CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 157/15

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Applicant

and

AFRIFORUM First Respondent

EVERT VAN DYK Second Respondent

Neutral citation:	*City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19
Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J
Judgments:	Mogoeng CJ (majority): [1] to [78] Froneman and Cameron JJ (dissenting): [79] to [162] Jafta J (concurring): [163] to [194]
Heard on:	19 May 2016
Decided on:	21 July 2016
Summary:	appealability of interim orders — requirements of an interim interdict — separation of powers — removal of street names prima facie right — irreparable harm — balance of convenience

ORDER

In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders by Prinsloo J and Jordaan J of the Gauteng Division of the High Court, Pretoria are set aside and the application for an interim interdict is dismissed.
4. The order of the Supreme Court of Appeal awarding costs against the Tshwane Metropolitan Municipality is set aside.
5. Each party is to pay its own costs.

JUDGMENT

MOGOENG CJ (Moseneke DCJ, Bosielo AJ, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

Introduction

[1] This case concerns a restraining order granted in favour of Afriforum and Mr Evert Van Dyk (Afriforum)[1] against the City of Tshwane Metropolitan Municipality (Council). The Council was ordered to stop removing the old street names in the Pretoria area and bring back those that had been removed already. For a proper understanding of the issues in this matter, a historical perspective and the implications of the underlying constitutional vision need to be outlined. This is accentuated by Afriforum's reliance on the Preamble to the Constitution.

[1] The respondents will be referred to as "Afriforum" throughout the judgment. This should by no means be misunderstood as a sign of disrespect or disregard for Mr Van Dyk. It is done purely for convenience.

Essential context

[2] South Africa is literally the last African country to be liberated from the system that found nothing wrong with the institutionalised oppression of one racial group by another for no other reason but the colour of their skin, shape of their nose and the length or texture of their hair. The underlying reason advanced for this irrational differentiation was that African people in particular and black people in general, were intellectually inferior, lazy and lesser beings in every respect of consequence. As a result, there hardly was any city, town, street, or institution of note that bore a name that sought to give honour to black people's leaders or recognition to their institutions or treasured history. Everything about the oppressed was dismissively branded as backward and inconsequential. Virtually all recognition and honour was thus respectively given to and bestowed upon white history and their heroes and heroines. The system was all about the entrenchment of white supremacy and privilege and black inferiority and disadvantage. No wonder the United Nations resolved that that system was a crime against humanity.

[3] More than three centuries from the inception of that system, South Africans of all races took it upon themselves to create a platform for the normalisation or harmonisation of race relations, democratisation of their country and attainment of peace and social cohesion. Against all odds, the nation has admirably come to the point where impunified violence, racial hatred or subjugation in all its manifestations is unlike before seldom openly and proudly practised.[2]

[4] That said, colonialism or apartheid is a system so stubborn that its divisive and harmful effects continue to plague us and retard our progress as a nation more than two decades into our hard-earned constitutional democracy. Almost all cities, towns and street names continue to reverberate with great sounds of veneration for the architects of apartheid, heroes and heroines of our oppressive and shameful colonial past. Virtually no progressive or potentially conciliatory change to city, town or street

[2] There has been numerous but comparatively fewer and less frequent open or public incidents of blatant racism over the years.

names goes unchallenged. There are fairly regular challenges to the equitable distribution of honour to heroes of all cultural or racial groups and a concomitant determination to preserve exclusivity to privilege and meaningful control. This highlights the crucial role of the Preamble to our Constitution, relied on by Afriforum.

[5] A preamble is after all a succinct expressionary statement that sets out a constitution's purpose and underlying philosophy.By design and like all others, our Preamble captures the essential principles by which we the people seek to govern our affairs. It is such a crucial part of our Constitution that, if only every citizen were to internalise it and live according to its terms, our aspirations would most likely be expeditiously realised. Ours reads in relevant part:

> "We, the people of South Africa,
> Recognise the injustices of our past;
> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity.
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."

[6] Knowing just how deep and engrafted the distrust, divisions and injustices were in the very being of some of our people from the days of apartheid, we have made a solemn undertaking to embark on an all-inclusive constitutional project, geared at achieving national unity and reconciliation. The injustices of the past are not to be pampered or approached with great care or understanding or sympathy. And the immeasurable damage racism or cultural monopoly has caused requires that stringent measures be taken to undo it. That approach will help us move away from exclusivity to opportunities, racial domination and intolerance to inclusivity, social cohesion and equitable access to opportunities.

