



IN THE ELECTORAL COURT OF NAMIBIA, WINDHOEK

JUDGMENT

Case no: EC 2/2020

In the matter between:

CHARMAINE TJIRARE

1ST APPLICANT

HIDIPO HAMATA

2ND APPLICANT

and

**THE CHAIRPERSON OF THE ELECTORAL COMMISSION
OF NAMIBIA**

1ST RESPONDENT

THE ELECTORAL COMMISSION OF NAMIBIA

2ND RESPONDENT

THE CHIEF ELECTORAL OFFICER

3RD RESPONDENT

POPULAR DEMOCRATIC MOVEMENT

4TH RESPONDENT

UNITED PEOPLES MOVEMENT

5TH RESPONDENT

ESMERALDA ESME !AEBES

6TH RESPONDENT

JOHANNES MARTIN

7TH RESPONDENT

KAZEONGERE ZERIPI TJEUNDO

8TH RESPONDENT

GEOFFREY KUPUZO MWILIMA

9TH RESPONDENT

TIMOTHEUS SYDNEY SHIHUMBU

10TH RESPONDENT

PIETER MOSTERT

11TH RESPONDENT

McHENRY MIKE KANYONOKERE VENAANI

12TH RESPONDENT

JENNIFER MURIEL VAN DEN HEEVER

13TH RESPONDENT

DIEDERIK ISAAK VRIES

14TH RESPONDENT

VIPUAKUJE MBERIKONDJA MUHARUKUA

15TH RESPONDENT

NICO ALBERTUS SMIT

16TH RESPONDENT

JAN JOHANNES VAN WYK	17 TH RESPONDENT
ELMA JANE DIENDA	18 TH RESPONDENT
KOVIAO VETARERA HENGARI	19 TH RESPONDENT
ELIZABETH CELESTE BECKER	20 TH RESPONDENT
WINNIE RAUHA MOONDO	21 ST RESPONDENT
FRANS JOSEF BERTOLINI	22 ND RESPONDENT
RAYMOND REGINALD DIERGAARDT	23 RD RESPONDENT
MIKE RAPUIKUA VENAANI	24 TH RESPONDENT
YVETTE ARAES	25 TH RESPONDENT
TJEKUPE MAXIMALLIANT KATJIMUNE	26 TH RESPONDENT
MINISTER OF URBAN AND RURAL DEVELOPMENT	27 TH RESPONDENT
THE ATTORNEY GENERAL	28 TH RESPONDENT
THE SECRETARY OF THE NATIONAL ASSEMBLY	29 TH RESPONDENT

Neutral citation: *Tjirare v The Chairperson of the Electoral Commission of Namibia* (EC 2/2020) [2020] NAHCMD 283 (13 July 2020)

Coram: ANGULA DJP, UEITELE J et MASUKU J

Heard: 24 June 2020

Delivered: 13 July 2020

Flynote: *Election Law* – Electoral Court – Jurisdiction – Interpretation of s 170(2) of Electoral Act, 2014 (Act No. 5 of 2014) – Whether provisions are peremptory or merely directory.

Constitutional Law – Constitution of Namibia – Schedule 4(4) of Constitution – whether it applies in the determination of persons to be members of the National Assembly, after the elections.

Election Law – Powers and functions of the Electoral Commission – Circumstances in which it can alter or amend the list Gazetted in terms of s 78 of the Electoral Act discussed – Independence and impartiality of the Electoral Commission.

Constitutional Law – Remedies – For breach of Constitutional Provisions – Whether appropriate to issue a prospective order regarding invalidity of sworn in members of the National Assembly – Interpretation of statutes revisited.

Summary: This is in opposed application brought on urgency – It arises from the 2019 National Assembly elections – The applicants are registered members of the Popular Democratic Movement (PDM) and in good standing – They were nominated by PDM and gazetted as candidate members of the National Assembly – After the elections and after garnering 16 seats in the National Assembly, PDM removed the names of the applicants whose names had been gazetted in terms of the Act and replaced them with the names of other members of PDM – The applicants, dissatisfied with the decision, approached the Court seeking the review of the decision by the Electoral Commission to change the list at the instance of PDM – PDM raised a point *in limine* to the effect that the Court had no jurisdiction to hear and determine the application because the matter was not heard within the period prescribed in s 170(2) of the Act – On the merits PDM argued that it has the discretion to nominate members of its party to serve in the National Assembly, even if they were not gazetted in terms of s 78.

Held that the period of seven days before the swearing in of members of the National Assembly prescribed in s 170(2) is merely directory and not peremptory because they would visit hardship and injustice to a party that has not done anything to contribute to the delay. Furthermore, there is no penalty stipulated for non-compliance, pointing to the provision being directory. The Court was thus held to have jurisdiction to hear the matter.

Held that in interpreting the relevant provisions in this matter, the Court would be guided by *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*, namely that the Court must assess the meaning, grammar and syntax of the words used and construe them within their immediate textual context. Where there is more than one meaning open to interpret the words, the Court should prefer a sensible meaning and not one leading to an insensible or unbusinesslike one.

Held further that the actions of PDM, as endorsed by the Electoral Commission, of removing names of persons who had been voted for by voters in a secret ballot

pursuant to a free election, and gazetted in terms of the law and replacing them with persons nominated by PDM is contrary to the letter of the law and the spirit of the Constitution of Namibia.

Held that the Electoral Commission has no power to alter or amend the *gazetted* lists in terms of s 78 at the instance of a political party, except in circumstances envisaged in s 110(4) of the Act, namely where the member dies, or becomes incapacitated, or does not qualify or the party is deregistered or he or she is expelled from the political party.

Held that in agreeing to the entreaties of PDM in altering or amending the list, the Electoral Commission acted outside the powers of its enabling Act and its conduct was therefore unlawful and invalid.

Held further that the Electoral Commission is an independent body and should, in all its dealings, manifest that independence and impartiality. In the instant case, the Commission appeared to take sides and aligned itself with PDM, which it should not have done.

Held that where there are proceedings regarding an election, the Commission should adopt an impartial posture and act in the same manner as judicial officers, by not embroiling itself in the merits of the dispute. It should, where necessary, just file papers to explain its position in order to assist the Court, without adopting a litigious posture, which detracts from its independence and impartiality.

Held that the interpretation of Schedule 4(4) of the Constitution, in particular the phrase '*shall be free to choose in its own discretion which persons to nominate as members of the National Assembly to fill the seats*' must be construed to mean that the person 'nominated' must have been duly nominated as a candidate for election as a member of the National Assembly. In this regard, the political party is not at large, after the elections to include a person in the list who was not declared duly elected as a member of the National Assembly.

Held further that the Constitution envisages that the government is responsible to the freely elected representatives of the electorate and not those imposed by political parties after the election.

Held that the circumstances of this case did not admit to granting a prospective order for the reason that the nomination of the affected respondents was invalid and unlawful. It would therefore set a bad precedent for them to continue in the hallowed corridors of the National Assembly and participate in the making of laws as their swearing in was contrary to the spirit of the Constitution and the provisions of the Electoral Act.

The application for review was thus granted with no order as to costs and the affected respondents were ordered to vacate their parliamentary seats to pave the way for the first applicant and the other PDM members who were illegally removed from the list.

ORDER

1. The applicants' non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 5(22) of the Rules of Court.
2. The announcement of the declaration by the Chairperson of the Electoral Commission of Namibia published by way of Government Notice 86 of 2020 in Government Gazette No. 7149 of 18 March 2020, is hereby reviewed and set aside insofar as it concerns the following persons:
 - (a) Esmeralda Esme !Aebes
 - (b) Johannes Martin
 - (c) Kazeongere Zeripi Tjeundo
 - (d) Godfrey Kupuzo Mwilima
 - (e) Timotheus Sydney Shihumbu
 - (f) Pieter Mostert

3. The swearing in as members of the National Assembly of the persons mentioned in para 2, from (a) to (f) above, is declared to be unconstitutional, unlawful and therefore null and void.
4. The Chairperson of the Electoral Commission of Namibia is hereby directed to announce a declaration as contemplated by section 110(3)(b)(i) of the Electoral Act, 2014 (Act No. 5 of 2014), that the following persons are duly elected members of the National Assembly, with effect from 20 March 2020, namely:
 - (a) Frans Bertolini
 - (b) Charmaine Tjirare
 - (c) Yvette Areas
 - (d) Tjekupe Maximilliant Katjimune
 - (e) Raymond Reginald Diergaardt
 - (f) Mike Rapuikua Venaani
5. It is declared that the Electoral Commission of Namibia has no power in terms of the Electoral Act, 2014), to alter or amend lists *gazetted* in terms of s 78 of the Act, except in the circumstances contemplated in s 110(4) of the Electoral Act.
6. There is no order as to costs.
7. The Registrar of this Court is directed to serve the copy of this judgment on the Speaker of the National Assembly.
8. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

THE COURT:

Introduction

[1] On 27 November 2019, Namibians (over the age of 18 years) from all walks of life braved the scorching heat and stood in long lines at different polling stations and at times waiting four, five, six and even seven hours in order to vote. The long lines demonstrated (their resolve as Namibians to wait for hours and to put up with innumerable obstacles placed in their way to express their will and to exercise their right, namely the right to vote that had for so long been denied to the people of Namibia by colonialism, racism and apartheid.

[2] One may be tempted to ask, naively, why are the people willing to do so? (ie. standing in long lines, exposed to the vagaries of nature, waiting to vote) and whether it is worth it. The answer must, unequivocally, be in the affirmative: Because in our view, voting is the foundational concept for our entire democratic structure. We, as a nation, have settled on the principle that political legitimacy is based on the consent of the governed. What this means in our view is that any government that wants to lay claim to legitimacy must, in some fashion or the other allow the people to choose its Rules and its Rulers. That 'in some fashion' is important, because it gives the people input in choosing their Rulers. This case is about the 'in some fashion' - it concerns the question of how those who must make Laws for us are to be elected.

