



REPORTABLE

CASE NO: A 1/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PANDULENI FILEMON BANGO ITULA

First Applicant

HENK MUDGE

Second Applicant

EPAFRAS MUKWILONGO

Third Applicant

IGNATIUS SHIXWAMENI

Fourth Applicant

MIKE KAVEKOTORA

Fifth Applicant

and

**MINISTER OF URBAN AND RURAL
DEVELOPMENT**

First Respondent

ATTORNEY-GENERAL OF NAMIBIA

Second Respondent

ELECTORAL COMMISSION OF NAMIBIA

Third Respondent

CHAIRPERSON OF THE ELECTORAL COMMISSION OF NAMIBIA	Fourth Respondent
PRESIDENT OF THE REPUBLIC OF NAMIBIA	Fifth Respondent
HAGE GOTTFRIED GEINGOB	Sixth Respondent
APIUS AUCHAB	Seventh Respondent
BERNADUS SWARTBOOI	Eighth Respondent
McHENRY VENAANI	Ninth Respondent
TANGENI IIJAMBO	Tenth Respondent
ESTHER UTJIJUA MUINJANGUE	Eleventh Respondent
ALL PEOPLES PARTY	Twelfth Respondent
CHRISTIAN DEMOCRATIC VOICE PARTY	Thirteenth Respondent
CONGRESS OF DEMOCRATS	Fourteenth Respondent
DEMOCRATIC PARTY OF NAMIBIA	Fifteenth Respondent
LANDLESS PEOPLES MOVEMENT	Sixteenth Respondent
MONITOR ACTION GROUP	Seventeenth Respondent
NAMIBIAN ECONOMIC FREEDOM FIGHTERS	Eighteenth Respondent

NATIONAL DEMOCRATIC PARTY OF NAMIBIA	Nineteenth Respondent
NATIONAL PATRIOTIC FRONT	Twentieth Respondent
NATIONAL UNITY DEMOCRATIC ORGANISATION	Twenty-First Respondent
POPULAR DEMOCRATIC MOVEMENT NAMIBIA	Twenty-Second Respondent
RALLY FOR DEMOCRACY AND PROGRESS	Twenty-Third Respondent
REPUBLICAN PARTY OF NAMIBIA	Twenty-Fourth Respondent
SOUTH WEST AFRICA NATIONAL UNION OF NAMIBIA	Twenty-Fifth Respondent
SOUTH WEST AFRICA PEOPLE'S ORGANISATION	Twenty-Sixth Respondent
UNITED DEMOCRATIC FRONT OF NAMIBIA	Twenty-Seventh Respondent
UNITED PEOPLE'S MOVEMENT	Twenty-Eighth Respondent
WORKERS REVOLUTIONARY PARTY	Twenty-Ninth Respondent

Coram: SHIVUTE CJ, MAINGA JA, SMUTS JA, HOFF JA, and NKABINDE AJA

Heard: 17 January 2020

Delivered: 5 February 2020

Summary: On 17 October 2014, the then Minister responsible for regional and local government published a notice in the *Government Gazette* putting into operation the Electoral Act 5 of 2014 (the Act). The Minister determined that the Act would come into operation on the date of the publication of the notice in the *Gazette*. However, such promulgation, according to the Minister, excluded the provisions of subsections (3) and (4) of section 97 of the Act. Section 97 makes provision for the use of voting machines in elections. The subsections that were excluded from coming into operation with the rest of the section provide that the use of voting machines was subject to the simultaneous utilisation of a verifiable paper trail and that where the results of the voting machines and the results of the paper trail did not agree, the paper trail results were to be accepted as the election outcome for the polling station concerned. The partial promulgation of the Act meant that elections conducted after the Act came into operation would take place by way of voting machines, but without a verifiable paper trail.

In this case, the applicants were all candidates in the 2019 Presidential election, held together with the election of members of the National Assembly, on 27 November 2019. The elections took place without a verifiable paper trail. The applicants approached the Supreme Court with the application for the court to set aside the 2019 Presidential election and order fresh elections 'without undue delay'. The application was brought in terms of section 172 of the Act, which says, in effect, that any challenge relating to the return or outcome in a Presidential election must be decided by the Supreme Court as a court of first and final instance.

The applicants argued that for the result of the Presidential election to be set aside, the court should first set aside the decision of the Minister to partially put into operation section 97 of the Act. The applicants alleged that the selective implementation of section 97 amounted to a breach of the constitutional principles of separation of powers, democracy and the rule of law.

They also asked that the decision of the Electoral Commission of Namibia (ECN) to use electronic voting in the election without a paper trail be set aside.

The applicants also referred to a number of alleged irregularities relating to the use of Electronic Voting Machines (EVMs) during the election and to concerns relating to the safe custody of EVMs before the election.

The respondents opposed the application on the merits and raised certain preliminary points of law. They argued that the court did not have jurisdiction and the competency to set aside the decision of the Minister and to set aside the decision of the ECN to use EVMs without a paper trail. They asserted that section 172 of the Act does not authorise the Supreme Court to grant relief relating to the Minister's decision as a court of first instance and final recourse as such decision is not related to the Presidential election. The applicants should have gone to the High Court, which according to the respondents is the correct place to decide the issues raised by the applicants.

The respondents also argued that the applicants unreasonably delayed launching proceedings reviewing the Minister's decision. They said that the decision was made in 2014; the applicants had known about it since then. Some of the applicants participated in the 2014 elections as Presidential candidates, but did not challenge the legality of that election. It was also the respondents' position that the issue of the lawfulness of conducting elections with EVMs but without a paper trail had already been tested and determined by the High Court in *Maletzky & others v Electoral Commission of Namibia & others* 2015 (2) NR 571 (HC). They submitted that this judgment was not appealed against. It remained the law on that issue until such time that it had been set aside by the Supreme Court. The ECN was therefore entitled to rely on it.

On the issue of alleged irregularities, the respondents argued that no credible evidence proving irregularities was established by the applicants. The allegations

based on the custody of the EVMs and the beeping sounds emitted by the EVMs during the election have been dealt with by witnesses who had first-hand information on the issues raised by the applicants. The version of the respondents has not been contradicted. It is not far-fetched or untenable. As such, it should be accepted by the court.

Having considered the application, the Supreme Court *held* that the applicant's challenge falls within the provisions of section 172 of the Act. Therefore, the Supreme Court has jurisdiction to entertain the application.

The court further *held* that the narrow approach to the interpretation of section 172 proposed by the respondents was not consistent with the use of the wide word 'any' in the section. The position is also contrary to the constitutional values the electoral law seeks to promote.

It was also *held*, that although the applicants should have challenged the Minister's decision well before elections, given the important constitutional issues being raised in the application, the matter must be heard and the issues decided.

It was accordingly *held* that the Minister's determination was unconstitutional and invalid and was therefore set aside. The use of the phrase 'subject to' in section 97(3) meant that the use of EVMs under section 97(2) is conditional upon complying with section 97(3) and (4) of the Act. The court reasoned that section 97 was a composite and integrated provision and as such, subsections (3) and (4) were required to be put into operation together with the first two subsections.

As to the allegations of irregularities, the court *held* that there was no evidence of irregularities or of the impact the alleged irregularities has had on the Presidential election.

In determining the appropriate relief, the court took into account Article 25 of the Namibian Constitution and other relevant factors and *declined* to set aside the election and direct a rerun.

About the costs of litigation, the court reasoned that although the applicants did not persuade the court to set aside the Presidential election and to order a fresh election, they have vindicated an important constitutional principle of separation of powers. As such, they were entitled to costs. However, as they were only partially successful, they were not awarded a full measure of their costs. Instead, they were awarded two-thirds of the costs.