[7] The normalised demonisation and stigmatisation of heroes and heroines of our struggle for justice, peace and freedom is now a thing of the past. We the people of South Africa promise to honour them, presumably the same way heroes and heroines have been venerated in this country and around the world. Just as important is the need to respect white and black South Africans who played a crucial role in building and developing South Africa into the modern country of note it now is. All of us must embrace and internalise the constitutional reality that this country belongs to all of us who live in it. Diversity thus ought to highlight the need for unity rather than reinforce the inclination to stand aloof and be separatist. An appreciation of the value-addition or special contribution of diversity, as in other countries, should strengthen our collective resolve to unite and tap into the special skills and experiences of all diverse groups in this country, for the betterment of all.

[8] As a people who were not only acutely divided but were also at war with themselves primarily on the basis of race, one of several self-imposed obligations is healing the divisions of the past. The effects of the system of racial, ethnic and tribal stratification of the past must thus be destroyed and buried permanently. But the healing process will not even begin until we all make an effort to connect with the profound benefits of change. We also need to take steps to breathe life into the underlying philosophy and constitutional vision we have crafted for our collective good and for the good of posterity. That would be achieved partly by removing from our cities, towns, "dorpies", streets, parks, game reserves and institutions, names that exalt elements of our past that cause grief to other racial groups or reopen their supposedly healing wounds. Also, by removing even some innocuous names that give recognition only to the history, language, culture or people of one race, so as to make way for the heritage and deserving heroes and heroines of the previously excluded. This is to be done sensitively and in pursuit of inclusivity, unity in diversity and recognition of the need for a sense of belonging for all. We all have the duty to transform our society. And all, black and white, are an essential part of "we the people of South Africa" that shoulder the burden to do so.

[9] Our shared values that underpin our constitutional vision cannot be achieved when one race almost always has its way or a near-absolute monopoly of respect and honour. That is a recipe for the illegitimate retention of exclusive privilege, undeserved domination of the past and future hostilities as opposed to inclusivity, reconciliation and the unity in diversity we have undertaken to pursue and achieve. No measure of sophistry, contortion, or strategy ought to be allowed to entrench any form of racial domination or exclusivity to privilege, honour and opportunities. For that is inconsistent with our foundational values and constitutional vision. South Africans of all races must unite to secure a brighter, peaceful, stable and prosperous tomorrow by allowing the previously excluded groups, to also be honoured in their own land. They too should at long last have a sense of belonging.

[10] This case highlights the need to familiarise ourselves with our vision in the Preamble to our Constitution. It also sounds a clarion call to South Africans of all races to take to heart the foundational values of our Constitution like human dignity, equality, the advancement of human rights and freedoms, non-racialism and non-sexism. When our actions are informed and driven by these facets of our constitutional project, then a proposed change of names of landmarks, streets and institutions would only attract constitutionally-inspired and constructive opposition. Strife and the consequential deepening of the divisions of the past would thus be most likely avoided or minimised.

[11] All peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision must embrace the African philosophy of "ubuntu". "Motho ke motho ka batho ba bangwe" or "umuntu ngumuntu ngabantu" (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must also enjoy prominence in our approach and attitudes to all matters of importance in this country, including name-changing. White South Africans must enjoy a sense of belonging. But unlike before, that cannot and should never again be allowed to override all other people's interests. South Africa no

longer "belongs" to white people only. It belongs to all of us who live in it, united in our diversity. Any indirect or even inadvertent display of an attitude of racial intolerance, racial marginalisation and insensitivity, by white or black people, must be resoundingly rejected by all South Africans in line with the Preamble and our values, if our constitutional aspirations are to be realised.

[12] South Africa still looks very much like Europe away from Europe. A very insignificant number of names of our cities, towns and streets gives recognition to the indigenous people of this country and other black people. Very little recognition or honour is given to their heritage, history, heroes and heroines in their own motherland. This does not reflect but rather belies a commitment by all to the spirit of genuine unity, transformation and reconciliation.

