

April 38

20665/2013 - mvd

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JUDGMENT **FAL4**

iAfrica Transcriptions (Pty) Ltd/mvd

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT

PRETORIA

CASE NO: 20665/13

DATE: 2013.04.19

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DELIVERED BY MAIL IS NOT AVAILABLE
(1) REPORTABLE ☒ YES/NO
(2) OF INTEREST TO OTHER JUDGES ☒ YES/NO
(3) JEWELL ☒
DATE 15/5/13 
SIGNATURE

In the matter between

AFRIFORUM

15/5/13

1st Applicant

EVERT VAN DYK

~~Catch~~

2nd Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

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PRINSLOO J: This application for interim interdictory relief serves before me in the urgent court today. The evening before yesterday I heard argument on the question of urgency and ruled that the matter was urgent and could be dealt with as such. I also heard argument on the merits and reserved judgment until this morning.

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This application is a further development in a long saga flowing from the respondent's decision on 27 September 2007 to change the name of 27 of the best-known and most widely used streets in Pretoria. Later the number of streets was reduced to 25 when two of the major streets, Paul Kruger and Pretorius, were left out of the equation. From the minutes of the meeting of the respondent's Council ("the Council") of 27 September 2007 where the decision to change the names was passed with a majority vote, it is clear that there were deep-rooted and serious differences of opinion about the proposed changes. Nevertheless, the
10 respondent embarked upon a public participation process involving, *inter alia*, a request for proposals for names ("the new names") to replace the existing names due to be changed ("the old names"). I will later revert briefly to the subject of the public participation process.

A number of years later, on 29 March 2012, the respondent resolved to change the old names to the new names. This inspired the first applicant (then the only applicant) to launch an urgent application for interim interdictory relief against the respondent (then as first respondent) and three other respondents namely the MEC and Minister of Public Administration and the Minister of Arts and Culture. The latter three
20 respondents indicated that they would abide the decision of the court. The main relief sought, freely translated into English, amounted to the following:

"Pending the finalization of an application to review and set aside the resolution of the respondent of 29 March 2012 with regard to the replacement of the 25 street names the respondent is

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interdicted and restrained from replacing any road signs and street name signs reflecting the proposed changes.”

The urgent application came before Tuchten J on 30 April 2012. The urgency arose because the respondent was in the process of putting up the new signs. The respondent contended that no case for urgency had been made out because the applicant had delayed the launching of the application for too long. On this issue the learned judge said the following:

10 “What happened is that Afriforum reacted promptly on learning of the decision and 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 up new signs. That means that the City made its decision to decline to provide the undertaking sought and then delayed for tactical reasons to communicate that decision to Afriforum.”

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It was ruled that the matter could be heard as one of urgency. During the hearing it turned out that 8 of the streets were classified as provincial roads and respondent undertook not to implement its decision until the completion of a process by which the respondent must first consult the provincial authorities.

One of these 8 streets is Church Street earmarked to have its name changed to three new names said to apply to three sections of Church Street. During the proceedings before me I was left with the impression that the provincial consultation process has not yet been
10 completed. Before Tuchten J the respondent gave a further undertaking namely that it would not replace any of the old signs for a period of six months. Instead it will put up the new names and leave the old names in place for that period. The effect of this, so the learned judge held, was to remove the imminent threat which the applicant sought to prevent by interdict. It seems that both sides undertook to work towards the swift adjudication of the review application so that it could perhaps be finalized within the six month period. The applicant, to this end, also undertook to launch its main review application within two weeks.

The learned judge, correctly, held that this arrangement disposed
20 of the urgent application because the relief sought was directed at preventing the respondent from replacing the old with the new, not from putting up new boards and leaving the old ones in place. The learned judge pointed out that the court hearing the review, if it succeeds, may competently order that the new name boards may be removed too. In this regard reference was made to *Democratic Alliance v Ethekwini*

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Municipality 2012 (2) SA 151 (SCA) where such an order was made after that council's decision to rename 9 streets was reviewed and set aside. See the order in *Ethekwini* at 154 B-E. In the end, no order was made in the interdict application before Tuchten J, and the costs were reserved for decision in the main application.

