



CASE No.: A 01/2010

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

RALLY FOR DEMOCRACY AND PROGRESS	1st APPLICANT
UNITED DEMOCRATIC FRONT OF NAMIBIA	2nd APPLICANT
DEMOCRATIC TURNHALLE ALLIANCE	3rd APPLICANT
CONGRESS OF DEMOCRATS	4th APPLICANT
REPUBLICAN PARTY OF NAMIBIA	5th APPLICANT
ALL PEOPLES PARTY	6th APPLICANT
NATIONAL UNITY DEMOCRATIC ORGANISATION	7th APPLICANT
NAMIBIA DEMOCRATIC MOVEMENT FOR CHANGE	8th APPLICANT
DEMOCRATIC PARTY OF NAMIBIA	9th APPLICANT
HIDIPO LIVIUS HAMUTENYA	10th APPLICANT
JUSTUS GAROEB	11th APPLICANT
KATUUTIRE KAURA	12th APPLICANT
BENJAMIN ULENGA	13th APPLICANT
HENRY FERDINAND MUDGE	14th APPLICANT
IGNATIUS NKOTONGO SHIXWAMENI	15th APPLICANT
KUAIMA RIRUAKO	16th APPLICANT
FRANS MIKUB GOAGOSEB	17th APPLICANT
DAVID SALOMON ISAACS	18th APPLICANT

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 DEMOCRACY PARTY	5th RESPONDENT
COMMUNIST PARTY	6th RESPONDENT
HIFIKEPUNYE POHAMBIA	7th RESPONDENT
USUTUALJE MAAMBERUA	8th RESPONDENT
ATTIE BEUKES	9th RESPONDENT

CORAM: **DAMASEB JP *et* PARKER J**

Heard on: 1st, 2nd March 2010

Delivered on: 4th March 2010

JUDGMENT:

DAMASEB, JP: [1] I wish to record at the outset that I concur with the result proposed by Parker J at the end of his judgment. Considering that I come to the same result for slightly different reasons, especially with the respect to the challenge to the result of the National Assembly Election, I thought it appropriate to make a few remarks of my own; not least also in view of the importance of the grounds on which the two election applications in this case stand to be disallowed.

[2] The statutory bases for the National Assembly election and the Presidential election are amply set out in the judgment of Parker J. I do not wish to repeat that because I am in agreement with the way Parker J deals

with that matter. I only wish to echo that the two are separate and distinct elections.

The challenge to the presidential poll

[3] It is common cause that the election application "*presented to court*" (*infra*) on 4 January 2010 related only to the National Assembly elections. In his founding affidavit, Mr Libolly Haufiku, who deposed to the main affidavit on behalf of all the applicants, stated that the papers may in due course be "*amplified*" on account of the alleged non co-operation of the first respondent in allowing access to election material pursuant to an order of this Court granting access to such material in terms of sec.93 of the Electoral Act . No.24 of 1992, as amended ("*the Electoral Act*"). In his founding affidavit , Mr Haufiku stated that the applicants intended to "*amplify*" the election application after its "presentation to court".

[4] Section 110 of the Electoral Act states as follows:

- (1) An election application *shall* be presented within 30 days after the day on which the result of the election in question has been declared as provided in this Act.
- (2) Presentation of the application *shall* be made by lodging it with the registrar of the court.
- (3)(a) At the time of the presentation of the application or within five

days thereafter, security for the payment of all costs, charges and expenses **that may** become payable by the applicant –

- (i) to any person which may be summoned as a witness on his or her behalf; and
- (ii) **to the person**, or, in the case of an election on party lists, the political party whose election or return is complained of (hereinafter referred to as the respondent)

shall be furnished by or on behalf of the applicant.

- (b) The security **shall** be for an amount determined by the registrar of the court and **shall** be furnished in money or by recognizance to the satisfaction of the said registrar.

