THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 887/2010

In the matter between:

THE DEMOCRATIC ALLIANCE **APPELLANT**

v

ETHEKWINI MUNICIPALITY **RESPONDENT**

Neutral citation: *Democratic Alliance v Ethekwini Municipality* (887/2010) [2011] ZASCA 221 (30 November 2011)

Coram: **Navsa, Brand, Heher, Maya *et* Cachalia JJA**

Heard: **4 November 2011**

Delivered: **30 November 2011**

Summary: **Applications to review decisions by local authority to change names of streets under its control – not 'administrative action' reviewable under Promotion of Administrative Justice Act 3 of 2000 – legality and rationality of decisions considered**

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Ntshangase J sitting as court of first instance):

1 The appeal is upheld to the extent reflected in paragraph 3.

2 The respondent is directed to pay the costs of the appeal.

3. The order of the court a quo is set aside and replaced by the following:

'(a) The first application, under case number 6608/2007, is upheld.

(b) The decision of the respondent's council on 28 February 2007 to rename the following nine streets:

1. Victoria Embankment;
2. Stanger Street;
3. NMR Avenue;
4. Point Road;
5. Alice Street;
6. Grey Street;
7. Broad Street;
8. Commercial Road;
9. M4 (Northern Freeway)

is hereby reviewed and set aside.

(c) The respondent is ordered to remove all signage indicating the names of the aforesaid streets by any name other than those set out in (b) above within three months.

(d) The second application, under case number 10787/2008, is dismissed.

(e) There shall be no order as to the costs of either application.'

4 The period of three months referred to in 3(c) above shall be calculated from the date of this Court's order.

JUDGMENT

BRAND JA (Navsa, Heher, Maya *et* Cachalia JJA):

[1] The appellant, the Democratic Alliance, is registered as a political party in terms of the Electoral Commission Act 51 of 1996. The respondent is the Ethekwini Municipality, established in terms of the Local Government: Municipal Structures Act 117 of 1998 (Municipal Structures Act), inter alia for the City of Durban. Though the appellant is represented on the respondent's council, (the council), it is one of the minority parties. The overall majority is held by the African National Congress (ANC). The appeal has its origin in two decisions of the council. Both decisions stemmed from a process embarked upon by the respondent to systematically rename certain streets, freeways and buildings within its municipal boundaries. The process took place in two phases. The first impugned decision, taken on 28 February 2007, marked the end of phase 1, while phase 2 ended with the second impugned decision which was taken on 28 May 2008.

[2] Pursuant to the first decision the council changed the names of nine streets and named – or renamed – two buildings. This led to an application by the appellant in the court a quo during June 2007, for an order setting that decision aside. In September 2008 another minority party represented in the council, the Inkatha Freedom Party (IFP), sought and obtained the leave of the court a quo to join the appellant as the second applicant in that application. The council's second decision of 28 May 2008, changed the names of 99 streets. This gave rise to a further application by the appellant and the IFP in the court a quo for the setting aside of that decision. When the matter eventually came before Ntshangase J, the two applications were heard and decided together. On 3 June 2010 he dismissed both applications, but made no order as to costs. The

appeal against that judgment by the appellant only – and not the IFP – is with the leave of the court a quo.

[3] Though disputed by the appellant at an earlier stage of the proceedings, it is now common cause that the council had the authority to assign names to streets, public places and buildings within its area of jurisdiction, which included the power to rename these streets and buildings. To the source of this power I shall soon return. But for the present, the council's authority to take the impugned decisions can be accepted as a fact. In broad outline the appellant's objections were against the process that led to the impugned decisions. These objections will be best understood against the background facts. These are largely common cause. Yet, there are areas of dispute. Since the appellant sought final relief in motion proceedings, I am constrained by the time-honoured approach of our courts in proceedings of this kind, essentially, to accept the correctness of the respondent's version with regard to the areas of dispute. Bearing that principle in mind, I propose to set out the background facts in chronological fashion. Though this does not necessarily make for entertaining reading, I found the chronology of assistance for my own understanding of the case.