[13] In this country, names of places and institutions of importance generally celebrate one-sidedness and at times resonate with the legacy of our oppressive past with unbelievable boldness and alacrity. Hopefully, this does not signify a disinclination to change for fear of protestations by retentionists that mere change to what they cherish, however miniscule, not only poses a threat to them and their environment but also denies them a sense of belonging. For, that position would inadvertently be saying to those who are victims of colonialism and apartheid, that they have no legitimate claim to any sense of belonging whatsoever.

[14] Our constitutional vision militates against a never-ending determination to oppose change to city, town or street names. Through the Preamble and the entire Constitution we imposed on ourselves the duty to transform. Recognition of the injustices of the past is neither a slogan nor an empty or meaningless assertion of recognition. It heralds an obligation to actively participate not in the perpetuation but, in the eradication of the injustices of the past. Honouring those who suffered for justice and freedom like Dr Beyers Naude and Advocate Bram Fischer promises, amongst other things, the naming of streets and institutions of importance after them. Respecting those who worked and developed South Africa recognises the role of our

black and white compatriots who toiled over the years to make our country better than it was before. For indeed South Africans across racial lines worked hard to change the country for the better, even during apartheid. A belief that South Africa belongs to all who live in it united in our diversity, is the antithesis of any obsession with or exaggeration of the role and importance of one racial group above all others.

[15] Thoroughgoing introspection is thus called for. Both black and white South Africans need to strive for the attainment of our shared values and constitutional aspirations. It is impermissible to ever adopt an attitude that seems to suggest that some of our people can afford to endure the pain and torture induced and symbolised by instruments of the colonial and apartheid legacy, probably because they have endured them long enough to find them tolerable, if not somewhat acceptable. This is even more so where others are categorical about their total inability to tolerate progressive and inclusive instruments like streets bearing names of leaders from other cultural groups even temporarily.

[16] Nothing that objectively encourages or seeks to perpetuate the stereotypes, prejudice or discriminatory practices of the past is to be tolerated. Inclusivity, unity in diversity, recognition of the culture and history of white and black South Africans and reconciliation are our chosen paths to the prosperous future. They accelerate social cohesion and the process of healing the divisions of the past. This national project demands that we reject everything that sustained, entrenched and still promotes racial discrimination.

[17] Ours is a country with great potential for enduring peace, stability and sustainable economic growth. Much will however depend on how we manage our differences as individuals, groups and as a nation. Our utterances and actions must always take cue from the foundational values of and Preamble to our Constitution. Our commitment to reject the injustices of the past, the disunity and pain they brought about must be unwavering and matched by our actions. That way and in harmony, we will be able to replace old names that celebrate people and things that divided and

caused us deep and incalculable pain with new ones that recognise the previously ignored and unify the nation.

[18] Our peculiarity as a nation impels us to remember always, that our Constitution and law could never have been meant to facilitate the frustration of real justice and equity through technicalities. The kind of justice that our constitutional dispensation holds out to all our people is substantive justice. This is the kind that does not ignore the overall constitutional vision, the challenges that cry out for a just and equitable solution in particular circumstances and the context within which the issues arose and are steeped. We cannot emphasise enough, that form should never be allowed to triumph over substance. Our Constitution was never meant to be a selectively recognised weapon, conveniently produced and used by some of us only when it could help advance illegitimate sectarian interests through legal stratagems. It was designed to facilitate justice and equity for all. That said, legitimate individual or sectarian rights and interests may always be vindicated and appropriately addressed within the prism of this constitutional dispensation.

[19] This then sets the scene for the resolution of a challenge to the order that seeks to preserve street names that Council believes are irreconcilable with our constitutional project.

Background

[20] In 2002, Council adopted policy guidelines relating to the possible change of street names and heritage sites in the city of Pretoria and the surrounding areas. One of the guidelines that stood out was that a street name would not be changed unless fifty one percent of the inhabitants of the ward in which it is located, agrees. How it could ever have been possible to change names in suburbs or industrial areas that are dominated by those who see nothing wrong with them, however objectively offensive the names might be, remains a mystery.

[21] In 2007, Council passed a resolution to replace those guidelines with new ones. And it was purportedly in terms of the new policy guidelines that a decision was ultimately taken to change 25 of the more than 100 old street names. The final decision was preceded by some consultative meetings held in areas located in 10 of the 76 wards of greater Pretoria.

