

**SIGNS OF CHANGE:  
THE RENAMING OF DURBAN'S STREETS**

**Democratic Alliance v eThekweni Municipality:  
Unreported Judgment (KZD)  
Case Numbers 10787/08 and 6608/07  
Judgment delivered: 3 June 2010**

## **1 Introduction**

On 27 February 2007, the council of the eThekweni Municipality, the governing entity of the Durban and surrounding metropolitan region, passed the first of two resolutions in terms whereof certain byways and landmarks would be renamed. In a public municipal advertisement, the City's mayor announced:

"The street renaming is indeed an ultimate step towards honouring all the heroes and heroines who fought a fight for a good cause. Chief among these are those who in the pursuit of freedom ventured their way through the troubled bridges of apartheid. Therefore as eThekweni council, we feel honoured to be part of such a historic process of ensuring that names of these great men and women of the struggle remain known even to the generations to come ... It is indeed a democratic process: members of the public were consulted and given an opportunity to suggest names. This will ensure that the city we live in is indeed accurately reflecting its people and its history ..." ("Old and New Street Names in the eThekweni Municipal Area" [www.durban.go.za](http://www.durban.go.za)).

Notwithstanding these sentiments, on 1 May 2007, about 10 000 demonstrators marched through the city's central business district and converged on the City Hall, where the Inkatha Freedom Party (IFP) and the Democratic Alliance (DA) held a joint protest to complain, not about the fact that the streets and landmarks were being renamed, but about the new names themselves ("Name Change Protest Disrupts Durban" 1 May 2010 *Mail and Guardian*). The suggested names of SWAPO, Griffiths Mxenge, Andrew Zondo and Che Guevara spawned a public outcry and accusations that the process was carried out without proper consultation ("DA and IFP Loose Durban Street Renaming Battle" 4 June 2010 *The Mercury*). The controversy prompted the *New York Times* to observe that "Durban is different. Intentional or not, some of the proposed name changes clearly flick at scabs covering deep divisions" ("Where the Road to Renaming Does Not Run Smooth" 27 May 2007 *New York Times*).

Against this background, the DA and the IFP launched an application in the public interest in the Durban High Court which will be analyzed hereunder. The Applicants prayed for an order to the effect that the decision

by the Municipality to rename the streets must be set aside and for the old names to be restored. A representative for the DA announced that:

“We took this case to court because we believed, and still do believe that the rights and opinions of thousands of eThekweni’s citizens were trampled by the actions of the municipality who simply roughshod over their objections” (“Renaming Process Flawed, Says DA” [www.iol.co.za](http://www.iol.co.za) accessed 2010-06-03).

## 2 Issues before the court

The Applicants’ argument was based on the contention that the decision and process to rename the streets constituted administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which attracted the guaranteed right to procedural fairness and consultation (par 3). PAJA was enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair, as contemplated by section 33 of the Constitution.

The Respondent Municipality contended that the decision to rename the streets constituted the exercise of original and deliberative policy and/or law-making powers which involves legislative or quasi-legislative decisions and not “administrative action” (par 4).

The court (per Ntshangase J) accordingly proposed to deal at the outset with the major issue as to whether the municipality’s decision to rename the streets constituted administrative action under the PAJA or section 33 of the Constitution, or the exercise of original and deliberative policy and/or law-making powers. The court thereafter dealt with the Applicant’s complaints regarding consultation and public participation in the decision-making process.

## 3 Judgment

The court began its relatively short judgment with a brief exposition of the present state of the law relevant to the issue at hand. Ntshangase J set out a few propositions of law:

The first point Ntshangase J noted was that the council is a deliberative legislative body whose members are elected; that the legislative decisions taken by them were influenced by political considerations for which they were politically accountable to the electorate. Therefore the decisions did not fall within the ambit of administrative action, as contemplated by section 33 of the Constitution (see par 8 and also *Fedsure Life Assurance Ltd v JHB Transitional Metropolitan Council* 1999 1 SA 374 (CC) par 41). He also noted that local government is no longer a public body exercising delegated powers, in terms of the constitution (par 10). He remarked that it is important to distinguish between laws made by functionaries – which may well be classified as administrative – and laws made by deliberative legislative bodies which are seldom described as administrative (par 10). It was also pointed out that administrative action in terms of section 33 includes legislative administrative action (par 12). Reference was also made to the

tendency of the courts to move away from the classification of powers to determine whether the *audi* rule applies (par 12).

