



“REPORTABLE”

CASE No.: A 01/2010

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
SOUTHWEST AFRICA NATIONAL UNION	4th RESPONDENT
NATIONAL DEMOCRACY PARTY	5th RESPONDENT
COMMUNIST PARTY	6th RESPONDENT
HIFIKEPUNYE POHAMBIA	7th RESPONDENT
USUTUAIJE MAAMBERUA	8th RESPONDENT
ATTIE BEUKES	9th RESPONDENT

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

Heard on: 1st March 2010

Delivered on: 4th March 2010

JUDGMENT:

PARKER J: [1] In this election application brought by the applicants, represented by Mr Tötemeyer SC assisted by Mr Strydom and Mr Van Vuuren, on notice of motion presented to Court on 4 January 2010, purportedly in terms of Part VII of the Electoral Act, 1992 (Act No. 24 of 1992) ('s. 109 application'), the applicants have moved the Court for an order in the following terms:

- (1) An order declaring the election for the National Assembly held on 27 and 28 November 2009 null and void and of no legal force and effect and that the said election be set aside.
- (2) Alternatively to prayer (1) above:

- (2.1) An order declaring the announcement of the election results for the National Assembly election held on 27 and 28 November 2009 made on 4 December 2009 and published in Government Notice No. 4397 dated 18 December 2009 null and void and of no legal force and effect.
- (2.2) Ordering the first respondent to recount in Windhoek the votes cast in the said election as provided for in Act 24 of 1992 and to allow the applicants as well as the second to sixth respondents to exercise their rights in regard to such counting as provided for in the said Act.
- (3) Granting the applicants leave to supplement their papers and to amend their notice of motion, before the expiry of the 10 day period contemplated in section 113 of Act 24 of 1992, such 10 day period commencing on the date when the election application is presented to the Registrar of the High Court as contemplated in section 110 of the said Act, and to accept any supplementary affidavit (or amendment of the notice of motion) already delivered at the time of the hearing of this application (and within the aforementioned 10 day period) as part of applicants' founding papers of record in this matter.
- (4) That insofar as it may be necessary non-compliance with the rules of Court regarding service of this application on 5th respondent be condoned.
- (5) Ordering the first respondent to pay the costs of this application including the costs consequent upon the employment of one instructing and two instructed counsel (and ordering any other respondents who may oppose this application to pay such costs together with the first respondent jointly and severally, the one paying the other to be absolved).
- (6) Further and/or alternative relief.

On 14 January 2010, the applicants filed of record an "amplified notice of motion" in the following terms:

- (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 setting aside the said election.

- (2) Alternatively to prayer 1 above-
 - (2.1) An order declaring the announcement of the election results for the National Assembly election held on 27 and 28 November 2009 made on 4 December 2009 and published in the Government Notice No 4397 dated 18 December 2009 null and void and of no legal force and effect.

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

- (3) An order declaring the election for the President of Namibia held on 27 and 28 November 2009 null and void and of no legal force and effect and setting aside the said election.

- (4) Alternatively to prayer 3 above -
 - (4.1) An order declaring the announcement of the election results for the Presidential election held on 27 and 28 November 2009 made on 4 December 2009 and published in the Government Notice No 4397 dated 18 December 2009 null and void and of no legal force and effect.

 - (4.2) 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 ninth respondents to exercise their rights in regard to such counting as provided for in the said Act.

- (5) Granting the applicants leave to supplement their papers (as per the affidavits and documents attached hereto) and to amend their notice of motion (as per this amplified notice of motion) on or before the expiry of the 10 day period contemplated in section 113 of Act 24 of 1992, such 10 day period having commenced on the date when the election application was presented to the Registrar of the High Court as contemplated in section 110 of the said Act, and to – *ex post facto* – accept the affidavits and documents attached hereto as well as this amplified notice of motion to form part of the applicants’ founding papers of record in this matter.
- (6) Only insofar as it may be necessary, granting the applicants leave – *ex post facto* – to have joined the 10th to 18th applicants and 7th to 9th respondents as parties to these proceedings and by virtue of this amplified notice of motion.
- (7) That insofar as it may be necessary, condoning the applicants’ non-compliance with the rules regarding service in respect of the 5th respondent and granting the applicants leave to have served these papers by way of electronic mail on the 5th respondent at the following e-mail address: ndppartv@yahoo.com or in such other manner as may be necessary.
- (8) Ordering the first respondent to pay the costs of this application including the costs consequent to the employment of two instructed counsel and one instructing counsel (and ordering any other respondent who may oppose this application to pay such costs together with the first respondent jointly and severally, the one paying the other to be absolved).
- (9) Further or alternative relief as the Court may deem fit.’

[2] The 1st respondent, represented by Mr Maleka SC, assisted by Mr Hinda, Mr Narib and Mr Namandje and the 2nd respondent, represented by Mr Simenya SC, assisted by Dr Akweenda and Mr Shikongo have moved to reject the application. It seems to us clear that no order is sought against the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents although the 7th respondent will be directly affected by any adverse order against the first respondent on the merits. As I see it, those respondents have been cited as parties to the application because they have an interest in the outcome of the application. Howsoever that may be, the 2nd respondent has filed an answering affidavit which in the main iterates some of the preliminary objections raised by the 1st respondent in its answering affidavit deposed to by the 1st respondent's Director. On that score, the 2nd respondent makes common cause with the 1st respondent as respects those preliminary objections. For the sake of convenience, therefore, where the context requires, any reference to 'respondents' hereinafter means the 1st and 2nd respondents.