[3] The applicants, Ms Charmaine Tjirare and Mr Hidipo Hamata, are members of a political party which is duly registered in terms of the electoral laws of Namibia, namely the Popular Democratic Movement, (PDM), the fourth respondent in this matter.

[4] They approached this Court on 28 February 2020 on an urgent basis, seeking the following relief:

- '1. Condoning the Applicant's (*sic*) non-compliance with the Rules of this Honourable Court and the time periods prescribed therein in so far as these have not been complied with and directing that this matter be heard as one of urgency.
2. Reviewing and setting aside the announcement of the declaration of (*sic*) by the Chairperson of the Electoral Commission of Namibia and published by way of

Government Notice 51 of 2020 in the Government Gazette No. 7126 of 2020, insofar as it concerns the names of candidates nominated by the Popular Democratic Movement (PDM), as members of the National Assembly.

3. Declaring the said declaration as unlawful, invalid and of no force or effect.
4. Compelling the Chairperson of the Electoral Commission of Namibia to announce a declaration, as contemplated in section 110(3)(b)(i) of the Electoral Act, 2014¹, that the following persons, nominated by the Popular Democratic Movement (PDM), are duly elected members of the National Assembly with effect from a date determined in accordance with the relevant provisions of the Namibian Constitution:
 1. Venaani McHenry Mike Kanyonokere
 2. Van den Heever Jennifer Muriel
 3. Vries Diederik Issak
 4. Muharukua Vipuakuje Mberikondjera
 5. Smit Nicolaas Albertus
 6. Van Wyk Jan Johannes
 7. Dienda Elma Jane
 8. Hengari Koviaio Vetarera
 9. Becker Elizabeth Celeste
 10. Moongo Winnie Rauha
 11. Bertolini Frans Josef
 12. Tjirare Charmaine
 13. Areas Yvette
 14. Katjimune Tjekupe Maximilliant
 15. Diergaardt Raymond Reginald
 16. Venaani Mike Rapukua
- 5 Granting the Applicants such further and/alternative relief as the Honourable Court may deem fit.'

[5] The application was opposed by PDM and its members cited above, and they filed answering affidavits to which the applicants replied. PDM, in the course of filing

¹ Electoral Act, 2014 (Act No. 5 of 2014).

papers, also filed a counter-application, to which the applicants and the Electoral Commission of Namibia ('the Commission') responded. The counter-application was, however, not pursued in argument by PDM. For that reason, no further mention of it shall be made in this judgment. It suffices to mention that the Commission opposed the counter application and since that application was withdrawn, the involvement of the Commission was limited, as will become evident below.

Background

[6] The genesis of this dispute arises from certain events that took place prior to and after the National Assembly elections that took place, as we stated earlier, on 27 November 2019 (the elections). Political parties, which participated in the elections, were required in terms of the provisions of s 77(1) of the Electoral Act, 2014, ('the Act'), to submit to the Commission, a list of its candidates for election as members of the National Assembly.

[7] The applicants, who are registered voters and members of PDM and in good standing, as stated earlier, were included in PDM's list of candidates for the National Assembly. Political parties were required, in terms of the law, to ensure that the persons they nominated qualified in terms Art 47(1)(e) of the Constitution of Namibia ('the Constitution') and s 77(4) of the Act to be elected as members of the National Assembly. In this exercise, some of the members who had been included in the list, did not meet certain requirements of the law and this necessitated the removal of their names from the list and a replacement of those removed.

[8] Those who were removed from the list were so removed because they apparently did not meet the constitutional² and legislative criteria³. The information relating to their removal from the list was conveyed to the Commission by PDM's Secretary-General, through a letter dated 22 October 2019.⁴ Those who were affected thereby are the following members of PDM:

- (a) Ms Esmerelda Esme !Aebes (Number 8);
- (b) Mr Johannes Martin (Number 9);

² Article 47(1)(e) of the Constitution.

³ Section 77(4) of the Electoral Act.

⁴ Page 35 and 35 of the record.

- (c) Mr Kazeongere Zeripi Tjeundo (Number 10);
- (d) Mr Geoffrey Kupuzo Mwilima (Number 12);
- (e) Mr Thimotheus Ndumba Sydney Shihumbu (Number 14); and
- (f) Mr Pieter Mostert (Number 16).

[9] The final list of candidates for the respective political parties, including PDM, was published in the *Government Gazette* by the Commission on 6 November 2019 (the *Gazetted list*). This was done in terms of s 78(1)(b) and (c) of the Act. The list, in respect of PDM, included the first applicant, who featured as no. 12 and the second applicant, as no. 17, respectively. It would appear that the applicants, together with the other listed members were involved in the campaign trail for their party, PDM.

[10] At the end of the elections, PDM garnered 16.65 per cent of the national votes. When the mathematics were done in accordance with Schedule 4 of the Constitution, after applying the relevant formulae, PDM became entitled to 16 seats in the National Assembly. Because of their respective rankings in the PDM list, the applicants expected that they would become members of the National Assembly, including Mr Bertolini, Mr Josef and Mr Mike Venaani, because of their ranking within the party list submitted to the Commission and caused to be published in the *Government Gazette* by the latter.

[11] It would appear that after the election results and the number of seats that PDM was entitled to were made known there was, some correspondence between PDM and the Commission, which culminated in PDM being allowed by the Commission to change its list of the members who would be eligible to become members of the National Assembly. The Commission, for its part states that it obtained a legal opinion, to the effect that a political party is at large, after the National Assembly elections, to include any of its members to become members of the National Assembly, even if they do not form part of the list that was *Gazetted* in terms of s 78(1)(b) and (c) of the Act aforesaid.

[12] As a result of this development, the members of PDM, who are listed in para 8 above, although they did not feature in the original list published in terms of s 78(1)(b) and (c) of the Act, were subsequently nominated by PDM to constitute part of PDM's quota of members to the National Assembly. They accordingly did not

undergo the campaign as possible candidates for the PDM in the National Assembly elections. Subsequent to the elections, however, they were included in the new list of candidates for the National Assembly. This resulted in the applicants, among others, being removed from the *Gazetted* list.

[13] The applicants state upon advice, that the Commission's interpretation of para 4 of Schedule 4 of the Constitution, to the effect that a political party may, at its own discretion choose which persons to nominate for membership of the National Assembly, is incorrect. They further argue, on advice that the said Schedule, applies exclusively to the pre-elections situation but not to the post-elections scenario. It is for these reasons that the applicants approached this Court for the order stated earlier in the judgment.

Issues for resolution

[14] It would appear that the main issue that the Court is called upon to determine, is the proper interpretation to be accorded the provisions of Schedule 4 of the Constitution and in this regard, the Court will come to a conclusion on whether the interpretation accorded to the said provision by the Commission is correct, or it is the one contended for by the applicants that should carry the day. A further question that manifested itself as being necessary to decide, relates to whether the Commission is empowered by law, to change the pre-election list that is published in the *Government Gazette* at the behest of a political party, for whatever reason. This question may entail the Court having to determine the proper grounds upon which a political party may properly seek the amendment of the *Gazetted list*.

The point *in limine* raised by PDM

[15] Before proceeding to deal with the main issue for determination, there are some preliminary points of law that PDM raised in its papers that deserve to be decided before the Court can proceed to deal with the merits, if at all. The issues raised by PDM, relate to the applicants' *locus standi in judicio*, to launch these proceedings.

[16] The second issue raised, relates to the question of what PDM refers to as the absence of the Court's jurisdiction to deal with this matter.

[17] During the hearing, however, Mr Maasdorp, for PDM, indicated to the Court that his instructions were to no longer persist in the argument relating to the applicants' *locus standi*. We commend Mr Maasdorp for his comely concession for it is our firm view that this argument had one result written all over its face – dismissal. We shall, for that reason, not deal with that issue and find, as we should, that the applicants do have and have amply demonstrated in their affidavits that they have the right at law to bring the present proceedings.

[18] We shall accordingly deal with the issues that arise for determination as recorded above. As is customary, we shall commence with the only remaining preliminary point of law, namely, whether the Court is possessed of the jurisdiction to hear and determine this matter. If this preliminary point succeeds, then the matter will be at an end. Should the converse position be upheld however, then the Court will proceed to deal with the questions arising, which are essentially on the merits of the matter as encapsulated above.

Does the Court have jurisdiction to decide the matter?

[19] Properly construed, the challenge by PDM of the Court's jurisdiction, stems from the provisions of s 170(2) of the Act. These provisions will be quoted below in the determination of this issue. The question that the Court posed to Mr Maasdorp during the hearing, was whether it is legally correct to refer to this question as one of Court's jurisdiction or whether properly considered, it is one of a legislative bar, based on passage of time, to the Court hearing the matter at this stage.

[20] The latter would appear to enamour itself to the Court. Mr Maasdorp, as we understood him, agreed to this proposition. In this regard, whatever label is placed on the container of the issue, the content still remains the provisions of s 170(2) of the Act. In the premises, the question for the Court's determination in this regard, is whether this Court is at large to consider and determine this application in view of the period set out in s 170(2) of the Act, by which election matters should be heard and conclusively decided by this Court.

[21] Section 170(2) of the Act, reads as follows:

‘The Electoral Court must conclusively determine all post-election matters seven days before the swearing in of the office-bearers concerned.’

[22] The fact of the matter is that in the instant case, the Court did not, as stipulated above, conclusively, or at all, for that matter, determine the post-election dispute in this matter, seven days before the swearing in of the members of the National Assembly. The question that arises, is what effect the failure to comply with this provision has on the Court’s ability to hear and determine the dispute at this stage, if as in this case, the dispute was not heard and finalised seven days before the swearing in of the members of the National Assembly.