Having set out these trite propositions of law, Ntsangase J went on to inquire whether the conduct of the Respondent bore the character of administrative action. He noted that it was not the arm of government to which the relevant decision-maker belonged, but to the nature of the power exercised that needs investigating. Therefore, the fact that the decision was taken by a politically elected, deliberative assembly whose members could not be asked for reasons for the manner in which they had voted was not decisive. A case by case analysis had to be done (par 16).

Ntshangase J observed that the mutation of the Applicants' original target of contention from initially "the *decision* of the respondent to *rename* the streets" in its Founding Affidavit to the contention in the summation of argument, where it was argued that the Application concerned was not an executive decision (which is excluded from the definition of administrative action in the PAJA), but was in fact the *procedure* adopted by the Respondent in *implementing* the decision to rename the streets (par 17). Ntshangase J found that implementation of a decision would not constitute administrative action and referred to the definition of "decision" under section 1 of the PAJA. According to PAJA, a "decision" is "any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision ..." (s 1 of PAJA). He further pointed out that the implementation of legislation on the other hand would constitute administrative action within the meaning of section 33 of the Constitution (par 22). The court noted that it was not disputed by the parties that the Respondent had the power to rename the streets and that it took the decision after deliberation (par 25). Ntshangase J found that the effect thereof constituted the exercise of a power which affected equally members of the community at large and such a decision was not closely related to matters which were administrative (par 26). Accordingly, he held that the decision of the Respondent did not constitute administrative action and therefore the power of judicial review under the PAJA could not be invoked (par 28).

The court then turned to look at the substance of the applicants' complaints, a significant part of which was devoted to showing the Respondent's failure to engage in full and proper consultation. Ntshangase J, citing the *Fedsure* case above, upheld that the decision was taken by the Respondent (which is vested with the power to assign street names) through its politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted (par 30).

He pointed out that public participation occurred through political structures (par 31) and that consultation did not guarantee that the participants would be able to affect the final decision (par 33). He was of the view that recommendations by ward committees broadened the extent of consultations (par 34). Although the Applicants complained of a lack of consultation at council level, the court noted that consultation did occur, but

that there was a lack of consensus, and the remedy lay at the decision-making stage of the consultations (par 37). Ntshangase J also felt it necessary in these circumstances to hold that it was not the function of the court to rule on the suitability of the names (par 38). He accordingly dismissed the application.

## 4 Discussion

It has been established that the municipalities and boroughs of numerous towns and cities across the Republic are contemplating or have already embarked on renaming exercises of public landmarks and streets. The case at hand raised questions as to the extent of public participation in these processes. Given the finding of the court that the decision to rename the streets did not constitute administrative action, Ntshangase J's decision to dismiss the application was to be expected and did not extend the principles governing the law of administrative review in a particularly significant manner. The court's assessment of the Applicant's complaints regarding a lack of or too limited consultation, however, merits some comment.

### 4.1 *Nature of the decision*

Before turning to consider the issue of public participation, it would be useful to consider also the court's finding on the nature of the action the Respondent was engaged in when deciding to rename the streets. Baxter describes the historical position as follows:

"By-laws are a form of subordinate delegated legislation and are fully reviewable by the courts. In the case of fully elected councils the courts will however, accord the by-laws in question a somewhat greater degree of respect if they appear to fall within the council's general legislative power and if they have been enacted according to the prescribed form and procedure than would be afforded in the case of other forms of delegated legislation" (Baxter *Administrative Law* (1984) 151).

