REPORTABLE

CASE NO: A2/2024

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PANDULENI FILEMON BANGO ITULA	**First Applicant**
BERNADUS SWARTBOOI	**Second Applicant**
LANDLESS PEOPLE'S MOVEMENT	**Third Applicant**

and

PRESIDENT OF THE REPUBLIC OF NAMIBIA	**First Respondent**
ATTORNEY–GENERAL	**Second Respondent**
ELECTORAL COMMISSION OF NAMIBIA (ECN)	**Third Respondent**
CHIEF ELECTORAL AND REFERANDA OFFICER	**Fourth Respondent**
MINISTER OF URBAN AND RURAL DEVELOPMENT	**Fifth Respondent**

MINISTER OF PRESIDENTIAL AFFAIRS	**Sixth Respondent**
NDEMUPELILA NETUMBO NANDI – NDAITWAH	**Seventh Respondent**
SWAPO PARTY OF NAMIBIA	**Eighth Respondent**
JOB SHIPULULO AMUPANDA	**Ninth Respondent**
AFFIRMATIVE REPOSITIONING	**Tenth Respondent**
VAINO AMUTHENU	**Eleventh Respondent**
CONGRESS OF DEMOCRATS	**Twelfth Respondent**
HENDRIK GAOBAEB	**Thirteenth Respondent**
UNITED DEMOCRATIC FRONT OF NAMIBIA	**Fourteenth Respondent**
EVILASTUS KAARONDA	**Fifteenth Respondent**
SWANU OF NAMIBIA	**Sixteenth Respondent**
KAMBOTO RATOVENI MIKE KAVEKOTORA	**Seventeenth Respondent**
RALLY FOR DEMOCRACY AND PROGRESS	**Eighteenth Respondent**
AMBROSIUS KUMBWA	**Nineteenth Respondent**
ALL PEOPLE'S PARTY	**Twentieth Respondent**
SAKARIA AMOS LIKUWA	**Twenty-first Respondent**
UNITED NAMIBIANS PARTY	**Twenty-second Respondent**
HENRY FERDINAND MUDGE	**Twenty-third Respondent**
REPUBLICAN PARTY OF NAMIBIA	**Twenty-fourth Respondent**
JAN EPAFRAS MULINASHO MUKWIILONGO	**Twenty-fifth Respondent**
NAMIBIA ECONOMIC FREEDOM FIGHTERS	**Twenty-sixth Respondent**
ERASTUS SHUUMBWA	**Twenty-seventh Respondent**

ACTION DEMOCRATIC MOVEMENT	**Twenty-eighth Respondent**
FESTUS THOMAS	**Twenty-ninth Respondent**
BODY OF CHRIST PARTY	**Thirtieth Respondent**
MCHENRY MIKE KANDJONOKERE	
VENAANI	**Thirty-first Respondent**
POPULAR DEMOCRATIC MOVEMENT	**Thirty-second Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ, MAINGA JA, ANGULA JA *et* SMUTS AJA

Heard: **10 February 2025**

Delivered: **28 February 2025**

Summary: Dr Panduleni Filemon Bango Itula, a candidate in the 2024 presidential election, had filed an application under s 172(1) of the Electoral Act 5 of 2014 (the Electoral Act), seeking to have the election results set aside. He contended that the elections held on 27, 29 and 30 November 2024 were unlawful and invalid. His challenge was based on several grounds: (a) the election contravened Part 5 of the Electoral Act and the Namibian Constitution; (b) it was tainted by serious illegalities; (c) the verification tablets used were not authorised under the Act; (d) ineligible voters were permitted to cast ballots; and (e) Proclamation 34 of 2024 which extended the voting period was unlawful. Accordingly, Dr Itula asserted that the election results warranted judicial intervention and should be declared invalid.

The application was opposed by the first, second, third, fourth, seventh, and eighth respondents, who argued that Dr Itula had failed to meet the requisite threshold under s 115 of the Act for challenging a presidential election. They contended that his claims lack sufficient evidentiary support and that deficiencies in his pleadings rendered it impossible to properly respond to the alleged violations of the Electoral Act and the Constitution.

On 6 January 2025, LPM and Mr Swartbooi applied to join Dr Itula's challenge. Beyond electoral irregularities, their challenge addressed the alleged abuse of power by the President and the Electoral Commission of Namibia (ECN). They sought a joinder to support the invalidation of the Presidential election, to present their case on executive overreach, and to uphold the rule of law.

The application for joinder was opposed by the first, second, third, fourth, seventh, and eighth respondents. The respondents objected to the joinder, arguing it was procedurally improper and that LPM and Mr Swartbooi should have filed a counter-application in terms of Rule 7(17) of the Rules of the Supreme Court of Namibia relating to presidential election challenges.

At the hearing, Dr Itula abandoned allegations of electoral irregularities, narrowing the challenge to the legality of Proclamation 34 of 2024, which extended the election period to 29 and 30 November 2024. With this abandonment, the court's decision was limited to the lawfulness or otherwise of the impugned Proclamation.

Held that; the respondents have not demonstrated any prejudice they suffer from LPM and Mr Swartbooi being joined as applicants to the proceedings.

Held that; given the undeniable public importance of the matter and the need to allow all interested parties to contribute to the debate on the issues arising from the 2024 election and the absence of demonstrable prejudice occasioned to the respondents by the procedural route adopted by the LPM and Mr Swartbooi, the Court has decided to exceptionally invoke its inherent jurisdiction to allow LPM and Mr Swartbooi to be joined as applicants.

Held further that; in motion proceedings the version of a respondent must be accepted unless it is so far-fetched or untenable that it can be rejected on the papers.

Held further that; the applicants have failed either to tender evidence supporting their allegation that people were allowed to vote inconsistent with the prescripts of

the law, or to gainsay the admissible evidence of the ECN that (a) after close of the polls at 21h00 on 27 November 2024 polling did not take place other than in terms of s 93(3) of the Act, and (b) that the counting of ballots occurred only at polling stations where voting was not taking place.

Held that; the finding that no voting otherwise than allowed by s 93(3) occurred after 21h00 on 27 November 2024 disposed of LPM and Mr Swartbooi's reliance on the alternative relief they sought to set aside the election result based on the 'poisoned fruit' doctrine.

Held further that; the extension of voting only to the 36 polling stations was not inherently discriminatory. The choice of the 36 polling stations, to the exclusion of the remaining polling stations, was aimed at achieving, and was related to, a legitimate and important public purpose.

Held that; reliance on the *functus officio* doctrine did not sit comfortably with the facts in the case where what was in issue was the validity of what academic sources describe as 'legislative administrative action' as opposed to 'judicial administrative action' or ' purely administrative action'.

Held that; the correct position in our law is that a repository of legislative administrative power is competent to reconsider a decision where circumstances have changed, if it is in the public interest to do so and it does not take away the rights created by its previous decision.

Held further that; there was no demonstrable prejudice to any potential voter on account of the impugned Proclamation. On the contrary, its purpose was to make it possible for every eligible voter who, by presenting themselves at polling stations, evinced the intention to vote. It was also not shown that any of the Presidential candidates were prejudiced by the extension of the voting period.

Held further; that for interpretation purposes, s 1(2) of the Electoral Act is a new provision which did not exist under the old Electoral Act 24 of 1992. It is a

fundamental canon of construction that the Legislature does not use meaningless language or words in a statute. Therefore, it must be given effect to, unless there are compelling public policy considerations as to why it should not be so interpreted (in conjunction with s 9(1) and (3) of the Interpretation of Laws Proclamation) to empower the ECN and the President to extend polling days during an election 'as occasion requires'.

Held further that; the interpretation function resting on the Court requires of it to interpret provisions of the Electoral Act in a way that promotes the right to vote and to do so in a manner that allows the implementers (ECN) to take all such measures as are within a range of reasonable and rational options open to them to promote and protect the right to vote.

Held that; the applicants' concern that an implied power to extend voting will give *carte blanche* to the President to extend voting to benefit himself or herself in circumstances where he or she is also a candidate, is assuaged by the fact that the power to extend is subject to the recommendation of the ECN. The President has no power to extend voting of his or her own accord. In any event, where there is evidence that the power was not used for the intended purpose, it cannot withstand a challenge and the case will be decided on its facts.

Held that; to visit with nullity a failure to complete an election within the time stipulated under s 64 of the Electoral Act (in the absence of proof that the non-completion denied eligible voters their right to vote), is out of all proportion to any legitimate public benefit to be derived from inferring nullity. By stronger reasoning, to deny the existence of a power to extend voting to afford eligible voters the right to vote – in circumstances such as faced by the ECN on 27 November 2024 – served no legitimate public objective.

Held that; there were no compelling public policy considerations from the Electoral Act why an election must be vitiated without affording the ECN and the President the opportunity to re-exercise the power under s 64(1)(*b*) in order to promote and protect the right to vote when occasion requires.

Held further that; the ECN was competent to recommend to the President and the President had the power to re-exercise the power granted in s 64(1)(*b*) as occasion required to make it possible for voters who would otherwise be disenfranchised, to vote on 29 and 30 November 2024. The extension did not amount to establishing new dates and a new election. It was a continuation and completion of the election which was determined in Proclamation 28 of 2024 on 26 September 2024.

Held that; Proclamation 34 of 2024 was lawfully enacted and the voting that occurred on 29 and 30 November 2024 was valid and lawful. The applicants did therefore not make out a case for the invalidation of the impugned Proclamation. Their challenge to the outcome of the 2024 Presidential election therefore failed.

Held that; based on the *Biowatch* principle, in the exercise of the Court's discretion, it was not a proper case to order costs against the unsuccessful applicants and that each party should pay its own costs.

JUDGMENT

THE COURT:

[1] The present case is before this Court in the exercise of its first instance jurisdiction concerning a challenge to the outcome of the 2024 Presidential election, as contemplated by s 172 of the Electoral Act 5 of 2014 (the Electoral Act) read with Art 79(2) of the Namibian Constitution (the Constitution).

[2] Namibia attained independence on 21 March 1990. Since then the country conducted six Presidential elections. Under Art 29(1)(a) of the Constitution, the term of office of the President of the Republic is five years unless the incumbent dies or resigns before the expiry of the five-year term or is removed from office. The third

President of Namibia, the late Dr Hage G Geingob, was re-elected for a second term in 2020 but died on 4 February 2024 before the expiry of his second five-year term. The then Vice-President, Dr Nangolo Mbumba, assumed the office of President of the Republic on 4 February 2024 to complete the unexpired portion of late Dr Geingob's term of office in terms of Art 29(4)(a) read with Art 34 of the Constitution. That unexpired term ends on 21 March 2025.

[3] Article 28(2) of the Constitution reads in part that:

> 'Election of the President shall be:
>
> '(a) by direct, universal and equal suffrage; and
>
> (b) conducted in accordance with principles and procedures to be determined by Act of Parliament . . . '

[4] The Electoral Act governs the conduct of elections in Namibia. In terms of s 63(1)(*a*)(i) of the Electoral Act, an election of the President of the Republic of Namibia must take place on a date not earlier than five months and not later than three months prior to the date on which the term of office of the incumbent President expires.

[5] To set the stage for the conduct of the seventh Presidential Election, President Nangolo Mbumba (the President) on 26 September 2024 issued

Proclamation 28 of 2024[1] to determine the date for the impending election as envisaged by s 64(1)(*b*) of the Electoral Act.

[6] In relevant part, s 64 reads:

> '(1) If a general election or by-election is to take place in accordance with section 63, the President must by proclamation in the *Gazette* make known -
>
> (a) in the case of any such election -
>
> (i) for the President or members of the National Assembly, in respect of Namibia;
>
> (ii) . . .
>
> a date determined by the President, upon recommendation by the Commission, upon which the submission of nominations of candidates must take place and the place at which it must so take place;
>
> (b) . . . the day determined by the President, upon recommendation by the Commission, upon which a poll must be taken in the election; and
>
> . . .
>
> (3) Any day determined under –
>
> . . .
>
> (b) subsection (1)(b) must be a day not less than 40 days and not more than 45 days after the nomination day.

[1] Proclamation 28 of 2024, GN 8454, GG 28, 26 September 2024.

(4) An election is deemed to commence on the day stipulated in the proclamation referred to in subsection (1) which is published in the *Gazette* in relation to the election.

(6) Any day determined under subsection (1)(b) for an election of the President or members of the National Assembly is a public holiday.'