[4] On 29 October 2001 the council adopted a street naming and renaming policy. Guidelines included in the policy were that, save in exceptional circumstances, streets would not be named after living persons; that every effort should be made to use names of people who are from KwaZulu-Natal; and that the adopted names should reflect the history and cultural diversity of the city. Under the rubric 'procedure for the renaming of streets', the policy document provided inter alia that:

'The changing of street names [should occur] subject to prior consultation with the addressees and all other affected parties having taken place.'

[5] During both phases of the renaming process, four bodies became involved, namely, a task team, a subcommittee of the council referred to as the

Masakhane Committee, the executive committee of the council (Exco) and the council itself. Apart from the task team, different political parties, including the appellant and the IFP, were represented in the other three bodies. The composition of the task team changed over time. But eventually it consisted of officials from different municipal departments. The functions of the task team during each phase were to initiate the renaming process, attend to the advertising required, scrutinise proposals and report to the Masakhane Committee. The Masakhane Committee reviewed the reports from the task team and made recommendations to Exco, which in turn submitted reports and recommendations to council for its consideration.

[6] Phase 1 of the renaming process commenced on 11 December 2003, when council noted a resolution by Exco to begin the process of renaming nine identified streets, being the streets that were eventually renamed during this phase. The process was, however, interrupted by the national and provincial government elections in 2004. During March 2005 the Masakhane Committee decided to restart the process. From 27 May to 10 June 2005 there were public advertisements in the print media inviting proposals for new street names in the respondent's area. No mention was, however, made in these advertisements of the nine streets that had already been earmarked to be renamed. About 200 submissions were received, but again the process was interrupted. This time by the local elections that took place in March 2006.

[7] On 31 January 2007 the respondent's mayor, in the course of delivering his new year's address to the council, referred to the nine streets involved by their new names. When the appellant and the IFP objected, they were told that these name changes were mere proposals which had not been finally decided. During February 2007 notice of phase 1 was pertinently advertised in the media. The notice was purportedly given in terms of s 28 of the Local Government Authorities Ordinance 25 of 1974 (KwaZulu-Natal) whereas it should have referred to s 208 of that Ordinance. It conveyed the message that on 28 February

2007, the council would ‘consider a proposal to change the names of certain streets in Durban as set out hereunder: . . ’. Then followed a list of the nine streets involved with their suggested new names, which happened to be the same as those alluded to by the mayor in his new year’s address. In conclusion the notice stated that ‘all persons or organisations having an interest in the proposal are invited to comment in writing to the under-mentioned address within seven days (7) of the date of this notice’.

[8] According to Mr Michael Sutcliffe, the respondent’s city manager, who deposed to the answering affidavits on its behalf, a large number of proposals were made consequent upon the advertised notice. The minutes of the meetings held by the various bodies involved, were annexed to the answering affidavit. They reflect that the task team then considered the proposals and resolved to recommend the new names which happened to be those already stated in the advertised notice. After by-passing the Masakhane Committee, Exco repeated the same recommendation – save for one exception – to the council and on 28 February 2007 this recommendation was accepted by the latter. The minutes also reflect that at the meetings of both Exco and the council, the decisions were opposed by the appellant and the IFP and that they were eventually taken by a majority vote after extensive debate.

[9] Finally the minutes of the various meetings reflect that although buildings referred to as the New Stadium and the International Convention Centre in Durban were not mentioned in the advertised notice, new names for these buildings were recommended by Exco and accepted by council. Sutcliffe’s explanation why these new names were not mentioned in the advertised notice was that these were new names and thus not part of the renaming process. Though the facts relied upon by Sutcliffe were disputed by the appellant, I am bound by the well-established rules pertaining to motion proceedings, to accept the correctness of the respondent’s version. Hence the names of these two buildings play no further part in this judgment.

[10] Phase 2 started in March 2007 when the task team published new notices in major local newspapers calling on the public to put forward proposals for the renaming of roads, streets, freeways, municipal buildings, parks and public places within the area of the respondent's jurisdiction. The same notice was conveyed by posters placed in the more than 40 public offices of the respondent and at municipal libraries in its area. The notices also reflected the policy considerations contained in the council's policy document of October 2001. So, for example, it stated that names of living persons would only be used in exceptional circumstances; that new names would recognise the history and cultural diversity of the city; and so forth.