[3] I find it necessary to set out in brief now the relevant facts that are either not in dispute or are indisputable. The last Presidential election and the National Assembly election – two distinct elections, as the name of each election indicates – took place on two consecutive dates, namely, 27 and 28 November 2009. The official results of the two elections were announced on 4 December 2009; in the case of the Presidential election in terms of s. 5 of the Electoral Amendment Act, 1999 (Act No. 19 of 1999), and in the case of the National Assembly election in terms of s. 6 of that Act. Thereafter, the

applicants brought application in terms of s. 93 of the Electoral Act, 1992 (Act No. 24 of 1992), as amended, ('the s. 93 application') in which this Court granted an order on 24 December 2009 whereby the applicants were granted permission to inspect or produce certain election materials which the applicants required for the purpose of an election application in terms of s. 109 of the Electoral Act, 1992 ('s. 109 application'). The present proceedings are in respect of an s.109 application.

[4] Counsel on both sides have referred plenteous authorities to us: we are grateful for their industry. I have not overlooked those authorities. I do not think I should adorn this judgment with copious extracts from all the authorities that are of real assistance on the points under consideration.

[5] Although by agreement the parties argued the entire application, the respondents have raised several preliminary points in the form of notices to strike and *in limine* objections. The points *in limine*, the respondents maintain are, individually or collectively, dispositive of the application without the Court having to consider the merits of the application. On the papers the respondents raised three crucial points *in limine* which they maintain render the applicants' application a nullity. The first relates to improper or non-service on some of the respondents. The second relates to the presentation to Court of the election application outside the statutorily prescribed deadline; and the third, a variant of the second, relates to the manner in which the applicants went about challenging the outcome of the presidential election. I have no good reason to

decline the respondents' invitation to first deal with those of their objections which are potentially dispositive of the election application without us having to consider the merits of the matter.

[6] Mr Töttemeyer for the applicants has submitted that to the extent that there are factual disputes the version of the applicants must prevail when I am considering the points *in limine* and the application to strike out (they being in the nature of interlocutory disputes). He relies for the proposition on *Webster v Mitchell* 1948 (1) SA 1186 (W), 1189, *SOS Kinderhof International v Effie Lentin Architects* 1992 NR 390 (HC), 399B-C, and *Hepute and others v Minister of Mines and Energy* 2007(1) NR 124 (HC), 130A-I. Counsel for the 1st and 2nd respondents made no specific reference in rebuttal of this submission. Mr Töttemeyer's submission on this score is not supported by authority, as is more fully set out in the supporting reasons under the hand of the Judge-President.

[7] In the view that I take of the matter in respect of the points *in limine*, I find it unnecessary to first deal with the notices to strike certain matter from the applicants' papers before I deal with the crucial *points in limine*.

Defective service

[8] The first respondent complains that there was defective service of the application. The first point *in limine* therefore concerns service of the application on some respondents; In the case of the 4th and the 8th

respondents, improper service, and in the case of the 3rd and 5th respondents non-service,

[9] In an s. 109 application service of the application is regulated by s. 113 of the Electoral Act, read with rule 4 of the Rules of Court. It is common cause that in the case of the 4th and 8th respondents, service was effected on a Mr Christiaan at the offices of the 6th respondent, and Mr Christiaan states in an affidavit that he is on the 4th respondent's Party List for the National Assembly elections, and he had been duly authorized by the 4th respondent to accept service of process in this matter on behalf of both the 4th and 8th respondents. The affidavit evidence has not been challenged by these respondents. There is evidence on the papers that the 4th and 8th respondents received the papers and they do not oppose the application; and so, as Mr Töttemeyer submitted, no prejudice has been occasioned to those respondents. The same submission was made in relation to the 5th respondent. As respects the 5th respondent, service was carried out on 22 January 2010; that is, outside the time limit of 14 January 2010. Mr Lukato, a representative of the 5th respondent, has stated that he had not been prejudiced by the late service and improper service (via email facilities) of process on him, and that he was not opposing the application. The respondents allege that no service was carried out on the 3rd respondent. That is not correct, as the respondents contended. I am satisfied on the papers that proper service was carried out by the deputy sheriff on the 3rd respondent. In the affidavit of return of service, the deputy sheriff states

that she served the process on the chairperson of the 3rd respondent at a specified address in Olympia, Windhoek.

[10] As a result of the aforementioned defective service of process, the respondents submit that ‘this application cannot and will not proceed without proper service on those respondents’. As I have demonstrated above this submission affects only the 4th, 5th and 8th respondents. I do not think the respondents’ submission has merit. The applicants do not, as I have intimated previously, seek any order from the 4th, 5th and 8th respondents. In their condonation application filed on 24 February 2010, the applicants have, in any case, applied to the Court to condone the applicants’ non-compliance with service of the applicants’ application on the 4th, 5th and 8th respondents. Indeed, it is our view that this is the kind of defect that this Court, on the authority of *Re Pritchard* [1963] 1 All ER 873 (referred to by Mfalila J in *Pio v Smith* 1986 (3) 145 (ZH)), *infra*, has ample jurisdiction to condone. Additionally, in a matter like the present, when there has not been proper service on a particular respondent among a multiplicity of respondents, the Court, in a proper case, could order that any order made by it would not bind such respondent. I do not think such infraction of the Rules of Court is capable of rendering the application nugatory. I am fortified in this conclusion by the first respondent’s own admission in the affidavit of its Director that such non-service or improper service ‘does not ... primarily affect the first respondent’. Accordingly, I reject the respondents’ first point *in limine*.

Lodgement of the election application

[11] I pass on to consider the respondents' second point *in limine*. It concerns the lodgement of the applicants' election application.