JUDGMENT

THE COURT:

Introduction

[1] The architecture of our Constitution cements the principles of democracy and the rule of law as fundamental values that bind us and form our identity as a nation. The Constitution identifies Namibia as a sovereign, secular, democratic and unitary State. It is founded upon the principles of democracy, the rule of law and justice for all.¹ The Namibian Constitution enshrines national values which include human rights, equality, freedom, democracy, social justice and the rule of law as some of the major facets upon which our nation is founded.² The Constitution also lays down frameworks and mechanisms through which these values and principles can be realised and enforced.

¹ Art 1 of the Namibian Constitution (the Constitution).

² *Id.*

[2] The drafters of our Constitution made a deliberate statement that the inalienable rights of human dignity, equality, justice, and peace, which were so long denied to the people of Namibia, are most effectively maintained and protected in a democratic society.³ The founding fathers and mothers gave effect to the notion of popular sovereignty through Article 17 of the Constitution, which details the rights of citizens to participate in peaceful political activity intended to influence the composition and policies of Government. It further safeguards the right of every adult citizen to vote and be elected to public office subject to the Constitution and the law.

[3] Elections are not perfect instruments for upholding the promises of democracy. Like any other public undertaking, they are susceptible to human error, voter fatigue, and the risk of being unrepresentative. However, they are a necessary premise for the legitimacy of government by facilitating the public's delegation of its inherent power to their representatives. The public's right to vote creates the executive's privilege to govern. It is therefore crucial that the voice of the electorate does and should find expression, meaning and content in the electoral process to ensure that elections are free, fair, accountable and transparent. After all, power ultimately rests with the people. This onerous task is entrusted to the Electoral Commission of Namibia, a body constitutionally charged with the conduct and management of national elections.⁴

³ Preamble to the Constitution.

⁴ Article 94B of the Namibian Constitution read with the Electoral Act 5 of 2014.

[4] A party arguing for election results to be upheld often cautions against judicial intervention in the results of an election, for fear of subverting the important role of the organised body politic.⁵ Parliament has both entrusted and obligated this court to maintain the public process of transparent elections, recognising, as other jurisdictions have, that elections are equally political and legal in nature.⁶ The public is not deprived of other constitutional rights through elections, including the right of access to justice and the courts.

[5] Democratic institutions tasked with giving meaning to our constitutional values must be informed by the historical, ideological and socio-political context of those values.⁷ The evolution of our present understanding of fundamental rights and freedoms is deeply tied to our collective story and represents the highest aspirations and deepest tragedies that preceded the adoption of our national document.⁸ It is thus not surprising that, given our historical background, the founders emphasised that the rights enshrined in the Constitution are most effectively maintained and protected in a democratic society where the government operates under a sovereign constitution and a free and independent judiciary.⁹

⁵ See the respondents' submissions in *Raila Amolo Odinga v Independent Electoral and Boundaries Commission* Presidential Petition No 1 of 2017 eKLR <http://kenyalaw.org/caselaw/view/140716/> (Accessed 22 January 2020) (*Odinga*) para 369 and also *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2013 (3) NR 664 (SC) (*RDP2*) para 1.

⁶ See for example, *Odinga* para 371.

⁷ *Id.*

⁸ *RDP2* para 3.

⁹ Preamble to the Constitution.

[6] Similarly, this court has astutely recognised that the principle of democracy is 'deepened and augmented by the other two equally important principles proclaimed in the same constitutional breath: the rule of law and justice for all'.¹⁰ Therefore, the supervisory power of the court does not detract from popular sovereignty, on the contrary, it is indispensable to ensuring 'respect and categorical adherence to the letter and spirit of the principle of democracy'.¹¹

[7] In this direct application to this court the applicants challenge the constitutionality of the action of a member of the Executive who selectively promulgated certain provisions of section 97 of the Electoral Act, 5 of 2014 (the Act) and sought a declaratory order and consequential relief that includes the setting aside of the 2019 Presidential election and directing a rerun of the Presidential election without undue delay. The application is opposed.

The application

[8] In this application, the applicants impugn the action of the first respondent, Minister of Urban and Rural Development, responsible for regional and local government (Minister) for his selective promulgation of the Act, more specifically, in selectively promulgating parts of s 97 of the Act which was adopted by the Legislature and signed by the President. That section, fully set out later in this judgment, provides for electronic voting subject to certain conditions contained in s 97(3) and (4). These two subsections were excluded by the Minister when the Act was brought into

¹⁰ RDP2 para 3.

¹¹ *Id.*

operation. They require a verifiable paper trail when use is made of Electronic Voting Machines (EVMs). The applicants contend that this selective implementation amounted to a breach of the constitutional principles of separation of powers and certain democratic principles described under Articles 44 (regarding legislative power), 56 (regarding assents to Bills), 94B (regarding the Electoral Commission of Namibia). The applicants also challenge the said action as, allegedly having been properly exercised in terms of section 209 of the Act. Section 209 empowers the Minister to determine the date on which the Act will come into operation and by notice in the *Gazette*. The applicants say that the action by the Minister was inconsistent with the Constitution and therefore invalid.

[9] The applicants also allege a number of irregularities relating to the use of EVMs during the election and concerning the custody of EVMs by the Electoral Commission of Namibia (the ECN).

[10] This application is opposed by the Minister, the Attorney-General, the ECN, its Chairperson and the President of the Republic although no argument was presented on his behalf. They are collectively referred to as the respondents in this judgment except where individually identified. The other presidential candidates and parties who participated in the election are also cited as respondents but have not opposed these proceedings.

[11] The respondents raise a number of preliminary objections to the application and also oppose it on its merits, including the irregularities contended for, and also oppose the relief sought.

[12] The five applicants were all candidates in the Presidential election held on 27 November 2019. They seek to invoke this court's jurisdiction under s 172 of the Act which empowers this court as a court of first instance to hear challenges to the election of the President. This section is quoted in full below in dealing with the respondents' attack upon this court's jurisdiction to hear and determine certain of the relief sought by the applicants and the competence of that relief.

[13] The facts relevant to the applicants' challenge concerning the selective implementation of s 97 are largely common cause. The Act was passed in 2014 and the President assented to it on 19 September 2014. Shortly afterwards and specifically on 17 October 2014 the Minister determined by way of a Government Notice that the Act, with the exception of s 97(3) and (4), would come into operation on the date of publication. Section 97 concerns the use of voting machines in elections. The excluded subsections provide for a verifiable paper trail when voting machines are used and further that the result of a paper trail would prevail in the event of disparity with the outcome of the EVMs.

[14] Shortly before the 2014 national elections a constitutional challenge was launched on an urgent basis in the High Court to impugn the Namibian Constitution Third Amendment Act 8 of 2014 (Third Amendment), s 209(2) of the Act and

Government Notice 208 of 2014.¹² The four applicants in that case, including Mr Maletzky, sought orders (a) setting aside the Third Amendment as unconstitutional for want of compliance with Articles 5, 17, 21 and 25 of the Constitution; (b) declaring s 209 unconstitutional with retrospective effect; (c) declaring Government Notice 208 unconstitutional as it sought to render s 97(3) and (4) of the Act inoperative; (d) directing a proper running of the Presidential and National Assembly elections before February 2015; (e) declaring all the by-elections and elections of 2014 – where voters used EVMs – null and void; (f) directing the ECN to run a transparent and credible election and (g) directing those concerned to stop using EVMs without a verifiable paper trail for every vote.¹³ That application was dismissed. The 2014 elections then proceeded with the use of EVMs without a verifiable paper trail as sanctioned by that decision.