[22] Council in effect says that this change was necessitated by the dictates of inclusivity, unity in diversity, overdue recognition of and bestowal of honour to the previously dishonoured as well as the need to heal the divisions of our past. Afriforum has consistently opposed the mooted changes from the beginning all the way through to the implementation of Council's resolution to replace old street names like Dr Hendrik Verwoerd, Louis Botha and Walker with new ones like President Nelson Mandela, Chief Justice Ismail Mohamed, Solomon Mahlangu and Steve Biko. Council's decision viewed in context seems indeed to have been intended to shed Pretoria of its colonial and apartheid legacy and to introduce those names that symbolise the pursuit of justice, peace, unity, reconciliation, fundamental human rights and freedoms for all our people. This should, however, never be misunderstood to mean that the end will always justify the means.

[23] When Afriforum learnt that Council had resolved to replace some of the old street names with the new, it brought an urgent application to restrain Council from doing so. That application came before Tuchten J. He did not have to make any order because Council undertook not to take any of the measures objected to by Afriforum. The lifespan of this self-restraint was six months. Afriforum also undertook to bring an application to have the decision to change the old street names reviewed within ten days of Council's undertaking. Whereas Council honoured its undertaking, Afriforum did not launch its review application as promised.

[24] Long after the expiration of the self-imposed six months moratorium, Council decided to and did implement its resolution to change street names. This prompted Afriforum to launch an urgent application. Even then, Afriforum only launched its

review proceedings seven months after the expiration of the ten day period. This it says was a consequence of its hope that an amicable solution to the street name-change issue could still be found.

[25] Council never promised to put that project on hold forever or indefinitely. Nor did it undertake not to implement its decision without first informing Afriforum. It is therefore inappropriate to accuse Council of deliberately taking long to respond to Afriforum's inquiry on whether it was going to replace old names anytime soon, with a view to ensuring that it would have completed that project before Afriforum could take legal steps. Afriforum's footprints appear to be all over Pretoria. It is highly unlikely that all the street names could have been removed and replaced without any of its constituents becoming aware of it and alerting Afriforum. The decision to challenge the name-changing process has always been Afriforum's to make. And so was the timing entirely in its hands. Its indecision and inaction cannot properly be blamed on Council.

[26] Having passed the resolution to change some of the names arguably linked to the colonial and apartheid legacy, Council embarked on the process of implementing its resolution. Afriforum, however, sees even a temporary removal of the old street names as doing violence to what defines the very being of the Afrikaner people as well as their healthy and peaceful existence. To them it was an assault on their treasured history and heritage which could not be left unchallenged. As a result, they launched a fresh urgent application for an order restraining Council from removing the old names and directing it to restore those names that had already been removed. The order was granted by Prinsloo J in those terms, pending the finalisation of the review proceedings.

[27] The rationale behind the grant of the interim order is essentially this. The old street names are an historical treasure and a heritage so intimate to the very being of the Afrikaner people that their removal would constitute an infringement of their right to enjoy their culture as envisaged by section 31 of the Constitution. In other words,

what reigns supreme in Afriforum's opposition to the notion that old names be removed, is that they are an integral part of an irreplaceable and much-cherished history, heritage and culture of the Afrikaner people. So dear and invaluable are the old street names to them, that even their temporary displacement would not only give rise to inestimable emotional hurt but also to irreparable harm. The replacement of old names with those of black people would according to Afriforum somehow toxify the environment to the point of jeopardising the health of like-minded residents of Pretoria. The temporary retention of the old names would, they say, give them a sense of place and a sense of belonging.

[28] Additionally, the temporary removal of the old names would cause them to be forgotten, with the result that by the time litigation processes connected to the review are finalised, courts would in all likelihood conclude that the horse has already bolted[3] and that no meaningful purpose would be served by bringing back the old names. Furthermore, confusion would reign consequent upon the placement of only new names since tourists, residents and business people would find it difficult to locate their destinations pending the drafting of new directional maps with new street names or updating the GPS. Business people would also have to change their stationery at great expense and if the review succeeds change it back to what it was.

