

IN THE HIGH COURT OF SOUTH AFRICA**(GAUTENG DIVISION, PRETORIA)****APPEAL CASE NO: A811/2013****NGHC CASE NO: 20665/2013**

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	☒ YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	☒ YES/NO.
(3) REVISED.	
26-5-2015	
DATE	SIGNATURE

CITY OF TSHWANE METROPOLITAN MUNICIPALITY**Appellant****(Respondent in the Court a quo)**

And

AFRIFORUM**1st Respondent****EVERT VAN DYK****2nd Respondent****(First and Second Applicants in the Court a quo)**

JUDGMENT

Jordaan J:



INTRODUCTION

1. This is an appeal against the decision of Prinsloo J handed down on 19 April 2013 granting then respondents interim relief interdicting and restraining the appellant, the CITY OF TSHWANE METROPOLITAN MUNICIPALITY

from removing street and road signs bearing the old names of streets forming the subject matter of the review pending the final determination of the review action under Case No. 21910/2012 (The review action) regarding the City's decision on 29 March 2012 and the finalisation of any appeal following therefrom.
2. The City was ordered, within two months of the date of the order, to restore and replace such signs bearing such old names to their position on the streets prior to them having been removed therefrom by the City or those acting on its behalf.
3. Leave to appeal to this Full Court was granted by the Supreme Court of Appeal on 12 September 2013.

4. BACKGROUND TO THE APPLICATION:

Both parties provided in their Heads of Argument a comprehensive chronology of events that lead up to the application in the court *a quo*. The Respondents annexed (annexure "A") to their heads, a table setting out these

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events. On behalf of the Respondents it was submitted that of particular relevance to this appeal is the following:

- 4.1 On the 25th of April 2002 the Appellant's council adopted its Policy Guidelines for the Naming of Public Places and Streets ("the Policy") which was developed by the Appellant to provide clear guidelines as to the renaming of public places and streets. These Guidelines appear in Volume 2 on paginated page 141. I agree that it is a comprehensive, thorough policy ensuring the promotion of the spirit of democracy, proper public participation and the involvement of the persons affected.
- 4.2 On the 27th of September 2007 the Appellant's Council resolved to change the names of 27 streets in Pretoria.
- 4.3 At the very same meeting (27 September 2007), and without prior notice of the intention to do so, following the adjournment for the majority party to convene a caucus on the issue, the Appellant's council decided to summarily set aside its Policy and also, that *"for purposes of this report"* a public participation process involving –
- (a) Ward Committees city wide;
 - (b) Stakeholders;
 - (c) The general public through submissions
- be approved.
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4.4 The Appellant states that it conducted public participation meetings at *"various wards"*. This is based on 10 meetings which were held at the following venues:

- 4.4.1 Temba Council Chamber;
 - 4.4.2 Mabopane Skills Centre;
 - 4.4.3 Soshanguve Bodibeng Library;
 - 4.4.4 East Lynne Community Centre;
 - 4.4.5 Mamelodi West Community Hall;
 - 4.4.6 Atteridgeville, Ramushu Hall;
 - 4.4.7 Centurion Council Chamber;
 - 4.4.8 Sammy Marks Auditorium;
 - 4.4.9 City Hall; and
 - 4.4.10 Pretoria North Town Hall; (a previous attempted meeting at this venue had to be postponed due to rioting).
- 4.5 On 29 March 2012 a report in respect of the renaming of the 27 inner-city streets was presented to the Appellant's Council and the Appellant's Council resolved to change the names of the relevant streets to the names as proposed in the report. (The Respondents submit that It should be noted that the proposed names were not presented to the community or the public at large after they were finally decided upon by Council and the decision to change the names directly occurred already on the 29th of March 2012.)

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4.6 On the 2nd of April 2012 the First Respondent requested an undertaking not to remove the old street name signs (affixed under the new street name signs with a red line through it) failing which they would proceed to launch an urgent application.

4.7 On the 16th of April 2012 the Appellant's response declining that request was received.

4.8 On the 17th of April 2012 the First Respondent again requested an undertaking. On the 18th of April 2012 the Appellant indicated that it will only be able to respond by the 20th of April 2012. The First Respondent then launched the first urgent application which led to the judgment by Tuchten J finding that:

"What happened is that Afriforum promptly on learning of the decision sought an undertaking that the City would not implement its decision pending a review which the Applicant intended bringing, giving the City a fairly lengthy period to respond to its request for an undertaking. The City did not respond until the last day of the period so given and then declined to furnish the undertaking and began putting up the new street boards. Afriforum brought its urgent application within a reasonable time after the City communicated its refusal to halt the implementation of its decision pending the proposed review. It became clear during argument before me that the City used the period offered by Afriforum to consider its position to engage a contractor to manufacture and put

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up new signs. That means that the city made its decision to decline to provide the undertaking sought and delayed for tactical reasons to communicate that decision to Afriforum".

And further that the Appellant provided an undertaking in open Court that:

"It would not proceed with the implementation of its decision until completion of a process which the city must consult the Provincial Government".

4.9 Thereafter a number of e-mails¹ exchanged between representatives of the First Respondent and the Appellant running from the 23rd of May 2013 until the 9th of October 2013. It is clear that those e-mails make it clear that there was an attempt by the First Respondent, initially welcomed by the Appellant's mayor, to discuss the issues in an attempt to arrive at an amicable result relating to both the issues of the street name and city name changes. After that process broke down the Respondent launched the review action on the 12th of December 2012. These communications are dealt with in the judgment of the Court *a quo* and explain why the First Respondent had not launched the main review application within two weeks as previously envisaged in the proceedings before Tuchten J.

¹ A summarised reference in chronological sequence is set out in the chronology (attached to the Respondents' heads of argument) relating to the respective e-mails and the subject thereof.

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- 4.10 On the 13th of December 2012 and after the service of the review action, the Respondents' attorneys requested an undertaking not to remove the old street name signs (affixed underneath the new street name signs) pending the outcome of the review action.
- 4.11 On the 17th of January 2013 a second request for an undertaking was made by the Respondent's attorneys.
- 4.12 On the 4th of February 2013 the Appellant's attorneys of record responded indicating that they are busy taking instructions from the Appellant, adding that *"...we hope to be in a position to revert to you shortly"*.
- 4.13 It is not in issue that on the 4th of April 2013 the Appellant's Mayor made a speech declaring that the old street name signs would be removed and that only the new street name signs would remain.
- 4.14 On the 5th of April 2013 the speech was reported in The Beeld newspaper and the Respondents became aware of the Appellant's intention to remove the old street name signs. On the very same day the Respondents' attorneys, referring to their previous request for the undertaking to the news reports of the Mayor's announcement that all street name signs would be removed, sent a further request for an undertaking to the Appellant's attorneys of record.
- 4.15 The Appellant's attorneys refused to give such undertaking.

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- 4.16 On the 6th of April 2013 a further article appeared in The Beeld newspaper dealing with the Appellant's accelerated removal of the old street name signs.
- 4.17 On the 8th of April 2013, and as it had become clear that the Appellant not only refused to give an undertaking but was accelerating the removal of the old street name signs, the Respondent sent an unsigned copy of the application to the Appellant's attorneys (which was eventually heard in the Court *a quo*) to enable them to start preparation of their answering papers.
- 4.18 On the 9th of April 2013 the application was served upon the Appellant's attorneys of record.
- 4.19 On the 10 of April 2013 the Respondents delivered their amended notice of motion and supplementary affidavit stating that since the service of the application the Appellant had accelerated "*op 'n ongekende spoedeisende skaal*" the removal of old street name signs. This drew only the following response in the Appellant's answering affidavit.

"132 The contents of the supplementary affidavit in support of the amended notice of notice are scandalous, irrelevant and vexatious. They have no bearing upon the determination of the application. The Applicants must make out a case for the relief

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sought and not litigate by reference to other matters for which no facts are adduced.

133. *Bald allegations emanating from other matters or circumstances, without outlining the full facts and context, is not only irrelevant, but is desperate and unhelpful”.*

On behalf of the Respondents it was submitted that far from denying that the removal of the street names were accelerated for the very purpose to thwart the pending legal proceedings, and clearly realising that scurrilous attacks for being “*scandalous, irrelevant and vexatious*” is the only possible form of defence available to Appellant, these passages do not contain a single phrase – even a bald one – which amounts to a denial. Hence, and as stated in the judgment of the Court below, the accelerated removal of the old names is common cause. Indeed, it continued whilst the matter was being heard, a fact which was also confirmed during argument by the Appellant's counsel before Prinsloo J.

4.20 On the 12th of April 2013 the Appellant delivered its plea on the review action which was served on them on 12 December 2013.

