persons in legal proceedings;the response required if the claimed authority is challenged and, thereafter, we shalldeal with the respondents' challenges to Mr Haufiku's authority.

[42] It is, of course, trite law that '(u)nlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution'.[52]It follows that if legal proceedings are instituted (or opposed) in the name of a juristic person, the proceedings must, as a general rule[53], be properly authorised. In motion proceedings it will normally suffice if the individual who institutes the proceedings on behalf of the artificial person states under oath that he or she has been duly authorised to do so.[54]Salutary as the practice may be to support an allegation to that effect by attaching a certified copy of the resolution of the juristic person authorizing the institution of the proceedings by the individual at its instance, it is not usually required.[55]In civil practice and procedure legal challenges to the

[52]*Per* Watermeyer J in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351E. Compare also: *AJ Jacobs t/a Southern Engineering v The Chairman of the Nampower Tender Board and Another* (unreported judgment of the High Court in Case No A 140/07 delivered on 11 March 2008).

[53] It is not necessary for purposes of this judgment to consider permissible exceptions to this general rule.

[54] Cf*Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 615H

[55] See: *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*, *supra,* at 352A. Compare also: *Wlotzkasbaken Home Owners Association and Another v Erongo Regional Council and Others* 2007 (2) NR 799 (HC) at 805F - 806C and *Otjozondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* 2011 (1) NR 298 (HC) at 312H para 53 where Damaseb JP held: 'It is now trite that the applicant need do no more in the founding papers than allege that authorisation has been duly

asserted authority of individuals purporting to act on behalf of juristic personsare not infrequent and range in force and scope from bare denials to incontrovertibleevidential proof that the action taken has not been authorised. The nature of the response expected by the Courts of the individual purporting act on authority of the artificial person depends on the evidential substance of the challenge. It is trite that not any challenge will suffice. The High Court recently dealt with challenges of that nature in the following manner:[56]

> 'It is now settled that in order to invoke the principle that a party whose authority is challenged must provide proof of authority, the trigger-challenge must be a strong one. It is not any challenge: Otherwise motion proceedings will become a hotbed for the most spurious challenges to authority that will only protract litigation to no end. This principle is firmly settled in our practice. It was stated as follows in *Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1190E – G:
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> > "In cases in which the respondent in motion proceedings has put the authority of the applicant to bring proceedings in issue, the Courts have attached considerable importance to the failure of the respondent to offer any evidence at all to suggest that the applicant is not properly before the Court, holding in such circumstances that a minimum of evidence will be required from the applicant.This approach is adopted despite the fact that the question of the existence of authority is often peculiarly within the knowledge of the applicant and not his opponent. *A fortiori* is this approach appropriate in a case where the respondent has equal access to the true facts." (Own emphasis added and footnotes omitted.)
>
> It is now trite that the applicant need do no more in the founding papers than allege that authorisation has been duly granted. Where that is alleged, it is open to the respondent to challenge the averments regarding authorisation. When the

granted.'

[56] In *Otjozondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* , *supra*, at 312E-I

challenge to the authority is a weak one, a minimum of evidence will suffice to establish such authority: *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228J – 229A.'

[43] The respondents rely on the resolutions belatedly lodged in the appeal by the applicants' legal representatives for their contention that the purpose and scope of the authority contemplated therein fellshort of what was required to authorise the institution of an application for condonation and reinstatement of the lapsed appeal on their behalf. The relevant parts of the separate, but similarly worded resolutions passed by the applicants read as follows:

'Resolved:

A. That an appeal be lodged in terms of Rule 5(2) of the Rules of the Supreme Court of Namibia against the whole of the judgment or order… delivered. . . on 14 February 2011 and *generally for effecting the purposes aforesaid, to do or cause to be done whatsoever shall be requisite, as fully and effectually, for all intents and purposes, as…we might or could do if personally present and acting herein* – hereby ratifying, allowing and confirming and promising and agreeing to ratify, allow and confirm all and whatsoever my said… agent(s) shall lawfully do, or cause to be done, by virtue of these presents.

B. That (name of the agent appointed by the applicant concerned) be and he is hereby authorised *with power of substitution* to institute such appeal and *to sign all the necessary documents, affidavits and powers of attorney* on behalf of (the name of the applicant concerned)'(*emphasis added*)

[44] Mr Namandje argued this point on behalf of the first respondent at the hearing and submitted that the authority contemplated in the resolutions expired at the time the applicants' appeal lapsed or, as Mr Semenya SC (assisted by Mr Akweenda) put it on behalf of the second respondent: when the appeal lapsed, the

authorities collapsed. For that reason, he contended, further substantive resolutionshad to be passed to specifically authorise the institution of the application for condonation and reinstatement of the appeal on the applicants' behalf. When he was invited to comment on the fact that individuals in leadership positions within the applicants had filed affidavits in reply to the respondents' challenge in which they stated that Mr Haufiku had been authorised to do whatever might be necessary to prosecute the appeal and, in terms of (or pursuant to) that authority, also had the authority to launch the application for condonation and reinstatement on the applicants' behalf, he submitted that the applicants should have made out a case to that effect in the founding papers. Although similar challenges to the authority of Mr Haufikuwere also raised by the second respondent, it was not vigorously pursued in argument.

[45] It is clear from the language used in the resolutions adopted by the various applicants that they authorised, in terms of the widest possible amplitude, the institution and prosecution of an appeal to the Supreme Court against the High Court's dismissal of the election application. To that end, the resolutions mandated in general terms whatever is required to be done and specifically contemplate that the persons authorised to act on their behalf, could sign 'all the necessary documents, affidavits and powers of attorney'.The applicants' intention behind the language used is clear: to present the appeal against the dismissal of the election application for adjudication to the Supreme Court. We do not find any support in the language used to suggest that they intended to stop short of that objective.

[46] The fact that the appeal lapsed does not imply that it has come to an inexorable end[57] or that itcannot be revived if reinstated with leave of the Court. Rule 18 contemplates that the non-compliance which resulted in the appeal's lapse, may be excused and that the Court 'may give such directions in matters of practice and procedure as it may consider just and expedient under the circumstances'. Those directions may include an order that the appeal be reinstated.[58]As it is, the ordinary meaning of the word 'reinstate'conveys the notion of 'restoring or replacing in a lost position'.[59]The 'reinstatement'of an appeal therefore implies that the lapsed appeal be restored to its position prior to the lapsing thereof. It follows that a reinstated appeal may be prosecuted on the strength and within the ambit of the original Notice of Appeal and on the basis of the authority which mandated its institution and prosecution at the outset: there would be no need to lodge a fresh Notice of Appeal or, for a juristic person to adopt yet another resolution mandating its institution and prosecution.

[47] For these reasons, we are satisfied that an application to condone an appellant's non-compliance which resulted in the lapsing of an appeal and for the reinstatement of the appeal constitutes a proceeding which, by its nature and purpose, is a procedural step in the prosecution of an appeal and that, on a proper construction of the wide language used therein, the resolutions adopted and lodged by the applicants in the appeal contemplate and authoriseproceedings of that nature. In the result, we hold that it was not necessary for the applicants to

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[57] In *Channel Life Namibia (Pty) Ltd v Otto, supra,* para [33] this Court held as follows: '…failure to file an appeal record on time, or to give security within the time laid down by the rules, had the effect that the appeal lapsed, even though there was no specific rule to that effect. *It did not mean the end of the appeal* and it could again be reinstated after application for condonation was made by the appellant and granted by the court.'

[58] *Ibid*para [39].

[59] See: *The Concise Oxford Dictionary*, 6th ed.

adopt resolutions after the lapsing of the appeal in which they specifically mandated the application for condonation and reinstatement.

[48] Counsel for both respondents drew our attention to a judgment by Hannah J in *Duntrust (Pty) Ltd v H Sediacek t/a GM Refrigeration*[60] where the High Court rejected the applicant's contention that an application for reinstatement of an appeal from the Magistrate's Court to the High Court might not necessarily require a resolution by the applicant because it was part and parcel of the appeal process. The rejection of the submission came in rather terse terms [61]and without reference to any authority. It is not apparent from the judgment whether the applicant adopted a resolution authorising the appeal at all or, if it did, what the terms thereof were. A closer reading of the judgment shows the Court's 'disquiet' about procedural irregularities in the application that suggested that the application had not beenauthorised. The case falls to be distinguished on that basis. In any event, to the extent that the *Duntrust* judgment may be interpreted as authority for the proposition that, once an appeal has lapsed, a separate and distinct resolution authorising an application for condonation and reinstatement of an appeal must in all instances be adopted by juristic persons, irrespective of the terms on which it authorised the appeal and prosecution thereof in the first instance, we would disapprove of it for the reasons given earlier.

[49] The second, but related attack on Mr Haufiku's authority is that the applicants' resolutions do not authorise him by name to bring the application on

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[60]2005 NR 147 (HC)

[61] At 150I-J where the Court held: 'I do not see how that can be right. The appeal has lapsed and this is an application for its revival. That is an important, if not fundamental, step.'

behalf of the applicants.On the face thereof, the resolutions authorised other individuals,who are identified by name, to sign the necessary documents and affidavits on behalf of the respective applicants. Attractive at first blush, this attack falls to be dismissed on closer scrutiny of the resolutions and in view of the affidavits filed in reply by the applicants.The challenge loses sight of the fact that the persons authorised by name to institute the appeal and'to sign all the necessary documents, affidavits and powers of attorney' on behalf of the respective applicants, were so authorised 'with power of substitution'. In law, the 'power of substitution'allows for the 'appointment by an agent of another person to act in his stead as representing the principal, in virtue of a power to do so contained in his authority as agent.'[62]In all instances, the individuals so mandatedby applicants' resolutions – all leaders or office bearers of the applicants - deposed to affidavits, filed specifically to meet the respondents' challenge in reply, that they, in turn, had appointed Mr Haufiku to act in their stead on behalf of the applicants in launching the application for condonation and reinstatement.

[50] Mr Namandje's contention that these affidavits must be disregarded because the founding papers should have included the evidence that Mr Haufikuhad been appointed by virtue of the powers of substitution cannot be sustained. We have already referred to the principle that 'in motion proceedings by an artificial person . . . a deponent's allegation that he was duly authorised would suffice in the absence of a challenge to his authority.'[63] Mr Haufiku's statement on oath that he was 'duly authorised by all the appellants to bring (the) application on

[62]See: Claassen, *Dictionary of Legal Words and Phrases*, Vol. 4
[63]To quote Strydom J (as he then was) in *South West Africa National Union v Tjozongoro and Others,* 1985 (1) SA 376 (SWA) at 318E

their behalf'was therefore enough for the time being to bring the application on behalf of the applicants. Mr Haufiku had no reason at that stage to anticipate that his authority to act on behalf of the applicants would be challenged. As it were, he was the person who, without objection, had sworn to virtually all the founding affidavits on behalf of the applicants in multiple earlier applications entertained both here and a quo in proceedings pertaining to the election application. It is only when his authority was challenged in the respondents' answering affidavits with specific reference to the resolutions annexed to the founding papers that it became necessary for him to expand on the basis of his authority. It is a well-settled rule of practice that anassertion of authority made in the founding papers, if challenged, may be expounded on in reply. [64] This is exactly what the applicants did.

[51] In the result, the respondents' *in limine* challenge to Mr Haufiku's authority to institute, on behalf of the applicants,an application for condonation and reinstatement of the election appeal and the application that the founding affidavit in the application deposed to by him should be struck, are dismissed.