[23] It would appear to be common cause that the members of the National Assembly, were sworn in on 20 March 2020. In terms of the s 1 of the Act, ‘days’ means, for the purposes of the performance of any function in terms of this Act, days as defined under section 4 of the *Interpretation of Laws Proclamation, 1920 (Proclamation No. 37 of 1920)*’.

[24] The latter provision reads as follows:

‘When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day shall happen to fall on a Sunday or on any other day appointed by or under the authority of a law as a public holiday, in which case the time shall be reckoned exclusively also of every Sunday or public holiday.’

[25] In our understanding of the above provision, the first day is not counted but the last day is counted, unless the last day falls on a Sunday or a public holiday, in which case the next working day will be reckoned as the last day on which the action contemplated may be taken or performed. A calculation of the period stipulated in s 170(2), would mean that this Court should have heard and determined the matter conclusively, by 11 March 2020. This was evidently not done. The question that now falls for determination is what are the implications of the Court not hearing the matter

within the period stipulated in the said provisions? Is the Court barred from hearing the matter at this stage the prescribed period having long expired?

[26] The parties have understandably but not unexpectedly provided disparate answers to this question. The applicants' case is that the failure to comply with the period set out in the said provision is not a total bar to the Court hearing this matter at this juncture. PDM, for its part, adopts the position that the law is clear. Once the matter is not heard and determined conclusively within the period prescribed, then *cadit quaestio*, the matter is at an abrupt end.

[27] Mr Tjombe, for the applicants, argued that the decision that the applicants seek to impugn, was taken by the Commission on 21 February 2020. The applicants, he argued, acted with deliberate haste and launched the application within five days of the decision complained of. He argued that the time within which the matter may be heard must be properly considered in the light of the rules of the Electoral Court.

[28] In this particular regard, Mr Tjombe drew the Court's attention to rule 13(3), which calls for the bringing of an application for review within a period of 14 days from the making of the decision sought to be impugned or from the date when the decision came to the attention of the applicant. He further pointed out that in terms of rule 13(9), the Commission must, within 7 days of service of the review application, dispatch the record to the Registrar of this Court.

[29] In this connection, Mr Tjombe further argued, this Court's rules further provide a timetable for the filing of subsequent papers, namely, answering affidavits and replying affidavits as well. It is only after all these steps have been taken that an application may be made to the Registrar for the setting down of the application for hearing.

[30] It was thus submitted on the applicants' behalf that faced with the requirements of the rules and the timetable set out above, it was impossible for the applicants, in the circumstances, who received the decision complained of less than a month before the swearing in of the members of the National Assembly, to have met the requirements of s 170(2) of the Act.

[31] To make an already bad situation worse, Mr. Tjombe further pointed out, that the Commission withdrew the declaration complained of by the applicants and replaced it with a further declaration dated 18 March 2020, a day before the swearing in of the members of the National Assembly. In the premises, it was his argument that the provision in question must be interpreted in a manner that does not achieve the result in terms of which the Court's hands are tied from determining a matter where there is a real dispute, with the potential to have an injurious effect on an affected party's rights under the Act and/or the Constitution. This, it must be stated is so only because the period prescribed in s 170(2) of the Act has not been met.

[32] It was Mr Tjombe's further contention that the proper approach to interpreting the provision in question, is for the Court to construe the word 'must', occurring in the said provision, as not peremptory but merely permissive. This, he argued, should be the case because the obligation to hear the case is not placed on the litigant but on the Court. Where the Court, for whatever reason, fails to adhere strictly to the requirements of the provision, it is not the Court that bears the brunt of that non-compliance but the effects thereof would be visited on the litigant who may not have done anything untoward.

[33] Mr Maasdorp's submissions were a horse of a different colour. He argued that litigants, who launch or intend to launch electoral complaints, must acquaint themselves with the rules of the game, so to speak. In this regard, there are reasons why there are stringent time limits attaching to electoral disputes. In this regard, he referred the Court to the reasoning that 'expedition lies at the heart of electoral applications . . .' and 'compliance with the time prescriptions in the Electoral Act is . . . not comparable with the ordinary Rules of the Court devised by the Court for its run-of-the-mill business.'⁵

[34] It was Mr Maasdorp's further contention that the applicants knew of the possible violation of their rights since December 2019, when it became clear that PDM intended to include the sixth to the eleventh respondents on the list of names for candidature to the National Assembly. He argued that the exchange of messages

⁵ *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* (A 01/2010) [2010] NAHC 7 (4 March 2010).

between the first applicant and the fifteenth respondent should have placed the first applicant on the *qui vive*.

[35] Any reasonable person in the applicants' shoes, Mr Maasdorp argued, should have been placed on guard and thus had a duty to enquire as to what was happening. In this regard, they would have been expected to have taken preventative steps early and not wait until the last moment. Because they failed to do so, he submitted, the Court should not come to their rescue and they should be victims of their own inaction.

[36] Mr Maasdorp helpfully referred the Court to some internationally recognised principles of procedural and open justice in electoral matters and argued that they should be invoked in the resolution of electoral disputes in this jurisdiction. These are:

- (a) fairness – the right to a reasonable opportunity to launch or defend a claim, including the right to a fair and impartial fact-finding process, hearing and decision;
- (b) efficiency – the requirement for an expeditious process, with reasonable deadlines for filing and the disposition of different types of electoral disputes and complaints;
- (c) effectiveness – the right to a written and reasoned decision that is not capricious, unreasonable or arbitrary. This includes the right to appeal or judicial review and the right to an effective remedy; and
- (d) transparency – access to case information in real time as the electoral dispute is being investigated and adjudicated. This includes an open hearing and decisions that are publicly available, subject however, to limited restrictions.⁶

⁶ Ellena K. Vickery, C and, Reppel L, (2018): *Elections on Trial: The Effective Management of Elections Disputes and Violations*.

[37] It is our view that these principles are applicable and should be adopted in Namibia as part of our electoral principles. When one has regard to the electoral laws, including the rules of this Court, it would appear that the above principles are, by and large catered for, even though not maybe stated in the exact language stipulated above. In our view, these principles ought to be the guiding light whenever an electoral dispute is placed before Court for determination. It is also important for the electoral Court to strive to meet these important criteria in any matter that serves before it.

[38] Turning to the argument advanced regarding the provision in question, we take the view that Mr Tjombe's position is the correct one in law when proper regard is had to the particular circumstances attendant to the present matter. In such cases, it is important to state that an interpretation that invites or gives birth to an unjust result should be eschewed, for it would amount to austerity of legal tabulism and does not accord with legislative solitudes and may not therefor have been intended by the legislature.

[39] We accordingly agree that the words employed by the legislature in s 170(2) should not be construed to mean that the word 'must' occurring in the said provision is peremptory. This is so because if such an interpretation is given, it would certainly result in an injustice, not to the Court that may not have conclusively dealt with the dispute as stated in the Act, but may infringe the rights of a litigant who has followed the rules to the letter by him or her being non-suited for the matter not being dealt with by the Court as the provision stipulates.

[40] In *Torbitt and Others v International University Management*⁷, the Supreme Court had to deal with the question of s 86(18) of the Labour Act, 2007, which provides that '*Within 30 days of the conclusion of the arbitration proceedings, the arbitrator must issue an award giving concise reasons and signed by the arbitrator*'.

[41] In deciding whether the word 'must' occurring therein was peremptory or not, the Court said:

⁷ *Torbitt and Others v International University Management* (SA 16/2014) [2017] NASC 8 (28 March 2017).

[30] The approach that a peremptory enactment must be obeyed exactly and that it is sufficient if a directory enactment is obeyed or fulfilled substantially has been described as rigid and inflexible and “that the modern approach manifests a tendency to incline towards flexibility”.’

[42] Tellingly, at para [36], the Supreme Court reasoned as follows on the subject:

‘Where a statutory duty is imposed on a public body or public officers “and the statute requires that it shall be performed in a certain manner or within a certain time or under specified conditions, such prescription may well be regarded as intended to be directory only in cases when injustice or inconvenience to others, who have no control over those exercising the duty would result if such requirement were essential and imperative”.’

[43] In *Sutter v Scheepers*,⁸ the Appellate Division of South Africa devised tests to ascertain whether the real intention of the legislature was to render the provision peremptory or merely directory. This approach, was adopted by the Supreme Court in *Torbitt*. In the *Sutter* case, the Court, per Wessels JA, set out the following principles to decipher the real intention:

- ‘1. The word “shall” when used in a statute is rather to be considered as peremptory unless there are other circumstances which negative this conclusion.
2. If a provision is couched in a negative form, it is to be regarded as a peremptory rather than directory mandate.
3. If a provision is couched in positive language and there is no sanction in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.
4. If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and there is no explicit statement that the act is to be void if the conditions are not complied with, or of no sanction is added, then the presumption is rather in favour of the provision being directory.’

⁸ 1932 AD 165 at 173 - 174.

[44] In view of the tests stipulated above, we come to the view that properly construed, the provisions of s 170(2) should be construed as being merely directory. This is because, to mention a few, there is no sanction added for non-compliance therewith. Furthermore, it is clear that if applied and rendered peremptory, as PDM argues, it would lead to manifest injustice and a negation of the very foundations of the Electoral Act, which amongst others, is to bring justice in electoral disputes to those aggrieved by decisions made by electoral officials.

[45] We fully align ourselves with the reasoning of the Supreme Court in *Torbitt* above as fully applicable to the instant matter. It is common cause that when the applicants got to know of the decision of the PDM, it was only a few days before the swearing in ceremony of members of the National Assembly. To make matters worse, the last decision was made a day before the swearing in of the members of National Assembly.

[46] It cannot be said to have been the intention of the legislature that when decisions are taken a day or two before the swearing in ceremony, the recipients of those decisions are not entitled to any relief because of the close proximity of the decision complained of to the swearing in ceremony. That would be manifestly unjust and would do irreparable harm to litigants by denying them access to the Court for a remedy. In that connection, the maxim, '*ubi ius ibi redium*', namely, where there is a right, there is a remedy, would be rendered hollow, if at all existent.