[7] The President's Proclamation reads:

'NOTIFICATION OF DETERMINATION OF POLLING DATE FOR PRESIDENTIAL AND NATIONAL ASSEMBLY ELECTIONS: ELECTORAL ACT, 2014

Under the powers vested in me by section 64(1)(b) of the Electoral Act, 2014 (Act No. 5 of 2014) and on the recommendation of the Electoral Commission of Namibia, I make known that, in respect of the general election –

(a) for the election of the President, pursuant to Article 28 of the Namibian Constitution, read with section 63(1)(a)(i) of that Act; and

(b) for the election of members of the National Assembly, pursuant to Article 46 of the Namibian Constitution, read with section 63(1)(b)(i) of that Act,

I have determined Wednesday, 27 November 2024 as the date on which a poll must take place, from the hours 07h00 to 21h00, for the election of the President as well as for the election of members of the National Assembly.

Given under my Hand and the Seal of the Republic of Namibia at Windhoek, this 12th day of September, Two Thousand and Twenty Four.'

Common cause facts

[8] The following facts are either common cause or are not in dispute. From June to August 2024, the ECN mounted a voter registration drive and registered a total of 1 449 569 voters. On 23 October 2024, the Chief Electoral and Referenda Officer

(CERO) by notice in GG No. 305 of 2024 designated 4699 polling stations across the country. That was done in terms of s 89 of the Electoral Act.

[9] During the week of 21 to 29 October 2024, the ECN printed a total of 1 611 000 ballot papers. This included 1 449 569 ballot papers corresponding to the number of registered voters; an additional 144 957 ballot papers – equivalent to 10 per cent of the registered voters – for contingency purposes; and a further 16 474 ballot papers to ensure an even allocation of 100 ballot papers per ballot book. The ECN deployed 2521 permanent and mobile polling teams to serve the 4699 polling stations in the conduct of the elections.

[10] On 27 November 2024, the electorate went to the polls to elect a President. The election process did not run altogether smoothly. Long queues were experienced at polling stations across the country; mobile teams failed to appear at certain mobile polling stations; electronic voter authentication machines overheated and froze; ultraviolet torches used to check the invisible ink on voters' fingers ran out of battery power; some polling stations experienced a shortage of ballot papers; ballot boxes overflowed; voters stood in lines for long periods in the scorching summer heat without food, water or ablution facilities. In short, there was a great deal of voter frustration with the electoral process.

[11] Some of this dissatisfaction was vented by the Independent Patriots for Change (IPC) and the Landless People's Movement (LPM), both registered political parties, which not only participated in the National Assembly Elections which took

place simultaneously with the Presidential election, but also fielded Presidential candidates in the election.

[12] The IPC's letter of 27 November 2024 addressed to the Chairperson of the ECN, was written on its behalf by its legal representative, Mr Dirk Conradie, and reads as follows:

> **'RE: COMPLAINT AGAINST THE UNAVAILABILITY OF BALLOT PAPERS AT VARIOUS POLLING STATIONS // INDEPENDENT PATRIOTS FOR CHANGE**
>
> We act on behalf of Dr Itula, duly registered Presidential Candidate for the 2024 Presidential elections, as well as the Independent Patriots for Change, a political party duly registered as such.
>
> It is our instructions to address the following letter to you, firstly to register our clients' objection/complaint against the lack and/or unavailability of ballot papers at various polling stations across the country and in particular the Ohangwena Region and Omundaungilo constituency where most of these stations do not have ballot papers since 15h00 on voting day today, as well as stations such as Finkenstein, Brakwater Shopping Centre and at some stations, ballot papers are running out such as at Centauras School, and secondly, to notify you of the very serious breach of the constitutional right to vote of registered voters across the country.
>
> Disappointingly, the Chief Executive Officer of the Electoral Commission is not reachable by phone and messages left behind remain unanswered. As by law the Commission had ballot papers printed making up 10% of the total ballots printed for contingencies and on request as to the whereabouts of these ballot papers, no satisfactory answers are given.
>
> Kindly be advised that your wrongful and unlawful actions deny registered voters their Constitutional right to Vote and you are notified of our clients' intention to take appropriate legal action in a competent forum for appropriate relief, as well as a punitive cost order against you. Only about 90 minutes are remaining before the

close of the voting stations and hitherto, despite various requests you failed to rescue the situation. The Commission had four years to ready itself for this election and failed to execute its constitutional and statutory duty to ensure free and fair election. It is further our instructions, and our clients have been so advised that Article 17 of the Constitution provides for political participation as follows:

"All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and; subject to such qualifications prescribed by law as are necessary in a democratic society to participate in the conduct of public affairs, whether directly or through freely chosen representatives."'

[13] LPM's letter to the ECN was written by its 'Political Czar', Mr Ivan Skrywer, and reads as follows:

'Dear Chairperson of the Electoral Commission,

It is with great concern that we write to address the numerous complications and challenges encountered during today's polling process, which threaten the integrity of our democratic exercise. These issues, observed across the country, are alarming and require immediate redress.

The following critical points have come to our attention:

1. **Shortage of ballot papers:** Polling stations in various constituencies have reported running out of ballot papers, leaving voters unable to exercise their constitutional right.

2. **Malfunctioning of Verification Tablets:** Several verification tablets have either malfunctioned or were unavailable due to delays in deployment. In some cases, these devices had to be sourced from other polling stations, further exacerbating inefficiencies.

3. **Unmoving long queues:** Citizens have endured long lines since the early hours of the morning, with little to no movement, fostering frustration and disenfranchisement.

These material shortcomings have created an untenable situation that burdens on voter suppression. The electorate, as well as political parties, have endured a chaotic and deeply frustrating experience, which undermines the constitutional principles of free, fair and credible elections.

This level of administrative mismanagement by the Electoral Commission of Namibia (ECN) is unprecedented and cannot be treated as business as usual. We must act decisively to protect the sanctity of our democracy.

In light of these grave concerns, we propose the following course of action:

The ECN should immediately recommend to His Excellency, the President of the Republic, Dr Nangolo Mbumba, to extend the voting period until 14:00 on 28 November 2024.

To proceed without such an extension would not only compromise the fairness of the electoral process but would also betray the fundamental tenets of our democracy. It would be unconscionable to close polling stations at 21h00 today and declare these elections free and fair under the present circumstances. We urge the ECN to rise to this occasion and take swift, corrective action to restore the confidence of the Namibian people in this critical process.'

[14] The ECN took the following steps in the wake of the difficulties experienced with the electoral process. At 22h57 on 27 November 2024 it issued a directive in the following terms:

'To: Political Parties Liaison Committee Members:
Authorised Representatives: Secretary General/General Secretariat

From: Peter Shaama
Chief Electoral and Referenda Officer

Date: 27 November 2024

SUBJECT: DIRECTIVE ISSUED TO ALL POLLING STATIONS TO REMAIN OPEN AFTER 21H00

1. This communication serves to inform you, our esteemed PLC Members, that all polling stations have been directed to remain open after 21h00 until further notice following the shortage of ballot papers observed in some of the Constituencies across the country.

2. This arrangement was found necessary to give the Returning Officers an opportunity to borrow ballot papers from polling teams with excess ballot papers and also for polling stations to attend to eligible voters who were in the queue by 21h00.

3. The Commission wishes to assure you esteemed PLC members that the situation is under control.'

[15] The ECN sought legal advice from the Attorney-General[2] on how to deal with the problem and following that advice concluded that it had to approach the President to extend the voting period determined by the President on 26 September 2024 by Proclamation 28 of 2024.

[16] On 28 November 2024, the ECN in that regard took the following resolution:

'COMMISSION RESOLUTION

[2] A constitutional office created by Art 86 of the Constitution and whose 'powers and functions' under Art 87 include '(b) to be the principal legal adviser to the President and the Government' and '(c) to take all action necessary for the protection and upholding of the Constitution'.

RESOLUTION CMR: 137/11/2024

CERTIFIED TRUE COPY OF A RESOLUTION PASSED AT A SPECIAL COMMISSION MEETING HELD ON 28 NOVEMBER 2024.

WHEREAS:

1. The Electoral Commission of Namibia approached the Office of the Attorney-General in an effort to explore our options regarding a possible extension of the voting days, after it emerged that some registered voters could not vote due to a shortage of ballot papers at some polling stations on the 27th of November 2024.

2. The Commission duly convened on the 28th of November 2024 to review and deliberate on the implications of the application.

THEREFORE, IT IS RESOLVED THAT:

3. The Commission shall approach the Office of the Attorney-General to draft a Proclamation for the signature of H.E. the President to extend the voting days to enable voters to vote on the 29th and 30th of November 2024.

4. A copy of the above resolution, duly certified as true by the Chairperson of the Commission, be made available from time to time if so formally requested for official confirmation.

5. That the Chairperson and/or the Chief Electoral Officer and/or any other person delegated by the Chairperson, be authorised to depose to any affidavit and to sign any document in the course of proceedings related to the abovementioned matter.'

Date: 28 November 2024'

[17] The President also had the benefit of the Attorney-General's legal advice, and that of independent senior counsel, that the course proposed by the ECN was the appropriate one in the circumstances.

[18] The ECN requested the Attorney-General to draft a proclamation for the signature of the President. That was done and the President issued Proclamation 34 of 2024 extending the voting period. It reads as follows:

> '**AMENDMENT OF PROCLAMATION NO. 28 OF 26 SEPTEMBER 2024: NOTIFICATION OF DETERMINATION OF POLLING DATE FOR PRESIDENTIAL AND NATIONAL ASSEMBLY ELECTIONS: ELECTORAL ACT, 2014**
>
> Under the powers vested in me by section 64(1)(b) of the Electoral Act, 2014 (Act No. 5 of 2014), and on the recommendation of the Electoral Commission of Namibia, I make known that –
>
> (a) I have amended Proclamation No. 28 of 26 September 2024 by extending the period for the election of the President and for the election of members of the National Assembly referred to in that Proclamation from 21h00 on Wednesday, 27 November 2024 until Saturday, 30 November 2024 at 21h00 subject to section 93(3) of that Act; and
>
> (b) the extension referred to in paragraph (a) is applicable to the polling stations set out in the Schedule which were notified in terms of Government Notice No. 305 of 23 October 2024.
>
> Given under my Hand and the Seal of the Republic of Namibia at Windhoek, this 28 day of November, Two Thousand and Twenty-Four.'

[19] Contemporaneously, the ECN issued a media statement, a portion of which is replicated below:

> '… **Emerging Issues During The Polling Day**
> While polling was in progress, there were issues that emerged and the Commission engaged itself to resolve them to ensure that every Namibian who registered was given the opportunity to vote. Some of the issues that arose included the following:

1. **Heating of tablets:** In some polling stations, especially where tents were set, we experienced that the tablets used for verification of voters were heating up because of high temperatures or exposure to the sun. Polling was temporarily interrupted for some minutes because polling staff had to switch off the tablet to allow cooling off and resume immediately after.

2. **Ultra violet light torch running out of battery:** In some polling stations, the batteries for the ultra violet light torches, used for verification of voters for invisible ink, were draining faster than anticipated. We moved fast to source extra batteries and supplied to the polling stations so that polling proceeds uninterrupted.

3. **Staying longer in the queues:** The Commission has observed and noted media reports regarding some voters complaining of slow movement of the queues. I should state here that the Commission engineered the process to ensure that people do not stay longer in the queues, however, so many factors could delay the process including human factors.

4. **Voter left behind by mobile polling teams:** The Commission got media reports that some voters were left behind by mobile teams despite being in the queue in good time. In some instances, we directed the teams to go back to the polling stations in question to make sure they cover such voters. The Commission attended to every incident and also encouraged voters who were still in the queue to remain put until they were attended to as required by law.

5. **Running low on ballot papers:** It was reported that some polling stations ran out of ballot papers. Electoral operating procedures allow for polling stations to transfer ballot papers from other stations in instances where they run out. However, this process is supposed to follow administrative and logistical protocols to ensure accountability for every ballot paper.

The Commission has also learnt that at the close of polling stations, a number of regions were still having ballot paper books in their possession yet they had raised alarm that they may run out of ballot papers because of a higher turnout.

To facilitate the transfer of ballot papers, the Commission issued a directive instructing Regional Electoral Officers to ensure that polling stations should not close to allow smooth transfer of the unused ballot papers to polling stations where there was a demand.

The Commission engaged returning officers to facilitate transfer of the ballot papers to all polling stations that were reported to be running out of ballot papers. A total of 247 polling stations were restocked before they ran out of ballot papers. However, there were 29 polling stations which, either ran out of ballot papers and polling was interrupted and voting resumed after the ballot papers were availed, or mobile polling stations that could not be reached at the time of close of poll.