[15] The respondents accept that the EVMs used in the 2019 Presidential election did not produce a paper trail.

[16] The importance of a paper trail to the credibility and transparency of elections is accepted by the ECN as ‘the right thing to do’ (as conveyed to the Minister on 26 February 2019). But the ECN changed tack and simultaneously advised the Minister, in that submission, that (a) its current supplier of EVMs could not achieve a verifiable paper trail in time for the 2019 elections, (b) this was not a legal requirement because s 97(3) and (4) had not been brought into operation and (c) that the High Court in

¹² *Maletzky & others v Electoral Commission of Namibia & others* 2015 (2) NR 571 (HC) (*Maletzky*).

¹³ *Id* p 573.

Maletzky had sanctioned the use of EVMs without a verifiable paper trail. The ECN reported to the Minister that it was not in a position to implement what it termed a Voter Verifiable Paper Audit Trail (VVPAT). This despite having previously publicly declared in December 2015 that elections from 2017 would have the checks and balances enacted by Parliament and that stakeholders would be informed when this would be implemented.

[17] The ECN Chairperson's denial of a statement attributed to her in a newspaper report to similar effect in February 2016 is, on the papers, untenable. Her statement to that effect was made at the ECN's year opening function and was prominently reported in a leading daily newspaper. The report was at no stage until her affidavit in these proceedings (more than three and a half years later), ever qualified or retracted. On a matter of such public importance pertaining to a material aspect of voting, one would have expected a retraction or correction to have been made in the event of an inaccurate or incorrect report, given the ECN's constitutional mandate of independence and transparency. The ECN Chairperson confined herself to a bald denial of the statement in question and significantly failed to disclose what was instead stated by her at the event, either with reference to the text or its gist if the text was no longer available. This denial is also inconsistent with her subsequent statement to the Minister as to a paper trail being the 'right thing to do'. This bare denial in the context of this litigation is not sufficient to raise a real or genuine dispute of fact on the issue and is in our view untenable. This court is justified to reject it on

the papers. This is but one unsatisfactory aspect of the ECN's conduct concerning the lead up to the election and its opposition to this application.¹⁴

[18] The public impression thus created by the ECN was that the use of EVMs after 2017 would in all likelihood be accompanied by checks and balances in the form of a paper trail as had been mandated by Parliament in s 97(3) and (4). The reversal of this position communicated to the Minister on 26 February 2019 was not, despite the ECN's constitutional obligation of independence, impartiality and transparency,¹⁵ disclosed to stakeholders in the form of political parties and the public as should have occurred. It is not disputed that the first applicant only established this reversal in the last week of October 2019.

[19] The election subsequently proceeded and the fifth respondent, the incumbent President, was declared the winner with 56.3 percent of the vote. The first applicant, an independent candidate, was second placed. He secured 29.4 percent of the vote.

[20] The applicants then brought this application within the prescribed time period.¹⁶ The applicants seek to vindicate the principle of democracy enshrined in Art 1 of the Constitution, the doctrine of separation of powers and the right to political participation¹⁷ in asserting that the failure to conduct the election without a paper trail, in the face of the requirements in s 97(3) and (4) passed by Parliament, meant that

¹⁴ The repeated pejorative reference to the first applicant in the ECN's answering affidavit also undermines the constitutional and statutory imperative of impartiality expected of that body.

¹⁵ In Art 94B (2) of the Constitution.

¹⁶ Rules of the Supreme Court of Namibia relating to presidential election challenges: Supreme Court Act, 15 of 1990 published in Government Notice No 118 of 2015 in *Government Gazette* 5761.

¹⁷ Protected in Art 17.

the election was invalid. After seeking a referral of the application for case management in prayer 1, the following further relief was sought in the applicants' notice of motion:

'2. Declaring that the determining by the first respondent that the provisions of section 97 of the Act was to be brought into force, with the exception of section 97(3) and (4), on 17 October 2014 by GN208/2014 in Government Gazette 5593, was inconsistent with

- i. Article 1(1) of the Constitution of the Republic of Namibia ("the Constitution");
- ii. The separation of powers under the Constitution;
- iii. Article 17 of the Constitution;
- iv. Article 28 of the Constitution
- v. Article 44 of the Constitution;
- vi. Article 56 of the Constitution;
- vii. Article 94B of the Constitution;
- viii. Section 209 of the Act;

and accordingly, contrary to law, unconstitutional and invalid.

3. Setting aside the aforesaid determination by the Minister;

4. Setting aside the adoption by the Electoral Commission of Namibia of voting by way of voting machines in the 2019 Presidential Election;

5. Setting aside the 2019 Presidential Election, and the formal declaration on 30 November 2019 of its results;

6. Directing the conducting of a fresh presidential election compliant with the Constitution and the Act, without undue delay.'

Costs were also sought against those respondents opposing the application.

[21] In opposition to the application, the respondents raise preliminary points. They challenge the merits of the relief sought and argue that the remedy sought in prayers 5 and 6 above is inappropriate even if the declaratory order in prayer 2 is granted.

[22] The respondents' first preliminary point relates to the jurisdiction of this court. It is contended that the relief sought in prayers 2, 3 and 4 does not fall within the purview of s 172 and that this court does not have jurisdiction to determine those issues. The respondents contend further that this court is not competent under s 172 to adjudicate this application as a court of first and final instance and that the applicants should have approached the High Court before the 2019 Presidential elections were held.

[23] In the second place, the respondents contend that the relief relating to the determination by the Minister in 2014 (putting the Act into operation to the exclusion of s 97(3) and (4)) should have been launched within a reasonable time after that determination. It is argued that the failure to do so is fatal to this application.

[24] A further point is taken that the lawfulness of conducting elections with EVMs without a paper trail had already been determined by the High Court in 2014 in *Maletzky* which decided that conducting elections using EVMs without verifiable paper trail was lawful. That judgment, so the argument continued, is binding and, if

set aside by this court, then the result should apply prospectively and not retrospectively.

[25] The respondents also dispute the merits of the application and deny the irregularities contended for.

[26] The respondents' notice of opposition was a day late. Condonation for this was sought. It was not opposed and was granted at the outset of the oral proceedings. The parties had earlier participated in judicial case management in an appropriate spirit of cooperation which has facilitated the ventilation of the issues in this application.

[27] Before turning to the issues raised in this application, the statutory scheme of the Act is first referred to.

The statutory scheme

[28] In terms of s 209(1), the Act would come into operation on a date determined by the Minister by Government Notice in the *Gazette*.

[29] Section 209 provides:

'(1) This Act is called the Electoral Act, 2014, and comes into operation on a date determined by the Minister responsible for regional and local governments by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.'

[30] On 17 October 2014, the then Minister determined that the Act came into operation on that date with the exception of s 97(3) and (4). This was done by notice in the *Gazette*.¹⁸

[31] Like its predecessor,¹⁹ the Act establishes and provides for the constitution of the ECN and determines procedures and mechanisms to facilitate the democratic representation in the institutions of State established by the Constitution.²⁰ The Act does so by providing the statutory framework for conducting regular elections for those democratic institutions of State ‘in a free, fair, transparent and accountable manner’.²¹

[32] By regulating elections for the institutions of State, the purpose of the Act is to give effect to the principle of democracy entrenched in Art 1 in the Constitution, as articulated by this court in *RDP2* in the following way:

‘The essence of the democratic process by which the sovereignty and power of the Namibian people as a body politic are democratically converted into representative powers of State exercisable by its institutions under the Constitution was captured in an earlier discussion of the subject by this court:

“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

¹⁸ Government Notice 2018/2014 in Government *Gazette* 5593.