(c) If the applicant complies with the provisions of paragraph (b), the application *shall* be deemed to be at issue, or, **if there is no such compliance, no further proceedings shall be had on the application.**” (Emphasis added)

Section 113 states:

“Notice in writing of the presentation of an election application, accompanied by a copy of the application and a certificate of the registrar of the court stating that the amount determined by him or her as security has been paid or sufficient recognizance has been furnished in respect of that amount as contemplated in section 110(3), shall within ten days after the presentation of the application, be served in accordance with the rules of the court on a respondent.”

[5] It is common cause that two separate elections took place on 27 and 28 November 2009: the National Assembly Elections and the Presidential

Elections. The results of both of polls were announced on 4 December 2009. On 4 January 2010 the applicants presented to Court an application in terms of Chapter VII (sec.110 , *supra*)of the Electoral Act , challenging the National Assembly elections only. Security for cotss was determined and duly paid in respect of that election application.

[6] In the election application presented to Court on 4 January 2010, Mr Haufiku for the applicants stated in his founding affidavit that:-

“the purpose of the application was to have the **elections of the National Assembly held on 27 and 28 November 2009, declared null and void and set aside**, alternatively, to have the elections results announced on 4 December 2009 ... nullified and to have the ballots cast and election recounted.” (Emphasis supplied)

[7] That the applicants sought relief only against the result of the National Assembly elections is borne out by the fact that in the 4 January application, none of the presidential candidates were cited either as applicants or respondents. They are now cited in the “*amplified notice of motion*” (*infra*). No assertions are made in the papers filed on 4 January 2010 relative to the presidential poll’s invalidity. This much was conceded by Mr Totemeyer in oral argument.

[8] On 14 January 2010, before service on the respondents of the election application as presented to Court on 4 January 2010, the applicants filed

further papers referred to as the “amplified notice of motion”, together with further affidavits. These papers are aimed at:

- i) adding additional grounds for challenging the National Assembly elections; and
- ii) mounting a challenge against the Presidential Election.

[9] From the above , two issues arise: the first is the applicant’s assumption that their indication in the founding papers that they may in due course amplify their papers entitled them to include a challenge against the presidential poll in the “amplified” papers. The second is the applicants’ assumption that it is competent under the Electoral Act to “*amplify*” (or amend) an election application which had already become at issue in terms of sec. 110 (3) of the Electoral Act, by adding additional grounds to an earlier application. This judgment does not address the last-mentioned assumption.

[10] The first and second respondents have raised objection to the applicants launching a challenge against the presidential poll in the “amplified notice of motion” filed on 14 January 2010. They premise the objection on the legal submission that the challenge to the presidential poll was brought beyond the 30-day period and is accordingly prescribed. In addition, they submit, being a separate and substantive application challenging the presidential poll, the applicant’s failure to have provided security in respect of the presidential poll’s challenge makes it a nullity in terms of sec. 110 (3)(c) of the Electoral Act.

[11] The applicants respond that, first, the Court must extend the 30-day time period for the lodging of the election application challenging the Presidential Election in view of the time pressure under which they had to prepare the papers, and the fact that they were obstructed in that endeavour by the first respondent's failure to give them timely access to election material in the wake of this Court's order of 24 December obtained in terms of sec.93 of the Electoral Act. Secondly, they say that in respect of the challenge to the presidential poll security is not an issue as it has become academic in the light of the fact that none of the persons cited as respondents in the presidential poll challenge had opposed that relief.

Requirement for security before service of election application

[12] The Electoral Act is silent on what is meant by "*presentation of the application*". The *Concise Oxford English Dictionary* defines the noun "*presentation*" as "*the manner or style in which something is presented; a formal introduction*". It then defines the verb "*present*" as "*give formally or ceremonially; formally introduce to someone*". The Electoral Act goes on to provide that service of the application on the respondents shall be effected within 10 days after its presentation to the Court. The scheme of the section is tolerably clear in my view: the first step in an election application is its presentation to Court. The reason is obvious: it is to afford the Registrar the opportunity to acquaint herself with the nature of the application as regards

the number of applicants, respondents and the complexity of the matter. Based on that, the Registrar is to make an assessment of the security payable (if any). It is only then that the second step is taken, that of service on the respondents “*in accordance with the rules of the court.*”