Counting and collation of results

Polling stations that were not affected by the shortage of ballot papers were allowed to proceed with counting upon closing. In addition, the Commission has earlier this morning issued a directive to all Regional Electoral Officers to commence with the counting of votes.

The way forward

After having received the number of complaints from different political parties, and after having considered these complaints, the Commission hereby announces the following:

a. In line with the Commission's obligation to provide every registered voter with a full opportunity to exercise his/her right to vote, and after having taken into consideration the complaints lodged, the Commission decided to recommend to the President of the Republic of Namibia, His Excellency, Dr Nangolo Mbumba to take the required steps to enable the continuation of the election in identified polling stations. On Friday, the 29th of November, 2024, and Saturday the 30th of November 2024 the fixed polling stations will open from 07h00 to 21h00 while for the mobile polling stations, they will open on the indicated times as follows:

[List of the 36 polling stations omitted]

b. The identified polling stations have been selected with reference to the facts available to the Commission, which indicate that voters may have been deprived

of the right to vote and which deprivation may not be immaterial to the outcome of the election.

c. The Commission has taken all precautions to ensure that the remaining polling stations and all attending voters were given the full opportunity and the required time to exercise their right to vote.

d. The existing counting process will continue, and the results will be made known in accordance with the provisions of the Electoral Act of 2014.

e. The results of the mentioned polling stations will be counted and dealt with separately as part of the electoral results. However, with respect to the mentioned polling stations, the final results will be calculated together with the results already made known.

f. The Commission has, in the meantime, done its best to establish the number of remaining ballot papers that will be distributed to the mentioned polling stations. The available information is as follows:

- Katutura Central Constituency- Khomas Region – 53 ballot books = 5300 ballot papers for each election

- Moses //Garoeb Constituency- Khomas Region – 70 ballot books = 7000 ballot papers for each election

- Rehoboth Urban East Constituency- Hardap Region – 46 ballot books = 4600 ballot papers for each election

- Oshakati East- Oshana Region- 56 ballot books = 5600 ballot papers for each election . . .'.

[20] On the strength of Proclamation 34 of 2024, polling took place at 36 selected polling stations from 29 to 30 November 2024.

[21] On 3 December 2024, the Chairperson of the Electoral Commission announced the results of the Presidential election as foreshadowed by the ECN in paragraph ‘a’ under ‘The Way Forward’ of its media statement.

[22] The total votes cast on 27 to 30 November 2024 were announced to be 1 099 582. This includes 1 089 777 votes cast on 27 November 2024, and 9805 votes cast from 29 to 30 November 2024.

[23] The votes recorded for the three candidates involved in the present dispute were announced as follows:

(a) Netumbo Nandi-Ndaitwah: 638 560 (58.07 per cent);
(b) Filemon Bango Itula: 284 106 (25.84 per cent); and
(c) Bernadus Swartbooi: 51 160 (4.65 per cent).

[24] The votes cast on 29 and 30 November 2024 for the three candidates are as follows:

(a) Netumbo Nandi-Ndaitwah: 4645 votes
(b) Filemon Bango Itula: 3725 votes; and
(c) Bernadus Swartbooi: 296 votes

[25] Consequently, the seventh respondent (Dr Nandi-Ndaitwah) was declared the President-Elect.

The litigation

[26] It is the corrective measures undertaken by the ECN and the President to address the difficulties experienced on polling day that led to the present litigation. Following the announcement of the results, Dr Itula on 24 December 2024 launched a challenge in this Court in terms of s 172 of the Electoral Act. The LPM and Mr Swartbooi were cited as the 29th and 30th respondents in Dr Itula's challenge.

[27] In his application, Dr Itula seeks relief in the form of a declaration that Proclamation 34 of 2024 (the impugned Proclamation) is unconstitutional, is in violation of Part 5 of the Electoral Act, and is therefore unlawful and invalid as it was allegedly conducted in breach of the Constitution and the Electoral Act.

[28] Dr Itula's challenge is based on several grounds. According to the applicant, the election violated the Constitution and the Electoral Act due to the alleged unlawful extension of the voting period beyond the time prescribed by the President by Proclamation 28 of 2024 on 26 September 2024. Crucially, he contends that unauthorised verification tablets malfunctioned and caused delays and disenfranchised voters. Further, he alleges irregularities in voting and counting, such as missing forms, unsigned documents, and voters not on the voters' roll being allowed to vote.

[29] Alleged failure to announce results in a timely and lawful manner is another ground for challenge. Additionally, Dr Itula asserts that eligible voters were disenfranchised due to procedural irregularities and the unlawful establishment of new polling stations. He further claims that the actions of the ECN and the President

suppressed eligible voters' right to vote in a free, fair, and credible manner. As a result, Dr Itula seeks to have the Presidential election results set aside and a fresh Presidential election conducted in accordance with the law.

[30] On 6 January 2025, LPM and Mr Swartbooi filed an application seeking to be joined as co-applicants. They, by and large, make common cause with Dr Itula but maintain that their challenge differs in material respects from Dr Itula's because they seek relief based principally on what they contend are unconstitutional actions by the President and the ECN. They wish to join the challenge by Dr Itula as co-applicants to ventilate concerns about executive overreach and the violation of constitutional principles.

[31] Alleged *ultra vires* of Proclamation 34 of 2024 is central to their case. First, these applicants request the Court to declare that the impugned Proclamation and its Schedule are unconstitutional and in contravention of the Electoral Act. According to them, the ECN and the President had no legal authority to unilaterally extend voting beyond the originally prescribed period and that doing so amounted to an abuse of power. They rely on the alleged breach of s 93(2)[3] of the Electoral Act, which mandates that any changes to election hours must be gazetted before polling begins.

[3] Section 93(2) reads as follows:
'The Commission may alter, by notice published in the *Gazette* at any time before the commencement of the poll, the polling hours referred to in subsection (1)*(a)* in relation to any polling station in Namibia in respect of any polling day of an election.'

[32] According to them, the impugned Proclamation came into force after the election had already started, rendering the extension unlawful for retroactivity. They contend that s 64 of the Electoral Act does not permit changes to election dates after polling has commenced. By extending voting over multiple additional days, being 28 to 30 November 2024, the ECN and the President allegedly effectively created new polling days, thus exceeding their powers.

[33] Additionally, LPM and Mr Swartbooi contend that the impugned Proclamation failed to adhere to procedural requirements outlined in s 64(3).[4] It is said that by immediately implementing the extension, the President disregarded these legal constraints and thereby undermined the legitimacy of the election. Alleged further violations stem from the ECN's alleged failure to adhere to candidate nomination procedures as prescribed under ss 72 and 73 of the Electoral Act. The point is made that the impugned Proclamation did not provide for new nomination opportunities for candidates, thereby rendering the extension unlawful.

[34] The LPM and Mr Swartbooi call for the annulment of ballots cast during the extended voting period, maintaining that those votes were taken under an unconstitutional extension. Should the Court sustain this line of attack, they request that the election results be determined solely on the basis of votes cast on 27 November 2024. In the alternative, should the entire election be declared unlawful because the allegedly unlawful votes cast on the strength of the impugned Proclamation cannot be disaggregated from the lawful votes, they ask that the

[4] Cited at para 6 above.

incumbent President and Parliament remain in office until a new election is conducted by 19 March 2025.

[35] These two applicants also assert that the ECN's decision to recommend the extension of the election was improperly influenced by the Executive, particularly the Attorney-General and the Minister of Presidential Affairs. This undue influence, they assert, compromised the ECN's independence and created a conflict of interest on the part of the Attorney-General and resulted in an unlawful election extension. Moreover, the applicants allege that the selective nature of the extension – favouring predominantly SWAPO strongholds – is proof of political bias and deliberate manipulation of the electoral process. This, they contend, not only subverted the voters' constitutional right to free and fair elections but also eroded public trust in the democratic process.

[36] More alarmingly, they allege that the President acted in bad faith, using the extension to favour his political party, SWAPO. It is said that the extended voting period primarily benefitted regions known for strong SWAPO support and compromised the integrity of the electoral process and violated the principles of equality and non-discrimination enshrined in the Constitution.

[37] LPM and Mr Swartbooi assert that their grievance extends beyond Dr Itula's focus on election irregularities. Instead, they seek to address the broader issue of executive overreach and the erosion of democratic principles.

[38] Dr Itula's application is opposed by the President, the Attorney General, the ECN, SWAPO and its candidate, the seventh respondent Dr Nandi-Ndaitwah. The LPM and Mr Swartbooi's joinder application is also opposed. It is necessary therefore to dispose of that application at the outset.

LPM and Mr Swartbooi's joinder application

[39] Dr Itula's application cites LPM and Mr Swartbooi as the 29th and 30th respondents. Given their interest in the outcome of the proceedings, their involvement is understandable. As parties who, it is common ground, are aggrieved by the conduct and outcome of the Presidential election, it is inconceivable that they would oppose the relief sought by Dr Itula.

[40] LPM and Mr Swartbooi had a choice to make: either to remain as respondents or to become co-applicants. If they opted for the latter, they were required to file a counter-application in terms of Rule 7(17) of this Court's Presidential Election dispute resolution rules.[5] Since they could not conceivably remain as respondents, the only viable course of action open to them was to become co-applicants through the Rule 7(17) mechanism. However, that is not the route they chose. Instead, they sought joinder as co-applicants under Rule 10. They filed a notice of motion, supported by an affidavit, outlining facts and circumstances in support of the relief they seek and the basis on which they seek joinder.

[5] Rules of the Supreme of Namibia Relating to Presidential Election Challenges: Supreme Court Act, 1990, GN 5761, GG 118, 17 June 2015.

[41] LPM and Mr Swartbooi's chosen approach was met with fierce opposition from the ECN, SWAPO, and Dr Nandi-Ndaitwah. They take the view that the two should have brought a counter-application under Rule 7(17) instead of seeking joinder.

[42] According to LPM and Mr Swartbooi, while Dr Itula's application focuses primarily on irregularities in the election, their grievance extends to the alleged abuse of power by the President and the ECN. The two applicants for joinder state that the conduct of the ECN and the President in extending the election, constitutes a rule of law issue that deserves scrutiny. Therefore, they seek to be joined in order to support the shared objective of invalidating the election, present their own arguments regarding abuse of power, act in the public interest to highlight the critical importance of lawful, free and fair elections as pillars of Namibia's constitutional democracy, ensure judicial consideration of their specific relief, and 'avoid procedural complications' that would arise from filing a separate counter-application. It is not explained what those procedural complications are.

[43] LPM and Mr Swartbooi's approach is two-pronged. First, they share common ground with Dr Itula in asserting that the ECN's Directive of 27 November 2024 and Proclamation 34 of 2024 tainted the entire election. On that basis alone, they say, the election should be declared invalid, set aside, and fresh elections held. Their alternative contention is that, should the Court find it possible to separate the results of the election that commenced at 07h00 and, by law, concluded at 21h00 on 27 November 2024, from the results of the polling that took place on 29 and 30 November 2024, the Court should validate the former while invalidating the latter.

[44] To the extent that it diverges from that of Dr Itula, the stance taken by LPM and Mr Swartbooi, introduces an important dimension to the case.

[45] The ECN, SWAPO, and Dr Nandi-Ndaitwah object to the joinder on the ground that it was not a permissible procedure and that the duo should have filed a counter-application instead. The ECN also states that LPM and Mr Swartbooi were late in filing a counter-application and are using the joinder procedure as a ruse to escape the consequences of the delay. SWAPO and Dr Nandi-Ndaitwah further object to LPM and Mr Swartbooi's proposition that, should the joinder be deemed inappropriate, their affidavit already on record be treated as an answering affidavit to Dr Itula's founding affidavit. The objecting respondents maintain that this approach would prejudice them, as it would mean that, under the *Plascon-Evans* test[6], the averments made would have to be accepted unless they are so untenable as to be rejected outright.

Disposal of objection

[46] To uphold the objection founded on Rule 7(17) would be to place form above substance. The objecting respondents have not demonstrated any prejudice they suffer from LPM and Mr Swartbooi being joined instead of being co-applicants. The only conceivable prejudice is if the LPM and Mr Swartbooi remain as respondents instead of being applicants. As respondents, they stand to benefit from the *Plascon-Evans* rule that their version must be accepted unless it is far-fetched. To that extent,

[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

the opposition to their being joined as co-applicants is counterintuitive. By LPM and Mr Swartbooi becoming applicants, the respondents benefit from the rule that the applicant's version should yield to that of the respondents on disputed facts.

