



REPORTABLE

CASE NO: SA 59/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

POPULAR DEMOCRATIC MOVEMENT & 6 OTHERS

Appellants

and

**CHAIRPERSON OF THE ELECTORAL COMMISSION
OF NAMIBIA & 23 OTHERS**

**First to twenty-third
Respondents**

and

CASE NO: SA 65/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ELECTORAL COMMISSION OF NAMIBIA

Appellant

and

CHARMAINE TJIRARE & 27 OTHERS

**First to twenty-
seventh Respondents**

Coram: SHIVUTE CJ, DAMASEB DCJ and FRANK AJA

Heard: 25 March 2022

Delivered: 30 May 2022

Summary: The Popular Democratic Movement (PDM), a political party, supplied a list of candidates to the Electoral Commission of Namibia (the ECN) in terms of s 77 of the Electoral Act 5 of 2014 (the Act). PDM forwarded its list to the ECN and the latter pointed out to PDM that some of the persons on the election list did not qualify to be included on the said list as they were either 'remunerated members of the public service' or members of the 'National Council, Regional Councils or Local Authorities'. PDM then submitted a new election list on which the candidates objected to by the ECN were removed and replaced by candidates who were not disqualified from becoming members of the National Assembly. This latter election list was then published in the *Gazette* pursuant to s 78 of the Act. The result of the election was that PDM became entitled to appoint 16 members to the National Assembly. PDM then reverted to their original election list which it provided to the ECN for the purpose of the publication of the results of the election of the newly elected members of the National Assembly. When it became clear that PDM would revert to its original list for purposes of the swearing-in ceremony, two of the PDM candidates who appeared on the gazetted election list (ie 30th and 31st respondents) approached the Electoral Court on an urgent basis to compel PDM to adhere to the list published by the ECN. In the meantime, the swearing-in ceremony went ahead and the urgent application was amended to also include a declaratory order to the effect that the gazetted list had to be adhered to and that the swearing-in of the specific members (who had to be removed from the initial list) was 'unconstitutional, unlawful and therefore null and void'. The application was opposed by PDM and the ECN, both of which maintained that Schedule 4 of the Namibian Constitution allows a political party the freedom to 'choose in its own discretion which persons to nominate as members of the National Assembly to fill the said seats'. PDM also raised the jurisdiction point in terms of s 170(2) of the Act, in that the Electoral Court did not have jurisdiction because the said

section provides that the Electoral Court 'must conclusively determine post-election matters seven days before the swearing-in' of a potential member of the National Assembly. The Electoral Court dismissed PDM's jurisdiction point and granted the relief sought by 30th and 31st respondents. These appeals are challenging the decision of the Electoral Court.

Held that, the application of s 170(2) in the manner submitted on behalf of PDM could lead to injustice.

Held that, the litigants in the Electoral Court are left to the mercy of the court processes, which are designed with the objective of fairness to the parties involved, and hence do not control these processes which are left to the chairperson of the Electoral Court.

Held that, the Electoral Court ensures that justice is done to the parties in respect of election disputes before it, both in respect of fairness of its process and in respect of the thoroughness of its judgments and on rare occasions, as it happened in the present matter, it will simply be impossible for the Electoral Court to adhere to the deadlines set in s 170(2).

Held that, the legislature could not have intended to deny persons their rights where it is impossible, due to factors completely outside the control of such aggrieved persons, to comply with s 170(2); *lex non cogit impossibilia*.

Held that, whereas it is clear that what is intended by the creation of the Electoral Court was to expedite an authoritative ruling at an early stage that would probably be the final say in respect of the vast majority of disputes, it would not prevent an aggrieved party from approaching the Supreme Court which by necessity would make the final decision on the matter beyond the time limit contemplated in the Act. It thus follows that the objective was to finalise as many disputes as possible prior to the

swearing-in ceremony and not to eliminate all disputes by the time of the swearing-in ceremony.

Held that, the court *a quo* correctly dismissed PDM's submissions to the effect that the Electoral Court lacked jurisdiction to hear the matter before it based on s 170(2) of the Act.

