"HEARING THE PEOPLE ON THE STREET" TESTING THE EXTENT OF PUBLIC PARTICIPATION IN DURBAN'S STREET-RENAMING PROCESS

Democratic Alliance v eThekwini Municipality
[2012] 1 All SA 412 (SCA);
2012 (2) SA 151 (SCA)[*]

1 Introduction

Section 152(1)(e) of the Constitution of the Republic of South Africa, 1996, provides that one of the objectives of local government is "to encourage the involvement of communities and community organizations in local government". This objective is further entrenched in section 16 of the Municipal Systems Act 32 of 2000, which requires that municipalities must develop a culture of participation by the community, and create mechanisms, processes and procedures accordingly. These obligations gave rise to a number of interesting questions. One of these is whether the local sphere of government is obliged to facilitate public participation in its legislative and executive functions. This issue was considered by the Supreme Court of Appeal (SCA) in *Democratic Alliance v eThekwini Municipality* (2012 (2) SA 151 (SCA)). In this case, the SCA had to decide whether two decisions taken by the eThekwini Municipality to rename certain streets in Durban were, first, lawful and second, rational.

Before turning to consider the facts of this case, however, it is important to note that the renaming of streets figures prominently in periods of regime change and revolutionary transformations. In his analysis of streets which were renamed in Berlin between 1945 and 1948, Azarhyu, for example, stated that:

> "[t]he process of renaming streets introduces a transformation of the political order and the ideology of the new regime into the mundane spheres of urban experience and even intimate levels of everyday life" (Azaryahu "The Politics of Commemorative Street Renaming: Berlin 1945–1948" 2011 37 *Journal of Historical Geography* 483).

Furthermore, in his analysis of streets which were named after Martin Luther King Jr in the United States, Alderman observed that:

[*] The writer wishes to acknowledge the anonymous peer reviewer for the helpful suggestions received on earlier drafts of this note. The relevant paragraph numbers of the judgment of the Supreme Court of Appeal that are discussed are inserted in parenthesis.

> "street renaming inscribes commemorative messages into many of the practices and texts of daily life, making certain versions of history appear to be the natural order of things. Road names permeate our daily vocabulary, both verbal and visual, appearing on road signs, advertising bill boards and maps. Street names are less ornate and awe-inspiring than monuments or museums, but they make the past intimately familiar to people in ways that these other memorials cannot" (Alderman "Martin Luther King Jr "Streets in the South, A New Landscape of Memory" 2008 14(3) *Southern Culture* 88–105).

The process of street renaming in Durban prompted a large public response locally. The local newspaper, *The Mercury*, published a series of media reports and letters from the public on the renaming process. A researcher who interviewed its journalists, established that the changing of street names resulted in the biggest audience response ever experienced in the more than 150-year history of the newspaper (Orgeret "The Road to Renaming – What's in a Name? The Changing of Durban's Street Names and its Coverage in the Mercury" 2010 2(3) *Journal of African Media Studies* 297 298).

2 Prior proceedings and background

In 2001, the Council of the eThekwini Municipality adopted a street-naming and -renaming policy. This policy provided *inter alia* that "[t]he changing of street names [should occur] subject to prior consultation with the addressees and all other affected parties having taken place" (4). After the Municipal Council adopted this policy, it embarked on a process to rename certain streets, freeways and buildings systematically. This process took place in two phases. The first phase began in December 2003 and after interruptions ended in February 2007, when the Municipal Council decided to rename nine streets. The second phase began in March 2007 and ended in May 2008 when the Municipal Council decided to rename 99 streets (1–2). During the extended comment period in phase 2, however, the Municipal Council amended the street-naming and -renaming policy. The amendment – although opposed by the appellant – was adopted by majority vote, and deleted the requirement of prior consultation with *addressees* and affected persons during the renaming process and replaced it with the requirement of consultation with *ward committees* (12). The then City Manager, Dr Sutcliffe, explained that the original policy was drafted at the time of isolated renaming requests and when ward committees were not in existence, and highlighted certain difficulties with consulting addressees (13).

