REPORTABLE

CASE NO. SA 6/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

RALLY FOR DEMOCRACY AND PROGRESS	**1st Appellant**
UNITED DEMOCRATIC FRONT OF NAMIBIA	**2nd Appellant**
DEMOCRATIC TURNHALLE ALLIANCE	
CONGRESS OF DEMOCRATS	**3rd Appellant**
REPUBLICAN PARTY OF NAMIBIA	
ALL PEOPLES PARTY	**4th Appellant**
NATIONAL UNITY DEMOCRATIC ORGANISATION	
NAMIBIA DEMOCRATIC MOVEMENT FOR CHANGE	**5th Appellant**
DEMOCRATIC PARTY OF NAMIBIA	
HIDIPO LIVIUS HAMUTENYA	**6th Appellant**
JUSTUS GAROEB	
KATUUTIRE KAURA	**7th Appellant**
BENJAMIN ULENGA	
HENRY FERDINAND MUDGE	**8th Appellant**
IGNATIUS NKOTONGO SHIXWAMENI	
KUAIMA RIRUAKO	**9th Appellant**
FRANS MIKUB GOAGOSEB	

DAVID SALOMON ISAACS **10th**

Appellant

11th

Appellant

12th

Appellant

13th

Appellant

14th

Appellant

15th

Appellant

16th

Appellant

17th

Appellant

18th

Appellant

and

ELECTORAL COMMISSION OF NAMIBIA **1st**

SWAPO PARTY OF NAMIBIA **Respondent**

MONITOR AKSIEGROEP **2nd**

SOUTH WEST AFRICA NATIONAL UNION **Respondent**

NATIONAL DEMOCRATIC PARTY

COMMUNIST PARTY **3rd**

HIFIKEPUNYE POHAMBA **Respondent**

USUTUAIJE MAAMBERUA

ATTIE BEUKES **4th**

Respondent

5th

Respondent

6th

Respondent

7th

Respondent

8th

Respondent

9th

Respondent

Coram: SHIVUTE, C.J., MARITZ, J.A., CHOMBA, A.J.A, MTAMBANENGWE, A.J.A. *et* LANGA, A.J.A.

Heard on: 2010-05-31

Delivered on: 2010-09-06

APPEAL JUDGMENT

THE COURT:

[1] The right accorded to people on the basis of equal and universal adult suffrage to freely assert their political will in elections regularly held and fairly conducted is a fundamental and immutable premise for the legitimacy of government in any representative democracy.[1] It is by secret ballot[2] in elections otherwise transparently and accountably conducted that the socio-political will of individuals and, ultimately, that of all enfranchised citizens as a political collective, is transformed into representative government: a "government of the people, by the people, for the people".[3] It is through the electoral process that policies of governance are shaped and endorsed or rejected; that political representation in constitutional structures of governance are reaffirmed or rearranged and that the will of the people is demonstratively expressed and credibly ascertained.

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[1] A discussion of other distinctive features which may allow for the further characterization or a more descriptive qualification of different types of modern representative democracies falls outside the scope of this judgement. As Roux pointedly remarks in his contribution to *Constitutional Law of South Africa* (Woolman *et al.*, 2nd ed., Vol.1, p.10-1, Original Service) before discussing and analysing the current descriptive and normative lexicon being used in theorising on the subject: "Democracy is a noun permanently in search of a qualifying adjective".

[2] Although the original ordinary meaning of the word "ballot" implies secrecy in the voting process as the High Court pointed out in *Republican Party of Namibia and Another v Electoral Commission of Namibia and 7 Others* (unreported judgment in Case No. A 387/2005 delivered on 26 April 2005), it may also have a wider and more general meaning (compare e.g.: *Len Colbung; Dennis Eggington; Terrence Garlett; Robert Isaacs; John Kalin; Larry Kickett; John Mcquire; Jim Morrison; Frank Nannup; John Pell; Neil Phillips; Spencer Riley; Rob Riley; Jack Walley; Gloria Walley; Ted Wilkes; Laurel Winder and The Australian Electoral Commission NO.,* (1992) 107 ALR 514 at par [27]) and we therefore qualify it accordingly to emphasise secrecy of the ballot as a pivotal element of a free election.

[3] To borrow the historic words of U.S. President Abraham Lincoln in his *Gettysburg Address* on 19 November 1863 (Bliss copy).

[2] Self-evident as this right may now seem to sovereign nations who, by revolution or political evolution, attained democratic self-governance long ago, it has been denied the people of Namibia by successive colonial and foreign regimes for more than a century in recent history. It was ultimately won only two decades ago after a protracted struggle for liberation and Independence. The cost of victory, measured in human lives, suffering, endurance and endeavour, was incalculable. Determined that the rights which they have gained as individuals and as a people should be preserved and protected for themselves and their children, Namibians resolved that it could be done "most effectively" "in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary".[4]

[3] Thus, the people[5] established Namibia as a democratic sovereign State under a Constitution and founded her on the principles of democracy, the rule of law and justice for all.[6] They vested all powers

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[4]C.f. The third paragraph of the Preamble to the Constitution.
[5]Although the Constitution was drafted by members of - and adopted by - the Constituent Assembly (c.f. Article 130 of the Constitution), they did so as duly mandated representatives of the Namibian people elected specifically for that purpose during a free and fair election held under United Nations supervision in November 1989 as contemplated by UN Security Council Resolution 435 of 1978. If the wisdom of the Founders guided the pen by which our Constitution was written, the will of the People was the inkwell upon which they drew to record their resolve.
[6] See: Article 1 (1) of the Constitution.

of State in themselves as a political collective and resolved to exercise them through the democratic institutions of State established under the Constitution.[7] They guaranteed for themselves and future generations of Namibians the right to participate in the conduct of public affairs, either directly or through freely chosen representatives; to vote for persons to represent them or to be elected to public office themselves; to participate in peaceful political activity intended to influence the composition and policies of the Government and to form and join political parties.[8] These rights they entrenched so deeply that they cannot be repealed, diminished or detracted from under the Constitution[9] by any majority[10] or circumstance.[11] They determined that the requirements of a “democratic society" would be one of the touchstones by which to assess the legitimacy of any purported limitation placed on the exercise of a number of entrenched fundamental rights[12] and provided for the regular election of persons

[7] See: Article 1 (2) of the Constitution.
[8] See: Article 17 of the Constitution.
[9] See: Article 131 of the Constitution.
[10] See: Article 132(5) of the Constitution.
[11] They may only be temporarily suspended during a state of emergency duly proclaimed under Art 26 of the Constitution.
[12] Compare e.g.: the right of persons arrested as illegal immigrants to consult confidentially with legal practitioners of their choice (Art 11(5)); the right to a public hearing or trial (Art. 12(1)(a)); the right to privacy (Art. 13(1)); the right of citizens to participate directly or indirectly in the conduct of public affairs (Art. 17(1)); the right of citizens to vote and to be elected to public office (Art. 17(2) and (3)) and the right of persons to the freedoms enumerated in Art. 21(1), such as the freedom of speech and expression, the freedom of the press and other media, the freedom of thought, conscience and beliefs (including academic freedom in institutions of higher learning), freedom to practice any religion and to manifest such practice, to assemble peaceably and without arms, the freedom of association (which includes the freedom to form and join associations or unions, including trade unions and political parties),

to hold office in the democratic institutions of State such as the Presidency,[13] the National Assembly,[14] the National Council,[15] Regional Councils[16] and Local Authority Councils.[17]

[4] We refer to these constitutional provisions in their historical context to broadly emphasise the important place which Namibians have given to democratic principles in the constitutional structure of our nascent Republic created upon Independence and, more in particular, to underline how important full universal suffrage and regular, free and fair elections are in Namibian society as a means to constitute representative structures of Government and to influence their policies. These democratic rights, long denied, were hard won and it is only appropriate that they be jealously protected; that enfranchised Namibians should be allowed to freely cast their votes in elections and that the individual or collective weight of their votes in the ultimate result should not be manipulated or eroded in any manner by illegal conduct – more so, if, as a consequence, it will affect the results of those elections.

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to withhold labour, to move freely throughout Namibia, to reside and settle in any part of Namibia, to leave and return to Namibia and to practice any profession, or carry on any occupation, trade or business. (Art. 21(2)).

[13] See: Article 28 of the Constitution.

[14] See: Articles 46(1)(a), 49 and 50 and Schedule 4 of the Constitution.

[15] See: Articles 69 and 70 of the Constitution.

[16] See: Article 106 of the Constitution.

[17] See: Article 111(3) of the Constitution.

[5] It was against this historical background and mainly because of these compelling considerations that Parliament passed the Electoral Act, 1992 (the "Act") soon after Independence. The Act, which applies to elections of the President and members of the National Assembly, regional councils and local authority councils,[18] regulates the registration of voters[19] and political parties,[20] the compilation of voters' registers, the nomination of candidates[21] and the conduct of elections[22] under the fair and impartial direction, supervision and control of an Electoral Commission.[23] Its provisions seek to further trench the democratic principles on which Namibia was founded and to promote and secure the free and fair election of political office bearers in a transparent and accountable manner. To that end, the Act criminalises electoral fraud and malpractices in all their manifestations, including conduct intended to improperly manipulate the casting of votes, undermine the integrity and fairness of the electoral process and detract from the reliability of the results. These include corrupt and illegal practices,[24] infringements which compromise the secrecy of the

[18]See: S. 2 of the Act.
[19]See: Part III of the Act.
[20]See: Part IV of the Act.
[21]See: Sections 54-58 in respect of presidential elections; sections 59 and 60 in respect of National Assembly elections; sections 61-66 in respect of regional council elections and sections 67-72 in respect of local authority council elections.
[22]See: Part V of the Act.
[23]See: Sections 4 and 5 of the Act.
[24] See: Sections 103 to 108 of the Act. In summary, they comprise undue influence (inducing or compelling voters by threat, violence, force or any fraudulent device), bribery (whether by gifting, lending, offering, promising or procuring any money or thing and agreeing to do so) and treating (by giving or providing any money or provisions or paying the expense of another person) which, in general, impedes,

ballot,[25] wilful neglect of duties by election officials[26] and any conduct which unlawfully interferes with the electoral mechanism, election officials, polling stations, polling equipment or the voting process in general.[27] Finally, the High Court is given jurisdiction to hear and determine complaints that an undue return has been rendered or that a person has been unduly elected by reason of any of these electoral malpractices, irregularities or, for that matter, any other cause whatsoever.[28] If the Court finds that the impact of one or more of those factors was so substantial that it affected the result of the election,[29] the court must determine who is entitled to be declared duly elected[30] or may find that no person was or is entitled to be so declared.[31]

The Election Application.

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hinders or prevent the free exercise of the franchise by any voter. It also includes impersonation and the corrupt procurement of a person to become a candidate or to withdraw as such.

[25]See: S. 100 of the Act.

[26]See: S. 99 of the Act.

[27]See: Sections 101 and 102 of the Act. These sections, amongst others, criminalise the impersonation of another when voting, double voting, ballot stuffing, forging or counterfeiting ballot papers, the destruction or removal of legitimately cast ballots, destroying, opening or otherwise interfering with any ballot box without due authority and the like.

[28] Section 109 of the Act, which deals with the powers of High Court in relation to election applications, provides: “An application complaining of an undue return or an undue election of any person to the office of President or as any member of the National Assembly or a regional council or local authority council by reason of want of qualification, disqualification, corrupt and illegal practice, irregularity or by reason of any other cause whatsoever, shall, subject to the provisions of this Part, be made to the court.”

[29]See: Sections 95 and 116(4) of the Act a discussion of their interrelationship and meaning in *Republican Party of Namibia and Another v Electoral Commission of Namibia and 7 Others, supra*, at p. 59-68.

[30]See: S. 116(5) of the Act.