Thereafter the applicant did not launch the main application within two weeks but instead, through its Chief Executive Officer, embarked upon talks with the Executive Mayor ("the Mayor") of the respondent with a view to amicably resolving both the street name issue and the issue
10 involving the threatened change of the name of Pretoria itself. The first such approach for a meeting on an informal basis was made already on 23 May 2012. The Mayor, in an electronic reply, said that he was keen on a discussion "to resolve amicably". The two leaders met on 24 July 2012 but, on a general reading of a number of e-mail exchanges between the parties, one is left with the impression that the CEO was the more eager of the two to make progress with the talks.

On 30 August 2012 the CEO wrote to the Mayor as follows:

"Just to remind you that I am waiting for feed-back from you re the ANC's stance on a possible agreement regarding the Pretoria
20 name and street name issue. Our attorneys are still awaiting my instructing (*sic*) regarding the pending court case we are holding back in a last ditch effort to reach an agreement."

On 9 October the negotiations broke down when the CEO referred to clear signs that the authorities were determined to work towards changing the name of the City after all. At this point it is useful to add that the first

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applicant is a registered non-profit company and a well-known non-governmental organization involved in the protection and development of civil rights within the context of the South African Constitution, Act 108 of 1996. It has more than 50 000 members and about 10 000 of those are rate payers of the respondent.

The first applicant alleges that its members and employees regularly travel on the particular streets and are affected by the respondent's decisions now under attack. The second applicant is a rate payer of the respondent who similarly makes use of the roads and is
10 affected by the decisions. After the discussions referred to broke down, the main review proceedings were launched by way of action on 13 December 2012 by the two applicants as plaintiffs together with a third plaintiff, a businessman and rate payer residing in Charles Street, one of the streets earmarked for a new name change.

On the same day, 13 December 2012, the applicant's attorney also delivered a letter to the respondent's attorney with the following request:

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- "1. We refer to your telephonic discussion with our Mr Willie Spies on even date and attach hereto a copy of the summons as issued yesterday in the North Gauteng High Court for your attention.
 2. We kindly request your client to provide an undertaking that the street name signs, as it appears presently, will not be removed pending the outcome of the court action.
 3. We await your urgent response herein."

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There was no response, and a similar request was sent on 17 January 2013 asking for an undertaking "not to remove the names of streets renamed pending the outcome of the action for review".

In a 4 February reply, the respondent's attorney said he was taking instructions and hoped to revert shortly on the question of an undertaking. He never did. On 4 April the Mayor gave his "state of the City" address during which he announced that the boards with the old names would be removed and added, according to a newspaper report, that people should by now be accustomed to the new names.

10 This development caused the applicant's attorney to write as follows to the respondent's attorney the next day, on 5 April 2013:

"A further more pertinent issue is the announcement of the Mayor of the City of Tshwane Metropolitan Municipality yesterday in his state of the city address that the former street names which were still left on the streets to avoid confusion, and to satisfy the judgment of Tuchten J granted last year, are to be removed with immediate effect.

20 We have previously without success requested your client's undertaking not to remove the names pending the finalization of the review process currently underway.

Since the Mayor has now made his intentions clear, we have no alternative but to consider an urgent application for an interdict to have the *status quo* maintained pending the finalization of the review proceedings.

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This letter therefore serves as an urgent formal request to your client to reconsider their position and to give us an undertaking by no later than close of business today, Friday 5 April 2013, that the removal of the existing names will be held in abeyance pending the finalization of the additional review.

Should we not receive your response by close of business today, our instructions are to bring an urgent application for an interdict to this effect."

The answer came on the same day stating that the request for an
10 undertaking was refused.

The respondent's attorney also referred to the six month grace period covered by the undertaking given before Tuchten J, *supra* having expired indicating that the applicant had "no entitlement" to the old names remaining in place beyond the end of October 2012 when the six months expired. The question of the six month period (in any event not part of a court order) was not mentioned when undertakings were sought in December 2012 and January 2013. It is difficult not to see a similarity between this delay in reacting to a request for an undertaking and the delay before the previous application as described by Tuchten J, *supra*.