[47] Besides, the joinder application clearly sets out what relief is sought and against whom and sets out clearly the basis on which the relief is sought. All the respondents fully traversed the factual and legal contentions advanced by LPM and Mr Swartbooi in their supporting affidavit.

[48] As counsel for the respondents pointed out during the course of oral argument, much debate and discussion has been had about the recently concluded elections, and there is significant public interest in the outcome of the challenge to the Presidential election in view of the animated public discourse taking place outside court. As we have already indicated, LPM and Mr Swartbooi introduce an important dimension to this case, which ought to be properly ventilated and addressed in an authoritative judgment of this Court in the public interest.

[49] The rules of Court exist for the Court and not *vice versa*. In an appropriate case, this Court, in the exercise of its inherent jurisdiction granted under Art 78(4), may deviate from the Rules and adopt procedures that facilitate its work. This is one such case. Given the undeniable public importance of the matter and the need to allow all interested parties to contribute to the debate on the issues arising from the 2024 election and the absence of demonstrable prejudice occasioned to the respondents by the procedural route adopted by the LPM and Mr Swartbooi, we have decided to exceptionally invoke our inherent jurisdiction to allow LPM and Mr

Swartbooi's joinder application. An unwritten power without which, it has been said,[7] the Court will not be able to do justice.

Contextualisation

[50] A great deal of written material has been exchanged in the present proceedings before the hearing, during the hearing and, regrettably, even after the hearing. It is necessary therefore that we at this stage clarify what the contested issues really are.

[51] For a proper appreciation of the positions taken by the respective respondents in their answering affidavits, and by all the parties when the matter was eventually heard, it is necessary to briefly revisit the foundational allegations made by especially Dr Itula when he launched the application in terms of s 172 of the Electoral Act.

[52] Dr Itula's challenge was mounted against the backdrop of statements made by leaders of the IPC in the aftermath of the elections. These statements are traversed in detail in the respondents' answering affidavits and since the outcome of the case no longer turns on them and they are now only tangentially relevant, only a brief reference should suffice.

[53] The pre-litigation statements included allegations made in a media statement by IPC on 30 November 2024 that:

[7] J Taitz *The Inherent Jurisdiction of the Supreme Court* (1985) at 1.

(a) An unknown total of ballots were cast between 27 and 30 November 2024, and only about 160 000 votes cast are known.

(b) There were polling stations designated for the so-called extended polling days, which were not only illegitimate but unconstitutional.

(c) There were two concurrent events taking place: the counting and casting of ballots and the process itself was marred by a ‘multitude of irregularities’ and widespread disenfranchisement of citizens, with voters who had been turned away over the three days during the process of election from 27 November 2024.

(d) As a result of the lack of ballot papers, notwithstanding the printing thereof in quantities that are proportional to the number of registered voters, there was suppression of the voters deliberately to ensure that citizens were not able to cast their votes.

[54] After the announcement of the results on 3 December 2024, the General Secretary of the IPC made the following allegations to a South African-based broadcaster Newsroom Afrika:

(a) Whether the results were declared a win, a runoff, or a loss, IPC could seek to nullify the elections in court.

(b) Once the Commission had announced the full results of the elections, IPC would approach the courts to ensure that 'this sham of an election is nullified'. IPC's representative indicated that IPC would seek to nullify the elections on the following grounds:

(i) IPC has incredible amounts of evidence of voter suppression;

(ii) IPC has incredible amounts of evidence of witnesses that have been turned away not only because the polling stations did not have ballots, but because the mobile stations 'left people in the queue without serving them';

(iii) they had 'significant evidence around the results that the provisional results that have been coming from the polling stations are not adding up';

(iv) the number of people voting and the number of votes allocated to polling stations were not tallying;

(v) they had 'missing ballot books that are unaccounted for' and 'ballot boxes that are being transferred without the escort of the police';

(vi) they had 'so many irregularities' and they were 'getting hundreds of reports and affidavits and statements under oath from members of the public who are supporting the findings that we have been receiving from our representatives at the various polling stations across the country'.

[55] In a social media offering, IPC called on members of the public who could not vote due to ECN's 'mismanagement' of the elections to submit affidavits to court to help IPC defend their right to vote. It reads:

'PUBLIC CALL
If you were unable to cast your vote due to the Electoral Commission of Namibia's mismanagement, we urge you to take action.
Write an affidavit at your nearest police station and send it to: ipcaffidavit@gmail.com

The Independent Patriots for Change (IPC) is committed to defending your right to vote and will pursue justice through the courts.'

[56] In his founding affidavit, Dr Itula reiterates the following allegations:

(a) Verification tablets, which were not authorised by law, were used during the election. These tablets overheated, causing delays and disenfranchising eligible voters.

(b) There were numerous irregularities, including missing forms, lack of ECN stamps, and unsigned forms.

(c) Some voters who were not on the voters' roll were allowed to vote, and there were discrepancies in the handling of tendered votes.

(d) The count for the election was not taken immediately after the close of the poll as required by law, and no result was announced in a manner sanctioned by the Electoral Act.

(e) Widespread disenfranchisement of voters occurred in that the election process was conducted in a manner that was not free, fair, credible, or impartial.

(f) The President established and published new polling stations, which he had no power to do.

[57] It is against the backdrop of those allegations that all the respondents resisted Dr Itula's application, primarily relying on s 204 of the Electoral Act which provides:

'**Occurrence Book**

204. (1) An Occurrence Book is to be kept at every registration point, polling station, and collation centre in which all complaints, events in which a person is dissatisfied and incidents are recorded and signed by any person present as a witness, but any event or complaint that is not recorded and signed for in the Occurrence Book is deemed not to have occurred, and the burden of proof lays with the person alleging the occurrence of the incident or complaint.

(2) A chief regional officer, returning officer, presiding officer, counting officer, polling officer, police officer, staff member or temporary staff member appointed to the [Directorate of Election and Referenda], persons referred to in section 18(17)(b) or 24(3), election agent, counting agent, a person appointed by an accredited observer or every candidate for an election may enter into an Occurrence Book any complaint, incident, fraudulent, irregular or illegal activity.

(3) A supervisor of registration, presiding officer, or returning officer may not deny any person referred to in subsection (2) permission to record any complaint, incident, fraudulent, irregular or illegal activity.'

Respondents' answers to Dr Itula's application

[58] The broad common thread running through the respondents' answers to Dr Itula's allegations of irregularities is that those allegations should not be entertained because of non-compliance with s 204 of the Electoral Act. According to the respondents, if the applicant wished to rely on allegations of irregularities and non-compliances on polling day to challenge the outcome of the election, the incidents complained about should have been recorded in the Occurrence Books (OBs).

[59] The respondents maintain that it is common cause that the ECN complied with the obligation cast on it by s 204 and availed OBs at all polling stations. The respondents also state that in terms of the law, all political parties were allowed to have agents at polling stations who ought, if they observed them, to have recorded the alleged irregularities and non-compliances. The respondents further aver that the applicant who had, in the aftermath of the elections, gone out on a public campaign to solicit evidence of voter disenfranchisement and other irregularities, never relied on such evidence in the founding affidavit and that the alleged irregularities are deemed by s 204 of the Electoral Act not to have occurred, and are therefore not legally cognisable.

[60] The crucial point made by the respondents is that even if Dr Itula furnished evidence of the alleged irregularities, he would have had to demonstrate that those irregularities affected the outcome of the election as required by s 115 of the Electoral Act, which states:

> **'Immaterial mistakes not to affect validity of elections**
>
> **115.** 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 non-compliance did not affect the result of the election.'

[61] As it turned out, Dr Itula elected not to pursue the allegations of irregularities at polling stations referenced in the IPC leaders' public statements and in the founding affidavit. In fact, the heads of argument filed on his behalf steer clear of those allegations. Dr Itula has, both in written submissions and in oral argument, relied on a very confined point of law: the *vires* of Proclamation 34 of 2024.

[62] During oral argument, his counsel, Mr Katz, SC raised an issue that was not adequately and issuably pleaded in the founding papers – that some of the 36 polling stations were not provided for in the CERO's original GG 28 of 2024[8] announcing polling stations and that the President had, to that extent, acted outside his powers.

[63] We showed earlier that pre-litigation and in the founding affidavit, Dr Itula alleged that the President, contrary to law, announced new polling stations in the impugned Proclamation. The 'new' polling stations were not identified in the founding affidavit. The allegation of new polling stations was denied by the ECN. In its answering affidavit, the ECN not only lamented Dr Itula's failure to name the so-called new polling stations but explained the manner in which both permanent and mobile polling stations were announced in terms of the law. The ECN pleaded that

[8] Proclamation 28 of 2025, GN 8454, GG 28, 26 September 2024.

all the 36 polling stations mentioned in the impugned Proclamation appear in the list of polling stations published by the ECN before the elections took place.

[64] Post-hearing, Dr Itula's legal practitioners submitted to Court a list of allegedly new polling stations created by the President in the impugned Proclamation. ECN's legal practitioners replied and furnished an explanation to the Court repeating averments made on behalf of the ECN in the answering affidavit. It bears quoting the part of the document filed on behalf of the ECN in response to the document filed by Dr Itula's legal practitioners.

[65] The document quotes extracts from the ECN's response to the allegations made in Dr Itula's founding papers. The ECN's response read as follows:

> '33. I digress to explain the content of the notification of the location of polling stations as published in Government Notice No. 305. I do so because the founding papers allege that the President extended polling day to newly established polling stations.
>
> 34. Unfortunately, the applicant does not in its papers provide the names of the so-called new polling stations that the President has purportedly established. I deny the allegation. In terms of the Government Notice, the CERO made known, for purposes of election for the President and members of the National Assembly, the following:
>
> 34.1 polling stations have been established in every constituency of each region at the places mentioned in Schedule 1;
>
> 34.2 the number of mobile polling stations contemplated in section 89(5) for each constituency is indicated in brackets next to the name of the constituency of a particular region in Schedule 1;

34.3 the location and times of the visit of the mobile polling stations referred to in paragraph (d) will be made known in terms of section 89(7) of that section by the returning officer in such manner as he or she thinks fit and practical.

35. Therefore, Government Notice 305 of 2024 did not contain the exact names of the mobile polling stations and the time of visit at those polling stations. Such information was made known by a publication in the newspapers, which was inserted in the form of a booklet circulated in all print media and social media across the country. The booklet is attached and marked "ECN3". The names of the polling stations were also shared with the Political Parties Liaison Committee ("PLC") members on 9 October 2024 prior to being made public and published in the Government Notice. It was also discussed during PLC meetings. None of the political party representatives, including those of the applicant, had any objection when the polling stations were made known.

36. A comparison of the mobile polling stations which were made known by the CERO and the polling stations referred to in Proclamation 34 of 2024 reveals that the locations of these polling stations are exactly the same. For completeness, I attach an extract of all the polling stations in respect of which the President granted an extension by Proclamation marked "ECN4".'

[66] ECN's legal practitioners proceeded to state the following after quoting the ECN's answers cited above:

'5. Dr Itula did not respond to these allegations in his replying affidavit. . . Accordingly, the Commission's version remains unchallenged.'

[67] ECN's legal representatives go on to deal with the list submitted post-hearing by Dr Itula constituting the allegedly new polling stations. ECN's lawyers, by reference to ECN's answering affidavit, explain that "ECN3" must be read together

with paragraph (d) of GN 305 of 2024 and s 89(5)[9] of the Electoral Act. ECN's legal representatives then set out a Schedule showing the allegedly new polling stations compared to a record reference where the supposedly new polling stations appear in the originally published polling stations and the constituencies in which they are located.

[68] For completeness, in response to ECN's post-hearing note, Mr Conradie for Dr Itula by letter stated the following in so far as it is relevant:

> 'The Commission's note is entirely consistent with the alternative submission advanced on behalf of Dr Itula, in as much as the polling stations in the Schedule of Proclamation 34 do not, in fact, appear as polling stations in Government Notice 305 of 2024. Dr Itula stands by his primary submission that Proclamation 34 of 2024 included all polling stations contained in Government Notice 305 of 2024.'