Baxter describes this approach as the "Benevolent Interpretation Doctrine" He states that:

"The deliberative process of a council chamber debate constitutes a method of structuring the decision making process. There is no guarantee that elected legislatures will make good decisions – especially where they legislate in respect of persons by whom they are not elected" (Baxter 191-192).

Ntshangase J's judgment seems to conform to this benevolent interpretation approach. The Constitutional Court (per O'Regan J) in *Mazibuko v City of Johannesburg* (2010 4 SA 1 (CC)) held that "where a decision is taken by a municipal council in pursuance of its legislative and executive functions, therefore, that decision will not ordinarily be administrative in character" (par 130).

Although correctly finding that the decision was one made by a deliberative legislative body, whose decisions and the implementation thereof were influenced by political considerations that did not constitute

administrative action, the court ought to have been mindful of the dictum of O'Regan J in the *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-u-College (PE) (Section 21) Inc* (2001 2 SA 1 (CC) par 18). O'Regan J explained that there was a difference between *policy formulation* in the *broad* (political) sense and in the *narrower* (administrative) sense. Policy could be formulated in a narrower sense where a member of the executive was implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.

In *Greys Marine Hout Bay v Minister of Public Health Works* (2005 6 SA 313 (SCA)) in which it was contended that a Minister's decision to let waterfront property was "policy decision", the court held that this was a case of "policy execution" rather than "policy formulation". Nugent JA (par 27) held that "there will be few administrative acts that are devoid of underlying policy – indeed, administrative action is most often the implementation of policy that has been given legal effect".

This can be illustrated by looking at the applicability of the South African Geographical Names Council Act 118 of 1998 (SAGNC Act). The purpose of this Act is to establish an advisory body known as the African Geographical Names Council (SAGNC) to advise the Minister responsible for arts and culture on the transformation and standardization of geographical names in South Africa for official purposes. Section 12(1) of the SAGNC Act provides that:

"The Minister must make regulations as to the criteria to be followed when deciding whether or not a geographical name should be regarded as national, provincial or local competence."

Section 3 of the Regulations passed by the Minister pursuant thereto (No. 24999, Notice 339, 2003) state that geographical names of local concern include streets, municipal buildings and squares, local parks and cemeteries and privately owned buildings. These areas must be situated within the jurisdiction of the local authority. Accordingly, the eThekweni Municipality *in casu* is the local authority which is vested with competence to deliberate geographical names in the city of Durban. Section 9 of the SAGNC Act further provides that the SAGNC must set standards and guidelines for local and provincial authorities in their respective areas of jurisdiction. The status of the guidelines has been recognized by the courts in *Chairpersons' Association v Minister of Arts and Culture* (2007 5 SA 236 (SCA)). These guidelines, however, exclude features under the control of the local authorities, such as *inter alia*, streets and municipal buildings. Ntshangase J upheld the contention that the local authorities were therefore removed from the jurisdiction of the SAGNC and accordingly not bound by it (par 32).

The guidelines, however, further provide that:

"The same policies and principles established by the SAGNC apply to all geographical names including those that do not fall under the direct jurisdiction of the SAGNC. Provincial geographical names committees should ensure that local authorities are aware of these principles so that they can be

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applied to the names of streets and other features that fall under the jurisdiction of local authorities.”

It is submitted that this latter guideline has the effect of truncating the original deliberative authority of the Municipality in its decision to rename the streets because they should consider and apply the policies and principles set out by the SAGNC guidelines. This gives the decision more of an administrative nature.

It is an established proposition that laws are general commands which place general obligations on persons; whereas a special command enjoining only particular action constitutes an administrative act (*Rex v Koenig* 1917 CPD 225 241-242). This broad criterion, however, does not afford any precise test by which the distinction between laws, legislative acts, and non-legislative acts can be determined in every instance (*South African Roads Board v Johannesburg City Council* 1994 4 SA 1 12). Milne JA in *Roads Board* formulated a distinction which should be drawn between:

- “(a) Statutory powers which, when exercised affect equally members of the community at large; and
- (b) Those which, while possibly having a general impact are calculated to cause particular prejudice to an individual or particular group of individuals” (12).