20 The applicants were then inspired to launch this urgent application for interim interdictory relief on 9 April. The main relief sought, freely translated into English, is that pending the finalization of the review action of the respondent's resolution of 29 March 2012 to change the names of the 25 streets, the respondent is to be interdicted from removing the street signs bearing the old names. Regrettably, it soon became known, and it

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is common cause, that shortly after the announcement, *supra*, was made by the Mayor, and well aware of the impending interdict application and, it seems, almost overnight, and at great speed, the respondent started removing the signs bearing the old names. This moved the applicants to, on 10 April, file an amended notice of motion asking for the same relief but adding a prayer that the old names already removed should be restored to their earlier position on the streets *pendente lite*.

Indeed, when the opposing affidavit was filed, belatedly, on 16 April, it contained a statement that at the time of such filing the old names
10 had been removed already from all 661 normal street name signs and all 150 green boards affected by the name changes. Moreover, the service provider had commissioned the manufacturing of new panels without the old names for the 141 affected illuminated street names signs. It is anticipated that the removal of the old names on all illuminated street name signs will be completed by mid May 2013.

On the strength of this information, it was argued in the opposing affidavit that the application should be refused because the relief sought will be ineffective or largely ineffective. In answer to a question I posed during the hearing, counsel for the respondent, Mr Motau, confirmed that
20 the removal of the remaining vestiges of old names on illuminated street name signs was an ongoing process uninterrupted by the filing of this interdict application. The removal operation carried on unabated even after the interdict application was served as long ago as on 8 April when it was first sent electronically to the respondent's attorney.

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According to an allegation in the opposing affidavit it will cost approximately R2,6 million to return the removed old names to their positions on the streets. This means that despite the interdict application and the prayer for the names already removed to be returned, the respondent carried on regardless, increasing the potential restoration costs as the operation progressed and in the face of at least the possibility of a restoration order being granted. Moreover, the respondent was also quite prepared to incur the removal costs, the amount of which was not disclosed, in the face of the pending interdict application and not knowing
10 what the outcome would be.

I now turn to an important issue and one strongly relied upon by the respondent. It can conveniently be termed the "separation of powers argument". It is common cause that relevant statutory provisions vest the control over streets within a municipal area and the authority to name and rename the streets in the council of that municipality. See *Ethekwini* at 159 D-G. Broadly put, it was argued on behalf of the respondent that it embarked upon the name changing project in terms of its constitutional and statutory mandate, did so in terms of a transparent public participation process, and for this court to intervene in the performance of those
20 functions by way of interdict would be to undermine the constitutional imperative of separation of powers.

The respondent relied on the guidelines laid down in *National Treasury and others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) where an interdict restraining the Government from

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implementing the e-Toll system was challenged and set aside. At 232 B-E the following is said:

10 "In the present case there can be no doubt that the impact of the temporary restraining order is immediate, ongoing and substantial. The order prohibits SANRAL from exercising statutory powers flowing from legislation whose constitutional validity is not challenged. In particular, the order prevents it from raising revenue through tolls, a power the statute vests in it. The immediate and ongoing result of the interdict is that the National Treasury, the executive government, and the National Legislature will have to allocate R270 million per month to SANRAL in order to meet its ongoing capital and interest repayments in respect of the GFIP. Thus the order has wide-ranging consequences for national finances and the management of our country's sovereign debt. At the behest of a court order, the National Executive is prevented from fulfilling its statutory and budgetary responsibilities for as long as the interim order is in place. In effect, the order compels a re-allocation of otherwise budgeted funds to satisfy the financial exigency. Thus grant of the interdict has a direct and immediate

20 impact on separation of powers as well as ongoing irreparable financial and budgetary harm."

The Constitutional Court at 235 D-F revisited the well-known requirements for the grant of an interim interdict set out in *Setlogelo v Setlogelo* 1914 AD 221 and refined in *Webster v Mitchell* 1948 (1) SA 1186 W. The test requires that

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"an applicant that claims an interim interdict must establish

- (a) a *prima facie* right, even if it is open to some doubt;
- (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;
- (c) the balance of convenience must favour the grant of the interdict;
- (d) the applicant must have no other remedy"

and went on to say the following at 236 G to 237 D:

10 "It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlogelo* test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution. Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the

20 Constitution it would be redundant to enquire whether that right exists. Similarly when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought. The balance of convenience enquiry

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must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of a statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case."