[29] Aggrieved by Prinsloo J's order, Council unsuccessfully sought leave to appeal against it. It then petitioned the Supreme Court of Appeal which granted it leave to appeal to the Full Court.[4] Jordaan J (with Pretorius J and Molefe J concurring) dismissed Council's appeal. An attempt was made to challenge that decision but the Supreme Court of Appeal refused leave with costs. Hence this application.

[3] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*) at para 50.

[4] See *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2015] ZAGPPHC 1056 (Full Court judgment).

In this Court

[30] The Council's case is that Afriforum has not satisfied the requirements for the interim interdict they were granted. In particular, that it stood to suffer irreparable harm in the event of the interim order not being granted[5] and that the balance of convenience favours them.[6]

[31] Afriforum's approach seems to assume that Council bears the burden of proof to satisfy the Court that Afriforum is not entitled to the interim order. They maintain that Council recklessly proceeded with indecent haste to remove old street names knowing that an application for a restraining order had been launched. Also, that Council admits that only 10 of the 76 wards were afforded the opportunity to participate in the name-changing process. Furthermore, Afriforum contends that Council cannot deny the emotional hurt they would suffer if the order were not granted. Very little is said to demonstrate how the requirements for granting an interim interdict were satisfied. There does not seem to be a proper appreciation of the legal reality that the onus to prove that the interim order should be granted, rests on Afriforum itself. Very little purpose would be served by an elaborate reproduction of the parties' submissions. It will suffice to raise only those pertinent to the issues to be determined, in the course of the discussion of the merits.

Leave to appeal

[32] The portion of the order that restrains Council from removing the old street names and that which enjoins Council to restore those already removed to their original position, are so inter-connected or inter-dependent that one cannot exist without the other. Afriforum wants all the old street names retained pending the finalisation of the review proceedings. The order directing Council to restore the old names depends for its significance on the restraining order. In other words, the reinstatement of the old names is meaningless without preventing Council from

[5] *OUTA* above n 3 at para 53.

[6] Id at para 50.

removing the remaining old names. Similarly the plan to preserve all the old names by interdicting the removal of the old names, would be frustrated if the old street names, already removed, are not brought back.

[33] The interim order issued by the High Court and upheld by the Full Court is therefore one and inseparable. Its appealability must be considered on that basis.

[34] It is not disputed that the pending review application raises at least four constitutional matters. First is the enjoyment of the cultural right provided for in section 31 of the Constitution. Second is the entitlement to a properly facilitated public participation process inferentially sought to be sourced from section 152 of the Constitution.[7] Third, the review hinges on the constitutional right to just administrative action.[8] The foundation on which the review application rests thus comprises not only the propriety of the facilitation of the public participation process in the renaming of streets and legality but also the constitutional right embedded in section 31. These issues are yet to be pronounced upon on review. Finally, the order granted and sought to be defended involves considerations of separation of powers. For, it is a hotly contested issue whether the court order constitutes a justifiable intrusion into the exclusive terrain of the Executive.

[35] We hold that it was in line with Council's executive powers to govern the city of Pretoria and its surrounding areas, that it took a policy decision to replace the old street names with the new ones it considers appropriate to reflect our more inclusive dispensation. Implementation of that policy decision was underway when Afriforum applied for and obtained the interim order that stopped Council dead in its tracks.

[36] Included in the implementation of the policy decision was the determination of the budget necessary to effect the change during the particular financial year. The

[7] I assume without deciding that *Democratic Alliance v Ethekwini Municipality* [2011] ZASCA 221; 2012 (2) SA 151 (SCA) (*Ethekwini*) could be relied on as authority for the proposition that this section is the constitutional basis for public participation at the local government level.

[8] Section 33 of the Constitution.

effect of the order is not only to suspend and frustrate the implementation of that decision, but also to stretch the budget through, among other things, subsequent inflation and the Rand's loss of value against major currencies. Now we know that to give effect to the order to bring back the old street names would as at that time have punched a R2.6 million hole in Council's budget.

[37] The reality of the order is again that Council is forced to live with that intrusive effect as long as the review proceedings are pending or remain inconclusive by reason of likely appellate processes. The issues at stake being hotly contested and emotive, it is very likely that the decision of the review court would indeed be taken on appeal by whomsoever loses. If the four years it took this interim order to be heard by this Court be anything to go by, then Council would have to wait for many years while the review order is slowly meandering its way up the appellate ladder of our court system.