Held that, political parties are free to nominate anyone who is not disqualified from becoming a member of the National Assembly by Art 46 of the Constitution for an appointment to the National Assembly and this list of nominees must be finalised a day prior to the polling as effect will have to be given to the appointment of members to the National Assembly once the results of the election are announced.

Held that, should a person on the election list of a political party in the meantime die, become incapacitated, is found to be disqualified as a member of the National Assembly or is expelled from the political party which made the nomination, such person's name on the list will be regarded as *pro non scripto*.

It is thus held that, the conclusion reached by the Electoral Court that PDM was not entitled to change their election list subsequent to the election is correct.

Held that, insofar as the invalidly appointed members participated in the work of the National Assembly the effect of this participation, insofar as it concerns the internal procedures of the National Assembly, is of no concern to the court and it is only if the effect is such that the National Assembly acted unconstitutionally or contrary to some Act binding on it that a court will be entitled to interfere.

Held that, the courts must respect the separation of powers enshrined in the Constitution and should not interfere in the processes of other branches of government unless mandated to do this in the limited circumstances mentioned in the judgment. As far as the effect of the invalidly appointed members' participation in the

work of the National Assembly is concerned, this is a matter between those members and the National Assembly and that this episode may be an opportune time to address this issue in general along the lines of the House of Commons Disqualification Act 1975 of the United Kingdom instead of dealing with it in an *ad hoc* manner.

The appeals are dismissed with costs, inclusive of the costs of one instructing and two instructed legal practitioners where engaged.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and DAMASEB DCJ concurring):

Introduction

[1] In terms of s 77 of the Electoral Act 5 of 2014 (the Act) a political party which intends to participate in the elections for members of the National Assembly must provide a list of 'at least 32 members but not more than 96 candidates with a view to the filling of any seats' to which such party may become entitled to after the results of such elections have been determined.

[2] The said list must be presented to the Electoral Commission of Namibia (ECN) by a date proclaimed by the ECN in the *Gazette*.

[3] The Popular Democratic Movement (PDM) is a political party that participated in the 2020 elections and hence had to supply its list of candidates to the ECN which it did. For the reason that will become apparent below, I refer to this list or to such lists as the election list or lists.

[4] When PDM forwarded its election list to the ECN, the latter pointed out to PDM that some of the persons mentioned on the election list did not qualify to be included on the said list as they were either 'remunerated members of the public service' or members of the 'National Council, Regional Councils or Local Authorities.'¹

[5] PDM in response submitted a new election list in which the candidates objected to were removed and replaced by candidates who were not disqualified from becoming members of the National Assembly. This latter election list was then published in the *Gazette* pursuant to s 78 of the Act.

[6] The result of the election was such that PDM became entitled to appoint 16 members to the National Assembly. PDM then reverted to their original election list and provided it to the ECN for the purpose of the publicising of the results of the election of the newly elected members of the National Assembly. I can only assume that the persons on the initial list of PDM, when it became clear after the elections that they would be entitled to seats in the National Assembly, but for their disqualifications, decided to resign from the positions that disqualified them from becoming members of the National Assembly.

[7] When it became clear that PDM would revert to its original election list for the purpose of the said swearing-in ceremony, two of the candidates who appeared on the gazetted election list (30th and 31st respondents) approached the Electoral Court

¹ Article 47(1)(e) and (f) of the Namibian Constitution read with s 77 (4)(a) of the Act.

on an urgent application to compel PDM to adhere to the list published by the ECN. Due to circumstances, the swearing-in ceremony went ahead and the application was amended to also include a declaratory order to the effect that the gazetted list had to be adhered to and that the swearing-in of the specific members (who had to be removed from the initial list) was 'unconstitutional, unlawful and therefore null and void'.

[8] Both PDM and ECN opposed the application, essentially maintaining that Schedule 4 to the Constitution allows a political party the freedom to 'choose in its own discretion which persons to nominate as members of the National Assembly to fill the said seats'. In the case of the ECN, its stance was backed up by the opinions of two eminent South African lawyers.

[9] A question relating to the jurisdiction of the Electoral Court was also raised *in initio* by PDM. This arose from the provisions of s 170(2) of the Act which states that the Electoral Court 'must conclusively determine post-election matters seven days before the swearing-in' of a potential member of the National Assembly. The stance of PDM was that as the application could only be finalised subsequent to the swearing-in ceremony, the Electoral Court did not have jurisdiction to hear the matter.