[52] Before we turn to the next point taken *in limine*, we must first address a further related issue: the second respondent's application to have the applicants' replying affidavit struck outon the ground that it was not filed within a reasonable time.

[64]Compare, for instance, *Wlotzkasbaken Home Owners Assoc v Erongo Regional Council, supra* at para [12].

[53] It is common cause that the affidavit (to which numerous supporting affidavits were annexed) was filed approximately one month after delivery of the second respondent's answering affidavit. It is also common cause that, because the Rules of Court do not prescribe a specific period within which an applicant must reply to an answering affidavit, the law implies that, unless otherwise directed by the Court in terms of its inherent powers, it must be done within a reasonable period.What would constitute a reasonable period, it seems to us, must be determined in the circumstances of each case, taking into account considerations such as the scope and complexity of the matter, the availability of witnesses, the requirements of a fair trial,prejudice occasioned by any delay, the convenience of the Court and the interests of justice, to name but a few.

[54] The applicants anticipated that they might be required to explain why the replying affidavit was filed a month after receipt of the answering affidavits. Thus, Mr Haufiku stated in the concluding paragraph of the replying affidavit that the reply could have been delivered earlier had it not been for the challenge to his authority which was raised in the respondents' answering affidavits. As a result, he stated, the applicants had to obtain affidavits from the persons designated as agents in the applicants' resolutions (most of them political leaders)to confirm that they had appointed and authorised him under their powers of substitution to act as agent for and on behalf of the applicants in the application. Two of them were abroadat the time and only returned on the weekend of 13 and 14 August 2011. They were only able to depose to their supporting affidavits the day following their return. The replying affidavit was delivered two days later.

[55] Mr Namandje, to his credit, did not question the importance of the affidavits to the applicants' cause. His complaintwas that, although the affidavits had been filed before the applicants' heads of argument were due,the first respondent's Heads were under preparation and that some of the research which had been done became obsolete when, belatedly, the replying affidavit came to hand. As a result, he submitted, the first respondent was prejudiced.

[56] It must be immediately clear that the prejudice which the first respondent claims to have suffered must have been minimal - bordering, at best, on mere inconvenience. Legal research - and adjustments to the focus of a legal practitioner's research as the issues evolve in any litigation - is part and parcel of life and experience at the Bar. One would hardly expect him to complain if, in the applicants' heads of argument (which were due to be filed even later), matters of law were advanced which required of him to do further research and effect additional adjustments to the first respondent's heads of argument. The claimed prejudice pales into insignificance when compared to the importance of the affidavits which the applicants needed to address the challenge to Mr Haufiku's authority.

[57] Given the narrow scope of the first respondent's complaint,we do not propose to deal in any detail with the other considerations to assess whether the replying affidavit was filed within a reasonable time in the circumstances of this case. Suffice it to note that the factual and legal issues raised were substantial, if not vital to the success of the application; that affidavits from numerous individuals had to be obtained; that the set down of the application was not affected;that the

hearing of the application was not delayed, and that the Court was not inconvenienced.

[58] For these reasons, we are satisfied that, in the circumstances of this case, the replying affidavit was delivered within a reasonable time. The first respondent's application that the applicants' replying affidavit should be struck off the record and that the application should be considered as if the replying affidavit had not been filed at all, is therefore dismissed.

[59] Yet another matter was raised *in limine* in the second respondent's heads of argument about the status of the Namibia Democratic Movement for Change, cited as the 8th applicant in the proceedings a quo.It was submitted that the appeal noted by itshould also be 'deemed to be withdrawn'; that it had not joined the other applicants in seeking condonation and reinstatement of the appeal and that it had failed to file heads of argument. For those reasons, it was submitted that its appeal should be struck off with costs. These contentions may be disposed of briefly. They are premised on an incorrect assumption that the 8thapplicant was a party to the lapsed appeal in this Court. Although it was cited as the 8th applicant in the Notice of Appeal lodged on 9 March 2011, that notice was withdrawn the following day and a fresh notice was lodged from which it is apparent that it did not join in the appeal. Therefore, the 8thapplicant neitherwas nor is a party to the proceedings before us and it will not be appropriate to make the order sought.

[60] The last matter to consider before we turn to the merits of the application for condonation and reinstatement of the appeal is the first respondent's application to

strike out certain parts of the applicants' papers on the ground that they contain inadmissible hearsay evidence.

[61] The most substantial part of the evidentiary material which the first respondent is seeking the Court to strike out is a transcription of multiple text messages exchanged between Mr Haufiku and Mr Louw by using the Short Message Service (SMS) facility available on their respective cellular phones. The text messages highlight the frequent exchanges between the two of them about the availability of funding for the prosecution of the appeal. The complaint is that, whoever transcribed the messages attached to the founding affidavit of Mr Haufiku, failed to certify that the transcription was accurate. This complaint must be considered in view of the fact that both the individuals involved in the SMS exchanges (i.e. the authors thereof) referred to - and relied on the correctness of – the messages in their affidavits filed of record. As a general proposition,[65]'hearsay evidence'[66] in civil proceedings is evidence of the contents of an extra-curial statement, relied on to prove what it asserts, made by a person who is neither a party to, nor a witness who gave evidence in the proceedings.[67] In the circumstances prevailing in this matter, where the authors of the messages refer to - and rely on - them in affidavits filed of record, the contents of what they had

[65]Subject to numerous exceptions and qualifications which we need not deal with for purposes of this application.

[66] We use the phrase in parenthesis, because, as Schreiner JA remarked in *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 296E-F: 'No doubt the difference between evidence and hearsay can be said to be an illustration of a broad rule favouring the use of the best evidence, but the better way of stating the position is that hearsay, unless it is brought within one of the recognised exceptions, is not evidence, i.e. legal evidence, at all.'

[67] Compare: *Akuake v Jansen Van Rensburg* 2009 (1) NR 403 (HC) at 406, para [13] where Damaseb JP held: 'Under the common-law rule against hearsay, an out-of-court statement by a person not called as a witness is inadmissible as evidence of any fact or opinion contained in it.' Compare also the definition referred to in *S v Chanda* 2005 NR 398 (HC) at 402A-B by Heathcote AJ: 'It would suffice to state the definition of hearsay to the following effect, and that is that 'oral and written statements by persons who are not a party to the proceedings or who are not witnesses in the proceedings, and who are not called, cannot be tendered as evidence for the truth of what those oral or written statements say'.' *S v Ndhlovu* 2002 (6) SA 305 (SCA) at 316A-B, para [13].

written do not constitute hearsay evidence. They should be considered no differently than testimonies by the two of them about what the one had said to the other. With the exchanges confirmed by them on oath, we find it difficult to understand why they are suddenly converted into inadmissible hearsay evidence just because a transcriber had not certified the correctness of the transcription.

[62] The first respondent prays in the alternative that part of one of the text messages (exchanged on 5 April 2011 at 15h57) should be struck off as hearsay. The part reads: 'On the other account, I learnt the party cheque from Parliament has been delayed.' It is common cause on the papers that payment of the subsidy/grant by Government to parties (the 'party cheque') who enjoyed representation in the National Assembly had been delayed because of an initial boycott by the first, third and fifth applicants to take up their seats in the National Assembly. The party cheque was only paid on 26 April 2011. Even if we accept that the contents of the SMS was based on a report which had been made to Mr Haufiku out of court by a person who did not confirm it on oath, it was not tendered for the truth thereof or to prove a fact in dispute between the parties. The message is what it purports to be and, as such, admissible to confirm the frequency of exchanges about the availability of funding and to put the exchanges that followed in proper context. The principle that not all reported statements fall to be considered as hearsay evidence is well-established in our law:

> 'But statements made by non-witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (ie, as evidence of the truth of what they assert), they are hearsay and are excluded because their truth

> depends upon the credit of the asserter which can only be tested by his appearance in the witness box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible if what they are tendered to prove is relevant to the enquiry.'[68]

[63] The next target of the application is a statement in Mr Haufiku's affidavit which reads:

> 'By this time it transpired that the employee at Shatech Printers tasked to prepare the record of appeal, Ms Gawanas, was apparently on leave and would only return by Monday the 16th of May 2011'.

This statement is based on - and confirmed in almost identical language in - the affidavit of Mr Louw, which, we should point out, is not targeted by the application to strike out. But, even if we accept in favour of the first respondent that a report was made to Mr Louw about the reason for Ms Gawanas' absence and the expected date of her return, it does not follow without more that the statement is inadmissible hearsay. Mr Louw clearly tendered the evidence of what had transpired not to rely on the truth thereof, but to explain why he had given instructions that the record of appeal should be ready by 20 May 2011 (and not on an earlier date).

[64] The final sentence which the first respondent is seeking to expunge from the record is also from the affidavit of Mr Haufiku. It reads:

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[68] *Per* Watermeyer JA in *R v Miller*, 1939 AD 106 at 119. Compare also *Kaputuaza v Executive Committee of the Administration for the Herero's* 1984 (4) SA 295 (SWA) where Bethune J said (at 312F): 'For establishing that reports were made to the persons concerned, the evidence is admissible, but in my opinion it is not admissible to prove the correctness of the contents of such reports.'

> ‘I point out that it was expected that these monies would be paid by the end of March 2011. However, it subsequently transpired that, for reasons unknown to the Appellants, this payment was delayed and was only received by 26th of April 2011.’

The first respondent acknowledges that, on the face thereof, the statement does not appear to be hearsay and, therefore, seeks to rely on the text messages to persuade us that the statement was based on reports which had been made to him by 'the treasurer'. We do not think that the inference is justifiable. There is only one text message prior to 26 April 2011 in which reference is made to 'the treasurer'. It is a message on 13 April 2011 made in response to a question by Mr Louw whether the first applicant had 'received their allowance yet'. Mr Haufiku responded that he did not know and would call the treasurer to find out. This he might well have done, but the allegations which the first respondent is seeking the Court to strike out are much wider in scope and there is nothing to suggest that he did not acquire personal knowledge of the facts stated in his capacity as an office bearer of the first applicant. We have also pointed out earlier in this judgment that it was not disputed that the first, third and fifth applicants had not received the grants which they had expected would be paid to them. As it is, the first respondent stated that the grants had not been paid to them at that stage because 'they did not work' during the boycott. It is therefore evident that nothing turns on the sentence which the first respondent is seeking the Court to strike out.

[65] In the premise the first applicant’s application to strike out parts of the applicants’ founding papers is dismissed. It follows from this order (and the earlier orders made on the *in limine* applications to strike out the applicants' founding

affidavit and replying affidavits) that the merits of the application for condonation of the applicants' non-compliance with Rules 5(4) and (5) and for reinstatement of the lapsed appeal must be considered in the form and on the facts that it was presented in. We shall do so presently but, before we do, it is apposite to briefly pause and reflect on the more significant considerations which must inform the Court's determination of applications of this nature.

[66] The Rules of Court are devised to further and secure procedures for the inexpensive and expeditious institution, prosecution and completion of litigation in the interest of the administration of justice;[69] to facilitate adjudication of the litigation in a manner that meets the convenience of, and resources available to the Court; to allow the litigants an equal, fair and reasonable opportunity to present their respective cases fully for final determination to the Court; to accommodate public interest in the efficiency, regularity, orderliness and finality of the legal process and, finally, to give procedural effect to the constitutional demand that, in the determination of their civil rights and obligations, all persons shall be entitled to a fair and public hearing.[70]Some of these considerations have been eloquently summarized by Slomovitz AJ in *Khunou v M Fihrer & Son (Pty) Ltd*[71]*:*

> 'The proper function of a Court is to try disputes between litigants who have real grievances and to see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven.