Milne JA then went on to state that the latter grouping might be categorized as either administrative or legislative or that they might fall into a grey area in between (par 12E-J). In support of this test, he cited the New Zealand case of *Fowler & Rodderique v Attorney General* (1987 2 NZLR 56), where Somers J said:

“If the exercise of power is likely to affect the interest of an individual in a way that is significantly different from the way in which it is likely to affect the interests of the public generally, the person exercising the power will normally be expected to have regard to the interests of the individual before it is exercised” (74).

Ntshangase J in the case at hand found that the decision to rename the streets constituted the exercise of power which equally affected the members of the community at large, and such a decision was not closely related to matters which are administrative. This was based on the fact that the decision was taken after deliberation, and meant that the decision would fall within the ambit of the first category of powers as formulated by Milne J and described above. It is submitted that the court ought to have stipulated why the latter category should not apply in the light of the court’s finding that “a person who lives in the affected streets may be more affected than persons who live elsewhere within or outside the municipal jurisdiction of the Respondent who uses the affected streets from time to time” (par 26).

#### 4 2 *Public participation*

Ntshangase J did not invoke the power for judicial review in terms of the PAJA based on the finding that it did not fall within the ambit of “administrative action” as defined in the PAJA (par 28). However, non-

administrative action can still remain reviewable under principles of legality and natural justice. Hoexter discusses that the narrowness of the definition of administrative action in the PAJA makes the principle of legality necessary to cater for the many cases that call for judicial scrutiny, but do not pass the threshold set by the PAJA (Hoexter *Administrative Law in South Africa* (2007) 119). The decision to rename the streets in this instance falls within this fold. These wider constitutional principles of legality and natural justice govern the use of all public power rather than the narrower realm of administrative action (see Hoexter 117; and *Fedsure Life Assurance Ltd v JHB Transitional Metropolitan Council supra* par 59). The principle of legality was described as an obverse facet of the *ultra vires* doctrine (Baxter 301) and under the common law the position was that the *audi alteram partem* rule would operate unless excluded either expressly or by necessary implication (*R v Ngwevela* 1954 1 SA 123 (A) 13H). The principles of natural justice dictate that persons affected by administrative action should be afforded a fair and unbiased hearing before the decision to act is taken, and is usually expressed by the *audi* rule (Baxter 536). Natural justice facilitates accurate and informed decision-making, ensures that decisions are made in the public interest and cater for important process values (Baxter 538).

The issues as to whether public participation and the extent (or lack) thereof, which are the substance of the complaint in the instant case, could be reviewed on the basis of the principles of legality or natural justice were not traversed by the court. Instead, Ntshangase J cited the judgment of Chaskalson J in *New Clicks* (2006 2 SA 311 (CC) par 118) who warned against a “free alternative” approach and the creation of parallel systems of law. Hoexter argues, however, that the PAJA must be applied where it is applicable and the principle of legality cannot be relied upon so as to bypass the PAJA. That said, the principle of legality is an essential safeguard for action that does not qualify as administrative action under section 33 of the Constitution or the PAJA (Hoexter 127). Hoexter argues further that “as far as public participation is concerned, the public may have to rely more heavily on the good intentions and efficiency of administrators than on any stick wielded by the courts” (Hoexter 83).

Notwithstanding provisions made for public participation in terms of the PAJA, and in terms of the principles of legality and natural justice, there is also a constitutional imperative which will be highlighted briefly below. In *Doctors for Life v Speaker of the National Assembly* (2006 6 SA 416 (CC)), the Constitutional court per Ngcobo J held that:

“our Constitution calls for open and transparent government and requires legislative organs to facilitate public participation in the making of laws by all legislative organs of state” (par 121).

The court further held that “the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of public participation and consultation” (par 145). The court found that this duty to facilitate public participation entails that the legislature must take steps to afford the public a reasonable opportunity to participate effectively in the law-making process with a broad scope – from providing

information and building awareness to partnering in decision-making (par 129).