[12] Election applications are governed by Part VII of the Electoral Act. For our present purposes, it is important to signalize the irrefragable statutory stipulation that an s. 109 application must, without any allowance of discretion whatsoever, begin with the 'presentation of election application' in accordance with s. 110 of the Electoral Act, 1992. Section 110 provides:

- (1) An election application *shall* be represented (it is clear by meaning and context, the last word should read '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)

[13] Section 110 (1) provides that an s. 109 election application must be presented within 30 days after the date on which the results of the election in question are announced; and additionally, the statutorily prescribed mode of presentation of an election application in terms of s. 110 of the Electoral Act, 1992, is by the lodgement of the application with the Registrar of the Court.

[14] *In casu*, on the papers, it is not in dispute that 4 January 2010 was the 30th day; that is, the last day the applicants had to lodge their application with the Registrar. And if s. 110 (1) is read with Rule 3 of the Rules of Court, as it should, seeing that Part VII of the Electoral Act, 1992, does not provide for its own rules, the applicants were obliged by both the enabling Act and the Rules of Court to have lodged their application not later than 15h00 on 4 January 2010 within the meaning of rule 3 of the Rules of Court, which must apply in the circumstances. Thus, I hold that 15H00 on 4 January 2010 are the critical time and date in the present matter. Rule 3 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)

[15] In this regard, I find on the papers that it is indisputable that the applicants lodged their application with the Registrar of the Court in terms of s. 110 of the Electoral Act, 1992, at 16h30 on 4 January 2010; and according to the respondents, the applicants' disobedience of s. 110(2) of the Electoral Act, 1992, and rule 3 of the Rules of Court should result in nullification of the application.

[16] In the replying papers the applicants' Mr Haufiku filed of record an affidavit by their instructing counsel, Mr. Louw, in which he purports to state that when he presented the application to Court on 4 January 2010 he had '*personally arranged with the acting registrar that was on duty for that day, for the filing of the applicants' application, which I informed her was an election application. She was made aware of the fact that it had been prepared under severe time constraints. The said acting registrar agreed to the arrangement.*') No such allegation was made in the founding papers and, besides, the assistant registrar is not named nor does she confirm that allegation pertaining to her.

[17] The gravamen of the applicants' argument in response to the respondents' second point *in limine* is that in her discretion, the Registrar may accept documents at any time. In this regard, the applicants submitted

further, 'This is a matter which falls entirely within the discretion of the Registrar. In doing so, he requires no intervention or direction of the Court.' That may be so, but what the applicants' counsel forgets is that the Registrar's discretion under the said rule 3 is not an absolute or unfettered discretion; it is, rather, a guided and fettered discretion. The words 'in exceptional circumstances' indicate the lines on which the Registrar's mind must naturally proceed in exercising the discretion which rule 3 confers on her. (See *The Government of the Republic of Namibia v Uvhungu-Vhungu Farm Development Corporation* Case No. I1332/2009 (judgment on 7 October 2009) (Unreported) at p. 3, applying dictum by Innes CJ in *Rood v Wallach* 1904 TS 257 at 258. The upshot of this qualification is that the exercise of the Registrar's discretion is also fettered inasmuch as she can only lawfully and properly exercise the discretion and accept documents at any time outside the prescribed time limit, as she did in the present case, only if exceptional circumstances existed. That is what rule 3 requires.

[18] In their answering papers, the respondents placed in issue the exercise of the registrar's discretion; that is to say, the respondents, in a way, contended that there were not in existence exceptional circumstances, within the meaning of rule 3, upon which the registrar, acting properly, could have been satisfied, entitling her to accept the applicants' application after 15H00 on 4 January 2010. The applicants bore the *onus* on that issue. In that event, I hold that it was reasonably incumbent on the applicants to place sufficient evidence in their founding papers indicating what information they submitted

to the Registrar which constituted the lines on which the registrar's mind naturally proceeded in finding that exceptional circumstances existed when exercising the discretion which rule 3 confers on her. Contrary to Mr Töttemeyer's suggestion to the contrary, it was necessary to file a confirmatory affidavit by the Registrar to confirm that she had been apprised of the exceptional circumstances and that she in light thereof exercised her discretion.

[19] As matters stand, there is no such evidence on the papers. In this regard, I do not think the applicants are entitled to assume that just because the Registrar accepted the papers at that late hour, she must have exercised her discretion properly. That is challenged by the respondents.

[20] Mr. Töttemeyer submitted that simply because the Assistant Registrar (for the Registrar) accepted the documents, the Assistant Registrar (whose identity is up to now unknown) exercised his or her discretion in terms of rule 3. If in their founding affidavit, the said 'arrangement' had been adverted to, the respondents could have taken the necessary steps to refute the applicants' contention. But then Mr. Töttemeyer submitted that the challenge to the exercise of discretion by the Registrar was only brought to the knowledge of the applicants in the respondents' founding affidavit. If that was the case, the applicants should have dealt with the challenge in their replying affidavit, by identifying the said Assistant Registrar. If that had happened, the respondents, too, would have had the opportunity to take the necessary steps

to test any such reply; for example, by filing (upon leave of the Court) further affidavits to deal with such response.

[21] As the Court asked during Mr. Töttemeyer's oral submission, what was so difficult for the applicants to have given the name of the particular Assistant Registrar in their affidavit to enable the respondents to test the veracity and credibility of the applicants contention by an affidavit that prior arrangements had been made between the applicants' instructing counsel and the nameless Assistant Registrar who exercised his or her discretion before accepting the documents? Concomitantly, not only credible evidence of any such prior arrangement but also the information that was received by the Assistant Registrar that constituted the lines on which the Assistant Registrar's mind proceeded in exercising his or her discretion, as he or she allegedly did, under rule 3. (See *The Government of the Republic of Namibia v Uvhungu-Vhungu Farm Development Corporation* supra, loc. cit).