[47] We can also not, in good conscience, close our eyes to the fact that the rules of the Court prescribe a time table for the filing of papers by the respective parties before the matter can be said to have fully ripened for hearing by the electoral Court. It would violate the electoral principles mentioned earlier if the approach was that the Court must meet the seven day rule and should in doing so, hear the matter even if not all the parties concerned have filed their papers, just so that the statutory requirement is met.

[48] If that were to be the approach, it would be a high-water mark of injustice and unfairness, if not the very cradle thereof. In this connection, there would be no fairness, but hurried efficiency, which may result in inefficiency; ineffectiveness and certainly lack of transparency. This is because it may be that not all the information

required to fully and effectively prosecute the electoral case, may have been obtained by the aggrieved party and placed before Court. There may even be no time to file the record of proceedings in some cases because of the deliberate haste to meet the peremptory s 170(2) time period.

[49] It should also be specifically mentioned that this case had an unusual nuance to it. This was the fact that PDM, after receipt of the applicants' application, and after filing its answering affidavits, decided on advice, to file a counter-application. This necessitated that the parties be afforded more time than usual, to file all the requisite sets of affidavits before the matter could have been said to have ripened for hearing. It is only after these steps were taken that the parties could be properly placed to refer the matter to the Registrar to appoint a date of hearing in terms of the rules of Court.

[50] In view of the foregoing, we come to the conclusion that the preliminary point of law must, as it does, fail. It is common cause that this matter could also not be heard earlier because when it ripened for hearing, there were measures that were promulgated by the President in terms of Article 26(5) of the Constitution that prevented Courts from sitting and adjudicating some disputes for a season.

[51] It would be an unjust dish to serve on the recipients for such matters, which have due to no fault of the litigant, not been readied in time for hearing and conclusion before the prescribed 7 day period. To willy-nilly hold that the Courts have no jurisdiction to hear the said cases would be a hotbed of injustice and a violation of the rights enshrined in Article 12 of the Constitution. Each matter must, accordingly be dealt with in terms of its own peculiarities, without in anyway sacrificing the tenets of justice and fairness on the altar of speed.

[52] By saying the foregoing, we must not be understood to count the provisions of s 170(2) as dung. By no stretch of imagination is that the case. All we advocate is that as far as possible and with attendant circumstances permitting, parties should strive to comply to the letter with the provisions of s 170(2) of the Act. In addition, we also say that there may be some peculiar circumstances in which it may not, for an array of formidable reasons, be possible to comply strictly with s 170(2). In those

cases, the Court should ensure that the promise of electoral justice and the rights protected thereunder, are not unduly sacrificed.

[53] It is accordingly our considered view that notwithstanding Mr Maasdorp's forceful and captivating argument presented, the twin interests of justice and fairness, in unison, call upon us to dismiss this particular preliminary point of law. Mr Tjombe was thus eminently correct in his submissions in our view.

[54] Having determined that the sole preliminary point of law is doomed to fail, we now proceed in earnest, to deal with the merits of the dispute below.

The proper interpretation to be accorded to Schedule 4(4) of the Constitution.

[55] We indicated earlier in the judgment that the main issue that the Court is called upon to determine, is the proper interpretation to be accorded the provisions of Schedule 4, particularly paragraph (4) thereof.

[56] Before we commence on the question of the proper interpretation of Schedule 4(4), we will briefly outline the principles that govern the interpretation of written documents as a guide in our task.

[57] The Supreme Court, in the matter of *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*⁹ set out the proper approach to the interpretation of written documents generally. We will paraphrase the reasoning of the Supreme Court. It, in effect reasoned that interpretation is the process of attributing meaning to the words used in a document, be it legislation, contractual or some other statutory instrument. The construction of any written document is a matter of law, and not of fact. Its interpretation is therefore a matter for the Court and not for witnesses.

[58] Interpretation is 'essentially one unitary exercise' in which both text and context are relevant to construing the written text. The Court, engaging upon the construction of a written document, must assess the meaning, grammar and syntax

⁹ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC) per O'Regan AJA.

of the words used; and the words used must be construed within their immediate textual context, as well as against the broader purpose and character of the document itself. Consideration of the background and context is an important part of interpretation of a written document.

[59] The Supreme Court went on to state that context is considered by reading the particular provision or provisions of the written document in the light of the document as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the document in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or one that undermines the apparent purpose of the document. The Court must avoid the temptation to substitute what it regards as reasonable, sensible or unbusinesslike for the words actually used.

[60] It is with that approach in mind that we intend to interpret Schedule 4(4) of the Constitution.

Preliminary remarks

[61] The founding Fathers and Mothers of our Republic established a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all¹⁰. The State power is *'vested in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State*¹¹. The main organs of the State, are the Executive, the Legislature and the Judiciary¹². The Founding Fathers and Mothers of our Republic were motivated by the recognition that the inherent dignity and the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace, which rights include the right of the individual to life, liberty and the pursuit of happiness,

¹⁰ Article 1(1) of the Namibian Constitution.

¹¹ Article 1(2) of the Namibian Constitution.

¹² Article 1(3) of the Namibian Constitution.

regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status¹³. (Emphasis supplied).

[62] The Founding Fathers and Mothers furthermore recognised that the rights referred to in the previous paragraph are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people¹⁴, operating under a sovereign constitution and a free and independent judiciary. (Emphasis supplied).

[63] To facilitate the election of the representatives of the people, the Constitution in Article 94B, provides for an Electoral Commission which shall, subject to the Constitution, be the exclusive body to direct, supervise, manage and control the conduct of elections and referenda. The Constitution furthermore provides that, an Act of Parliament must define the powers, functions and duties of the Commission and the procedures in accordance with which elections are to be conducted.

[64] With these preliminary remarks we will now proceed to set out the legal framework that prescribes how the representatives of the people are to be elected.

The legal framework

The Constitution

[65] Chapter 7 of the Constitution, amongst other matters, deals with legislative power, the representative nature, composition, disqualification of members, vacation of seats and election of members of the National Assembly. The Constitution vests the legislative power of Namibia in the National Assembly¹⁵. It further provides that members of the National Assembly shall be representative of all the people¹⁶. Article 46 of the Constitution, which deals with the composition of the National Assembly amongst other matters, provides that the National Assembly shall be composed of ninety-six (96) members to be elected (in accordance with procedures to be

¹³ See the Preamble to the Namibian Constitution.

¹⁴ See the Preamble to the Namibian Constitution.

¹⁵ Article 44 of the Namibian Constitution.

¹⁶ Article 45 of the Namibian Constitution.

determined by an Act of Parliament)¹⁷ by the registered voters by direct and secret ballot. (Emphasis supplied).

[66] Article 49, to which Article 46 is subservient, provides that the election of members in terms of Article 46(1)(a) shall be on party lists and in accordance with the principles of proportional representation as set out in Schedule 4 of the Constitution. We will in the course of the judgment return to Schedule 4.

[67] The National Assembly did, as contemplated in the Constitution and with the assent of the President, enact the Electoral Act, 2014, which defines the powers, functions and duties of the Commission and also spells out the procedure in accordance with which members of the National Assembly are to be elected. It is to the framework of that Act that we now turn.

The Electoral Act 5 of 2014

[68] The Act in s 2 provides for the continuation of the existence of the Electoral Commission established by section 3 of the repealed Act (ie. the Electoral Act, 1992). Section 3 outlines the objectives of the Commission namely; to organise, direct, supervise, manage and control the conduct of elections and referenda in a free, fair, independent, credible, transparent and impartial manner as well as to strengthen constitutional democracy and to promote democratic electoral and referenda processes.

[69] Section 4 of the Act outlines the powers and functions of the Commission. Section 4(1)(a) makes it abundantly clear that the Commission is the exclusive authority to direct, supervise, manage and control in a fair and impartial manner and without fear, favour or prejudice any elections and referenda under this Act; and in para (b) the Commission is commanded to exercise and perform its powers and functions, independent of any direction or interference by any other authority or any person. Section 4(2) of the Act sets out the specific powers and functions of the Commission. Those powers include the power to supervise, direct and control the conduct of elections and referenda referred to in subsection (1) of s 3 of the Act. (Emphasis added).

¹⁷ Article 46(2) of the Namibian Constitution.

[70] The Act, in Part 5, deals with the conduct of elections. Section 63(1)(b) provides that a general election for the election of members of the National Assembly must take place on a date not earlier than five months and not later than three months prior to the date on which the term of office of members of the National Assembly expires by effluxion of time, as contemplated in Article 50 of the Constitution; or (ii) in the event of the dissolution of the National Assembly as contemplated in Article 57(2), read with Article 50 of the Constitution, on a date within the period required by Article 57(2) of the Constitution must take place.

[71] Section 64(1) of the Act provides that where a general election or by-election for members of the National Assembly, is to take place in accordance with section 63, the President must, by proclamation in the *Gazette* make known, a date determined by the President, upon recommendation by the Commission, upon which the submission of nomination of candidates must take place and the place at which it must so take place. (We will in this judgment refer to this date as the '*nomination date*'); and subject to subsections (2) and (6), the day determined by the President, upon recommendation by the Commission, upon which a poll must be taken in the election. (We will, in this judgment refer to this day as the '*polling day*').