¹⁹ Electoral Act, 24 of 1992.

²⁰ *RDP2*.

²¹ As was stated in *RDP2* with reference to the Act’s predecessor at para 5.

conducted is a fundamental and immutable premise for the legitimacy of government in any representative democracy. It is by secret ballot in elections otherwise transparently and accountably conducted that the socio-political will of individuals and, ultimately, that of all enfranchised citizens as a political collective, is transformed into representative government: a “government of the people, by the people, for the people”. It is through the electoral process that policies of governance are shaped and endorsed or rejected; that political representation in constitutional structures of governance is reaffirmed or rearranged and that the will of the people is demonstratively expressed and credibly ascertained.[Footnotes omitted]”²²

[33] The Act also provides for the conducting of elections in Part 5.

[34] Section 97, entitled ‘Voting machines in elections’, is contained in Part 5 and provides:

‘97(1) Before the commencement of the poll on a polling day at any polling station, the presiding officer must –

- (a) satisfy himself or herself that all voting machines to be used at the polling station are cleared of any votes;
- (b) permit the inspection of the voting machines by the persons entitled in terms of section 94(1) to attend at the polling station, and who are so present; and
- (c) immediately thereafter close and seal all the voting machines in the prescribed manner.

²² *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2010 (2) NR 487 (SC) (RDP1).

(2) Despite anything to the contrary contained in this Act or any other law, the Commission may adopt voting by way of voting machines in the manner as may be prescribed, including –

- (a) the manner of registering and recording of votes by way of voting machines;
- (b) the procedure relating to voting to be followed at polling stations where voting machines are used;
- (c) the procedure as to counting of votes recorded by way of voting machines; and
- (d) the safe custody of voting machines,

in respect of any constituency, region or local authority area as the Commission, having regard to the circumstances of each case, may specify by notice in the *Gazette*.

(3) The use of voting machines referred to in subsection (2) is subject to the simultaneous utilisation of a verifiable paper trail for every vote cast by a voter, and any vote cast is verified by a count of the paper trail.

(4) In the event that the results of the voting machines and the results of the paper trail do not accord, the paper trail results are accepted as the election outcome for the polling station or voting thread concerned.'

[35] Also of relevance to these proceedings is s 172, governing Presidential election challenges. It provides:

'172.(1) In any election of the President any challenge relating to the return or outcome of the election, including any request to review electoral materials in respect

of the election for the purposes of bringing a challenge, the challenge or request is directed to and adjudicated by the Supreme Court of Namibia as a Court of first instance and final recourse as contemplated in Article 79(2) of the Namibian Constitution, read with section 15 of the Supreme Court Act, 1990 (Act No. 15 of 1990).

(2) Any proceedings referred to in subsection (1) is heard on an urgent basis and the Supreme Court must give a written or an oral decision and reasons for the decision at the conclusion of the hearing, or as soon as possible after conclusion of the hearing, having due regard to the complexity of the matter, but not later than 14 days from the conclusion of the hearing.

(3) Subject to subsection (4), the Chief Justice must make rules as contemplated in section 37 of the Supreme Court Act, 1990 (Act No. 15 of 1990), regulating challenges referred to in subsection (1).

(4) Until such time as rules referred to in subsection (3) have been made the rules of court made under section 37 of the Supreme Court Act, 1990, apply with the necessary changes in respect of challenges referred to in subsection (1).'

Jurisdiction

[36] The respondents take the point that the declaratory relief concerning the review

of the impugned determination by the Minister under s 209 fall outside the ambit of s172 and that, as a consequence, this court lacks jurisdiction to determine the issues raised by prayers 2 and 3 of the notice of motion (as well as prayer 4 which concerns a review of the ECN's decision to use EVMs without a paper trail).

[37] Mr Mokhare SC, who appeared for the respondents, argued that s 172 should be given its literal grammatical meaning and that the declaratory order and review relief sought against the Minister in prayers 2 and 3 respectively do not constitute a presidential challenge contemplated by s 172. The declarator seeks an order of constitutional invalidity of the Minister's determination and the review relief would be consequential upon it. Relief of this nature, the respondents submitted, falls outside the scope of s 172. It was argued that the relief sought in prayers 2 and 3 falls to be dismissed with costs on this basis alone.

[38] Mr Gauntlett SC, who appeared for the applicants, argued that the use of the term 'any' in s 172 with reference to a challenge to the return or outcome of a Presidential election connotes a special expansive jurisdiction.

[39] Applicants' counsel also referred to the 'broad and liberal' approach of the Supreme Court in Kenya in interpreting the election legislation of that country²³ in construing its jurisdiction in the context of that legislation. Counsel also pointed out that a fundamental constitutional issue underlies the application, as to whether the doctrine of separation of powers was breached by the selective implementation of the Act by the Minister to exclude the checks and balances included by the legislature for voting by EVMs. Counsel contended that this was unconstitutional and rendered the outcome of the Presidential election invalid, and thus brought that relief within the wide ambit of s 172.

²³ *John Harun Mwau & others v Independent Electoral and Boundaries Commission & others* Presidential Petitions Nos. 2 and 4 of 2017 eKLR <http://kenyalaw.org/caselaw/cases/view/145261/> (Accessed 23 January 2020) para 286.

[40] Relying upon the trite principle that parties are required to establish jurisdiction in their pleadings,²⁴ the respondents contended that paragraph 6 of the applicants' founding affidavit, which sought to establish jurisdiction, failed to do so. It reads:

'At the heart of this application lies an important constitutional issue. This is whether the Constitution permits the *selective* promulgation, at the choice of the Executive, of *parts* of section 97 of the Act as adopted by the Legislature. This is not, it will be shown, what section 209(2) of the Act authorises, when it provides for *provisions* to be introduced at different times. The effect has been to introduce electronic voting machines ("EVMs") – without any check and balance at all of a hardcopy record ("paper trail") in respect of each vote cast, as Parliament has specifically required.'

[41] The respondents proceeded to characterise the relief sought in prayers 2 and 3 (concerning the Minister's determination) as the applicants' primary or main relief. They argued that the declaratory and review relief embodied in these prayers do not relate to the return or outcome of the Presidential election and should have been sought in the High Court (within a reasonable time of the determination by the Minister in 2014).

[42] This court's jurisdiction is pleaded by the applicants under the rubric 'nature and purpose of this application'. Under this heading then follows four explanatory paragraphs including paragraph 6. Properly read together (and not in isolation as the respondents sought to do), these paragraphs demonstrate that the application is directed at the outcome of the Presidential election. Paragraph 6 relied upon by respondents merely seeks to explain where the invalidity (of the outcome) lies and

²⁴ *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC).

has its origin. The paragraph which follows paragraph 6 contends that the impugned Presidential election has been vitiated by the breach of the constitutional principle of separation of powers and paragraph 8 asserts an effective remedy flowing from the declaratory (and review) relief which relate to the outcome of the election.

[43] The relief sought by the applicants is composite and interrelated and the challenge to the outcome is conjoined to the declaratory and review sought in prayers 2 and 3. The composite relief sought thus squarely relates to the outcome of the Presidential election. The challenge to jurisdiction would appear to rest upon the respondents' own mischaracterisation of the applicants' relief in prayers 2 and 3 as primary or main. Besides, the respondents' reliance on *RDP2* in relation to the argument of this court's jurisdiction – insisting that the applicants ought to have approached the High Court and to avoid this court deciding the matter as a court of first and last instance – does not in the circumstances of this case assist the respondents. The argument is devoid of merit. That case was, in any event, decided under the repealed Act which did not have a provision similar to s 172 of the Act.