[11] A total of 245 proposals were received. Some were disqualified as not adhering to the criteria of the policy document. Of those which did qualify, the task team prepared a list of 181 new names which was then tabled at the Masakhane Committee meeting of 18 April 2007. At that meeting the committee resolved to publish the list of names and invite public comment. Since the 181 names were found to contain a number of duplications which were removed, a list of 176 was published for comment in the major local newspapers circulating in the area. The published list contained the old names of 176 streets with the proposed new names alongside them. In conclusion the notice invited comments to these new names within 21 days of publication.

[12] The notice elicited 27 645 responses which, by all accounts, was beyond expectation. The task team prepared a schedule which summarised the substantive submissions and objections received. The schedule was then presented to the Masakhane Committee. Due to the large number of responses, this committee recommended that the period for public comment should be extended for another month to 23 June 2007. That recommendation was endorsed by Exco and eventually confirmed by a council decision of 29 May 2007. At the same meeting of the council it was also decided to accept a recommendation by Exco to amend the street names policy which was adopted

on 29 October 2001. According to the amendment, the requirement of prior consultation with the addressees and affected persons during the renaming process was deleted and replaced with the requirement of consultation with ward committees. From the minutes of the council meeting as well as the preceding Exco meeting where the amendment was recommended, it appears that the amendment was vigorously opposed by the appellant and the IFP but eventually adopted by majority vote.

[13] Sutcliffe's explanation for the amendment to the policy was essentially twofold. Firstly, that the 2001 policy was adopted in the context of isolated renaming requests and before the council started to contemplate a city-wide renaming of streets. Secondly, that the policy was adopted at a time when ward committees were not yet in existence. These committees were only established in the respondent's area on 21 April 2007 pursuant to Part 4 of Chapter 4 of the Municipal Structures Act. After the inauguration of the ward committees, Sutcliffe explained, it made more sense to consult with these committees rather than with individual addressees, particularly with regard to a city wide renaming process which was of interest to people beyond those living in a particular street. What is more, Sutcliffe continued, the requirement of consultation with addressees carried its own inherent difficulties. While, for example, freeways have no apparent addressees, roads in which there are informal settlements with a dynamic population may have thousands of unidentified persons who would qualify as addressees.

[14] After the meeting of the council in May, the extension of the public comment period to 23 June 2007 decided upon at that meeting was also published and received considerable media coverage. On 4 June 2007 Sutcliffe sent a notice to the ward committees instructing them to consider the proposed phase 2 names on the lists that he enclosed and to submit their comments by 25 June 2007. Of the 100 committees 76 responded. On 21 August 2007 the task team was mandated to consider all the new names proposed, including those

submitted during the extended period and to prepare a shortlist of no more than 100 names. At the end of August 2007 the task team submitted a list of 83. This was sent to the ward committees on 17 September 2007. They were given until 12 October 2007 to respond.

[15] On 28 November 2007 the task team submitted a report of all the responses received to a meeting of the Masakhane Committee. According to the minutes of that meeting, the committee considered the report thoroughly and then adjourned for further discussion in order to allow party caucuses to consider the proposals. On 13 February 2008 some political parties had still not submitted their comments and they were given an extension to do so until 18 February 2008. Ultimately, deliberations of the Masakhane Committee finally took place on 14 May 2008. According to the minutes of that meeting the committee reinserted further names, previously removed from the recommended shortlist, to make up a new list of 100 which it then recommended to Exco. Though Exco endorsed the recommendation, council decided, at its meeting of 28 May 2008, to change the names of 99 streets in its area. That is the decision which the appellant and the IFP sought to set aside in their second review application.

[16] Departing from this factual premise, the appellant's objections were in broad outline that:

(a) no proper public consultation process preceded either of the decisions in relation to phase 1 or phase 2;

(b) no proper deliberative process took place in any of the committees or the council itself with reference to these decisions;

(c) the council had failed to comply with its own street naming policy of 29 October 1991 and with the guidelines set out by the South African Geographical Names Council under the provisions of the South African Geographical Names Council Act 118 of 1998.

