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**
BERNARDUS SWARTBOOI	**Eight Respondent**
McHENRY VENAANI	**Ninth Respondent**
TANGENI IIJAMBO	**Tenth Respondent**
ESTER UTJIJUA MUINJANGUE	**Eleventh Respondent**
ALL PEOPLE'S PARTY	**Twelve Respondent**
CHRISTIAN DEMOCRATIC VOICE PARTY	**Thirteenth Respondent**
CONGRESS OF DEMOCRATES	**Fourteenth Respondent**
DEMOCRATIC PARTY OF NAMIBIA	**Fifteen 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 AFRICAN NATIONAL UNION OF NAMIBIA	**Twenty-Fifth Respondent**
SOUTH WEST AFRICAN PEOPLE'S ORGANISATION	**Twenty-Sixth Respondent**
UNITED DEMOCRATIC FRONT OF NAMIBIA	**Twenty-Seventh Respondent**
UNITED PEOPLE'S MOVEMENT	**Twenty-Eight Respondent**
WORKERS REVOLUTIONARY PARTY	**Twenty-Ninth Respondent**

Coram: FRANK AJA

Heard: **IN CHAMBERS**

Delivered: **10 September 2021**

Summary: This is a review of a taxation under the provisions of rule 25(3) of the rules of this court.

The matter involved an application in this court to challenge the result of a presidential election. After the matter was heard and judgment delivered, the matter was enrolled to be taxed by the Taxing Master. At the taxation, the applicants objected to each and every item in the bill of costs. It was contended on behalf of the applicants that the Supreme Court Rules do not provide a scale or tariff applicable to the unique s 172 applications and that due to the extraordinary nature of such applications coupled with the fact that a successful litigant should in principle be entitled to recover costs reasonably incurred, the High Court's taxation tariffs should have been applied by the Taxing Master. The Taxing Master's response was that the rules of this court provides for presidential election challenges to be taxed in accordance with the tariffs applicable in the Supreme Court. According to him this means it is not appropriate to use the High Court scale. The Taxing Master further maintains that he applied his mind to the nature of the matter and hence did

differentiate between instructed and instructing legal practitioners where the tariff did not provide for such distinction and thus did take into account the exceptional and complex nature of the process as well as the fact that it was dealt with on an urgent basis. According to the Taxing Master, the applicants in this matter cannot complain about the Supreme Court tariffs as they chose to institute proceedings in this court knowing that its tariffs were lower than that of the High Court.

The question on review is whether the nature of the proceedings should have moved the Taxing Master to move away from the tariffs provided for in the Supreme Court Rules and hence apply the High Court tariffs across the board.

Held that a court will not easily disturb a finding of the Taxing Master and will also not do so in a borderline case.

Held that review of the Taxing Master is not only available in terms of the common law grounds of review but will be afforded where the court is satisfied that a view the Taxing Master took was clearly wrong.

Held that the Taxing Master misdirected himself when he reasoned that the Supreme Court as a forum was chosen by the applicants and as such they should accept the tariff of fees applicable within this forum.

Held that the applicants were not correct to regard the whole process as exceptional or extraordinary and complex. All electoral challenges to any presidential election must be brought on this basis and therefore the process is on par with all applications insofar as the exchange of affidavits, discovery of documents and urgent applications are concerned.

Held that there was no basis to simply seek to apply the High Court tariffs across the board.

Held that the Taxing Master was entitled to tax the bill of costs based on the tariff of this court.

The application is dismissed.

REVIEW JUDGMENT IN TERMS OF RULE 25(3) OF THE SUPREME COURT OF NAMIBIA

FRANK AJA:

[1] This is a review of a taxation under the provisions of rule 25(3) of the rules of this court. Objection is raised to each and every item in the bill of costs on the following grounds:

> ‘1. To wit, we raised objection to each and every line item in the bill of costs as taxed, on the following basis:
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> 1.1 The scale supplied by the Supreme Court of Namibia, on which the bill of costs was taxed does not provide for the unique nature of a challenge to the presidential election, which is brought as an urgent, court managed application to the Supreme Court of Namibia as a Court of first instance, under section 172 of the Electoral Act 8 of 2009, and therefore an exceptional proceeding.
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> 1.2 The extraordinary nature of the issue at hand was raised at the taxation and accompanied by way of memo laying out submissions for the fact that, in the present, the rates of the High Court of Namibia would be a more just and appropriate scale for taxation.
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> 1.3 The taxing master did not apply his mind to the exceptional and complex, nature of the proceeding when taxing the matter or the urgency

thereof, and thereby failed to apply the guideline provided for in Annexure A, Section H, Note II of the rules of the Supreme Court of Namibia.