[69] Cf *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654C: 'They are provided to secure the inexpensive and expeditious completion of litigation before the courts.' Compare also: *L F Boshoff Investments v Cape Town Municipality (2)* 1971 (4) SA 532 (C); *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654C.
[70]See: Art 12(1)(a) of the Constitution.
[71] 1982 (3) SA 353 (W) at 355F-H

> The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner.'

[67] Given the importance to further these objectives and interests, there are compelling reasons why the Court, as a general rule, would not countenance non-adherence to its procedures in the absence of sufficient cause.[72] The Rules, however, 'are not an end in themselves to be observed for their own sake.'[73] It has often been said, that the Rules 'exists for the court, not the court for the rules'[74] and that the Court will not 'become the slave of Rules designed and intended to facilitate it in doing justice'.[75] It will interpret and apply them, not in a formalistic and inflexible manner, but in furtherance of the objectives they are intended to serve. But, because the Rules cannot conceivably be exhaustive and cater for every procedural contingency that may arise in the conduct of litigation[76], the Court

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[72]We were reminded of the remarks of Friedman JP in *Molebatsi v Federated Timbers (Pty) Ltd* 1996 (3) SA 92 (B) quoted with approval in *S v Kakololo*, 2004 NR 7 at 10C-E)where he said at 96H-H para 32: 'The Rules of Court contain qualities of concrete particularity. They are not of an aleatoric quality. Rules of Court must be observed to facilitate strict compliance with them to ensure the efficient administration of justice for all concerned. Non-compliance with the said Rules would encourage casual, easy-going and slipshod practice, which would reduce the high standard of practice which the Courts are entitled to in administering justice. The provisions of the Rules are specific and must be complied with; justice and the practice and administration thereof cannot be allowed to degenerate into disorder.' See also: *Swanepoel v Marais and Others* 1992 NR 1 (HC) at p 2 l-J.

[73] Per Van Winsen AJA in *Federated Trust Ltd v Botha, supra, at 654D*

[74]*Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at 377B para [32].

[75] Per Van Winsen J in *Riddle v Riddle*, 1956 (2) SA 739 (C) at 748.

[76]*Khunou v M Fihrer & Son (Pty) Ltd*, where it was pointed out (at 356 in fine): 'Of course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover are sometimes not appropriate to specific cases. Accordingly the Superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if needs be, the Rules of Court, according to the circumstances.'

may draw on its inherent powers[77] to relax them[78] or, on sufficient cause shown, excuse non-compliance with them[79] to ensure the efficient, uniform and fair administration of justice for all concerned.[80]

[68] What would constitute 'sufficient cause' for the Court to grant condonation for the non-compliance with the Rules in any given instance, must be determined with reference to the facts and circumstances of each case. The factors which the Court will normally consider in deciding a condonation application are the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the Court andthe avoidance of unnecessary delay in the administration of justice.[81]These factors, it has been pointed out on

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[77]The Court's inherent power to regulate its own procedures is recognised in Art 78(4) of the Constitution.

[78] Compare s 37 of the Supreme Court Act, 1990 (dealing in subsection (1) with the power to make the Rules of Court on the matters mentioned therein) and continuing as follows in subsection (2) thereof: 'Nothing in this section contained shall preclude the Supreme Court from dealing with any matter before it, in such manner and on such principles so as to do substantial justice and to perform its functions and duties most officially'. The word 'officially' must be understood to mean 'efficiently'. Compare: *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) at 10G para [16] and *Nationwide Detectives and Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 (SC) at 298D para [20].

[79]See: Rule 18 of the Rules which reads: 'The Supreme Court may for sufficient cause shown, excuse the parties from compliance with any of the aforegoing rules and may give such directions in matters of practice and procedure as it may consider just and expedient under the circumstances.'

[80] Compare: *Khunou v M Fihrer & Son (Pty) Ltd*, at 355H-I

[81]The list is not exhaustive and represents a distillation of jurisprudence on considerations for condonation most often referred to. The authorities where a more detailed exposition may be found on the application of these considerations include *Namib Plains Farming & Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC) at 475H-476D paras [18] and [19]; *Kamwi v Duvenhage and Another* 2008 (2) NR 656 (SC) at 663A para [23]; *Channel Life (Pty) Ltd v Otto*, *supra,* at 444G-445F,paras [43]-[46] and *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 165G – I.

numerous occasions, ‘are not individually decisive, but must be weighed one against another’,[82]and, in the final analysis, must be considered in their totality to determine whether, as a matter of fairness to both sides[83], 'sufficient' cause has been shown for the Court to grant condonation in the exercise of its judicial discretion.

[69] With these observations as a ‘prelude’, we shall first proceed to apply these considerations to the applicants’ application to condone the late filing of the record of appeal.

[70] The record of appeal was filed five days out of time. This is a comparatively short delay and cannot be regarded by any measure or means as a 'substantive failure' to comply with the Rule.It is common cause that final adjudication of the election application is of great importance, not only to the litigants involved but also to the country and the public at large. We have been at pains to emphasise in the introduction to this judgment the importance of the principle of democracy and the legitimacy of the democratic institutions of State in our constitutional society. We have referred to the indubitable and significant public interest at stake in free, fair and transparent multiparty elections and in the assessment and adjudication of election complaints.We acknowledged the onerous dutiesand responsibilities attaching to judicial guardianship of the principles, rights and values articulated in our Constitution. There is no need to repeat the importance of these

[82]Per Holmes, JA in *S v Yusuf*, 1968(2) SA 52 (A) at 54. By way of illustration, he continued: ‘…for example a short delay and good prospects of success might compensate for a weak explanation.’
[83]Op cit, at 53G: ‘…the Court has a discretion, to be exercised judicially, on a consideration of the facts of each case, and in essence it is a matter of fairness to both sides.’

considerations to assess theircumulative weight comparative to a mere 5 day delay in submitting the record of appeal.

[71] We have also invited counsel for the respondents to draw the Court's attention to any specific prejudice suffered by the respondents as a result of the delay.They were unable to refer to any. Mr Maleka emphasized on behalf of the first respondent that both the respondents and the public at large 'have an undeniable and immeasurable interest in finality of the matter'. Mr Semenya, for the second respondent, referred to the nature of the application and the importance of the principles at stake to Parliament and civic society alike and, he too, stressed that finality was in the interest of all. As general propositions, these contentions areundoubtedly correct.But, do they establish that the applicants' non-compliance delayed finality or the administration of justice in this instance? We think not. Given the importance of the matter, the application was set down for hearing on the earliest possible date in the very next term of the Court's calendar. Counsel were invited to address at the hearing not only the application but, on the assumption that the appeal may be reinstated, also the merits of the appeal. Even if the record had been filed in time, it would not have been possible to set the appeal down for hearing at an earlier date. It follows that the 5 days delay did not adversely impact on the Court's convenience and affected neither the expedited set down nor the hearing of the applicationand, if reinstated, the hearing of the appeal.

[72] The applicants, speaking jointly through Mr Haufiku filed an extensive affidavit in support of the application for condonation and reinstatement in which

they seek to detail their efforts to comply with Rule 5(5)(b) and explained the reasons for their failure to meet its time limits. Distilled to its bare essence, the applicants allege that,once they had entered into security for the costs of the appeal and paid outstanding fees and disbursements that had been incurred earlier, they simply did not have sufficient funds to cover the expenses attendant on the preparation of the record of appeal.

[73] They were initially advised that security for the costs of the appeal was expected to be determined by the registrar at around N$100 000 and that, because the record to be used in the appeal would essentially be the same as the one which had been used in the previous appeal (except for one volume which needed to be transcribed at a cost of N$3 245,26), its preparation would not be costly and that it would not take long. The affidavit then proceeds to catalogue a series of financial setbacks: they learned that the costs of the record would be in excess of N$25000; the anticipated party subsidy from Government materialized about a month later than expected and, due to other financial commitments, they only had a balance of N$100 000 available which they paid over to their legal representatives in the expectation that it could be utilized in the appeal but, in the end, had to be applied towards the payment of outstanding legal fees and disbursements; they had to incur costs in defending orders relating to taxations; only a fraction of the costs taxed in their favour were paid and had to be applied towards the payment of outstanding legal fees; unforeseen urgent litigation racked up a bill of a further N$160 000; security for the costs of this appeal was eventually set at N$150 000 (not N$100 000 as had been anticipated) and had to be entered into within the 3 month period allowed for the lodging of the record of appeal;

efforts to raise funds from supporters yielded only N$50 000 and, if taken together with a further contribution of N$100 000 received subsequently, they only had enough to pay the amount of security determined for the costs of the appeal. It is evident from the affidavit – and the supporting affidavit of Mr Louw – that the raising of funds to meet the payment of outstanding legal fees; to cover the additional costs which they had in prosecuting the collection of costs awarded in their favour and to resist others; to enter into security for the appeal and to pay for the record of appeal was a matter which received their continuing attention. These averments are supported in part by the frequent exchanges of text messages between Mr Louw and Mr Haufiku. Efforts were made to raise the required funds – some of them admittedly towards the latter part of the 3 month period because of unforeseen circumstances which resulted in unexpectedexpenses.

[74] With part of the outstanding fees and disbursements due to them paid; security for the costs of the appeal deposited in trust and a firm commitment given to pay the disbursements required for the preparation of the record of appeal, the applicants' legal representatives were confident enough to issue an instruction to the court's transcription services on 11 May 2011 (two days before the expiry of the 3 month period) that the record of appeal be prepared. Given the amount of work required to prepare, collate, paginate and copy the record and the availability of personnel knowledgeable about the matter, Mr Louw directed that the record should be ready by 20 May 2011. His instruction having been complied with, the record was lodged on the next court day.

[75] With the benefit of perfect hindsight, the respondents criticize the sufficiency of the applicants' efforts; question the rationality of their expectations; attack the authority of Mr Haufiku to speak on behalf of the applicants and cast doubt on his knowledge about the financial affairs of the applicants (other than the first applicant). It was argued on behalf ofthe respondents that litigation was a serious matter and 'once having put a hand to the plough, the applicant should have made arrangements to see the matter through';[84] that the applicants either had funds but that paying for the record of appeal was simply not a priority or that they did not seek to raise funds with due diligence. Much was also made of the applicants' failure to seek the respondents' consent to an extension of the 3 month period as contemplated in Rule 5(5)(c).

[76] It is our considered view that the applicants gave a full explanation of the efforts which they had made to secure the funds necessary to prosecute the appeal timeously. Unfortunately, their expectations of income from grants, the payment of taxed bills of costs, fundraising activities and donations did not always materialize. To the extent that it did, the income received had to be applied to address existing obligations (mainly legal fees and disbursements incurred in the course of earlier proceedings); to fund ongoing urgent litigation about costs in matters ancillary to earlier proceedings or had to be applied towards the payment of the security determined in the appeal. Although, by hindsight, it might have been prudent to launch fundraising events earlier or to have conducted or responded to the urgent litigation about costs differently, we do not find that they were culpably remiss in their efforts to seek and secure funding towards the prosecution of the

[84]With reference to the dictum of Holmes JA in *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 721E-F.

appeal. Once they had made payment to their lawyers in part-settlement of outstanding fees and to enter into security for the prosecution of the appeal, they lost no time to give their lawyers adequate financial assurances to allow for the preparation of the record of appeal.