[72] Subpart 3 of Part 5 of the Act deals with the nomination of candidates for National Assembly elections. Section 77(1) provides that a registered political party that intends to take part in the election for members of the National Assembly, must submit to the Commission a list of candidates in writing at any time after the publication in the *Gazette* of the appropriate proclamation referred to in section 64(1) (a), but not later than 11h00 on the day (the *nomination day*) determined in accordance with that section. The -

- (a) list must contain the names, indicate the sex and residential addresses of at least 32 but not more than 96 candidates nominated with a view to the filling of any seats in the National Assembly to which the registered political party may become entitled in accordance with Schedule 4 to the Constitution;

- (b) names on a list of candidates must appear in the order as the registered political party may determine with a view to para (4) of Schedule 4 to the Constitution; and
- (c) voter registration number of each candidate must be stated on the list after his or her name.

[73] Section 77(4) provides that a person may only be nominated as a candidate on a list of candidates if the person qualifies to be elected as a member of the National Assembly by virtue of Article 46(1)(a) of the Constitution; is a registered voter; and is a member of the registered political party submitting the list of candidates concerned. Section 7(5) provides that a list of candidates must be accompanied by a declaration with the seal of the registered political party thereon by the person who is the authorised representative of the political party concerned that each person whose name appears on the list of candidates concerned has consented to the nomination as a candidate of the political party and that every such person qualifies to be elected as a member of the National Assembly by virtue of Article 46(1)(a) of the Constitution; is a registered voter; and is a member of the registered political party submitting the list of candidates concerned. A person may not be nominated as a candidate for the National Assembly by more than one political party. The Act, in s 77(7), compels the Commission to keep a copy of each list of candidates at the offices of the Commission, for inspection by the public and at places in any region and any constituency as the Commission may think necessary.

[74] Section 78 of the Act deals with the publication of party lists. Section 78(1) provides that the Commission must as soon as is practicable after s 77 of the Act has been complied with, publish a notice in the *Gazette* – (a) stating, in alphabetical order the names of all the registered political parties; (b) setting out the list of candidates of each political party concerned for the election concerned, as drawn up by the registered party in terms of s 77; and declaring that the persons whose names appear on the list have been duly nominated as the candidates of the political party concerned for the election. (the '*Gazetted list*').

[75] Section 78(2) deals with the situation where any person whose name appears on the *Gazetted list* dies or becomes incapacitated or is found not to qualify in terms

of s 77(4) to be a member of the National Assembly or where the candidature of the said person is withdrawn by him or her or by the registered political party which submitted the list of candidates or where the registration of a political party which has submitted a list of candidates for the election of members of the National Assembly is canceled and the political party is deregistered in terms of this Act before polling day.

[76] Where an event which is mentioned in the preceding paragraph occurs, the Commission is empowered to amend the *Gazetted list* by a further notice (the amendment notice) in the *Gazette* by the deletion from the list of the name and voter registration number of the person who died or became incapacitated or was found not to qualify to be a member of the National Assembly); and by the addition or insertion, as may be required by the registered political party concerned, on the *Gazetted list* the name and voter registration number of any person who so qualifies and has been nominated in writing by the political party whose *Gazetted list* it is; and consented to the nomination in writing¹⁸.

[77] When a person whose name has, in terms of an amendment notice been deleted from the list of candidates of a registered political party, ceases to be a candidate for the election or a person who has been added or inserted to the list of candidates of a registered political party, thereby becomes a candidate for the political party for the election¹⁹.

[78] Subpart 6 of Part 5 of the Act deals with general provisions relating to the conduct of elections and Subpart 7 of Part 5 deals with voting at polling stations. These parts are not relevant for the determination of the issue that the Court is required to resolve and we will therefore not deal with them. Once the poll is conducted and the votes casted are counted, Subpart 8 of Part 5 of the Act, which deals with the determination of result of a poll and announcement of results of election becomes relevant, particularly section 110 of the Act.

[79] Section 110 of the Act provides that when in an election for members of the National Assembly the counting of votes has been completed, a returning officer

¹⁸ Section 77(3).

¹⁹ Section 78(4).

must amongst other matters, announce in the prescribed manner the result of the count and inform the Chief Electoral Officer of the result. The Chief Electoral Officer must in accordance with the results received from returning officers, determine preliminarily in the manner provided in Schedule 4 to the Constitution the number of candidates of each political party to be declared duly elected as members of the National Assembly. Once the Chief Electoral Officer has determined the result of the election, he or she must communicate the result to the Commission and the Chairperson of the Commission must announce in the prescribed manner the result, by:

- (a) making known -
 - (i) the total votes cast;
 - (ii) the total number of votes counted;
 - (iii) the appropriate *quota* determined in accordance with Schedule 4 to the Constitution; and
 - (iv) in respect of each political party -
 - (aa) the number of votes recorded for it; and
 - (bb) the number of seats in the National Assembly, if any, determined in its case in accordance with Schedule 4 of the Constitution to which the political party is entitled; and

- (b) declaring -
 - (i) the candidates on the *Gazetted list* of each political party in which case a number of seats has been determined, as aforesaid, but subject to Schedule 4 of the Constitution; and
 - (ii) if the number of seats determined, as aforesaid, is more than the candidates available on the *Gazetted list*, a person who qualifies in terms of section 77 to be a member of the National Assembly and has been nominated in writing in the prescribed manner for the purpose by the political party concerned and has in writing consented to his or her nomination,
to be duly elected as members of the National Assembly with effect from the date as determined in accordance with the relevant provisions of the Constitution.

[80] Section 110(4) provides that if there appears on any list (the *Gazetted list*) of candidates the name of a person who has died or became incapacitated or was found not to qualify in relation to the National Assembly or has been expelled from the political party by whom he or she has been nominated, on or before the date of the declaration as a duly elected member, the name is for the purposes of the declaration deemed not to appear on the list concerned.

[81] The legal framework can therefore be summarised as follows: At the least three months before the term of office of members of the National Assembly expires, the President must announce a *polling date* on which the elections for the next term of office of the members of the National Assembly will take place and announce the date (*nomination date*) on which the nomination of the candidates will take place. On nomination day, a registered political party that intends to take part in the election for members of the National Assembly must submit to the Commission a list of names of its candidates.

[82] After a political party has submitted a list of its candidates, the Commission must announce the names of the persons who have been duly nominated as the candidates of the political party concerned for the election. The poll then takes place and after the poll the Commission must announce the results of the poll and the names of the persons who are duly elected as members of the National Assembly. The Act does empower the Commission, to in certain eventualities, amend both the *Gazetted list* and the list of candidates declared duly elected members of the National Assembly. It is within this context and that we intend to deal with the question that confronts us.

Discussion

[83] We have in the introductory part of this judgment dealt with the background that gave rise to the applicants approaching this Court. To recap the applicants' names were on the *Gazetted list* of PDM and were in accordance with s 78 of the Act declared as duly nominated candidates of PDM for election to the National Assembly. But when it came to the declaration of duly elected members of the National Assembly, the Commission on the insistence or demand of PDM, announced persons whose names were not on the *Gazetted list* of PDM as duly

elected members of the National Assembly and excluded the applicants from the declaration. The applicants are, as we said earlier, aggrieved by the fact that they were removed from the *Gazetted list* after the *polling day*. The applicants contend that their removal is unlawful and tantamount to election fraud.

[84] The Commission argues that it sought and obtained legal advice to the effect that it is within the discretion of a political party to ‘chop and change’ the list of persons who will represent it in the National Assembly.

[85] Mr Maasdorp, who appeared for the respondents, argued that despite the fact that the Act in s 77 requires a registered political party to compile and submit a list of candidates for nomination as candidates for election to the National Assembly and the declaration of the list of names of the persons submitted as contemplated in s 77, as duly nominated candidates in terms of s 78 of the Act, para (4) of Schedule 4 to the Constitution empowers a political party to still choose whom they want to fill the seats in the National Assembly that the political party won in a general election.

[86] Mr Maasdorp further argued that after knowing how many seats a political party won in the election, there is a short window of opportunity for a political party to in its discretion, decide whom it must nominate to the National Assembly to fill those seats. He argued that, that discretion is only limited by one consideration, namely that the persons whom the party nominates to fill the seats must meet the requirements pertaining to qualification of members of the National Assembly as spelt out in Art 47 of the Constitution. Properly understood, Mr Maasdorp argues that a political party has a discretion before and after the elections, to amend (by removing and adding names) its *Gazetted list*, depending on the number of seats it won and whether the candidates meet the requirements of Article 47 of the Constitution. The nomination list, according to his argument, is not cast in stone in terms of which candidate goes to the National Assembly.

[87] Mr Tjombe for the applicants has a view that is diametrically opposed to that of Mr Maasdorp. He argued that Article 45 of the Constitution clearly provides that ‘the members of the National Assembly shall be representative of all the people. . .’ It is noteworthy, he argued, that it is not the political parties that are the representatives of the people – but the members. He proceeded and argued that it is

apparent from Article 46(1)(a) of the Constitution that the National Assembly will consist of ninety-six (96) members who must be elected by the registered voters by direct and secret ballot. (Emphasis added).

[88] Mr Tjombe submitted that:

‘What the ECN and PDM propose is that a political party may appoint the members of the National Assembly, which will be in violation of Article 46(1)(a) of the Namibian Constitution. When PDM submitted the names of the 6 persons to make up as part of the composition of the National Assembly, such members were not elected by registered voters – but by PDM’s Central Committee. The members of PDM’s Central Committee may or may not be registered voters and the voting process may or may not be by secret ballot.

This not only flies against the clear meaning of “freely elected representatives” in the Preamble and “the members shall be representatives” in Article 45 of the Namibian Constitution.’