4.21 Only on the 15th of April 2013 did the Appellant belatedly deliver an unsigned answering affidavit per e-mail (some 5 days late) at 18:49, and the annexures only at 20:17.

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4.22 On the 16th of April 2013 the Respondents delivered their replying affidavit.

4.23 The urgent application to which the appeal relates was argued on the 17th of April 2013 and judgment was delivered on the 19th of April 2013.

5. In the Heads of Argument on behalf of the Appellant the salient facts are set out as follows:

5.1 The Executive Mayor of the City of Tshwane Metropolitan Municipality on 4 April 2013 in his State of the City speech, announced that the old street names in Tshwane would be replaced with the new names. This follows a resolution adopted by the City Council 29 March 2012 to replace 27 street names.

5.2 The City had on 29 March 2012, resolved at its meeting that:

- "1. That the proposed street names as submitted hereinunder be approved.*
- 2. That concurrence be obtained from Gauteng Provincial Government on the provincial roads once approved by Council, and that the Chairperson: Section 79 Standing Committee: Local Geographical Names be authorised to lodge with the necessary applications with the Gauteng Provincial Government.*

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3. *That Nelson Mandela Drive be extended up to R21 where it meets Albertina Sisulu Drive, and that the Chairperson: Section 79 Local Geographic Names Committee be authorised to lodge with the necessary applications with the Gauteng Provincial Government.*
4. *That the Department of City Planning, Transport and Roads be authorised to proceed with the necessary administrative actions to give effect to the name changes and embark on a process to inform the public of the new names. (emphasis added by Appellant)*
5. *That the Department of Marketing and Communications be authorised to proceed with a campaign to publicise the new names. (emphasis added by Appellant)*
6. *That any street name elsewhere in the City that is named after any of the individuals contained in one above be changed to avoid any duplication of names; consistent with the policy.*
7. *The Chairperson: Section 79 Local Geographic Names Committee be authorised to initiate Phase 2 of the process of changing public names and street names and that such report be tabled to the Council no later than May 2012."*

5.3 Subsequent to the above resolution, the respondents instituted a review action in this Court on 12 December 2012 seeking to set aside the City's resolution of 29 March 2012 and that the City be ordered to remove all signage within three months of the order.

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- 5.4 The respondents' case in the review action is, essentially, that there had been a series of illegalities, i.e. failure to comply with the guidelines set out by the South African Geographical Names Council under the provisions under the South African Geographical Names Act No. 118 of 1998, s33 and s41 (a), (g) and (h) of the Constitution, the National Heritage Resources Act, 25 of 1999 and the Local Government: Municipal Finance Management Act, 56 of 2003. Furthermore, there had been no consultation and/or public participation process as undertaken by the City in its resolution of 27 September 2007.
- 5.5 The review has not been adjudicated upon.
- 5.6 Following the resolution of 29 March 2012, the respondents on 19 April 2012 launched an urgent application before Tuchten J on 24 April 2012. Tuchten J did not deem it necessary to make an order in light of the City's undertaking that it would not proceed with the implementation of its resolution until the completion of a process by which the City must consult the provincial government in respect of the eight affected provincial roads and it would not replace any of the other road signs for a period of six months; instead it would put up the new names and leave the old names in place for that period.
- 5.7 Tuchten J did not grant an interdict but only noted the undertaking made by the City, ie that it would not remove the old street signs for a period of six months, effective from 30 April 2012. That period lapsed on 31 October 2012, having been noted by Tuchten J on 30 April 2012. No extension was granted nor did the parties agree to extend the "moratorium".

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5.8 Justice Prinsloo on 19 April 2013 granted the orders referred to above. In doing so, Prinsloo J made the following findings:

5.8.1 The relief sought by the respondents would have no meaningful impact on the statutory powers and duties of the City because the City would continue with its own scheme introduced in April 2012, during the proceedings before Tuchten J (i.e. the undertaking made by the City that the old street names would exist alongside the new street names for a period of six months as referred to above).

5.8.2 Prinsloo J also criticised the City for having removed the old street signs, notwithstanding the fact that there was no bar, whether statutory or contractual, to the City removing the old street names. He expressed his criticism as follows:

"The City should have heeded repeated calls not to remove the street signs but [it] recklessly proceeded with the removal operation, in the face of the interdict application, the potential expense of restoring the old names would also have been saved".

5.8.3 In ordering the restoration of the removed old street names, Prinsloo J appears to justify his decision based on the fact by the time the review process is concluded the names of the removed street names would have fallen into disuse.

5.8.4 As the court put it, if the review process were to stretch over a longer period and finally come before a court of appeal, such court may decline to set aside the actions of the respondent even if found to be unlawful, it may

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hold that it is too late and impractical to unscramble the proverbial egg by reintroducing the old names years after the event.

5.9 It is this reason that underlies the decision and the order that the City reinstate the old street names.

5.10 Prinsloo J also concluded that on the authority of *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) at 159 A-F and 160 C – E, he could order the City to restore the removed street signs.

"I see no reason, against this background, why an order directing the respondent to perform an Act (as foreshadowed in PAJA) rather than to refrain from doing so, would not be competent in the circumstances of this particular case especially given the manner in which the old names were removed even in the face of pending interdict application."

6. Both parties dealt with the **appealability** of the order made in the court *a quo*.

On behalf of the Appellant it was submitted for the following reasons that the order, although "interim" in form, is actually final in effect.

6.1 The City is restrained from implementing its resolution pending the determination of the review action. It was submitted that the order effectively prevents the City from discharging its statutory powers and accordingly undermines the separation of powers doctrine.

6.2 The order directing the City to reinstate the signs that have been removed, effectively anticipates the findings of the review court that will adjudicate the

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matter. It means that the City would have to incur the costs of reinstating the street signs (a competence of the review court). The costs attendant to the reinstatement of the street names, once incurred are irreversible notwithstanding the fact that the review court might find in favour of the City. That would mean that the City would have to incur further costs of removing the reinstated street names.

6.3 So, whilst the review court might find in favour of the City, the issue of the costs pertaining to the reinstating of the street signs would be moot (the immediate, irreparable effects of the order).

7. The Appellant inter alia referred to ***National Treasury & Others v Opposition to Urban Polling Alliance & Others*** 2012(6) SA 223 (CC) (OUTA) at [25].

“whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary standing order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.” (emphasis added by Appellant.)

8. Reference was also made to ***Metlika Trading Ltd and Others v Commissioner, South African Revenue Services*** 2005 (3) SA 1 SCA at 24 where the court held that where an interim order is intended to have an immediate effect and will not be reconsidered on the same facts in the main proceedings it will generally be final in effect.

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9. It was submitted that given the immediate, irreversible and immediate impact of the orders of Prinsloo J, the City should not be compelled to first undergo the review action including any appeal and costs that will attend to those proceedings before the decision is corrected.
10. Regarding the Appellant's argument that the order issued by the court below, although interim, in form, is actually final in effect for the reason that the Appellant is restrained from implementing its resolution pending the determination of the review action and that the order effectively prevents the Appellant from discharging its statutory powers, undermining the separation of powers doctrine it was submitted on behalf of the Respondent that the reasoning of the Court *a quo* in this regard cannot be faulted: The relief granted does not as such interfere with the resolution to introduce the new names; they have been in place since April 2012 and will remain so; the new names were displayed prominently above the old names and the old names have a red line drawn through them "to place the impact of the change beyond doubt in the eyes of any reasonable observer". (My emphasis.)
11. The Respondents argued that the conclusion reached by the Court *a quo* namely that to allow that *status quo* to continue *pendente lite* could have no meaningful impact on the statutory powers of the Applicant is unassailable.
12. It was argued on behalf of the Respondents that the Appellant failed to perform a proper public participation process. It is submitted that their submissions in this regard are supported by the Constitution, the Local Government: Municipal Structures Act, No. 117 of 1998, the Local

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Government: Municipal Systems Act, No. 32 of 2000, and the decision of the Supreme Court of Appeal in *Democratic Alliance v eThekweni Municipality* 2012 (2) SA 151 (SCA).

13. This argument is raised at paragraphs 19.1 and 19.6 of the founding affidavit.

Paragraph 19.6 reads:

"Die Respondent het versuim om te voldoen aan sy eie besluit wat hy geneem het op 27 September 2007 en die proses wat daarin uiteengesit is met betrekking tot die hou en voer van 'n inklusiewe openbare deelname proses".