With these principles laid out in *Doctors for Life* above, the Constitutional Court in *Matatiele Municipality v President of the Republic of South Africa* (2006 1 SA 47 (CC)) examined the nature of this duty further and found that the democratic government envisaged by the Constitution is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies (par 65). In this case, the state contended for a restrictive meaning of this duty which required the legislature to do no more than create space for the public to be involved (par 51), and a process of public involvement is not necessary because the public opinion is voiced through duly elected representatives of the people. The court rejected this restrictive approach as it would render meaningless the public involvement provisions and reduce the democracy to a representative democracy (par 56). The Constitution contemplates that people will have a voice in the legislative organs of the state not only through the elected representative, but through participation in the law-making process (par 60). The court upheld the view that public involvement might include public participation through submission of commentary and representations, but which are neither definitive nor exhaustive of their content (par 52). Accordingly, the issue becomes whether the State has taken reasonable steps to comply with this duty to facilitate public involvement. In other words, a court must look at whether the nature and degree of public participation are reasonable, and consider for example the nature, importance and urgency of the legislation and the intensity of the impact on the public. In this case, the court looked at the impact on the public of the transfer of the Matatiele Municipal authority from KwaZulu-Natal to the Eastern Cape Province and noted that there are "natural elements and affections which grow up for places [in] which persons have long resided" (par 79). The consequences a change thereof are of considerable symbolic and practical importance.

Since the Constitution establishes parliament, the provincial legislatures and municipal councils as the primary democratic institutions in the country, it follows that the eThekweni Municipality must facilitate public participation, as contemplated in the *Doctors for Life* and *Matatiele* judgments above. Whilst it is not in dispute that consultations did in fact occur in the present case, it is submitted that the court should have tested the reasonableness of the methods of representation and public participation employed by the Municipality.

This analysis of the extent and reasonableness of the public participation measures becomes relevant when considering Atkinson's argument, which points out that the increasing diversity and complexity of urban society make it very difficult for elected representative to know the wishes of the citizens they purport to represent (Atkinson *The Technique of Public Participation in Local Government* (1997) 3). Arnstein notes that there is a critical difference between going through an empty ritual of participation and having the real

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power to affect the outcome of the process (Arnstein “A Ladder of Citizen Participation” 1969 *AJIP* 3 216).

Ntshangase J was of the view that the makings of recommendations by a ward committee, even if outside the confines its respective ward, broadened the extent of consultations (par 34). Nzimake and Reddy state that the object of a ward committee is to ensure that participatory democracy is enhanced in the local government, and ward committees are representative structures of the citizenry and liaise with the Municipalities on the aspirations and problems of its inhabitants (Nzimake and Reddy “Community Participation in eThekweni with Particular Reference to Ward Committees” 2008 43(4) *JPA* 671). They also cite the view of the Speaker of the Municipality, Councillor James Nxumalo (as he then was), who said that “the Municipality has made a commitment in the form of participation that is genuinely empowering, and not token consultation or manipulation (Nzimake and Reddy 2008 43(4) *JPA* 673). Sokupa argues, however, that the efficiency of this system of ward committees is compromised. Sokupa points out that their deliberative role is practically confined and although ward committees are meant to identify key issues affecting their ward and deliberate thereon, the failure to integrate ward committees explicitly into the decision-making or deliberative process of a local municipality means that there is little impact beyond merely deliberating (Sokupa “Revitalizing Public Participation” [www.afesis.org.za/local\\_governance\\_articles](http://www.afesis.org.za/local_governance_articles)).

## 5 Conclusion

Although this judgment is relatively brief, the following two aspects can be highlighted:

First, it provides a case study of the impact of the narrowness of the definition of administrative action in the PAJA and how the distinction between policy formulation in the broad political sense and the narrower administrative sense can be critical. Secondly, the concept and role of public participation processes are well traversed under section 4 of the PAJA. However, in cases, such as the instant, which does not fall under the threshold of the Act to yield the benefits thereof, there is a need to define the extent and role of such public-participation process, bearing in mind the overarching constitutional provision of public participation and involvement.

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