[77] We must also remark in passing that, given the importance of the constitutional principles which the Election Application is seeking to vindicate, the undeniable public interest in the running of free and fair multi-party elections on a regular basis and the constitutional mandate of the Superior Courts in such matters, the Court should not be unduly critical of a political party's failure to secure funding timeously – even less if the application is bona fide, the delay is relatively short and has not resulted in any prejudice to the opposing parties, inconvenience to the Court or otherwise impeded the administration of justice.

[78] The cumulative effect of all the factors pertinent to the consideration of this application so strongly favour condonation that we need not dwell at length on the prospects of success. Suffice it to say that the principles at stake are important; that complex issues are raised about the interpretation of the Act, the correct evidential approach to the adjudication of factual issues, the onus of proof and that the volumes of evidence to be considered is intricate in detail and touch on multiple issues. This is not a matter capable of easy resolution and, although the legal representatives confidently sought to convince the Court of the merits of their respective clients' cases, it would have been bold of them to suggest that the opposing party's contentions entertain no reasonable prospects of success.

[79] For these reasons, we are satisfied that the applicants have shown sufficient cause why they had failed to lodge the record of appeal within the period prescribed by Rule 5(5)(b).Thus, it follows that their earlier non-compliance with the sub rule must be, and is hereby, condoned and the lapsed appeal reinstated. We shall make an appropriate order to that effect in due course. In what follows, we shall therefore refer to the 'applicants' as 'appellants'.

[80] The appellants are also seeking condonation for their non-compliance with Rule 5(4)(a) pertaining to the late filing of their respective powers of attorney in the appeal. The sub-rule requires that, if a notice of appeal is lodged by a legal practitioner on behalf of an appellant, the appellant's legal representative must lodgewith the registrar a power of attorney within 21 days from the date on which the notice of appeal was lodged.[85]It is common cause that the appellants' powers of attorney were not lodged within the prescribed period. Although it is evident from the resolutions of the respective appellants authorising the appeal that they were passed within the 21 day period and that, on the authority of those resolutions, the powers of attorney were also executed within that period, they were only lodged together with the record of appeal on 24 May 2011 – about a month and a half out of time. Mr Louw, who confirmed on oath that he had received the powers of attorney within the prescribed period, frankly admitted that he was at fault: he thought that they only needed to be lodged within three month period contemplated in Rule 5(5).

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[85]The sub-rule reads: ‘If the notice of appeal or of cross-appeal is lodged by a legal practitioner, he or she shall within 21 days thereafter lodge with the registrar a power of attorney authorising him or her to prosecute the appeal or the cross-appeal.’

[81] Both respondents accept that the powers of attorney were executed within the 21 day period. They were, however, unanimous in characterizing Mr Louw's failure to lodge them in time as 'grossly negligent'. This, the first respondent says, was aggravated by the fact that counsel briefed all the parties shortly after the appeal had been lodged about the procedures that needed to be followed in accordance with the Rules. Presumably, this briefing would have included a reference to the time limits allowed for the lodging of the powers of attorney. Therefore, they say, Mr Louw should have been aware of it - if not by virtue of his experience as a legal practitioner of many years standing. In argument, their counsel referred to the dictum in *Swanepoel v Marais and Others*,[86] that negligence on the part of a litigant's legal representative will not necessarily exonerate the litigant and relied on *Saloojee and Another NNO v Minister of Community Development*[87] for their contention that the appellants should not be allowed to escape the results of the legal representative's lack of diligence.

[82] In the view we take, the appellants' legal representative was entirely at fault for this non-compliance. There is nothing in the application before us to suggest that the appellants were or should have been aware of the omission on the part of their legal representatives. They passed the resolutions authorising the appeal and executed the powers of attorney required for that purpose timeously. They had every right to expect that the powers of attorney would be lodged in terms of the rules. Unlike the other Rules relating to the institutionand prosecution of appeals

[86] 1992 NR 1 (HC) at 3E-F

[87] 1965 (2) SA 135 (A) where Steyn CJ said (at 141B – F): 'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity.'

which impose duties and obligations on the appellants concerned, Rule 5(4)(a) imposes the obligation to lodge a power of attorney on the legal practitioner who has lodged a notice of appeal on behalf of an appellant. In the circumstances, there is no reason to attribute the legal practitioner's mistaken understanding of the requirement to the appellants. There is also no suggestion that the respondents were prejudiced by the non-compliance on the part of the appellants' legal representatives.

[83] The object of a power of attorney is '... to prevent any person, whose name is cited in the process, from thereafter repudiating the process and denying his authority for the issue of the process . . .'.[88] As a matter of record, it follows that a power of attorney must be lodged with the registrar but the rule does not even require that a copy of it should be delivered to the respondent. The omission did not cause any delay or inconvenience and, in view of the importance of the case and the prospects of success to which we have referred to earlier, we are satisfied that sufficient cause had been shown to excuse the failure to comply with Rule 5(4)(a) within the 21 day period. In the result, the non-compliance in question must be condoned and we propose to do so.

F Application for Condonation and Leave to Supplement the Record of Appeal

[84] The first and second respondents delivered notices of their intention to apply at the hearing in the High Court that parts of the appellants' (then the 'applicants')papers in the election application should be struck out. These

[88] See: *United Dominions Corporation (S.A.) Ltd. v Greylings Transport*, 1957 (1) SA 609 (T) at 6l4C – D in relation to Rule 7 in that jurisdiction concerning powers of attorney. This dictum was approved in *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 752D-F and *Viljoen v Van der Walt* 1977 (4) SA 65 (T) at 66A-C.

applications were moved at the hearing of the application and the High Court dealt with them, to the extent required, in the course of its judgment. Inasmuch as the appeal is against the entire 'judgment or order of the High Court', it is common cause that the notices to strike out should beincluded in the record of appeal. The appellants' legal representative claims that they were omitted as a result of a bona fide oversight during the preparation of the recordof appeal comprising more than 3000 folios.When attention was drawn to the omission in the first respondent's heads of argument, the appellants' legal representative immediately verified the omission and sought to rectify it. To that end, the appellants brought an application for leave to supplement the record of appeal by adding and incorporating the two notices to strike out and for condonation forthe failure to include them in the first instance.

[85] The application is opposed. In the answering affidavits filed on behalf of the respective respondents, they seek to draw attention to the fact that an identical mistake was made in the preparation of the record for the earlier appeal to this Court and aver that, in the circumstances, the conduct of the appellants and their legal representatives was grossly negligent, unreasonable and constituted a wilful disregard of the rules. The first respondent also claims that it was prejudiced as a result of the omission because it had to prepare for the appeal on a record which was not complete. Significantly, it did not allege that it did not have copies of the two notices available.

[86] There is little doubt that the appellants' legal practitioners, who were entrusted by the appellants to prepare the record of appeal, bear responsibility for

the failure to include the two notices. While we appreciate that it may be difficult to preparea record as substantial as the one under consideration, the appellants' legal representatives should have been mindful not to repeat the same mistake which hadbeen made previously in the preparation of what, for the greater part thereof, was essentially the same record for the earlier appeal. That said, it is difficult to comprehend the respondents' contention that the remissness of the appellants' legal representative should be imputed to the appellants and that their appeal should be struck as a consequence. There is no evidence to suggest that the appellants were – or should have been - aware of the omission and that they should have acted earlier to rectify it. The compilation of a record of this magnitude comprising hundreds of affidavits and an even greater number of annexures requires skills which are beyond that of a layperson. That is probably why they have given instructions to their legal representatives to attend to it.

[87] We are also not convinced that the respondents suffered any significant prejudice as a result of the failure to include the two notices to strike out. These notices, after all, emanated from the first and second respondents and they should have had no difficulty to access copies thereof to the extent that they required the information contained therein to prepare and submit their heads of argument. If anything, the effort should have been little more than an inconvenience. It is also not contended that the omission resulted in any delay in the hearing of the appeal or had any deleterious effect on the administration of justice. Given the importance of the case and the prospects of success, which we have discussed earlier in this judgment, we are satisfied that there is no reason why leave should not be granted to the appellants to supplement the record of

appeal by the addition of the first and second respondents' notices to strike out. In our view, sufficient cause had been shown that the appellants' failure to have them included in the first instance, should be condoned.

[88] With the multiple ancillary and interlocutory applications disposed of – except for the question of costs which we shall consider towards the end of this judgment – we now turn to consider the reinstated appeal.

G Merits - Refusal of Leave to Supplement the Election Application

[89] In addition to the appellants' prayers in the election application presented on 4 January 2010 that the National Assembly election be avoided, alternatively that the results be set aside and a recount be ordered (quoted elsewhere in this judgment), the appellants also prayed for an order in the following terms:

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

[90] The appellants included this prayer because they admitted at the outset of their founding affidavit that, by the end of the 30 day period within which they were required to lodge the election application in terms of s 110 of the Act, they were not in possession of all the relevant facts required to substantiate the numerous

grounds on which they were seeking to set aside the election. They claim that the first respondent ‘has been the sole cause’ of their predicament. In support, they say that they were obstructed on numerous occasions by the first respondent to obtain discovery of and access to election materials necessary to substantiate their complaints. In affidavits filed on their behalf, the appellants advanced a rack of complaints against the first respondent. We pause here to note that, as is apparent from the answering affidavits filed on behalf of the first respondent, these allegations are vehemently denied.

[91] As foreshadowed in prayer 3 of the election application, and admittedly without leave,the appellants lodged an ‘Amplified Notice of Motion’ with the registrar of the High Court on 14 January 2010. The relief prayed for in the Amplified Notice of Motion is virtually identical to that claimed in the election application of 4 January 2010 except in two respects: the appellants also sought to have the Presidential election invalidated and leave was sought to serve the papers by electronic mail on the 5th respondent. The relief sought in relation to the Presidential election, as previously mentioned,has since been abandoned and, in what follows, we shall make no further mention of the challenge to that election and ignore the facts relied on by the appellants for that purpose. The supplementary affidavits which were presented in support of the Amplified Notice of Motion were extensive and, by and large, advanced further grounds on which the appellants sought to challenge the validity of the National Assembly election. In the appellants' heads of argument, they concede that it is apparent ‘from an analysis of those additional facts as contained in appellants' amplifying papers . . . that . . . the bulk of the information contained therein, contains further grounds to

challenge the National Assembly election.' In addition, but to a much lesser extent, the appellants sought to reinforce some of the factual allegations made in support of the earlier election application in an apparent attempt to add more muster to some of the grounds on which they challenged the return. The election application presented to the registrar on 4 January 2010 andthe Amplified Notice of Motion, the supplementary affidavits and documents attached thereto and presented to the registrar on 10 January 2010 were allserved on the respondents on 18 January 2010.

[92] The respondents not only opposed the appellants' prayer for leave to supplement their papers and to amend the notice of motion in the election application as prayed for, but also sought to have the Amplified Notice of Motion as well as the amplified founding affidavit, the confirmatory affidavits and annexures thereto struck out for want of compliance with the provisions of s 110(1) and (3) of the Act. They maintained that the introduction of the supplementary papers to amplify and augment the challenges relied on in the election application of 4 January was both legally impermissible and substantively unjustifiable.