14. In paragraph 19.4 of the founding affidavit a further complaint is raised at paragraph 19.4 criticizing the Appellant for having simply set aside and/or ignored the pre-existing policy and guidelines (entitled "Policy Guidelines for the naming of Public Places and Streets) ("The 2002 Policy"). This was done by way of paragraph 6 of the resolution of 27 September 2007 in the following terms:

"That for purpose of this report, the Public Participation Policy Guidelines for naming of public places and streets be set aside and that a city wide public participation process involving –

- (a) Ward Committees city wide;
- (b) Stakeholders; and
- (c) The general public through submissions.

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be approved." (Emphasis added by the Respondents.)

They refer to this as "the 2007 PPP".

15. The Respondents' submissions are focussed on the fact that the Appellant did not even comply with the 2007 PPP. They however submit that it is necessary to have regard to the 2002 Policy as it demonstrates that, at least at that time still, the Appellant properly appreciated the immense gravity in cultural, historical, political and emotional terms, of any process by which the Council takes it upon itself to re-design and re-invent the historical character of the city through changing the names of streets and public places. The Respondents submit that in accordance with the legal principles applicable to the interpretation of any document, including ones such as the 2007 PPP, the 2002 Policy forms part of the *factual matrix* in the context of which it must be interpreted. They refer in this regard to ***National Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) at par 18 and *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009(4) 399 (SCA) at 409I – 410B.**
16. The Public Participation Policy Guidelines of 2002 is attached as an annexure to the papers. The Respondents have also quoted from this document extensively in their Heads of Argument. I only quote from this document insofar as I deem it necessary as it forms part of the record. It is a comprehensive document with an introduction which reads:

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"1. INTRODUCTION

In order to control and regulate the naming of public places and streets within the City of Tshwane Metropolitan Municipality's boundaries, the Council of the Municipality established an advisory committee in terms of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998). The advisory committee, which is known as the Public Place and Street Names Committee, was established by the Council of the Municipality by a resolution dated 6 September 2001".

This is followed by a comprehensive discussion of the applicable legislation (mainly from the Local Government Ordinance of 1939). It then proceeds as follows:

"3. GENERAL RULES FOR NAMING PUBLIC PLACES AND STREETS

- *The historical, social, cultural and emotional concerns of the local residents must be considered.*
- *The use of neutral names such as those of trees, birds, minerals and flowers is recommended.*
- *Names should preferably have a South African character of connection.*

The following are the types of names that must be avoided:

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- *Names of living persons, unless they are truly of national and/or international significance.*

- *Names that are offensive, vulgar, blasphemous, indecent or derogatory as regards race, colour, creed or gender.*

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4. GENERAL PROCEDURAL GUIDELINES FOR NAMING PUBLIC PLACES AND STREETS

- *All matters concerning the naming of public places, streets or structures vested in the Municipality and the naming of municipal properties must be referred in writing to the*

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Geomatics Information Office of the Municipality.

- *Any application for a name must include sufficient information about the name (origin, meaning, pronunciation, etc.) and the reason for wanting the name.*
- *The authorised official must evaluate the proposed names against the provisions of this policy.*
- *All names must be presented to the community for their acceptance. Depending on the circumstances, names must be presented to the community through the ward committee, through the local press or through a questionnaire on which signatures are to be affixed.*
- *The Ward Councillors should invite the members of the Public Place and Street Names Committee to ward committee meetings as observers.*
- *All names must be referred to the Public Place and Street Names Committee, which evaluates and considers the names.*
- *The Public Place and Street Names Committee must forward its recommendations to the Council for consideration and approval.*

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- *The relevant municipal departments, Telkom Ltd, the Surveyor-General and the Postmaster-General, as well as the applicant, must be notified immediately of an approved name". (Emphasis added by the Respondents.)*

17. The Respondents submit that the central focus is on *local residents* and presentation of proposed name changes *to the community* which clearly signify that in any naming process the *historical, social, cultural and emotional concerns* of residents (or the community) of the immediate locality should be accorded special weight.

18. In regard to the change of street names the 2002 Policy provides:

"6.3 Changing street names

- *A street may be renamed in exceptional circumstances only.*
- *The application for the renaming of a street must be accompanied by convincing reasons for it.*
- *Renaming must take place in accordance with-*
 - *the general procedural guidelines and rules for naming public places and streets; and*
 - *the additional procedures set out below:*

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- *A notification of the proposed new name must be published in the local press.*
- *Written comments on the name must be received within 28 days from the date of publication of the notification.*
- *The comments must be included in a report to the Public Place and Street Names Committee for consideration.*
- *The Public Place and Street Names Committee must forward its recommendations to the Council for consideration and approval.*
- *The applicant is held liable for all the costs involved in the changing of a name (endorsements on general plans, new street name boards, etc).*
- *The residents are liable for all the costs involved in changing their personal addresses (letterheads, business cards etc).*
- *In the spirit of democracy, at least 51% of the registered voters who live in a street must agree in writing to a change of the street name".* (Emphasis added by Respondents.)

19. The Respondents submitted that they quote comprehensively from the 2002

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Policy in order to demonstrate the weight it should be accorded on account of the comprehensive deliberative exercise which obviously had led to its creation.

20. It is not in issue that the 2002 Policy was adopted by the Appellant on 25 April 2002. The Respondents point out that this was 8 years after the advent of democracy in this country and with full knowledge of what is now presented to this Court (and to the public at large by the politicians governing the Appellant) as "offensive" for having a "colonial legacy/apartheid legacy".

In this regard the Respondents refer to paragraph 3 of the 2007 resolution which reads as follows:

"The motivation (for changing the street names) is as follows:

The process intends to undertake a comprehensive reconstruction and transformation of the image of the city with a view to create a new African Capital City, reflective of a common heritage, identity and destiny. This envisaged Capital City will strive to recognise the contribution of all in the spirit of the Freedom Charter and consciously immortalize heroes and hereines in the process. The process entails changing of names of streets ...in the City that are offensive or have colonial legacy / apartheid legacy."

The Respondent argues that the Appellant does not explain why, how and at what stage subsequent to the introduction of the 2002 Policy (8 years after the advent of democracy in the Republic) offensiveness of a degree warranting such a drastic re-design of the city centre's historical character has dawned

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upon the Appellant's Council. It is argued, whatever the answer to this might be, by the time that the 2007 resolution was actually executed, the Appellant did not even comply with the few sentences and phrases of the 2007 PPP by which it summarily jettisoned the thoroughly thought-through and sensitively formulated 2002 Policy.

21. Sub-paragraph (a) of the 2007 PPP envisages that the Public Participation Process was to be conducted with "Ward Committees city wide". It is argued that given the meagre terms by which the 2007 PPP displaced the 2002 Policy one must accept in favour of the Appellant, that on a proper interpretation of the 2007 PPP, the intention was (at least when that process was decided upon) that the city wide consultation with the Ward Committees was introduced by Appellant as an important requirement, to be thoroughly complied with, and not merely as a piece of empty lip-service to the constitutional and statutory propriety.
22. It is argued that the Appellant must have realised, when it formulated the 2007 PPP, that the displacement of the thorough 2002 Policy should be substituted by a very thorough consultation with the Ward Committees, and at any rate the Appellant's obligation to do so thoroughly is founded on the prescripts of the Constitutional and statutory framework which applies.
23. The following is pointed out by the Respondents:

Ward Committees are established in terms of section 72 of the Local Government: Municipal Structures Act, No. 117 of 1998 ("The Structures Act"). In terms of sub-section 3 the very object of the Ward Committee is to enhance participatory democracy in local Government.

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In terms of section 73(1) thereof Ward Committees must be established for each Ward in the Municipality.

In terms of section 16(1) of the Local Government: Municipal Systems Act, No. 32 of 2000 a Municipality must develop a culture of municipal governance that complements formal representative Government with a system of participatory governance. Section 17(1)(a) of the latter Act provides:

"1. Participation by the local community in the affairs of the Municipality must take place through –

(a) Political structures for participation in terms of the Municipal Structures Act"

The latter is a clear reference to Ward Committees. The obligation is plainly couched in peremptory terms. It is driven by section 152(1)(e) of the Constitution:

"(1) The objects of local Government are –

(e) To encourage the involvement of communities and community organizations in the matters of local Government"

Section 152 (2) then adds that the Municipality must strive to achieve the objects set out in sub-section (1).

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The Respondents point out that the constitutional prescript finds further expression in sections 44(3)(g) and 56(3)(g) of the Structures Act which require an annual report on the involvement of communities and community organizations in the affairs of the Municipality by the Executive Committee and the Executive Mayor respectively. It does not merely require a reflection of what was done in general terms. It is aimed at individual municipal decisions. In this regard reference was made to Steytler & De Visser, Local Government Law of South Africa, s6, par 1.8 at p6 – 9.