[44] By using the term 'any challenge' a wide meaning is intended by the legislature.²⁵ This in the context of a challenge to the outcome of a Presidential election. Taking into account the primacy of the right to vote in the context of our constitutional democracy and its history, s 172 is to be construed broadly and purposively.

²⁵ *Mwadingi v Minister of Defence* 1990 NR 363 (HC) at 373A-C and confirmed on appeal in 1993 NR 63 (SC).

[45] The challenge to the outcome of the Presidential election is with reference to the Minister's determination which excluded a paper trail when use is made of EVMs. Properly considered as a whole, it plainly relates to the Presidential election given the direct relationship between the declaratory relief and the conduct of voting by EVMs. The election challenge by the applicants thus falls within the gamut of s 172 and the jurisdiction objection is without merit and must fail.

[46] The respondents' challenge to this court's competence to adjudicate and grant the relief sought in prayers 2, 3 and 4 is in essence a repeat of the jurisdiction point even though it is contended that a s 172 challenge is to be confined to irregularities occurring during and after the election. This narrow approach to s 172 is inconsistent with its wide ambit by the use of the term 'any' and is also at odds with the purpose and context of s 172 seen within the profound constitutional importance of a Presidential election, to the right to vote and the principle of democracy. This point likewise is without merit and must also fail.

Urgency

[47] The respondents took issue with the urgency with which the relief in prayers 2, 3 and 4 was sought. The applicants countered that if the applicants brought themselves within the ambit of s 172, the matter is statutorily urgent and that this point should likewise fail.

[48] The respondents correctly accepted that if the relief sought in those prayers is found to fall within s 172, then the point concerning urgency would fall away.

[49] Given this court's finding of jurisdiction, this point accordingly falls away.

Unreasonable delay

[50] The respondents contend that the applicants unduly delayed in seeking the declaratory relief and review of the Minister's determination already made in 2014. The respondents point out that the challenge to the Minister's determination under s 209 was made some five years after that determination was made and that this delay is fatal to the applicants' challenge. The respondents contend that the delay is unexplained and that the delay rule also applies to attacks upon legislative action.²⁶ The other cases relied upon by the respondents concerned delays in challenging administrative action.

[51] The present proceedings concern a challenge to the legislative act of putting legislation into operation on the grounds of being in conflict with the constitutional principle of separation of powers. It is not necessary for present purposes to determine the ambit of the delay rule in relation to a challenge to a legislative act on constitutional grounds and whether that should be distinct from a common law review of subordinate legislation.

²⁶ Citing *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) where the court found that the delay rule in reviews applied to a common law review of subordinate legislation – in that instance a declaration by a Group Areas Board of a number of group areas made by Proclamation with Corbett J however stating (para 378B) that the case in question in substance constituted a review of the proceedings of the Board.

[52] This court in *Keya*²⁷ held that in determining the question of an undue delay in review proceedings, a court is to engage in two enquiries. The first is an objective and factual enquiry as to whether the delay was on the facts unreasonable. The second is whether the delay is to be condoned in the exercise of a court's discretion. If a court finds the delay to be unreasonable, it would then need to exercise its discretion in determining whether to grant condonation by applying the criterion of the interest of justice as was stated by the South African Constitutional Court in a decision relied upon by the respondents (although with reference to other passages):

‘An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.’²⁸

[53] This court in *SAPA* held that in the absence of a finding that the delay is so egregious so as to justify determining condonation without a consideration of the merits, the criterion of the interest of justice would require a court to consider the merits.²⁹

[54] Applying these principles to the facts, the respondents do not contest that the first applicant, up to 24 October 2019 operated on the basis that the assurance given

²⁷ *Keya v Chief of the Defence Force & others* 2013 (3) NR 770 (SC) paras 21-22. *S.A.Poultry Association v Minister of Trade and Industry & others* 2018 (1) NR 1 (SC) paras 42-44 9 (*SAPA*).

²⁸ *Khumalo & another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 57 followed by *SAPA* in para 59.

²⁹ Para 67.

by the ECN in 2015 (and to an extent confirmed in February 2016) that it would seek to implement a paper trail for EVMs in time for the 2019 elections. Prior to that, the use of EVMs without a paper trail had been challenged in the High Court and dismissed in *Maletzky* on the eve of the 2014 elections. The first and some of the other applicants were not candidates in that election. The next relevant event is the assurance given by the then Director of Elections in December 2015 which was to a large extent confirmed in February 2016 by the ECN's Chairperson.

[55] As soon as the first applicant became aware on 24 October 2019 that there would not be a verifiable paper trail, he took up the issue in writing with the ECN the following day and some three weeks after that proceeded to the Electoral Tribunal – the remedy created and prescribed by the Act.

[56] The first applicant was unsuccessful in that Tribunal and thereafter in the Electoral Court on an appeal (together with an urgent application in composite proceedings). The Electoral Court made its order on the day before and reasons were given a few days after the election. That relief then became academic and this application was launched within the tight time periods provided for in the Act and the rules promulgated under it.

[57] The steps thus taken by the first applicant, albeit in some respects imperfect, were taken without undue delay after becoming aware of the absence of a paper trail on 24 October 2019 for the purpose of a review.

[58] But there is a significant period of unexplained inaction prior to establishing the lack of a paper trail on 24 October 2019. As is pointed out in the context of the appropriate relief, both announcements (in December 2015 and February 2016) are less settled and both spoke of consultations with stakeholders before implementing a paper trail. That would need to occur timeously prior to an election so that parties and candidates can properly prepare for its use. As the elections approached in 2019, stakeholders should have enquired from the ECN concerning the issue and not have left it to a mere month before the election to raise it, particularly in the absence of any announcement by the ECN or a further notice in the *Gazette* by the Minister.

[59] The prevailing legal position at the time was the Minister's determination which precluded a paper trail, as upheld by the High Court in *Maletzky*. Whilst the applicants are entitled to rely on indications given by the ECN in December 2015 and February 2016, no further announcements were made on the issue as foreshadowed in the statements relied upon by early 2019 and with the election approaching, it became incumbent upon the applicants to raise the issue well before at least mid-2019. Apart from the inadequate reliance upon the statements in December 2015 and February 2016, no explanation is forthcoming from the applicants as to why no enquiry was made on the issue until a mere month from election day. This portion of the delay is thus not adequately explained.

[60] The failure to do so meant that the applicants delayed in raising the issue, even though they took steps after discovering the position on 24 October 2019.

[61] Although the delay in the circumstances of this matter in raising the issue with the ECN is relevant in determining appropriate relief, it is not necessary to determine whether it was unreasonable for the purpose of the delay rule in review proceedings because the applicants should not be non-suited on this ground from raising this issue of profound constitutional importance and where the merits of the challenge are sound as is shown below. It is in the interest of justice to grant condonation.

[62] It follows that the point taken by the respondents that the applicants should be non-suited on grounds of undue delay must fail.

The Act's promulgation and selective implementation

[63] As counsel for the applicants submitted, the material facts concerning the passing of the Act, its assent and entry into force are not in dispute, even though the Minister did not place any material before court to explain the course adopted by his predecessor with regard to the selective implementation.