[22] I therefore on this point accept Mr. Maleka's submission that transparency and public accountability require that the information that was given to the Assistant Registrar by the applicants' instructing counsel that apparently formed the lines on which the Assistant Registrar's 'mind naturally proceeded in exercising' the guided and fettered discretion given to the Registrar by rule 3 of the Rules of Court should have been shown for all to see, particularly the respondents so as to enable them to decide whether to challenge it. As I have said *ad nauseam*, the discretion in terms of rule 3 of the

Rules of Court is not an absolute or unfettered discretion; it is a guided and fettered discretion; that is, guided and fettered by the same rule. In sum, the Registrar would be said to have exercised her discretion properly if she had done so in strict accordance with the provisions of rule 3. There is no credible evidence that she did. I am fortified in my conclusion by *Bezuidenhout v A. A. Mutual Insurance Association Ltd* 1978 (1) SA 703 (A) which Mr. Töttemeyer referred to us. Unlike in the present case, in *Bezuidenhout v A. A. Mutual Insurance Association Ltd* information constituting ‘special circumstances’ was given to the exerciser of the discretion (i.e. the authorized insurer) under the applicable statute, namely, s. 24 (2) of the Compulsory Motor Vehicle Insurance Act, 1972 (Act 56 of 1972); that is, information forming the lines on which the authorized insurer’s ‘mind naturally proceeded in exercising the discretion’ which s. 24 (2) of Act 56 of 1972 conferred on the authorized insurer.

[23] Mr. Töttemeyer submitted that if the respondents contended that the Registrar had exercised her discretion improperly, the respondents ought to have brought an application to review the Registrar’s decision in terms of the Rules of Court. I do not know of any rule of law – and none was pointed out to us by Mr. Töttemeyer – that a party cannot challenge the exercise of discretion in an ongoing matter in which the exercise of discretion is at issue.

[24] It was Mr. Töttemeyer’s further submission that rule 3 of the Rules of Court and s. 110 (2) of the Electoral Act, 1992, are separate provisions, and

therefore one should ‘not conflate’ those provisions of the Act and those of the Rules. With the greatest deference, Mr. Tötemeyer misses the crucial point. In these proceedings the Court is not called upon to merely interpret s. 110 (2) and rule (3), and stop there. Doubtless, any such exercise will be of no use to anyone. The Court is rather asked to both *interpret* the provisions of s. 110 and those of rule 3 and also *apply* those provisions together in order to determine the present application. (The words ‘interpret’ and ‘apply’ are italicized for emphasis.) Indeed, in a way, that is exactly what the applicants have done: they have brought the present s. 109 application through the *interpretation* and *application* of s. 110 (2) and rule 3; otherwise the applicants could not have succeeded in bringing the present application, if they had merely interpreted those provisions and stopped there. Section 110 (2), in effect, says so: in an s. 109 application, s. 110 (2) and rule (3) of the Rules of Court must be *interpreted* and *applied* together. Significantly, s. 110 (2) provides: ‘Presentation of the application *shall* be made by lodging it with the Registrar of the Court.’ (Emphasis added) In sum, in my view if the provisions of s. 110 (2) and rule 3 of the Rules of Court are not interpreted and applied together, there can never be an s. 109 application for the Court’s determination.

[25] It appears to us clear that rule 3 imposes two peremptory requirements, and either of them must – and I use the word ‘must’ advisedly – be satisfied before the lodgement of an election application in terms of s. 110 of the Electoral Act, 1992, can be said to be proper in the eyes of the law. In this

regard, I do not have one iota of doubt in my mind that the relevant provisions of s. 110 of the enabling Act and those of rule 3 of the Rules of Court are couched in clear peremptory terms. In this regard, I underline the following indicative clauses in s. 110: ‘An election application *shall* be presented ...’ (subsection (1)) and ‘Presentation of the application *shall* be made ...’ (subsection (2)) (Emphasis supplied). I also signalize the following indicative clauses in rule 3 of the Rules of Court: ‘the offices (i.e. of the Registrar) *shall* be open from 9 am to 1 pm and from 2 pm to 3 pm’; and ‘the registrar ... *shall* do so when directed by the court or a judge.’ (My emphasis)

[26] When a provision of a legislation or a subordinate legislation is passed for the purpose of enabling something to be done, and such provision prescribes the way in which it is to be done, that provision may be either an *absolute* provision or a *directory* provision; the distinction is reflected in the use of ‘shall’ to signify an absolute provision and ‘may’ a directory provision. And the difference is that an absolute provision must be obeyed or fulfilled exactly, but it is sufficient if a directory provision be obeyed or fulfilled substantially; *a priori*, the act permitted by an absolute provision is lawful only if done in strict accordance with the conditions annexed to the statutory permission. (SGG Edgar, *Craies on Statute Law* (7th edn.): p. 260, and the cases there cited) In this regard, it was stated in *Hercules Town Council v Dallah* 1936 TPD 229 at 240 that –

‘there seems to be one rule that stands clear, and that is that provisions with respect to time are always obligatory, unless a power of extending the time is given to the Court.’

I respectfully accept the above dictum in *Hercules Town Council v Dalla* as a correct statement of law, and so I adopt it.