[13] There can therefore be no doubt that the determination of security, who must pay it and in what amount, is a very important aspect of the election application procedure envisaged in Part VII of the Electoral Act . If the applicant complies with the security required by the Registrar the application is deemed to be at issue, and if no security is paid no further proceedings shall be had on the application and non- compliance cannot be condoned. That much is now settled. See the decision of the Full Bench of this Court in *DTA of Namibia and Another v Swapo Party of Namibia and Others* 2005 NR 1 at 11J/12A-D from which it is clear that the payment of security in terms of sec.110(3) of the Act is a *conditio sine qua non* to the pursuit of an election application where a person is cited who stands the risk of being unseated in the event of the challenge being successful. Security is determined by the Registrar at the time of the presentation of the application to Court or within 5 days of such presentation, but before service on a respondent, i.e. even before it is known which of the respondents will oppose the relief sought.

[14] The sole criterion for the determination of security payable is that a respondent is “*a person whose election or return is complained of*”. It is neither

here nor there that the person whose election or return is complained of does not upon service on him oppose the relief sought. No further proceedings shall be had on an election application in respect of which security has not been paid. The applicants' reply that the security issue had become moot because none of the respondents had sine opposed it is, therefore, bad in law.

[15] The challenge against the presidential poll launched by the applicant on 14 January 2010 therefore stands to be struck from the roll with costs. Having so decided, it becomes unnecessary for me to consider the issue whether this Court has inherent jurisdiction to extend the 30-day time period for the filing of the challenge to the Presidential Election on the basis stated by the applicants.

The *in limine* point raised in respect of the National assembly election challenge: non-compliance with rule 3 of the Rules of the High Court, read with sec. 113 of the Electoral Act

[16] Section 113 of the Electoral Act requires that an election application be served on the respondents "in accordance with the Rules of Court". Service is governed by Rule 4 and, in this context, nothing turns on it. The relevant rule for our present purposes is rule 3 which 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. ” (Emphasis added)

[17] It is common cause that the applicants’ election application challenging the outcome of the National assembly Election was launched after 16h00 on 4 January 2010. The first respondent has taken the point that the application purportedly lodged in terms of sec.110 on 4 January 2010 is a nullity because it was presented to Court irregularly. For this stance the first respondent draws inspiration from the terms of Rule 3 which I have already quoted.

[18] Parker J comes to the conclusion that the challenge to the National Assembly election lodged at 16h30 on 4 January 2010 is a nullity because it ought to have been filed at 15h00, unless there were “exceptional circumstances” for its acceptance by the Registrar after the period stipulated in rule 3 of the Rules of Court. He holds that the applicants failed to make the necessary averments in their founding papers to satisfy the Court that exceptional circumstances existed for the acceptance of the application by the Registrar after 15h00.

[19] The applicants maintain that the Registrar had at the time exercised her discretion to accept the papers and that she was satisfied about the existence of “exceptional circumstances” to trigger the operation of rule 3.

[20] Rule 3 prohibits the filing of process after 15H00, unless there are "exceptional circumstances" It is the applicant who relies on the existence of such special circumstances. I am in agreement that unless there were exceptional circumstances the acceptance of the application by the Registrar was a nullity and there could have been no valid election application before Court. I am also in agreement therefore that it ought to have been presented as part of the applicants' case. The attempt to introduce evidence in the replying papers to the effect that the Registrar agreed (being satisfied of the exceptional circumstances) to accept the election application is not permissible. Since the applicants had acted contrary to law they were required to place on record in the founding papers, those exceptional circumstances which excused their prohibited conduct. The attempt to cure that in the replying papers does not avail the applicants. This proposition is settled and requires no citation of authority. I do not accept Mr Totemeyer's submission that the applicants were not required at all to allege in their papers that the Registrar had been apprised of the existence of exceptional circumstances for filing papers after 15H00 and that she had thereafter exercised her discretion in accepting them.