[31]See: S. 116(7) of the Act - which, in effect, may avoid the result of the election altogether.

[6] Namibia held Presidential and National Assembly elections as contemplated by the Act on 27 and 28 November 2009. The presidential election was contested by a number of candidates[32] and the one for members of the National Assembly – held on a party list-basis[33] - by a number of registered political parties.[34] The official results of both elections were announced on 4 December 2000.[35] Both before and after the announcement, a number of political parties claimed that the elections had been marred by numerous irregularities and, after they had sought and obtained[36] by urgent application an order that certain election material should be made available to them for inspection, they launched an election application in terms of s. 109 of the Act seeking, amongst others:

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

[32]They were nominated in terms of s. 54 of the Act and are cited in this appeal as 10th-18th applicants and 7th-9th respondents.
[33]As contemplated in Schedule 4 to the Constitution read with s. 59 of the Act.
[34]Cited in this appeal as 1st-9th appellants and 2nd-6th respondents respectively.
[35]Under sections 88 and 89 of the Act respectively. The announced results were later published in Government Notice No. 4397 dated 18 December 2009 in compliance with s. 92(1) of the Act.
[36]On 16 and 24 December 2010 respectively.

> 2.1 An order declaring the announcement of the election results for the National Assembly election … null and void and of no legal force and effect.
>
> 2.2 Ordering the first respondent to recount in Windhoek the votes casted (*sic*) in the said election as provided for in Act 24 of 1992 and to allow the applicants as well as the second to sixth respondents to exercise their rights in regard to such counting as provided for in the said Act."

[7] Originally, the application was brought on Notice of Motion dated 4 January 2010 by the 1st - 9th appellants (then as applicants) against the 1st - 6th respondents only and, as is evident from the quoted passage, the challenge was limited to the National Assembly election.[37] Due to time constraints in preparing the application, the appellants anticipated that they would have to amend the notice of motion and supplement their affidavits – a step which they thought could be taken before the expiry of the 10-day period within which they had to cause service of the application on the respondents in terms of s.113 of the Act. They, therefore, also included a prayer for leave to that effect. As envisaged, they filed an amplified notice of motion and further affidavits on 14 January 2010. These papers, however, not only added to the grounds on which they challenged the National Assembly election but, in substance, incorporated a further election application: one challenging the validity and results of the Presidential election. To

[37] That much was also expressly stated in the founding affidavit of Libolly Haufiku.

that end, all the individuals who stood as candidates in the Presidential election, either joined in the "amplified" application as co-applicants (the 10th -18th appellants) and those who did not, were cited as co-respondents (the 7th - 9th respondents).

[8] On the face thereof, the grounds on which the appellants are seeking to challenge the validity and results of the elections are numerous, substantial and wide-ranging. For reasons which will become apparent later in this judgment, it is not necessary to discuss them - or the factual allegations on which they are based – in any detail. It will suffice for purposes of the issues which we are called upon to decide in the appeal, if we refer to them only in summary to demonstrate their gravity in the context of the constitutional values and democratic principles we have referred to earlier and to note the width of their sweep and ambit of evidence on affidavit which had to be gathered in support thereof. In summary, the appellants complain about irregularities which, they allege, were pervasive in the run-up to, during and after the election; a lack of transparency and accountability in the election process; statutory non-compliance in the verification process and resultant undue returns and results. They aver that the principles which should have governed the election as embodied in Part V of the Act were substantially deviated from and contend that,

because many of the irregularities tainted the polling process, they cannot be cured by a mere recount of the ballot. Therefore, they insist that both elections should be annulled and, only in the alternative, pray for a recount.

[9] In substantiation of their complaints they sought to establish that, if regard is had to the voters' register which they say had been used during the election, impossibly high voter turnouts had been achieved (in certain constituencies between 100% and 191% and an overall national voting percentage of between 98% and 99%); that the voters' register was disturbingly inaccurate (e.g. containing approximately 50,000 duplicate registrations, the names of an estimated 40,000 deceased persons, etc); that the number of ballot papers issued to presiding officers as recorded on Elect 16 forms do not reconcile with the Elect 20(b)-returns in which they accounted for ballot papers used, unused and spoiled as required by s. 85 (2) of the Act; that the voter registration numbers of about 16,357 voters in 10 regions had not been entered on the counterfoils of ballot papers issued to those voters as prescribed by s. 82(9)(a) of the Act; that tendered votes were not announced at polling stations where they had been cast and counted; and that the announced results of the elections were those ascertained by returning officers during the verification of

ballot paper accounts and not those which were actually counted under supervision of – and should have been publicly announced and posted by - presiding officers at polling stations in terms of s. 85 of the Act. In addition to these complaints, they also rely on other claimed irregularities: the existence of ballot paper books with a different print and numbers to the official ones; the late completion of Elect 16 returns and, in certain instances, the failure to sign or return them altogether; allowing supporters of the second respondent to vote on behalf of other persons; asking certain voters to publicly demonstrate their political affiliation at the polling stations before they were allowed to vote; mobile stations forwarding sealed ballot boxes to verification centres instead of to the polling stations to which they had been assigned; allowing certain voters to vote twice; allowing political campaigning inside polling stations; allowing persons to vote without their identities having been verified; denying party agents permission to enter certain polling stations; adding votes cast for the first appellant to those cast for the second respondent and counting them in favour of the second respondent; allowing persons who were not registered on the voters roll to vote and using ink which could be washed off easily, thereby creating the potential that persons could vote more than once. These alleged malpractices, the appellants contend, allowed for the potential circumvention of the checks and

balances put in place by the Act in the interest of accountability; undermined transparency in the electoral process; diminished the value of the verification process; opened the door for ballot stuffing and the manipulation of votes and returns and, ultimately, resulted in undue elections.

[10] The Electoral Commission and SWAPO Party of Namibia (cited in the application and in this appeal as 1st and 2nd respondents respectively) opposed the application - and, in support, filed extensive answering affidavits in which they squarely and firmly denied virtually all allegations of substance made by the appellants. In most instances they adduced rebutting evidence intended to refute the appellants' assertions and, in general, took issue with the substance of, and the relief prayed for in, the applications on their merit. We do not propose to deal with the rebutting evidence, either in summary or otherwise – not because we wish to detract from the substance, importance or veracity thereof, but simply because considerations of relevance to the issues at hand in the appeal, which require of us to note the volume and ambit of the evidence which the appellants had to obtain and collate before they could present the election application, do not equally apply to the respondents' case. This will become clearer as we narrow down the issues and our reasoning unfolds later in the

judgment. It should, however, be pointed out that respondents also took issue with the manner in which the appellants presented the application and supporting evidence. They contended that it was done in clear violation of settled rules and of the law of evidence. They, therefore, applied for substantial portions of the affidavits and supporting documentation filed on behalf of the appellants to be struck as unsubstantiated hearsay and inadmissible opinion evidence and, in addition, raised two objections *in limine*. Only the second of the two objections, which formed the basis on which the Court *a quo* ruled on the National Assembly election application, is pertinent to the appeal and we shall refer to it later in this judgment.

[11] After appellants' replying affidavits had been filed, the applications were set down and comprehensively argued in the High Court before Damaseb JP and Parker J on the first two days of March 2010. In separate reasoned judgments handed down a few days later they unanimously concluded - albeit for different reasons on some of the issues - that the election applications challenging the National Assembly election and the Presidential election respectively should both be struck off the roll with costs.[38]

[38]They ordered, in relation to each of the applications, that the first respondent's costs include the costs of one instructing and four instructed counsel; that second respondent's costs include the costs two instructed counsel and that the costs should be paid by the appellants jointly and severally, the one paying, the others to be absolved.

[12] This appeal is against that order, but only against the part striking the National Assembly election application off the roll with costs. No appeal was noted against the remainder of the order. Thus, the order striking off the Presidential election application with costs and the reasons for that part of the order are not in issue and do not arise on appeal.[39] It will suffice to note in passing - and only for the sake of completeness – that, in relation to the Presidential election application, the Court *a quo* held that the challenges against the validity of the two elections constituted in substance two separate and distinct election applications under the Act, i.e. the National Assembly election application dated 4 January 2010 and the challenge against the Presidential poll raised in the appellants' amplifying Notice of Motion filed on 14 January 2010; that the appellants were obliged by law to furnish security in respect of both of the applications on - or within five days of – their respective presentations;[40] that compliance with the security-requirement of the Act was a *condictio sine qua non* to the pursuit of any election application; that the appellants had failed to comply with the security requirements of the Act in respect of the Presidential election application and that, in terms of s. 110(3)(c) of the

[39] Except, of course, to the extent that the reasons for striking off the National Assembly election application have also been relied on as cause to also strike off the Presidential election application.
[40] See: S. 110(3)(a) of the Act.

Act, “no further proceedings shall be had on the application” even though the 7th respondent, who was at risk of being unseated in the event of the challenge being successful, was nevertheless served with – and did not oppose – the application. Hence, the Presidential election application was struck off the roll with costs.

[13] The basis on which the Court *a quo* also decided to strike the National Assembly election application (to which we shall henceforth simply refer as “the application”) off the roll is founded on the second objection *in limine* raised by the respondents: i.e. that, on a proper application of rule 3 of the High Court Rules read in conjunction with s. 110(1) of the Act the application should be struck off the roll because the applicants did not make out a case in the founding papers that exceptional circumstances as provided for under Rule 3 existed for the registrar to accept the application outside his or her prescribed office hours. Before we reflect on the reasons why this point found favour with the Judges *a quo* and turn to consider counsel’s submissions in that regard, it may be expedient to recite the two provisions relied on and to briefly capture the common cause facts most pertinent to their application.

[14] Section 110(1) and (2) reads:

> "(1) An election application shall be represented (*sic*) within 30 days after the day on which the result of the election in question has been declared as provided in this Act.
>
> (2) Presentation of the application shall be made by lodging it with the registrar of the court." [41]

It is common cause between the parties that the result of the National Assembly election was announced by the Director of Elections on 4 December 2009 and that the period of 30 days referred to in the subsection should be computed from that date. It is also not in issue that the last day of the 30-day period fell on a weekend[42] and, if regard is had to s.126 of the Act,[43] the appellants had to lodge the application

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[41] "Court" is defined in s. 1 of the Act as "the High Court of Namibia".

[42] It matters not in this instance whether the first day is included and the last day excluded (*de die in diem*) according to the civil method of computation (c.f. *Cock v Cape of Good Hope Marine Assurance Co,* 3 Searle 114; *Nair v Naicker,* 1942 NPD 3 at 7; *Makhutchi NO v Minister of Police*, 1980 (2) SA 229 (W) at 231A and *Minister of Police v Subbulutchmi,* 1980 (4) SA 768 (A) at 771 *in fine* – 775D for a discussion of this method of computation) or whether the first day is excluded and the last included as s. 4 of the *Interpretation of Laws Proclamation, 1920* stipulates (Compare *Fouche and Another v Mutual Fire and General Insurance Co Ltd*, 1969 (2) SA 519 (D) at 520E – 521E where Fannin J illustrates the different results these two methods may give rise to). Compare also the remarks of Silungwe J in *DTA of Namibia and Another v Swapo Party of Namibia and Others,* 2005 NR 1 (HC) at 7H-J regarding the manner in which the days are to be calculated. As it is not relevant for purposes of this appeal, we do not express any views thereon.

[43] It provides: "Whenever under this Act anything is required to be commenced, concluded or done on a particular date, and that date happens to fall upon a Saturday, Sunday or a public holiday referred to in, or declared under, section 1 of the Public Holidays Act, 1990 (Act 26 of 1990), such thing shall be commenced, concluded or done on the first day following such Saturday, Sunday or public holiday, which is not a Saturday, Sunday or public holiday, as the case may be: Provided that the provisions of this section shall not apply to any polling day which falls on a Saturday, Sunday or such a public holiday."

with the registrar of the High Court not later than Monday, 4 January 2010.