[27] On the point under consideration; delivering the unanimous judgment of a Full Bench of this Court in *DTA of Namibia and another v SWAPO Party of Namibia and others* 2005 NR 1, Silungwe J applied at 11A-B thereof the above-quoted dictum in *Hercules Town Council v Dalla* supra. Ten years after *Hercules Town Council v Dalla*, in *Volschenk v Volschenk* 1946 TPD 486 at 490, the same Court as in *Hercules Town Council v Dalla* modified, by way of a qualification, the observation that Court had made in *Hercules Town Council v Dalla* thus:

I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity.

[28] Silungwe J applied the above-quoted dictum in *Volschenk v Volschenk*, too, in *DTA of Namibia and Another v SWAPO Party of Namibia and others* supra at 11A-B; and relying on *Volschenk v Volschenk* in that case, the learned judge opined at 11C that there was ‘a tendency towards flexibility’ in the application of the *Hercules Town Council v Dalla* principle. That may so; but in my opinion

the irrefragably preponderant consideration in all this is what the intention of the Legislature or the rule maker of the statutory instrument (*in casu*, the rule 3) is, *as clearly expressed in the wording of the particular provision* of the statute or statutory instrument in question. I stress '*as clearly expressed in the wording of the particular provision*' for a purpose: it is to show that the intention of the statute maker or rule maker can only be gathered from the wording of the provision in question. Relying on the authorities, this Court observed as follows in *Jacob Alexander v The Minister of Justice and Others* Case No. A210/2007 (judgment on 2 July 2008) (Unreported) at p. 21, which the Court applied in *Rally for Democracy and Progress and others v Electoral Commission of Namibia and others* Case No. A432/09 (judgment on 24 December 2009) (Unreported) at pp 14 – 15:

The stupendous difficulty, which faces any argument that claims better knowledge of what the Legislature intended than what the Legislature actually had in mind when it expressed itself clearly as it did in the ... Act, is to put forward without any justification, the unexpressed intention of the Legislature.

[29] In the instant case, I have shown above in the indicative provisions in s.110 (2) and rule 3 that the word 'shall' is used in either case. The use of the word 'shall' by Parliament in s. 110(2) of the Electoral Act, 1992, and by the rule maker in rule 3 of the Rules of Court shows what Parliament and the rule maker, respectively, had in mind when they expressed themselves clearly as they did in the said respective provisions, namely, that those provisions are absolute and peremptory. (See SGG Edgar, *Craies on Statute Law* supra; *Hercules Town Council v Dalla* supra.) And it is my view that failure to obey the

peremptory provisions in s. 110(2) of the Electoral Act, 1992, and rule 3 of the Rules of Court, is fatal.

[30] The absoluteness and peremptoriness of those two provisions, which must be applied together in an s. 109 application, as aforesaid, loom large because of ‘the expeditious nature that the Legislature attached to election applications’ (*DTA of Namibia and Another v SWAPO Party of Namibia and Others* supra at 11G). Thus, apart from the wording of s. 110(2) of the Electoral Act, 1992, and rule 3 of the Rules of Court, which as I have held previously, is expressed in peremptory terms, the circumstances which weigh heavily with me in favour of a mandatory construction in respect of those two related provisions, are the interests of the public that an electoral matter be speedily determined. (*Nair v Teik* [1967] 2 All ER 34 (Privy Council) at 40B). Besides, the need for flexibility adverted to by this Court (*per* Silungwe J) in *DTA of Namibia and Another v SWAPO Party of Namibia and Others* supra, relying on *Volschenk v Volschenk* supra (as aforesaid), is satisfied in the application of rule 3 of the Rules of Court because rule 3 – and this is important – is not harsh and inflexible: the rule has a built-in flexibility mechanism inasmuch as the Court may direct the Registrar to issue process and accept documents at any time outside the prescribed time limits. Accordingly, on this score, it is my opinion that *DTA of Namibia and Another v SWAPO Party of Namibia and others* supra and *Volschenk v Volschenk* supra do not in any way detract from the conclusion I have already reached about the consequence for an application that disobeys the time limits prescribed by s. 110(2) of the Electoral Act, 1992,

read with rule 3 of the Rules of Court; that is to say, nullification for disobedience.

[31] I am fortified in this conclusion by the following. That the provisions of s. 110(2) of that Act and rule 3 of the Rules of Court are absolute and peremptory and that disobedience must, without any allowance, result in nullification of the application in question is put beyond doubt when one takes into account the fact that the time limits in those provisions bind not only litigants but also the Court itself. According to s.116 (3) of the Electoral Act, 1992, the Court must determine an s.109 application within 60 days from the date of the presentation of the application to the Registrar unless special circumstances dictate otherwise.

[32] It follows that the applicants' submission that they had only seven days 'up to 4 January 2010' to inspect the election materials as ordered by this Court on 24 December 2009, as aforementioned, cannot take their matter any further. As I have noted previously, rule 3 of the Rules of Court is not inflexible. The applicants could have approached the Court to direct the Registrar to issue process and accept documents after 15h00 on 4 January 2010. That, the applicants did not do: it is too late in the day for the applicants to seek succour in the alleged situation in the present proceedings. In any case, as this Court held in *Rally for Democracy and Progress and others v Electoral Commission of Namibia and others* Case NO. A432/09 supra at p. 22, it is not a precondition that an s. 109 application may only be made after an s.14 (of the Electoral Amendment Act, 1998 (Act No. 30 of 1998)) application

has been made; and so, as I see it, nothing prevented the applicants from lodging an s.109 application timeously in the present matter.