[93] The Court a quo agreed with the respondents on both points.It held that s 110(1) of the Act, which provides that an 'election application shall be presented within 30 days after the day on which the result of the election in question has been declared,' is peremptory. It reasoned that the presentation of an election application cannot be divorced from the determination and provision of security contemplated in subsection (3) thereof. On a proper construction of the section and the scheme contemplated by the Act, the determination and payment of

security are jurisdictional facts for the prosecution of an election application. Inasmuch as an election application must be accompanied by affidavits to support it, it must follow that the amount of security payable,falls to be determined by the registrar with reference to the information contained therein. The supplementary papers, in effect,attempted to introduce new grounds and additional evidence upon which the appellants sought to set aside the election or obtain a recount of the ballots cast. To that extent, it constitutes a separate and distinct election application which is not dependent for its life on the one earlier presented. If allowed, the Court reasoned, it would in effect circumvent the 30 day limitation period and the determination and provision of security required by s 110 of the Act: the appellants would be permitted to prosecute - and the respondents be constrained to incur costs in opposition to –an amplified application brought outside the 30-day period on facts and grounds which had not been considered by the registrar in the determination of security which the appellants had to enter into. Hence, the Court concluded that the amplified application could not escape the peremptory provisions of s 110 of the Actand that the appellants had no entitlement to file further papers after the election application of 4 January had become at issue.

[94] Without derogating from this conclusion, as we understand its reasoning, the Court a quo held, by parity of reasoning to remarks of this Court in the previous appeal,[89]that the appellants should have brought an urgent interlocutory

[89] Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others, *supra* where this Court said the following at 530F-G para [70]: ‘Had the second respondent been minded to challenge the validity of her decision — and we must again point out that their answering affidavits manifest no such intention — they could have sought reasons from her for her decision and brought an application for the urgent review thereof. The review application could have been enrolled before the same court either before the election application or simultaneously with it.’

application to obtain leave to amplify prior to delivery of the amplified papers. Such a course, the Court reasoned, would have afforded the respondents the opportunity to deal upfront with the allegations of obstruction made against them and to resolve the issue whether admission of the amplified papers waspermissible under the Act.

[95] On the assumption that its conclusion (that the amplified papers fell foul of the peremptory provisions of s110) was wrong and that it had a discretion in law to allow the amplified papers as prayed for, the Court proceeded to examine the evidence to assess whether it should exercise its discretion in favour of the appellants. It reminded itself that, in deciding whether or not to allow the amplified papers, it had to apply the principles evident from the following quotation:

> ‘’If a party to an application files and serves certain affidavits and files additional affidavits before the other party has replied to them because there was not enough time to complete all of the affidavits before a fixed time or because new matter has been discovered or for any other good reason, a court will not reject the additional affidavits solely upon the basis of any alleged rule of practice against the filing of more than one set of affidavits. If there is an explanation that negatives mala fides or culpable remissness as the cause of the facts or information not being put before the court at an earlier stage, the court should incline towards allowing the affidavits to be filed. But there must be a proper and satisfactory explanation as to why it was not done earlier and, what is more important, the court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs.’[90]

[96] The Court a quo acknowledged that the appellants premised their application for amplification on the need for access to the election material to bring

[90]The quote is from the authoritative work of Cilliers et al, *Herbstein & Van Winsen:The Civil Practice of the High Courts of South Africa,* Vol 1, 5th ed, pp 434-435.

in the election application; the numerous allegations of obstructive conduct on the part of the first respondent and the claimed absence of prejudice on account of the fact that the election application only needed to be served 10 days after presentation thereof to the registrar. It noted the strenuous denials of obstruction and counter allegations in the answering affidavit deposed to on behalf of the first respondent. After reference to the appellants' replying affidavit, the Court acknowledged that there were monumental disputes of fact on about every issue. Having earlier rejected the contention advanced on behalf of the appellants that the *Plascon-Evans* approach to factual disputes on affidavit did not apply to thedetermination of the issues at hand, the Court a quo accepted the first respondent's version that it had not obstructed the appellants during the inspection process. The evidence, it held, rather suggested that the appellants had sought to obtain too much material; that they had been ill-equipped to sift through all the material in good time; that they underestimated the size of the task, and that they should have been able to file the affidavits in time because they had taken a decision to challenge the election application soon after the election had taken place at the end of November 2009. To the extent that the appellants might have been delayed somewhat because the first respondent summoned all responsible officials to Windhoek to make sure that the election materials would not be compromised during the inspection, the delay was necessary and not unreasonable by any means. The Court a quo examined and rejected the appellant's allegation that it had been an impossible task to obtain affidavits from all party agents within the 30 day period in support of the complaint that there had been a failure to post election results. The Court questioned how information which had been difficult to obtain over a period of one month could all of a sudden

become available in the space of five days and why those affidavits, included in the amplified papers could not have been included in the election application. It analysed and demonstrated with reference to examples how substantially the appellants' cause of action metamorphosed between the 4th and 14th January 2010.

[97] The Court a quo concluded as follows:

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

It consequently held that the respondents' objection against the filing of the amplified papers was good; that those papers stood to be rejected in their entirety and, therefore, struck them from the record.

[98] The Court a quo's refusal to grant the appellants leave to supplement their papers and to amend the notice of motion is part of the wider appeal before us. Although the appellants no longer persist with most of the election complaints enumerated in the supplementary papers, they are seeking the admission of those papers in evidence not only in support of some of the remaining grounds in the election application of 4 January (to be considered later in this judgment) but also

to press forward with the following three substantive grounds on which they claim the election should be invalidated:

(a) The failure of presiding officers to comply with s85(6) of the Act which requires them to post a copy of the announced results at their respective polling stations after the votes had been counted - in substantiation of which the appellants are seeking to introduce more than 200 affidavits emanating from 7 regions and affecting 41 constituencies;

(b) material discrepancies in reconciling the number of ballot papers received by presiding officers at certain polling stations in the Khomas region as recorded on Elect-16 formsand the recorded number of ballot papers used, not used and spoiled at those polling stations as reflected on those forms - in substantiation of which the appellants seek to rely on a 37-page affidavit dealing with the discrepancies and also detailing a number of Elect 16 forms which were missingin respect of that region; and

(c) discrepancies between the number of ballot papers supplied to polling stations as recorded on Elect 21-forms and the number of ballot papers received by those polling stations as recorded on Elect 16- forms.

[99] The appellants' principal attack on the finding of the Court a quo is that iterred in the evidential approach which it adopted to decidethe multitude of factual disputes on the papers about the conduct of the parties during the discovery process. They contend that, because the application to condone the filing of the

appellants' application outside the time-limit provided for by s 110(1) of the Act was an interlocutory matter, the Court should have adopted an approach similar to that applied in the case of interim interdicts. The approach proposed in *Webster v Mitchell*[91](to assess whether an applicant has made out a prima facie case for an interim interdict) has been formulated as follows:

> 'The use of the phrase "prima facie established though open to some doubt" indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to "some doubt"'.[92]

Instead of this approach to the factual disputes, the appellants complain, the Court a quo adopted and applied the *Plascon-Evans*[93] approach.That approach has conveniently been summarised in *Republican Party of Namibia and Another v Electoral Commission of Namibia and 7 Others*[94]as follows:

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[91] 1948 (1) SA 1186 (W) at 1189.

[92]The approach was criticised and qualified as follows in *Gool v The Minister of Justice and Another*, 1955 (2) SA 682 (C) at 688E: 'With the greatest respect, I am of opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial.'

[93] Cf *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). See also: *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 E – G.

[94] 2010 (1) NR 73 (HC) at 109C-D; See also: *Mostert v The Minister of Justice* 2003 NR 11 (SC) at 21G - H

> '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 respondents' 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.'

[100] Even a cursory reading of these passages clearly demonstrates that the approach proposed in Webster's case is virtually an inversion of the *Plascon-Evans*-approach:the one departs from an acceptance of the facts averred by the applicant whereas the other requires that the facts set out by the respondent must be accepted. This is so because of differences in the nature of the proceedings and effect of the relief granted therein.

[101] We appreciate that Appellants' application for leave to supplement their papers may be interlocutory to the subject matter of the main dispute but, as to the substance of the application, the Court must be satisfied that the explanation why they did not put the facts or information before the Court at an earlier stage is adequate; that it was not due to mala fides or culpable remissness on their part and that, regard being had to all the circumstances, the affidavit should be allowed.As Franklin J put it in Cohen, NO v Nel and Another[95]-

> 'Where an affidavit is tendered in motion proceedings, both late and out of its ordinary sequence, the party tendering it is seeking, not a right,but an indulgence from the Court; he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although his affidavit is late, it should, having regard to all the circumstances, nevertheless be received. On any approach to the

[95]1975 (3) SA 963 (W) at 966A-B

problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit is always an important factor.'

[102] Save to the extent that the merits of the main proceedings may be a relevant consideration in an application of this natureand require of the Court to consider whether those proceedings enjoy reasonable prospects of success,the determination of the substance of the application requires final adjudication of the adequacy of the explanation and the other facts and circumstances relevant to the introduction of further affidavits. Hence, in instances where factual disputes arise on affidavit that are not resolved by reference to oral evidence, those disputes fall to be determined on the approach adopted in the *Plascon-Evans* case in applications of this nature.On this approach, the two authorities relied on by the appellants are clearly distinguishable: In *SOS Kinderhof International v Effie Lentin Architects*[96]the High Court dealt with an application for rescission of judgment and in *Hepute and Others v Minister of Mines and Energy*[97]it dealt with a Rule 47 application for security. Hence, we agree with the Court a quo that the approach to factual disputes applied therein does not find applicationto these proceedings.

[103] The second basis on which the appellants are seeking to assail the decision of the Court a quo is that its conclusion was not justifiable if regard is had to the following 'overriding factors': the fact that there was insufficient time for the appellants to complete all their affidavits before expiry of the 30 day period; the fact that new matter had been discovered subsequent to the institution of the

[96] 1992 NR 390 (HC) at 399 B-C
[97] 2007 (1) NR 124 (HC), 130

election application; the existence of an explanation which negatives mala fides or culpable remissness on the part of the appellants pertaining to the cause why these facts or information could not have been put before the Court at an earlier stage; the fact that permission to amplify in essence deals with a question of fairness to both sides and the fact that the respondent did not suffer any prejudice. Counsel emphasized on their behalf that the respondents received the amplifying papers simultaneously with the original papers in the election application and that, as a consequence, neither they nor the public interest was prejudiced as a result. They criticised the Court a quo for referring to the passage in Herbstein & Van Winsen (quoted above) which permits the practice to file additional affidavits before the other party has replied to them, yet failing to apply it in the circumstances of this case.

[104] A reading of the judgment shows that the Court a quo considered most, if not all of the factors which the appellants claim should have informed its decision. We have already referred to some of them in summary. The Court concluded that the appellants' inability to complete the affidavits before the expiry of the 30 day period was mainly of their own making and not due to any obstructive behaviour on the part of the first respondent. It quoted extensively from the affidavits and concluded that the appellants embarked on a fishing expedition during which they sought to trawl through too much election materials. The discovery of new matter at a late stage was due to the fact that the appellants were ill-equipped to sift through the election materialsin good time. The Court noted that the appellants had taken a decision to challenge the outcome of the election towards the beginning of December 2009. During the month that followed they had more than

enough time to obtain affidavits of party agents and could have annexed them to the original rather than to the supplementary application. The Court not only quoted the extract from Herbstein & Van Winsen but, in its concluding remarks on the admissibility of the amplifying papers, by implication referred to the approach advanced therein when it decided the matter on the assumption that ‘all else was in the applicants' favour and that success of amplification rested entirely on the existence of special circumstances. It therefore assumed that the Court should not reject additional affidavits solely upon the basis of an alleged rule of practice against the filing of more than one set of affidavits; that the appellants' explanation negatives mala fides or culpable remissness as the cause for the facts or information not being put before the Court at an earlier stage and that the respondents were not prejudiced.