[38] Realistically, Council would then have to brace itself for another four or so years of waiting, before it could carry out its constitutional and statutory duties. Not only would this trench upon its executive powers and budgetary responsibilities, but that long period of suspension has a final effect. The R2.6 million spent on the restoration of the names can never be undone. The same applies to Council's inability to spend the R98 million set aside for the name-changing process. Council's executive powers would have been encroached on without this Court having considered whether that was sanctioned by our Constitution. And these considerations provide sound bases for appealability.

[39] The appealability of interim orders in terms of the common law depends on whether they are final in effect.[9] In this connection, it must be borne in mind that the effect of the restraining and mandatory order granted is to mortify and prevent

[9] *OUTA* above n 3 at para 24. See also *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) (*Zweni*) at paras 532J-533A,where the Court stated that:

> "[F]irst, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

Council from implementing its resolution. And this is the resolution taken in terms of its constitutional[10] and statutory[11] powers. To say that this amounts to an intrusion by courts into the domain reserved exclusively for the Executive, would not be an overstatement.

[40] The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before,[12] appealability no longer depends largely on whether the interim order appealed against has final

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[10] Section 151 of the Constitution states:

> "Status of municipalities
>
> (1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
>
> (2) The executive and legislative authority of a municipality is vested in its Municipal Council.
>
> (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
>
> (4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

[11] Section 63(1) of the Local Government Ordinance 17 of 1939 reads as follows:

> "The council shall have the control and management of all—
> (a) roads, streets, thoroughfares, bridges, overhead bridges, subways, including foot pavements, footpaths, side-walks, and lanes;
> (b) squares and other open spaces, gardens, and other enclosed spaces;
> (c) culverts, and ferries;
> (d) dams, canals, reservoirs water-courses, and water-furrows;
> which have been or shall be at any time be set apart and appropriated by proper authority for the use and benefit of the public, or to which the inhabitants of the municipality shall at any time have or acquire a common right. . . ."

Section 69(1)(a) reads as follows:

> "The Council may from time to time cause the houses, buildings or erections fronting upon all or any public places to be marked with such number as it thinks fit, and may cause the name, by which any public place is to be known, to be put up or painted on a conspicuous part of any house, building, fence, wall or place fronting thereon, and may further at its distraction change or vary such number or name, whether or not such name or number existed before the commencement of this Ordinance, and any change or variation in the name of any public place shall forthwith be notified by the council to the Surveyor-General who shall make the necessary alterations on the general plan of the township; provided that no change in the name of a public place shall be made except with the consent of the Administrator after reference to the Surveyor-General. . . ."

[12] See *Zweni* above n 9 at paras 532J-533A.

effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability.[13] The principle was set out in *OUTA* by Moseneke DCJ in these terms:

> "This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is 'the interests of justice'. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable."[14]

The Deputy Chief Justice also dealt with the role of separation of powers in relation to appealability as follows:

> "A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of Government,

[13] *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) (*Informal Traders*) at para 17 states that:

> "This provision [section 167(6) of the Constitution] makes it plain that the Court has a wide appellate jurisdiction on constitutional matters. It may decide whether to hear an appeal from any court on any constitutional dispute provided it serves the interests of justice to do so. There is no pre-ordained divide between appealable and non-appealable issues. Provided a dispute relates to a constitutional matter, there is no general rule that prevents this Court from hearing an appeal against an interlocutory decision such as the refusal of an interim interdict. However, it would be appealable only if the interests of justice so demand. Thus, this Court would not without more agree to hear an appeal that impugns an interlocutory decision, especially because such a decision is open to reconsideration by the court that has granted it. Doing so would be an exception rather than the norm."

[14] *OUTA* above n 3 at para 25.

> provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review except perhaps where the review has no prospects of success whatsoever."[15]

[41] What the role of interests of justice is in this kind of application, again entails the need to ensure that form never trumps any approach that would advance the interests of justice. If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest. This is especially so where, as in this case, the interim order should not have been granted in the first place by reason of a failure to meet the requirements. The Constitution and our law are all about real justice, not mere formalities. Importantly, the constitutional prescript of legality and the rule of law demand that nobody, not even a court of law, exercises powers they do not have. Where separation of powers is implicated and forbids the grant of the order sought to be appealed against, the interests of justice demand that even an order that is not of final effect or does not dispose of a substantial portion of the issues in the main application, nevertheless be appealable.

