

Election Watch X

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UNFINISHED BUSINESS



Namibia's elections took place on November 27 and 28 2009 and the final result was certified and declared by the Electoral Commission of Namibia (ECN) on December 4 2009. Finish and klaar? Far from it.

Hardly any opposition parties attended the ECN's announcement of the final results as part of a boycott over the way the election had been organized. The post-election situation has turned out to be extremely messy. Initially, nine opposition parties approached the courts to gain access to the materials related to the election so that they could carry out their own audit.

Citing irregularities, the nine parties won access to the election materials just before Christmas in a judgement handed down by Judge Collins Parker. The opposition parties, having won the right to audit election materials, said they would then make a decision on whether to go on to challenge the results in court or accept them. The Judge gave the ECN until December 28 2009 to comply with the judgement and make the materials available, which included the returns from polling stations and the counterfoils of ballot paper books. The opposition parties then had a week to complete their audit. Having reviewed the results for 50 constituencies, the parties said they had enough evidence to bring a case calling for the election result to be set aside. As a result, another court application was brought on January 4 2010, which sought the nullification of the National Assembly election or alternatively a recount of votes cast. On January 14, the opposition parties expanded their court challenge to include the presidential election when they presented new documents to the court.

Unconfirmed reports have said the High Court will hear the case on February 5 2010, although officially a date has not been set.

The parties challenging the election results are: the Rally for Democracy and Progress (RDP), the DTA, the United Democratic Front (UDF), the National Unity Democratic Organisation (Nudo), the Congress of Democrats (CoD), the All People's Party (APP), the Republican Party (RP), Namibia Democratic Movement for Change (NDMC), and the Democratic Party of Namibia (DPN), as well as presidential candidates Hidipo Hamutenya (RDP), Katu-

tire Kaura (DTA), Justus Garoëb (UDF), Kuaima Riruako (Nudo), Ben Ulenga (CoD), Ignatius Shixwameni (APP), Henk Mudge (RP), Frans /Gôagoseb (NDMC) and David Isaacs (DPN).

There are nine respondents, the first being the Electoral Commission of Namibia. The other respondents are Swapo and President Hifikepunye Pohamba, and the other parties – Swanu, Monitor Action Group (MAG), the Communist Party (CP), the National Democratic Party (NDP), and presidential candidates Usutuaije Maamberua (Swanu) and Attie Beukes (CP).

Mistakes or rigging?

It is not clear if the opposition parties are alleging deliberate rigging of the election or a series of irregularities caused by incompetence and other factors which undermined the accuracy and fairness of the final result.

It is clear that there are loopholes in the system which could be exploited for the purpose of rigging an election. But whether they were exploited for such ends remains to be seen. With much of the evidence not yet in the public domain, there has inevitably been much speculation, including claims that extra ballot paper books were in circulation, some without registration numbers on their counterfoils. Other claims yet to be substantiated by the court, include: that 19,000 people voted without being on the voters register (this is allowed as long as a special form is filled in); that the names of 92,000 dead people appeared on the voters register and that 58,000 people were registered twice. Allegedly, these irregularities could have meant the real National Assembly result was different from the announced result by 11 seats. The court will have to decide whether these claims are backed by enough evidence before ordering any nullification or recount.

The opposition also focused on possible breaches of the Electoral Act, such as the failure to post results at some polling stations, the ECN's use of 'verification centres' to check results after official counting had ceased, and the apparently inaccurate and wildly fluctuating voters register, among others

Mistakes alone may not be enough to persuade the court to

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ELECTIONS EXPLAINED

Electoral disputes

Part 7 of the Electoral Act deals with what happens if there is a dispute about the election results. Court applications disputing the result of an election should be made within 30 days of the announcement of the result of the election in question. The applicant also has to pay an amount as security for future costs that the applicant may become liable for.

An election application can be presented to the court by a voter, a political party, candidates or the Attorney General.

Election applications must be heard in open court and should be decided on within 60 days from the date of the presentation of the application to the registrar of the court or within a longer period if special circumstances apply.

The court can only set aside the result of an election if any irregularity or illegal practice is deemed to have affected the result of the election. In other words, mistakes that did not affect the final result would not be enough to have a result nullified.

If the court states in a report on an election application that any person has been guilty of a corrupt and illegal practice or that there is reason to believe that corrupt and illegal practices have extensively prevailed at the election the information should be sent by the registrar of the court to the Prosecutor-General, with a view to prosecution.

The Electoral Act does not address the issue of what happens if a court case dealing with an election application continues after the five-year terms of office for the President and National Assembly members are finished.

