THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

30 November 2011

STATUS: Immediate

DEMOCRATIC ALLIANCE V ETHEKWINI MUNICIPALITY (887/2010)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal (the SCA) today upheld the appeal with costs.

The appeal has its origins in two decisions of the respondent's 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. Pursuant to the first decision the council changed the names of nine streets and renamed two buildings. This led to an application by the appellant in the KwaZulu-Natal High Court (the court a quo) for an order setting that decision aside. 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 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 came before the court a quo, the two applications were heard and decided together.

The court a quo, per Ntshangase J, dismissed both applications but made no order as to costs. The appeal against that judgment by the appellant only – and not the IFP – was with the leave of the court a quo.

The SCA acknowledged the fundamental principle that the exercise of all public power be it legislative, executive or administrative is only legitimate when lawful. This has become known as the principle of legality which requires that the decision should not only satisfy all legal requirements but that it should also not be arbitrary or irrational. Departing from these principles, the appellant contended that the impugned decisions were illegal in that they fell foul of statutory requirements and also failed to meet the rationality test. As to the former the appellant's objection was that the impugned decisions were not preceded by a process of public participation required by statute. The Constitution does not require municipal councils to facilitate public involvement in their legislative and other processes, nonetheless, the SCA

stated, municipal councils are also constrained to facilitate public participation in the performance of their executive and legislative functions. This, the SCA stated, derives from their general constitutional obligation to 'provide democratic and accountable government for local communities' which by implication requires public involvement. Moreover, 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. The enquiry is whether the council acted reasonably in facilitating public involvement. One of the considerations in deciding this question is whether the council complied with its own rules. The council's own street naming policy provided that the changing of street names would be 'subject to prior consultation with addressees and all other affected parties having taken place'. The procedure was subsequently amended by a resolution of the council to the effect that the words 'consultations with addressees' was replaced by 'consultation with ward committees'. When the decision with regard to phase 1 was taken, the naming policy of 29 October 2001 was still operative in its unamended form. The SCA stated that it was apparent that the council did not comply with that policy with reference to phase 1 and had therefore failed to satisfy its own demands of reasonableness. The respondent did not suggest that this failure was of no consequence, it tendered no explanation for this failure on the part of the council and it was not dictated by urgency. The respondent argued that it had nevertheless done enough to satisfy the dictates of reasonableness. The SCA did not agree and held that council's decision to change the names of the nine streets did not satisfy the legal obligation imposed on it to engage in a public participation process which is reasonable. In consequence, the decision failed the legality test and therefore was set aside by the SCA. As to phase 2, the SCA held that it was taken at a stage when the policy had been amended and the requirements of the amended policy had been met.

The appellant's further objection that the respondent failed to engage in a consultative process with opposition parties in the various committees and at the level of council itself, so the SCA held was simply not borne out by the facts. The decision resulted in a political decision for which the ANC must account to the electorate and for the SCA to review that decision would offend the doctrine of separation of powers. The appellant's further contention was that the council's decision during phase 2 had failed the legality test as it rested on standards and guidelines set by the South African Geographical Names Council. However, this Council's only power in relation to local authorities is to set standards and guidelines. What the appellant relied on was a booklet published by the Council. The SCA found it unnecessary to decide the legal status of the booklet as the appellant's objection was in any event unwarranted on the facts. The principle it relied on was 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. Only a small number of names adopted by the council in phase 2 are those of living persons. Hence the appellant failed to establish a case that the respondent did not 'generally' avoid names of this kind.

The appellant then objected that the council's decision in phase 2 was irrational. They submitted that the decision as a whole was irrational, and it was not aimed at individual name changes. The rationality standard merely requires that the impugned decision must be aimed at the achievement of a legitimate government object and the chosen method to achieve that object. This standard does not require that the decision is reasonable, fair or even appropriate. It is of no consequence that the object could be achieved in a different or better way. The rationale behind the decision was that the existing names reflected a single and narrow historical perspective essentially of a colonial past, it was political, not irrational.

For these reasons the SCA held that the appellant's first application, 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 followed that with reference to the first application, the appeal should succeed which meant that the

appeal was substantially successful and the costs of the appeal should follow that event. The SCA stated that despite its interference on the merits, the cost order of the court a quo should stand.

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