[33] On the point under consideration, Mr. Töttemeyer referred the Court to *Suidwes -Afrikaanse Munisipale Personeel Vereniging v Minister of Labour and Another* 1978 (1) 1027 (SWA). Mr. Töttemeyer was particularly enamoured with the following observation by Hart AJP at 1038A-B:

These authoritative views are most germane in deciding the present issue. This decision was referred to with approval in *Meintjies v H. D. Combrinck (Edms.) Bpk*, 1961 (1) SA 262 (AD), and *Regal v African Superslate (Pty) Ltd*, 1962 (3) SA 18 (AD) both of which admittedly concerned late compliance with the Appellate Division Rules of Court but the principle in my opinion has now been firmly established that, in all cases of time limitations, whether statutory or in terms of the Rules of Court, the Supreme Court has an inherent right to grant condonation where principles of justice and fair play demand it to avoid hardship and where the reasons for strict non-compliance with such time limits have been explained to the satisfaction of the Court. Other useful examples are to be found in *Sithole v Sekretaris van Binnelandse Sake en 'n Ander*, 1960 (4) SA 105 (T), where the Court condoned a delay of as long as four and a half years in regard to a statutory limitation of 30 days within which an appeal could be brought.

[34] The 'issue' which, according to Hart AJP, 'the authoritative views (he referred to earlier) are most germane' concerned the prosecution of an appeal by a single individual, one Konrad Lilienthal, involving a contract of employment, that is to say, the issue involved private contract and the

prosecution of an appeal concerning some aspect of that private contract. Besides, Hart AJP was only able to refer to a solitary case, that is, *Sithole v Sekretaris van Binnelandse Sake en 'n Ander*, supra as containing 'other examples'. In my view, if Lilienthal delayed in bringing an appeal or Sithole delayed for four and half years or more to prosecute an appeal, that is of no moment; it is a private concern of Lilienthal or Sithole. There was no national and public interest involved. There was no '*expeditious nature that the legislature attached to*' either appeal. (See *DTA of Namibia and Another v SWAPO Party of Namibia and Others* supra). (My emphasis) The delayed appeals by Lilienthal or Sithole did not engender any 'interests of the public that (the matter) be speedily determined'. (See *Nair v Teik* supra.) It follows that in my view *Suidwes -Afrikaanse Munisipale Personeel Vereniging v Minister of Labour and Another* supra cannot be put up as authority contrariwise to the view that the Electoral Act, 1992, read with the provisions of rule 3 of the Rules of Court, are peremptory, and disobedience of them must as a matter of law result in nullification of the application concerned. The applicants cannot be rescued by that case. In my judgement, the applicants were required to file the election application not later than 15h00 on 4 January 2010.

[35] From all the above, I discern a clear intention on the part of the Legislature and the rule maker that the Legislature and the rule maker, respectively, wished to create a nullity when there has been disobedience of s 110(2) of the Electoral Act, 1992, and rule 3 of the Rules of Court, respectively.

[36] In virtue of the foregoing conclusions and reasoning, I hold that *China State Construction Engineering Corporation South Africa (Pty) Ltd v Pro Joinery* CC 2007 (2) NR 675 (HC) and the cases there relied on are not of real assistance on the point under consideration because that case dealt with irregular proceedings within the meaning of rule 30 of the Rules of Court. We are in the present proceedings rather concerned with disobedience of peremptory and absolute provisions of a statute and a rule of the Rules of Court applicable thereto and the lack of evidence on the papers that a guided and fettered discretion was exercised in accordance with the guidance provided in the said rule. I hesitate not in noting that, in any case, the time limits regulating election applications do not fall within the provisions of the Court regulating its own procedures. (*Reinecke and another v Nel and another* 1984 (1) SA 820 (Head note); *Ipland v Veldman and another* 1983 (1) SA 520 (Head note))

[37] As I have held previously, the condition attached to the statutory permission that will enable the Registrar to issue process and accept documents at any time outside the statutorily prescribed time is when exceptional circumstances exist or when the Court directs the Registrar to issue process and accept documents at any time outside the prescribed time. Furthermore, I have already found that there is no evidence whatsoever on the papers that establishes to our satisfaction that in the opinion of the Registrar exceptional circumstances existed or that a Judge directed the Registrar to issue process or accept documents after 15h00 on 4 January 2010. In this

regard, it has been held that ‘it is a principle of our law that a thing done contrary to the direct prohibition of the law is generally void and of no effect; the mere prohibition operates to nullify the act.’ (*Watson NO and another v Shaw NO and others* 2008 (1) SA 350 (C) at 360H, applying dictum at 188A-B in *Metro Western Cape (Pty) Ltd v Ross* 1996 (3) SA 181 (A) and dictum at 109 in *Schierhout v Minister of Justice* 1926 AD 99). I respectfully accept the aforementioned dictum in *Watson NO and another v Shaw NO and others* supra as a correct statement of law, and so I adopt it.

[38] *In casu*, the Registrar was prohibited from issuing process and accepting documents after 15h00 on 4 January 2010 when, as I have found above, no exceptional circumstances existed and when the Court or a Judge had not directed her to act as she did.

[39] But, that is not the end of the matter. The applicants submit that there was the ‘undisputed agreement between the parties to extend ‘the 30 (-) day period beyond 4 January 2010’. This argument does not even begin to get off the starting-blocks. Doubtless and with the greatest deference, the entire submission is a fallacy. It is only the Legislature which has got the Constitutional legislative power to amend s. 110 so as to extend the thirty-day time limit for the presentation of an election application under Part VII of the Electoral Act, 1992; not even any of the two other organs of State can lawfully do that. In any case, it has been held in a long line of cases that an individual cannot waive a matter that the Legislature has enacted for the public good;

that is, a matter in which the public have an interest. (E.g. *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719; *S v Nzuzi* 1963 (3) SA 631 (A); *Hunt v Hunt* 31 LJ, Ch p. 175; *R v Perkins* 1920 AD 307; *SA Eagle Insurance Co. Ltd v Bavuma* 1985 (3) SA 42 (A); *Graham v Ingleby* 1 Exch, p. 657; *Pio v Smith* 1986 (3) SA 145 (ZH)).