[21] Rule 3 applies not just to the applicants but also to the Registrar. She cannot act as she pleases. The public must know why she acted in the way she did. It cannot lie in the mouth of the applicants or the Registrar to say: "Look I [she] had the discretion; I [she] exercised it, *cadet questio*." I am afraid that is an invitation to lawlessness.

[22] The applicants bore both the evidentiary burden and the legal burden in respect of the existence of exceptional circumstances which justified prohibited conduct.. They should have placed on record the evidence that demonstrates such circumstances so that it can be objectively assessed as to qualifying as such. That is no mere formality: Mr Totemeyer made this look like some trivial matter that can be overlooked “*in the interest of justice*”. With the greatest respect, he is wrong. Rules exist to promote predictability and certainty. The public expect their enforcement and “*justice*” demands that the law is complied with. It is not that the applicants had no other recourse: the Court or a judge could have been approached to come to their assistance.

[23] On two occasions the Full Bench of this Court emphasised the importance of the Rules of Court: *Swanepoel v Marais and Others* 1992 NR 1 at 2I-J and 3E-F; *Ark Trading v Meridien Financial Services Namibia (Pty) Ltd* 1999 NR 230 at 238D-H. In the *Swanepoel* matter, Levy J writing for the Court put it thus:

“*The Rules of Court are an important element in the machinery of justice. Failure to observe such rules can lead not only to inconvenience of immediate litigants and the Courts but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the proper application of the law that the Rules of Court, which have been designed for that purpose, be complied with. Practice and procedure in the Courts can be completely dislocated by non-compliance.*”

[24] I cite the above dicta not so much to show that the respondents were prejudiced in this case by the applicants’ non-compliance with rule 3, but to

show that compliance with Rules of Court is no trivial matter and that a very good basis must exist for a departure from the Rules.

Should condonation be granted for the failure to comply with rule 3?

[25] I have considered the approach adopted by Parker J in respect of the admitted non-compliance with rule 3. I do not wish to adopt the approach that such non-compliance rendered the application a nullity. I would rather assume, without deciding, that the combined effect of sec.113 and rule 3 is not peremptory but directory and that non-compliance in the circumstances before us, is amenable to condonation by the High Court. (See: *DTA of Namibia*, *supra*, at 12 F – H).

[26] In oral argument, Mr Totemeyer confirmed that there is no formal application before Court seeking condonation for the admitted late lodgement of the election application. He submitted that the applicants' position is that no condonation is required as they complied with rule 3. It is only if the Court were to find that they did not so comply that he, in the alternative and from the Bar, seeks such condonation in view of the admission by Mr Namandje for the first respondent that the first respondent does not rely on prejudice.

[27] Mr Totemeyer submits that the Court has an inherent power to grant condonation after expiry of a relevant statutory time limit with or without a

prior formal application to do so. He cited *Mc Gill v Vlakplaats Brickworks (Pty) Ltd*, 1981 (1) SA 637(W), 634; *Hessels Cash and Carry v S A Commercial Catering and Allied Workers Union*, 1992 (4) SA 593 (E), 599; *Federated Insurance Co. Ltd v Malakwana*, 1986 (1) SA 751 (A).

[28] The first respondent opposes any condonation being granted to the applicants for the late filing of the application on 4 January - although they do not rely on any prejudice. Being satisfied that the applicants did not comply with rule 3, I must now consider the application for condonation made “in the alternative” by Mr Totemeyer from the Bar.

Important considerations in considering the “alternative” application for condonation

[29] I must stress at once that the parties directly locked in horns in an election application are not the only ones with an interest in its outcome. An election application has a far wider public interest and *that* must be placed in the scale in assessing whether or not condonation for the non-compliance with rule 3 read with s. 113 should be allowed.