[15] The application was submitted by the appellants' legal representative to the office of the registrar on that date at about 16h00 or 16h30 but, in any event, after 15h00 – and in the time lies the contention, because rule 3 of the High Court rules, titled "Registrar's Office Hours", provides:

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

[16] Reading these two provisions together, Parker J held that 15h00 on 4 January 2010 were the critical time and date for the filing of the application. He remarked that he did not "have one iota of doubt … that the relevant provisions of s. 110 of the Act and those of rule 3 of the Rules of Court are couched in clear peremptory terms" and that they were "absolute". Failure to obey them, he concluded, was fatal

and their “disobedience must, without any allowance, result in nullification of the application”. More so, he reasoned, because of the expeditious nature that the Legislature attached to election applications and the public interest in a speedy determination. Hence, he discerned a clear intention on the part of the Legislature and the "rule maker" that they wished to create a nullity where there has been disobedience of s 110(2) of the Act and rule 3 of the Rules of Court. On that basis, he sought to distinguish judgments which held that there was "a tendency towards flexibility" in the application of time periods.[44] He noted that, “in any case, the time limits regulating election applications do not fall within the provisions of the Court regulating its own procedures” and that it was not necessary for him to decide whether there was properly a condonation application before the Court.

[17] The learned Judge *a quo* recognised that the registrar, in her discretion, could have accepted the late submission of the application but, he reasoned, the words “in exceptional circumstances” in rule 3 fettered the ambit of the discretion accorded to her. He held that the appellants bore the onus of proof on that issue; that it was incumbent

[44]Such as *DTA of Namibia and Another v SWAPO Party of Namibia and Others, supra,* at 11A-B following *Volschenk v Volschenk*, 1946 TPD 486 at 490, *Zantsi and Others v Odendaal and Others; Motoba and Others v Sebe,* 1974 (4) SA 173 (E); and *Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour and Another*, 1978 (1) SA 1027 (SWA) at 1038B.

on them to place sufficient evidence in the founding papers to show that the registrar had been apprised of the exceptional circumstances and, in the light thereof, exercised her discretion; that, in the absence of a confirmatory affidavit by the registrar to that effect, their allegation in reply of a prior arrangement made by their legal representative with an unnamed assistant registrar fell short of what had been required and that they had failed to discharge the *onus*. He also dismissed the appellants' contention that, if it was the respondents' case that the assistant registrar had exercised her discretion improperly, they should have brought a substantive application to have it reviewed. Finally, he disposed of the appellants' contention that there had been an undisputed agreement between the parties to extend the 30-day period beyond 4 January 2010 on the basis that an individual cannot waive a matter that the Legislature had enacted for the public good. For these reasons, he concluded that the registrar's acceptance of the presentation of the election application in terms of s. 110 of the Act, read with rule 3 of the Rules of Court, after 15h00 on 4 February 2010 was void and of no effect and, *a priori*, that in the eyes of the law no application has been presented by the appellants within 30 days after the results of the National Assembly elections had been announced and struck the application off with costs.

[18] In a separate judgment, Damaseb JP agreed with Parker J that, unless there were “exceptional circumstances” as required by rule 3, acceptance of the application by the registrar was a nullity and that there could have been no valid election application before the Court; that the exceptional circumstances ought to have been presented as part of the appellants' case in the founding affidavits (reasoning that, since the appellants had acted contrary to law, they were required to place on record in the founding papers those exceptional circumstances which excused the prohibited conduct) and that it was not possible for them to introduce evidence in the replying papers to the effect that the registrar had agreed (being satisfied of the exceptional circumstances) to accept the application.

[19] He, however, declined to adopt the approach of Parker J that non-compliance with rule 3 rendered the application itself a nullity. He assumed, without deciding, that the combined effect of the Act and the rules is not peremptory but directory and that non-compliance is amenable to condonation. He noted that the appellants had to show "good cause" before the Court could grant condonation for non-compliance with the rules and that they attempted to do so by alleging that the election application had been prepared under extreme time

pressure, amongst others, because they had limited time to inspect the election material obtained following an earlier court order. He held that it was apparent that the appellants had underestimated the size of the task of inspecting the material obtained in the attempt to buttress their complaints of electoral irregularities. Their underestimation of the labour that would be involved in going through the masses of documents was neither a basis for claiming "exceptional circumstances" nor “good cause” for granting condonation. In his view, their failure to come to Court in time related substantially to the fact that they had wished to access too much information and that, to grant condonation in those circumstances would not advance the general public interest as it had the potential for encouraging "fishing expeditions" before challenging election results. In the result, he refused condonation – only sought "in the alternative" from the bar by the appellants – and, for these reasons, agreed with the order proposed by Parker J.

The Issues on Appeal

[20] Given the central place of s. 110(1) and (2) of the Act and rule 3 of the High Court Rules (the “Rules”) in the reasoning which resulted in the orders appealed against, the Chief Justice, on behalf of the Court,

directed counsel to address the Court at the hearing of the appeal on the following issues:

> "… 1. Whether the Election Application was properly and timeously presented as contemplated in the Act;
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> … 2. If not, whether the presentation thereof, after 15h00, resulted in a nullity, unless appellant could show "exceptional circumstances" and whether they have shown "exceptional circumstances" on admissible evidence;
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> … 3. If not, whether the Court could have condoned the presentation of the Election Application after the hours as contemplated in Rule 3 of the Rules of the High Court; and
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> … 4. If so, whether the Court *a quo*, should have granted such condonation.
>
> … 5. In the event that the Supreme Court finds that the Election Application should not have been struck –
>
> > … 5.1 whether the Supreme Court should remit the matter to the High Court to decide the balance of the issues, already argued before the High Court; or
> >
> > … 5.2 whether the Supreme Court should entertain argument both on the application to strike out certain affidavits or portions thereof, as well as argument on the merits of the application."

[21] These, then, set the lines of contention at the hearing of the appeal. The merits of the election application and the other preliminary aspects raised in the Court *a quo* have not been argued before us. As expected, there is little common ground to be found between the argument advanced by Mr Tötemeyer (assisted by Mr. Strydom) on behalf of the appellants and the submissions made by Mr Maleka (assisted by Mr Narib and Mr Namandje) and Mr Semenya (assisted by Dr Akweenda and Mr Shikongo) on behalf of the first and second respondents respectively. On one point, however, they are united: if, on the first issue raised, the Court finds on appeal that the application was properly and timeously presented to the registrar as contemplated in the Act, it would dispose of the appeal unless the Court is amenable to entertain the appeal at a later date also on the other issues raised in the application and argued - but not decided - in the proceedings before the Court *a quo*. Most of counsel's submissions were focused on this very issue, to which we now turn.

Presentation and Section 110(1) of the Act

[22] Mr Tötemeyer's principal argument is that the first issue falls to be decided with reference to the provisions of s. 110(1) of the Act only. It is common cause, he says, that the last day for presentation of the

application was 4 January 2010. Given the ordinary grammatical meaning of a "day", the appellants were entitled to present the application to the registrar at any time until midnight of that day. It is not in issue that appellants presented it a number of hours before that time. Rule 3, he argues, does not find application because it determines the registrar's office hours and, being part of subordinate legislation, may not be used to cut down the meaning or effect of a statutory provision.[45] He also contends that the interpretation which the appellants propose is supported by the context of s. 110 in the Act: in all instances where the Legislature intended the Rules of Court to apply - such as the manner in which an election application must be served,[46] the form thereof and the matter which it must contain[47] - the Act expressly refers to the rules and, because it does not do so in the case of s. 110, the change of language evinces an intention that the time allowed for the presentation of the application under s. 110 should not be limited by the office hours of the registrar provided for in the Rules. Hence, he argues, the application could have been presented to the Registrar at any time before midnight on 4 January 2010. Mr Maleka and Mr Semenya, on the other hand, submit that this

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[45]For this proposition, he relies on *Moodley v The Minister of Education and Culture, House of Delegates*, 1989 (3) SA 221 (A) at 233 E – F; *Hamilton-Brown v Chief Registrar of Deeds*, 1968(4) SA735 (T) at 737 C – D and *S v Blaauw's Transport (Pty) Ltd & Another*, 2006 (2) SA NR 587 (HC) at 600 G – J.
[46]Provided for in s. 113 of the Act.
[47]Prescribed by s. 115 of the Act.

argument loses sight of the fact that the registrar's office is a creature of statute and that, in a constitutional democracy founded on the principle of the rule of law, the registrar, as a public functionary, can only validly perform a function or exercise a power if authorised by law to do so. His or her power to receive applications, notices and documents, they say, must be found within the parameters of rule 3 and it is within those confines that the Court must assess whether acceptance of the application in this instance has obtained legal validity.

[23] The rule of law is one of the foundational principles of our State.[48] One of the incidents that follows logically and naturally from this principle is the doctrine of legality.[49] In our Country, under a Constitution as its "Supreme Law",[50] it demands that the exercise of any public power should be authorised by law[51]- either by the Constitution itself or by any other law recognized by or made under the Constitution. "The exercise of public power is only legitimate where

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[48]See: Art 1(1) of the Constitution.
[49] See: *Affordable Medicines Trust and Others v Minister of Health and Others,* 2006 (3) SA 247 (CC) in para 49 noted with approval in *Kessl v Ministry of Lands Resettlement and Others and Two Similar Cases,* 2008 (1) NR 167 (HC) at 206D
[50]See: article 1(6) of the Constitution.
[51] See: *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another,* 2007 (1) SA 343 (CC) in para 68; See also: *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others,* 1999 (1) SA 374 (CC) in paras [40] and [56] and *Masetlha v President of the Republic of South Africa,* 2008 (1) SA 566 (CC) in para 173.

lawful."[52] If public functionaries purport to exercise powers or perform functions outside the parameters of their legal authority, they, in effect, usurp powers of State constitutionally entrusted to legislative authorities[53] and other public functionaries. The doctrine, as a means to determine the legality of administrative conduct, is therefore fundamental in controlling – and where necessary, in constraining - the exercise of public powers and functions in our constitutional democracy.

[24] Thus, we have no difficulty with the respondent's submissions on the principle which they are seeking to advance – and, if the issue presents itself, it may be important in assessing the validity of the registrar's acceptance of the application at the time she did. We question the support which they are seeking to draw from it to refute the appellants' principal submission. The powers of the registrar to accept documents and issue process may well be gathered from rule 3, as the respondents contend, but, in the case of election applications, the rule is not the exclusive source of those powers. Section 110(2) requires that presentation of an election application must "be made by lodging it with the registrar". The corollary to that obligation, which

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[52]To quote the words of Chaskalson P in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others,* 1999 (1) SA 374 (CC) at para 56

[53]Devenish et al., *Administrative Law and Justice in South Africa*, p. 228

follows by necessary implication, is that the registrar also has the authority to accept an application when presented to him or her in terms of s. 110 of the Act.

[25] In the view we take, the principal argument of the appellants on this point must fail for other reasons. The causal link between rule 3 and s. 110 is evident from the requirement in subsection (2) thereof that presentation of an election application shall be made by "lodging it with the registrar of the court". The ordinary grammatical meaning of the verb "lodging" in the subsection means: to "present (a complaint, appeal, etc.) formally to the proper authorities".[54] It follows by implication from the formality attached to the presentation of an election application that the lawgiver contemplated that it should be lodged with the *office* of the registrar where it can be acted on in accordance with the requirements of the Act[55] and the Rules – and not that it be given to the registrar in person at whichever other public or private place he or she may be found. The registrar's office hours – both ordinary and extraordinary - for the purpose of filing any document are prescribed by rule 3. A reading of the rule demonstrates that those who have business with the High Court are entitled to file

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[54]See: *The Concise Oxford English Dictionary*, Oxford University Press, 10th ed. revised, edited by Judy Pearsall at p 834.
[55]Amongst others, the assessment and determination of security by the Registrar in terms of s. 110(3)(a) of the Act.

their papers on days, other than Saturdays, Sundays and public holidays, between 9h00 and 13h00 and between 14h00 and 15h00.[56] These are the registrar's ordinary official office hours. In addition, the rule conditionally allows for papers to be filed "at any time" (i.e. at hours falling outside the ordinary office hours) but then only as an indulgence allowed by the registrar, the Court or a Judge thereof and no longer as of right. Those who present their papers at an extraordinary hour run the risk that the registrar may decline to accept them in the absence of exceptional circumstances and that neither the High Court nor a judge thereof may be amenable to direct the registrar to receive them.