[17] For the primary legal basis of its challenge to both decisions the appellant

relied on the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The respondent denied, however, that PAJA finds application because, so it contended, the impugned decisions do not constitute 'administrative action' contemplated in PAJA as an essential prerequisite for all judicial review in terms of that Act. The court a quo considered the issue thus arising for the most part of its judgment. Eventually it agreed with the argument of the respondent. Hence it concluded that PAJA is not applicable. On appeal the issue was again raised by the appellant. Soon after the commencement of his argument before us, counsel for the appellant, however, conceded that the decision of the court a quo on this aspect could not be faulted.

[18] In the light of the concession, which in my view was rightly made, I propose to deal with the issue without elaboration. The definition of 'administrative action' in PAJA expressly excludes the executive and legislative functions of a municipal council. The question is therefore whether the impugned decisions constituted the exercise of an executive or a legislative function by the council, on the one hand, or administrative action, on the other. The starting point in answering this question seems to lie in the determination of the nature of the impugned decisions and the source of the council's authority under which these decisions were taken. As I see it, that source is to be found, firstly in ss 151 and 156, read with part B of Schedules 4 and 5 of the Constitution; secondly in s 83(1) of the Municipal Structures Act; and thirdly in s 208 of the Local Authorities Ordinance 25 of 1974 (KZN). The import of these provisions, in short, is to vest the control over streets and public places within a municipal area – and pertinently the authority to name and rename these streets and public places – in the council of that municipality.

[19] The impugned decisions were therefore taken by the council in the exercise of direct authority – as opposed to delegated authority – which has its origin in the Constitution itself. These decisions were taken by the elected members of the council, in open plenary session and by majority vote, as

contemplated by s 160(3)(*c*) of the Constitution. Moreover, the impugned decisions were clearly influenced by political considerations for which the elected members are politically accountable to the electorate. According to *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 41 these are all pointers away from 'administrative action' (See also *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 130). As the decision in *Fedsure* also implies, the fact that a particular decision is not incorporated in a bye-law, does not in itself exclude it from the category of 'legislative functions'. (As to the nature of the decisions in *Fedsure*, see paras 1 and 11-16.)

[20] There is further authority for the proposition that a decision taken by a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted, does not constitute 'administrative action'. This is to be found in decisions such as *Steele v South Peninsula Municipal Council* 2001 (3) SA 640 (C) at 644D and *Van Zyl v New National Party* 2003 (10) BCLR 1167 (C) paras 48-54. Since the decisions under consideration bear all these hallmarks, I think it can be accepted with confidence that they do not constitute administrative action under PAJA. The further somewhat intricate question as to whether these decisions should be categorised as the exercise of an executive function as opposed to a legislative function, is one we do not have to decide. As long as these decisions do not qualify as 'administrative action', PAJA does not apply.

[21] This conclusion does not mean, however, that these decisions are immune from judicial review. The fundamental principle, deriving from the rule of law itself, is that the exercise of all public power, be it legislative, executive or administrative – is only legitimate when lawful (see eg *Fedsure* para 56.). This tenet of constitutional law which admits of no exception, has become known as the principle of legality (see eg Cora Hoexter *Administrative Law in South Africa* 117). Moreover, the principle of legality not only requires that the decision must

satisfy all legal requirements, it also means that the decision should not be arbitrary or irrational (see eg *Pharmaceutical Manufacturers of South Africa: In re ex parte President of the RSA* 2000 (2) SA 674 (CC) at para 85; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at paras 74-75).

[22] Departing from these well established principles, the appellant contended that the impugned decisions were illegal in that they fell foul of statutory requirements and that they also failed to meet the rationality test. As to the former, it is not the appellant's case that the decisions were not taken in accordance with procedural requirements that are prerequisites to their validity, ie that they suffered from what has become known as a 'manner and form' deficiency (see eg *King v Attorneys' Fidelity Fund Board of Control* 2006 (1) SA 474 (SCA) paras 17-18). The objection is that the decisions were not preceded by a process of public participation required by statute. I propose to deal with this objection first.

[23] The Constitution places a specific duty on the National Assembly (s 59(1)) and on the National Council of Provinces (s 72(1)) to facilitate public involvement in their legislative and other processes. The same is expressly required from provincial legislatures – by s 118(1) of the Constitution – but not from municipal councils. Nonetheless, as I see it, municipal councils are also constrained to facilitate public participation in the performance of their executive and legislative functions. In my view that constraint derives, first, from their general constitutional obligation – under s 152(1)(*a*) of the Constitution – to 'provide democratic and accountable government for local communities' which by implication requires public involvement (see eg *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 145). Second, there are various statutory provisions which impose the obligation on municipalities to establish appropriate mechanisms so as to enable local communities to participate in municipal affairs (see eg s 17(2) and s 51(1)(e) of the Local Government: Municipal Systems Act 32 of 2000).