[30] This court is required under the Electoral Act to determine (i.e. finalise) an election application “*within 60 days from the presentation of an election application to the registrar of the court or within such longer period as special*

circumstances may require". The law thus requires all processes attendant upon an election application after presentation to Court, i.e. exchange of pleadings and, crucially, preparation by both the Court and the parties, to take place in a rather compressed time frame. Expedition therefore lies at the heart of an election application as recognised by the Full Bench in *DTA of Namibia and Another (supra)* at 11G. I might add, predictability by all involved as to when defined activities will take place is equally an important matter; and understandably so: There is a clear public interest that election disputes are quickly resolved so that there is certainty: either that there will be an orderly re-election or recount as directed by a Court in the event it finds irregularities, or validating the election and thus bestowing legitimacy on those elected to proceed with the business of governing the nation. For this purpose, at the Court administration level, entertaining election applications involves making special arrangements in respect of the normal Court Roll, not without insignificant inconvenience and cost implications for other litigants. In the present matter, it involved removing other matters already enrolled and advising parties who had already prepared that their matters would not proceed so that a Bench could be constituted to hear the application: a very challenging task in a jurisdiction with a Bench as small as ours.

[31] Compliance with time prescriptions in the Electoral Act is therefore not comparable to the ordinary Rules of Court devised by the court for its run-of-the-mill business. I am not aware of any other legislation in this country, and

none has been cited to us, which contains a *regime* for the disposal of causes, similar to that provided in the Act. The two examples¹ cited by Mr Totemeyer at the request of the Court are not comparable. Not only does the Electoral Act contain a statutory limitation (which is not unusual) for the launching of an election application, but it uniquely requires that such an application must be finalised within a stated period. If one discounts the 10-day window provided for determination of security- and payment thereof before service, the law in reality only provides for 50 days within which pleadings must be exchanged, the matter heard and a judgment given. That is no mean feat even by the standards of the most hardened trial judge or trial lawyer.

[32] It must be borne in mind that a respondent is not entitled to the election application until actual service on it after presentation to Court and determination of security by the Registrar. The applicant in an election matter therefore has a head-start over a respondent: The applicant knows what facts it will rely on and what grounds it will advance. It alone knows whether it will ask for the setting aside of an election or only a recount. It alone knows whether it will be in respect both the Presidential election and the National Assembly

¹ Arbitration Act No. 42 of 1965, sec. 23

“23. Time for making award. – The arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award –

- (a) in the case of an award by an arbitrator or arbitrators, **within four months** after the date on which such arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date; and
 - (b) in the case of an award by an umpire, within three months after the date on which such umpires entered on the reference or the date on which such umpire was called on to act by notice in writing from any party to the reference, whichever date be the earlier date.
- or in either case on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award: Provided that the court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not”.

The Labour Act No. 11 of 2007 in sec. 86 (18) states: “**Within 30 days** of the conclusion of the arbitration proceedings, the arbitrator must issue an award giving concise reasons and signed by the arbitrator.”

election. It alone knows whether only some or all constituencies will be the subject of challenge.

[33] On the contrary, the respondent can only sit and guess what next where, as here, (and it is a matter of public notoriety) an election application is threatened. This has implications for a respondents' trial preparation in an election application : Until it is actually served with the application, a respondent would not know the nature of the case against it; which witnesses will be required to rebut any complaints: the documents to be relied on in rebuttal; verifying the complaints by the applicant(s) , etc. In the case especially of the first respondent, the problem can be serious. It will, as said in its papers before us by its Director, Mr Ndjarakana, have to recall officials who conducted the elections in order to consult. What if they have gone on leave or cannot be traced reasonably soon? And then the process of consulting, preparation of answering papers, cross-checking averments and doing confirmatory affidavits and so on must be had regard to. Before that counsel must be engaged: A decision must be taken not only of the seniority of counsel but also of their experience in such matters. There may be a clash with diaries- a factor not uncommon in litigation.

[34] For the reasons I take the view that litigation in terms of Part VII of Electoral Act must be distinguished from ordinary litigation and for that reason the *ratio decidendi* discernable from the cases cited by Mr Totemeyer

must be approached with great caution. Even then, it is clear from all of the above authorities cited by Mr. Totemeyer that “*good cause*” must be shown before the Court can grant condonation for the non-compliance with the Rules of Court.