Following these decisions, the appellant, which was a registered political party represented in the Municipal Council, applied to the Durban High Court for an order setting aside both decisions. The appellant based its application on the grounds that both decisions infringed the right to procedural fairness in the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA") (16). Both decisions infringed on the right to procedural fairness, the appellant argued, because: (a) no proper public-consultation process preceded either of the decisions in relation to phase 1 or phase 2; (b) no proper deliberative process took place in any of the committees of the Municipal Council itself with reference to the decisions; and (c) the Municipal Council had failed to

comply with its own street-naming policy and with the guidelines set out by the South African Geographical Names Council (16).

The court *a quo* rejected these arguments. It held that the Municipal Council is a deliberative legislative body whose members are elected, and that their decisions were influenced by political considerations for which they were politically accountable to the electorate. The decisions in question could not therefore be classified as "administrative action" – the use of which is an essential prerequisite to invoke the procedural rights to fairness and consultation contained in the PAJA. The court further held that consultation did not guarantee that the participants would be able to affect the final decision and that, in any case, consultation did in fact occur at Council level. However, there was a lack of consensus and the remedy lay at the decision-making stage of the process.

After the court *a quo* dismissed the application, the appellant appealed to the SCA.

In my previous note ("Signs of Change: The Renaming of Durban's Streets 2011 32(3) *Obiter* 731), I commented that the threshold set by PAJA to invoke procedural rights to fairness and consultation (which would encompass the notion of public participation) was not the only yardstick with which to scrutinize the decisions of the council. The court *a quo* ought to have recognized and implemented the generic *principle of legality*, which is trite in our law (*Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 par 57–59). This principle governs the use of all public power. This principle of legality embodies the concepts of natural justice, which requires accurate and informed decision-making. This also encompasses the constitutional duty to facilitate public participation (*Doctors for Life v Speaker of the National Assembly* 2006 (6) SA 416 (CC) par 121 and 145).

Having this general notion of public participation as an established principle, the court in *Matatiele Municipality v President of the Republic of South Africa* (2006 (1) SA 47 (CC)), held that the *extent* of forms of public participation was broad and the public could have a voice, not only through an elected representative, but *inter alia* also through commentary and representations. The issue then became whether the state acted *reasonably* in facilitating this duty (Surbun 2011 32(3) *Obiter* 738). I submitted previously that the court *a quo* ought to have tested the reasonableness of the decision of the Municipal Council, by looking into the methods of representation and public participation.

3 The judgment of the Supreme Court of Appeal

3 1 Introduction

The SCA (per Brand JA; Navsa, Heher, Maya and Cachalia JJA concurring), having set out a lucid and detailed factual analysis, began its judgment by finding that the Municipal Council did have the authority to rename streets, and the primary objection of the appellants before the Court was the process which led up to the decision (3). The court pointed out that the appellant had

correctly accepted that the Municipal Council's decisions could not be classified as "administrative action" and consequently that PAJA was not applicable. This did not mean, however, that the decisions taken by the Municipal Council were immune from review. This was because the exercise of all public power had to comply with the principle of legality, which is derived from the rule of law, and this principle provided not only that the Municipal Council's decisions had to satisfy all legal requirements, but also that they had to be rational. In light of these principles, the appellant argued that the Municipal Council's decisions were unlawful because (a) they did not comply with the relevant statutory requirements; and (b) they were irrational (22).

The SCA proceeded to examine these contentions in turn:

3 2 Statutory requirements

In so far as the statutory requirements were concerned, the SCA began by observing that the Constitution imposed a specific duty on the National Assembly (s 59(1)) and the National Council of Provinces (s 72(1)) to facilitate public involvement in their legislative and other processes. The same obligation was also imposed on the provincial legislatures (s 118(1)), but not on the Municipal Councils. Despite the fact that the Constitution did not impose a specific obligation on Municipal Councils to facilitate public involvement they were nonetheless required to do so. This is because section 152(1)(a) of the Constitution and various provisions of the Local Government: Municipal Systems Act 32 of 2000 impose obligations on municipalities to provide democratic and accountable government for local communities and to establish appropriate mechanisms to enable local communities to participate in municipal affairs (23).