It was further pointed out that in terms of section 73(3) of the Structures Act:

“(3) A metro or local council must make rules regulating –

(a) the procedure to elect the subsection (2)(b) members of a ward committee, taking into account the need –

*(i) for women to be equitably represented in a ward committee;
and*

(ii) for a diversity of interests in the ward to be represented”.

We were referred to *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at par 115 where Ngcobo J said the following:

“(P)articipation by the public on a continued basis provides vitality to the

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functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identified themselves with the institution of Government and become familiar with the laws as they are made".

Reference was also made to the discussion of Ward Committees as a mechanism designed for public participation in Local Government affairs by Steytler and De Visser, *Local Government Law of South Africa*. p 6 – 12 (3), Chapter 6 par 2.5.1.

We were also referred to *Democratic Alliance v eThekweni Municipality 2012 (2) SA 151 (SCA)* where Brand JA concluded that decisions of this nature remains justiciable for legality and rationality notwithstanding the fact that PAJA does not apply thereto and that although the Constitution does not expressly require from Municipal Councils to facilitate public involvement in their legislative and other processes (as is the case with the National Assembly and National Council of Provinces) they are constrained to facilitate public participation in the performance of their executive and legislative functions. Referring to *Doctors For Life* Brand JA concluded that this derives firstly from the general constitutional obligation in terms of s152(1)(a) of the Constitution "to provide democratic and accountable Government for local communities" which publications requires public involvement; and secondly 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.

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24. The Respondents pointed out that the Appellant's case on compliance with its self-imposed obligation as regards the Ward Committees is simply that:

"The city held several public consultations at various wards within its area of jurisdiction. It has received written and oral representations from members of the public".

It was correctly submitted that there is no reference to the Ward Committees, let alone all of them, city wide, or otherwise. The representations received are stated by Appellant to be from members of the public and not any from the Ward Committees.

In the extra-ordinary provincial gazettes of 28 February 2005 and 19 April 2005 by which Notices 672 and 1443 of 2005 were published, confirmed the 76 wards for the Appellant's jurisdictional area in terms of section 5(2) of schedule 1 to the Local Government Municipal Structures Act, No. 117 of 1998. The boundaries of each of the specific wards are shown in the maps appended to the notices.

The Appellant attaches the minutes of the oral representations received at the public consultations held at the "various wards" within the jurisdiction of the Appellant. The meetings were held at the East-Lynne Community Centre, the Centurion Council Chamber, Atteridgeville, Bodibeng Library, City Hall, Mabopane Skills Centre, Mamelodi West Community Hall, Pretoria North

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Town Hall and the venues as indicated in the respective minutes. Each Ward is established for a specific area, and each with its own Committee. On Appellant's own account, the best which could be said for it is that meetings were held in the geographical areas of the 10 Wards where the meetings were held.

The Respondents point out that there is no evidence of any communication between the Appellant and any single Ward Committee at all. It is argued that the case pleaded by the Appellant that:

"The city held several public consultations at various wards within its area of jurisdiction..."

is an express confession to non-compliance with the 2007 PPP.

25. On behalf of the Respondents it was argued that the decision in *eThekwin* offers clear and direct authority that the appeal should fail. In that matter the change of certain street names took place in two phases. Nine streets were changed in phase 1 and 99 in phase 2. The outcome of the judgment was based on the difference between the Municipality's own rules cast in the form of policies. This approach was derived from the decision of the Constitutional Court in *Doctors for Life* to the effect that one of the factors according to which the reasonableness of any public participatory process which has been followed is to be determined include the rules adopted by Parliament itself to facilitate public participation.

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The Respondents pointed out that the Municipality's resolution concerning phase 1 was set aside by the Supreme Court of Appeal due to the failure to observe its own public participation policy which applied at that stage. The resolution relating to the second phase was accompanied by an amendment of the previous policy. The latter required prior consultation with the addressees and affected persons (as was the case with the 2002 Policy in this matter). It was deleted and replaced with the requirement of consultation with Ward Committees.

It was further pointed out that in *eThekwin*i all one hundred of the Ward Committees were consulted, of which 76 responded. A task team was then mandated to consider all the new names proposed and to prepare a shortlist of no more than a hundred names. A list of 83 names thus gathered by the task team was again submitted to the Ward Committees. Finally, emanating from the latter responses, the task team submitted a report of all the responses received to a committee dealing with the matter, which submitted a final list to the Executive Committee whose recommendation was ultimately accepted by the Municipality. Accordingly all of the Ward Committees were consulted.

It was submitted on behalf of the Respondents that the appeal falls to be dismissed for the very reasons why the municipality failed in *eThekwin*i on the name changing process which formed Phase 1 in that matter: the

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Appellant's failure to comply with the self-imposed public participation procedure per the 2007 PPP.

It was further submitted that the flaw in Appellant's case in this regard is fatally compounded by the fact that the names finally decided upon were never submitted to any form of public participation process at all as was done in *eThekweni*. From a reading of that decision it is clear that the fact that the finally chosen names were again submitted to a public participation process weighed heavily with the Supreme Court of Appeal.

26. During argument it was submitted on behalf of the Appellant that it is not for this court to pronounce upon the question whether there was adequate public participation. It was submitted that it is for the review court to decide. In this regard it was pointed out on behalf of the Respondents that this very matter is raised by the Appellants in their Notice of Appeal. Paragraph 5.2 and 5.3 of the said notice reads:

"In making the above findings the Court disregarded the following:

5.2 The appellant had undertaken an extensive participation process in compliance with the resolution of 27 September 2007.

5.3 Public participation process does not require agreement with the proposed street name changes but a demonstration that the views of the residents of the City were sought and that they were afforded sufficient and reasonable opportunity to make representations.

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It was submitted that the Appellant thus introduced this aspect within the realms of this appeal and therefore cannot be heard to argue that this court of appeal cannot pronounce on this aspect. I agree with this submission.

27. One of the main contentions raised by the Appellant is that the court *a quo* overstepped the boundaries of the separation of powers. This argument is to the following effect:

SEPARATION OF POWERS HARM

28. On behalf of the Appellants it was argued that the Constitution (in Chapter 7) provides that the local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic. The executive and legislative authority of a municipality is vested in its Municipal Council.

29. Section 151(3) provides that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

30. Under section 152 the objects of local government are to provide democratic and accountable government for local communities, to ensure the provision of services to communities in a sustainable manner, to promote social and economic development, to promote a safe and healthy environment and to

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encourage the involvement of communities and community organisations in the matters of local government. (My emphasis.)

31. The powers and functions of a local municipality are set out in section 156. A municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of schedule 4 and Part B of schedule 5 and any other matter assigned to it by national or provincial legislation. A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
32. Part B of schedule 5 provides that municipal roads fall under the competency of the local government sphere. The Policy Guidelines for the Naming of Public Places and Streets ("the 2002 Policy") provides for the establishment of an advisory committee known as the public place and street names committee established by the council of the City by resolution dated 6 September 2001.
33. Under section 63(1) of the Local Government Ordinance, 17 of 1939, the council shall have the control and management of all roads, streets, etc.
34. Under paragraph 6.3 of the Policy, a street may be renamed in exceptional circumstances only. The application for the renaming of a street must be accompanied by convincing reasons for it. The renaming must take place in accordance with the general procedural guidelines and rules for naming public places and streets and the additional procedure set out below. That procedure provides that a notification of the proposed new name must be published in

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the local press. Written comments on the name must be received within 28 days from the date of publication of the notification. The comments must be included in a report to the public place and street names committee for consideration and the committee must forward its recommendations to the council for consideration and approval.

35. It was submitted on behalf of the Appellant that when the City resolved on 29 March 2012 to replace street names it was acting pursuant to the Constitution read with the Local Government Ordinance and its own Policy. It was accordingly exercising a statutory power. The City was therefore implementing a resolution which was taken pursuant to a power it derives from the Constitution and the Ordinance. We were referred to *The National Treasury & Others v Opposition to Urban Polling Alliance & Others* 2012(6) SA 223 (CC) at [26] (OUTA) where the following was said in connection with the court's obligations when faced with adjudicating the exercise of statutory powers:

"A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been fully successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of government, provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an

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interim order, the Appellate Court would in effect usurp the role of the review court. Ordinarily the Appellate Court should avoid anticipating the outcome of the review, except perhaps where the review has no prospects of success whatsoever."

36. At paragraph [44] the court said the following:

"The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common-law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself." (emphasis added by Appellant.)