[10] The Electoral Court dismissed the challenge to its jurisdiction and granted the relief sought by the two applicants. Both PDM and ECN filed notices of appeal against the judgment of the Electoral Court. As the record is the same in respect of both appeals and as the same issues also arise on the merits in both appeals, these

appeals were heard together. For the purpose of convenience, I refer to the parties in this matter as they are cited in PDM's appeal. The judgment however is in respect of both the appeals (ie PDM's (SA 59/2020) and ECN's (SA 65/2020)).

The Electoral Court

[11] The Electoral Court is a division of the High Court in respect of the exercise of the powers granted to it by the Act. As it is presided over by three judges of the High Court, its decisions are effectively those of a full bench of the High Court.²

[12] The powers of the Electoral Court are essentially related to disputes arising between parties during the run-up, conducting of and subsequent to the election and the processes involved in the holding of elections.³

[13] It is important for disputes relating to elections to be dealt with expeditiously so that election processes are not delayed and so that the results thereof can be finalised so as to ascertain who are to represent the parties in the National Assembly. It is in this context that s 170(2) of the Act provides as follows:

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

[14] In the present matter, the swearing-in ceremony of the members of the National Assembly took place on 20 March 2020. The application in the Electoral

² Section 167 of the Act.

³ Section 168 of the Act.

Court, although the pleadings were finalised earlier, was only heard on 24 June 2020. There does not appear to be any dispute that because of the time frame involved it would have been impossible for the Electoral Court to hear the matter in accordance with the deadline provided for in s 170(2) of the Act.

[15] Should the submissions on behalf of PDM be accepted, it would mean that an aggrieved person would have no remedy to address any unlawful action against him or her in an election related matter taken at any time prior to, but so near in time to the swearing-in ceremony, that it is impossible for the Electoral Court to abide by s 170(2). In other words, a statutory indemnity would apply to unlawful acts relating to elections perpetrated in the seven days prior to the swearing-in of office bearers. This would mean that the section instead of reinforcing rights, is taking away any remedy that may have been available otherwise. Clearly, such person would not be allowed to approach the High Court as the Electoral Court was specifically created for these kind of disputes. It in any event would make no sense to require persons in these circumstances to approach the High Court (constituted by a single judge) when the Electoral Court is essentially a full bench of the High Court. It is obvious that an application of s 170(2) in the manner submitted on behalf of PDM could lead to injustice. It must also be borne in mind that the litigants in the Electoral Court are, to a large extent, left to the mercy of the court processes, which are designed with the objective of fairness to the parties involved, and hence do not control these processes which are left to the chairperson of the Electoral Court.⁴ The Electoral Court itself must ensure that justice is done to the parties in respect of election disputes before it,

⁴ Section 169(1) of the Act.

both in respect of fairness of its process and in respect of the thoroughness of its judgments. On rare occasions, as happened in the present matter, it will simply be impossible for the Electoral Court to adhere to the deadlines set in s 170(2). Surely, the legislature could not have intended to deny persons their rights where it is impossible, due to factors completely outside the control of such aggrieved persons, to comply with s 170(2); *lex non cogit impossibilia*. Lastly, whereas it is clear that what is intended by the creation of the Electoral Court was to expedite an authoritative ruling at an early stage that would probably be the final say in respect of the vast majority of disputes, it would not prevent an aggrieved party to approach this court which by necessity would make the final decision on the matter beyond the time limit contemplated in the Act. It follows that the objective was to finalise as many disputes as possible prior to the swearing-in ceremony and not to eliminate all disputes by the time of the swearing-in ceremony.

[16] The court *a quo* in a thorough and well-reasoned judgment took into account virtually all the indicators mentioned above and with reference to both South African⁵ and Namibian authorities⁶ concluded that the section was directory and not peremptory and hence did not affect its jurisdiction to hear the matter. Of particular relevance is the extract from *Torbitt & others v International University of Management*⁷ which was as follows:

‘Where a statutory duty is imposed on a public body or public officers—

⁵ *Sutter v Scheepers* 1932 AD 165 at 173-174.