[26] The flaw in the appellants' principal argument is that they seek to interpret s. 110(1) of the Act as if, by necessary implication, it has excluded or amended rule 3 when it comes to election applications: that, the provisions of the rule notwithstanding, an applicant in an election application may, as of right, require of the registrar to accept an application at his or her office at any hour of the day or night. We do not discern such an intention from the language of the subsection and do not find that this was the purpose of its enactment. Section 110(1) limits the period within which an election application may be presented

[56]The only exception, not of any relevance in this appeal, is that the hours for the filing of a Notice of Appearance to Defend are extended by a further hour in the afternoon.

and, if the section is to be read together with the compressed time periods prescribed for the adjudication of election applications in sections 110(3)(a),[57] 113[58] and 116(3),[59] it is evident that its principal purpose is to facilitate the expeditious determination of election applications on a semi-urgent basis[60] in the interest of the litigants and the public at large. The reasons for urgent determination have been articulated by Damaseb JP in para [30] of his judgment *a quo* and we wish to adopt them:

> "There is a clear public interest that election disputes are quickly resolved so that there is certainty: either that there will be an orderly re-election or recount as directed by a Court in the event it finds irregularities, or validating the election and thus bestowing legitimacy

[57] It requires the registrar to determine - and for the applicant to furnish - security for costs, charges and expenses that may become payable by the applicant at the time of the presentation of the application or within five days thereafter.

[58] It stipulates that notice in writing of the presentation of an election application, accompanied by a copy of the application and a certificate of the registrar of the court stating that the amount determined by him or her as security had been paid or sufficient recognizance has been furnished in respect of that amount must be served on a respondent within 10 days after presentation of the application.

[59] It provides that an election application shall be heard within 60 days from the date of the presentation of the application or within such longer period as special circumstances may require.

[60] The judgment of Damaseb JP in the Court *a quo* refers to the preference which the court is called upon to give to applications of this nature: "For this purpose, at the Court administration level, entertaining election applications involves making special arrangements in respect of the normal Court Roll, not without insignificant inconvenience and cost implications for other litigants. In the present matter, it involved removing other matters already enrolled and advising parties who had already prepared that their matters would not proceed so that the Bench could be constituted to hear the application: a very challenging task any jurisdiction with a Bench as small as ours." (At para [30]) "If one discounts the 10 day window provided for determination of security-and payment thereof before service, the law in reality only provides for 50 days within which pleadings must be exchanged, the matter heard and a judgment given. That is no mean feat even by the standards of the most hardened trial judge or trial lawyer"

on those elected to proceed with the business of governing the nation."

[27] The stated purpose of the subsection is entirely unrelated to the purpose underlying rule 3. The specific purpose of rule 3, within the general overarching intention of the Rules of Court to "achieve an efficient, expeditious and uniform administration of justice"[61] is "to assist with the smooth running of the registrar's office"[62] by regulating the issuing of process and the acceptance of documents both during and outside ordinary office hours. To facilitate the expeditious hearing of election applications, the Legislature expressly referred to and incorporated certain provisions of the Rules of Court in Part VII of the Act and, where it contemplated a deviation from the normal procedures prescribed by certain Rules, it expressly prescribed different procedures[63] and time periods.[64] Had Parliament intended to

[61]Per Silugwe J in *DTA of Namibia and Another v Swapo Party of Namibia and Others*, *supra,* at 7C. See also: *SOS Kinderdorf International v Effie Lentin Architects*, 1992 NR 390 (HC) at 399H-400A: "The Rules of Court constitute the procedural machinery of the Court and they are intended to expedite the business of the Courts. Consequently they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible." and Art. 78(4) which, as part of the Superior Courts' inherent jurisdiction, vested them with "the power to regulate their own procedures and to make court rules for that purpose."

[62]Per Bethune J in *The Minister of Police v Axel Jackson Johannes and Lydia Johannes*, Unreported judgment of the Supreme Court of South Africa (SWA Division) handed down on 8 April 1981 at p 7.

[63]E.g. that an election application shall be presented by lodging it with the registrar of the Court (s. 110(2)) and be served on the respondents only after security had been provided (s. 113), whereas applications, other than *ex parte* applications, brought in the ordinary course on Notice of Motion are first served on the respondents and then lodged with the registrar together with the returns of service.

[64]E.g. s110(3)(a) regarding the period within which security must be furnished; s.113 dealing with the period within which the application must be served and s. 116(3)

amend the ordinary office hours of the registrar to accommodate the presentation of an election application until midnight, it could have done so expressly – as it did in the case of the other rules to which we have referred. Section 110(1), however, manifests no expressed intention to interfere with - or amend - the registrar's office hours. Mr Tötemeyer concedes that much but submits that it follows by necessary implication from the meaning of the word "days".

[28] We accept that the word “day” in context means a whole day consisting of a 24-hour period ending at midnight, the night of the day in question[65] and that the period within which an election application may be submitted in terms of s. 110(1) therefore expires at that time on the last day. It does not follow by necessary implication, however, that the subsection also obliges the registrar to extend his or her ordinary office hours until that hour of the night and leaves him or her with no discretion to decline acceptance in the absence of exceptional circumstances. In construing s. 110(1), we must be mindful of the important and oft-applied presumption that, unless the contrary appears clearly, the legislature did not intend to alter the existing law

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dealing with the period within which an application must be heard.

[65] See: e.g. the application in *Sfetsios and Others v Theophilopoulos and Another,* 1967 (4) SA 645 (W) at 649B; *Platjies v Eagle Star Insurance Co*, 1968 (4) SA 141 (C) at 149C and *Ex Parte Minister of Social Development and Others,* 2006 (4) SA 309 (C) at 317B.

more than is necessary.[66] In *Kent NO v SA Railways and Another,*[67] Watermeyer CJ, referring to the presumption and its application, summed it up as follows:

> "In considering that question, it is necessary to bear in mind a well-known principle of statutory construction, viz, that Statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later Statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later Statute. The inference must be a necessary one and not merely a possible one. In *Maxwell's Interpretation of Statutes*, the principle is stated as follows (4th ed., p 233):
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> > 'The language of every enactment must be so construed as far as possible as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a Statute by construction when the words may have their proper operation without it. But it is impossible to will contradictions; and if the provisions of a later Act are so inconsistent with, or repugnant to those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later.'"

[29] In our view, the words of s.110(1) may have their "proper operation" in setting the period within which to present an election

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[66] See: *S v Barnard and Others,* 1971 (1) SA 474 (C) at 476G and *R. v. Vos; R. v. Weller,* 1961 (2) SA 743 (AA) at 749. See generally: Steyn, *Uitleg van Wette* (5 ed.) at 99 – 100; Devenish, *The Interpretation of Statutes*, (2nd imp., 1996) p. 159.

[67] 1946 AD 398 at 405

application without implying an amendment to the registrar's office hours defined in Rule 3. Applicants in election applications must structure the presentation thereof with Rule 3 in mind. If they – or, for that matter, any other litigant, present applications outside the registrar's ordinary office hours, they run the risk that the applications may not be accepted. The same obtain in the case of s. 110(3)(a) of the Act: the provision that an applicant should provide security within 5 days after presentation of the application does not imply that the registrar must keep his or her office open and is obliged to receive security until midnight of the fifth day. As it is, our laws are interspersed with numerous provisions, which, like s. 110(1) and (3)(a) of the Act, prescribe specific periods within which certain acts must be performed, actions must be instituted and applications, notices, objections, complaints or security must be lodged, but none of them by necessary implication obliges the relevant public offices to stay open for all hours of the day and night to facilitate compliance. For these reasons, we cannot entertain the appellants' principal submission on the first issue.

[30] Before we part with our analysis of s. 110, we need to address one more aspect concerning the interpretation and application of subsection (1) thereof. If the appellants' rejected principal contention

(i.e. that the subsection by necessary implication excludes the application of rule 3 to the presentation of election applications) represents a view lying at one extremity of the interrelationship between the subsection and rule 3, the approach which Parker, J adopted finds itself at the other – that is, if we accept the interpretation of his judgment contended for by Mr Tötemeyer. He submits that the learned Judge effectively held that rule 3 curtailed the period within which an election application may be presented in terms of s. 110(1). This conflation of the rule and the subsection, he submits, was the basis upon which Parker, J reasoned that non-compliance with the rule was in effect non-compliance with a peremptory statutory provision which rendered the application a nullity. Although a number of excerpts from the judgment may seem to support his contention,[68] their qualification by context may justify a more charitable interpretation which we prefer to adopt and will discuss in the next section of this judgment.

[31] It is beyond cavil that s. 110(1) and rule 3, read together, must inform a prospective applicant when to present an election application.

[68]For example: "…the applicants were obliged by both the enabling Act and the Rules of Court to have lodged the application not later than 15:00 hours on 4 January 2010 …"; "… I hold that 15:00 hours on 4 January 2010 are the critical time and date in the present matter" in para [14]; "The absoluteness and peremptoriness of those two provisions, which must be applied together" in para [30]; and "… I hold that in the eyes of the law no election application has been presented by the applicants within 30 days after the results of the… elections were declared within the meaning of section 110 of the… Act" in para [44]

This, it seems to us, might have been what the learned Judge intended to convey. By reading the two provisions together, one would be mindful that the meaning and purpose of each should be ascertained not only with reference to their ordinary grammatical meanings, but also with reference to their context in and the purpose of the respective legislative instruments in which they are contained. One should ask oneself in relation to each of those provisions (if we may paraphrase the words of Lord Greene MR in *Re Bidie*: “In this statute, in this context, relating to this subject matter, what is the true meaning thereof?”.[69] It would therefore be wrong to read the provisions of one statute into that of another and then attribute a meaning to the conflated result in the context of the statute they have been read into. To illustrate this: if the directory provisions of one statute are read into the peremptory provisions of another, the result would be to elevate the directory status of the one to the peremptory status of the other. This will be in clear conflict with the intention of the lawgiver which promulgated the directory provisions. Hence – and without attaching

[69]1949 Ch. 121 at 129: “Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context. The method of construing statutes that I myself prefer is not to take out particular words and attribute to them a sort of *prima facie* meaning which may have to be displaced or modified, it is to read the statute as a whole and ask myself the question: 'In this statute, in this context, relating to this subject matter, what is the true meaning of that word?'..”. Quoted with approval by Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another,* 1950 (4) SA 653 (A) at 663 *in fine*-664A. See also: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others,* 2004 (4) SA 490 (CC) where the South African Constitutional Court (per Ngcobo J) held that: “The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.”

any directory or peremptory label to either the rule or the section - one may not read the registrar's office hours provided for in rule 3 into s. 110(1) and, if an election application is lodged outside the ordinary office hours but within the 30 day period allowed under the subsection, attach the same consequences to that non-compliance as one would have done, had the application been filed outside the 30-day period. One of the unintended results which immediately springs to mind, if one would do otherwise, would be to detract from the Court's powers under rule 27(3) to condone any non-compliance with rule 3.