37. Addressing the question of the irreparability of harm, the Court said,

"[53] OUTA had to show a reasonable apprehension of irreparable harm if the interim relief were not granted. The High Court found that it was self-evident that the aggrieved commuters would suffer irreparable harm, although difficult and impossible to gauge in the real terms. They would be left to pay "excessive toll monies which they cannot afford" without adequate alternative routes to avoid the tolls. The High Court recognised that there would be a financial

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drain on car-rental companies that are members of the South African Vehicle Renting and Leasing Association in particular and on members of the third, fourth and fifth respondents. The High Court accepted that there would be financial hardship to tens of thousands of motorists and businesses. It recorded that there had been widespread protests and exceptionally high levels of concern and resistance on the part of thousands of aggrieved motorists."

38. The court rejected as not persuasive enough the submission that, should the review be successful, SANRAL will be obliged to refund the millions of aggrieved motorists the toll charges. It held that it is questionable why the harm motorists are likely to face is irreparable. Should the decision to impose toll on the roads be set aside by a court, there is no reason why the affected motorists would not have an enrichment claim to recover toll so paid to Sanral or why the National Executive Government or Sanral would validly resist paying the toll charges.

39. In determining whether the requirement of the balance of convenience had been satisfied, the court said the following:

"[55] A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant, if interim relief is not granted, as against the harm respondent will bear, if the interdict is granted. Thus a court must assess all relevant factors carefully in order to decide where the balance of convenience rests.

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[63] There is yet another very important consideration when the balance of convenience is struck. It relates to separation of powers. In ITAC we followed earlier statements in Doctors for Life and warned that:

"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

40. The Constitutional Court warned that it did not mean that an organ of State was immunised from judicial review only on account of separation of powers. It affirmed that the exercise of all powers is subject to constitutional control. In appropriate cases an interdict may be granted against it. For instance, if the review court in due course were to find that SANRAL acted outside the law then it is entitled to grant effective interdictory relief. That would be so because the decision of SANRAL would in effect be contra to the law and thus void.

41 The Constitutional Court went on to state that when it evaluates where the

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balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. While a court has the power to grant a restraining order of that kind, it does not really do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

42. Furthermore, a court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or a duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised State functionary is competent but rather whether it is constitutionally appropriate to grant the interdict. (OUTA, supra, at paras [63], [64], [65] and [66].)

43. The Appellant submitted, based on the above that the interdict granted by Prinsloo J stops dead the exercise of the City's powers even before that exercise has been fully successfully and finally impugned on review.

44. It was further submitted that it also undermines the comity the courts owe to

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other branches of government provided they act lawfully.

45. It was submitted that in granting the interdict, Prinsloo J entered the terrain of local government, in particular insofar as it pertains to municipal votes and the change of names and that such an intrusion was not mandated by the Constitution itself. It was a usurpation of the City's powers.

46. It was submitted all this happened in the context where the respondents had not made out a proper and strong case for the interdict, nor was this the "*clearest of cases*".

47. In answer to the argument that the separation of powers rule was overstepped the Respondents argued as follows:

48. The principle that the Courts should pay respect, or deference, to the Executive is closely allied to the principle of separation of powers between the Legislature, the Executive and the Judiciary.

49. It was submitted that the Appellant's case in this regard is without foundation. It was argued, as with all legal principles, the rule is not limitless. In this regard we were referred to *Kalil v Mangaung Municipality* 2014 (5) SA 123 (SCA) at par 3 where Leach JA held:

"[3] The resolution that the Appellant sought to prohibit the municipality from adopting on 30 May 2013 (but which was in fact passed after the application was

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dismissed in the court below) involved the approval of an increased rate to be applied on commercial properties in the municipal area. In this court as well as in the court below, the municipality relied upon the Constitutional Court's warning that courts are to be conscious of the 'vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government' and should not interfere 'in the processes of other branches of government unless to do so is mandated by the Constitution. (The learned judge referred to **Glenister v President of the Republic of South Africa & Others 2009(1) SA 287 (CC) (2009) (2) BCCLR 136 par 34** and the authority there cited.) I accept that the principle unhesitatingly, but it is now axiomatic that the exercise of all public power must comply with the Constitution and the doctrine of legality. (The learned judge referred to **Albutt v Centre for the Study of Violence and Reconciliation & Others 2010(3) SA 293 (CC) (5) BCLR 391 par 49** and **Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) para 1.**) And where those in government, whether national, provincial or municipal, act beyond the constraints of the law a court should not hesitate to declare their actions illegal, thereby controlling and regulating public power. (Reference was made to **Affordable Medicines Trust and Others v Minister of Health and Others 2006(3) SA 247 (CC) par 48 – 49.**) As the decision the Appellants sought to impugn was not administrative in nature it could not be assailed on the grounds of non-compliance with the Promotion of Administrative Justice Act 3 of 2000. Consequently, in seeking relief, they relied solely upon the legality principle. The matter thus turned on whether the municipality's 2013/14 budget could lawfully be adopted."

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50. It was submitted that the finding of the Judge *a quo* at p 428 line 10 – p 432 line 15 cannot be faulted: The Appellant's decision to introduce the new names were not affected by the order of the Court *a quo* at all. It only concerned the retention of the old names pending the review, and that with a red line drawn across them to place the impact of the change beyond doubt in the eyes of any reasonable observer – a state of affairs which had already been in existence for more than a year which the Respondents merely sought to perpetuate pending the outcome of the review. I agree with this submission. The finding of Prinsloo J was not to the effect that the new names must be removed.

51. The Respondents further argued both in *eThekwini* and in this matter the Appellant's decision stands to be reviewed on the basis of its failure to comply with the procedure which it has designed itself. In a very real sense the Court will be paying deference to the Appellant as branch of the Executive by holding it to the procedures which it had created itself – exactly as was done in *eThekwini*, and by the Constitutional Court in *Doctors for Life*, following the failure of Parliament to comply with its own Public Participation Rules.

52. On behalf of the Respondents it was pointed out that deference also applies in the opposite direction in that the executive should also respect the judiciary. Reference was made to the Appellant's accelerated removal of the historical names in the face of the impending legal proceedings referred to above.

53. It was argued that deference cuts both ways, as does the separation of powers. It ill-behoves the Appellant to raise the deference rule where it has

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flagrantly attempted to subvert and undermine the proper and effective functioning of this Court. It has done so twice in a manner which itself stands as a violation of the separation of powers. The Appellant's strategy to avoid an effective Court order – a repeat of what occurred in the proceedings before Tuchten J – is common cause. It was submitted that the comments of the Supreme Court of Appeal in *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) is on all fours with this matter insofar as the Appellant's attempts to thwart the relief sought by the Respondents, and with it any order of the Court below, is concerned.

54. In *Gauteng Gambling Board* the Board ("the GGB") and the MEC were at loggerheads following the former's refusal of the latter's instruction (found, and indeed ultimately admitted, to be illegal), to accommodate a commercial company favoured by the MEC in its building. The MEC's umbrage resulted in her telephoning the chairperson of the GGB informing him that she expected the entire Board to resign. They refused. On 16 January 2012 she wrote a letter to each member of the Board requesting reasons as to why she should not terminate his or her membership of the Board, giving them two days to respond. It appeared that at the meeting held on the same day than her letter of 16 January 2012 the MEC informed a meeting of chief executive officers of the provincial entities over which she held oversight that she intended to fire the Board and appoint an administrator. This was confirmed by her in her opposing affidavit of 25 January 2012. The letter of 16 January 2012 prompted the GGB to launch an urgent application on 18 January 2012 for an interim interdict, *inter alia* preventing the MEC from carrying out her threat to dissolve the Board. On 23 January 2012 after the application was launched

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and, allegedly before the MEC became aware thereof, she dismissed the entire Board. In a letter communicating the dismissal another reason was raised for the step, i.e. that the GGB had refused to move from its newly erected building in Bramley to the offices of the Provincial Department for Economic Development.

55. The application for the interim interdict was thwarted by the MEC's termination of the membership of all the members of the Board which was effected after the litigation was launched but before the matter was heard. On 26 January 2012 when the urgent interdict and associated application for final relief was set down the parties agreed that the MEC's decision would be stayed and that the parties would attempt to settle the dispute in terms of the Inter-Governmental Relations Framework Act of 1995. That attempt however failed and the matter proceeded to the application for final relief.
56. The Supreme Court of Appeal found against the MEC on the merits. The dissolution of the GGB was unlawful, *inter alia* on account of the ulterior motive to install the commercial enterprise in the GGB's building.
57. On behalf of the Respondent it was submitted that the following comments of Navsa JA, are directly applicable to the matter at hand, pertaining to the MEC's manipulative actions following the launching of the urgent application in order to thwart the impending judicial procedure:

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[49]it is necessary to say something to demonstrate the court's displeasure at the manner in which the MEC behaved, over and above the manner in which she terminated the membership of all the members, more particularly her conduct subsequent to the litigation being launched. It is true that the board is bound by the MEC's denial that she had not actually seen the court papers for a few days after they had been served. Her behaviour and that of her department were strange indeed. Her HOD knew of the threat of litigation and knew of the litigation once it had occurred. The application papers were not immediately brought to the MEC's attention. This is strange behaviour by a department which primarily should be concerned about the proper functioning of the board. One is driven to the conclusion that it was convenient for the MEC not to have sight of the application and supporting documents. The MEC appointed an administrator almost immediately after dissolving the board. The respondent, while not actively associating himself with the MEC's prior conduct, nevertheless went ahead and appointed and the purported successors. This was done even though the present appeal was pending.