[89] In view of the arguments on behalf of both the applicants and the respondents we now return to Schedule 4 of the Constitution to consider its proper meaning. Schedule 4 deals with the Election of Members of the National Assembly and it reads as follows:

- ‘(1) For the purpose of filling the ninety-six (96) seats in the National Assembly pursuant to the provisions of Article 46(1)(a) hereof, the total number of valid votes cast in a general election for these seats shall be divided by ninety-six (96) and the result shall constitute the *quota* of valid votes per seat.
- (2) The total number of votes cast in favour of a registered political party which offers itself for this purpose shall be divided by the quota of votes per seat and the result shall, subject to paragraph (3), constitute the number of seats to which that political party shall be entitled in the National Assembly.
- (3) Where the formula set out in paragraph (2) yields a surplus fraction not absorbed by the number of seats allocated to the political party concerned, such surplus shall compete with other similar surpluses accruing to any other political party or parties participating in the election, and any undistributed seat or seats (in terms of the formula set out in paragraph (2)) shall be awarded to

the party or parties concerned in sequence of the highest surplus. In the event of a tie of surpluses, and as a result of such tie the undistributed seat(s) cannot be awarded, then the undistributed seat(s) will be awarded by lot.

- (4) Subject to the requirements pertaining to the qualification of members of the National Assembly, a political party which qualifies for seats in terms of paragraphs (2) and (3) shall be free to choose in its own discretion which persons to nominate as members of the National Assembly to fill the said seats.
- (5) Provision shall be made by Act of Parliament for all parties participating in an election of members of the National Assembly to be represented at all material stages of the election process and to be afforded a reasonable opportunity for scrutinising the counting of the votes cast in such election.'

[90] The meaning and purport of the first three paragraphs of Schedule 4 are not in issue here but the purport of para (4) is what is in dispute. As we have indicated earlier, the applicants contend that once the *Gazetted list* is published in the *Gazette* and a poll is taken, a political party cannot instruct the Commission to change the list, by removing names of persons who were declared duly nominated in terms of s 78 of the Act and adding names of persons who were not declared duly nominated. The respondents on the other hand contend that a political party has the discretion to, at any point prior to persons taking the oath of office as members of the National Assembly, choose in its own discretion which persons to nominate as members of the National Assembly.

[91] In our view the phrase '*shall be free to choose in its own discretion which persons to nominate as members of the National Assembly to fill the said seats*' is the phrase that requires interpretation. The critical question is 'what is the meaning that must be attributed to that phrase?' In our view the phrase is capable of more than one meaning. One possible meaning is that a political party has the free hand to choose who it will nominate as a member of the National Assembly, and this does not matter at what point that nomination takes place.

[92] However, the operative word in the phrase is the word '*nominate*' and in that phrase, the word '*nominate*' is used as a verb. The Concise Oxford English

Dictionary defines the verb '*nominate*' as '*propose or formally enter as a candidate for election or for an honour or award*'. We are therefore of the view that in a contextual and grammatical sense, the phrase is also capable of meaning that a political party is at liberty to choose which persons it will propose or formally enter as candidates for election to the National Assembly.

[93] It will be remembered that we pointed out that the Supreme Court has guided us to, in the process of seeking to attribute meaning to words used in a text, have regard to the context and background against which the words were used. The Supreme Court has further guided that where more than one meaning is possible, each possibility must be weighted in the light of all factors. The process is objective, not subjective and that a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or one that undermines the apparent purpose of the document.

[94] The context in which Schedule 4(4) must be interpreted is set by the Constitution itself. The Constitution envisages that the government is responsible to freely elected representatives of the people and that the National Assembly shall be composed of ninety-six (96) members to be elected by the registered voters by direct and secret ballot. The Constitution furthermore envisages a Commission that will be the exclusive body to direct, supervise, manage and control the conduct of elections. The Constitution further envisages that the election of members of the National Assembly must be in accordance with procedures determined by Act of Parliament.

[95] To accord to para (4) of Schedule 4 the meaning contended for by Mr Maasdorp is to undermine the purpose of the Constitution because that interpretation will mean that a political party can prior to the poll having been taken place, '*parade*' persons as its candidates for election to the National Assembly and once the poll is taken and the results known, put up totally different persons who were never '*marketed*' to voters as candidates.

[96] Can it in those circumstances be said that those persons who fall in the latter category, were elected by the registered voters by direct and secret ballot? This answer is surely a big 'No!'. We therefore find that for a person to become a member

of the National Assembly, that person must have been duly nominated as a candidate for election to the National Assembly.

[97] Parliament has determined the procedures in accordance with which members of the National Assembly are to be elected. The procedures that Parliament has established are that for a person to be elected as a member of the National Assembly, the person must be nominated by a registered political party and once found to be not disqualified in terms of the Constitution, must be declared duly nominated and only after the person is duly nominated as a candidate can he or she be elected as a member of the National Assembly.

[98] We accordingly prefer the interpretation that for a person to be proposed or formally entered as a candidate for election to the National Assembly that person must be so proposed, or formally entered as a candidate for election to the National Assembly in accordance with the procedures established by the Act. In other words the person's name must appear on the *Gazetted list* prior to the conduct of the poll. This interpretation is not only sensible or businesslike but actually gives effect to the apparent clear and obvious purpose of the Constitution. The purpose of the Constitution in no uncertain terms being to confer on eligible citizens the right to elect who must represent them in the National Assembly.

[99] We are furthermore fortified in the interpretation that we accord to para (4) of Schedule 4 by the fact that the Act only confers powers on the Commission to amend the *Gazetted list* of candidates for election to the National Assembly if there appears on any list of candidates the name of a person who has died or became incapacitated or was found not to qualify in relation to the National Assembly or has been expelled from the political party by whom he or she has been nominated, on or before the date of the declaration as a duly elected member. We therefore find as a fact that the names of Esmeralda Esme !Aebes, Johannes Martin, Kazeongere Zeripi Tjeundo, Godfrey Kupuzo Mwilima, Timotheus Sydney Shihumbu and Pieter Mostert did not appear on the *Gazetted list* and they were as such never duly nominated as candidates for election to the National Assembly. They are therefore not eligible to become members of the National Assembly.

[100] We furthermore incline to the interpretation that we accord to para (4) of Schedule 4 by the fact that the Act only confers powers on the Commission to amend the *nomination list* of candidates for election to the National Assembly if there appears on any list of candidates the name of a person who has died or became incapacitated or was found not to qualify in relation to the National Assembly or has been expelled from the political party by whom he or she has been nominated, on or before the date of the declaration as a duly elected member.

Does the Commission have the power to change the post-election party list that was published in the Government Gazette, after the election results are announced at the behest of a political party for whatever reason?

[101] It is a well-established principle of our law that a creature of statute has no power beyond that granted by the statute creating it. It has no inherent jurisdiction such as is possessed by the superior Courts and can claim no authority which cannot be found within the four corners of its constitutive Act²⁰. It has further been held that if a statutory body performed an act *ultra-vires* – ie. outside its power, either because it exceeded its powers or because it failed to comply with the requirements for validity by the legislature, such body is considered in law not to have acted at all.²¹

[102] The Commission is a creature of the Act, having been established as such by s 3 of the repealed Act and continues to exist by virtue of the provisions of s 2 of the Act.

[103] With that in mind, we posed the following questions to Mr Akweenda, who held a watching brief for the Commission, at the end of the hearing and granted him an opportunity to file supplementary heads of argument addressing those questions. We also afforded both Mr Tjombe and Mr Maasdorp an opportunity to file supplementary heads of argument as well, if they so wished, in response to Mr Akweenda's written submissions.

²⁰ The Civil Practice of the Magistrate Courts in South Africa, Vol. 1 – The Act.

²¹ LAWSA Vol. 9 para 389 Footnote (Strydom v Die Land en Landboubank van SA 1972 I SA 801(A)).

- '1. On what basis or by virtue of what power did the Commission accept the changes of the candidates submitted by PDM after the elections?
2. Did the Commission have the power to accept and affect such changes? If so what are the relevant provisions of the Act, which allow the Commission to accept and affect such changes and to publish a new list of PDM in the *Government Gazette*?'

[104] We also sought explanation as to why it was necessary for the Commission to cause two publications to be made, first on 21 February 2020 and again on 18 March 2020, and whether there was a difference between the contents of the two publications.

[105] As regards the explanation, we were informed through a document or memorandum signed and filed by Ms Tjahikika, Acting Government Attorney representing the Commission, that the Commission *mero motu* but erroneously removed from the list of the Swapo Party a candidate based, on incorrect information. Thereupon the Swapo Party demanded that the Commission reinstate the name of the candidate so removed. Furthermore, two candidates on the Swapo Party list resigned as candidates, following their resignation as members of the Cabinet. In addition the Republican Party instructed the Commission to remove two candidates from its list and replace them with two other candidates.

[106] As a result of those developments, 'in order to accommodate the two political parties' as Ms Tjahikika put it, the Commission was obliged to replace the *Gazette* that was published on 21 February 2020, with the *Gazette* that was published on 18 March 2020, before the candidates were sworn in as members of Parliament.

[107] Before we consider the Commission's responses, to the questions posed by the Court to the Commission, we deem it appropriate to refer to the provisions of the Act which circumscribe the power of the Commission, in order to provide the context in which the Commission's conduct is to be considered.

[108] Section 4 of the Act outlines the powers and functions of the Commission. It is quoted in full below and reads as follows:

‘4 Powers and functions of Commission:

- (1) Subject to the Namibian Constitution and this Act, and in particular with due regard to Schedule 2 and any other law, the Commission –
 - (a) is the exclusive authority to direct, supervise, manage and control in a fair and impartial manner and without fear, favour or prejudice any elections and referenda under this Act; and
 - (b) must exercise and perform its powers and functions, subject to section 2(3), independent[ly] of any direction or interference by any other authority or any person.