[69] The persistent reference to Proclamation 305 of 2024 standing alone, in the face of ECN's complete answer providing the full context of how polling stations were announced, is rather frivolous and vexatious and deserving of censure. It is most regrettable that Dr Itula's counsel brought about this unfortunate diversion during oral argument and even persisted with it after the ECN drew their attention to the fact that the matter was fully dealt with in the answering affidavit and that on the test in motion proceedings, the ECN had established that all the 36 polling stations mentioned in the Schedule to the impugned Proclamation had been duly

[9] Which states: 'The Commission may authorize the Chief Electoral Officer, to the extent determined by the Commission, to provide one or more mobile polling stations for the purpose of facilitating the taking of a poll in any election'.

published in accordance with the law and were not new polling stations as alleged by Dr Itula and his counsel.

[70] The legal principle, as reaffirmed in *Standard Bank Namibia Ltd v Maletzky*[10] requires that founding affidavits contain clear and precise averments so that respondents are aware of the case they must meet. The lack of clarity in the founding papers undermines the applicant's claim, and the Commission has outright denied the allegation, a denial that remains unchallenged by the applicant.

[71] If regard is had to Dr Itula's sparse allegations and lack of specificity as regards the allegedly new polling stations, compared to ECN's very detailed answer supported by the relevant provisions of the Electoral Act, the assertion that the President created new polling stations stood to be rejected in preference to ECN's version.

Alleged non-compliance with Part 5 of the Electoral Act

[72] Another allegation made by Dr Itula is that the Presidential election was not conducted in accordance with the provisions and principles contained in Part 5 of the Electoral Act. The applicants did not specify any particular provision or principle of Part 5 to substantiate the allegation. This form of pleading has predictably and understandably been objected to by the respondents for its lack of specificity and for causing them embarrassment as they are unable to properly respond thereto. That criticism is justified.

[10] *Standard Bank Namibia Ltd & others v Maletzky & others* 2015 (3) NR 753 (SC) para 43.

[73] It was necessary to sketch the above background so that it is clear what really at the end of the day fell for decision by the Court and therefore the limited scope of factual disputes that still need to be traversed.

Events on polling day

[74] Against the backdrop of Dr Itula's criticism of the events on polling day, the Chairperson of the Electoral Commission gave a very detailed explanation in the answering affidavit. We turn to that next.

[75] On 13 November 2024, the ECN conducted special voting for Namibians abroad, sea-going personnel, and security personnel required to be on duty during the election process. The general elections then commenced nationwide on 27 November 2024 at 07h00. However, some polling stations experienced delays in opening. Despite these setbacks, all voters who arrived before 21h00 on 27 November 2024 were able to vote, except at certain polling stations where unforeseen circumstances necessitated an extension.

[76] Technical issues disrupted polling at various locations. Tablets used for voter verification overheated due to direct exposure to high temperatures, necessitating temporary shutdowns for cooling. Additionally, the ultraviolet light torches used to verify invisible ink markings on voters' fingers depleted their batteries faster than expected. The Commission promptly supplied extra batteries to minimise disruptions.

[77] Some polling stations exhausted their ballot papers. The established electoral procedures permit the redistribution of ballot paper books to polling stations experiencing shortages. However, this process requires adherence to strict administrative and logistical protocols to ensure accountability. Despite concerns raised about shortages, certain regions retained ballot books after the polls closed, even though they had earlier reported potential shortfalls due to high voter turnout. The Commission resolved these discrepancies except in 36 polling stations where voting was extended to 29-30 November 2024.

[78] To ensure a fair electoral process, the Commission instructed regional electoral officers to facilitate the transfer of unused ballots to polling stations in need. Polling stations that had sufficient ballots proceeded with vote counting immediately after the close of polls in accordance with the Electoral Act. Others remained open temporarily only to facilitate the transfer of ballot papers. Once the transfer was completed, those stations also commenced the counting process. According to the ECN, no voter who was in the queue by 21h00 on 27 November 2024 was turned away, and the voting that took place on 28 November 2024 was conducted strictly in terms of s 93(3)[11] of the Electoral Act.

[79] By 10h00 on 28 November 2024, the Commission had established that at 36 polling stations, some voters who had arrived on time were unable to vote due to depleted ballot stocks, full ballot boxes, or the inability of mobile polling teams to reach designated locations. Consequently, the Commission recommended to the

[11] It states: 'Despite subsection (1) a presiding officer must permit every voter who at the time of the closing of the poll is in attendance to vote, to record his or her vote'.

President that voting be extended to 29 and 30 November 2024. A general extension for all polling stations nationwide was deemed unnecessary and impractical. In stations where all voters in the queue had been accommodated before the deadline, polling ended as scheduled. The logistical constraints of redistributing ballot papers across the country within the required timeframe further rendered a nationwide extension unfeasible.

[80] Despite these challenges, the extended voting period proceeded smoothly on 29 and 30 November, with no disruptions reported. Vote counting and verification had already commenced on 27 November 2024 in unaffected polling stations, and the process continued until 3 December 2024, when the final results were announced. The Commission ensured transparency by keeping the results from 29 and 30 November 2024 distinct from those of 27 November 2024. The ballot papers from the extended polling period were stored separately in sealed and uniquely marked ballot boxes to prevent any discrepancies.

[81] Polling in terms of s 93(3) of the Electoral Act continued past midnight on 27 November 2024, as the Proclamation took effect just after midnight on 28 November 2024. The Commission confirmed that, by midnight, voters were still in queues at multiple polling stations, and voting lawfully proceeded into the early hours of 28 November 2024. Therefore, the President's Proclamation did not operate retrospectively, as there was no break between polling on 27 and 28 November 2024.

[82] According to the ECN, no individual was permitted to join a queue and to vote after 21h00 on 27 November 2024. The ECN pleaded that the applicants have not provided any evidence to the contrary. The Commission stands by its actions, emphasising that the election process was conducted lawfully and in full compliance with the Electoral Act.

[83] Dr Itula chose not to engage with these detailed explanations and statement of facts. That has adverse consequences for an applicant in motion proceedings.

[84] Similarly, in light of LPM and Mr Swartbooi's allegations in the joinder application that voting occurred at polling stations after polls closed at 21h00 on 27 November 2024, the Chairperson of the ECN gave a full explanation.

[85] Mr Swartbooi alleged as follows:

> '71.2. It was resolved that the ECN would approach the Attorney-General to draft a Proclamation for the signature of the President to extend the voting days on 27 from 21h00, 28, 29 and to 21h00 on 30 November 2024.
>
> I pause to mention here that although this would logically mean that the voting could have only been extended on 29 and 30 November, it is not clear to me that no voting occurred on 28 November 2024, and I specifically challenge the ECN to confirm that no such voting transpired by attaching all the entire 121 constituencies and or polling stations Form 26 promulgated in No 5873 Government Gazette of 10 November 2015 and if it did, to explain what time such voting occurred and whether this was because of voters being in the line on 27 November 2024. I reserve my right to address this issue in reply depending on what the ECN says in response hereto.'

[86] The ECN Chairperson gave the following answer:

> '83. In addition, no voting took place on 28 November 2024, other than those who voted by virtue of being in line by 21h00 on 27 November 2024. Mr Swartbooi and the LPM elected not to apply for access to the electoral material with respect to the presidential election and are now resorting to conjecture. This is entirely unnecessary considering the facilities provided by the Electoral Act relating to electoral and party agents, as well as sections 172 and 204.
>
> 84. The LPM elected not to apply to this Court to have access to the election material in respect of the election of the President. The Commission declines the invitation.
>
> 85. The LPM must provide admissible evidence that voting took place on 28 November 2024 among persons other than those contemplated under section 93(3). This, Mr Swartbooi and the LPM failed to do.
>
> 86. In any event, Mr Swartbooi must allege an incident, occurrence, or irregularity which is cognisable by the Court in the sense that the Court may adjudicate upon it before the Commission can be required to answer thereto. There is no reference whatsoever in the applicant's papers to any record of any incident, complaint, or irregularity in the Occurrence Book on the basis of which a complaint of an irregularity is raised. The applicant is not entitled to circumvent the requirements of section 204 of the Electoral Act.'

[87] In terms of s 172 of the Electoral Act, a party intending to challenge the return or outcome of the election may apply to the Supreme Court for a review of electoral materials. The request must be directed to and determined by the Supreme Court. Mr Swartbooi, who had earlier reserved the right to reply fully to any answer the ECN might give, only gave a general denial of the ECN's allegations concerning the polling day and placed no contradictory evidence on record.

Plascon-Evans applied

[88] According to the applicants, the ECN by means of its Directive of 27 November 2024 and its implementation unlawfully extended voting beyond 00h00 on 27 November 2024. In addition, the allegation is made that voting and counting of ballots happened contemporaneously when that is clearly against the law.

[89] It is trite that in motion proceedings the version of a respondent must be accepted unless it is so far-fetched or untenable that it can be rejected on the papers.[12]

[90] As we have demonstrated, the applicants have failed either to tender evidence supporting their allegation that people were allowed to vote inconsistent with the prescripts of the law, or to gainsay by admissible evidence the version of the ECN that (a) after close of the polls at 21h00 on 27 November 2024 no polling took place other than in terms of s 93(3) of the Electoral Act, and (b) that the counting of ballots occurred only at polling stations where voting was not taking place.

[91] The inescapable conclusion is that the ECN Directive did not produce the consequences contended for by the applicants. Voting stopped at the 36 polling stations at the times the ballot papers ran out. Polling however continued at the other polling stations after 21h00 only in terms of s 93(3). Polling continued at the 36 polling stations on 29 and 30 November 2024 in terms of the impugned

[12] *Mostert v Minister of Justice* 2003 NR 11 (SC) at 21G-I, applying *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

Proclamation, after ballot papers were received from other polling stations that had excess.

[92] On the test in motion proceedings, we find that counting and voting did not occur contemporaneously at the 36 polling stations. Counting only commenced at those polling stations after voters then in the queues completed voting in terms of s 93(3). Crucially, the Proclamation came into force one second past 00h00 on 28 November 2024 and in respect of the 36 polling stations the voting at those polling stations could only occur from 29 November 2024.

[93] The finding that no voting occurred after 21h00 on 27 November 2024, save for the voting in terms of s 93(3) of Electoral Act, disposes of LPM and Mr Swartbooi's reliance on that circumstance for the alternative relief they seek of setting aside the election on the 'poisoned fruit' doctrine.

Applicants' other complaints and contentions

[94] The defining features of the applicants' remaining case in support of the challenge to the election are that:

(a) the ECN and the President had no power under the scheme of the Electoral Act to extend the period for voting;

(b) the ECN and the President selected for extended voting polling stations which are in the ruling party's strongholds;

(c) the President and the ECN discriminated against voters from constituencies not forming part of the selected 36 polling stations and in that way disenfranchised certain voters;

(d) the election was marred by the Attorney-General and the Minister of Presidential Affairs' unconstitutional conduct;

(e) having once exercised the power under s 64(1)(*b*) the ECN and the President became *functus officio* and could not re-exercise that power;

(f) in Proclamation 34 of 2024 the President purported to act in terms of s 64(1)(*b*), and having done so could not in reply assert that he had implied power to do so by virtue of Art 31(1) of the Constitution and s 9 of the Interpretation Ordinance 37 of 1920.

[95] At the heart of the remaining complaints is the question whether the President had the power on the recommendation of the ECN to extend the voting period in the manner that he did. It is necessary therefore to first address that threshold question. If the President was so empowered on a proper construction of in particular s 64 of the Electoral Act, the only issue that will remain is whether it was permissible for Proclamation 34 of 2024 to restrict the voting to the selected 36 constituencies.

[96] If the President lacked the power to extend the voting period it is immaterial that the voting on 29 and 30 November 2024 did not influence the result of the election and that, consequently, the voting on 29 and 30 November 2024 should not

be invalidated. In other words, the absence of authority in the President to extend voting does not engage s 115 of the Electoral Act as the exercise of a power he did not enjoy would be *void ab initio* as submitted on behalf of LPM and Mr Swartbooi.

Did the President have the power to extend the voting period?

Applicants' salient contentions

[97] According to the applicants, once the President upon the recommendation of the ECN, determines the date upon which a poll must be taken, only the ECN may alter the polling hours and only before the election takes place.[13] And that neither the President nor the ECN have express or implied power under the Electoral Act to extend the date(s) for election once determined. They postulate that once the s 64(1)(*b*) power has been exercised, it is exhausted in the sense that the functionaries become *functus officio*.