When it comes to determining whether a Municipal Council has complied with its obligation to facilitate public involvement in its legislative and other activities, the SCA observed further, that Courts should apply the same test to municipal councils that they do to Parliament and the provincial legislatures. This test, which was set out by the Constitutional Court in its judgment in *Doctors for Life International v Speaker of the National Assembly* (*supra*), provides that while a Municipal Council has a broad discretion to determine how best to facilitate public involvement, it must act reasonably. When it comes to determining whether a Municipal Council has acted reasonably, a court must take into account various factors, one of which is whether the Municipal Council complied with its own rules.

After setting out these principles, the SCA turned to apply them to the facts. In this respect, the Court distinguished between phase 1 and phase 2.

In so far as phase 1 was concerned, the SCA found that the Council had not complied with its own policy, being the original policy. Certain concerns were raised by the court, namely that the seven-day notice period provided by the Municipal Council in these circumstances was wholly inadequate, as there was no urgency for the decision to be made. Furthermore, without a situation of urgency, common sense dictated that members of the public should have been afforded a reasonable time period to submit, *inter alia*, comments and objections (26–27). In addition, the court found that the public

notices were not proper as they did not, *inter alia*, invite any suggestions for alternative names (27). The court, using the reasonableness standard, accordingly found that the process in phase 1 failed the test for lawfulness, and had to be set aside (29).

Thereafter, the SCA turned its attention to examine the process in phase 2, which had a much longer time frame to enable meaningful public participation (28). By the time this process was initiated, the Municipal Council had already effected the amendment to the original policy, which then required consultation with ward committees instead of addressees. The Court found that there was no suggestion that the amendment was invalid for reasons pertaining to substance or procedure, and the reasons furnished by the Municipal Council appeared to be "eminently sensible" (30). Consultation did occur in the various committees and objections were levelled by the appellant. The final decision was taken by the Municipal Council and the appellant was outvoted. The court held that this was inherent in a democratic process (31).

The appellant's further contention was that the Municipal Council ought to have applied the SAGNC guidelines, which provided amongst other things that "names of living persons should generally be avoided" (32–33). The SCA found that the SAGNC guidelines were broad and tentative, which by their nature did not impose an absolute injunction on the council to be bound by their provisions. Accordingly, the court held that insignificant deviations from them could not render the impugned decision unlawful (35).

3 3 Rationality

In so far as the rationality requirement was concerned, the SCA confirmed once again that the well-established rationality standard did not have a high threshold. All it required was that the impugned decision be aimed at the achievement of legitimate governmental objectives and that the chosen method in this case – which is the renaming of streets – achieved this object (37). The court found that the legitimacy of the governmental objective could hardly be doubted, and that there was an obvious rational connection between the achievement of that objective and the decision to change the names of the streets (38). The court emphatically found that the determination as to which streets should be renamed and the selection of the names was an inherently political decision (38), and that it was not for the courts to impugn on the lawful exercise of powers by the council in that regard (38).

The SCA accordingly held that the process in phase 2 satisfied the test for rationality (39).

4 Comment

In the court *a quo*, Ntshangase J (par 38) found that: "[i]n regard to the unsuitability of some names, the remedy lies again at the stage of the decision-making of the council. I do not consider it to be a task of the court in this matter as being to decide whether any of the streets and places should have been assigned different names". The SCA also considered this point

and found that: "the determination of just which streets should be renamed and what new names chosen admits of no right answer and is inherently political. … It is not for this court, or any other court, to interfere in the lawful exercise of powers by the council on that basis" (38).

That being said, the processes, with specific reference to public participation, that lead up to the decisions were adjudicated. It is evident, however, that the judgment handed down by the SCA distinctly contrasted with the judgment in the court *a quo*. The court *a quo* ended its examination of the process of the renaming, when it found that the decisions and the process leading up to the decisions did not constitute administrative action under PAJA.

Facilitating public participation, however, is not limited to administrative acts affecting the public, and recent cases have developed a jurisprudence surrounding public participation in government decisions and processes. In the landmark judgment in *Doctors for Life* the court described South African democracy as being constituted by "mutually-supportive" representative and participatory elements and that "participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist" (par 115). The court, in considering the fulfilment of this duty on the legislature to facilitate public involvement formulated a test underpinned by the standard of reasonableness. They held that the duty entailed: (a) providing meaningful opportunities for public participation in the law-making process; and (b) taking measures to ensure that people had the ability to take advantage of the opportunities provided (par 129). Ngcobo J, held that "legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably" (par 123 and 124).