[40] A dictum in *Ritch and Bhyat* supra that is apropos to the matter now before us, and which I accept as a correct statement of law, is at p. 735. There, Innes ACJ stated:

... the same principle (i.e. the principle that an individual cannot waive a matter in which the public have an interest) must necessarily apply where the result of a renunciation by an individual would be to abrogate the term of a statute which in their nature are mandatory and not merely directory ... Because otherwise the result would be not merely to destroy private rights, but to defeat the provisions of an enactment intended on general and public grounds to be peremptory and binding on all concerned.

[41] On this point, the dictum by Mfalila J in *Pio v Smith* supra at 151C is also apposite. There, the learned judge said:

That is to say, if the provision is for the public interest and it is contained in a peremptory enactment, *then it must be complied with exactly and to the letter*, whereas if the provision is for the personal interest of the respondent or the plaintiff then even if contained in a peremptory enactment, it can be waived at the instance of the person concerned. (Emphasis added)

[42] It follows that the argument founded on the terms of counsel's submissions meant to be the applicants' additional response to the respondent's second point *in limine*, falls away. The provisions of s. 110(2) of the Electoral Act, 1992, and rule 3 of the Rules of Court are, in my view, as I have demonstrated previously, intended on general and public grounds to be peremptory and binding on all concerned.

[43] Having come to the conclusion that the presentation of the election application in respect of the National assembly election is a nullity, it becomes unnecessary to decide whether there is properly a condonation application before us and whether or not it must succeed.

[44] In view of the foregoing conclusions and reasoning, I am impelled to the inevitable conclusion that the respondents' second point *in limine* has a great deal of merit, and so I uphold that point *in limine*. In the face of all that, I do not think I am entitled to decide otherwise; armed with the Court's inherent power or not. I therefore hold that the registrar's acceptance of the presentation of the election application in terms of s. 110 of the Electoral Act, 1992, read with rule 3 of the Rules of Court, after 15h00 on 4 February 2010 is void and of no effect; *a priori*, I hold that in the eyes of the law no election application has been presented by the applicants within 30 days after the results of the Presidential and National Assembly elections were declared, within the meaning of s. 110 of the Electoral Act, 1992.

Is there an application properly before the Court challenging the result of the Presidential election?

[45] It is my view that the foregoing conclusions also effectively dispose of any contentions as to whether this Court may permit amplification of the applicant's application after 15H00 on so as to challenge the result of the Presidential election, too. It is rudimentary logic that one cannot naturally amplify that which does not exist. I have already held that there is no s. 109 application properly before the Court. That being the case, there cannot in law and in logic be any amplified application, which seeks to amplify that which does not exist, ad which this Court can take cognizance of.

[46] A further reason why I cannot accept the amplification of the applicant's application filed after 15h00 on I 4 January 2010 is grounded firmly on the interpretation and application of s. 110, read with s. 113, of the Electoral Act, 1992.

[47] I have set out the provisions of s. 110 above, and so I do not need to rehash them here. And s. 113 provides:

Notice in writing of the presentation of an election application, accompanied by a I copy of the application and a certificate of the registrar of the court stating that the I amount determined by him or her as security has been paid or sufficient I recognizance has been furnished in respect of that amount contemplated in I 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.

[48] The following emerges from the interpretation and application of those provisions. The election application that was presented by the applicants to the Registrar in terms of s. 110 (2) of the Electoral Act, 1992, and based on which the Registrar determined the amount of security that should be furnished in terms of s. 110 and for which she issued a certificate did not include the applicants' challenge to the result of the Presidential election. It follows indubitably that if I accepted the so-called 'amplified application', I would be acting in breach of the applicable statutory provisions, namely, s. 110 and 113 of the Electoral Act, 1992, because no certificate of the Registrar stating that the amount determined by her as security has been paid or sufficient recognisance has been furnished to the Registrar's satisfaction would have been issued for such application. In other words, the amount of security determined by the Registrar and paid by the applicants and in respect of which a certificate was issued did not cover the 'amplified application'. In my judgement, I cannot accept the applicants' amplified application without rendering s. 110 and 113 nugatory. I can accept the 'amplified application', as the applicants have urged the Court to do, only if authorized to do so by the Act.

[49] Accordingly, I do not find *De Visser v Fitzpatrick* 1907 TS 298 of any real assistance on the point under consideration. In *De Visser v Fitzpatrick*, a

petition (the forerunner of an application) charging corrupt and illegal practices containing certain particulars relating to those charges was duly filed. After the expiration of the prescribed period the petitioner applied for leave to add further particulars relating to the charges contained in the petition. The Court in *De Viser v Fitzpatrick* allowed the proposed amendments because they did not amount to a new general charge. That is not the issue in the present proceedings. The challenge to the result of the Presidential elections can never be an amendment to the challenge to the result of the National Assembly election. The two elections, as I have mentioned previously, are very different by all accounts.

[50] I have no doubt in my mind that the so-called ‘amplified application’ is a totally different application from the application concerning the challenge to the result of the National Assembly elections: it was a new application on every count, as Mr Simenya submitted. That being the case that application should be subjected to the peremptory requirements of s. 110, and for our present purposes, s. 110 (3) concerning the payment of security and the issuance of the Registrar’s certificate ‘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)’.