ABOUT ELECTION WATCH

Election Watch is a bulletin containing electoral analysis and voter education, which will appear regularly in 2009 and 2010. It is produced as a PDF download and as a printed newspaper insert. Election Watch is a project of the Institute for Public Policy Research (IPPR). It is produced with the support of the Canadian Fund for Local Initiatives (CFLI), the Hanns Seidel Foundation (HSF) and The Namibian newspaper. The content of Election Watch is the sole responsibility of the IPPR. Comments and feedback should be sent to the IPPR, PO Box 6566, Windhoek, Namibia.

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order a re-run or a recount. The mistakes would have had to be significant enough to have affected the result of the election.

Section 95 of the Electoral Act states that “no election shall be set aside by the court by reason of any mistake or non-compliance ... if such a mistake or non-compliance did not affect the result of that election.”

Section 36 states that “if through accident, inadvertence or oversight, anything required by law to be done in the preparation of any voters’ register is erroneously done or omitted to be done, the voters’ register in question shall not be invalidated thereby...”.

The ECN and other respondents were yet to file their countering affidavits at the time of going to press.

Constitutional vacuum?

As to what happens if the court does nullify an election result, we are in uncharted territory – at least for Namibia. Neither the Constitution nor the Electoral Act make clear what should happen if an election dispute drags on beyond the five year terms of the President and the National Assembly, both due to end on March 21 2010. If, as March 21 approaches, the court process is still ongoing, a recount is still due or ongoing, or a new election is to take place, it would seem the current National Assembly would have to sit in emergency session to add a clause to the Constitution setting out a transitional arrangement whereby the existing government and president stay in power until the process is resolved. There are inherent dangers in such a move, but if such a situation arises it may become inevitable. Safeguards, including time limits and a possible reduction in executive power, may have to be considered for such a transitional period.

THE ISSUES AT STAKE

These are some of the crucial issues likely to be weighed by the court when assessing the merits of the opposition election application:

Ballot boxing stuffing

If there are ballot papers in ballot boxes that are not from the original ballot paper books then this would constitute ‘smoking gun’ evidence of vote rigging. Since there are no voter registration numbers on cast ballots, they might be difficult to spot. Differences in print quality or lack of the ‘secret mark’ on the back of the paper might be signs that extra ballots have been printed for the purpose of ballot stuffing. Other indications of ballot irregularities could include ballot paper books that have counterfoils with no voter registration numbers written on (although this could be a sign of incompetence or lack of training among electoral officials) or false voter registration numbers written on. Turn-outs of over 100 percent in some constituencies are not in themselves evidence of vote rigging, since the tendered ballot system could potentially create such a situation without any laws being broken.

The ever-changing voters register

The various versions issued to the parties in the run up to the election caused a lot of confusion. The question is: was this a deliberate attempt to make it difficult for parties and observers to track down vote rigging or was it plain incompetence on the part of the ECN? The voters register issued to the parties two days before the election contained the names of 822,344 voters. If this correct, then the eventual turn out of some 810,000 votes is extremely, if not impossibly, high. However, the ECN maintains that the official voters’ roll was one published in the Government Gazette on November 9 2009. That register contained the names of 1,181,803 voters.

What is the voting age population?

What would be a realistic number of registered voters? This would depend on government population projections as to the number of people over 18 in 2009. According to National Planning Commission projections the voting age population could be around 1.3 million out of total population of 2.1 million. That would make a voters register of 822,000 look quite low and a voters register of 1.2 million look very high. It depends which figure the ECN present to the court as the real voters register.

Name of political party/organization/association/candidate (in sequence of highest to lowest number of votes)	Number of votes recorded
SWAPO	652
NDP	606
MAG	1150
RDP	1150
DTA	103
N/UDO	273
COB	273
INWANK	273
UDF	273
APP	273
NDP	273
PCN	273
N/UMC	273
TOTAL	1767

REJECTED BALLOT PAPERS: 0

Full names of Presiding Officer (in print): JOHANNA WENGA
 Signature of Presiding Officer: [Signature]
 Date: 29/11/09

The result from Baines polling station in Windhoek West constituency - posted in a public place as required by law after counting was finished

Duplicates and dead people

The opposition parties claim there were 92,000 dead people on the version of the voters register last given to them just before the election and 58,000 duplicate names. If true this would demonstrate that the voters register was highly inaccurate. However, the Electoral Act appears to state that an inaccurate voters register alone is not enough to have an election set aside since ‘honest mistakes’ would not invalidate the register. The ECN is likely to argue that the use of indelible and invisible inks prevented double voting anyway. However, a deliberately inflated voters register could have been used to allow ballot stuffing, since unrealistic turnouts might be difficult to spot if the voters register has been falsified. This would probably only come into play as a key factor if there is clear evidence of ballot box stuffing to link to it.