⁶ *Torbitt & others v International University of Management* 2017 (2) NR 323 (SC).

⁷ *Ibid* para 36.

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

[17] I am thus of the view that PDM’s submissions to the effect that the Electoral Court lacked the jurisdiction to hear the matter before it based on the provisions of s 170(2) of the Act were correctly dismissed by that court.

Immutability or otherwise of an election list pursuant to s 78 of the Act

[18] Before I deal with the issue of the finality or otherwise of election lists, it is necessary to create some clarity in this regard. This is so because there appears to be some confusion created by the use of the phrase ‘party lists’. Article 49 of the Constitution provides for the elections to be ‘on party lists’ and in compliance with the principles set out in Schedule 4 of the Constitution. It is clear when Art 49 is read with Schedule 4 of the Act that this is a reference to a list of political parties that must appear on the ballot paper. In other words, a voter will receive a ballot paper with a list of political parties on it and he or she will have to elect between those political parties for the purposes of his or her ballot.

[19] The only other list evident from the Constitution is to be found in Art 48(2) which provides that where there arises a vacancy in the National Assembly ‘. . . the political party which nominated such member to sit in the National Assembly shall be

entitled to fill the vacancy by nominating any person on the party's election list compiled for the previous general election . . . '.

[20] This appeal turns around the composition of the mentioned 'election list' and not the party list as envisaged in the Constitution. Hence my reference to election list or lists. The confusion between the two lists is also apparent from the Act where ss 77 and 78 in their heading refer to 'party lists' where it is clear from their contents that they deal with the 'election lists'. This confusion unfortunately also permeates the definition of 'party lists' in s 1 of the Act.

[21] Article 46(1)(a) of the Constitution provides in respect of the composition of the National Assembly that its 'members (are) to be elected by direct and secret ballot'. Article 46(2) of the Constitution provides that the members of the National Assembly shall be elected in accordance with the procedures to be determined by Act of Parliament. The Electoral Act is this Act. Whereas Art 46 of the Constitution may create the impression that the members of the National Assembly are to be voted for individually in their personal capacities this is not the case.

[22] Schedule 4 of the Constitution spells out the position in more detail. It is clear that the elections are to be contested by parties and that votes are to be cast in favour of a preferred registered political party. The participating parties to an election are then, on the basis of proportional representation, allocated the number of seats based on the proportion of their votes. Thus, if the party obtains 50 per cent of the votes they may appoint 50 per cent of the members of the National Assembly. The

appointment of persons to the National Assembly based on the proportion of votes obtained by a political party is stated as follows in para 4 of Schedule 4 of the Constitution (I quote only the portion relevant to this matter):

‘Subject to the requirement pertaining to the qualification of members of the National Assembly, a political party which qualifies for seats (in the National Assembly) . . . shall be free to choose in its own discretion which persons to nominate as members of the National Assembly to fill the said seats.’

[23] As mentioned in the introduction above, s 77 requires the political party to provide the ECN with a list of at least 32 candidates for members of the National Assembly and these candidates must qualify to become such members. Furthermore, a copy of the lists of candidates must be kept at the offices of the ECN and at such other places as the ECN may require, where it will be open for public inspection.

[24] Once the election lists from all participating parties have been received, the ECN must publish a notice in the *Gazette* which must, among others:

- (a) set out the list of candidates of each political party as drawn up by such party;
- (b) declare that the persons on such list ‘have been duly nominated as candidates of the political party concerned for the election’.⁸

⁸ Section 78(1).

[25] Pursuant to s 78(2) a political party may withdraw the candidature of any person on its election list at any time prior to the polling day in which event the ECN must publish an amendment to such party's list.

[26] When the election results are announced in terms of s 110 of the Act, the Chief Electoral Officer must announce, among others, the number of seats that each political party is entitled to fill and declare 'the candidates on the list of candidates of each political party'⁹ that qualifies according to their ranking on that list 'to be duly elected as members of the National Assembly . . .'.¹⁰

[27] The stance of PDM and that of the ECN is to emphasise the wording in Schedule 4 to the Constitution to the effect that a political party 'shall be free to choose in its own discretion which persons to nominate as members of the National Assembly . . .'. The stance on behalf of the relevant respondents is to focus on the language of Art 46 of the Constitution which seems to focus on the 'members' of the National Assembly who are stated to be elected by a 'direct' vote and who are elsewhere in the Constitution referred to as 'freely elected representatives of the people' and to couple this with the publication of the election lists which according to the submission gives effect to the phrases in the Constitution as the lists inform and influence the electorate in their choice of parties. Thus, a change in the list post the polling day cannot be countenanced in the Act.