[105] The Court a quo’s refusal to grant the appellants leave to supplement their papers in the election application, [98]is premised on the assumption that the requirement in s110 of the Act that an election application ‘shall’ be presented within 30 days after the day on which the result of the election in question has been declared, is directory rather than mandatory. It approached the applicationon the premise that it was within its competency to grant such an order. It therefore had specific regard to factors which, according to the authorities, shouldinform its decision in applications of that nature.

[106] The relief sought related to a matter falling within the inherent powers of the High Court to regulate its own procedures. As such, the discretion which the Court

[98]As prayed for in para. 3 of the election application (quoted above).

a quo exercised on consideration of the facts of this case, was judicial in nature[99] and involved a value judgment[100] on whether the appellants had given a proper and satisfactory explanation for their failure to include the amplified papers as part of the election application. Although a discretion of that nature is not unfettered,[101] it is well settled that a Court of Appeal would be slow to interfere with it 'unless a clear case for interference is made out and (it) should not interfere where the only ground for interference is that the Court of appeal might have an opinion different from that of the Court a quo or have made a different value judgment'.[102]The power to interfere on appeal in such instances is strictly circumscribed.[103]It is considered a discretion in the 'strict or narrow sense, ie a discretion which this court as a court of appeal can interfere only if the court below exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself.'[104]

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[99]Not unlike the judicial discretion to condone non-compliance with the rules. Compare *S v Yusuf, supra* at 53G.

[100] Compare: *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) where it was held (at 805G): 'It is difficult to discern a general principle underlying all cases in which a discretion conferred on a court of first instance has been categorised as narrow. What does seem clear is that, where the court of first instance is in a better position than an appeal Court to decide a question which involves the exercise of a value judgment, especially a question of procedure . . . an appeal Court will be reluctant to interfere.'

[101]*Ashipala v Nashilongo and Another* 2011 (2) NR 740 (HC) at 748D-E para [36].

[102]Per Marais J in *B&W Industrial Technology (Pty) Ltd and Others v Baroutsos* 2006 (5) SA 135 (W) at 139E-F para [14].

[103]Cf *Western Cape Housing Development Board and Another v Parker and Another* 2005 (1) SA 462 (C) at 466E-F para [5] and para [6] where the Court summarised the authorities referred to therein as follows: 'As stated by E M Grosskopf JA in *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800C - F, the discretion referred to in *Ex parte Neethling* is a truly discretionary power characterised by the fact that a number of courses are available to the repository of the power. As explained by the learned Judge of Appeal, the essence of a discretion in this narrower sense is that if the repository of the power follows any one of the available courses, he would be acting within his powers and his exercise of power could not be set aside merely because another court would have preferred him to have followed a different course among those available to him.'

[104]Per Streicher ADP in *Clipsal Australia (Pty) Ltd and Others v Gap Distributors and Others* 2010 (2) SA 289 (SCA) at 298B-C para [19]. See also: *Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335E and *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781H - 782A.

[107] We have carefully considered the reasoning of the Court a quo on the merits of the appellants' application to supplement the election application to ascertain whether it falls short of these criteria. Although we might have placed more emphasis on the constitutional importance of the principle at stake and may not necessarily have arrived at the same conclusion, it would not be proper for us to interfere with the exercise of judicial discretion by the High Court simply because we would have made a different value judgment on the facts. We are not persuaded that the Court a quo exercised its discretion in a manner which would justify interference on appeal when it refused the application to supplement the election application.

[108] In view of this conclusion, it is unnecessary for us to consider whether the provisions of s110 (1) of the Act are mandatory or directory and, if mandatory,whether it would have been competent to supplement the election application after the expiry of the 30 day period. We are indebted to counsel for the submissions made in this regard but must emphasise thatour silence on this matter must not be understood as either a rejection or an endorsement of the views expressed by the High Court on this point.It is also not necessary for us to deal with the reasoning of the Court a quo that the appellants should have brought an urgent application for amplification to allow the Court to deal upfront with the issues raised therein. We note, however, that the procedural analogy which the Court a quo sought to draw to the reasoning of this Court in the previous election appeal(ie that the second respondent could have challenged the validity of the registrar's decision in an urgent review application) is misplaced: it loses sight of the fact that the registrar was not a party to the election application

in which the validity of her decision to receive the application outside office hours was challenged – unlike in this case where all parties with an interest in the relief prayed for have been cited.

H Merits – The Election Application

[109] The Court a quo dealt extensively in a reasoned judgmentwith each and every one of the specified complaints advanced by the appellants in the election application and, in conclusion, dismissed the election application. Although the appellants noted an appeal against the 'whole of the judgment or order as well as the cost orders', it subsequently narrowed the scope of the appeal on the merits of the election application when their counsel recorded the following in their heads of argument:

> 'At the outset it is recorded that the appellants will no longer place reliance on the initial complaints concerning the deficiency of the voters' register. Accordingly issues concerning an alleged high voter turnout, mistakes contained in the voters' register, the admissibility of the affidavit evidence of the appellants' witness, Mr Götz, documents produced by him and related issues no longer arise in this appeal. The same applies to issues previously raised concerning the manner in which tendered votes were counted or otherwise dealt with. The issues which the appellants will rely on, are those set out hereafter and principally concern the following:
>
> 48.1 The absence of the entry of voter registration card numbers on 16 357 ballot paper counterfoils;
>
> 48.2 That the results announced were of a verification process and not of the polling station results;
>
> 48.3 The fact that in many instances elect 20 (b) Forms and elect 16 Forms do not reconcile.'

The appellants' challenge to the validity of the National Assembly elections and its results has thus been reduced to these 3 grounds. It is to them that we shall turn next.

Voter Registration Card Numbers not entered on Ballot Paper Counterfoils

[110] '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)).'[105]Each ballot paper in a ballot paper book is attached to a counterfoil. The counterfoil is a complementary part of the ballot paper. Amongst the information of the ballot paper printed on the counterfoil is the ballot paper number. To preserve the secrecy of the vote, the ballot paper number is not reproducedon the detachable part of the ballot paper which is given to a voter to cast his or her vote. Once a ballot paper is detached from its counterfoil,it can no longer be linked to the counterfoil on the basis of any information printed thereon.

[111] Section 82(9)*(a)(i)* of the Act requires of a presiding officer or polling officer at a polling stationto 'enter the voter registration number of the voter in the ballot paper book on the counterfoil of ballot paper which bears on the back thereof the official mark.' This requirement is part of the checks and balances of the electoral process to enable verification that only registered voters have cast votes in the

[105]*Republican Party of Namibia and Another v Electoral Commission of Namibia and Seven Others, supra* at 101E-F.

election. The appellants' complaint is that 16,357 ballot paper counterfoils from polling stations in 10 regions do not have voter registration numbers on them. This flaw, they say, detracts from the system of checks and balances envisaged in the Act in the interest of transparency and accountability and leaves the door wide open for ballot box stuffing. As such, it is alleged, it constitutes a transgression of the principles embodied in Part V of the Act. Given the number of ballots involved, the appellants claim, it will also affect the result of the election.

[112] The substance of the complaint is advanced in the founding affidavit of Mr Haufiku. Given its importance to the discussion which will follow, it is necessary to reproduce it verbatim.

> 'In having regard to the counterfoils given to the applicants by the first respondent it transpired that 16 357 of these did not contain the required voter registration numbers which is peremptory in terms of section 82(9)(a) of the Act. I respectfully point out that the reports verifying this are contained in the file which contains approximately 500 pages and which shall be made available to the respondents opposing this application as well as will be filed with the court. A copy of the report verifying this figure and compiled by Mr Visser is annexed hereto and marked "LH8"'.

In his confirmatory affidavit, Mr Visser confirms the correctness of the affidavit of Mr Haufiku insofar as it relates to him and continues:

> 'I further respectfully confirm that I have compiled the file which contains the source documents referred to in the report next to the affidavit of Mr Haufiku. I am advised that this file shall also be presented to the Registrar in due course as part of the election application although it is not expressly attached as annexure to the papers.'

[113] Both respondents took issue with these allegations. It is evident from their responses that neither had sight of the 500 page-file containing the ‘source documents’ which the appellants undertook to present to the Registrar. The first respondent objected to the allegations and annexure ‘LH8’ as inadmissible hearsay and points out that neither Mr Haufiku nor Mr Visser alleged that they had personally investigated and inspected the counterfoils.

[114] It became clear when the appellants lodged their replying affidavits that the allegations in the founding and confirmatory affidavits as well as the annexure were based on hearsay. It was then disclosed by Mr Haufiku that he had tasked a certain Mr Gurirab to copy some of the documents discovered for inspection. The ballot paper counterfoils were still bound in ballot boxes and could not be properly copied. He therefore required of Mr Gurirab ‘to have all the serial numbers of the booklets containing these blank counterfoils written down and he thereupon provided same to Mr Visser.’ In his affidavit Mr Gurirab said the following:

> ‘3. I further confirm that I was personally present at the inspection of the election materials. I confirm that I personally oversaw the recordal of serial numbers of counterfoils of empty ballot paper books where such counterfoil contained no entry of a voter registration number. I confirm that they were at least 16,357 of such instances.
>
> 4. I confirm that I oversaw the copying of the documentation obtained during the said inspection process by the applicants. I also ensured that the information obtained and recorded (including the information referred to in the previous paragraph), and those copied were provided to Mr Johan Visser, which information he bases his findings on and was incorporated into his reports, which he has prepared as alluded to in the applicants' founding papers’.

[115] We have a number of concerns about the veracity and admissibility of the allegations proffered in support of this complaint. The first is that both Mr Haufiku and Mr Visser state unambiguously in the first paragraphs of their respective affidavits that they are ‘personally acquainted with the facts set out hereinafter unless the contents or context indicates otherwise or the contrary appears therefrom and the same being both true and correct.’ With full knowledge that they did not have personal knowledge of the facts on which this complaint is based, they failed to qualify their assertions accordingly.

[116] The second is that Mr Visser stated in his confirmatory affidavit that he had compiled a file which contained the ‘source documents’ referred to in the reports annexed to the affidavit of Mr Haufiku. Yet, we learn from the replying affidavit of Mr Haufiku (lodged at least a month later) that the source documents (the counterfoils) for this complaint (and on which annexure LH8 was based) could not be properly copied as a result whereof the serial numbers had to be written down. It follows, that the statement of Mr Visser that he had already compiled a file which contained the source documents at the time the election application was brought was clearly not true. This concern about his credibility also impacts on the reliability of the report compiled (annexure ‘LH8’) - more so, because it later appeared from the affidavit of Mr Gurirab that Mr Visser had not been in possession of any source documents on which he could have based his report and if one considers the extraordinary co-incidence – and statistical improbability - that the sum of uncompleted counterfoilsfor at least nine polling station are expressed

in exact multiples of a hundred (ie 1300, 100, 500, 600, 100, 100, 200, 200, and 900).