[42] Consequently, although the final effect of the interim order or the disposition of a substantial portion of issues in the main application are not irrelevant to the determination of appealability and the grant of leave, they are in terms of our constitutional jurisprudence hardly ever determinative of appealability or leave.[16] The role of the final effect of an interim order recedes to the background when an interim order impermissibly trenches upon the sole terrain of the other branches of Government. To arrest the execution of Council's policy decision as finally as the High Court has done before a determination of the grounds of review, is too drastic a measure to take in the circumstances.[17] It remains the constitutional and statutory

[15] Id at para 26.

[16] Id at para 25.

[17] See generally *OUTA* above n 3 at paras 25, 26 and 27.

responsibility of Council to determine the fate of the street names, obviously subject to facilitation of genuine and appropriate public participation in the name-changing process. The power to determine how much of Council's budget will be used, when and for what purpose is also firmly in the hands of Council.

[43] Operating with the ever-abiding consciousness of the crucial role separation of powers plays in our constitutional democracy, courts should thus be very slow to interfere with the legitimate exercise of governmental powers save in the "clearest of cases"[18] or where bad faith or corruption or fraud was proved.[19] Even the common law recognises that courts should exercise the power to grant an interdict restraining the exercise of statutory powers, "only . . . in exceptional circumstances and when a strong case is made out for relief."[20] This being a case that relates to a grant of such an interdict, it cannot be treated as an ordinary run of the mill application for an interim order. It is about transformation and the related right to govern. All of the above clamour not just for the conclusion that the order is appealable but also that it is in the interests of justice that leave to appeal be granted to Council. But, there is more.

[44] The mainstay of Afriforum's review application is that Council failed to facilitate a proper public participation process prior to passing the resolution to change street names. In support of this, reliance is placed on its alleged non-compliance with the 2007 policy guidelines which apparently required of it to consult all Ward Committees before street names could be changed. The non-observance of the principle of legality is also an integral part of Afriforum's case on review. And these are the issues on which the Full Court not only entertained full argument, but also dealt with quite extensively in its judgment and decided in favour of Afriforum. Part of what the Full Court said to this end was that:

[18] *OUTA* above n 3 at para 47.

[19] Id at para 71.

[20] *Gool v Minister of Justice and Another* 1955 (2) SA 682 (CPD) at paras 688F and 689B-C. This authority was endorsed by *OUTA* above n 3 at para 43.

> "The argument on behalf of the respondent that the appellant failed to perform a proper public participation process is in my view likewise unassailable."[21]

[45] Having resolved the legal basis for public participation in the name-changing process, it held that Council failed to comply with its 2007 policy guidelines by not involving Ward Committees city-wide. And it relied on *Ethekwini*[22] as authority for its conclusion that it was entitled to interfere "with a decision of a municipality where the element of legality is lacking." [23] It thus disposed of the assertion that there have been a series of illegalities[24] including non-compliance with several pieces of legislation in favour of Afriforum and made an order endorsing the order of the Court of first instance. A punitive costs order was then made purely on the basis that Council expedited the implementation of its policy decision.

[46] It needs to be repeated that the review stands or falls on the inadequacy or otherwise of public participation in the name-changing process. And the Full Court has in essence disposed of all the issues on review. Very little, if any, still remains to be decided. All the remaining grounds of review are so dependent on the alleged inadequacy of the public participation process and legality for their relevance and significance that they cannot stand on their own. And they are the, (i) failure to consider the financial implications of changing street names; (ii) non-compliance with the provisions of the South African Geographical Names Council Act,[25] National Heritage Resources Act,[26] Local Government: Municipal Finance Management Act[27]

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[21] Full Court judgment above n 4 at para 107.

[22] *Ethekwini* above n 7.

[23] Full Court judgment above n 4 at para 108.

[24] In paragraph 5.4 of the Full Court judgment it says:

> "The respondents' case in the review action is, essentially, that there had been a series of illegalities, i.e. failure to comply with the guidelines set out by the South African Geographical Names Council under the provisions under the South African Geographical Names Act No. 118 of 1998, section 33 and section 41(a), (g) and (h) of the Constitution, the National Heritage Resources Act, 25 of 1999 and the Local Government: Municipal Finance Management Act, 56 of 2003. Furthermore, there had been no consultation and/or public participation process as undertaken by the City in its resolution of 27 September 2007."