⁹ Section 110(3)(a)(i) of the Act.

¹⁰ Section 110(3)(b) of the Act.

[28] I intend no disrespect to the legal practitioners representing the respective parties, but in my view it is not necessary to attempt to distil the essence of our electoral system as either being the political party or the individual members to fill the seats of the National Assembly. This is because I find no difficulty in the interpretation of the Act if read with the Constitution.

[29] In fact the balance clearly favours the political party as the focal point if regard is had to schedule 4 of the Constitution. This does not mean that persons on the election list are of no moment. Once a person on the election list takes up a seat in the National Assembly, he or she can only be removed as such member in the circumstances prescribed in Art 48 of the Constitution and not at the discretion of the political party on whose election list he or she appeared. Furthermore, even a person who was on the election list of a political party but did not become a member of the National Assembly due to the fact that the political party involved did not obtain sufficient seats, remains eligible for appointment to the National Assembly should a vacancy arise in respect of seats allocated to such a party. By virtue of the fact that he or she featured 'on the party's election list compiled for the previous general election . . .'.¹¹

[30] Article 49 of the Constitution stipulates that elections for the members of the National Assembly shall be conducted on the basis of party lists and in accordance with the principles of proportional representation as set out in Schedule 4 of the Constitution. From this it is clear the electorate will have a choice between the

¹¹ Article 48(2).

registered political parties participating in the election. Article 46(2) of the Constitution provides that subject to the principles set out in Art 49, the members of the National Assembly are to be elected in accordance with the procedures to be determined by an Act of Parliament. As pointed out above this is the Electoral Act.

[31] The Act sets out no requirements when it comes to the manner in which a political party must nominate its candidates for seats in the National Assembly. This is left to the political parties and is in line with Schedule 4 of the Constitution. It simply provides for a list of such candidates by a certain date which can be changed up to the date prior to the polling day and in line with Art 46, provides for the disqualification of persons on such list who would also be disqualified from becoming members of the National Assembly. It thus does not fetter the discretion of a political party at all to 'freely choose in its own discretion' which persons to 'nominate as members of the National Assembly to fill' the seats allocated to such party. What it does is set a deadline by when this decision is to be made, ie by latest the day prior to polling day. That this date is a deadline is clear from s 110(3)(a)(iv) and(b) which compels the Chief Electoral Officer to declare these members on the election list of any party who according to their ranking would qualify for the seats allocated to such party as 'duly elected members of the National Assembly . . . '.

[32] The Act is clear. Political parties are free to nominate anyone who is not disqualified from becoming a member of the National Assembly by Art 46 of the Constitution for an appointment to the National Assembly and this list of nominees must be finalised a day prior to the polling as effect will have to be given to the

appointment of members to the National Assembly once the results of the election are announced. Should a person on the election list of a political party in the meantime die, become incapacitated, is found to be disqualified as a member of the National Assembly or is expelled from the political party which made the nomination, such person's name on the list will be regarded as *pro non scripto*.¹² In other words, it is clear that the only thing that the Act does is to set a deadline for the registered political parties to provide their respective list of candidates for seats in the National Assembly. It does not interfere at all with their choice as to who to put on the list.

[33] Although Art 48(2) of the Constitution only obliquely refers to the election list, it is clear that this list must be compiled for the purpose of an election. This is, at least indicative of something that must be done prior to an election and not after the election or for purposes of the announcement of the results or the swearing-in ceremony. This reinforces the finding that, a deadline for the completion of the election lists as determined in the Act is only a procedural issue that the Act addresses.

[34] It follows that, I agree with the conclusion reached by the Electoral Court that PDM was not entitled to change their election list subsequent to the election.

Condonation application

¹² Section 110(4) of the Act.