[117] A most disconcerting and potentially misleading feature of Mr Visser's untruthful statement about the compilation of the file containing the source documents, is the impression created that the file would be made available to the Registrar of the High Court. The respondents were entitled to act on the assumption that the appellants would follow through on that undertaking. There was thus no need for the first respondent to sift through the ballot paper counterfoils of the constituencies mentioned in the report to verify the allegations contained in 'LH8'. At the end of the day, neither the file nor the source documents were made available to substantiate this complaint - not even a list of the recorded serial numbers of the uncompleted ballot paper counterfoils.

[118] We are satisfied that the allegations made in the founding papers about this complaint and the 'report' of Mr Visser (annexure 'LH8') constitutes hearsay[106] and 'hearsay, unless it is brought within one of the recognised exceptions, is not evidence, ie legal evidence, at all'[107]. For these reasons, we agree that this complaint must be rejected.

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[106] *S v Ndhlovu* 2002 (6) SA 305 (SCA) at 316A-B, para [13].Long before the Constitution came into effect the common law was alert to the dangers such an approach would have entailed. Not only is hearsay evidence - that is, evidence of a statement by a person other than a witness which is relied on to prove what the statement asserts - not subject to the reliability checks applied to first-hand testimony (which diminishes its substantive value), but its reception exposes the party opposing its proof to the procedural unfairness of not being able to counter effectively inferences that may be drawn from it.'

[107] Per Schreiner JA in *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 296F.

Results Announced were of the Verification Process and not Polling Station Results

[119] The appellants contend that, on a proper interpretation of ss 85, 87, 89 and 92 of the Act, the results of votes counted must be announced by presiding officers at the polling stations where the counts have taken place; that the aggregate of the votes so announced at polling stations within a particular constituency must determine the results for that constituency; that the ultimate results of the election must also be compiled and based on the aggregate of votes counted and announced at polling stations and that the results announced at polling stations cannot be changed by the process of verification. To assess the correctness of these contentions, we must briefly refer to the relevant provisions of the Act.

[120] Section 85 of the Act deals with the closing of polls at polling stations, the counting of votes, the sealing of ballot boxes and packets and the rendering of ballot paper accounts. Subsections (1), (2), (3), (4) and (5) deal with the counting of votes at the polling station under supervision of the presiding officer in the presence of election agents. Subsection (6), which deals with the announcement of the results once the count has been completed is perhaps most pertinent to the appellants' submission. It reads:

> '(6) The presiding officer shall, when the counting of votes have been completed, announce in the prescribed manner the result of such count and inform the returning officer thereof and post a copy of the results at the polling station concerned, but in the case of a mobile polling station the results of all the polling stations for that mobile polling station shall be posted at the polling station used at the closing of the poll where the votes are counted.'

Subsections (7), (8) and (9) require of the presiding officer at a polling station to prepare a return of the result of the poll at that station and to deliver the return together with sealed packets of the ballots counted and other election material to the returning officer for the particular constituency.

[121] Section 87 of the Act provides for the verification of ballot paper accounts by returning officers appointed for each constituency, including the returns furnished to them in terms of s 87(9) by the presiding officers at polling stations within their respective constituencies. Section 87 (2) (a) and (b) provides as follows regarding the duties of the returning officers:

> '(2) The returning officer shall-
>
> (a) open all the ballot boxes and sealed packets relating to a particular polling station received from the presiding officer in terms of section 85 and remove there from the counted, unused and spoilt ordinary ballot papers, the counted results of the poll in the case of voting machines and the counted tendered vote ballot papers and counted ballot papers in the authorisation envelopes and verify the correctness of the return furnished by the presiding officer concerned in terms of subsection (9) of that section;
>
> (b) after such verification-
>
> (i) prepare a report on the results thereof;
>
> (ii) allow any counting agent or candidate to make copy of the report; and
>
> (iii) cause the report to be delivered or transmitted to the Director.'

[122] Section 89 deals with the determination and announcement of results in National Assembly elections. Most relevant are subsections (1) and (2) thereof:

> ‘(1) At an election for members of the National Assembly a returning officer shall, when the counting of votes in accordance with section 85 has been completed, and whether or not the return referred to in section 85(9) was found to be correct, announce in the prescribed manner the result of such count and inform the Director thereof.
>
> (2) The Director shall in accordance with the results received by him or her from returning officers in terms of subsection (1), determine in the manner provided in Schedule 4 to the Namibian Constitution the number of candidates of each political party to be declared duly elected as members of the National Assembly.’

[123] An analysis of these sections shows that a presiding officer must announce the results of the votes counted at that polling station in terms of s 85(6) and, in terms of subsection (9) thereof, furnish a return of the result of the poll at that polling station to the returning officer for the constituency within which that polling station is situated. In the case of National Assembly elections, the returning officer must announce the result of the count done by the presiding officer at the polling station in terms of s 85 irrespective of whether the return of the result of the poll furnished to him or her in terms of s 85(9) was found to be correct. The returning officer for a constituency must, in turn, furnish the Director with the results announced in respect of the polling stations within that constituency (ie the results of the count at the respective polling stations announced in terms of s 85(6) of the Act). The Director must transmit the results received by him to the Commission as is required by s 89(5) and the Commission must cause the publication of any announcement made and transmitted to it in terms of s 85(6) – ie the results announced at polling stations by presiding officers.

[124] We are therefore in agreement with the proposition advanced on behalf of the appellants. This was also the view taken by the High Court and, from what we understand, it is not disputed by counsel for the respondents. Mr Tötemeyer drew attention to a paragraph in the first respondent's answering affidavit which, he contends, must be understood that the first respondent had a different understanding of the Act and that he maintained that the results which had to be announced were those determined in the course of the verification process. The paragraph reads as follows:

> '"63.1 It is correct that the results announced by the returning officer is the collation of the results announced by the presiding officers of the various polling stations, of the constituencies for which the returning officer is appointed. However it is incorrect to state that the results announced are not of any verification process. The first respondent has two Elect Forms for announcement of results by the presiding officer and by the returning officer Elect 20 (b) is an announcement of the results by the presiding officer. This Form is made available to the returning officer for purposes of verification. Elect 20 (b) is the Form used by the presiding officer to announce the results at the polling station, and to the returning officer. Elect 20 is the Form used by a returning officer to announce the results after verifying the results of all the polling stations of the constituency and consolidating such results into this single form, Elect 20. Thus the results announced by the presiding officer are the same results (subject to verification), consolidated into Elect 20, announced by the returning officer. The applicants' interpretation of the relevant provisions of the Act is with respect absurd. I must also point out that at every stage of the electoral process, at the polling stations presided over by presiding officers and at the verification center presided over by the returning officer, the applicants were either represented or entitled to be represented by party agents. For each constituency, one polling station was converted or was used as verification center where the returning officer executed his functions as per the provisions of section 87 of the Act. The verification centers were not secret as was made out in, various newspaper reports. Party agents had access thereto. The applicants' polling agents at both polling stations and verification centres, were

> largely unprepared and in some cases their polling agents left polling stations and verification before counting and verification was respectively completed.'

[125] Counsel for the appellants submits that the use of the double negative in the second sentence of the quoted response by the first respondent must be understood that the results announced were those of the verification process. Moreover, the qualifications suggesting that the results announced are subject to verification, must also be understood to mean that, should the results change as a consequence of the verification process, it is the changed results which would then be announced. This inference, he contends is supported by the first respondent's allegation that the appellants' interpretation of the provisions of the Act is 'absurd'. That, he says clearly implies that the appellants' interpretation of the Act (ie that it is the polling station results that form the basis of the ultimate result announced on a national level) is wrong. Based on this interpretation, he contends that the first respondent's misunderstanding of the Act had a direct bearing on the manner in which the election was conducted, how the votes were processed and which results were ultimately used to determine the outcome of the election.

[126] It seems to us that the interpretation which counsel for the appellants is urging upon us may be somewhat uncharitable to the first respondent. The results of National Assembly elections can be announced at three levels: the results of counts at individual polling stations in terms of s 85(6); the aggregate of the results of all the polling stations within a constituency as the election results for that constituency in terms of s 89(1) and, finally, the national aggregate of the results of all the polling stations as the national result of the election in terms of s 89(2). It is therefore to be expected that the returning officer will collect and collate the results

of the various polling stations within the constituency as part of the verification process to announce the election results for that constituency as required by s 89(1). Moreover, s 85(6) requires of the presiding officer to inform the returning officer of the results announced at the polling station and it is only to be expected that the returning officer will verify it against the return of the result of the poll at that polling station when he receives it together with the other election material. If, for instance, it is established during the verification process that, due to an erroneous entry on the return submitted by a presiding officer, the result of the count differs from that which was actually announced at the polling station and communicated by the presiding officer to the returning officer in terms of s 85(6), the returning officer will be mindful not to use the erroneous entry for purposes of the constituency's collated result. ‘Verification’ in this sense simply means to establish the correctness of a fact. It does not perforce imply that, if the fact cannot be verified, the verification process requires that it must be corrected.

[127] The first sentence of the quoted passage is a strong indication that this is also how the first respondent understood the process. He makes it clear that the results announced by a returning officer area collation of the results announced by the presiding officers of the various polling stations falling within the constituency for which the returning officer has been appointed. He then continues: ‘However, it is incorrect to state that the results announced are not of any verification process.’ If, as we have pointed out in the previous paragraph, the collation of results for purposes of an announcement on a constituency level is regarded as part of the verification process, then the sentence - however inelegantly it might have been worded - makes perfect sense. The same applies to the qualification: ‘subject to

verification' used elsewhere in the text. It is not clear precisely which part of the interpretation which the appellants placed on the Act was considered by the first respondent to be 'absurd'. We do not know whether the deponent does not perhaps consider as 'absurd' an interpretation which excludes the collation of results as part of the verification process on a constituency level.

[128] What is more, notwithstanding the fact that the appellants had numerous party agents in the field, they could not refer to a single incident where the results announced by a presiding officer at a polling station differed from those which were used for purposes of an announcement on constituency or national level. This, it seems, is also what the first respondent in effect alleges and what the Court a quo found to be the case.

[129] We are therefore of the view that the interpretation which the appellants are seeking the Court to attach to the quoted passage from the first respondent's statement is not the only reasonable interpretation and does not necessarily imply that the result announced in the National Assembly election was not the aggregate of the results announced at the various polling stations but different results created by the process of verification instead. In the absence of any evidence that a result different to any of those announced at polling stations were used, this complaint must fail.

Reconciliation between 'Elect 20(b)' and 'Elect 16' Forms

[130] In order to manage and administer the electoral process, the first respondent designed various electoral forms designated by the abbreviation 'Elect'

and followed by a number, identifying the purpose for which that form has been designed. These forms can be classified into two distinct categories, i.e. those designed for administering the electoral process and those designed as official returns to be used, as required by the Act, to communicate election results to returning officers, the Director of Elections and the Chairman of the first respondent. The forms have been designed to complement one another and to create a transparent paper trail as part of the wider range of the checks and balances built into the election process. The two forms referred to in this complaint may both be classified as 'election returns' as contemplated under the Act.

[131] The Elect 16 form is titled 'Ballot Paper Account by the Presiding Officer'. It is divided into three parts: Part A requires of presiding officers to enter the number of ballot papers (and their serial numbers) received prior to or during the election at their respective fixed or mobile polling stations. Part B is intended to be an account of the ballot papers done after the voting process and requires of presiding officers to enter information about the number of ballot papers in the ballot box, the number of spoiled ballot papers (which have not been placed in the ballot box) and the number of unused ballot papers. This information is required in terms of s 85(2) of the Act. The total number of ballot papers accounted for under Part B must be reconciled with – and should be identical to - the total number of ballot papers received under Part A. We note that the number of voters who cast their votes at a particular polling station, may also be ascertained with reference to the number of 'ballot papers in the ballot box' as accounted for in Part B. Part C allows the presiding officers to record the number of voters who had voted with

valid voter registration cards but whose names did not appear on the voters' register.