[98] Another strand of the argument advanced in particular on behalf of Dr Itula is that in the impugned Proclamation, the President located his authority in s 64 and that it is an afterthought for him to subsequently rely on Art 32(1) of the Constitution and s 9 of the Interpretation of Laws Proclamation 37 of 1920. Once the President had invoked s 64, it is argued, he was bound by that election and that on the authority of this Court in *Mostert,*[14] he was 'ring-fenced' by that election.

[99] The LPM and Mr Swartbooi contend that both the ECN and the President violated the Constitution and the Electoral Act because instead of independently

[13] Section 93(2) of the Electoral Act.
[14] *Mostert v Minister of* Justice 2003 NR 11 (SC).

assessing the legality of the extension, the President rubber-stamped ECN's recommendation. By doing so, the President allegedly unlawfully prolonged the election period beyond what was legally permissible under the Electoral Act, which does not empower retroactive modification of the timelines prescribed for the holding of a lawful election.

[100] It is said that since the extension was only implemented after the election had already started and ended, it rendered the extension unlawful. The LPM and Mr Swartbooi also state that the procedural requirements of s 64(3) were disregarded which require that the date determined for the holding of a Presidential election must be a day not less than 15 days and not more than 20 days after the date on which the proclamation declaring the election is published in the *Gazette*. The complaint is that instead, the extension took immediate effect in conflict with this statutory timeframe.

[101] According to the applicants, the extension decision was improperly influenced by the Attorney-General and thus undermined the independence of the ECN contrary to the principle of separation of powers.

[102] They also assert that the extension of the voting period disproportionately benefited regions where SWAPO enjoys strong support. This selective extension, they claim, is proof of bad faith and political bias, skewing the election results in favour of the SWAPO.

[103] According to the applicants, in addition to violating s 93(2)[15] by failing to gazette changes before the election began, the ECN also contravened s 93(3) of the Electoral Act by extending voting with additional days (28 to 30 November 2024) and the ECN effectively created new polling days contrary to the Electoral Act.

[104] The allegation is made that to be valid the extension decision should have – but did not – make provision for new nominations for the Presidential election, as required by ss 72 and 73 of the Electoral Act.

[105] The point is made that the selective nature of the extension had the effect of prioritising vote extension in pro-SWAPO regions and that in so doing the ECN contributed to an electoral outcome skewed in favour of the ruling party.

The respondents

[106] The President's stance is that on 27 November 2024, he was informed by the ECN about the problems experienced on polling day. The ECN informed him that the remedy for the problems was to extend the polling period. According to the President, he was advised by the Attorney-General and, independently, by senior counsel, not only that he had the power to re-exercise the power under s 64(1)(*b*), but he had a duty under Art 32(1) of the Constitution to do so to afford every eligible and desirous voter the constitutional right to vote guaranteed by Art 17 of the Constitution. The President adds that based on the recommendation made and the

[15] Section 93(2) reads as follows:
'The Commission may alter, by notice published in the *Gazette* at any time before the commencement of the poll, the polling hours referred to in subsection (1)(a) in relation to any polling station in Namibia in respect of any polling day of an election.

information received from the ECN, he was satisfied that if he did not act on the ECN's recommendation, he would unconstitutionally be depriving eligible voters of the right to vote.

[107] The President contends further that the ECN made clear to him that the corrective measure that was required was only in respect of the 36 polling stations where, according to the ECN, ballot papers had run out. The ECN also informed him that no such corrective action was necessary in respect of the rest of the polling stations.

[108] According to the President, he accordingly signed off Proclamation 34 of 2024 whose clear objective was to extend polling only to the 36 polling stations mentioned in the Schedule to the impugned Proclamation. He also states that all those polling stations were previously designated as polling stations in the CERO's Proclamation 305 of 2024 issued before the commencement of the election.

[109] The President adds that he acted on legal advice that he had the power to issue Proclamation 34 of 2024.

[110] The legal bases on which the President extended the voting are at the heart of the dispute.

[111] The President defends the legality of Proclamation 34 of 2024, asserting that he had the authority to extend the voting period because of the constitutional duty he had under Art 32(1) of the Constitution, s 1(2) of the Electoral Act, and s 9(1) of

the Interpretation of Laws Proclamation 37 of 1920. He argues that the extension was necessary to afford the right to vote to persons who would otherwise be disenfranchised on account of ballot papers running out at specific polling stations. The President contends that the applicants failed to provide specific legal violations or evidence of disenfranchisement.

[112] The ECN supports the President's stance on the validity of Proclamation 34 of 2024, asserting that the extension was lawful because it recommended it to the President in order to remedy the problem that resulted from some voters being unable to vote due to the absence of ballot papers at certain polling stations.

[113] The ECN contests Dr Itula's proposition that the extension of voting should have applied to all polling stations published by the Chief Electoral and Referenda Officer (CERO) in Government Notice No 305 of 2024 of 23 October 2024. That contention, the ECN argues, is inconsistent with the established legal approach to statutory construction, which requires courts to attribute meaning to legislative text by considering its wording within the broader context of the instrument being interpreted.[16]

[114] As for that context, in the view of the ECN, the impugned Proclamation became necessary to address specific logistical challenges, particularly a shortage of ballot papers at identified polling stations. The ECN on 28 November 2024 made

[16] *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors CC* 2015 (3) NR 733 (SC) paras 18 and 24.

known its intention to seek an extension of voting at the 36 designated polling stations as a precursor to the impugned Proclamation. The ECN maintains that the lawful way to extend polling days was by amending Proclamation No. 28 of 26 September 2024, which had determined the election date of 27 November 2024. According to the ECN, the amendment therefore extended the voting period from 21h00 on 27 November 2024 to 21h00 on 30 November 2024, in accordance with s 93(3) of the Electoral Act**.**

[115] The ECN disputes the suggestion that while Proclamation 34 of 2024 provided for voting at all polling stations across the country, it allowed voting only at 36 polling stations. According to the ECN, the wording in the extension Proclamation is actually to the contrary. The Commission also refutes allegations that new polling stations were created.

[116] SWAPO and Dr Nandi-Ndaitwah also argue in favour of the validity of the impugned Proclamation. They maintain that the President's decision was lawful because he had the implied power to extend the voting period in order to give effect to citizens' right to vote guaranteed under the Constitution. They also argue that the ECN acted within its mandate and was entitled to seek legal advice from the Attorney-General.

[117] A central theme in the respondents' support of the impugned Proclamation is the need to uphold the constitutional right to vote. The respondents reject the claim that the extension prejudiced any party or altered the election's outcome in a manner detrimental to the applicants.

[118] Concerning the complaint about the Attorney-General's role, the respondents state that the Attorney-General merely provided legal advice in keeping with Art 87 of the Constitution and that he did not at all interfere with the ECN's mandate and independence.

[119] As regards the applicants' contention that to be valid the extension should have been accompanied by fresh nominations, respondents counter that the contention is based on a wrong interpretation of the Electoral Act. According to the respondents, it was not necessary because the extension did not amount to a fresh election requiring new nominations. Rather, its purpose was to make it possible for voters who were unable to vote on polling day to do so. The extension Proclamation achieved that objective.

Peripheral issues

[120] It bears repeating that the core of the present dispute is the *vires* of Proclamation 34 of 2024. But based on the above summary of the contentions of the parties, there are a raft of peripheral issues which need to be resolved first. We proceed to deal with those issues.

Alleged retroactivity

[121] Because of its centrality to the applicants' case, it is apposite to first deal with their contention that the impugned Proclamation extended the voting retroactively. By which must be meant that the impugned Proclamation sought to validate votes

cast either after the polls closed at 21h00 on 27 November 2024 or after voting had been finalised as contemplated by s 93(3) of the Electoral Act.

[122] On the applicable test in motion proceedings, we found that, barring the identified 36 polling stations, polling stopped in the remaining 4663 polling stations at 21h00 on 27 November 2024 – save for the polling mandated by s 93(3) of the Electoral Act. In the latter respect, in terms of the law, there is no time limit for the completion of such polling. The 4663 polling stations that remained open did so for the purpose of transferring ballot paper books to the 36 polling stations.

[123] As regards the 36 polling stations, we must accept the ECN's version that at the close of the polls at 21h00 on 27 November 2024, ballot papers had run out. It is stating the obvious that no poll could be taken in the absence of ballot papers. The ECN's version, which prevails, is that the 36 polling stations remained open only for the purpose of receiving ballot papers from those polling stations that had excess ballot papers. The transfer of ballot papers therefore occurred on 28 November 2024.

[124] It is common ground that Proclamation 34 of 2024 was signed by the President on 28 November 2024 and came into operation immediately at 00h00 on 29 November 2024 on the expiration of the previous day.[17] Voting at the 36 polling stations therefore took place on 29 and 30 November 2024 as stipulated in Proclamation 34 of 2024.

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[17] Section 12 of the Interpretation of Laws Proclamation 37 of 1920; *Bloem & another v State President of the Republic of South Africa* 1986 (4) SA 1064 (O) 1091J.

[125] As regards retroactivity, the applicants' contentions and the explanations advanced by the ECN and the President on that issue, should be considered in light of (a) the proven facts and (b) the language of the impugned Proclamation, in order to give it the correct interpretation. The applicants' complaint is that the impugned Proclamation retroactively extended polling that had ended at 21h00 on 27 November 2024. That much is supported by the terms of the Proclamation which states:

> '(a) I have amended Proclamation No. 28 of 26 September 2024 by extending the period for the election of the President and for the election of members of the National Assembly referred to in that Proclamation from 21h00 on Wednesday, 27 November 2024 until Saturday, 30 November 2024 at 21h00 subject to section 93(3) of that Act; . . .' (Our underlining for emphasis).

[126] If proper regard is had to the language of the impugned Proclamation, it is plain that the ECN and the President assumed (perhaps out of abundance of caution) that for the voting that occurred on 27 November 2024 after 21h00 to be valid, it was necessary for the Proclamation to relate the extension to 27 November 2024. Yet, in law, that was not necessary because s 93(3) allowed such voting to take place if a voter was already in the queue before 21h00 on polling day. Contrary to the President's assumption otherwise, s 93(3) voting required no extension as the Proclamation purported to do. To the extent that it did so, it is *pro non scripto*.

[127] On the established facts, the real objective the ECN and the President were pursuing was to make it possible for voters who could not vote at the 36 polling stations to be able to do so. That is apparent from the fact that the ECN met at

10h00 on 28 November 2024 and passed a resolution to recommend extension to the President. The President then issued the Proclamation on 28 November 2024 based on that recommendation.

[128] The legal effect of the impugned Proclamation therefore was not to validate the s 93(3) voting but to extend the right to vote to those who could not because ballot papers ran out at certain polling stations.

[129] The issue of retroactive extension of voting is therefore a moot one and nothing turns on it. Factually, no such voting took place.

Restriction of voting to 36 polling stations

[130] In oral argument Mr Katz, on behalf of Dr Itula, placed great store by the President's admission in his answering affidavit that he was actuated to extend the polling days because he was informed by the ECN that an 'unknown number' of voters had not voted by close of polls on 27 November 2024 and would be denied the right to vote unless voting was extended. Mr Katz made the point that if that were the case, it was discriminatory to extend voting only to some polling stations as voters elsewhere would be and were disenfranchised.

[131] Mr Katz's interpretation of the Presidents' evidence distorts the true picture emerging on the papers. It is clear from the versions of the ECN and the President that the information about the inability of people to vote was presented to the President by the ECN. It is not information that the President obtained independently.

[132] The ECN clarified that it approached the President against the backdrop of ballot papers having run out at specific polling stations and that in respect of all the other polling stations, whatever logistical problems there were, had been resolved and polling took place without anyone being turned away. The President's reference to 'an unknown' number of voters potentially being disenfranchised was clearly made in that context.

[133] Another nuance to Dr Itula's complaint about voting being limited to 36 polling stations is that the measure was *per se* discriminatory and therefore unlawful. In the first place, discrimination cannot arise because the President was not dealing with a situation where ballot papers had run out in all the 4699 polling stations. It is clear from the evidence that the measure was intended to place voters who presented themselves at the 36 polling stations and were unable to vote, in the same position as those who were able to cast their votes at the other polling stations.

[134] As the ECN made clear, it would have been utterly unnecessary and impractical in any event to extend polling to all the 4699 polling stations.

[135] It is common knowledge that the fact that the law permits voters to cast their votes at any polling station and not necessarily where they are registered, was in no small measure the cause of long queues at polling stations and some polling stations running out of ballot papers and ballot boxes overflowing. To have extended polling to all polling stations as suggested by Dr Itula would have led to a repeat of the problems which resulted in the situation that led to the present dispute.