People not on the register

According to the opposition parties at least 19,000 people who weren’t on the voters register voted. Some people were inexplicably left off the register even though they had registered properly (MAG MP Jurie Viljoen being one of them). Under the Electoral

Act people not on the register are allowed to vote as long as they have a valid voters registration card. However, their details are entered on a separate form before they are allowed to vote. Again this comes down to an inaccurate voters roll, but will that be enough evidence to derail the result? Perhaps only if it can be proved that some of the 19,000 did not have the right to vote.

Failure to post results

According to an amendment to the Electoral Act, results were to be posted at polling stations once the counting and announcing at a polling station had been completed. The opposition claim that in at least 41 constituencies the results were not posted as required by the law. Again, the question before the court will concern whether such an omission could have a material effect on the final result?

Use of ‘verification centres’

One of the reasons for the delay in announcing results was the apparent checking and re-checking of results at constituency centres and at the results centre in Windhoek. Such a drawn-out process inevitably raises suspicions. Also, is such a verification process legal, particularly if it involves re-opening ballot boxes without the presence of party agents, observers and the police? According to Section 87 of the Electoral Act, a returning officer in a constituency is allowed to verify the correctness of returns sent through by presiding officers.

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Mobile polling stations

There were more than 2,000 mobile polling stations as compared to nearly 1,000 fixed polling stations. There were fears, prior to the election, that if irregularities were to occur they would take place at mobile polling stations where there were few party agents or observers to check what was going on.

Tendered votes

This system which allows Namibians to vote anywhere in the country rather than in their home constituency only appears to have caused a series of problems, particularly as the ECN does not announce the tendered ballots cast separately. This can give the appearance of turnouts in excess of 100 percent in some constituencies. Whether or not it was linked to any malpractice, the tendered vote system creates loopholes and confusion which could be used by those wishing to manipulate an election result.

THE TENDERED VOTE CONTROVERSY, AGAIN

The tendered vote once again raised questions following the 2009 Presidential and National Assembly elections on November 27 and 28.

Tendered ballots have long been a source of some controversy in Namibian elections and one of the international observer missions, following the elections of November, went as far as calling for a “review” of the use of tendered votes in such important elections.

Critics of the tendered vote system say that in the absence of an accurate and reliable voters roll, ideally digital and encompassing voters across all 107 constituencies, being easily accessible at all polling stations across the country, the tendered ballot can become a means of manipulating electoral outcomes.

Supporters of the tendered vote system point to the fact that in highly mobile societies, such as Namibia’s, expecting people to return to their home constituencies just to vote for one or two days once every five years is unrealistic.

While both arguments have strong merits, the fact is that Namibia, or rather the Electoral Commission of Namibia (ECN), doesn’t have an accurate and reliable voters roll, which ECN Director of Elections, Moses Ndjarakana, admitted to in the week before the elections. This is evidenced by the fact that in the weeks prior to the elections at least four versions of the voters roll were released to political parties, the last one on the after-



Ballot box confusion ... tendered votes and ordinary votes

noon before the elections, with the number of voters varying from 1.3 million to just over 820 000, according to which version is accessed.

The state of the voters roll was one of the central issues with which some political parties approached the High Court to have November’s election results set aside.

The used of tendered ballots was questioned in both the 1999 and 2004 elections, and following the 2004 polls, the ECN itself undertook to review the use of tendered votes in the five years leading up to last year’s elections. However, the electoral body doesn’t seem to have given the issue much thought during that time.

On the election days of last November, a great many people cast their vote as tendered in both the Presidential and National Assembly elections, but it is impossible to say how many as the ECN has not provided a breakdown. What was striking about last year’s elections though was that an extraordinary number of ten-

dered votes, more than in previous elections, were cast in the northern regions of the country.

Why this was questioned was because people from the northern regions, which are Namibia’s most populous and probably most underdeveloped areas, have historically tended to migrate south, so when elections have come around the number of tendered votes was proportionally generally

considerably higher across the central and southern regions than across the north itself.

What makes the whole tendered vote issue murky and controversial is the perception that the ECN doesn’t have an adequate system available to reconcile tendered votes to their home constituencies. Compounding this is the fact that during the last elections, polling stations only had a voters roll available for the particular constituency in which the station was situated and thus a voter could not be marked off against their home constituency, regardless of where they voted. In light of this, it remains unclear, as it did in previous elections, how the electoral body handles the tendered ballot.