[35] As a result of the non-compliance with certain rules of this court, both the appeals lapsed but both PDM and the ECN sought condonation for their non-compliance with the rules and consequently the reinstatement of their appeals.

[36] In general terms in condonation and reinstatement applications the court considers the reasons for non-compliance together with the prospects of success in coming to its decision. When the non-compliance is flagrant or evidences an intentional disregard of the rules, the court may refuse the application without consideration of the prospects of success. Conversely, an eminently reasonable explanation where there is no prospects of success on the merits will also lead to the dismissal of such an application. Apart from these two extreme positions, there are some interplay between the reasons for the non-compliance and the prospects of success on the merits. Thus, good prospects of success may make up for unsatisfactory aspects relating to the reasons for the non-compliance. The above considerations appear from the numerous decisions of this court and it is not necessary for the purpose of the present appeals to go into these aspects in more detail.¹³

[37] The non-compliance in the appeals relates to the record not being timeously filed and certain other steps in the prosecution of the appeals such as the late filing of the power of attorney, the late furnishing of security and the non-compliance with rule 11(10). There was no suggestion that these failures were either flagrant or indicative

¹³ See eg *Telecom Namibia Ltd v Nangolo & others* 2015 (2) NR 510 (SC), *Felisberto v Meyer* (SA 33/2014) [2017] NASC (12 April 2017), *Metropolitan v Nangolo* (CA 03/2015) [2017] NAHCNLD 02 (30 January 2017) and *Minister of Health and Social Services v Amakali* 2019 (1) NR 262 (SC).

of an intentional conduct or even a deliberate strategy to delay the appeal. The legal practitioner for the respondents conceded that this was not a case where the condonation applications could be determined without reference to the prospects of success.

[38] In fact all the parties were of the view that the prospects of success should be determinative of the condonation applications in view of the public importance of the issues involved. This is so because it deals with the powers of the ECN in conducting elections and the interplay between the Act and the Constitution which need to be clarified so that certainty can exist in respect of the conduct of future elections. The public importance of an appeal is a factor relevant to the consideration of condonation applications and can sway a court one way or the other.¹⁴

[39] As is evident from the discussion of the issues raised on the merits above, the appellants had a clearly arguable case to be made on appeal and the appeals could not be said to be without prospects on the merits. Further, it is correct that it is of public importance to deal with the issues as they affect the conduct of elections in this county which is a pivotal part of our democracy. In these circumstances, the applications for condonation and reinstatement are granted. As this is an indulgence granted to the appellants and there was no unreasonable opposition to the applications, no order of costs will be granted in respect of these applications.

Conclusion

¹⁴ *Joseph & others v Joseph* 2020 (3) NR 689 (SC) para 15, *Road Fund Administration v Skorpion Mining Company (Pty) Ltd* 2018 (3) NR 829 (SC) para 2.

[40] The Electoral Court granted its order in general terms, namely setting aside the official announcement of the members elected to the National Assembly on behalf of PDM in respect of the six members who did not feature on the gazetted list and declaring their swearing-in as members of the National Assembly unconstitutional, unlawful and therefore null and void, and ordered the ECN to make a new announcement to the effect that the six persons on the election list published in the *Gazette* by the ECN to be declared elected to the National Assembly with effect from 20 March 2020.

[41] In view of the facts that the 'new' members who are to take up the seats in the National Assembly did not act as members of that body nor performed any services in such capacity in respect of that body and because the full consequences of the order were not apparent from the facts placed before the Electoral Court, I am of the view that although the appeal should be dismissed, the order of the Electoral Court should be narrowed down so as to address the current reality. I point out in passing that insofar as the invalidly appointed members participated in the work of the National Assembly, the effect of this participation, insofar as it concerns the internal procedures of the National Assembly, is of no concern to the court and it is only if the effect is such that the National Assembly acted unconstitutionally or contrary to some Act binding on it that a court will be entitled to interfere. This is so because the courts must respect the separation of powers enshrined in the Constitution and should not interfere in the processes of other branches of government unless mandated to do this in the limited circumstances mentioned above.¹⁵ As far as the effect between the