Was good cause shown by the applicant? The factual matrix

[35] I remind myself that in considering in what circumstances to grant condonation for non-compliance with rule 3 read with sec 113 of the Electoral Act, one cannot use the same interpretative template as would be applicable in the consideration of a condonation application germane to other causes that come before this Court; for the latter are not subject to the same strictures as the time limits imposed for the finalisation of an election application.

[36] Before I consider the factual basis for the condonation sought “in the alternative from the Bar” , I will start by quoting Mr. Totemeyer’s submission in his heads of argument, repeated in oral argument, on the approach we must take in resolving factual disputes on the preliminary points raised by the respondents. In paragraph 8 of the written heads he states:

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

[37] Mr Totemeyer is plainly wrong: None of these cases are authority for this proposition. The two South African cases, at the pages he cites, do not at all deal with the issue of how to resolve factual disputes when it comes to determining applications to strike, and points *in limine*. Of the Namibian cases, the first, SOS Kinderhof, is relevant in so far as it rejected the argument by counsel “*that in terms of Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd ... and similar cases , the Court a quo was obliged to accept [the respondent’s version] and could not have regard to the applicant’s version*”. The Court stated:

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

[38] It is worthy of note that in in the case before us, the applicants seek final relief to set the National Assembly election aside. *Hepute* holds that in an “interlocutory procedure” relating to whether or not security should be granted:

“ the Plascon -Evans rule does not apply and the court should approach the ‘application’ and all the affidavits as a whole to ascertain whether the second respondent (as applicant in this rule 47 application has made out a case for the order sought in terms of rule 47.”

Hepute is therefore against Mr. Totemeyer’s proposition.

[39] I see no reason in principle why the respondents’ version should be disregarded in the determination of the preliminary points raised in an

application seeking final relief. That is not a path that leads to justice. I think it is only proper to have regard to all averments and to determine whether or not the applicants' papers establish a good basis for granting condonation for the lodgement of the election application contrary to rule 3, read with sec. 113.

[40] The applicants' position seems to be that "good cause" lies therein that in the founding papers it was alleged the election application papers were prepared under extreme time pressure and that they had limited time to inspect the election material obtained following a Court order. This, they say, was compounded by the first respondent's non-co-operation during the inspection process.

[41] The first respondent not only denies frustrating the applicants in the inspection process, but states that they had already - even before the Court order under sec.93 - begun to make certain election material available to the applicants who in any event had threatened to challenge the election results soon after its announcement and therefore ought to have been prepared. The first respondent maintains that the root cause of the applicants' failure to meet the deadline was on account of their having tried to access too much information and that they were not properly equipped for the task.

[42] As the first respondent's Director Mr Ndjarakana puts it:

“the applicants wanted initially to go through electoral materials constituency by constituency, but later realised that they did not have sufficient time and capacity to go through all electoral materials. The applicants requested the first respondent’s officials to only provide them with specific documents relating to specific constituencies and or polling stations. I emphasise that the court order could only be implemented from 28 December 2009 being the ensuing working day after court order was granted. This being a holiday period, the Electoral Commission also had to contact relevant officials who were scattered outside Windhoek for them to report to the Warehouse where the electoral materials were kept so that they could assist with disclosing the materials to the applicants. Finally I point out that even though the applicants intended to challenge the elections, even before the announcement of the results on 4 December 2009 they waited until 16 December 2009 to launch the section 93 application. This did not work in their favour as the application could only be heard on 24 December 2009 and the ensuing court order could only be given effect to from 28 December 2009. I refer to the confirmatory affidavits of Mr Shigwedha and Farmer.”

[43] The applicants’ Mr Haufiku replies to this allegation in the following terms:

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

only serve to illustrate and underscore the applicants' frustration with the way in which the first respondent conducted itself during these proceedings."

[44] The first respondent's Director also maintains that at no stage did they frustrate the applicants access, but that the first respondent's concern was to make sure that the election material in the custody of the first respondent was not compromised during the inspection process. That the first respondent had the duty to make sure election material is not compromised is not seriously disputed, and seems self-evident to me.