In the present case the relief sought by the applicants does not, in my view, have any meaningful impact on the statutory powers and duties of the respondent. The applicants are not asking for the name changing process as such to be interfered with or curtailed *pendente lite*. The new names have been in place since April 2012 and will remain so. Moreover, in terms of the respondent's own scheme, introduced in April 2012, during the proceedings before Tuchten J, as explained, the new names are displayed prominently above the old names and the old names, to boot, have a red line drawn through them to place the impact of the change beyond doubt in the eyes of any reasonable observer. It is this state of affairs, already in existence for more than a year, which the applicants seek to perpetuate pending the outcome of the review. To allow this

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status quo to continue *pendente lite* can have no meaningful impact on the statutory powers of the respondent, the very architect of the introduction of the scheme in the first place, let alone an impact on the National fiscus or any other adverse consequences as described in *National Treasury, supra*. All that the applicants are seeking is the extension *pendente lite* of a *status quo* created by the respondent itself more than a year ago. Seen like this, and returning to the test in *Setlogelo, supra*, there can be no question of prejudice or harm for the respondent, neither can it be said that the balance of convenience will

10 favour the respondent if the interim relief is granted. Had the respondent, as a public body in charge of public funds, heeded the repeated calls by the applicants dating back to December 2012, to maintain the *status quo pendente lite* instead of, in my view, recklessly proceeding with the removal operation, in the face of the interdict application, the potential expense of restoring the old names would also have been saved.

Returning to the test in *Setlogelo* and the requirements for the granting of an interim interdict, I see no inconvenience or irreparable harm for the respondent if the *status quo* created on its own initiative, and perhaps also to counter the earlier urgent application which came before

20 Tuchten J, is maintained by the granting of the relief now sought. I also don't see, for the reasons mentioned, any "separation of powers harm" as foreshadowed by the learned deputy Chief Justice in *National Treasury* at 237 B-D *supra*.

On the other hand the harm or inconvenience, real or potential, for the applicants, including the 10 000 rate payer members of the first

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applicant, if the relief is refused, exceeds that to be suffered by the respondent, if any, if the relief were to be granted. The allegation is made in the founding affidavit that removal at present of the old names will cause confusion or potential confusion for many people not yet familiar with the new names. The same applies to tourists and visitors to the City. There is clear evidence in the affidavits presented by the applicants that existing road and street maps do not yet reflect the new names, and if such maps were to be adapted, and the review succeeds, the whole process will have to be reversed again leading to more confusion and

10 potential inconvenience and expense for rate payers, tourists and others such as businessmen and women, the latter having the additional inconvenience and expense of having to print and perhaps reprint amended letterheads and stationery.

There is also another, and what I consider to be significant, issue which underscores the irreparable harm or potential harm which the applicants will or could suffer if the relief were to be refused. Indeed, this issue also supports the case of the applicants that they have a *prima facie* right to relief claimed. The deponent to the founding affidavit puts it as follows when contending for the *prima facie* right:

20 "Verder het die totale verwydering van bestaande name die effek dat die name in onbruik kan verval terwyl 'n moontlik uitgerekte hersieningsproses homself oor 'n tydperk van jare uitspeel. Dit kan die hersieningsproses laat ontaard in bloot 'n akademiese oefening."

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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 hold that it is too late and impractical to unscramble the proverbial egg by reintroducing the old names years after the event. In *Chairperson Standing Tender Committee and others v J F E Sapela Electronics (Pty) Limited and others* 2008 (2) SA 638 (SCA) at 649 J to 650 F it was held that in cases of undue delay, and because there is a public interest element in the finality of administrative decisions and the exercise of administrative functions,
10 and because of considerations of pragmatism and practicality, such a discretion may be exercised against a justifiably aggrieved litigant.