Steytler and Visser suggest that the ambit of this duty is wider than just Parliament and the provincial legislatures, and that a municipality's efforts at involving the local community must meet the same standard of reasonableness (Steytler and Visser *Local Government Law of South Africa* (2012) 6–16). They further suggest that the standard of reasonableness should not be interpreted to apply to a municipal council's legislative actions only, as municipal councils are also vested with executive powers (Steytler and Visser *Local Government Law of South Africa* 6–16). Their rationale is that a limitation of the Constitutional Court's principles to municipal by-laws and budgets would be contrary to the manner in which the local government legislation (the Local Government: Municipal Systems Act 32 of 2000) has placed community participation as central to the entire municipal exercise (the Local Government: Municipal Systems Act 32 of 2000). The SCA in the present case has also adopted a similar view and held that "municipal councils are also constrained to facilitate public participation in the performance of their executive and legislative functions" (23). The effect of this is that the reasonableness standard in enquiring into public participation, adopted in *Doctors for Life* become applicable to municipal councils, even when making executive decisions.

The SCA in the present case extended the enquiry by establishing that the principle of legality had to also be applied. This principle, which was an

aspect of the rule of law, was comprised of two components. The first was the requirement that the exercise of all public power had to be lawful. In terms of that requirement, an organ of state might have to follow a fair procedure or make a reasonable decision. This was dependent on what the other provisions of the Constitution or the law in question required. The second was the requirement that every exercise of public power had to be rational. In terms of this requirement there had to be a rational relationship between a legitimate governmental purpose and the means chosen by the State to achieve that purpose. This requirement applied even if the law in question said nothing about it (see also Hoexter *Administrative Law in South Africa* (2012) 121–125).

The court in *Poverty Alleviation Network* (2010 (6) BCLR 520 (CC)) also applied this test in addition to the challenges related to public participation. Bishop describes the relationship between the rationality review and public participation as follows:

> "[r]ationality is … connected to deliberation and participation. How carefully the Court is willing to scrutinise the rationality of government action determines the outer boundaries of the quality of deliberation … The more exacting the Court is, the closer it pushes the legislative (and executive) branch to the ideal of deliberation where only public reasons count and the decision-maker acts only after considering all views. The less demanding the Court's review, the more space it provides for unprincipled decision making based on private interests and for government to take decisions without listening to alternatives, whether from political parties, interest groups or the general public" (Bishop "Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum v President of the Republic of South Africa*" 2009 2 *Constitutional Court Review* 313 334).

The SCA in applying this test and the standards of reasonableness and rationality, therefore delivered a more detailed and structured analysis of the facts, and considered the process in two identifiable phases. The result of this detailed factual analysis was that the first phase did not pass the legality test, whereas the second phase did. This lucid and practical approach assessing the process differs markedly from the holistic approach to the facts by the court *a quo*.

Of particular value in the judgment of the SCA, is the simple affirmation and application of the two-stage approach of the legality test – namely to satisfy all legal requirements and not to be irrational or arbitrary. The court looked at original policy (the lawfulness requirement in the legality test) and found its non-compliance was at the heart of phase 1 falling foul of the legality test. The amendment to the original policy during the second phase, however, allowed it to pass the legality test. A crucial consideration by the court was that the amendment was not invalid for reasons pertaining to substance or procedure and that it was eminently sensible (32). What the court relied on in making this determination, were the facts on record, and in particular the submissions presented by the then City Manager, Dr Sutcliffe. He stated that consultation with addressees carried its own inherent difficulties, for example that freeways have no apparent addressees to consult with (13 read with 32).

What was critical about this amendment was that it had an impact on the extent of public participation by replacing consultation with addressees (the

end user) with ward committees. An argument could be advanced that the circumstances of this case dictated the need for ongoing consultation, particularly with regard to the amendment. Sachs J in *Doctors for Life* held that:

> "[w]hen expectations of candour and open dealing have been established and certain unambiguous … Commitments have been made, a change of commitment without further consultation can be disruptive of the constitutionally-required relationship of dialogue between the legislature and members of the public" (*Doctors for Life International v Speaker of the National Assembly supra* par 291).