¹⁵ *Swartbooi v The Speaker of the National Assembly* (SA 38/2021) [2021] NASC (4 August 2021) paras 22 and 23 and s 21 of the Powers, Privileges and Immunities Act 17 of 1996.

invalidly appointed members and the National Assembly is concerned in respect of personal benefits granted to such appointees, such as remuneration, allowances, perks and privileges, it is for the National Assembly to decide to what extent, if any, it will enforce any legal remedies that may be open to it. It may also be an opportune time for the National Assembly to address this issue in general along the lines of the House of Commons Disqualification Act 1975 of the United Kingdom instead of dealing with it in an *ad hoc* manner.¹⁶

[42] Whereas it is correct that in an indirect way all unlawful acts are unconstitutional as they negate the principles of legality, I am of the view that the swearing-in in the present matter cannot be regarded as unconstitutional. The acceptance of the nominations by PDM of the six persons not on the published election list was contrary to the Act. I cannot see on what basis this can be stated to be unconstitutional in the narrow sense. PDM nominated them and in constitutional terms, that is what is envisaged. PDM was thus not prejudiced in terms of the number of seats it could occupy in the National Assembly. The same applies to the declaration of those members as duly elected to the National Assembly. The Act prohibited their nomination at such late stage and the nominations were thus accordingly invalid. The Constitution is simply the background to the Act.

Order

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

¹⁶ *Halsbury's Laws of England* 4 ed paras 1106 and 1116.

- (a) The non-compliances with the rules of this court is condoned in respect of both appeals (SA 59/2020 and SA 65/2020) and the appeals are hereby reinstated.
- (b) Both appeals are dismissed with costs inclusive of the costs of one instructing and two instructed legal practitioners where engaged.
- (c) The order of the Electoral Court is set aside and the following order is substituted for it:
- ‘(i) The Applicants’ non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 5(22) of the Rules of Court.
- (ii) The announcement of the declaration by the Chairperson of the Electoral Commission of Namibia published by way of Government Notice 86 of 2020 in Government *Gazette* No. 7149 of 18 March 2020, is hereby reviewed and set aside insofar as concerns the following persons:

Esmeralda Esme !Aebes

Johannes Martin

Kazeongere Zeripi Tjeundo

Godfrey Kupuzo Mwilima

Timotheus Sydney Shihumbu

Pieter Mostert

- (iii) The swearing-in as members of the National Assembly of the persons mentioned in para (ii) above, is declared unlawful, invalid and set aside.

- (iv) The persons mentioned in para (ii) above are ordered to immediately vacate their seats in the National Assembly.

- (v) The Chairperson of the Electoral Commission of Namibia is hereby directed to announce a declaration as contemplated by the provisions of section 110(3)(b)(i) of the Electoral Act 5 of 2014, that the following persons are duly elected members of the National Assembly, pursuant to the general election held in November 2019, namely:

Frans Bertolini

Charmaine Tjirare

Yvette Areas

Tjekupe Maximilliant Katjimune

Raymond Reginald Diergaardt

Mike Rapuikua Venaani

- (vi) The persons mentioned in para (v) above are to be sworn-in as members of the National Assembly with immediate effect.
- (vii) It is declared that the Electoral Commission of Namibia has no power in terms of the Electoral Act 5 of 2014, to alter or amend lists gazetted in terms of s 78 of the Act, on and subsequent to polling day except in the circumstances contemplated in s 110(4) of the Act.
- (viii) There is no order as to costs.
- (ix) The Registrar of this Court is directed to serve the copy of this judgment on the Speaker of the National Assembly.
- (x) The matter is removed from the roll and is regarded as finalised.'

FRANK AJA

SHIVUTE CJ

DAMASEB DCJ

APPEARANCES:

FIRST to SEVENTH APPELLANTS:	J M Marais SC (with him N Bassingthwaighte) Instructed by Theunissen, Louw & Partners
FIRST, THIRD, TWENTY-EIGHTH and TWENTY-NINTH RESPONDENTS:	I A M Semanya SC (with him S Akweenda) Instructed by Government Attorney
TWENTY-SECOND, THIRTIETH and THIRTY-FIRST RESPONDENTS	N Tjombe Instructed by Tjombe-Elago Inc.
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