- (2) Without derogating from the generality of subsection (1), the Commission has further powers and functions to -
 - (a) supervise, direct and control the registration of voters for the purposes of any election or referendum referred to in subsection (1);
 - (b) supervise the preparation, publication and maintenance of a national voters' register and local authority voters' register;
 - (c) supervise, direct and control the registration of political parties and organisations;
 - (d) supervise, direct and control the conduct of elections and referenda referred to in subsection (1);
 - (e) supervise, direct, control and promote voter and civic education in respect of elections and referenda, including the cooperation with educational or other bodies or institutions with a view to the provision of instruction to or the training of persons in electoral and related matters;
 - (f) supervise, direct and control electoral observers;
 - (g) establish and maintain liaison and cooperation with political parties, the media and the public;
 - (h) undertake and promote research into electoral matters;
 - (i) develop and promote the development of electoral expertise and technology in all spheres of government;
 - (j) promote knowledge of sound and democratic electoral processes;
 - (k) issue and enforce any code of conduct provided for in this Act;

- (l) supervise and control the disclosure and dissemination of information regarding electoral matters and establish and maintain the necessary facilities for collecting and disseminating the information;
- (m) secure in the electoral and referenda processes the representation of the diverse social and cultural groups in Namibia and seek their cooperation;
- (n) create its own organisational structure, to allow its leadership to take full control of all its operations to strengthen areas where operational effectiveness is lacking; and
- (o) exercise and perform any other powers and functions conferred and imposed upon it by or under this Act or any other law or which are necessary or expedient for purposes of achieving the objects of this Act or any other law.' (Underlining supplied for emphasis).

[109] We move to consider the Commission's response to the Court's questions. We interpose to point out that from the explanation tendered on behalf of the Commission, it appears that it was not only PDM which changed its list but also the Republican Party. We pause to observe that the latter is new information, which was never revealed to the Court by the Commission in its papers. It is not clear from the explanation whether the Swapo Party also changed its list following the resignation of its two former ministers.

[110] Notwithstanding the Commission's initial denial that it altered PDM's list, it responded to both questions by referring the Court to Schedule 4 of the Constitution 'considered as a whole' and to the two legal opinions provided by Mr Budlender SC and Mr Mokhare SC, respectively. It bears mentioning that in putting the question to the Commission, we took the view that its bare denial that it did not alter the list was not a serious one and did not raise a genuine dispute of fact. The reason for this is that in terms of Act, the Commission is the custodian of the list. It is required to keep a copy of each list of candidates for the political parties at its office. The political parties simply submitted the changes to the Commission and it was the Commission, which effected the changes upon the political parties' request or instructions.

[111] As regards the legal opinions, we should mention that the two legal opinions already formed part of the papers placed before us and we had considered them before we put the questions to Counsel for the Commission.

[112] Mr Mokhare SC formulated his brief as follows: 'The question is whether it is procedurally permissible to gazette the names of the members of a political party to the National Assembly even though they did not appear on the initial gazetted list'.

[113] Mr Budlender SC, for his part, formulated his brief as follows: 'Is a political party bound by the pre-election gazette list in that either: it may nominate persons to the National Assembly if their names appeared on the *gazetted* list; or if it may nominate persons who did not appear on the *gazetted* list, it is bound first to nominate persons whose names were on the list, and only thereafter to fill any 'excess' position with persons whose names were not on the gazette list'.

[114] Both counsel concluded that a political party is not limited to choosing its candidate from the *gazetted* list and is free to nominate any person even if that person's name does not appear on the *gazetted* list.

[115] It is to be noted that the opinions dealt with the power of a political party and not the question whether the Commission itself has the power to alter the *gazetted* list post- election. It follows therefore that the Commission has not been helpful by referring the Court to the two opinions, which as the name suggests, are merely opinions which have no binding effect on this Court

[116] In response to our two questions, it is has been stated on behalf of the Commission that it derives its power from 'Schedule 4 of the Constitution considered as a whole'. It is significant to note that the Commission does not rely on any provision of its enabling Act as the source of its power to alter the lists. We pointed out at the beginning of this enquiry that the Commission, as a creature of the Act, only has such power as is vested upon it by its enabling Act. We have perused and considered the provisions of Act, particularly section 4 quoted above but could not find any provision which gives the Commission the power to alter or amend the list post-elections. The Commission itself was not able to direct us to such provision.

[117] Schedule 4 of the Constitution does not even mention the name of the Commission. If the Legislature intended the Commission to derive any power from the Schedule, it would have said so in clear and unambiguous language.

[118] It is correct that by implication Schedule 4 has assigned a function to the Commission limited to the implementation of the formula set out in Schedule 4. In respect of the Schedule, the formula, read with the result of the elections, is done mathematically and is self-executing. By that we mean that in carrying out that function, the Commission is not exercising any power in relation to the lists. It is instead merely applying the formula prescribed. To conclude on this point, we hold that Schedule 4 of the Constitution does not vest any power upon the Commission to alter or amend the *gazetted* political parties' lists.

[119] Mr Tjombe, in his supplementary written submission, argues that the Commission does not have the power to accept changes to the list of candidates by a political party after the elections. Counsel points out that the Commission may only amend or alter a party list after the elections in limited and specified circumstances.

[120] We fully agree with Mr Tjombe's submission. As we pointed out earlier in para [100] of this judgment, the Commission has the power to alter the list post-elections in very limited circumstances. These are set out in section 110(4)(a) to (c) of the Act, which reads as follows:

- '(4) If there appears on any list of candidates the name of a person who -
- (a) has died or became incapacitated;
 - (b) was found not to qualify in relation to the National Assembly; or
 - (c) has been expelled from the political party by whom he or she has been nominated, on or before the date of the declaration referred to in subsection (4)(b), the name is for the purposes of the declaration deemed not to appear on the list concerned.'

[121] We must mention that Mr Maasdorp also filed his supplementary heads of argument in this matter. Regrettably, however, he failed to meet the deadline that had been placed by the Court on the parties. We have, within the limited time available, considered his additional heads of argument. We are of the considered view that he did not make a new point beyond the arguments he had presented

earlier. The additional heads appeared to be a rehash of his previous argument in the main.

[122] It is not the Commission's case, neither that of PDM, that any or all of those limited circumstances mentioned in paragraph 120 above, were present in the instant matter. It follows therefore in our view that the Commission acted *ultra-vires* – (outside its power), when it altered the list after the elections. It arrogated upon itself, power that is not vested in it by the enabling legislation.

[123] There is a further reason why we hold the view that the Commission acted *ultra vires*. It relates to the status of the *gazetted* lists published after publication in the Gazette in terms of s 78. Subsection (6) provides as follows:

'(6) A notice published under subsection (1) is, on the mere production of a copy of the Gazette in which it is published, and in the absence of proof to the contrary, conclusive evidence that-

- (a) the requirements of this Act relating to the submission of lists of candidates by registered political parties and to matters precedent or incidental thereto have been complied with in respect of any registered political party whose name is set out therein; and
- (b) any candidates on the list of candidates are the candidates nominated in respect of the political party, but subject to paragraph (4) of Schedule 4 to the Namibian Constitution.' (Underlining supplied for emphasis).'

[124] In our view the 'proof to the contrary' would be the alteration effected to the lists in terms of s 110(4). By altering the *Gazetted* list, the Commission has by its own hands in fact destroyed the evidential status of the lists, namely the conclusiveness of the *gazetted* lists without statutory power for doing so. As we have found, the only bases upon which the Commission is allowed to alter the *gazetted* lists are the circumstances listed in s 110(4) of the Act. We move to consider the status of the Commission in relation to its independence.

The Commission's independence

[125] Earlier in this judgment we referred to the power vested upon the Commission by s 4 of the Act. Section 4(1)(a) stipulates that the Commission must perform its power and functions independently of any direction or interference by any other authority or any person. Did the Commission adhere to this stipulation in the present matter?

[126] It appears from the papers that the Commission was confronted by PDM with a demand to change its list failing which PDM would approach the Court to compel it to do so. The Commission initially resisted, which in our view was the correct thing to do. It then happened that the Commission went out of its way to seek for a legal opinion on the question whether a political party such as PDM, is entitled to change its list, post elections.

[127] We are of the view that it is not within the power nor is it the function of the Commission to solicit legal opinions on behalf of political parties. By doing so, as it happened in this matter, the Commission compromised its independence and impartiality. It adopted a position, which effectively amounts to it taking sides with a political party, against elected candidates of the said political party.

[128] The Commission ought to have asked itself whether it has the power to alter the list as demanded by PDM by looking at its own enabling Act. The Act is its sole source of power and nothing else. Instead the Commission allowed itself to be pressured into adopting the position peddled by PDM. As a result it lost its impartiality and independence.

[129] We are of the considered view that in maintaining its impartiality and independence, the Commission is in no different position than that of a judicial officer when his or her decision is challenged on review. It is not advisable that a judicial officer should join issue with those who happen to be challenging his or her decision and file opposing affidavits to defend his or her decision. In such a situation, we are of the view that like a judicial officer, in order to maintain its impartiality and independence, the Commission should simply abide by the decision of the Court.

[130] Having said that, the Commission can, however file an affidavit to place the necessary and relevant information before Court and to explain what it took into

consideration in arriving at its decision. In doing so, the primary motivation would be rendering assistance to the Court in its determination and not to defend its decision. In this connection we are of the view that the following remarks by the Court in *Esau v Director-General of Anti-Corruption Commission*²², relating to the conduct of judicial officers, are apposite and of equal application to the conduct of the Commission in general.

[131] The Court remarked as follows:

[31] It is generally inadvisable that judicial officers should join issue and in particular, file affidavits in matters where their decisions or orders are taken up on review. This is so for the reason that the Court should not be seen as an active protagonist in a matter that involves its judgment or application of the law. Once that happens, the Court appears to lose its independence and objectivity as an arbiter and this may place the particular judicial officer beyond the call of duty of a judicial officer, but a litigant in the proceedings and others involving the same litigant in future.