[50] More than a century ago Mason J in *Li Kui Yu v Superintendent of Labourers* 1906 TS 181 said the following (at 194):

'That being so, it is impossible for me to pass over without some notice what is, I consider, an offence of a serious kind, namely that of interfering with the administration of justice by taking an action which is bound to prevent the Court granting a remedy'.

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[51] *The decision in Li Kui Yu was qualified in Roberts v Chairman, Local Road Transportation Board, and Another (1) 1980 (2) SA 472 (C) at 488 on the basis that, for an act to constitute contempt, it was necessary that there be an intention to defeat the course of justice.*

[52] *Our present constitutional order is such that the state should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by courts of constitutional rights. In Tswelopele Non-Profit Organisation & Others v City of Tshwane Metropolitan Municipality & Others 2007(6) SA 511 (SCA) in para 17 this court stated the following:*

'This places intense focus on the question of remedy, for though the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand an effective remedy, since (in the oft-cited words of Ackermann J in Fose v Minister of Safety & Security) 'without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced':

'Particularly a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does

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establish that an infringement of an entrenched right has occurred, it be effectively vindicated”.

[53] *In para 27 of the same case the following appears:*

‘Vindication, Kriegler J noted, “recognises that a Constitution has as little or as much weight as the prevailing political culture affords it”. Essentially, the remedy we grant should aim to instil recognition on the part of the Governmental agencies that participated in the unlawful operation that the occupiers, too, are bearers of constitutional rights, and that official conduct violating those rights tramples not only on them but on all. The remedy should instil humility without humiliation, and should bear the instructional message that respect for the Constitution protects and enhances the rights of all. It is a remedy special to the Constitution, whose engraftment on the mandament would constitute an unnecessary superfluity’.

[54] *In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the board, cannot conclusively be said to constitute contempt of court. However, that does not excuse their behaviour. The MEC, in her responses to the opposition by the Board, appeared indignant and played the victim. She adopted this attitude while acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client*

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scale, sought by the board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers. Regrettably, in the present case, it was not prayed for and thus not addressed"

58. Those stringent comments were prefaced by reference to the following principles of constitutional legality set out at the commencement of the judgment:

"[1] Our country is a democratic state founded on the supremacy of the Constitution and the rule of law. It is central to the conception of our constitutional order that the legislature, the executive and judiciary, in every sphere are constrained by the principle that they may have exercise no power and perform no function beyond that conferred on them by law. This is the principle of legality, an incident of the rule of law. Public administration must be accountable and transparent. All public office bearers, judges included, must at all times be aware that principally they served the populace and the national interest. This appeal is a story of provisional government not acting in accordance with these principles"

59. In *Kalil v Mangaung Municipality supra*, the Supreme Court of Appeal referred to *Gauteng Gambling Board* in support of similar criticism of

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officialdom whose representatives litigated obstructively, by way of unsubstantiated bald denials:

"As this Court stressed in Gauteng Gambling Board..., our present constitutional order imposes a duty upon state officials not to frustrate the enforcement by Courts of Constitutional rights". (At par 30 and further.)

The Respondents dealt in their supplementary founding affidavit dealing with Appellant's strategy to frustrate the functioning of the Court. It was submitted that it was treated in the answering affidavit in no more than a scurrilous complaint that those allegations, which Appellant clearly cannot deny, were scandalous, irrelevant, and vexatious, as well as bald. It was submitted that Appellant's presentation of its case in this manner is even more deserving of such trenchant criticism.

60. It was submitted on behalf of the Respondents that such machinations by officialdom to avoid judicial control can of course be performed as much by cynical legal processes instituted, as by strategies devised to deprive the Courts from the ability to afford justice to those entitled to it. In regard to manipulative litigation, we were referred to *Permanent Secretary, Department of Welfare, EC v Ngxuza* 2001 (4) SA 1184 (SCA) at par 15 where Cameron JA said the following:

"All this speaks of contempt for people and process that does not befit an organ of Government under our constitutional dispensation. It is not the

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function of the Courts to criticize Government's decisions in the area of social policy. But when an organ of Government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of State to be loyal to the Constitution and requires the public administration to be conducted on the basis that the 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it were at war with its own citizens..."

61. It was submitted that the order of the Court *a quo* to re-install the street name signs so hastily removed for the specific purpose of the destruction of the Court's ability to grant redress where it is due was fully justified by the abovementioned principles.

62. It was further submitted that the Respondents' case in this regard is strongly supported by the provisions of section 173 of the Constitution in terms of which the Court has the inherent power to protect and regulate its own process. It was submitted that the wide field of implementation of section 173 by our Courts is demonstrated by the following examples.

63. The inherent power created for the courts to regulate their own process, taking into account what is in the interest of justice, was applied by the Constitutional Court in order to limit the claim by the State that certain documentation should be protected from publication on account of national

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security. See *Independent Newspapers v Minister for Intelligence Services 2008(5) SA 31 (CC) par 53 and further*. Disclosure of some of the documents was ordered.

64. In *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions 2007 (1) SA 523 (CC)* the Constitutional Court emphasized that a discretion exercised in terms of section 173, aimed as it is at the power of the Court to regulate its own process, will only be overturned on appeal in narrow circumstances as it is not for a Court of appeal to second guess the assessment according to which the discretion was exercised by the lower court.

65. It was pointed out by the Respondents that although it has been stressed by the Constitutional Court that the powers created by section 173 should be exercised with caution, (see *Phillips v The National Director of Public Prosecutions 2006(1) SA 505 (CC) at par 47*) an analysis of the decisions to that effect will show that such caution is mainly aimed at the part of section 173 which refers to the development of common-law, and not the emphasis of that section upon the inherent power of the Courts to protect and regulate their own process in the interests of justice. Section 173 may even found an order for the dismissal of an action on account of the delay or want of prosecution – although the power will be used sparingly and only in exceptional circumstances to that end as it seriously impacts on the Constitutional and common-law right of a plaintiff to have a dispute adjudicated upon. However, the court will exercise such power in

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circumstances where there has been a clear abuse of the process of court. In this regard we were referred to **Sanford v Haley N.O.** 2004(3) SA 296 (C) at par 8.

66. Applying section 173, the Supreme Court of Appeal crafted a procedure for the conduct of class actions. It was done with Parliament failing to create the necessary statutory prescriptions in accordance with the recommendations of the South African Law Commission, of a judicial commission of enquiry into the matter, and what the Court referred to as "*academic voices*" which over many years have not been heard by Parliament. See **Children's Rescue Centre Trust v Pioneer Food (Pty) Ltd 2013 (2) SA 213 (SCA)**, par 15 and *further*. The procedure adopted on the basis of section 173 was accepted by the Constitutional Court as proper and warranted in **Mukaddam v Pioneer Foods (Pty) Ltd 2013(5) SA 89 (CC)**, although it overturned the decision of the Supreme Court of Appeal in denying certification for **Mukaddam**.

67. Section 173 enables a Superior Court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribed. It may in the interests of justice depart from its own rules. See **PFE International v Industrial Development Corporation of South Africa Ltd 2013(1) SA 1 (SCA)**, par 30 and **Mukaddam v Pioneer Foods (Pty) Ltd 2013(5) SA 89 (CC)** par 39.

68. Accordingly, section 173 empowers the Court to order the making available the record pertaining to a decision of a functionary exercising a public power

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in tandem with, and independent of, Rule 53. *Democratic Alliance v Acting National Director of Public Prosecution* 2012(3) SA 486 (SCA), par 37.

69. In *Coetzee v National Commissioner of Police* 2011 (2) SA 227 (GNP) at par 102 the Court based an order for costs *de bonis propriis* against certain police officers involved in an unlawful arrest on section 173.