Against the background of so much suspicion of the tendered ballot system, maybe it has become time for the ECN to really conduct a “review” of this particular voting system and to either make the use of it more transparent and efficient or possibly drop the tendered ballot altogether.

SETTING THE STANDARDS

Electoral disputes

The African Charter on Democracy, Elections and Governance seeks to entrench in the continent a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies. The Charter was adopted by the African Union on January 30 2007.

Article 17 of the Charter says that States must “establish and strengthen national mechanisms that redress election-related disputes in a timely manner” and also “ensure that there is a binding code of conduct governing legally recognised political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them through exclusively legal channels.”

The Southern African Development Community (SADC) adopted the SADC Principles and Guidelines Governing Democratic Elections at the SADC Summit in Mauritius in August 2004.

In a section on the principles governing elections, the SADC document states that “challenge of the election results as provided for in the law of the land” should be allowed (2.1.10). Later in a section on the responsibilities of states holding elections, it is stated that SADC countries must “establish impartial, all-inclusive, competent and accountable national electoral body staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections (7.3).

OFFICIAL ELECTION RESULTS FROM THE ELECTORAL COMMISSION OF NAMIBIA

Presidential	Total	Percentage
REJECTED BALLOTS	12,363	1.52%
ATTIE BEUKES	1,005	0.12%
BENJAMIN ULENGA	5,812	0.72%
DAVID ISAACS	1,859	0.23%
FRANS GOAGOSEB	1,760	0.22%
HENRY MUDGE	9,425	1.16%
HIDIPO HAMUTENYA	88,640	10.91%
HIFIKEPUNYE POHAMBA	611,241	75.25%
IGNATIUS SHIXWAMENI	9,981	1.23%
JUSTUS GAROEB	19,258	2.37%
KATUUTIRE KAURA	24,186	2.98%
KUAIMA RIRUAKO	23,735	2.92%
USUTUAIJE MAAMBERUA	2,968	0.37%

Abbreviation	Political Party	Total Votes	Percentage
REJECTED	REJECTED BALLOTS	10,576	1.30%
APP	ALL PEOPLE’S PARTY (APP)	10,795	1.33%
CP	COMMUNIST PARTY(CP)	810	0.10%
COD	CONGRESS OF DEMOCRATS (COD)	5,375	0.66%
DPN	DEMOCRATIC PARTY OF NAMIBIA (DPN)	1,942	0.24%
DTA	DTA OF NAMIBIA (DTA)	25,393	3.13%
MAG	MONITOR ACTION GROUP	4,718	0.58%
DMC	NAMIBIA DEMOCRATIC MOVEMENT FOR CHANGE	1,770	0.22%
NDP	NATIONAL DEMOCRATIC PARTY	1,187	0.15%
NUDO	NATIONAL UNITY DEMOCRATIC ORGANIZATION (NUDO)	24,422	3.01%
RDP	RALLY FOR DEMOCRACY AND PROGRESS (RDP)	90,556	11.16%
RP	REPUBLICAN PARTY OF NAMIBIA	6,541	0.81%
SWANU	SOUTH WEST AFRICA NATIONAL UNION (SWANU)	4,989	0.62%
SWAPO	SWAPO PARTY OF NAMIBIA (SWAPO PARTY)	602,580	74.29%
UDF	UNITED DEMOCRATIC FRONT OF NAMIBIA (UDF)	19,489	2.40%

Q & A

Q: Can the swearing in of a new president and government be delayed if an electoral dispute in the court has not been resolved?

A: Namibian law is unclear on this. The Constitution clearly states that both the President and members of the National Assembly can only serve for a maximum of five years from the dates they are sworn in (Articles 29 and 50). The Electoral Act has a section (Part 7) on election court applications but does not say what would happen if a court case continued beyond the five year-term limits of elected politicians. According to the Electoral Act, court cases dealing with disputes should be dealt with within 60 days of the application being filed. As long as there is no unforeseen delay to court proceedings, this should mean that the High Court will pronounce on the opposition case calling for nullification of the result by the end of February or early March. However, if the court orders a re-run of the election, there could be further constitutional implications (see below).

Q: What happens if the High Court does nullify the result of either or both the National Assembly and Presidential elections?

A: Again the law is not specific on this, but there should be a re-run of the election that was nullified by the court. It is not clear at what point the electoral process would have to begin again. If the new process also involves a new period of voter registration, it could be a period of several months before a new election is held. In the event of this happening, neither the Constitution nor the Electoral Act specifically states that the existing National Assembly and President should continue in power during the interregnum. It may be that if the court orders that a new election be held, the present National Assembly would have to meet before March 21 to add a clause to the Constitution that would enable an existing government and president to stay in power until an electoral dispute is resolved. Any such clause would have to be carefully worded to avoid any future attempts by incumbents to stay in power indefinitely.