Another submission made in the founding affidavit in support of the applicants' case that they have a *prima facie* right to the interim relief sought is worded as follows:

"Die mees voor-die-hand-liggende reg is die reg van kultuur-gemeenskappe om hulle kultuur goedere in beskerming te neem. Die grondwetlike regte, soos vervat in artikel 33 van die Grondwet is hier ter sprake asook die grondwetlike grondbeginsel dat erkenning te alle tye gegee moet word aan sowel die onregte van
20 die verlede as aan diegene wat Suid-Afrika oor jare heen gebou en ontwikkel het."

The applicants maintain that they have a constitutional right to protect and preserve their cultural and historical heritage. This would also satisfy the requirement set in *National Treasury, supra*, at 237 B-D for interim relief in the face of so-called separation of powers harm if indeed such harm

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exists in the particular case namely that "one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights."

It is also clear, in my view, that the applicants have no alternative remedy at their disposal to preserve the *status quo* on an interim basis.

In the result I have come to the conclusion that the applicants have made out a case for the existence of the requirements for interim relief. If one were to assume, for the benefit of the respondent, that this is a case where "separation of powers harm" comes into play, the
10 requirement that it should be one of the "clearest of cases" has probably been met, as I have stated, by the fact that the applicants rely, *inter alia*, on a breach of their fundamental constitutional rights. Where it is generally not prudent and even frowned upon to delve too deeply into the merits of the main review action or application, at this interim stage, so as not to usurp the function of the trial court, I will only make a few brief remarks in considering whether it may be said that the applicants have made out a "clear case", a term which remained undefined in *National Treasury*, (at 237 B-D).

When the Council resolved in September 2007 to change the old
20 names and replace them, broadly speaking, with the names of

"persons who have contributed to the liberation struggle, persons who have contributed to freedom of our country, persons who contributed in the struggle for gender equality, cultural activists"

it was clearly stipulated that the Policy Guidelines for the Naming of Public Places and Streets, as approved on 25 April 2002, would be applied and

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followed for purposes of this name change exercise. These guidelines are the following:

"6.3 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 as set out below.

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A notification of proposed new names 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.

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The applicant is held liable for all the costs involved in the changing of a name (endorsements on general plans, new street name boards et cetera).

The residents are liable for all the costs involved in changing their personal addresses (letterheads, business cards et cetera)

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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."

The lengthy minute of the meeting of 27 September 2007 clearly stipulates that in terms of Council's policy for the renaming of streets the following procedure should apply, thereafter prescribing a procedure including the following:

10 "In the spirit of democracy at least 51% of the registered voters who live/own property in a street, must agree in writing to a change of the street name."

Later during this meeting of 27 September 2007 a motion was simply proposed and carried by majority vote to set aside the aforesaid guidelines and replace them with

"a City wide public participation process involving:

(a) ward committees City wide;

(b) stake holders; and

(c) the general public through submissions be approved for this purpose."

20 Since there was opposition to this proposal the speaker then put the proposal to the vote and declared result as follows: for 81 against 51. In the light of this outcome of the vote the final resolution was taken.

This amendment and abandoning of the prescribed rules for renaming streets was done without e.g. obtaining the approval of the registered voters living in a particular street, 51% of whom had to agree to the change. There are a few minutes of public meetings held in the

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course of the replacement public participation process. On a general reading of these minutes, as pointed out by Mr Groenewald, who appeared for the applicants, the public was deeply divided on the issue. No polls were held and no voting took place to determine the majority view of the public. It is also not clear whether "ward committee's City wide" and particularly those representing residents in the affected streets were properly consulted in terms of the resolution aforesaid. I say no more about the merits of the main case and will conclude my remarks on this subject by merely quoting the grounds of review as crafted in the

10 founding affidavit:

"In breë trekke is die gronde waarop die hersieningsproses geloods is die volgende:

19.1 Dat daar nie 'n behoorlike openbare deelname proses gevolg is voor die besluite geneem is deur die respondent nie. (Dit sluit in die feit dat die spesifieke inwoners van die strate nie behoorlik geken is en ook nie in die lig daarvan dat die straatname van 'n hoofstad sekerlik die inwoners van beide die provinsie en die land in die breë raak, breër openbare deelname toegelaat is nie.)