[32] It is common cause that the application was not filed outside the 30-day period allowed in s. 110(1) of the Act. It is therefore not necessary for purposes of this appeal to consider whether the subsection's provisions may conveniently be labeled as "peremptory" or "directory"; whether the High Court may or may not entertain an election application presented outside the 30-day period or to make any findings on the validity thereof. We expressly decline to do so because it is not pertinent to the issues in the appeal which we are called upon to decide. Our silence on this issue should, however, not be construed as acquiescence in the views forcefully expressed by Parker, J on the peremptory nature of s 110(1); his adoption of the

dictum in *Hercules Town Council v Dalla*[70] (regarding the obligatory nature of prescribed time periods) as a correct statement of our law in the face of later, more moderated approaches adopted or endorsed by the Courts[71] (including the Full Bench of the High Court which held that the modern approach manifests "a tendency to incline towards flexibility")[72] and his conclusion[73] that a peremptory provision "must be obeyed or fulfilled exactly" and that an "act permitted by an absolute provision is lawful only if done in strict accordance with the conditions annexed to the statutory permission",[74] notwithstanding case law to the contrary[75] and the cautionary remarks made by Trollip JA in *Nkisimane and Others v Santam Insurance Co Ltd*[76] not to infer

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[70] 1936 TPD 229 at 240: "… the provisions with respect to time are always obligatory, unless a power of extending the time is given to the Court."

[71] E.g. *Volschenk v Volschenk,* 1946 TPD 486 at 490: "I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity." See also: *Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour and Another, supra,* at 1038A-B: "principle in my opinion has now been firmly established that, in all cases of time limitations, whether statutory or in terms of the Rules of Court, the Supreme Court has an inherent right to grant condonation where principles of justice and fair play demand it to avoid hardship and where the reasons for strict non-compliance with such time limits have been explained to the satisfaction of the Court."

[72] *DTA of Namibia and Another v Swapo Party of Namibia and Others*, *supra*, at 11C.

[73] Par [26] of his judgment.

[74] Based on *Craies on Statute Law* (7th ed.) p 260.

[75] Compare *JEM Motors Ltd v Boutle and Another,* 1961 (2) SA 320 (N) at 327 *in fin* - 328B; *Shalala v Klerksdorp Town Council and Another,* 1969 (1) SA 582 (T) at 588A-H, and *Maharaj and Others v Rampersad,* 1964 (4) SA 638 (A) at 646C - E).

[76] 1978 (2) SA 430 (A) at 433H – 434E: "'Preliminarily I should say that statutory requirements are often categorised as ''peremptory'' or ''directory''. They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and

merely from the use of those labels “what degree of compliance is necessary and what the consequences are of non- or defective compliance”. These are matters best left for adjudication on another day.

Presentation under Rule 3

[33] In the view we have taken above, the first issue raised by the Court cannot be answered by reference to subsection (1) of s. 110 only but, given the provisions of subsection (2), must also be answered with reference to rule 3. We must immediately point out that the rule does not absolutely preclude – but rather conditionally facilitates – presentation of an election application “at any time” outside the registrar's ordinary office hours. This, then, is also the premise on which the appellants have structured their alternative argument in support of the contention that the application was properly and timeously presented: i.e. that they lodged – and the registrar, in his or her discretion, received – the application in terms of rule 3 before expiry of the 30 day period allowed by the subsection.

Rule 3: Acceptance by the Registrar - peremptory or directory?

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what the consequences are of non- or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular …”

[34] The appellants' counsel has taken issue with a number of Parker J's findings on the interpretation of rule 3 and his application of the rule to the facts in this case. The first number of misdirections counsel contends for relate to the learned Judge's classification of rule 3 as "peremptory," "absolute," prohibitive in effect and his findings which followed thereon. Parker J held that he had no doubt that the rule was couched in clear peremptory terms [para. 25]. As such, it was an absolute provision which had to be obeyed or fulfilled exactly if the act permitted thereunder was to have any lawful effect [para. 26]. Disobedience of the rule, without any allowance, had to result in nullification [paras. 31 and 35]. Moreover, the rule was prohibitory and anything done by the registrar contrary to the prohibition was "generally void and of no effect; the mere prohibition operates to nullify the act" [paras 37and 38]. Finally, he held that, "armed with the Court's inherent power or not", he was not entitled to decide otherwise [para 44]. This reasoning, as we pointed out earlier, was not followed by Damaseb JP. He declined to adopt the approach that non-compliance with rule rendered the application a nullity and assumed, without deciding, that the combined effect of the section and the rule was not peremptory but directory and that non-compliance was amenable to condonation by the High Court.

[35] We are unable to agree with the reasoning of Parker J. For reasons which will follow, we find that the relevant provisions of the rule are not peremptory, but directory and not prohibitory, but permissive; that they only require, at most, substantial compliance; that non-compliance is condonable and need not result in nullification and, if necessary, that the High Court may draw on its inherent powers to redress a mistaken application of the relevant provisions in appropriate circumstances.

[36] Parker J reasoned that the distinction between a peremptory (or absolute) provision and a directory provision "is reflected in the use of ‘shall’ to signify an absolute provision and ‘may’ a directory provision" [para 26]. As a general proposition of law, it, with respect, presents an oversimplification of the semantic and jurisprudential guidelines pragmatically developed by the courts and distilled in a long line of judgments to differentiate between – what they conveniently labeled as - peremptory and directory provisions.[77] In *DTA of Namibia and Another v Swapo Party of Namibia and Others*,[78] the Full Bench of the High Court noted some of these guidelines summarized as early as

[77]For a discussion of the guidelines and the authorities in question, see: Devenish, *op.cit.* at p.229-234
[78]*Supra*, at 9G-10C

1949 by Herbstein J in *Pio v Franklin, NO and Another*[79] with approval as “useful, though not exhaustive”.

[37] Because the word "shall" appears twice in rule 3, Parker J found that the rule was peremptory. The provisions of the rule referred to by him are these: that the offices of the registrar "shall" be open during ordinary office hours and that the registrar "shall" issue process and accept documents at any time when directed to do so by the court or a judge. It is common cause that the application was not presented during ordinary office hours and that the appellants did not seek or

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[79] 1949 (3) SA 442 (C) at 451: “In *Leibbrandt v SA Railways* (1941 AD 9 at 12) De Wet CJ said that ‘it is impossible to lay down any conclusive test as to when a legislative provision is directory and when it is peremptory’.

He quoted with approval the statement of Lord Campbell in *Liverpool Bank v Turner* (1861) 30 LJ CH 379 which was recently again quoted with approval in *Vita Food Products v Unus Shipping Co* (1939 AC 277 PC):

‘No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Courts of Justice to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered.’

In *Sutter v Scheepers* (1932 AD 165 at 173-4), Wessels JA suggested ‘certain tests, not as comprehensive but as useful guides’ to enable a Court to arrive at that ‘real intention’. I would summarise them as follows:

1. The word ‘shall’ when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.
2. If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.
3. If a provision is couched in positive language and there is no sanction added 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 if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.
5. The history of the legislation also will afford a clue in some cases.”

For a more recent summary, see: *Sayers v Khan,* 2002 (5) SA 688 (C) at 692 A-D.

obtain a direction from a judge or the Court to present the application outside those hours. It was therefore not necessary for the Court *a quo* to determine whether these two provisions of the rule were peremptory or directory. They are also not material to the outcome of the appeal and we need not express any view on them.

[38] The relevant provision of the rule upon which the registrar acted and the appellants relied in presenting the application reads: "... the registrar *may* in exceptional circumstances issue process and accept documents at any time ..." (emphasis added). Parker J made no reference to this provision in his peremptory/directory-analysis. Even by the constrained distinguishing criterion adopted by him, the word "may" ought to have alerted him that it might be directory in nature. Given the element of discretion conveyed by the word, the positive language in which the provision is couched,[80] the absence of any penal or other sanction for the registrar's non-compliance with it,[81] the power of the Court to grant condonation for such non-compliance[82] and the clear intention of the rule to conditionally facilitate the acceptance of documents and the issuing of process outside ordinary office hours in the interests of justice and fairness, we must conclude that the provision is directory.

[80] Compare *R v Sopete*, 1950(3) SA 769 (E) at 772F-G.
[81] *Sayers v Khan, supra*, at 692E.
[82] See: Rule 27(3) of the Rules of Court.

[39] Two contentions advanced by counsel for the respondents bear on the underlying reasons for our conclusion on this point and we, therefore, interpose here to briefly dispose of them. We do not find any substance in the contention advanced by counsel for the second respondent in their heads of argument that the registrar has no discretion to determine whether exceptional circumstances exist for the acceptance of documents outside office hours or not; that it is a judicial determination which has to be done by the High Court or a judge thereof and that, in the absence of an application to the Court or a judge for leave to file the application outside those hours, it is otiose to enquire which of the parties had to shoulder the burden to establish "exceptional circumstances". These contentions, although not pressed in argument, were not abandoned. It is in our view apparent from the contradistinction between the words "may" and "shall" in the phrases "the registrar may in exceptional circumstances … accept documents" and "shall do so when directed by the court or a judge" that the registrar is vested with a discretion to accept documents and issue process outside the stipulated hours in exceptional circumstances and may do so in the absence of any direction by the Court or a judge. But, if directed by the Court or a judge to accept them, the registrar has no discretion to decline.

[40] The second is a contention advanced by counsel for the first respondent: that non-compliance with rule 3 is not open to condonation by the Court under rule 27(3). He submits that rule 3 has a built-in condonation mechanism to deal with the issuing of process and filing of documents outside the registrar's ordinary office hours. In support, he relies on the provision that the registrar is obliged to accept documents or issue process when directed by the Court or a judge and argues on the basis thereof that a litigant who wishes to lodge documents outside those hours must approach the Court or a judge before the documents are presented and not, as rule 27(3) contemplates, for condonation after the lodging thereof.

[41] As we have pointed out earlier in this judgment, rule 3 contemplates the issuing of process and filing of documents, firstly, as of right during the registrar's ordinary office hours and, secondly, by indulgence at all other times. If exceptional circumstances exist which require the issuing of process or the filing of documents during extraordinary hours, a litigant will normally approach the registrar first to seek his or her indulgence. If the registrar declines to issue the process or accept documents, a litigant may seek a direction from the High Court or a judge that the registrar should do so. A litigant may

also seek a direction from the Court or a judge without first having approached the registrar, and the Court may grant the indulgence even if there are no exceptional circumstances to justify the issuing of process or the receipt of documents outside the registrar's ordinary office hours. Seeking such an indulgence from the Court or a judge is not akin to condonation. It is sought in compliance with the rule, not because of any non-compliance. As Mr Semenya, for the second respondent, tersely advanced the point: “the rule in its language says, these are the hours, this is what you do, but you can also do differently. So when you do differently, you are not condoning non-compliance; you are acting within the language of the rule”. We agree. It matters not whether the registrar issues process or receives documents during office hours or, in the exercise of his or her discretion or upon the direction of the Court or a judge outside those hours, the administrative act performed by him or her falls squarely within his or her competency under the rule. If, however, the registrar receives documents outside ordinary hours but, in doing so, exercises his or her discretion on a wrong premise of fact or an incorrect understanding of his or her powers under the rule, there is no reason why the litigant who benefitted from his or her decision should be precluded from seeking condonation if the opposing litigants challenges the validity of the registrar’s decision on review. Rule 27(3) reads: "The court may, on

good cause shown, condone any non-compliance with these rules." The phrase "these rules" includes rule 3 and to construe it differently, as counsel for the first respondent contends we should, places an unwarranted constraint on the Court's inherent powers to regulate its procedures and is likely to give rise to unjust and unfair results. After all, the rules are there for the court and not the court for the rules.[83] They are intended to further the administration of justice[84] and, on good cause shown in appropriate cases, the Court will draw on Rule 27(3) or its inherent reservoir of powers to condone non-compliance in the interest of fairness and justice. For these reasons, we must also reject the first respondent's contention.