[136] We are satisfied that the extension of voting only to the 36 polling stations was not inherently discriminatory. This finding disposes of the suggestion that the ECN, the President, and the Attorney-General skewed the process to give an advantage to SWAPO. On the assumption (an issue we turn to in due course) that the President and the ECN had the power to extend the polling, the choice of the 36 polling stations, to the exclusion of the remaining polling stations, was aimed at achieving, and was related to, a legitimate public objective of enfranchising voters.

Separation of powers

[137] The complaint that the manner in which Proclamation 34 of 2024 was birthed breached the constitutional principle of separation of powers was given particular prominence in the submissions on behalf of Dr Itula. The suggestion made is that either the ECN was improperly influenced by the Attorney-General and the Minister of Presidential Affairs, or that the Attorney-General acted unlawfully in advising the ECN when he is, it is said, a political functionary. It is also suggested that the Minister of Presidential Affairs improperly influenced the ECN.

[138] We deal with the Minister first. The evidence shows that the Minister in the Presidency acted as an interlocutor between, on the one hand, the ECN and the Attorney-General, and the President on the other, to facilitate the signing of the Proclamation by the President and causing it to be forwarded to the Attorney-General for publication. There is no impropriety on the part of the Minister in playing that role.

[139] The irregularity or impropriety being attributed to the Attorney-General's involvement in proffering legal advice to the President and the ECN is founded on the premise that the incumbent is a member of the ruling party and a member of Cabinet. The Attorney-General stated under oath, that it is the President, and not the Commission, that issued Proclamation 34 of 2024, and that he acted as he did in the performance of his constitutional function of being an adviser to the President and other agencies of government – which includes the ECN. In terms of s 3(1A) of the Public Service Act 13 of 1995 (PSA)[18] the ECN is an Office which falls within the purview of the Attorney-General's mandate as legal adviser. The Attorney-General also clarified that he is not a member of the Cabinet.

[140] Besides, in light of our finding that there was a clear need for isolation of the 36 polling stations from the rest, nothing really turns on the role played by the Attorney-General in the birth of the impugned Proclamation.

Reliance on *Functus* and *Mostert*

[141] Reliance on the *functus officio* doctrine does not sit comfortably with the facts before us where what is in issue is the validity of what academic sources describe as 'legislative administrative action' as opposed to 'judicial administrative action' or 'purely administrative action'.[19]

[18] Section 3(1A) provides that for 'the purposes of subsection (1), the Electoral Commission… shall be deemed to be an agency. The Commission is listed in Schedule 3 to the PSA which contains Agencies and Executive Directors'.
[19] Y Burns *Administrative Law* 4 ed at 226-227 and Baxter *Administrative Law* at 372.

[142] South Africa's Interpretation Act 33 of 1957 in s 10(3) provides that administrative legislation may be varied, amended or repealed by the person who has the power to enact the legislation.[20] Therefore, as Burns correctly observes, by statute the South African Legislature has made the doctrine of *functus* inapplicable in the case of legislative administrative action.[21]

[143] The South African provision is couched in identical terms as Namibia's s 9(3) of the Interpretation of Laws Proclamation 37 of 1920. The s 9(1) and (3) of the latter read as follows:

> '(1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.
>
> (2) . . .
>
> (3) Where a law confers a power to make rules, regulations, or bye-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend, or vary the rules, regulations, or bye-laws.'

[144] Therefore, it admits of no doubt that s 9(3) of the Interpretation of Laws Proclamation renders the doctrine of *functus* inapplicable to the power granted under s 64(1)(*b*) of the Electoral Act.

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[20] Section 10(3) states that: 'Where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as included a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws'.

[21] *Burns* supra at 226.

[145] In addition, a good indicator of whether *functus* has set in is if the decision or action in question affects the rights of third parties. Where such rights are affected, the decision or action may not be amended except of course after *audi*. *Baxter*, by reference to several authorities,[22] recognises that whether or not the *functus* principle applies will depend on whether or not the decision or action is favourable or unfavourable.

[146] In our view, the correct position in our law is that a repository of legislative administrative power is competent to reconsider a decision where circumstances have changed, if it is in the public interest to do so, and it does not take away vested rights created by its previous decision.

[147] In the present case, there is no demonstrable prejudice to any potential voter on account of the impugned Proclamation. On the contrary, its purpose was to make it possible for every eligible voter who, by presenting themselves at polling stations, evinced the intention to vote, to do so. It has also not been shown that any of the Presidential candidates were prejudiced by the extension.

[148] The ECN and the President were therefore <u>not</u> *functus* after the determination of the election date of 27 November 2024.

[149] LPM and Mr Swartbooi's reliance on this Court's judgment in *Mostert*[23] is even less convincing. In that case, the Permanent Secretary of Justice sought to

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[22] Baxter at 373-375.

[23] *Mostert v Minister of Justice* 2003 NR 11 (SC) at 21G-I, applying *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

transfer a magistrate while she had no power to do so and also relied in the process on a wrong statutory provision. She was purportedly exercising an administrative and not a legislative administrative power. That case is distinguishable in principle on the basis that what was involved there was not the exercise of a legislative power. The case before this Court concerns the threshold question whether the re-exercise of a legislative power was authorised in the first place. Either it exists or it does not.

[150] On a different note, the proposition that a legislative measure must recite all the legal provisions from which the power to enact it derives is a novel one and finds no support in the law reports.

[151] Having disposed of the peripheral issues, what is left is to consider whether, on a proper construction of its provisions, the Electoral Act grants a power for extension of the voting period determined by the President in terms of s 64(1)(*b*).

Disposition

[152] The applicants refute the existence of a power to extend the voting while the respondents, in particular the President, argue in favour of the existence of such a power and locate it in Art 32(1) of the Constitution, s 9 of the Interpretation of Laws Proclamation 37 of 1920 and s 1(2) of the Electoral Act.

[153] According to Art 32(1) of the Constitution:

> 'As the Head of State, the President shall uphold, protect and defend the Constitution as the Supreme Law, and shall perform with dignity and leadership all acts necessary, expedient, reasonable and incidental to the discharge of the

> executive functions of the Government, subject to the overriding terms of this Constitution and the laws of Namibia, which he or she is constitutionally obliged to protect, to administer and to execute.'

[154] The respondents posit that the President's duty to protect and defend the Constitution compelled him to act so as to protect registered voters' rights under Art 17 of the Constitution. Article 17(2) states:

> 'Every citizen who has reached the age of eighteen (18) years shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein.'

[155] The President states that when he received information from the ECN about people who had been turned away, coupled with a recommendation to extend the voting to facilitate the franchise, he was duty bound by the Constitution to act on the recommendation of the ECN. His duty to protect and defend the Constitution, read with s 1(2) of the Electoral Act, gave him an implied power to extend the voting period he declared under s 64(1)(*b*) of the Constitution.

[156] Section 1(2) of the Electoral Act states:

> 'A person interpreting or applying this Act must –
>
> (a) do so in a manner that gives effect to the rights, freedoms and responsibilities contained in the Namibian Constitution; and
>
> (b) take into account the Bill of Fundamental Voters' Rights and Duties and any other appropriate law.'

[157] Crucially, the respondents rely on s 9 of the Interpretation of Laws Proclamation for the proposition that the President had the power to extend the polling period as he did in terms of the impugned Proclamation because occasion required that he did.

[158] Section 9(1) of the Interpretation of Laws Proclamation provides:

> 'When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.'

[159] The respondents argue that this provision empowered the ECN and the President to amend Proclamation 28 of 2024 so as to extend the voting period to 29 and 30 November 2024 by re-exercising the power granted in s 64(1)(*b*) of the Electoral Act. They contend that the situation that occurred at the 36 polling stations with the ballot papers running out is what s 9(1) contemplates: 'as occasion requires'.

[160] For their part, the applicants argue that the reliance on Art 32(1) is misplaced: first because it is not an empowering provision and secondly because even on its own terms the article makes clear that it is subject not only to other provisions of the Constitution but also to other laws. The argument goes that Art 32(1) is therefore subject to s 64 of the Electoral Act which spells out the manner in which and by whom the power to determine or alter the election date is to be exercised.

[161] Similarly, the applicants reject the President's reliance on s 9 of the Interpretation of Laws Proclamation on the basis that the provision only applies if no contrary intention appears from the statute under consideration. According to the applicants, there is a clear contrary intention in the Electoral Act that the power to determine the date of an election is exhausted when exercised and may not be exercised subject to the only allowance made under s 93(2) and (3): that the ECN may alter the hours before polling and that a person in the queue after 21h00 on Election Day must be allowed to vote.

[162] LPM and Mr Swartbooi argue that there is a compelling case to be made that the President had no power to extend the voting period as he did because on this Court's authority in *Puma*[24] that power can only be exercised by the functionary in whom it is vested – which is an incident of the rule of law. The argument concludes, that the only power given under the Electoral Act is to the ECN and not the President, to vary the polling hours only before Election Day. For that reason, there is no implied power for the President to extend the voting period.

[163] Clearly, the interpretation preferred by the applicants is underpinned by the notion that the intention of the Legislature was to invalidate an election which is not completed within the time stipulated in s 64.

[164] It is not surprising therefore that counsel for Dr Itula made the following submission in the written heads of argument:

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[24] *Namibian Competition Commission v Puma Energy Namibia (Pty) Ltd* 2021 (1) NR 1 (SC).

> 'If the election of 27 November 2024 was unlawful because voters were disenfranchised, then this illegality cannot be cured with a further illegality: two unlawful electoral acts, do not render an election lawful. The President contends that he had no option but to extend, in order to give effect to the right to vote. That is not correct. The obvious (and lawful) option was to approach the Courts to set aside the election of 27 November 2024, and order a re-run. Neither the Commission nor the President did this. They collaborated together to commit an illegality.'

[165] To test the soundness of that approach, it is important to appreciate what, to a large extent, led to the difficulties experienced on polling day.

[166] The Electoral Act permits a voter to vote at any polling station and not necessarily at a polling station in the constituency where he or she is registered as a voter.[25] For the Presidential election, there were potentially 1 611 000 voters and 4699 polling stations.

[167] The ECN had printed only 10 per cent excess ballot papers as a contingency. It is a practical impossibility for the ECN to have known in advance how many voters would turn up at a particular polling station on polling day and to distribute the ballot papers in a way that there would be a sufficient number of ballot papers at a particular polling station. Moreover, such an exercise would have been impossible without the election administrators prescribing to voters where they should vote in order that their distribution of ballot papers is not thrown out of balance. If they turned away voters not registered in the constituency in preference to voters registered at the polling station that would have been an irregularity.

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[25] In terms of s 98(6) of the Electoral Act.

[168] That there would be voter frustration from long waiting in the queues on account of a shortage of ballot papers is therefore understandable. Dr Itula and his legal practitioner of record pre-litigation suggested that the ECN had enough time to plan for the elections but failed to do so. The deponent does not suggest how the problem just described could have been foreseen and avoided.

[169] Another feature of the election process that caused delay at the polling stations was the malfunctioning of the electronic verification tablets and loss of battery power in the devices used to examine voters' fingers for the indelible ink. Although not prescribed by the Electoral Act, the ECN explained that it decided on their use in order to facilitate voter identification and to eliminate double-voting. The ECN explained on oath that it was practically unfeasible to use the Manual National Voter's Register printouts which consisted of thousands of pages. The ECN made clear that the use of the paper voter rolls would certainly have exacerbated the delays. It stated as follows:

> '53. Challenges associated with the manual verification, particularly during national elections (Presidential and National Assembly) during which voters are entitled to vote at any polling station in any constituency are amongst others:
>
> 53.1. The impracticality of providing every polling station with a copy of the manual National Voters Register, which at times for a single constituency consists of up to 24 books of 200 double-sided pages each;

53.2. The cumbersome process of searching for a voter on the manual voters' register, thereby delaying the voting and consequently leading to voter apathy;

53.3. The challenges associated with the inability to retrieve the voter information from the manual voters' register due to the high volume of voters in the register.'

[170] That there might well have been some incompetence on the part of officials of the ECN cannot be discounted but the applicants do not identify them and no reliance is placed on specific human failures affecting the integrity of the election. In the absence of admissible evidence that the ECN's lack of proper planning caused the problems experienced on polling day, it is an open question whether the ECN could have done better preparation. The upshot of it all is that in substantial part, the delays experienced at the polls were the result of the legal framework governing elections in Namibia.