[24] It stands to reason, I think, that the yardstick as to whether, in given circumstances, the requirement of public participation had been satisfied by a municipal council cannot be different from the one applied with reference to the constitutional obligations imposed on the Houses of Parliament. That yardstick was succinctly formulated thus by Ngcobo J in *Doctors for Life International* para 145:

'. . . [T]he duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. . . . '

And para 146:

'In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.'

(See also *Matatiele Municipality v President of the Republic of South Africa* 2007 (1) BCLR 47 (CC) paras 50-56.)

[25] Applied to the impugned decisions under consideration the enquiry is therefore whether the council acted reasonably in facilitating public involvement.

As appears from the quoted dicta by Ngcobo J, one of the considerations in deciding this question is whether the council complied with its own rules. I find an appropriate starting point to the enquiry in the street naming policy which council adopted on 29 October 2001. It will be remembered that according to that policy the changing of street names would be 'subject to prior consultation with addressees and all other affected parties having taken place'. We also know that the procedure was subsequently amended by a resolution of council on 29 May 2007 to the effect that the words 'consultations with addressees' be replaced by 'consultation with ward committees'. I shall return to the amendment when dealing with phase 2. It is apparent, however, that when the decision with regard to phase 1 was taken on 27 February 2007, the naming policy of 21 October 2001 was still operative in its unamended form.

[26] Equally apparent is the fact that with reference to phase 1, the council had not complied with that policy, nor did it implement the new policy. That much is common cause. It is therefore clear that the council had failed to satisfy its own demands of reasonableness. The respondent did not suggest that this failure was of no consequence. That suggestion would hardly be open to it since it deviated from its own prescription. Moreover, the respondent tendered no explanation for this failure on the part of the council. What is clear is that it was not dictated by urgency. It will be remembered that the name change of the nine streets in question were considered more than three years before the decision was actually taken.

[27] The argument on behalf of the respondent, which was apparently accepted by the court a quo, was that it had nevertheless done enough to satisfy the dictates of reasonableness. I do not agree with this argument. The first indication that the names of streets within the respondent's area may change was conveyed by notices in the press during May and June 2005. However, these advertisements did not mention the names of the nine streets involved, even though they had already been earmarked for change. They consisted of no

more than a general invitation to propose new street names in the respondent's area. In the circumstances these advertisements could hardly be regarded as proper notice to the public of the impugned decision which was to follow nearly two years later. The first public notice of this decision came in February 2007. This notice identified the nine streets under consideration and their proposed new names. It did not invite any suggestions for alternative names. It only informed the public that these were the new names the council would consider at the end of that month. More significantly, it afforded members of the public only seven days to submit written comment. The appellant's objection was that the time period was inadequate in that it provided insufficient time for the receipt and compilation of objections; research into the background of the old and new names; and so forth. The validity of this objection, it seems to me, is dictated by common sense.

[28] There is no explanation for this unreasonably short notice period. Again the reason could obviously not be ascribed to urgency. As I have said, the proposal to change the names of these nine streets had already been mooted more than three years earlier. What is more, the procedure adopted is in stark contrast with that which was to follow in phase 2. We know that during the latter phase the eventual decision was preceded, for example, by a notice conveyed in the press and by posters placed in the respondent's offices throughout its area of jurisdiction. When the proposed new names had been identified, the public was first given 21 days and then another month to comment. Ward committees were then consulted and they were also given a month to respond. Finally party caucuses were allowed ample time to consider and discuss the proposed new names before phase 2 eventually terminated in the council's decision of 28 May 2007.

[29] In short, the manifest unreasonableness of the public participation process adopted during phase 1 is illustrated by what the council itself regarded as reasonable during phase 2. It follows, that in my view, council's decision of 28

February 2007, to change the names of the nine streets involved did not satisfy the legal obligation imposed on it to engage in a reasonable public participation process. In consequence, the decision failed the legality test and therefore falls to be set aside.