[42] Counsel for the appellants submits that the registrar is not even required to comply with the requirement of "exceptional circumstances" before he or she may issue process or receive documents outside ordinary office hours. He relies on the judgment in *The Minister of Police v Axel Jackson Johannes and Lydia Johannes, supra,* where Bethune J held that the provision was designed to assist with the smooth running of the registrar's office and "to enable him to refuse to act outside the hours laid down" in the absence of

[83]See: *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk,* 1972 (1) SA 773 (A) at 783A; *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*, 1982 (3) SA 654 (A) at 676H and *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd,* 2007 (2) SA 363 (SCA) at 337B;
[84] See: *Ncoweni v Bezuidenhout*, 1927 CPD 130.

exceptional circumstances. With this objective in mind, he found that the registrar was at liberty to waive the requirement of "exceptional circumstances".[85] The *ratio* is all the more inviting because no greater public interest in the enactment - which usually constrains the right of a public authority to waive compliance[86] - is at stake. In the absence of an allegation that the registrar waived the requirement, we prefer not to express any final views on this contention.

[43] Given the general purpose of the Rules, the intention behind formulation of rule 3, the enabling thrust of the provision of the rule under consideration, the discretionary power accorded to the registrar by it, the positive language used in its formulation, the absence of any prescribed sanction for the registrar's non-compliance, the power of the Court to condone any non-compliance by the registrar and our earlier finding that the provision is directory, we are of the view that substantial compliance by the registrar will suffice to meet its requirements.

Acceptance by the Registrar and the issue of legality

[44] As an introduction, it may be useful to recapture the salient facts relevant to the application's presentation. It is common cause that the

[85] *Supra, at p 7*
[86] See: Wade and Forsyth, *Administrative Law*, (7th ed. Clarendon Press, Oxford) at p. 272.

application was lodged with the assistant registrar and that she received and date-stamped it with her official stamp of office on 4 January 2010. The imprint of the stamp on the face of the application shows the date but not the time at which it was presented. It is not in issue that the application was lodged by the appellants' legal representative in the presence of a commissioner in the first respondent, outside the registrar's ordinary official office hours – at approximately 16h00 or 16h30. Following the chronological order of cases in the registry, the application was given a case number (A01/2010). It was thereafter acted on by the appellants and the registrar on matters of security and service as if it had been properly presented in terms of the Act and the rules.

[45] These events, in particular the official act of imprinting the registrar's official stamp on the face of the application when it was presented after ordinary office hours on 4 January 2010 are not without legal significance. The registrar’s competency to receive documents at all times outside normal office hours in the course of her official duties is expressly authorized by rule 3. We accept for purposes of this judgment that, as a condition precedent for the validity of her decision to receive the application, the assistant registrar had to comply substantially with the requirement to assess whether exceptional

circumstances attached to the presentation of the application and, if so, whether they justified acceptance of the application at that late hour. The imprint of the registrar's official stamp on the application evinces that it was formally accepted by her and, in our view, gives rise to a rebuttable evidential presumption that the prescribed "condition precedent to the validity of the performance by the (registrar) … has been fulfilled"[87] (our insertion).

[46] The presumption, commonly known as the presumption of regularity, is encapsulated in the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium*:[88] The maxim, Lindley LJ observed in *Harris v Knight,*[89] -

> "is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where

[87] Per Trollip J in *R v Magana*, 1961(2) SA 654(T) at 656H.
[88] Translated by Hiemstra and Gonin, *Trilingual Legal Dictionary*, (3rd ed.) p 249 as: "All (official) acts are presumed to have been lawfully done (or: duly performed) until proof to the contrary be adduced".
[89](1890) 15 PD 170 at 179 and more recently quoted with approval in *Hall v Moore and Others,* [2008] EWCA Civ 965 (Judgment of the England and Wales Court of Appeal (Civil) dated 10 July 2008).

> there is no proof one way or the other; but where it is more probable that what was intended to be done was done, as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proven to exist, and would render what is proved to have been done of no effect."

[47] The principle which the maxim contemplates “seems to be that there is a general disposition in the court of justice to uphold official, judicial or other acts rather than to render them inoperative; and with this view, there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy."[90] In *Byers v Chinn and Another* [91] Stratford JA noted with reference to Wigmore on *Evidence* that its application is, in most instances, attended by several conditions:

> "first, that the matter is more or less in the past, and incapable of easy procured evidence; secondly, that it involves a mere formality, or detail of required procedure, in the routine of a litigation or of a public officer's action; next, that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent

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[90] *Best on Evidence* (12th ed.) p 312, sec. 353 quoted with approval in *Kellermann v Minister of the Interior*, 1945 TPD 179 at 193.
[91] 1928 AD 322 at 332 with reference to Wigmore on *Evidence,* vol. 4, para 2534

> an unwholesome uncertainty; and, finally, that the circumstances of the particular case add some element of probability."

In what follows, we shall briefly consider whether some of these conditions present themselves with sufficient force to justify application of the presumption in the circumstances of this case.

[48] The registrar's decision to accept the application outside ordinary office hours clearly involves a “detail of required procedure in the routine of a litigation" under the Rules and, for that matter, in her conduct as a public officer vested with the power to receive documents pertaining to the business of the Court. Once the application had been received formally, the appellants acquired the right to prosecute it upon compliance with the other requirements of the Act (regarding security and service) and the rules and, ultimately, to have their election complaint adjudicated. Moreover, the registrar's acceptance of the application in the exercise of her discretion under the rule removed any “unwholesome uncertainty” about the application's presentation. It obviated the need to approach the Court or a judge to direct the registrar to receive the application outside ordinary office hours. It also provided certainty about the period within which the appellants had to

furnish security and to cause service of the application as required by s.110(3)(a) and 113 of the Act.

[49] Finally, the circumstances prevailing at the time of presentation, to say the least, added "some element of probability" that the assistant registrar could have considered them “exceptional”. Election applications are important by their nature. They concern the election of representatives of the people to the highest public offices in the democratic institutions of our State. They are one of the most important mechanisms through which to protect our constitutional democracy and the fundamental right of citizens to equally participate in political activity; to preserve the integrity of free and fair elections as a means to ascertain the collective socio-political will and wishes of all enfranchised Namibians; to preclude representation in these high offices by persons who have not been duly elected and to allow for an independent adjudication of election complaints in a peaceful, transparent and accountable manner – to mention a few of the many important considerations we have referred to at the outset of this judgment. Election applications are also not to be equated with applications brought in the ordinary course: The compressed time periods prescribed in the Act for their presentation and hearing suggest that they must be accommodated in the Court’s procedures as

semi-urgent. In this instance, the application relates to country-wide elections on a party list-basis and information regarding irregularities had to be obtained and collated from observers and agents all over the country. As we have indicated in summary earlier in this judgment, the grounds on which the appellants are seeking to challenge the validity and results of the National Assembly election are, on the face thereof numerous, substantial and wide-ranging. They are apparent from the affidavits attached to the application which were presented to the assistant registrar and could have informed her. So too, the fact that the appellants had to approach the High Court during the 30-day period on an urgent basis to obtain access to a wide range of the election materials (involving more than a million documents - judging by the voters' register and announced results); that they allegedly had difficulty to obtain immediate access to many of those documents even after they had obtained an order of Court and that they had to employ teams to work around the clock to meet the statutory deadline for presentation. The application itself is extensive with numerous affidavits and the assistant registrar was told that it had been prepared under severe time constraints.

[50] With three of the four usual requirements met, we are satisfied that the presumption of regularity applies to the assistant registrar's acceptance of the application. The presumption, Devenish[92] observes –

> "is a seminal one, on which the operation of the entire edifice of state administration and administrative law rests. The operation of the administrative state would be completely untenable without it. Consequently, administrative acts are valid until they are found to be unlawful by a court of law".

This is also the position which currently prevails under English law: With exception, "(a)ll official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent jurisdiction."[93]

[51] The meaning and import of the presumption aside, Mr Tötemeyer contends that, in any event, it is settled law that administrative decisions stand until they are set aside by a Court. In support, he cited the remarks of Lord Radcliffe in *Smith v East Elloe Rural District Council*[94] that an administrative order –

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[92] *Administrative Law and Justice in South Africa*, p 228. See also: Baxter, *Administrative Law*, p 355

[93] De Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, (5th ed., Sweet & Maxwell, London) p 260.

[94] [1956] 1 All ER 855 at 871H;

> "is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

Closer to this jurisdiction, he refers to the more recent judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[95] where the South African Supreme Court of Appeal (*per* Howie P and Nugent JA) observed:[96]

> "The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

In an analytic and insightful judgment the Court explored the legal basis for the apparent anomaly that even an unlawful act can produce legally effective consequences. In this context they considered the presumption of regularity and the notion of "legal pragmatism" as

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[95]2004 (6) SA 222 (SCA). It has been followed since in *Khabisi N.O v Aquarella Investment 83 (Pty) Ltd*, 2008 (4) SA 195 (T) at 204H – 205C, *Umvoti Municipality v ANC Umvoti Council Caucus and others*, 2009 (2) SA 388 (N) at 394A – G, *Club Mykonos Langebaan v Langebaan Country Estate Joint Venture*, 2009 (3) SA 546 (C) at 559G – J and a number of other cases.
[96]At 242B-C

possible explanations for the anomaly but ultimately adopted the proposition advanced by Forsyth[97] that, while a void administrative act is not an act in law, it is, and remains, an act in fact" until it is set aside. In the context of that case (dealing with a public authority's disregard of the Administrator's approval to establish a township), the Court held as follows (in para [37]):

> "In our view, that analysis of the problems that arise in relation to unlawful administrative action recognises the value of certainty in a modern bureaucratic State, a value that the Legislature should be taken to have in mind as a desirable objective when it enacts enabling legislation, and it also gives proper effect to the principle of legality, which is fundamental to our legal order....And this case illustrates a further aspect of the rule of law, which is that a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it."

[52] Under the presumption of regularity "it is presumed, in the absence of evidence to the contrary, that all the procedural formalities pertaining to an official act have been complied with"[98] and, even if the presumption does not apply, the person who challenges the validity of an administrative act normally bears the onus to prove unlawfulness

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[97]Christopher Forsyth: '''The Metaphysic of Nullity'': Invalidity, Conceptual Reasoning and the Rule of Law' in *Essays on Public Law in Honour of Sir William Wade QC* (Christopher Forsyth and Ivan Hare (eds), Clarendon Press) at 141.
[98]Baxter, *Administrative Law*, p 738 and the authorities cited therein

on a balance of probabilities:[99] "the onus rests upon the applicant for review to satisfy the Court that good grounds exist to review the conduct complained of."[100] It is against this legal matrix that the respondents' challenge falls to be considered.

The respondents' challenges.

[53] The respondents' challenge, formulated by the director of the first respondent in his answering affidavit, reads:

> "As the applicants did not make out a case in the founding papers that exceptional circumstances as provided for under Rule 3 existed for the Registrar to accept the application outside the prescribed hours (9h00 am to 13h00 pm and from 14h00 pm to 15h00 pm), the applicants could and should not have presented the application at that time in the absence of a court or a judge directing that such application be issued and accepted after the prescribed time. The applicants' time to present the application on 4 January 2010 expired at 15h00. This application falls to be struck with costs for want of compliance with the provisions of Section 110 read with rule 3."

[54] The principal assertion is that the appellants "did not make out a case in the founding papers that exceptional circumstances as

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[99]Subject to exceptions in the case of unlawful arrest and invasion of property. See: Baxter (ibid.) and the authorities quoted there.