20 19.2 Dat daar nie behoorlike oorweging was of 'n behoorlike oorwegingsproses in plek gestel is by wyse van enige van die komitees van die respondent met betrekking tot die besluite nie.

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- 10 19.3 Dat die respondent se raad versuim het om te voldoen aan sy eie straatnaambeleid soos afgekondig in September 2008 en/of Junie 2009.
- 19.4 Dat die respondent klaarblyklik tydens 'n raadsvergadering gehou op 27 September 2007 sy eie openbare deelname-beleidsriglyne met betrekking tot die verandering van straatname en openbare plekke tersyde gestel het en/of geïgnoreer het. (Dit sal aangevoer word dat die respondent se raad nie geregtig was om sodanige wysiging of uitsluiting van openbare deelname prosesriglyne te doen sonder behoorlike kennisgewing van die voorneme om sodanige besluit te neem nie en/of dat sodanige besluit arbitrêr of irrasioneel was.)
- 20 19.5 By 'n vergadering van die respondent se raad gehou op 27 September 2007 het die respondent se Raad besluit om 'n ondersoek te doen met betrekking tot die lewensvatbaarheid (insluitende die finansiële implikasies) met betrekking tot die verandering van straatname en die beginsels rondom openbare deelname met betrekking tot die verandering van straatname. Die respondent se raad het versuim om te voldoen aan die bogenoemde besluite.
- 19.6 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 deelnameproses.

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- 19.7 Die respondent se raad het versuim om te voldoen aan die riglyne gestel by die Suid-Afrikaanse Geografiese Naamraad in terme van die bepalings van die Suid-Afrikaanse Geografiese Naamraadwet, Wet 118 van 1998, alternatiewelik die Suid-Afrikaanse Geografiese handboek oor geografiese name.
- 19.8 Die besluite wat die respondent geneem het is strydig met die bepalings van onder andere artikels 33 en 41 (1)(g) en (h) van die Grondwet van die Republiek van Suid-Afrika.
- 10 19.9 Die besluite wat geneem is, is strydig met die bepalings van die Nasionale Erfenis Hulpbronnwet, wet 25 van 1999 en spesifiek artikels 3, 5 en 8 daarvan.
- 19.10 Die besluite wat geneem is, is strydig met die bepalings van die "Plaaslike Regering: Munisipale Finansiële Bestuurswet 56 van 2003" en spesifiek insoverre as wat die respondent versuim het om behoorlike oorweging te skenk aan die omvang van die uitgawes wat betrokke is by die naamsverandering en/of die respondent uit 'n ekonomiese, alternatiewelik sosio-ekonomiese oogpunt, kan bekostig om sulke geweldige onkoste aan te gaan.
- 20 19.11 Dat die besluite bereik is sonder om behoorlike oorweging te gee of enigsins te oorweeg wat die gevolge sal wees vir die besighede en individue in daardie betrokke strate met betrekking tot reeds gedrukte skryfbehoeftes,

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bemarkingsmateriaal, ander goedere en naamborde wat straatname vertoon.

10 19.12 Dat die respondent relevante oorwegings geïgnoreer het en irrelevante oorwegings inaggneem het in die bereik van die besluite en spesifiek dat die besluite daartoe sal lei dat daar ekonomiese groei, ontwikkeling en werkskepping sou wees en dat die besluit in lyn is met deelnemende demokrasie, "Batopele" en dat dit behoorlike plaaslike regering sal bevorder. In die alternatief sal dit aangevoer word dat daardie oorwegings irrelevant en/of irrasioneel was vir doeleindes van die besluite.

19.13 Die besluite is bereik onder omstandighede waar die respondent nie behoorlike oorweging gegee het aan die besware wat geopper is teen die besluite nie.

19.14 Die besluite blyk gebaseer te wees op feitlik verkeerde oorwegings en/of aannames met betrekking tot die persone na wie die ou straatname vernoem is en hulle beweerde betrokkenheid by sogenaamde historiese ongeregtighede.

20 19.15 Dat die besluite veronderstel is, en/of voorgehou is om sosiale samewerking in Pretoria te bevorder en as 'n katalisator te dien vir samewerking en deelname terwyl die besluite inderdaad die teenoorgestelde effek mag hê,

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19.16 Dat die besluite en proses wat die respondent gevolg het nie voldoen aan die ligaliteitsbeginsel nie en derhalwe tersyde gestel en hersien behoort te word."