1.4 The taxing master did not apply his mind with regards to disbursements incurred by [the plaintiff] by way of two instructed counsel. The taxing master refused to consider the special, complex and urgent circumstances of the case, or the consequent need for specialist counsel in the matter, and instead applied the same fee to junior and senior counsel that is used for all matters in the supreme court.

2. Kindly take notice that the Applicants hereby give notice in terms of rule 25(3) of the rules of the Supreme Court of Namibia, requiring the taxing master to state a case to the parties for the consideration of a judge.'

[2] As is evident from the objections quoted above the matter involved an application in this court to challenge the result of a presidential election.

[3] The Taxing Master's response is that the rules of this court provides for presidential election challenges to be taxed in accordance with the tariffs applicable in the Supreme Court. According to him this means it is not appropriate to use the High Court scale. The Taxing Master further maintains that he applied his mind to the nature of the matter and hence did differentiate between instructed and instructing legal practitioners where the tariff did not provide for such distinction and thus did take into account the exceptional and complex nature of the process as well as the fact that it was dealt with on an urgent basis. According to the Taxing Master the applicants in this matter cannot complain about the Supreme Court tariff as they chose to institute proceedings in this court knowing that its tariffs were lower than that of the High Court.

[4] When it comes to the challenges to the presidential elections, the Electoral Act[1] (the Act) provides that such challenges must be 'directed to' and 'adjudicated by' the Supreme Court as 'a Court of first instance and final recourse'. In addition such challenges must be dealt with on an urgent basis. Prior to the promulgation of the Electoral Act such challenges were initiated in the High Court from where an appeal lied to the Supreme Court. This change to direct that such challenges be dealt with by the Supreme Court from the outset was clearly brought about to determine such challenges speedily and finally.

[5] The Act also provides for rules to be made regulating electoral challenges in presidential elections in the Supreme Court.[2] The current rules in this regard were published in GN 118 of 2015 per Government Gazette No. 5761 of 17 June 2015 (Special Rules). Rule 16 provides for taxation of bills by the registrar of this court as Taxing Master. Rule 17 makes the tariff of fees of this court applicable and rule 18 provides that the costs recoverable 'must be the same as those recoverable in respect of the Rules of the Supreme Court'.[3]

[6] The special rules refer to the Rules of the Supreme Court (the ordinary rules) by way of reference to the specific numbering used in the ordinary rules applicable in 2015. The current ordinary rules came into operation per Government Notice 249 published in the Government Gazette of 29 September 2017. The current ordinary

[1] Section 172 of Act 5 of 2014.
[2] Section 172(3) of the Electoral Act.
[3] Rule 18.

rules relating to costs corresponding to those mentioned in the rules relating to presidential elections are rules 25 (taxation and costs), 26 (legal practitioner's fees), 27 (fees of the court) and 28(c) (tariffs and fees payable in respect of process).

[7] In short, the rules relating to presidential challenges expressly stipulates that taxation in such challenges are to be dealt with in terms of the applicable Supreme Court Rules and tariffs.

[8] It was submitted on behalf of the applicants that the Supreme Court Rules do not provide a scale or tariff applicable to the unique s 172 applications and that due to the extraordinary nature of such applications coupled with the fact that a successful litigant should in principle be entitled to recover costs reasonably incurred, that the High Court's taxation tariffs should have been applied by the Taxing Master. As is evident from the grounds of objections quoted above, into the mix of considerations, one must add the exceptional and complex nature of the proceedings which must be brought on an urgent basis. According to applicants, the Taxing Master was entitled and indeed in the circumstances, obliged to rely on a note to Annexure A of the Supreme Court tariffs which provide as follows:

> 'The taxing master is entitled in his or her discretion at any time to depart from any of the provisions of the tariff in extraordinary or exceptional circumstances where the strict execution thereof will be unjust, and in this regard must take into account the time necessarily taken, the complexity of the matter, the nature of the subject-matter in dispute, the amount in dispute and any other factors he or she considers relevant.'[4]

[4] Note II of Annexure A.

[9] A court will not easily disturb a finding of the Taxing Master and will also not do so in a borderline case. However a review of the Taxing Master is not only available in terms of the common law grounds of review but will be afforded where the court is satisfied that a view the Taxing Master took was clearly wrong. However, the matter must be more than a mere disagreement before the court will intervene.[5]

[10] The Taxing Master did misdirect himself when he stated that as the applicants chose to institute action in the Supreme Court they cannot complain that the Supreme Court tariffs are applicable. As is evident from what is stated above, the applicants had no choice. The Electoral Act compelled them to launch their application in the Supreme Court. This consideration was thus not relevant to the issue at hand.

[11] The only question remaining was thus whether the nature of the proceedings should have moved the Taxing Master to move away from the tariffs provided for in the Supreme Court Rules and hence apply the High Court tariffs across the board as submitted by applicants.