[64] The question which arises for determination is whether the Minister in putting into force s 97(1) and (2) while leaving s 97(3) and (4) in limbo acted in conflict with the Constitution. The applicants argue that this amounted to a breach of the principle of separation of powers entrenched in our Constitution whilst the respondents contend that the Minister was entitled to sever s 97(3) and (4) from s 97(1) and (2) by

virtue of s 209 of the Act. Counsel for the respondent further argues that the granting of the declaratory relief by this court is a discretionary matter. This argument can be dealt with forthwith. It has no merit because the respondents confuse the concepts of granting declaratory relief when, for example, the impugned conduct or action of an organ of State is inconsistent with the Constitution as is the case in this matter with a court's power to grant constitutional remedies.

[65] In its opposition to the application, the ECN states that it acted in accordance with the law as put into force by the Minister. The ECN also asserts that the Minister acted within his powers in putting the Act into operation in the way he did. The Attorney-General merely states that he does 'not agree' with the declaratory relief sought in prayer 2 and opposes the relief sought in prayers 2 and 3.

[66] The Minister does not assert any basis for bringing the Act into force without s 97(3) and (4) but merely contends that his predecessor acted *intra vires* in doing so. He attached the ECN's letter of 26 February 2019 addressed to him which stated that the ECN's position was that the introduction of VVPAT alongside EVMs 'will increase voter's trust and confidence' and 'further enhance the credibility of our electoral system'. The ECN also recorded in that submission to the Minister its 'considered view' that 'the introduction of VVPAT is the right thing to do'. The ECN also advised the Minister that a paper trail was not a legal requirement and that it was not in a position to implement VVPAT in time for the 2019 elections. A verifiable paper trail as the check and balance to the use of EVMs is not merely to provide comfort to voters

that their votes had been cast, as is inexplicably suggested by the ECN Chairperson and the ECN's expert Mr Rao as its sole purpose in the affidavits. This gainsays the ECN Chairperson's earlier statement prior to this application, correctly made, that it provides a verifiable audit trail in the event of a dispute.

[67] The importance of a paper trail is also confirmed by comparative jurisprudence. The Supreme Court of India³⁰ - from where the EVMs emanate held that a:

“paper trail” is an indispensable requirement of free and fair elections.’

[68] The Supreme Court of India in that matter also stressed that the purpose of VVPAT was both for the purpose of verification of a voter's choice and for manual counting of votes in case of a dispute.³¹ This is precisely what Parliament contemplated in s 97(3) and (4).

[69] The German Constitutional Court³² has also concluded that electronic voting machines would only be compatible with the Basic Law subject to strict preconditions where ‘the constitutionally required possibility of a reliable correctness check is ensured’ and where ‘votes are recorded elsewhere in addition to the electronic storage’.³³

³⁰ In *Subramanian Swamy v Election Commission of India* Case no. 9093 of 2013 (8 October 2013) <https://indiankanoon.org/doc/113840870/> (Accessed 22 January 2020) para 29.

³¹ Para 28.

³² BVerfG, Urteil des Zweiten Senats vom 3. März 2009 – 2 BvC 3/07 – Rn (1-166) https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2009/03/cs20090303_2bvc000307en.pdf?__blob=publicationFile&v=1 (Accessed 23 January 2020).

³³ Para 123.

[70] The principle of separation of powers is established in Art 1 of the Constitution and emphatically reaffirmed in the provisions vesting the legislative authority in Parliament.³⁴ Article 44 states that the legislative power is vested in the National Assembly (to pass laws with the assent of the President and subject to the power and functions of the National Council). In this instance, the President assented to the Act in its entirety. The legislature may delegate subordinate legislative powers (to regulate) to the executive and to put legislation into operation but the legislature cannot devolve upon the executive any entitlement to select statutory sub-provisions to implement.³⁵ It would be for the legislature to amend or repeal an enactment if minded to do so.

[71] In exercising the power entrusted to him under s 209, the Minister is required to carry it out lawfully and consistently with the Constitution.³⁶ In determining this, the question is whether this selective implementation was in conflict with the Constitution.

[72] Section 97 authorises the use of EVMs in s 97(2). Section 97(3) however makes it clear that the use of EVMs as authorised in s 97(2) is 'subject to the simultaneous utilisation of a verifiable paper trail for every vote cast by a voter, and any vote cast is verified by a count of the paper trail'.

³⁴ Articles 44.

³⁵ *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd & others* 2018 (3) NR 664 (SC) (CRAN), applying *Executive Council, Western Cape Legislature, & others v President of the Republic of South Africa & others* 1995 (4) SA 877 para [51]. See also *Minister of Finance & another v Hollard Insurance Co. of Namibia & others* 2019 (3) 605 (SC) para 117.

³⁶ *Kruger v President of the Republic of South Africa & others* 2009 (1) SA 437 (CC) para 65.

[73] Section 97(4) further provides that where the results of the EVMs and paper trail do not accord, then the results of the paper trail will prevail.

[74] The use of the term 'subject to' in s 97(3) means that the use of EVMs under s 97(2) is conditional upon complying with s 97(3) and (4). The legislative authorisation of the use of EVMs in s 97(2) is thus subordinate to the conditions being met as set out in s 97(3) and (4).³⁷ Section 97 is a composite and integrated provision. This means that those subsections were required to be put in operation alongside the power to make use of EVMs. It plainly exceeded the Minister's powers under s 209 to selectively put into force the power to use EVMs without the conditions placed by the legislature for their use. It was not open to the Minister to hold those provisions in abeyance as the use of EVMs is dependent upon the safeguards placed in them. By doing so, the Minister effectively deleted (for the time being) the safeguards enacted by Parliament and thus usurped its role and breached the separation of powers provided for in the Constitution.

[75] In exercising his power under s 209 to place the Act into operation, it was not open to the Minister to subvert the intention of the legislature by implementing the use of EVMs without the safeguards expressly enacted by the legislature to which that use was made subject.

³⁷ See *S v Marwane* 1982 (3) SA 717 (A) at 747H followed by this court, amongst others, in *Rössing Uranium Limited & another v Former Member of the Rössing Pension Fund* 2017 (3) NR 819 (SC) para 49.

[76] By exceeding his powers and acting in conflict with the doctrine of separation of powers, the Minister's determination is unconstitutional and invalid as a consequence. It follows that the applicants are entitled to a declaratory order to that effect (as set out in prayer 2) and to have the Minister's determination set aside (as sought in prayer 3).

Appropriate remedy

[77] The question arises as to whether this court should grant the further relief sought to set aside the election and the formal announcement/declaration on 30 November 2019 of its result and direct the conducting of another Presidential election.

[78] As was stated in this court in *CRAN* at para 94:

'Objective constitutionalism implies that a breach of the Constitution invalidates the implicated provisions from the moment they were enacted (in other words *ex tunc*), and unless a contrary order is made, s 23(2)(a) of the Act and Item 6 should cease to have the force of law immediately. That is because of the default position that when a provision is declared unconstitutional, the declaration of invalidity operates retroactively. The inevitable consequence of which is that those who suffered its existence on the statute book should not be made to bear its consequences. . . .'

[79] Article 25 of the Constitution empowers a court in its discretion to allow Parliament, any subordinate legislative authority or the executive to correct any defect in impugned legislation or action within a specified period subject to conditions as may be specified during which time the legislation or action may be deemed to be valid.

[80] Counsel for the applicants argued that the failure to give effect to s 97(3) and (4) vitiates the 2019 Presidential election. He referred to the Supreme Court of Kenya nullifying the 2017 Presidential election in *Odinga* on the basis that cross-verification in the form enacted by the Kenyan legislature did not occur. He submitted that setting aside the election and directing a fresh election would amount to an effective remedy for the applicants.