[132] The Elect 20(b) form is titled ‘Announcement of Results’. It must be completed by presiding officers after they have counted the votes at their respective mobile or fixed polling stations. It is drafted in the form of a declaration to announce the results of the votes counted at the polling station in terms of s 85 of the Act. It requires of Presiding Officers to enter, among other things, the following information for purposes of the announcement: the number of ballot papers rejected; the number of votes counted and the number of votes counted which have been allocated to each of the political parties that participated in the National Assembly election.

[133] It must be immediately evident that the sum total of ballot papers rejected and votes counted at a particular polling station as recorded by a presiding officer on the Elect 20(b) form should be the same as the number of ‘ballot papers in the ballot box’ recorded in respect of that polling station in Part B of the Elect 16 form. (For the sake of brevity we shall refer to the sum of ballot papers rejected and votes counted as recorded in the Elect 20(b) forms simply as ‘votes counted’ in the discussion of this complaint). The appellants' complaint is that these numbers do not reconcile at 33 polling stations. The appellants detailed the discrepancies alleged in respect of each polling station in a report prepared by Mr Visser. In summary, the report shows that at 10 of the polling stations a total number of 2334 more votes were counted (according to the Elect 20(b) forms) than the number of ballots which should have been in the ballot boxes (according to the Elect 16

forms). In respect of the other 23 polling stations the converse applies: the number of ballots which should have been in the ballot boxes (according to the Elect 16 forms) exceeded the number of votes counted from those ballot boxes (according to the Elect 20(b) forms) with 5613.

[134] The first respondent points to some errors in the report which, even if accepted, would not have a substantial effect on the discrepancies asserted. It was constrained to acknowledge, through the answering affidavit deposed to by its Director of Elections, that ‘there were mistakes here and there’ and that ‘the elections were not without flaws’ but maintained that the results of the election were reliable ‘except for the few discrepancies’. Elsewhere in the answering affidavit, the first respondent also acknowledges human errors and ‘administrative hiccups’ but he strongly denies that they constitute evidence that the elections have been ‘rigged’ or that ballot boxes have been ‘stuffed’. It proceeds to detail at length the security measures in place and refers to the transparent and accountable manner in which the election has been conducted. We shall return later to consider some of these aspects in greater detail.

[135] The Court a quo rejected this complaint on a premise not advanced by any of the parties. Mr Visser’s report, the Court held, refers to ‘Elect 20’ forms. These forms are used by returning officers to announce the results in respect of the election for members of the National Assembly per constituency (not per polling station, as Elect 20(b) does). As a result, the Court reasoned, it was not supported by the allegations in the appellants’ affidavits and could not be used for comparative purposes. The Court, therefore, rejected the complaint.

[136] It is clear, as counsel for the appellants argued in this Court that the reference to ‘Elect 20’ in Mr Visser’s report should have been a reference to ‘Elect 20(b)’. It was at all relevant times read and understood by all the litigants in that manner. In argument before this Court counsel for the respondents sought to defend the approach which the Court a quo had taken to this complaint - even though it is not one which they have proposed in the proceedings a quo. We must immediately say that we do not propose to adopt the same approach. The underlying principles and values at stake in applications of this nature, as we have pointed out at the outset of this judgment, are too important to reject an election complaint, properly understood and fully addressed by all the litigants, on what might have been a typographical error or an innocent misstatement. It has always been the approach of this Court to look at substance rather than form, more so, when the matter is of great importance and the public’s interest is at stake. We shall therefore proceed to decide the complaint on the premise that Mr Visser intended to refer to the Elect 20(b) forms.

[137] The view taken in the first respondent's answering affidavit to the particulars contained in the report is not that it lacked the source documents relied on for its compilation or that it was based on hearsay. Although it reserved its rights to apply that it be struck out, the first respondent nevertheless dealt with the information contained in the report head on. It alleged that the report was ‘riddled with mistakes as follows . . .’ but then proceeded only to refer to 3 errors. These errors, even if corrected in the manner proposed by the first respondent will reduce the discrepancies earlier referred to from 2334 to 1892 and the other from 5613 to

5502. On the *Plascon-Evans* approach to factual disputes, discussed in greater detail elsewhere in this judgment, we must accept that the appellants have at least proven the discrepancies to the extent that they have not been contested by the first respondent.

[138] On that basis we must accept that the ballot boxes of 10 polling stations had 1892 more ballot papers in them than the number that should have been there according to the Elect 16 forms completed for those polling stations and that 23 polling stations had 5552 ballot papers less in them than the number that should have been there according to the Elect 16 forms for those polling stations. Does this constitute evidence of electoral fraud in the National Assembly election or should it be considered as evidence of administrative ineptitude on the part of the presiding officers concerned?

[139] Other than generalised allegations raising the possibility of ballot box stuffing in respect of some complaints, we do not find any allegation of that nature specifically linked to the discrepancies under this complaint. To the extent that it is required, however, we must briefly consider the first respondent's denial that electoral fraud of that nature could have been committed, given the unprecedented nature of control and security measures which had been in place during the election. Its Director of Elections also claims that the process was completely transparent. He states that every fixed polling station was staffed by eight polling officials (each mobile polling station had six polling officials) and that political party agents observed the elections at each and every polling station. The political party agents were provided with seals and were entitled to affix their own seals to the

ballot boxes. The presiding officer had his or her own seal with a unique number which was used to seal the ballot boxes in the presence of the party agents. Seals were only removed from ballot boxes by the presiding officer in the presence of the other staff and the party agents. The ballot boxes and ballot papers were at all times in the custody of, or under guard by, members of the Namibian police. The effect of the evidence is that, due to the security measures in place, it was impossible to remove ballot papers from boxes or to 'stuff' them.

[140] Insofar as these allegations are at odds with the appellants' general allegations of electoral fraud and ballot box stuffing, the disputes of fact evident on the papers must be resolved with regard to the *Plascon-Evans* rule. In the judgment handed down by this Court in the previous appeal it was expressly foreseen that the appellants might wish to reconsider their position and that they might seek for those disputes be referred to oral evidence for determination. That was one of the express reasons why this Court remitted the matter for further adjudication to the High Court. The remarks of this Court notwithstanding, the appellants elected not to adopt that course. The inescapable inference to be drawn from their attitude, is that they abided by the determination of the factual disputes with reference to the *Plascon-Evans* approach. It is on this basis that we must evaluate the evidence.

[141] On the evidence presented by the first respondent we therefore conclude that only ballots cast by voters were deposited in the ballot boxes and that, once deposited, none of those ballots was removed before they were counted. The difficulty to reconcile the contents of the returns in question, it follows, resulted

from administrative errors in the compilation of those returns and not from any fraudulent conduct or illegal and corrupt practices. We shall assume, without deciding, in favour of the appellants that the discrepancies are 'mistakes' contemplated in s 95 of the Act, which reads:

> '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 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.'

[142] Counsel for the appellants drew our attention to the analysis of a similar provision in the matter of *Putter v Tighy*,[108] where the Court held (at 408) as follows:

> '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'.

The Court continued (at 410):

> '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.'

[108] 1949 (2) SA 400 (A)

Similar views were expressed in *Scott & Others v Hanekom & Others*[109] and approved in *Republican Party of Namibia v Electoral Commission of Namibia.*[110]

[143] The administrative mistakes made by the presiding officers who completed the returns in question undoubtedly bears on the checks and balances provided for in Part V of the Act. However, when considered against the total number of polling stations and ballots cast in the National Assembly election, those errors, preventable as they were, are not so serious that they detracted from or diminished that or any other of the principles in accordance with which the National Assembly election had to be conducted under Part V of the Act. We are also satisfied - and this follows from our earlier findings of fact - that the first respondent has proven on a balance of probabilities that the result of the National Assembly election was not affected by the mistakes.

I Costs

[144] Administrative mistakes of this nature in the conduct of elections are a matter which also received attention from the Court a quo. Court noted as follows:

> 'It will be unfortunate if the people responsible for the lapses are allowed to participate in the conduct of elections and to unnecessarily put the country through the same controversy and suspicion that had characterised the aftermath of the 2009 (National Assembly) election. It will be a sad day indeed for this fledgling democracy if, after this verdict, those who manage elections think that they have been completely vindicated, and therefore to continue with business as usual.'

[109] 1980 (1) SA 1182 (C) at 1198 E- H
[110] Supra at 106J – 107E.

We have noted the other reasons and considerations why that Court found it necessary to make a special order of costs and, although we do not find it necessary to repeat them for purposes of this judgment, we nevertheless endorse those views. Those considerations apply with equal force to this case. The responsibilities cast by the Act on the Commission are onerous but they must be executed with impartiality and efficiency. Hence, we intend to make a similar order of costs.

[145] In the result, the following orders are made:

1. The applicants' failure to timeously deliver and file their heads of argument in respect of the application for condonation and reinstatement is condoned.
2. The first and second respondents' *in limine* application that the appellants' founding affidavit in the application for condonation and reinstatement of the appeal be struck out on account of lack of authority, is dismissed with costs, such costs to be paid by the first and second respondents jointly and severally, the one paying the other to be absolved.
3. The first respondent's *in limine* application that the applicants' replying affidavit in the application for condonation and reinstatement of the appeal be struck out on the ground that it was not filed within a reasonable time, is dismissed with costs.
4. The first respondent's application to strike out certain parts of the applicants' papers in the application for condonation and reinstatement of the appeal on

the ground that they contain inadmissible hearsay evidence, is dismissed with costs.

5. The applicants' non-compliance with –

    5.1 rule 5(4)(a) pertaining to the period within which they had to file their respective powers of attorney in the appeal and

    5.2 rule 5(5)(b) pertaining to the period within which they had to file the record of appeal

    is condoned and the applicants' appeal is reinstated.

6. The appellants' non-compliance with the period within which they had to file their heads of argument on the merits of the appeal is condoned.

7. The appellants in the applications for condonation referred to in paragraphs 1, 5 and 6 are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the applications excluding the costs occasioned by the respondents' opposition to the applications, which, in respect of the application referred to in paragraph 1 shall be paid by the second respondent and, in respect of the applications referred to in paragraphs 5 and 6, shall be paid by the first and second respondents jointly and severally, the one paying the other to be absolved.

8. The appeal is dismissed.

9. The appellants are ordered to pay the costs of the second respondent in the appeal.

10. No order of costs is made as between the appellants and the first respondent in the appeal.

11. All the cost orders shall include the costs consequent upon the employment of one instructing and two instructed counsel.

_____
SHIVUTE CJ

_____
MARITZ JA

_____
MAINGA JA

_____
CHOMBA AJA

_____
MTAMBANENGWE AJA

APPEARANCES:

1st, 2nd, 3rd,4th, 5th,6th, 7th and 9th	R Tötemeyer
APPELLANTS:	(with him J A N Strydom
	Instructed by Theunissen , Louw & Part
1st RESPONDENT:	I V Maleka SC
	(with him S Namandje)
	Instructed by Government Attorney
2nd RESPONDENT:	I A M Semenya SC
	(with him S Akweenda and E N
	Shikongo
	Instructed by Shikongo Law Chambers