[51] Relying on the conclusions and reasoning above respecting the interpretation of s. 110 (2) of the Electoral Act, 1992 and rule 3 of the Rules of

Court, I conclude that the provisions of s. 110 (3) of that Act have not been complied with thereanent the challenge to the results of the Presidential results. For the sake of convenience, I will not repeat the conclusions and reasoning here.

[52] The considerations that must be signaled in order to dispose of Mr. Töttemeyer's arguments on the point is as follows. In terms of s. 113, the papers that must – and I use 'must' advisedly – be served on the respondents are these: (1) the notice in writing of the presentation of an election application, (2) a copy of the application, and (3) a certificate of the Registrar 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). If even one of items (1), (2), and (3) is missing, no amount of legal sophistry can persuade me that there is an application properly filed and served on the respondents. This conclusion is borne out by the clear, unambiguous and imperative provisions of s. 110 (3) (c). As Mr. Simenya submitted, it is only when an applicant complies with the furnishing of security or sufficient recognizance to the satisfaction of the Registrar and the Registrar has issued a certificate acknowledging either act that, in the words of s. 110 (3) (c), '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'.

[53] The intention of the Legislature is crystal clear: no furnishing of security or sufficient recognizance; no further proceedings 'shall be had on the application'. As respects the challenge to the result of the Presidential elections, item (3) (see my presentation above) is missing. That being the case 'no further proceedings shall be had on the application' within the meaning of s. 110 (3) (C) of the Electoral Act, 1992; and this Court cannot condone the applicants' non-compliance with the imperative and peremptory provisions of s. 110 (3). I should have said so even if I had not looked at decided cases on the issue. But when I look at *DTA of Namibia and Another v SWAPO Party of Namibia and others* 2005 NR 1, I feel bound to say that the applicants' non-compliance with s. 110 (3) of the Electoral Act, 1992, cannot be condoned. In my opinion, no amount of judicial activism based on the inherent power of the Court can overrule the intention of the Legislature expressed so clearly in the wording of s. 110 (3) in such an important matter as the election of the Head of State and Government.

[54] Mr. Töttemeyer submitted that the furnishing of security is for the benefit of the respondents, and taking out of the equation the 1st respondent, the other respondents have not opposed the application and so non-compliance with rule 110 (3) ought to be condoned. The 2nd respondent has opposed the application; but then Mr. Töttemeyer says that no relief is sought from the 2nd respondent. Mr. Töttemeyer's argument, with the greatest deference, is a weak one. When the applicants presented the application challenging the result of

the Presidential election, the applicants did not know the respondents would not oppose the application; neither did the Registrar. Security is required regardless of whether or not a respondent later opposes the application. In the present case the applicants chose not to comply with the peremptory requirement of obtaining the Registrar's certificate. They also failed to comply with item (3) of the aforementioned items required to be served on the respondents in terms of s. 113 of the Electoral Act, 1992. It follows that the respondents' point *in limine* succeeds. In the face of the foregoing conclusions and reasoning, I feel bound to hold that there is no application properly before the Court respecting a challenge to the result of the Presidential elections.

[55] For all that I have held above, it need hardly saying that it is otiose on any pan of scale to consider the rest of the respondents' preliminary objections. It will also be superlatively senseless and illogical to consider any striking out application targeting certain matters in the papers filed of record and, indeed, any other aspects of the present application.

[56] Mr Simenya for the second respondent had in argument raised the issue of non-joinder of the members of the National Assembly declared duly elected in terms of their respective party lists. He argued that their non-joinder is fatal and that the election application challenging the National assembly Election stands to be struck from the roll on that basis alone. Although the point raised is an important one, we prefer not to decide it in these proceedings, not least because it was raised for the first time, without warning, in oral argument. In

view of the conclusions to which I have come on the other preliminary points which effectively dispose off that application, any views on the issue raised would be obiter in any event. In the light of the submission by Mr Strydom for the applicants that the point raised is not valid because in an earlier election challenge no such issue was raised but the Court regardless proceeded to set the election aside that we wish to warn that nothing prevents any party to in future raise a point of law that had not been raised in earlier litigation.

[57] The parties are in agreement that costs should follow the event and that it should include costs occasioned by the employment of all instructed counsel on either side. We have no reason to think otherwise and would so order.

[58] In the result, I make the following order:

- (i) The election application, lodged on 4 January 2010 challenging the results of the National Assembly Election held on 27 and 28 November 2009 and declared on 4 January 2010 in Government Notice 246 (Government Gazette No. 4397) (2009), is struck from the roll, with costs, including costs occasioned by the employment of four(4) instructed counsel in the case of the first respondent and two(2) instructed counsel in the case of the second respondent. The applicants are liable to pay such costs jointly and severally, the one paying, the other to be absolved.

- (ii) The election application, lodged on 14 January 2010, challenging the Presidential Election held on 27 and 28 November 2009 and duly declared on 4 January 2010 in Government Notice 246 (Government Gazette No.3497) (2009), is struck from the roll with costs, including costs occasioned by the employment of four(4) instructed counsel in the case of the first respondent and two(2) instructed counsel in the case of the second respondent.

PARKER J

ON BEHALF OF THE APPLICANTS:

Adv. Tötemeyer SC

Adv.Strydom

Adv. Van Vuuren...

Instructed by:

Theunissen, Louw & Partners

ON BEHALF OF THE 1ST RESPONDENT:

Mr Maleka SC

...

Mr Hinda

Mr Namandje

Mr Narib

Instructed by:

The Government Attorney

ON BEHALF OF THE 2ND RESPONDENT:

Mr Simenya SC

Dr Akwenda

Instructed by:

Shikongo Law Chambers

3RD – 9TH RESPONDENTS:

No appearance