[45] On a perusal of the papers, the applicants do not really undermine the assertion by the first respondent that they sought to obtain too much material and were ill-equipped to sift through it in good time; that the applicants underestimated the size of the task of inspecting the material to be obtained as a result of the Court order ; that they ought to have been on time because the decision to challenge the elections was taken very soon after the election; and that the first respondent begun to cooperate with the applicants even before the Court order of 24 December.

[46] The applicants in my view do not make out a case on the papers that they were in any way frustrated by the first respondent in accessing election material. I cannot see any unreasonableness in the first respondent taking such steps as were necessary to make sure that election material was not compromised. If that delayed the applicants somewhat (and on the facts it

seems very insignificant) the applicants must accept it as a necessary part of the order they obtained to access election material.

[47] One gets the very distinct impression that the applicants genuinely underestimated the labour that would be involved in going through what must have been masses of documents they obtained in the attempt to buttress their complaints of electoral irregularities. That to me is no basis for claiming “*exceptional circumstances*” in terms of rule 3; nor is it the basis for granting condonation for the failure to have lodged the application on time. Those who approach court under sec.93 to obtain information in order somehow to (in the mass of paper) find the proverbial “*smoking gun*” that makes out the case for nullifying an election, do so at their own peril.

[48] In considering Mr Totemeyer’s alternative application for condonation from the Bar, the overriding consideration is whether in the public interest the applicants’ failure to lodge the election application ought to be given. In view of the predictability that one expects in litigation in electoral matters, I take the view that it is not - for the reasons that I have given. The applicants make out no good case why they were not able to file the papers on time on 4 January 2010. It is apparent that their failure to come to Court on time related substantially to the fact that they wished to access too much information , and were overwhelmed by the information they obtained in the process. To grant condonation in those circumstances would not advance the general public

interest as it has the potential for encouraging “*fishing expeditions*” before challenging election results. This is the basis on which I exercise my discretion against granting condonation as sought “*in the alternative*” and from the Bar.

[49] The attitude taken on behalf of the applicants creating confusion about whether or not such condonation is required, fortifies me in this view: Condonation is in the discretion of the Court and to justify it, a litigant must show good cause and *bona fides*. The applicant had notice of the respondents’ *point in limine* when the answering papers were filed on 12 February 2010 and the replying papers on 19 February 2010. The applicants persisted even after that that the papers were properly lodged on 4 January 2010. No attempt at all was made at the reply stage to seek the Court’s condonation in any shape or form. Because applicants’ counsel takes the view that it is not necessary, no substantive application for condonation was filed fully setting out the reasons why the applicants filed their papers out of time to enable this Court to properly apply its mind to the matter.

[50] I am therefore unable to give the applicants condonation for the late lodgement of the application on 4 January 2010. Being satisfied that the registrar improperly accepted the application on 4 January 2010, and being satisfied that no proper case is made out for the Court granting condonation for its late filing, the application for condonation stands to be dismissed and

the election application filed on 4 January 2010 challenging the National Assembly election struck from the roll.

Costs and order

[51] It is for these reasons that I too would strike the election application challenging the National Assembly Election and the one challenging the Presidential Election- both announced on 4 January 2010, with costs including one instructed counsel and four instructed counsel for the first respondent; and two instructed counsel for the second respondent. Such costs are against the applicants jointly and severally, the one paying, the others to be absolved.

DAMASEB, JP

ON BEHALF OF THE APPLICANTS:

Mr. Töttemeyer SC

Assisted by: Messrs Strydom
and Van Vuuren

Instructed by:

Theunissen, Louw & Partners

ON BEHALF OF THE 1ST RESPONDENT:

Mr Maleka SC

Assisted by: Messrs: Hinda,
Namandje and Narib

Instructed by:

The Government Attorney

ON BEHALF OF THE 2ND RESPONDENT:

Mr Semenya

Assisted by: Mr Akweenda

Instructed by:

Shikongo Law Chambers

3RD – 9TH RESPONDENTS:

No appearance