[81] The respondents strenuously oppose the relief sought in prayers 5 and 6 of the notice of motion, in the event of the declaratory order being granted. The ECN referred to the considerable cost of holding another election. Respondents' counsel referred to the discretion of this court in granting relief consequent upon a declaratory order and submitted that this court should exercise its discretion against such far reaching relief and that any setting aside of the Minister's determination should be prospective and not retrospective.

[82] Whilst cost and practicalities may be factors to consider, this court is however mindful of the right to vote entrenched in Art 17. The essence of the democratic process lies in elections conducted with transparency and accountability as emphasised by this court in *RDP1*³⁸ and the court may give effect to this principle whatever the cost to public finances in doing so.³⁹ This court in *RDP1* confirmed that a court would grant appropriate relief under the circumstances.⁴⁰

³⁸ Para 1.

³⁹ Para 7.

⁴⁰ Para 7.

[83] The respondents' counsel further argued that the irregularities contended for by the applicants were not alleged to have materially affected the outcome, invoking s 115 of the Act which provides:

'No election may be set aside by any competent Court by reason of any mistake or non-compliance with this Part, if it appears to the Court that the election in question was conducted in accordance with the principles laid down therein and that the mistake or noncompliance did not affect the result of the election.'

[84] Applicants' counsel countered that the outcome is not capable of being saved by a resort to s 115. He submitted that the two requirements to be met in not setting aside an election are conjunctive and must both be met – namely, firstly if it appears to the court that the election was conducted in accordance with the principles laid down in the Act and, secondly that the mistake or non-compliance in question did not materially affect the result. He argued that there was a clear non-compliance with the principles contained in Part 5 (which includes s 97(3) and (4)) which meant that the first leg of s 115 could not be satisfied and that effective relief should thus not be withheld.

[85] The principle contained in s 115 is essentially that a court would be precluded from setting aside an election where a mistake or non-compliance is not material and where the election is conducted in accordance with the principles laid down in Part 5. It does not however necessarily follow that in all other circumstances, that a court must set aside an election. A court certainly retains a discretion whether to do so or

not. In the exercise of that discretion a court would have regard to the circumstances of the case before it and grant appropriate relief as is stated in *RDP2*.⁴¹ We turn to factors taken into account in the exercise of that discretion.

[86] In the founding affidavit, the applicants alleged irregularities concerning the operation of EVMs on election day described by the applicants as 'multiple malfunctions by EVMs'. It was however pointed out by the respondents that the allegations in the founding affidavit concerned faulty EVMs at 16 out of 4213 polling stations and that it was not stated how many alleged malfunctions concerned the Presidential election. Furthermore, counsel for the respondents pointed out that the allegations of irregularities and malfunctions were separately answered and refuted by the presiding officers at the respective polling stations and further that one of the 16 polling stations contended for was non-existent. He also said some of the complaints were not sufficiently specific (by referring to a constituency and not to a specific polling station). In a few instances, malfunctioning machines and beeping occurred and are explained in the answering affidavits. In one instance there was a machine which stopped for three minutes and later went back on again with no one in the booth when it stopped. The other incidences of malfunctioning and irregularities are denied by the presiding officers at the respective polling stations.

⁴¹ Para 7.

[87] Upon the application of the *Plascon-Evans* rule⁴² in motion proceedings, the applicants have established very little in the way of irregularities or machine malfunctioning.

[88] The making of allegations of irregularities without properly establishing them is entirely unlike the position in the *Odinga* application in Kenya where systematic illegalities and systematic irregularities were alleged against that Commission and where the court found that ‘the illegalities and irregularities committed by the 1st respondent (Commission) were of such a substantial nature that no Court properly applying its mind to the evidence and the law. . .can in good conscience, declare that they do not matter and that the will of the people was expressed nonetheless’.⁴³ In this case, even where machines malfunctioned, the applicants did not apply to review electoral materials after initially indicating an intention to do so. Besides, the applicants do not contend that the machines had been tampered with.

[89] Counsel for the applicants’ response to this observation was that there was nothing to review seeing that there was no verifiable paper trail. But it would have been open to the applicants to apply to review electoral materials which would include inspecting the machines in question and request that they be opened up to check the votes cast and results produced by those machines and inspect for any evidence of tampering and to check the security system of those EVMs. Significantly, this was clearly not done.

⁴² As set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C consistently followed and applied by this court and the High Court.

⁴³ *Odinga* para 379.

[90] The ECN's expert, Mr Rao, who although was not entirely independent by reason of being employed by the machine manufacturers in India, referred in some detail to security aspects of machines and their reliability, in the absence of a verifiable paper trail. This aspect of Mr Rao's evidence has not been contradicted by the applicants' own expert, Mr Sheehama.

[91] There was little which remained to the allegations of irregularities after the answering affidavits were filed.⁴⁴ The applicants have not shown that the absence of a verifiable paper trail has adversely affected their fundamental right to vote particularly with reference to irregular use of EVMs or their unreliability.

[92] The ECN Chairperson stated that whilst no election anywhere is perfect, the Presidential election (and that for the National Assembly) reflected the will of the people and was transparent, free and credible.

[93] Whilst the transparency and credibility of the election were compromised by the lack of a verifiable paper trail, the question remains whether that adversely impacted on the electorate's fundamental right to vote. This was not established on the applicants' evidence. What the first applicant says, confirms that he exercised his right to vote, but under protest. What the latter statement seeks to suggest is not explained. It needs to be stressed that the ECN proceeded without a paper trail on the clear assumption that it was by law entitled to do so. The Minister had in 2014 not put s 97(3) and (4) into operation and when this was challenged, the High Court had

⁴⁴ Upon an application of the rule in *Plascon-Evans*.

in *Maletzky* upheld the Minister's determination and sanctioned the use of EVMs without a paper trail. The ECN had thus set out to act in accordance with the law as then determined and to comply with the principles of Part 5 as put into operation by the Minister and found by the High Court to be lawful. This is entirely different to the conduct of the relevant Commission in Kenya and what is intended in *RDP2* with reference to 'illegitimate means and methods'.⁴⁵ It would have been another matter entirely if the ECN had acted in defiance or in breach of its duties set out in the Act. On the contrary, its Chairperson states that the ECN was scrupulous in applying the law with reference to the Act as then determined by the High Court and it was satisfied that the EVMs were capable of producing a free and fair, and credible election – and states that the EVMs effectively did so.

[94] The previous elections in 2014 were also conducted in accordance with the Minister's determination not to implement s 97(3) and (4) and thus without the use of a verifiable paper trail which has now been established to be in conflict with the Constitution. The current members of the National Assembly were elected in 2014 pursuant to those elections and Parliament has passed legislation for the past five years (with the President, also elected pursuant to those elections, assenting to that legislation) with wide ranging implications, including those relating to expenditure and administrative action pursuant to that legislation.

[95] A further factor to be taken into account is the failure of the applicants to raise the issue and effectively and timeously challenge the lack of a paper trail after 2015

⁴⁵ Para 9.

and 2016 and before the election. The ECN assurances concerning a paper trail are less categorical upon an examination of the text of the actual press reports relied upon and attached to the founding papers.

[96] The statement by the erstwhile Director of Elections in a newspaper interview as reported in December 2015 does in fact reflect that the ECN would use EVMs with VVPAT as from 2017. The Director however went on to state in the interview that the ECN would meet political parties and stakeholders as from 2016 'to discuss the modalities on how to implement the EVMs with VVPAT'. The report concerning the remarks made by the ECN Chairperson in February 2016 at the ECN's year opening shows that the remarks are even less unequivocal. The opening paragraph of the report states:

'The (ECN) will consider introducing a voter verifiable paper audit trail to accompany (EVMs) during the next elections.'