70. In *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) the Constitutional Court referred *inter alia* to section 173 in devising an order compelling the Provincial Department to make payment of some 200 outstanding debts, following a declaration of section 3 of the State Liability Act as unconstitutional. The order provided *inter alia* as follows:

"The Second Respondent is required to provide this Court on affidavit with a plan of the steps it will take to ensure speedy settlement of unsatisfied Court orders by no later than 31 July 2008"

71. In *Qwelane v Minister of Justice & Constitutional Development* 2015 (2) SA 493 (GJ) at parr 6 – 11 the Court, relying on section 173, decided that it is competent for a Judge of the High Court to hear equality proceedings and High Court proceedings based on a constitutional challenge (of the provisions in terms of which the Equality Court proceedings were brought) in one consolidated case in the dual capacity of High Court Judge and duly designated Equality Court Judge.

72. It was submitted that the power of the Courts to protect their own process provided for in section 173 is coupled to a duty to act where the Rule of Law itself is threatened by attempts of a branch of the Executive to subvert and undermine the judicial capacity to deliver justice.

73. It was further submitted that in the present matter it ill-behoves the Appellant to complain that it would cost R2,6m to comply – and that in the context of an exercise which on its own account was costing it R98m. It was submitted that absent an order such as that issued by the Court below, members of the Executive who may happen to be likeminded, especially for purposes of political gain, will no doubt be encouraged to act accordingly whenever it may suit those purposes.

74. It was submitted that the order of the Court *a quo* that the hastily removed name plates are to be re-installed, is fully warranted as a measure to protect the Court's process.

75. With regard to the order directing the City to restore the removed street signs within two months of the order it was submitted on behalf of the Appellant that the powers of the review court have been pre-empted by the court *a quo*.

HAS THE POWERS OF THE REVIEW COURT HAVE BEEN PRE-EMPTED?

76. On behalf of the Appellant it is argued that in the review action, the respondents seek the relief that the decision of the City Council of 29 March 2012 referred to above be reviewed and set aside and that the City be

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ordered to remove all signage indicating the new street names within two months.

77. Prinsloo J justified his decision to order the restoration of the old sign names as follows:

77.1 He recognised that a similar order was granted in *eThekwin*;

77.2 He recognised that PAJA did not apply but nonetheless found that there was no reason why an order directing the City to perform an act rather than to refrain from doing so, would not be competent in the circumstances of this particular case especially given the manner in which the old names were removed been in the face of the pending interdict application.

77.3 He found that such an order would probably also comfortably resort under "*appropriate relief*" as intended by the provisions of section 38 of the Constitution.

77.4 He found that such an order may also be especially indicated in this case, where the respondent is carrying on with the removal exercise, so that the granting of a prohibitory interdict in respect of what may be left of the old names may not afford sufficient protection to the applicant.

78. The Appellant advanced the following reasons that the finding is erroneous.

78.1 It was argued there is simply no comparison between the *eThekwin* case and the application before Prinsloo J.

78.2 The *eThekwin* matter was determined by the Supreme Court of

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Appeal dealing with the legality of municipality's decision to change street names in Durban. The case did not deal with the granting of an interim interdict. Therefore to an extent that the Court purported to be bound by *eThekwini* in granting the interim relief, such reliance is unfounded.

78.3 The decision was that of a review court and not an urgent court adjudicating whether it should grant interim relief. But more importantly, *eThekwini* is authority for the proposition that the review court is at large to order a city council where the latter fails to comply with applicable regulatory instruments, to review and set aside the decision of the City to rename street names and to order the municipality to remove all signage indicating the names of the new street names.

79. The respondents in the review application seek to review and set aside the decision to rename the streets and to remove the signage bearing the old street names. It is common cause that that lies within the competency of the review court.

80. The review court has in fact been called upon to determine the legality of the resolution of 29 March 2012 and any conduct flowing from that resolution including removing the old signage and replacing that with the new signage.

81. We were referred to *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014(4) SA 371 CC; at [22] where the following was said:

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"Another consideration is whether the interim relief would thwart the judicial role of the review court. The order sought by the applicants before this court would not anticipate any part of the main proceedings to be determined before the High Court in Part B. Nor would it prejudice such proceedings. On the contrary, without an order from this court, the damage in the interim would be so severe that the applicants' ability to obtain relief from the High Court in Part B would substantially be rendered nugatory. The order sought now is thus no more than a 'status quo order' granted in the interests of justice 'to prevent what might otherwise be substantial prejudice'"

82. It was submitted on the authority of this case that when Prinsloo J ordered the City to restore the old street names, he effectively anticipated the findings and decision of the court that will adjudicate the review action.

83. It was submitted that this is so in particular in the light of the following:

83.1 When the application was heard the City had already commissioned a service provider to attend to the removal of the old signage.

83.2 The old signage had been removed from all 661 normal metal street name and all 115 green boards affected by the name changes.

83.3 The City's service provider had commissioned the manufacturing of new panels without the old names for 141 affected illuminated street name signs.

83.4 To order the City to restore the old signage would cost it R2,6 million.

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84. On behalf of the Respondents it was argued that the argument that the order *"effectively anticipates the findings of the review Court that will adjudicate the matter"* is without foundation. No Court dealing with a prayer for final relief is bound to a previous order granting interim relief. It would be highly surprising if the Appellant would at the trial set down for 22 April 2016 accept that that Court would not be entitled to undo the retention of the old names as granted by the interim order. The review proceedings are primarily aimed at the introduction of the new names. Only if that succeeds, will the ancillary relief for the reinstatement of the old names apply. There is no question of some form of *irreversibility* as submitted by the Appellant.
85. The Respondents submitted that the costs to be incurred by the Appellant in executing the order is attributable to the Appellant's attempts to frustrate the Court's ability to grant relief. This is a product of the fact that the Court should defend and protect its own procedures. In a very real sense of the word it is the Court's own interests which are at stake. The Appellant cannot be heard to establish appealability by lifting itself by its own bootstraps.
86. It was further argued on behalf of the Appellant that the horse has already bolted.
87. It was argued Prinsloo J ordered the City to restore the street names that had already been removed when the matter was heard. He found that there was no reason why such an order could not be made especially in the light the City

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was on course with the removals even whilst the matter was being heard. It was submitted that Prinsloo J erred in ordering the City to restore the removed names. In this regard we were referred to ***National Treasury & Others v Opposition to Urban Tolling Alliance & Others*** 2012(6) SA 223 (CC) at [50]. (OUTA) "An interdict is meant to prevent future conduct and not decisions already made."

88. The act of removing street signs had already happened. 661 street names signs had been removed. 150 green boards had been removed. The City's service provider had already commissioned the manufacturing of 141 new street name signs. The proverbial horse had bolted.

89. It was argued that the relief sought and eventually granted by Prinsloo J is the same as the relief sought in the main review action. It means that the harm complained of was not irreparable in the circumstances so that an interim *pendente lite* order should have been granted.

90. We were referred to the following dictum in OUTA:

"[50] Under the Setlogelo test of a prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made."

Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable

harm. The right to review the impugned decisions did not require any preservation pendente lite. (emphasis added by Appellant)

91. At paragraph [53]:

"OUTA had to show a reasonable apprehension of irreparable harm if the interim relief was not granted."

92. On behalf of the Appellant it was argued that the harm claimed by the respondents in this matter was not irreparable in a sense that unless an interim interdict was granted, irreparable harm would ensue. The claimed harm was eminently repairable at the instance of a review court determining the matter.

93. On behalf of the Respondents it was argued that the question of irreparable harm, alternative remedy and balance of convenience must be dealt with together due to the ambivalence of Appellant's contentions. It was argued the Appellant conflates them with each other, and the ambivalence is to a degree which render the arguments presented self-refuting. Thus the argument that *"the horse has (already) bolted"*, cannot be reconciled at all with the argument that the Respondents have an alternative remedy and suffer no irreparable harm as the review court can grant the necessary relief to the Respondents.

94. The Respondents argued that the Appellant's argument that *"the horse had already bolted"*, referring to the extensive acts performed by the Appellant to remove the old names and install new *"green boards"* etc. Yet, they immediately thereafter argue that no irreparable harm has been shown as *"the*

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claimed harm was eminently repairable at the instance of a review Court determining the matter”.