[32] The proper approach to this situation by judicial officers was adopted and restated by Ueitele J in *J B Cooling and Refrigeration CC v Willemse t/a Windhoek Armature Winding*.²³ In doing so, the learned Judge quoted with approval the remarks made by Hull CJ in *Director of Public Prosecutions v The Senior Magistrate Nhlango and Another*²⁴, where the learned Chief Justice made the following lapidary remarks:

“Criminal trials, and applications for review, are of course not adversarial contests between the judicial officer and the prosecutor. It is wrong and unseemly that they should be allowed to acquire that flavour. Ordinarily on review, the judicial officer whose decision is being called into question is cited as a party for formal purposes only. He will have no need to do anything beyond arranging for the record to be sent up to the High Court, including any written reasons that he has or may wish to give for his decision.

It may be necessary, very occasionally, for him to make an affidavit as to the record. This is, however, to be avoided as far as possible. It is generally

²² 2020 (1) NR 123 (HC).

²³ (A 76/2015) [2016] NAHCMD 8 (20 January 2016).

²⁴ 1987 -1995 SLR 17 at 22 G-I.

undesirable for a judicial officer to give evidence relating to proceedings that have been taken before him. In principle, there may be a need for a Magistrate to be represented by counsel upon review, if his personal conduct or reputation is being impugned but these too will be in very exceptional circumstances." (Emphasis added).

- [33] I fully align myself with the above quotation, as accurately reflective of the correct position that Magistrates even in this jurisdiction should assume where their orders or judgments are taken on appeal or review. It is thus clear that there was no allegation in the applicants' affidavits that served to impugn the reputation or question the probity of the Magistrate in question in the exercise of his powers to issue the warrant.
- [34] In the premises, I come to the considered view that it was accordingly unnecessary, regard had to the facts of the matter, to have cited the Magistrate in this matter. As Hull CJ stated, the Magistrate is cited for formal reasons only. The said Magistrate does not stand to suffer any prejudice by any order the Court makes, even if it sets aside his decision to authorise the warrant, nor can it be said that the Court would be unable to carry out its order, if the Magistrate is not cited in these proceedings²⁵.
- [35] It is necessary, whilst still on this issue, to deal, albeit briefly, with the issue of the Magistrates who were cited and did file their answering affidavits. It must be mentioned that in the light of the authority cited above, it was ill-advised for them to have done so, considering that they were cited for formal purposes only. No allegations of bias, malice, fraud or such like epithet, were made by the applicants.
- [36] What is more worrying, is that the said Magistrates not only filed affidavits, but they actually joined issue with the other respondents. They in fact filed answering affidavits not just explaining what they took into account in issuing the warrants, but they proceeded to take issue literally with every allegation made by the applicants, answering all the allegations made by the applicants.'

²⁵ *Kleinhans v The Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) p477 para 32.

[132] We urge the Commission to keep these remarks in mind in its future conduct so that it may preserve and protect its independence and impartiality in carrying out its functions in terms of the Constitution and the Act.

[133] To sum up and to conclude on this aspect, we hold that the Commission did not have the power to alter or amend the *gazetted* lists in the circumstances it did and in doing so it acted *ultra vires*. Its act in that regard stands to be reviewed and set aside. The Commission was ill-advised to join the present proceedings as a litigant and to make common cause with a political party, thereby sacrificing and compromising its independence and impartiality contrary to its mandate as set out in its enabling Act.

Prospective Order?

[134] Mr Maasdorp, on PDM's behalf implored the Court that in the event it finds for the applicants regarding the invalidity of PDM's nomination of the respondents whose membership of the National Assembly is questioned in these proceedings, the Court should nonetheless issue a prospective order. This means that the Court order setting aside the said respondents' nomination as members of the National Assembly should not take immediate effect, thus allowing the said respondents to complete their current term as members of the National Assembly.

[135] It was submitted, in support of this argument, that the said members have already been sworn in and that if they were to be retrieved, as it were, from the National Assembly, they will suffer immense prejudice, considering that they have already been sworn in, have and are partaking in the activities of that August House. In this regard, it was argued that they have put aside all other commitments and pursuits in order to serve the Republic and her people without distractions. In this regard, they may find themselves without any other means of livelihood as they had committed themselves to serve in the National Assembly and nowhere else.

[136] It was further argued that the decision to change the list was done in a *bona fide* manner and without any touch of malice. This was because of the concerned respondents' track record with PDM, spanning over a number of years which even the public is well aware of. Mr Maasdorp further moved the Court to consider that the

respondents affected have held high positions within the Party and that the discretion to nominate them was to ensure a broad national representation in the National Assembly, coupled with regional diversity and appropriate experience and competence.

[137] In argument, the Court was referred to the Supreme Court judgment of *Itula v Minister of Urban and Rural Development*²⁶. The Supreme Court, after considering the entire conspectus of facts applicable to the matter, was of the view that in those circumstances, a prospective order of invalidity would serve to vindicate the Constitution and would ensure that future elections are held in accordance with what Parliament had intended and in furtherance of the principle that elections are not only free and fair, but also transparent and credible. Mr Maasdorp implored to follow the Supreme Court route in this matter by granting a prospective Court order.

[138] On the facts of this case, we are disinclined as the Court, regardless of how persuasive and attractive this argument may appear to be, to give in to the entreaties of PDM in this regard. The point of the matter is that we have found that the said respondents were not eligible to be sworn in as members of the National Assembly for reasons discussed above. It would be odious for this Court to overlook what is an illegality and allow those persons to continue to sit in the August House when their membership of the House is characterised by illegality at every turn and every minute, going forward.

[139] We are of the considered view that this being a democratic country, based on the foundational principle legality and of which of the rule of law forms part, it would set a very bad precedent for the Court to allow the said respondents to sit and participate in the performance of the lofty responsibilities of the National Assembly when they have no right at law to be there. To allow this may eventually culminate in a challenge to the work done by the National Assembly as a result of the participation of persons who should not have been sworn in as members in the first place thus tainting the entire work of the National Assembly.

[140] It is fitting that we mention that as prospective members of the National Assembly, the said respondents were served with this application before their

²⁶ 2019 (1) NR 86 (SC).

swearing in ceremony. That notwithstanding, they elected to take the oath of office, fully aware that their membership to the National Assembly was subject to a Court challenge. Their persistence in taking the oath of office in the face of the challenge does not bode well for them or for the rule of law. It can thus not be an excuse for allowing them to continue as members of the National Assembly. They should have allowed the Court to determine the matter before submitting themselves to the oath of office as members of the National Assembly, in the event the Court found in their favour.

[141] For the above reasons, we find ourselves unable to agree with Mr Maasdorp regarding the granting of a prospective order in the circumstances. The concerned persons will have to vacate their positions in the National Assembly in order to allow the first applicant and her colleagues whose names were removed from the gazette list to take their rightful place in the August House. Unlike in *Itula*, the order that would serve to vindicate the Constitution and the solicitudes of the Act, as discussed above, placing the rule of law in its proper pedestal, is to refuse the prospective order in the instant case, as we hereby do.

New development

[142] Some new information came to light from the additional material placed before the Court by the Government Attorney, acting on behalf of the Commission. This was when the Court put further questions to Mr Akweenda regarding the source of the Commission's power to alter or amend the lists. The Court was informed that the Republican Party, also approached the Commission, to seek the alteration or amendment of its list and which request appears to have been effected by the Commission.

[143] In light of the finding that we made regarding the validity of the alteration or amendment of the party lists by the Commission in the case of PDM, we draw the attention of the Speaker of the National Assembly to the violation of the law and the Constitution, as held above. It is common cause that the Republican Party is not a party to these proceedings and has not had an opportunity to deal with this issue as resolved by this Court. We accordingly have no power to issue any order in this judgment that binds the Republican Party. The Speaker's attention is drawn to this

fact for him to take such steps as he may be advised, which will be geared to preserve the integrity and lawful composition of the National Assembly.

[144] In the result, we find it appropriate to make the following order:

1. The Applicants' non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 5(22) of the Rules of Court.
2. The announcement of the declaration by the Chairperson of the Electoral Commission of Namibia published by way of Government Notice 86 of 2020 in Government Gazette No. 7149 of 18 March 2020, is hereby reviewed and set aside insofar as concerns the following persons:
 - (a) Esmeralda Esmé !Aebes
 - (b) Johannes Martin
 - (c) Kazeongere Zeripi Tjeundo
 - (d) Godfrey Kupuzo Mwilima
 - (e) Timotheus Sydney Shihumbu
 - (f) Pieter Mostert
3. The swearing in as members of the National Assembly of the persons mentioned in para 2, from (a) to (f) above, is declared to be unconstitutional, unlawful and therefore null and void.
4. The Chairperson of the Electoral Commission of Namibia is hereby directed to announce a declaration as contemplated by the provisions of section 110(3)(b)(i) of the Electoral Act, Act No. 5 of 2014, that the following persons are duly elected members of the National Assembly, with effect from 20 March 2020, namely:
 - (a) Frans Bertolini
 - (b) Charmaine Tjirare
 - (c) Yvette Areas
 - (d) Tjekupe Maximilliant Katjimune

- (e) Raymond Reginald Diergaardt
- (f) Mike Rapuikua Venaani

5. It is declared that the Electoral Commission of Namibia has no power in terms of the Electoral Act, 2014, to alter or amend lists *gazetted* in terms of s 78 of the Act, except in the circumstances contemplated in s 110(4) of the Act.
6. There is no order as to costs.
7. The Registrar of this Court is directed to serve the copy of this judgment on the Speaker of the National Assembly.
8. The matter is removed from the roll and is regarded as finalised.

H Angula
Deputy Judge-President

S Ueitele
Judge

T S Masuku
Judge

APPEARANCES:

APPLICANTS:

N TJOMBE

Of Tjombe-Elago Inc., Windhoek

1ST TO 3RD and 27TH TO 29TH

RESPONDENTS:

S AKWEENDA (with him M ASINO)

Instructed by Office of the Government Attorney,
Windhoek

4TH TO 21ST RESPONDENTS:

R MAASDORP

Instructed by Theunissen, Louw & Partners,
Windhoek