WHAT THE LOCAL OBSERVERS SAID

Extracts from the preliminary statement of the Joint NANGOF Trust and SADC-CNGO Observer Mission in respect of the 2009 Namibian Presidential and National Assembly Elections;

The Namibia Non-Governmental Organisations Forum (NANGOF) Trust in partnership with the SADC Council of Non-Governmental Organisations (SADC-CNGO) participated in the observation of the Namibian Presidential and National Assembly Elections deploying 47 observers to strategic constituencies in the country.

Comments on the pre-election phase

General: The late tabling of the Electoral Amendment Act in 2009 did not allow for adequate input from stakeholders. The Voter Education by the ECN was inadequate and this could be one of the reasons for the unacceptably high number of spoiled ballots (over 10,576 out of 811,143).

The election dates were announced very late (4 September 2009) and not by the Head of State as required by Section 50(1)(b) of the Electoral Act, Act 24 of 1992 as amended, but by the ECN. This was clearly in violation of the said section of the Act. The lawful announcement of the election dates by the President was only gazetted on 30 September 2009.

Voter registration: The continued practice of registering voters 20 years after independence by sworn statement rather than by Namibian identification documents diminishes the credibility of the Voters' Roll. Prospective voters were frustrated and turned away by inadequately trained ECN registration officials, who insisted on documents required for voter registration for local authority elections, while these citizens only wanted to be registered for the Presidential and National Assembly elections.

There were at least four different versions of the Voters' Roll which has brought the Voters' Roll into disrepute. Concerns were raised by most stakeholders that the Voters' Roll did not reflect thorough checking and updating.

Political tolerance: In contravention of the ECN's Code of Conduct for Political Parties to which all the fourteen (14) participating political parties had subscribed, the election campaign process was tainted by political intolerance and intimidation. Certain regions have effectively been declared as "no-go areas" for certain parties. Violence was used to prevent members of the opposition campaigning in such areas.



Media coverage: As far as the publicly funded state media are concerned the news coverage on NBC TV was glaringly biased in favour of one political party; so were the radio broadcasts, while the *New Era* newspaper and *Nampa* attempted to present some balanced information.

Role of Security Forces: The Mission adds its voice to the numerous commendations for the exemplary lead taken by the Minister of Safety and Security, the Inspector-General of the Namibian Police, supported by regional commanders, executing their mandate free from political interference, fear or favour and instructing their subordinates to act likewise.

Comments on the election phase

Polling Days: Both polling days were peaceful and calm. The voting process was generally smooth.

The Mission however noted the following issues of concern:-

- Limited deployment of party agents.
- Inadequate knowledge of party agents regarding their roles and responsibilities.
- Deficiencies in the layout at some polling stations.
- Inconsistencies in the application of the inking procedures in some polling stations.
- The widely observed failure of either one or both of the inks.
- Inconsistent interpretation of the overnight vigil at ballot boxes.
- Fatigue of the polling officials, police and party agents, especially on the second day of the elections, which had a negative effect during counting.
- Interference by some party agents with the voting.

Counting: The Mission regards it as a positive development that the new Electoral Amendment Act provides for counting of votes at each polling station. However, the legal requirement of posting of results at polling stations was not adhered to in numerous cases.

Comments on the post-election phase

Announcement of results: At the Central Election Results Centre (CERC) the ECN was receiving the results under a cloak of secrecy. Accredited persons to the CERC were all locked out and left idling their time away in the foyer. This has raised serious questions about the transparency of the ECN and the purpose of the CERC.

Tendered votes: It is clear that the Tendered Vote System remains a challenge to the ECN, thereby creating serious logistical and election management challenges, resulting in more time being taken to tally, compute and announce the results. The practice of lumping results of ordinary votes and tendered votes together contravenes Section 26 of the Electoral Amendment Act of 2009. This unlawful practice resulted in voter turn-outs of above 100%.

Verification Centres: Section 25(5) of the Electoral Amendment Act of 2009 makes it clear that the only place where recounting of votes is authorised is at the polling station. No recounting of ballots should be done at the so-called 'verification centres'.

General: The simultaneous announcement and rejection of the overall results has created a nationwide state of uncertainty. Based on our findings in the pre-election, election and post-election phases the Mission has serious reservations about the freeness and fairness of the election process.

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WHAT IS THE IPPR?

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