It may be informative to very briefly dwell on some of the particulars of the individuals after whom the streets were originally named and which names are now to be replaced by categories of persons as I have referred to. The 25 names, and I will only deal with a few of them, are the following, Schoeman, Van der Walt, Andries, D F Malan, Prinsloo, Generaal Louis Botha, Skinner, Church, Leah Mangope, Lukas Mangope,
10 Jacob Maree, Walker/Charles, Queen Wilhelmina, Mears/Beatrix/Voortrekker, Hendrik Verwoerd, Hans Strydom, Mitchell, Esselen, Vermeulen, Schubart, Potgieter, Proes, Michael Brink, Duncan, Zambezi.

The applicant, in crafting the founding affidavit, presented biographical details of some of these individuals and I will only select a few for the sake of brevity. The deponent to the founding affidavit alleges that intensive research was done into the background of these individuals and authorities generally recognised on the subject, such as Tom Andrews and Jan Ploeger, who researched the street and place names of old
20 Pretoria, were consulted. They are generally recognised as authoritative on the subject. I mention very briefly only a few of the names and their origins.

Kerkstraat or Church Street is about 12 kilometres long. It is now set to be renamed over three sections with different names. It is generally accepted that the origin of this street is coupled with Church Square

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where the name also originates from because one of the first churches in Pretoria was built on the Church Square. There is no political connotation, so it is submitted, and I agree, with this name and the proposed change has already been the source of dismay expressed by a number of members of the community and members of churches and church organizations. It is alleged that the proposed change of this name cannot be rationally connected to the final decision to change street names.

Michael Brink was born in the Cape in 1889 and he stayed in the
10 present Rietfontein for more than 25 years. He was the Mayor of Innesdal for 9 years and a member of the provincial council. Michael Brink Street in Gezina is named after him as is Michael Brink Park in Sunnyside. He was clearly a prominent and important citizen of this City and there is no connection between him and the last apartheid government.

Zambezi is a street named after the Zambezi river, the fourth longest river in Africa, and it is not clear on what basis that name has to be changed.

Beatrix is named after Beatrix Dori Meintjies, born in 1885, the
20 eldest daughter of Edward Phillip Arnold Eddy Meintjies the son of Stephanus Jacobus Meintjies 1819-1887. Meintjies street in Sunnyside is named after Eddy Meintjies. Stephanus Meintjies was an attorney and later an advocate of this court.

Mears Street is named after James Edward Mears who landed in Durban from London in 1840. He later married Johanna Raaths, a cousin

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of the voortrekker leader Gerrit Maritz. Mears came to Pretoria in 1870 and bought a portion of the farm Elandspoort where he surveyed or founded Pretoria's first suburb, Sunnyside, in 1875. Voortrekkers Road is named after the voortrekkers. Mitchell Street is named after George Mitchell of Edinburgh Scotland who was a surveyor responsible for surveying Pretoria West.

Schoeman Street is named after Commandant-General Stephanus Schoeman 1810 to 1890. Van der Walt Street is named after Andries Petrus Jacobus van der Walt born in 1814. Andries Street is
10 named after Generaal Andries Wilhelmus Jacobus Pretorius voortrekker leader 1798 to 1853. Skinner Street is named after William Skinner born in 1828 who came to this country in 1840 and built the first Church and the Raadsaal in 1857. Jacob Mare is named after Jacobus Phillipus Mare, member of the Transvaal Volksraad who lived between 1823 and 1900. Esselen is named after Ewald August Esselen 1858 to 1918 a jurist and politician, former judge and also a member of the Volksraad for Potchefstroom. Vermeulen is named after the Brothers Vermeulen, Jacob, or Kooitjie, and Hendrik. Hendrik was a mason who worked in the Pretoria area in 1848 and was involved with surveying the town and Jacob
20 was the first vegetable and cattle farmer.

Schubart was named after Anton Frederik Schubart 1830 – 1898 a Dutch immigrant who came to Pretoria or to Cape Town in 1854. He later settled in Potchefstroom and did valuable work as a secretary of a school committee and later as secretary of State.