[30] This brings me to phase 2. In this instance the appellant again raised the objection that the respondent had failed to apply the policy reflected in the council resolution of 29 October 2001 by failing to consult with street addressees. But this time the objection falters because of the formal amendment of the policy by the subsequent council decision of 29 May 2007 which substituted addressees with ward committees. There is no suggestion that the amendment was invalid for reasons pertaining to either substance or procedure. Such suggestion would in any event be untenable. The reasons for the amendment given by Sutcliffe appear to be eminently sensible. What the appellant did contend was that the amendment could not find application midway through a name change process which had already started. But I cannot see why not. The amendment occurred before the process had reached the stage where it would take effect, ie before consultation with either the addressees or ward committees was required. It is common cause that the ward committees were then consulted. Hence the requirements of the amended policy had been met.

[31] I have already given a rather laborious account of all the steps taken by the respondent to facilitate public participation during phase 2. Repetition of the exercise can hardly serve any useful purpose. Suffice it to say that what the respondent did during phase 2 cannot, in my view, be categorised as unreasonable. The appellant's further objection was that the respondent had failed to indulge in a consultative process with opposition parties in the various committees and at the level of council itself. Apart from the questionable legal validity of this objection, it is simply not borne out by the facts. On the contrary, the minutes of the meetings of the various committees and of the council reflect comprehensive debates between council members representing the different

political points of view. The appellant's real objection appears to be that it and the other minority parties had been outvoted by the ANC which holds the overall majority. That, however, is inherent in the democratic process. It resulted in a political decision for which the ANC must account to the electorate. For this Court to review that decision would offend the doctrine of the separation of powers, which is inherent to our constitutional democracy.

[32] The appellant's further contention that the council's decision during phase 2 had failed the legality test, rested on the standards and guidelines set by the South African Geographical Names Council. This council (the Names Council) was established in terms of the South African Geographical Names Council Act 118 of 1998. In terms of s 9(1)(*b*) of the Act, the Names Council's only power in relation to local authorities is to set standards and guidelines. Its power to recommend names to the responsible Minister – who is the Minister for Arts and Culture – in terms of s 9(1)(*d*) is restricted to names falling within 'the national competence'. In terms of s 12(3) of the Act, the Minister is empowered to make regulations about any matter that is permitted or required to be prescribed by the Act. Regulations were indeed promulgated in terms of s 12 (see Government Notice R339 in *Government Gazette* of 7 March 2003). But these regulations do not deal with any standards and guidelines for local authorities.

[33] What the appellant relied on was a booklet published by the Names Council. The booklet itself confirms that the Names Council has no jurisdiction over names of streets under the control of local authorities. It however records that the same policies and principles established by the Names Council apply to all geographic names, including those that do not fall under its direct control. The principle referred to in the booklet pertinently relied on by the appellant is that 'names of living persons should generally be avoided'.

[34] I find the booklet a rather curious document with questionable legal status. In *Chairpersons' Association v Minister of Arts and Culture* 2007 (5) SA 236 (SCA) this Court accepted that the booklet is generally binding. But the

acceptance was based on an assumption to that effect by the parties involved in that case (see para 10 of the judgment). This Court was therefore not required to determine the legal status of the booklet. In this matter I again find it unnecessary to decide the question. This is so because, in my view, the appellant's objection is in any event unwarranted on the facts. The principle on which it pertinently relies is no more than a guideline which contains no absolute injunction against the use of the names of living persons. All it says is that these should generally be avoided. It seems that only a small number of the names adopted by the council in phase 2 are those of living persons. As I see it, the appellant has therefore failed to establish a case that the respondent did not 'generally' avoid names of this kind.

[35] While referring to policy guidelines, it will be remembered that the council adopted its own guidelines which provided, for instance, that every effort should be made to use names of people who are from KwaZulu-Natal and to adopt names which reflect the history and cultural diversity of the city. Though the appellant raised the objection in its papers that the new names adopted during phase 2 did not follow these guidelines, no specific challenge of illegality was mounted on this basis. Perhaps the appellant realised that, due to the tentative nature of the guidelines – which required no more than 'that every effort should be made' – insignificant deviations from them could hardly be said to render the impugned decision unlawful. But, be that as it may, absent any pertinent challenge on this basis, it cannot be entertained.