[12] Section 172 of the Act provides for electoral challenges and for rules to be issued uniquely in respect of such challenges or applications. These rules where there is a reference to the tariff of fees applicable thus is exclusive to presidential challenges. The applicants' stance to the contrary is thus not correct. As far as rules

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[5] *Legal and General Assurance Society Ltd v Lieberum, NO & another* 1968 (1) SA 473 (A) at 478, *Mahomed v Bezuidenhout & others* 1948 (4) SA 369 (T) at 372, *Schoeman v Phoenix Assurance Co Ltd and The Taxing Master* 1963 (3) SA 742 (E) and *Afshani & another v Vaatz* 2007 (2) NR 381 (SC).

are concerned, the Supreme Court tariffs should, as a general rule, apply and the qualifying note mentioned above operates as an exception to the general rule.

[13] It is also, in my view, not correct to regard the whole process as exceptional or extraordinary and complex. All electoral challenges to any presidential election must be brought on this basis. The procedure is thus the usual one for such applications. Furthermore, the process is on par with all applications insofar as the exchange of affidavits, discovery of documents and urgent applications are concerned. As far as the process is concerned it is an application in the usual style and form which is brought in the Supreme Court instead of the High Court.[6]

[14] The applicants' contention that the 'issue at hand' was of an extraordinary nature is in my view likewise not correct. The objection does not specify which issue is referred to as there were more than one issue as is evident from the judgment. If the issue referred to was the central issue on the merits, namely the legality of the use of voting machines without a paper trail then the issue is one, in my view, that is not in terms of the general principles applied to determine it, one that can be described as an extraordinary or exceptional in terms of the process of the law compared to the cases normally adjudicated in the Supreme Court.[7]

[15] The Taxing Master points out that in differentiating between counsel employed, he relied on the exception created by the general note to provide for different fees in

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[6] See *Bradshaw v Florida Twin Estates (Pty) Ltd* 1973 (3) SA 315 (D) at 317E-318A and the approach there taken in a contractual context.
[7] *City Deep Ltd v Johannesburg City Council* 1973 (2) SA 109 (W) at 118G-119C.

respect of instructing and instructed counsel. I can only assume that the problem here is that the High Court Rules would have provided for higher rates or tariffs.

[16] The fact that the High Court Rules provide for higher rates than the Supreme Court is an anomaly that should be addressed by an amendment to the rules but does not mean that the rules must be disregarded. If the tariffs become so outdated as to be totally unreasonable this may be a factor for the Taxing Master to consider the position as extraordinary or exceptional and to disregard the tariff.[8] It should be pointed out in passing that in my view there was no basis to simply seek to apply the High Court tariffs across the board. The duty of the Taxing Master is to deal with the bill of costs item for item and where the applicants felt there were extraordinary or exceptional circumstances and the Taxing Master agreed then a reasonable amount (and not necessarily the tariff of the High Court) should be allowed by the Taxing Master. To simply seek to *holis bolis* seek to replace the Supreme Court tariffs with that of the High Court would be to elevate the exceptional to the rule and render the rule obsolete. That, in my view was not justified in the present matter.

[17] The applicants' contention that the matter was a first in Namibia and of national importance does not advance their stance. All election challenges are of national importance and I am not sure what is meant by the reference to a first in Namibia. There has been electoral challenges before this one and if the reference is to the grounds for the challenge, I have already indicated that the grounds were not extraordinary in the sense that it was more complex than many of the issues that

[8] *Van Der Westhuizen v Coetzee* 1968 (1) SA 249 (C) at 251.

arise in the ordinary course in the Supreme Court. To, in their rule 25(3) notice, refer to specific items by way of example of to justify why higher tariffs than those provided for should have been awarded cannot assist the applicants in their case that the High Court writ should have been applied across the board. If they had raised objections on a question basis in respect of the items they now refer to as examples these may have been merit in all or some of those items being taxed on a reasonable writ that is higher than the prescribed tariff. This, however, was not their case.

[18] It follows from the aforegoing that despite the misdirection on the part of the Taxing Master as to the choice of the Supreme Court as forum there is, in my view, no basis for the approach by the applicants that the matter was of such a nature that the Taxing Master had to exercise his discretion pursuant to Note II of Annexure A of the Supreme Rules to tax the bill of costs on the basis of the High Court tariffs. The Taxing Master was thus entitled to tax the bill of costs based on the tariff of this court.

[19] The application is thus dismissed with costs.

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FRANK AJA

APPEARANCES

APPLICANTS:	E N Angula
	Of AngulaCo. Inc, Windhoek
RESPONDENT:	N Tjahikika
	Of Government Attorney