[97] The Chairperson referred to the 'high demand and interest' in the introduction of VVPAT and that 'a framework for the acquisition and introduction of VVPAT is to be adopted by the Commission', adding that 'all relevant stakeholders will be consulted during the process of developing this system to meet the country's needs'. Those remarks were made in early 2016.

[98] Whilst the Director and Chairperson expressed an intention to provide for VVPAT, they both expressly stressed the involvement of stakeholders in the process

of implementation. The Chairperson's reported statement is however also tentative, stating that the implementation of VVPAT was 'under consideration'.

[99] If the principle of a verifiable paper trail was of considerable importance to stakeholders including the applicants and their parties, it is inconceivable that there was no follow-up by them with the ECN to confirm its use well in advance of the election, especially after the absence of any announcement to that effect which had been undertaken. Both reports expressly indicated that consultations would precede the introduction of VVPAT. Stakeholders would need advance notice and consultations on the modalities of the operation of a paper trail so as to prepare their monitors on their use.

[100] The lack of any follow-up on the part of any of the applicants on this crucial aspect is significant. As from 26 February 2019, the ECN would have informed them that there would be no VVPAT in time for the elections. If the ECN were to have failed to advise parties of this when seeking clarification on this issue following its communication to the Minister and assessment, that would be another matter entirely. The fact that the ECN failed to apprise political parties and stakeholders (and the public) of the outcome of its submission to the Minister on 26 February 2019 serves to compromise its transparency. No reason is proffered by the ECN for this failure. There was however the absence of any approach to the ECN on this score by any of the applicants before 24 October 2019 when the first applicant states that he was disabused of the notion of VVPAT in the 2019 elections.

[101] Although the respondents did not raise this in their answering papers, it would certainly seem that this issue should have been raised with the ECN much more than a month before the election, given the assurances concerning consultations before the introduction of VVPAT and the absence of any further announcement by the ECN or the Minister on the subject. The applicants sat back at their peril in waiting until the very eve of the election before taking up this issue - a mere month before the holding of the elections. Plainly, parties seeking to challenge the conduct of an election are under a duty to act 'timeously ensuring that potential violations can be remedied by the granting of (an) interdict or other forms of relief'.⁴⁶

[102] This issue is raised as a factor in the exercise of this court's discretion as to further appropriate relief upon the granting of the declaratory relief. Whilst the applicants were not non-suited in their quest to set aside the determination upon the application of the delay rule in review proceedings, the lack of expedition and failure to raise the issue earlier are both factors to be taken into account in the exercise of the court's discretion to grant appropriate relief.

[103] Moreover, even after realising the absence of VVPAT, it took the first applicant until 13 November 2019 – more than three weeks - before launching his application to the Tribunal which it heard on 19 November 2019, with its ruling and reasons provided on 25 November 2019.

⁴⁶ Iain Currie and Johan de Waal *The Bill of Rights Handbook* 5 ed (2005) at 458.

[104] Whilst it is correct that the first applicant proceeded with the remedy contemplated by the Act to the correct forum (and thereafter sought to appeal against the ruling to the Electoral Court on the next day), this was the day before election day.

[105] The first applicant, whilst pursuing the remedies provided for in the Act, could also have done so far more expeditiously after becoming aware of the lack of a paper trail and not have waited more than three weeks before launching his application to the Tribunal, given the far reaching relief sought by him – of interdicting the elections. It would also appear from the reasons given by the Tribunal and the Electoral Court that the basis for challenging the absence of a verifiable paper trail was not raised as a breach of the constitutional principle of separation of powers by the Minister in the manner raised in these proceedings.

[106] We also take into account that the respondents did not place before us any evidence concerning the impact of any order of invalidity and its timing. It was open to them to do so but they chose not to do so.

[107] These are factors to be taken into account by this court in the exercise of its discretion concerning the appropriate remedy to be granted and the timing of its order of invalidity. They are also relevant in considering whether or not to grant consequential relief by declaring the election invalid and ordering a rerun of it. In the exercise of that discretion, we decline to set aside the election and order a rerun.

[108] This court in *CRAN*⁴⁷ delayed an order of invalidity where there had been a breach of separation of powers. As was stressed in *CRAN*, the rule of law dictates that care should be exercised so that the effect of an order of invalidity is not rendered meaningless.⁴⁸ That would not be the case where an order of invalidity is prospective to ensure that s 97 as a whole is adhered to or as a whole is not implemented until current EVMs are modified to produce a verifiable paper trail. A prospective order of invalidity vindicates the Constitution and ensures that future elections are held in accordance with what Parliament intended and in furtherance of the Constitutional principle that elections are not only free and fair but also transparent and credible.⁴⁹

[109] The order of invalidity of the Minister's determination should be effective upon the end of the current term of office of those elected in 2014 on 21 March 2020 and after those elected in the November 2019 elections are sworn in. It should also not affect the validity of further by-elections held under the Act subsequent to the 2019 elections until the date of invalidity.

[110] In view of the timing of the order of invalidity we have determined, it follows that the relief sought in prayer 4 (to set aside the ECN's adoption of voting by EVMs in the Presidential election) must be declined and would fall away. As we have

⁴⁷ Paras 104-106.

⁴⁸ In para 105.

⁴⁹ As has been found to be the position by the apex courts in India and Germany with regard to the need for a verifiable paper trail.

already stressed, the ECN proceeded on the basis of the validity of the s 209 determination as found by the High Court in *Maletzky*.

Costs

[111] Although the applicants have not succeeded in setting aside the Presidential election, they have vindicated their position concerning the invalidity of the Minister's determination. They have thus been partially successful in these proceedings. In exercising our discretion with regard to costs, we also take into account that the Minister in his determination failed in his duty to act in accordance with the fundamental constitutional principle of separation of powers and that the applicants were vindicated in asserting this fundamental constitutional principle. We also take into account that much of the argument directed to this court concerned that issue. Taking these factors into account, we consider that the applicants should receive a measure of their costs - set at two-thirds of their costs.

[112] Given the complexity and importance of this matter, the applicants' costs should include those consequent upon the engagement of two instructed counsel.

Order

[113] The following order is made:

- (a) The determination by the Minister that the provisions of s 97 of the Act were brought into force with the exception of s 97(3) and (4) on 17 October 2014 by Government Notice 208/2014 is in conflict with the Constitution and is invalid.

- (b) The aforesaid determination is set aside.
- (c) The aforesaid setting aside and order of invalidity will take effect on 21 March 2020 unless the determination by the Minister under s 209 is withdrawn by the Minister before such date in which event it will take effect upon the date of such withdrawal.
- (d) The validity of the election of office bearers elected under Act 5 of 2014 before 20 March 2020 and action taken by them is not affected by this order of invalidity.
- (e) The first to fourth respondents are jointly and severally ordered to pay two thirds of the applicants' costs, including the costs of one instructing legal practitioner and two instructed legal practitioners, the one paying the others to be absolved.

SHIVUTE CJ

MAINGA JA

SMUTS JA

HOFF JA

NKABINDE AJA

APPEARANCES

APPLICANTS:

J J Gauntlett SC QC (with him F B
Pelser)

Instructed by AngulaCo. Inc.,

1ST AND 2ND RESPONDENTS:

W R Mokhare SC (with him S
Akweenda)

Instructed by Government Attorney

3RD AND 4TH RESPONDENTS:

W R Mokhare (with him E Nekwaya)

Instructed by Government Attorney