In *Merafong Demarcation Forum v President of the Republic of South Africa* (2008 (5) SA 171 (CC)), a sudden change of decision by the Gauteng Provincial Legislature without further consultation was found to violate the civic dignity of participants and it denied any spirit of accommodation and produced a total lack of legitimacy for the process and its outcome in the eyes of the people (*Merafong Demarcation Forum v President of the Republic of South Africa supra* par 292). Bishop and Raboshakga point out that reasonableness will entail partnering in decision-making, which potentially requires ongoing dialogue between the legislature and interested members of the public where the legislature explains its response to the community's concerns and seeks further feedback (Woolman and Bishop *Constitutional Law of South Africa* 2ed (2008) 17–79). The importance of the decision can also be measured by looking at the degree to which the communities display interest in the matter (*Doctors for Life International v Speaker of the National Assembly* (*supra*) par 128). Ngcobo J considered that in a bill of a mundane nature, it was reasonable not to attempt to solicit further public interest that did not exist (*Doctors for Life International v Speaker of the National Assembly supra* par 192). It is submitted that in the present case, the SCA's rejection of the appellant's contention that the amendment could not find application midway through a name-change process which had already started, fails to consider the above *dicta* regarding ongoing consultation.

The consultation and input of the end-user was a significant contention of the appellant. Although the considerations of the end-user are meant to be incorporated in deliberations with ward committees, it was evident from the public response that led to the litigation, that the system of consultation with ward committees has shortcomings, and the nature of the policy and decisions directly affected the end-user. In light of this, it is submitted that the SCA ought to have extended the application of the legality test to the substance and process of the amendment.

The process of public participation through the channels facilitated by local government (the Municipality), is not, however, as simple as may appear from Dr Sutcliffe's submissions in the judgment. Mbambo, in his unpublished dissertation, revealed that in 2005: (i) people viewed the Municipality's system of governance as unresponsive because of the lack of effective communication between the councilors, officials and the communities; (ii) there was a general feeling that local government did not consult with people when taking decisions on crucial matters; and (iii) there was uncertainty about whether community inputs had any influence on

decision-making (Mbambo "Community Participation in Local Governance: A Systemic Analysis of eThekwini Municipality's Design for Effectiveness" unpublished M Comm dissertation at University of KwaZulu-Natal 2005 ii). An apt issue raised in his findings, was how policy could strengthen citizen action that delivered a sufficient level of decision-making to citizen groups over issues that impact on their lives, while not at the same time detracting from constitutionally derived decision-making powers of councilors and officials (Mbambo unpublished M Comm dissertation 57). In this regard, these considerations were considered by the Municipality when it adopted its Community Participation Policy on 29 June 2006 (http://www1.durban.gov.za /durban/government/policy/ (accessed 2012-10-15). The policy is aimed at creating an enabling environment for citizens' involvement in the affairs of the eThekwini Municipality, and highlights the vision of developmental local government which puts participation at its centre. The policy recognizes Mbambo's findings and provides *inter alia* practice principles for community participation, citizen's participation levels, process of community participation and channels and mechanisms for community participation. It is submitted that the amendment ought to have been subject to scrutiny in the light of, *inter alia,* the aims, objectives and provisions of this Policy.

5 Concluding remarks

As pointed out in my introductory remarks, public participation becomes especially relevant in situations of commemorative street naming and renaming which affect the end-user in a personal way. The council of the eThekwini Municipality replaced direct consultations with addressees with consultation through ward committees – with the effect that the extent of public participation was partially truncated. Commemorative renaming is not a feature new to South African politics and litigation and will continue to be a feature in future. Consultation processes in renaming have, for example, once again led to litigation, as the Lowveld Chamber of Business and Tourism are challenging the government's plan to change the name of the town of Nelspruit to Mbombela. A media report states that the court challenge is expected to be a test case of how name changes should be handled in the country (Viljoen "Nelspruit-saak 'Sal Rigting Wys'" 5 October 2012 *Beeld*).

It is submitted that name changes need to be considered from two perspectives. Firstly, the policy which will be applied must be scrutinized through the legality principle and the implementation thereof using the reasonableness standard, and secondly the process initiated though the policy must enable citizen participation to the fullest extent. The SCA judgment further, is a welcome affirmation that the exercise of public power, and in this case at a local government level, – whether administrative or not – is subject to the principle of legality.

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