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Proes was named after Bernard Cornelius Ernst Proes an advocate and general agent from the Netherlands who lived from 1831 to 1872.

The general trend when considering the biographical details of the others largely corresponds with the details which I have briefly quoted. They are generally people from days gone by and they played a central role in founding and developing this City.

In all these circumstances, in my view, there are clear signs of a *bona fide* arguable case.

10 I gave some consideration to the question whether it would be appropriate to grant the second leg of the relief sought, namely an instruction for the old names to be restored in their former places. J R De Ville Judicial Review of Administrative Action in South Africa, when dealing with mandatory interdicts on page 369, points out that section 8(1)(a)(ii) of the Promotion of Administrative Justice Act 3 of 2000, or PAJA, allows a court to grant an order "directing the administrator to act in the manner the court ... requires."

20 It appears that PAJA does not apply in this case. See *Ethekwini* at 159 A-F. However, as stated in *Ethekwini* by the Supreme Court of Appeal at 160 C-E after dealing with the conclusion that PAJA does not apply to decisions of this nature:

"This conclusion does not mean, however, that these decisions are immune from judicial review. The fundamental principle, deriving from the rule of law itself, is that the exercise of all public power, be it legislative, executive or administrative, is only

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legitimate when lawful ... this tenet of constitutional law which admits of no exception has become known as the principle of legality ... Moreover, the principle of legality not only requires that the decision must satisfy all legal requirements, it also means that a decision should not be arbitrary or irrational ..."

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
10 removed even in the face of the pending interdict application.

Moreover, where the applicants complain about an infringement of their fundamental constitutional rights, an order such as the one sought, would probably also comfortably resort under "appropriate relief" as intended by the provisions of section 38 of Constitution of South Africa, Act 108 of 1996. Such an order may also be especially indicated in this case, where the respondent is carrying on with the removal exercise, perhaps even as I am delivering this judgment, 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 applicants.

20 I have already pointed out that a similar order was granted in Ethekwini under comparable circumstances, although only at the appeal stage.

I make a few remarks about the costs of this application. Although tempted to grant an adverse costs order against the respondent in view of its conduct as I have described it, I recognise that there is compelling

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authority for the proposition that in a case like this, where the final outcome of the dispute will only be known once the main action has been disposed of, it would be prudent not to grant costs at this stage but to reserve the costs for decision by the court dealing with the final review action.

In all the circumstances I make the following order:

1. Pending the final adjudication of the review action under case No.71910/2012 regarding the respondent's decision of 29 March 2012, and the finalization of any appeals flowing therefrom:

- 1.1 The respondent is interdicted and restrained from removing street and road signs bearing the old names of streets forming the subject of the review action; and

- 1.2 The respondent is ordered, within two months from the date of this order, to restore and replace such signs bearing such old names to their positions on the streets prior to them having been removed therefrom by the respondent or those acting on its behalf.

2. The costs of this application are reserved for decision by the court hearing the final review action.
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CASE NO: 20665/2013

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

PRETORIA 13 June 2013

BEFORE THE HONOURABLE MR JUSTICE PRINSLOO

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY APPLICANT

AND

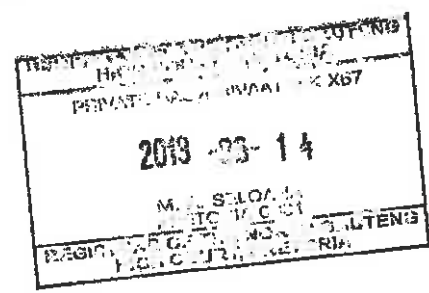
AFRIFORUM
EVERT VAN DYK

1ST RESPONDENT
2ND RESPONDENT

HAVING HEARD counsel for the parties and having read the application for leave to appeal against the judgment of the Honourable Justice Prinsloo delivered on 19 April 2013.

IT IS ORDERED

1. Application for leave to appeal is dismissed.
2. Applicant is to pay the costs which will include costs flowing from the employment of senior counsel



BY THE COURT

REGISTRAR
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☐ Att:

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