[36] I now turn to the appellant's objection against the council's decision in phase 2 which is based on irrationality. On the appellant's papers this objection was raised within the narrow parameters that the decision as a whole was irrational. Conversely stated, the objection was not aimed at individual name changes. Whenever objections were raised against specific names they were pertinently prefaced by the introduction that this was done 'by way of example'. In this light the attempt by the appellant's counsel in argument before us to extend

the rationality challenge to particular name changes, can therefore not be entertained. The reason is obvious. Had these attacks been raised on the appellant's papers, the respondent may well have been able to explain why that particular name had been chosen.

[37] As to the rationality challenge against the decision in principle, involving the names of 99 streets, it has by now become well established that the rationality standard does not have a high threshold. All it requires is that the impugned decision must be aimed at the achievement of a legitimate government object and the chosen method to achieve that object. The standard does not require that the decision is reasonable, fair or even appropriate. It is of no consequence that the object could have been achieved in a different or better way (see eg *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 36; *Pharmaceutical Manufacturers supra* para 90; *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) paras 32-35).

[38] The rationale given by the respondent for the council's decision to embark upon a process of renaming streets under its control is that the existing names reflect a single and narrow historical perspective essentially of a colonial past. The legitimacy of that governmental object can hardly be doubted. Equally obvious, in my view, is the rational connection between the achievement of that object and the decision in principle to change the names of 99 out of the thousands of streets under the respondent's control. Clearly the determination of just which streets should be renamed and what new names chosen admits of no right answer and is inherently political. That is reflected in the polar-contrasting perspectives taken by the appellant and the respondent in relation to the individual names. The appellant contended that some of the new names are provocative and insensitive. It is apparent, however, that these denouncements derive from the appellant's political perspective, which is obviously not shared by the majority party. From a political point of view, the appellant may be right, but bad politics is something for the electorate to decide. It is not for this court, or any

other court, to interfere in the lawful exercise of powers by the council on that basis.

[39] It follows that in my view the appellant's first application, which was for the review of the council's decision in phase 1 should have succeeded, but that the court a quo's dismissal of the second application, pertaining to the decision in phase 2, should be upheld. It follows that with reference to the first application, the appeal should succeed which means that the appeal is substantially successful and that the costs of the appeal should follow that event. What remains is the issue of costs in the court a quo. Though both applications were dismissed by the court a quo, it made no order as to costs. In doing so it was clearly guided by the principle established by the Constitutional Court, eg in *Biowatch Trust v Registrar Genetic Resources* 2009 (10) BCLR 1014 (CC) para 95, that private litigants seeking to protect their constitutional rights should not be mulcted in costs, even when they are unsuccessful in doing so. With regard to the second application where the appellant was successful, I think that order should stand. As to the first application which should, in my view, have succeeded, the result would ordinarily be that respondent should pay the costs. I do not believe, however, that in all the circumstances that result would be fair. The two applications were argued together and the papers bearing upon the second application, where the respondent was the successful party, were substantially more voluminous that those pertaining to the first. In consequence I conclude that, despite our interference on the merits cost order of the court a quo should stand.

[40] For the reasons the following order is made:

1 The appeal is upheld to the extent reflected in paragraph 3.

2 The respondent is directed to pay the costs of the appeal.

3. The order of the court a quo is set aside and replaced by the following:

'(a) The first application, under case number 6608/2007, is upheld.

(b) The decision of the respondent's council on 28 February 2007 to

rename the following nine streets:

1. Victoria Embankment;
2. Stanger Street;
3. NMR Avenue;
4. Point Road;
5. Alice Street;
6. Grey Street;
7. Broad Street;
8. Commercial Road;
9. M4 (Northern Freeway)

is hereby reviewed and set aside.

(c) The respondent is ordered to remove all signage indicating the names of the aforesaid streets by any name other than those set out in (b) above within three months.

(d) The second application, under case number 10787/2008, is dismissed.

(e) There shall be no order as to the costs of either application.'

4 The period of three months referred to in 3(c) above shall be calculated from the date of this Court's order.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

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RESPONDENTS:	A M Stewart SC
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