[171] Against that backdrop, the question arises whether the Electoral Act should, as proposed by the applicants, be so interpreted that there exists no power in the ECN and the President to re-exercise the power to extend the polling period.

[172] To determine whether a power to extend can be implied, the departure point no doubt must be s 1(2) of the Electoral Act. It proclaims what the purpose of the Act is: to promote and not limit the franchise. It directs both its 'interpreter' and 'implementer' to give pre-eminence to the 'fundamental right to vote'. But not only the Electoral Act: it extends also to other legislation which may have a bearing on the right to vote. That includes the Interpretation of Laws Proclamation.

[173] Section 9 of our Interpretation of Laws Proclamation has counterparts in other common law jurisdictions including South Africa as we have already shown.[26] Judicial consensus in these jurisdictions is that the mischief that the provision is designed to remedy is the common law doctrine that if a legislative power has been exercised once, it may not be re-exercised even if circumstances and occasion require that it be re-exercised.

[174] The question is, when does the provision find application? The cases emphasise that the relevant inquiry is whether there is in the statute under which the power is granted, a contrary intention that s 9 does not apply. As was stated in *Secretary for the Interior v Moosa & another:*[27]

> 'As to whether the contrary appears it must be appropriate to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole. . .'

[175] To uphold the applicants' contention that the Electoral Act contains a contrary intention that the power in s 64(1)(*b*) may not be re-exercised, it must be clear from that Act that once exercised, the power is exhausted and is not susceptible of re-exercise even if occasion requires, such as presented itself on polling day on 27 November 2024.

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[26] Australia; s 33(1) Interpretation Act 1901 (Cth); England: s 32(1) Interpretation Act 1889.
[27] *Secretary for the Interior v Moosa & another* 1970 (4) 445 (AD) at 449A.

[176] The first obstacle in the way of the applicants is s 1(2) of the Electoral Act which requires that when interpreting it, the Court must do so in a manner that gives effect to the fundamental right to vote.

[177] For interpretation purposes, s 1(2) of the Electoral Act is a new provision which did not exist under the old Electoral Act 24 of 1992. It is a fundamental canon of construction that the Legislature does not use meaningless language or words in a statute.[28]

[178] Therefore, s 1(2) of the Electoral Act must be given effect to unless there are compelling public policy considerations why it should not be so interpreted (in conjunction with s 9(1) and (3) of the Interpretation of Laws Proclamation) to empower the ECN and the President to extend polling during an election when occasion requires.

[179] On a practical level, the implementers of the Electoral Act are the ECN and the President while the Court is the interpreter of the legal framework under which the franchise is exercised.

[180] Section 9(1) and (3) of the Interpretation of Laws Proclamation must therefore be seen in that light, if regard is had to the words ‘as occasion requires’ and ‘unless the contrary appears’ in other legislation.

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[28] G E Devenish *Interpretation of Statutes* (2002) at 210.

[181] The implementation role assumes significance in circumstances such as that which faced the ECN and the President where ballot papers had run out at specific places and there existed a solution to the problem capable of promoting the right to vote.

[182] The interpretation function resting on the Court requires of it to interpret provisions of the Electoral Act in a way that promotes the right to vote and to do so in a manner that allows the implementers to take all such measures as are within a range of reasonable and rational options open to them to promote and protect the right to vote.

[183] The interpretation put forward by the applicants is underpinned by the notion that completion of voting within the time determined for the conduct of the poll is so important a principle that it trumps the importance of creating as much opportunity as possible to extend the franchise to the greatest number of eligible voters. That is in sharp contrast to s 1(2) of the Electoral Act.

[184] The demerit of that interpretation is that it approaches s 64(1)(*b*) as if it imports an intrinsically immutable value in the period determined for voting. In other words, that the Legislature intended that if the period determined for voting cannot be complied with, the objective of a free and fair election is irreversibly compromised and that only a fresh election will cure the defect and satisfy the objective of a free and fair election.

[185] Undoubtedly, in our view, different considerations must apply where the exercise of a power is in furtherance of the right to vote as opposed to limiting or restricting it.

[186] The applicant's concern that an implied power to extend voting will give *carte blanche* to the President to extend voting to benefit himself or herself in circumstances where he or she is also a candidate, is assuaged by the fact that the power to extend is subject to the recommendation of the ECN. The President has no power to extend voting of his or her own accord. Moreover, each case is decided on its own unique facts. If the President were to extend voting to benefit himself or herself, it is arguable that such a decision would not withstand challenge.

[187] To visit with nullity a failure to complete an election within the time stipulated under s 64 of the Electoral Act (in the absence of proof that the non-completion denied eligible voters their right to vote), is out of all proportion to any legitimate public benefit to be derived from inferring nullity. By stronger reasoning, to deny the existence of a power to extend voting to afford eligible voters the right to vote – in circumstances such as faced by the ECN on 27 November 2024 – serves no legitimate public purpose.

[188] We discern no compelling public policy considerations from the Electoral Act why an election must be vitiated without affording the ECN and the President the opportunity to re-exercise the power under s 64(1)(*b*) 'from time to time' in order to promote and protect the right to vote 'when occasion requires'.

[189] It could not have been within the contemplation of Parliament that if voting is not completed on the date determined in terms of s 64(1)(*b*) of the Electoral Act, that that would be a complete failure of a free and fair election and that the only remedy is a fresh election. Such an interpretation would produce an absurd result.

[190] Concerning the reference to *Puma*, in the absence of an expressly granted power, whether a power can be implied or not is a function of interpretation. A unique feature of the Electoral Act is that it instructs the Court as interpreter to give pre-eminence to the right to vote. That has two consequences: The first is that the Electoral Act must be so interpreted that a power exercisable under the Act should advance and not limit the right to vote. Secondly, the power must not be exercised so as to deny the franchise to some while facilitating it to others. That raises the strong inference of an implied power of extension of the voting period from time to time when occasion requires. Reliance on *Puma* therefore does not assist the applicants.

[191] For all the reasons set out above, we are satisfied that the ECN was competent to recommend and the President had the power to re-exercise the power granted in s 64(1)(*b*) as occasion required to make it possible for voters who would otherwise be disenfranchised, to vote on 29 and 30 November 2024. That extension did not amount to establishing new polling dates and a new election. It was a continuation and completion of the election which was determined on 26 September 2024.

[192] As the respondents correctly submit, the dates of 29 and 30 November 2024 were well within the 'not less than 40 days and not more than 45 days after the nomination day', as contemplated by s 64(3)(*b*) of the Electoral Act.

[193] It was not necessary, contrary to the applicants' suggestion otherwise, to make provision for all other incidental arrangements and provision for fresh nominations and such like. That could not have been done without the entire election being called off and the process starting afresh.

[194] The conclusion we come to is that Proclamation 34 of 2024 was lawfully enacted and the voting that occurred on 29 and 30 November 2024 was valid and lawful. The applicants have therefore not made out a case for the invalidation of the impugned Proclamation. Their challenge to the outcome of the 2024 Presidential election therefore fails.

Costs

[195] In our legal system, an award of costs is intended to indemnify the successful party in respect of expenses incurred to ward off a suit by the unsuccessful party.[29] In the constitutional era courts have sought to balance this common law principle against people's right to vindicate protected rights against officialdom. It is now trite

[29] *Afshani & another v Vaatz* 2007 (2) 381 (SC) para 27 where it was held that:
'Costs are not awarded on a party to party basis as punishment to the litigant whose cause or defence has been defeated or as added bonus to the spoils of the victor: the purpose thereof is to create a legal mechanism whereby a successful litigant may be fairly reimbursed for the reasonable legal expenses he or she was compelled to incur by either instituting or defending legal proceedings as a result of another litigant's unjust actions or omission in the dispute. It is intended to restore the disturbed balance in the scale of litigation expenses.'

that where a litigant seeks to ventilate constitutional complaints against the state or its organs it should not be mulcted in costs if unsuccessful.[30]

[196] The applicable principles relating to costs in constitutional litigation have been comprehensively set out in *Biowatch Trust v Registrar, Genetic Resources & others*[31] as follows:

(a) The primary consideration in constitutional litigation is the way in which a costs order would hinder or promote the advancement of constitutional justice and not so much whether the parties were acting in their own interest or in the public interest. It is also not a relevant consideration whether the parties were financially well endowed or indigent.

(b) What is relevant is not the nature of the parties or the causes they advanced, but the character of the litigation and their conduct in pursuit of it. Therefore, regard must be had to whether the litigation was conducted to assert constitutional rights and whether there had been impropriety in the manner in which the litigation was undertaken.

(c) A private litigant who loses in a constitutional litigation against an organ of State should not as a rule be condemned in costs. The rule rather is that in such circumstance each party should bear its costs.

(d) Where a litigant achieves substantial success against an organ of the State, particularly powerful reasons have to exist for the court not to award costs against the State.

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[30] *Standard Bank Namibia Ltd and Others v Maletzky & others* 2015 (3) NR 753 (SC).
[31] *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC).

[197] The South African Constitutional Court held in *Biowatch* that in litigation between private parties and government, where a private party unsuccessfully seeks to assert a constitutional right each party would bear its own costs.[32] The Constitutional Court also made clear that this general approach is not unqualified or risk free, adding:

> '. . .If an application is frivolous or vexatious or in any way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. . .'[33]

[198] The court in *Biowatch* also stated that if a litigant acted from improper motives or there are other circumstances which make it in the interest of justice to order costs, the court in its discretion would do so, controlling as it does its process.[34] The *Biowatch* approach has been approved by this Court.[35]

[199] In the present case, Dr Itula made serious and sweeping allegations of irregularities for which he has not laid any evidential basis. To his credit, he did not pursue that line of attack in his challenge against the Presidential election. Had he done so and lost, it would certainly have been a weighty factor whether or not costs would be ordered against him.

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[32] *Affordable Medicines Trust and others v Minister of Health & others* 2006 (3) SA 247 (CC) as cited in *Kambazembi Guest Farm CC t/a Waterberg Wilderness v Minister of Lands and Resettlement & others* 2018 (3) NR 800 (SC) paras 124-125.
[33] *Biowatch* para 24.
[34] *Biowatch* paras 20, 23-24, *Lawyers of Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) at paras 17-18. See also *Helen Suzman Foundation v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC) paras 36 to 38.
[35] *Kambazembi Guest Farm CC t/a Waterberg Wilderness v Minister of Lands and Resettlement & others* 2018 (3) NR 800 (SC) paras 124-125.

[200] The LPM and Mr Swartbooi made it clear from the outset that they did not allege irregularities in support of their challenge. Their challenge focused solely on the *vires* of Proclamation 34 of 2024. In the end, Dr Itula too narrowed the challenge to the impugned proclamation.

[201] It must be apparent from the judgment that many of the issues raised are not only novel in our electoral jurisprudence but raised important issues about the exercise of public power especially in our pluralist, multi-party democracy. The Court has had the opportunity to clarify important issues which no doubt will assist functionaries who conduct elections in the future. That would not have been possible had the applicants not brought the challenge.

[202] For this reason it would have a chilling effect if we order costs. Although they are unsuccessful, as the judgment demonstrates, the applicants' case on the *vires* of the impugned proclamation was an arguable one.

[203] We are satisfied therefore, in the exercise of the Court's discretion, that this is not a proper case to order costs against the unsuccessful applicants and that each party should bear their own costs.

Order

[204] We make the following order:

(a) The Landless People's Movement and Mr Bernadus Swartbooi are joined as second and third applicants respectively.

(b) The first, second, and third applicants' applications are dismissed.

(c) There is no order of costs and each party must bear its own costs.

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SHIVUTE CJ

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DAMASEB DCJ

_____
MAINGA JA

_____
ANGULA JA

_____
SMUTS AJA

APPEARANCES

FIRST APPLICANT:	M Katz (SC) (assisted by J Diedericks and K Perumalsamy) Instructed by Conradie Inc
SECOND & THIRD APPLICANTS:	P Kauta (assisted by K Premhid, T Luvindao, E Shigwedha and S Paulus) Of Dr Weder Kauta & Hoveka Inc
FIRST & SECOND RESPONDENTS:	R Heathcote (assisted by Dr S Akweenda Instructed by the Government Attorney
THIRD & FOURTH RESPONDENTS:	G Narib (assisted by E Nekwaya and E Shifotoka) Instructed by Andreas-Hamunyela Legal Practitioners
SEVENTH & EIGHTH RESPONDENTS:	S Namandje (assisted by T Chibwana and K Gaeb) Of Sisa Namandje & Co Inc