95. The Respondents submitted the following is obvious: If indeed matters have reached a stage where the Court can no longer assist the Respondents (the specific situation indicated by references in our jurisprudence to the fact that *the horse has bolted*) then that principle will be *a fortiori* applicable by the time when the review Court considers the matter.
96. The Respondents argue that it is incomprehensible how this argument is to be reconciled with the argument that Respondents suffer no irreparable harm as it will be entitled to redress by the review Court.
97. The degree of merit established by an Applicant for an interim interdict for a clear right is weighed against the balance of convenience. So that the stronger the prospects of success, the less need for the balance of convenience to favour the Applicant. In this regard we were referred to Erasmus p E 8-11.
98. Further in regard to the balance of convenience it was submitted that on account of this Court's constitutional right (and duty) to protect its own process, and with it the Rule of Law, the Appellant cannot be heard to literally require the Court to have regard to its own machinations to manufacture “*inconvenience*” for itself by its desperate attempts to beat the Respondents to the judicial goalposts through the feverishly accelerated removal of the

historic nameplates. Both the Appellant's arguments on balance of convenience and the "*the horse has bolted*" theme, based as they are on the calculated strategy to thwart the Court proceedings, seal their own fate. The strategy is nothing but an attempt by the Appellant to lift itself by its proverbial bootstraps through:

Removing the names in all haste before the Court can pronounce on it;

Then arrive at Court arguing that the names had already been removed, and that it would be prejudiced by an order replacing same as it would be costly and cumbersome;

that *therefore* the balance of convenience favours it;

and that the horse has in any event bolted.

99. The Respondents point out that the grounds of appeal do not cover an attack on the Respondents' *prima facie* rights. Accordingly, and quite rightly so, neither does the Appellant's heads of argument. There is no attack on appeal on the Respondents' right to a retention of the old names. The degree of merit established by an Applicant for an interim interdict for a clear right is weighed against the balance of convenience. So that the stronger the prospects of success, the less need for the balance of convenience to favour the Applicant. As there is no attack on the Respondents' right to retention of the old names, balance of convenience does not come into play.

100. The Appellant's rely on the decision in "OUTA" where the Constitutional Court linked considerations of balance of convenience to the separation of powers doctrine. The Appellant then refers to the discussion in OUTA where it was stated that the Court must assess how and to what extent the interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers.
101. It was submitted that the position which the Court had to deal with in OUTA is a far cry from the situation *in casu*. The interim order issued by the Court of first instance in OUTA had the direct consequence of summarily terminating the ability of SANRAL to collect tolling revenues. The delay in implementing tolling had by then already cost R2,7 billion, representing 40% of SANRAL's estimated 2012 toll revenue, whilst its average monthly expenditure would amount to R601 million for the 2012/2013 financial year. (OUTA at par 58.) This is to be compared with the situation here, where it only concerns the retention of the old names as an interim measure without affecting the Appellant's decision to introduce the new names at all. As pointed out by the Judge *a quo* the retention of the old street name signs, with a red line drawn across them, underneath the new names.
102. It was submitted that in OUTA only the extreme and far-reaching consequence of the interim order granted by the Court of first instance moved the Constitutional Court to link the separation of powers, which is a consideration which goes to merit, to balance of convenience, which is a procedural consideration normally considered separately from the merits,

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namely the question whether the Applicant for an interdict has shown a *prima facie* right.

103. Dealing with the requirement of irreparable harm it was argued on behalf of the Respondents that it is well established that if an Applicant can establish a clear right his apprehension of irreparable harm need not be established. See ***Setlogelo v Setlogelo*** 1914 AD 222 at 227 and ***Edrei Investments 9 Ltd (in liquidation) v Dis-Chem Pharmacies (Pty) Ltd*** 2012(2) 553 (ECP) at 557C – H. It was submitted that the Respondents' case on Appellant's failure to conduct a proper public participation process established a clear right in the full sense of the word. However, the principle does not apply only where a clear right has conclusively been shown. It comes into play even if the case made out for relief approaches a clear right, though not conclusively established. Thus, in ***Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton & Another*** 1973(3) SA 685 (A) at 691C – G Holmes JA, dealing with the abovementioned passage from ***Setlogelo v Setlogelo***, commented:

"The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the Applicant's prospects of success the less his need to rely on prejudice to himself".

104. It was argued moreover, this case concerns actions undertaken by the Appellant already since April 2013 when the urgent application was heard by the Court a quo. The review trial has been set down for hearing on 22 April

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2016. There is always the possibility of further postponements and/or appeals, including appeals by the Appellant such as this one. There is no reason why the constitutional rights of the Respondents should be subjected to the actions of the Appellant which forms the subject matter of this case for such prolonged periods. Especially in the face of the attempts made by the Appellant to create exactly that position through the accelerated removal of the street names.

105. The Respondents submitted no doubt when the review trial is heard, the Appellant will only be harping on the *"horse has bolted"* theme, again relying on the fruits of its own attempts to subvert the judicial process, no longer acknowledging that the Court is still *"at large"* to allow the relief sought.

CONCLUSION:

106. Regarding the appealability of the order of the court *a quo* the arguments raised by the Respondents seems to be unassailable. The relief granted does not interfere with the resolution to introduce the new names; they have been in place since April 2012 and will remain so. The new names were displayed prominently above the old names and the old names have a red line drawn through them *"to place the impact of the change beyond doubt in the eyes of any reasonable observer"*. Had the order been to the effect that the new names had to be removed *pendente lite* the situation would have been different. The conclusion reached by the Court *a quo* that to allow that *status quo* to continue *pendente lite* could have no meaningful impact on the

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statutory powers of the Applicant is unassailable.

107. The argument on behalf of the Respondents that the Appellant failed to perform a proper public participation process is in my view likewise unassailable. The 2007 PPP *inter alia* referred to Ward Committees city wide to be involved. On its own papers the Appellant failed to do so. The argument on behalf of the Respondents that the Local Government: Municipal Systems Act provides (in addition to the 2007 policy) public participation is also sound.

The Respondents in argument concentrated on the fact that meetings were held in only a few Ward Committees. There is also in my view no or very little indication that "Stakeholders" (which would certainly include those who reside in or do business in the affected streets) were consulted. Although the 2002 Policy which *inter alia* was to the effect that a majority of 51% of them had to be in favour of the name change (creating a legitimate expectation that they would be consulted) was repealed by the 2007 policy the 2007 still required consultation with such stakeholders.

108. The decision in *eThekweni* is in my view clear authority that a court can interfere with a decision of a municipality where the element of legality is lacking. I am of the view that the attempt by the Appellant that *eThekweni* is distinguishable from the present matter does not hold water.

109. The argument on behalf of the Appellant that the separation of powers rule has been overstepped has in my view effectively been answered by the Respondents. Furthermore, as illustrated by the respondents, our courts have

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in fact in the past set aside decisions of local authorities where the element of legality was lacking. A striking example is the judgement of the Supreme Court of Appeal in *eThekweni*. I furthermore agree that the decision in OUTA is distinguishable from this case for the reasons advanced by the Respondents.

110. I am in agreement with the Respondents that the Appellant is itself guilty of transgressing the separation of powers rule by attempting to thwart the court process as illustrated above.
111. I am in further agreement with the Respondents that the powers of the review court have not been pre-empted. The review court will not in any way be bound by the ruling made by Prinsloo J.
112. I am further of the view that the Respondents have satisfied the elements for an interim interdict by illustrating irreparable harm, no alternative remedy and balance of convenience. During argument it was contended on behalf of the Appellant that the Respondents indeed had an alternative remedy namely the review court. There is in my view no merit in this submission. The old street names were hastily removed by the Appellant at the time. The Respondents illustrated an interest in preventing the Appellant to do so and to preserve the *status quo*.
113. After due consideration of all the arguments before us I am of the view that the appeal must fail.

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114. The Respondents submitted that the appeal should be dismissed with costs, including the costs of two counsel. It was further submitted that such costs should be granted on an attorney and client scale: A punitive order for costs is warranted by both the Appellant's attempts to frustrate the effective functioning of this court, and the late filing of its heads of argument.

115. Prinsloo J was requested to make a similar cost order. The conduct of the Appellant was also referred to before him. He however reserved costs for the court dealing with the final determination of the issues in this case.

116. In granting leave to appeal to this court the Supreme Court of Appeal remarked as follows regarding costs: "The costs order of the court *a quo* in dismissing the application for leave to appeal is set aside AND the costs of the application for leave to appeal in this court and the court *a quo* are costs in the appeal."

117. I agree with the submission on behalf of the Respondents that this appeal is a separate self standing procedure and that the costs should follow the outcome of this appeal.

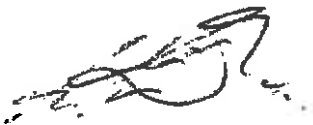
118. As indicated the Respondents ask for a cost order on a punitive scale. In this regard they *inter alia* refer to the attempt by the Appellant to frustrate the process of the court. Reference was made to the **Gauteng Gambling Board** matter and the remarks made in that matter by the Supreme Court of Appeal. I am in agreement with these submissions.

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119. In the result the following order is made:

The appeal is dismissed with costs, including costs of two counsel on an attorney and client scale.



E Jordaan

Judge of the High Court.



C Pretorius

Judge of the High Court

I agree



DS Molefe

Judge of the High Court.

I agree.

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