[100]*Per* Zulman J in *Davies v Chairman, Committee of the Johannesburg Stock Exchange,* 1991 (4) SA 43 (W) at 47G-H. See also: *The Administrator, Transvaal, and The Firs Investments (Pty) Ltd v Johannesburg City Council,* 1971 (1) SA 56 (A) at 86A-C and *Johannesburg City Council v The Administrator, Transvaal, and Mayofis,* 1971 (1) SA 87 are (A) at 100A-B referred to.

provided for under Rule 3 existed for the Registrar to accept the application" outside ordinary office hours. The others are merely premised thereon and advanced by inferential reasoning. Mr Tötemeyer was quick to point out that the respondents did not even allege that no exceptional circumstances existed for the registrar to receive the application outside ordinary office hours. The first respondent's complaint is merely that the appellants should have made out a case in their founding affidavits that the exceptional circumstances existed. This, he contends, does not constitute a proper challenge to the validity of the assistant registrar's decision.

[55] Parker J held that the respondents "in a way, contended that there were not in existence exceptional circumstances, within the meaning of rule 3, upon which the registrar, acting properly, could have been satisfied, entitling her to accept the ... application" at the time she did; that the appellants bore the *onus* on that issue; that it was reasonably incumbent on them to place sufficient evidence in the founding papers to indicate what information they submitted to the registrar; that "it was necessary to file a confirmatory affidavit by the registrar to confirm that she had been apprised of the exceptional circumstances and that she in light thereof exercised her discretion" (para [18]); that the applicants were not entitled to assume that, just

because the registrar had accepted the papers, she must have exercised her discretion properly (para [19]); that considerations of transparency and public accountability required that the information that was given to the assistant registrar should have been included in the founding affidavit for all to see, in particular the respondents so as to enable them to decide whether to challenge it and that there was no credible evidence that assistant registrar had exercised her discretion in strict accordance with the provisions of rule 3 (para [22]). Damaseb JP, agreed. He held that "since the applicants had acted contrary to law, they were required to place on record in the founding papers, those exceptional circumstances which excused the prohibited conduct"; that the attempt to cure that omission in the replying papers did not avail the appellants (para [20]); that the public was entitled to know why the registrar acted in the way she did and that the appellants bore both the evidentiary burden and legal burden in respect of the existence of exceptional circumstances which justified the prohibited conduct (para [22]).

[56] We are unable to agree with the reasoning by the learned judges *a quo*. The appellants did not act “contrary to law” when they presented the application outside the registrar's ordinary office hours. It is expressly envisaged in rule 3 that documents may be presented

and accepted by the registrar "at any time" and, as we have held earlier, the appellants acted squarely within the enabling provisions of the rule when they presented the application outside the registrar's ordinary office hours.

[57] The registrar is the functionary entrusted by the lawgiver with the discretion to decide whether there are exceptional circumstances which would allow him or her to receive the documents presented for acceptance. Once the registrar exercised her discretion and accepted the documents in this case – and it is not in issue that she could have done so without first having solicited the respondents' views - she was *functus officio* and her decision was and remained "as effective for its ostensible purpose as the most impeccable" of decisions until it is set aside by a court of competent jurisdiction. Moreover, for the reasons we have stated earlier in this judgment, the presumption of regularity applied to the formalities and conditions precedent to the validity of her decision. Hence, the appellants were entitled to premise their further conduct on the assumption of ostensible effectiveness and presumption of regularity - and to structure the further prosecution of their application accordingly. It was therefore not incumbent on them to include in the founding papers the exceptional circumstances which

- they might have thought - could have persuaded the registrar to receive the application outside ordinary hours.

[58] The validity of the registrar’s decision was not in issue at that time when the application was presented and there is no evidence to suggest that the appellants should have had reason to anticipate that the respondents would challenge it – that is, if the respondents would oppose the application – even less, that appellants should have divined on which basis the registrar’s decision would be challenged and, least of all, that it would be presented as a collateral challenge in the same proceedings and not as a substantive challenge in review proceedings which would have accorded them an opportunity to respond to the grounds relied on by the respondents.

[59] We have not been referred to any provision in the Rules which requires a litigant who either intends or is constrained by circumstance to present a document outside the registrar's ordinary office hours to incorporate the exceptional circumstances relied in the founding affidavit or in any other affidavit or written instrument. Neither have we been referred to any legal precedent in point or any legal textbook, journal or other authority on matters of law and procedure where such a proposition was suggested. We are also not aware that rule 3 (or its

predecessor in the Uniform Rules of Court) has ever been applied in that manner. One of the incidents of the rule of law is that the law should be ascertainable in advance so as to be predictable[101] and allow persons to arrange their conduct and affairs accordingly. In the absence of any rule, practice or precedent, how should the appellants have known that they would be required to include those circumstances in the founding affidavits; that they had to obtain a confirmatory affidavit from the registrar and that, should they fail to do so, it might or would result in the nullification of their application seeking adjudication of issues most important to our constitutional democracy?

[60] Given the assumption of ostensible effectiveness; the presumption of regularity regarding compliance with the necessary procedural formalities to the receipt of the application and the absence of any rule, practice or precedent to that effect, on which basis then, should the appellants have obtained from the registrar a confirmatory

[101]See: *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others,* 2010 (2) SA 181 (CC) para [22]: “It is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that rules be articulated clearly and in a manner accessible to those governed by the rules.” and *Veldman v DPP, Witwatersrand Local Division,* 2007 (3) SA 210 (CC) where Ngcobo J endorsed the view of De Smith, Woolf and Jowell (*Judicial Review of Administrative Action* 5 ed (Sweet & Maxwell, London 1995) at p14) in para [70] of the judgment: “The rule of law embraces, among other things, the requirement that laws be 'ascertainable in advance so as to be predictable and not retrospective in its operation'.” See also: *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others,* 2000 (3) SA 936 (CC) at para 47.

affidavit to justify her decision at a time when the validity thereof was not in issue? Inasmuch as rule 3 does not differentiate between documents by type[102] received outside ordinary office hours, would the registrar be required to make such a “confirmatory affidavit” at the instance of every litigant whose documents she allows outside ordinary hours? Should the litigants in each such instance, no matter the nature of the pleading or proceeding presented outside ordinary office hours, file affidavits to record the exceptional circumstances advanced for consideration by the registrar, state the facts they assume she has considered and acted on and deliver them to the opposing litigants and otherwise publish them to inform the public at large “why she acted the way she did”? And what must be done if the exceptional circumstances are known not to the litigant but only the registrar – such as, for example, when the registrar’s office temporarily closes down at the crucial hour for reasons of internal security and delay receipt of the documents which would otherwise have been filed during ordinary office hours? How should the exceptional circumstances be reflected in the founding affidavit if it was not even foreseen that the application would be presented late, for example, when the messenger was dispatched timeously with the documents but was involved in an accident on the way? Or should the messenger first return, the affidavit be amended and the application be presented at an even later hour?

[102]With the exclusion of notices of appearance to defend.

We pose these questions rhetorically to highlight the practical difficulties of such an approach, the additional costs and delays it is likely to give rise to and the burden it will place on human and other resources. Given the purpose of rule 3, the express accommodation given in it to the receipt of documents and issuing of process outside ordinary office hours, the practice and procedure contemplated for the consideration of exceptional circumstances and, for that matter, a direction to be obtained from the Court or a judge, the rule is, with respect, much less formal, more expeditious and substantially more practical than that envisaged by the judgments *a quo*.

[61] In our view the learned judges misdirected themselves to require of the appellants to include matters in their founding papers which, in the absence of a challenge at the time, fell within the competency of the registrar under rule 3 to determine and had no relevancy to the issues which the appellants placed before the Court to decide.

[62] These findings were based on – and fell squarely within the ambit – of the first respondent's objection *in limine* i.e. that the appellants "did not make out a case in the *founding papers* that exceptional

circumstances as provided for under rule 3 existed for the registrar to accept the application outside" ordinary office hours. It follows, for the same reasons we have held that those findings were wrong, that the point *in limine* should also have been dismissed.

[63] Mr Maleka made it abundantly clear during argument - and repeatedly so - that the first respondent was "not challenging the decision of the registrar" but only that there had been "no objective facts showing a 'trigger' for the exercise of" her powers. His primary argument is that, because the appellants went to the registrar outside ordinary office hours to present the application, they had the evidential and legal burden to show *in their founding affidavits* that exceptional circumstances existed to justify the registrar's decision to receive the application. This submission only supports the point *in limine* but does not add anything of substance to the findings and contentions we have already dealt with and rejected.

[64] His secondary argument is that, once the challenge was raised in the first respondent's answering affidavit, the appellants should have recorded the "exceptional circumstances" on which they had sought the registrar's consent in their replying affidavits. He contends that, by

saying in reply that the registrar was aware that the application had been prepared under severe time constraints and that the appellants' legal representative had arranged with her to receive the application outside ordinary office hours, the appellants have nailed their colours to the mast and the matter falls to be decided on that basis. This submission, in our view, does not even get out of the starting blocks.

[65] The first respondent's objection *in limine* is that the appellants should have recorded the “exceptional circumstances” upon which the registrar had acted *in their founding papers*. That was the preliminary challenge which the appellants were required to meet. If the objection refers in express terms to “the founding papers”, how could the appellants have divined that the first respondent actually required of them to record those circumstances in their replying affidavits? In our view, they were entitled to take the objection at face value, treat it as a point which could be addressed more appropriately in legal argument and which was not deserving of more than a cursory response in reply.

[66] The second respondent did not independently present an objection *in limine* in substance or form different from the one noted by

the first respondent. It, in effect, latched onto the first respondent's objection. As such, the second respondent is bound to the scope of the objection as raised by the first respondent and, as Mr Maleka repeatedly assured us on behalf of the latter, it does not seek to challenge the validity of the registrar's decision to receive the application after ordinary office hours - only the appellants' failure to demonstrate the existence of exceptional circumstances on the papers, as they should have done. We have found it unnecessary to consider the remark by Bethune J in *Johannes'* case that the registrar may waive the rule 3-requirement of "exceptional circumstances" and, for the reasons earlier given, have proceeded to consider the appeal on the basis that the requirement of "exceptional circumstances" in the rule is a jurisdictional fact which the registrar had to comply with substantially. We understand the concise, but lucid, argument advanced by Mr Semenya to contend that the objection, in effect contemplates and, therefore, allows the second respondent to mount a collateral challenge to the validity of the registrar's decision on the basis that the appellants have not discharged the burden they bore to show that the registrar's decision was justified by the existence of exceptional circumstances required as a jurisdictional fact by rule 3.

[67] Even if we assume in favour of the second respondent that the form in which the objection *in limine* has been cast, contemplates such a challenge - and we do not think that it does - we are of the view that it must nevertheless fail for two reasons: firstly, because a collateral challenge to the validity of the registrar's decision is not permissible on the proceedings before us and, had it been the intention of the second respondent to avoid the registrar's decision, it should have brought a substantive review application on an urgent basis. Secondly, because the appellants did not bear the *onus* to prove that the registrar's decision was lawful.

[68] A collateral challenge to the validity of an administrative decision, it has been said,[103] will be available only "if the right remedy is sought by the right person in the right proceedings." We have earlier referred to the presumption of regularity,[104] the assumption of ostensible effectiveness[105] and the factual foundation-theory[106] as a basis for attaching legal consequences to administrative acts (even those which may later prove to have been invalid) until they are set

[103] With reference to Wade *Administrative Law,* 6th ed. at p 331 by Conradie J in *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory),* 1991 (2) SA 527 (C) at 530C – D and by Howie P and Nugent JA in the *Oudekraal*-case, *supra,* para [35] with reference to a later edition of the same work.
[104] Expressed by the *omnia praesumuntur rite esse acta*-maxim.
[105] So labeled for convenience on the basis of Lord Radcliffe's remarks in *Smith v East Elloe Rural District Council, supra,* at 871H
[106]Proposed by Forsyth and approved in the *Oudekraal*-case, *supra,* para [29]

aside or otherwise avoided by a Court of competent jurisdiction. Until then, they may be acted on and, in determining the validity of the subsequent acts "nothing but the formal validity"[107] of the first act will be relevant unless, of course, it is a case where the law requires substantive validity of the first-mentioned act as a necessary precondition for the validity of the consequent act.[108] Generally, the formal (as opposed to legal) validity of an administrative act cannot simply be disregarded by those affected by it as if it is void and does not exist in either fact or law. There is, however, an exception to the general rule, which Forsyth[109] explains as follows:

> "Only where an individual is required by an administrative authority to do or not to do a particular thing, may that individual, if he doubts the lawfulness of the administrative act in question, choose to treat it as void and await developments. Enforcement proceedings will have to be brought by the administrative authority involved; and the individual will be able to raise the voidness of the underlying administrative act as a defence."

In those circumstances, for example, "(i)t will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action

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[107] Per Lord Hoffmann in *R v Wicks* [1997] 2 All ER 801 at 815h – j quoted in the *Oudekraal*-case, *supra*, para [30].
[108] See: *Oudekraal's*-case, *supra*, para [121]
[109] Quoted in *Oudekraal's*-case, *supra*, para [34]

precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question."[110]We hasten to add though, that there are also others[111]on which we need not elaborate.

[69] Given the nature of the application, the parties thereto, the principal issues raised therein and the relief sought, we find the collateral challenge to the validity of the registrar's decision on a mere procedural matter inappropriate. De Smit *et al.,*[112] briefly refer to situations where collateral challenges may not be permitted for the very reason that the proceedings are inappropriate to decide the matter raised in the challenge. He refers, amongst others, to the following:

> "… where … evidence is needed to substantiate the claim, or where the decision maker is not a party to the proceedings, or where the claimant has not suffered any direct prejudice as a result of the alleged invalidity".

These examples find application in our reasoning which will follow.

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[110]Per Howie P and Nugent JA in *Oudekraal's*-case, *supra*, para [35].
[111] For examples, compare Wade, op. cit., p 321 and further.
[112]Op.cit., *supra*, at p. 265.

The application seeks adjudication of a matter which is of national importance: the claimed undue election of members of the National Assembly. By contrast, the collateral challenge bears on a procedural decision (to receive the application, at most, an hour and a half outside the registrar's ordinary office hours but within the 30 day period prescribed by the Act) which did not prejudice the respondents in any manner or form. The remedy which is being sought is declaratory and not "coercive" in any sense of the word. More importantly, the functionary whose decision the second respondent is seeking to challenge collaterally, i.e. the assistant registrar, is not a party to the proceedings. It is not known which circumstances she considered, why she regarded some circumstances as exceptional and what the reasoning was for her decision to receive the application. We interpose here to note that Mr Semenya concedes - and correctly so in our view - that the assistant registrar was not by law constrained to consider only those circumstances which had been placed before her by the appellants. She was entitled to consider any relevant circumstance, irrespective of how it had come to her attention. Therefore, even if the appellants would have informed the Court of the circumstances which they had placed before the assistant registrar, there might still have been others which the assistant registrar had taken into account and which the Court would not know of. And even if all the

circumstances had been placed before it, the Court would still not know along which lines the registrar's reasoning progressed to come to the conclusion she did. We re-emphasise: the registrar is the functionary entrusted by the lawgiver to make the decision and, for the reasons we have given earlier in this judgment, she was only obliged to comply substantively with the provision.

[70] The registrar has a direct and substantial interest in any order invalidating her decision. To invalidate it in proceedings to which she has not been cited as a party and without according her an opportunity to defend the legality of her decision, would infringe the principles of natural justice and detract from her right to a fair hearing. That, in effect, will be the result if the collateral challenge is entertained without more. Had the second respondent been minded to challenge the validity of her decision - and we must again point out that their answering affidavits manifest no such intention - they could have sought reasons from her for her decision and brought an application for the urgent review thereof. The review application could have been enrolled before the same Court either before the election application or simultaneously with it. This they did not do. In the absence of any prejudice suffered by them as a result of the assistant registrar's decision to accept the application outside ordinary office hours –

properly conceded in argument in the Court a quo – it would be inappropriate, if not manifestly wrong, to entertain the collateral challenge in these proceedings.

[71] The second reason why the objection should not be allowed is because the second respondent, who bore the burden to prove that the assistant registrar's decision was invalid, failed to discharge it on the evidence before us. Baxter[113] concludes with reference to a significant body of case law that "except in the case of unlawful arrest and invasion of property, the *onus* of proving the existence of unlawfulness normally rests on the party who makes the allegation." As a footnote to this general and widely accepted restatement of our law, he notes[114] that –

> "(a)n exception appears to exist where the action concerned depends for its legality upon the existence of a 'jurisdictional fact' peculiarly within the knowledge of the public authority; it has been held that where the opposing party raises *prima facie* evidence against its existence, the onus of proving that the jurisdictional fact does exist rests on the public authority concerned."

[113]Op cit., p 738-739.
[114]With reference mainly to *Sigaba v Minister of Defence and Police*, 1980(3) SA 535 (Tk) at 544H-545A (and the cases there quoted).

Even if we assume that the exception to the general rule exists - and we express no view to that effect - it finds no application in the circumstances of this case. The “public authority” in the context of the challenge under consideration, is the assistant registrar - not the appellants. As we have remarked earlier, the assistant registrar is not even a party to the proceedings and, because the appellants were not privy to the reasoning which ultimately led her to the conclusion upon which she decided to receive the application, any legal or evidential burden which she might have had to establish the jurisdictional facts for her decision, cannot be transferred to the shoulders of the appellants. In the circumstances, the general rule must prevail. Counsel for the second respondent frankly and properly conceded that if we were to conclude that the appellants did not have the onus to prove that the registrar's decision was valid, the respondents’ objection *in limine* must fail.

[72] For these reasons we find in favour of the appellants on the first issue raised by the Court through the Chief Justice: Whether the Election Application was properly and timeously presented as contemplated in the Act. We hold that it was. In the circumstances it is not necessary for us to deal with the other issues raised, except for the

last, which we shall consider presently. In the view we take, the Court *a quo* should have dismissed the first and second respondents' objection *in limine.* It follows that the order of the Court *a quo* striking the National Assembly election application off the roll with costs should be set aside.

[73] The appellants prayed for costs in the event of the appeal being successful, such costs to be the costs in the Court below and on appeal and to include the costs consequent upon the employment of one instructing and two instructed counsel. Mr Maleka submitted that, in such eventuality, we should direct that the costs should be costs in the judgment of the High Court on the merits. Normally, costs follow the event to indemnify successful parties, within reasonable limits to be determined by the Taxing Master in accordance with the Rules, for the expense to which they have been put through by the unwarranted or unjust litigious conduct of other litigants.[115] We have not been given any reason to deviate from the general rule and propose to make an order accordingly.

[115]Compare: Texas & Co (SA)Ltd v Cape Town Municipality, 1926 AD 467 at 488.

[74] We asked counsel, in the event of the appeal being allowed, whether the Court should remit the matter to the High Court for that Court to decide the balance of the issues already argued before it or whether this Court should set the matter down for argument on those issues and deal with them, as well as the merits, as the Court below should have done? Counsel for the appellants proposes that we should hear all outstanding matters and, on that basis dispose of the application. Counsel appearing for the two respondents, on the other hand, contend that the former will be the most appropriate course of action.

[75] In our view, the matter should be remitted to the High Court for further adjudication. This Court, constitutionally positioned at the apex of the Judiciary, is primarily a Court of Appeal.[116] Being a Court of ultimate resort, it will be slow to entertain litigation as if a Court of first instance. Constitutionally, the High Court is differently positioned. In all important matters, it is a Court of first instance. Albeit in another context, some of the resulting differences have been highlighted in *Schroeder and Another v Solomon and 48 Others*:[117]

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[116]See: Art. 79(2) of the Constitution. Although the Supreme Court may sit as a court of first instance in matters referred to it for decision by the Attorney-General and review certain proceedings as contemplated by sections 15 and 16 of the Supreme Court Act, 1990, these are extraordinary procedures of infrequent occurrence.
[117]2009 (1) NR 1 (SC) at 12F-13A

> “The Constitution conferred original jurisdiction on the High Court to hear and adjudicate upon all civil disputes and criminal prosecutions; its rules and structures are designed to entertain such matters as a court of first instance; … Moreover, proceedings in the High Court accord the parties ample opportunity to ventilate the disputes between them; allows for those disputes to be referred to oral evidence in appropriate instances and for the court to make credibility findings where necessary; serve to distil the most pertinent issues to be debated in legal argument and to be pronounced upon. The intellectual and judicial contribution of the judges of that court in the adjudication of … matters have also been of great value to this court in the hearing of appeals following thereon.” (footnotes omitted)

It is, without doubt, for these reasons that the Legislature ordained the High Court in terms of the Act as the forum where an election application should be lodged and adjudicated upon in the first instance.

[76] There are a number of preliminary issues, in addition to the merits, which must still be determined. They include various applications to strike out substantial parts of the appellants’ papers and objections to the admissibility of the appellants’ "Amplified Founding Affidavit". These issues are highly contentious and a judgment on them one way or another may well prompt a party to reassess its position and rethink its further strategy in the proceedings.

If, for instance, the amplifying founding affidavit (including approximately 230 supporting affidavits in addition to the many other annexures) is allowed, either one or both the respondents may move an application that some of the factual disputes should be referred for determination on oral evidence.

[77] Considerations of convenience and costs also suggest that remittal is the more appropriate course to follow. The remaining issues have already been argued before the Court *a quo.* They need not be repeated – as would be the case if the matter is set down on those issues in this Court. On this issue, we must note that we have had regard to the contents of an affidavit which the appellants sought to introduce as fresh evidence about strong exception which had been taken by one of the Judges *a quo* to the publication of certain statements made in public on behalf of one of the appellants which, appellants contend, might result in the recusal of that Judge if the matter is remitted. We are encouraged, however, by the allegation that the legal representatives of the persons involved apparently had "fruitful discussions" aimed at resolving the issue amicably. If a resolution is not found, the matter of recusal may arise. However, it is one which will have to be decided in the Court below and, if

unavoidable, it will not necessarily follow that the matter will have to be reargued before a Bench of the same court differently constituted: the parties may still agree in writing to accept the decision of the remaining judge as contemplated by s. 14(2) of the High Court Act, 1990.

[78] In the result, we make the following order:

1. The appeal is allowed with costs, such costs to include the costs consequent upon the employment of one instructing and two instructed counsel and are to be paid by the first and second respondents jointly and severally, the one paying the other to be absolved.

2. The part of the order of the High Court dated 4 March 2010 in terms of which the National Assembly election application lodged on 4 January 2010 was struck off the roll with costs is set aside and the following order is substituted:

> "The first and second respondents' objection *in limine* (that the applicants did not make out a case in the founding papers that exceptional circumstances as provided for under rule 3 of the Rules of Court existed for the registrar to accept the application outside the prescribed hours (9h00 am to 13h00 pm and from

14h00 pm to 15h00 pm); that the applicants' time to present the application on 4 January 2010 expired at 15h00 on that day and that it falls to be struck with costs for want of compliance with the provisions of section 110 read with rule 3) is dismissed with costs, such costs to be inclusive of the costs consequent upon the employment of one instructing and two instructed counsel and are to be paid by the first and second respondents jointly and severally, the one paying the other to be absolved."

3. The matter is remitted to the High Court for further adjudication.

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Shivute, C.J.

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Maritz, J.A.

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Chomba, A.J.A.

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Mtambanengwe, A.J.A.

Langa, A.J.A.