[25] 118 of 1998.

[26] 25 of 1999.

and sections 33 and 41 of the Constitution; (iii) disregard for the impact of the street name-change on the business community and for the Bathopele principles; and (iv) failure to appreciate the correct historical context of the personalities or institutions whose names the old streets bear. Just as important is the punitive costs order which the review court would be unable to reverse. Even if the relief granted by the Full Court does not have a final effect, it does in the very least dispose of a substantial portion of the issues on review. A single Judge review court would be confronted with a three-Judge conclusion that Afriforum's assertion that public participation was flawed is unassailable and that legality was not observed in respect of a series of legislations. That predetermination of key grounds of review inadvertently but effectively undermines the role and authority of the review court to resolve these issues. It is thus in the interests of justice that the Full Court's order be appealable for this reason also, to allow this Court to clear the decks for the review court.

[47] Apart from the irreparable harm to Council[28] that flows from being restrained from executing the decision taken in terms of its constitutional and statutory powers, there are other bases for Council's irreparable harm. The punitive costs order made against it is not the subject-matter of review. And so it is with the costs ordered by the Court of first instance. These orders are not subject to reconsideration and confirmation or susceptible to alteration by the Court of first instance. They are final in effect. Council's prospects of success are very strong and this is, in terms of our

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[27] 56 of 2003.

[28] See *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC); 2002 (10) BCLR 1075 (CC) (*TAC 1*) at paras 5 and 12, the Court had this to say about the grant of leave to appeal against an interim order:

> "The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a Court when it considers that the ordinary rule would render injustice in a particular case. Were the interim order to be the subject of an appeal, that, in turn, would suspend the order."
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> . . .
>
> "[F]or an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted — a matter which would, by definition, have been considered by the Court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail."

law, an important factor to be taken into account in considering appealability and leave to appeal against interim orders.[29]

[48] It is indeed a general principle of our law that leave to appeal against an interim order would ordinarily be refused unless the applicant is able to demonstrate that irreparable harm would otherwise ensue. But this is only a general principle. And the irreparable harm that Council stands to suffer if leave were not granted is set out not because that principle necessarily applies to this case but on the assumption that it does. It follows that, the order of the Full Court is appealable and that leave should be granted. The additional basis for appealability is admirably dealt with by Jafta J in his strongly reasoned concurring judgment, which we endorse fully.

[49] To determine whether this is perhaps one of those cases where "a proper and strong case" or "the clearest of cases" has been made out for the interim relief,[30] it is necessary to examine how Afriforum met the requirements for the grant of an interim interdict. Those requirements were of course set out in *Setlogelo*[31] and *Webster*[32] as (i) a *prima facie* right that might be open to doubt; (ii) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (iii) the balance of convenience favourable to the grant of the interdict; and (iv) the absence of any other adequate remedy.

Prima facie right

[50] Afriforum relies partly on section 31 of the Constitution as the *prima facie* right sought to be protected with the restraining order pending the finalisation of the review proceedings. Fortunately, the right is only required to be *prima facie*, though open to some doubt. It need not be clear. Otherwise there might have been a problem given what a section 31 right entails. For section 31 basically affirms the enjoyment

[29] See *Informal Traders* above n 13 at para 20.

[30] *OUTA* above n 3 at paras 66 and 71.

[31] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[32] *Webster v Mitchell* 1948 (1) SA 1186 (WLD).

of a cultural, linguistic or religious right of a community and its members provided that right is exercised consistently with all the other provisions of the Bill of Rights.[33] How this right finds application to street names is not readily apparent to me. Happily, as I said, it is acceptable that the right may be open to some doubt. For this reason, I will assume without deciding that Afriforum has established a *prima facie* right.

[51] Of greater moment appears to be the right to insist on Council's facilitation of a proper public participation process before changes are effected, in relation to emotionally charged and potentially divisive developments like street names. In principle and in anticipation of predictable tensions, everything reasonably possible must be done to alleviate strife or dampen all likely tensions. A genuine and properly facilitated consultative process or public participation exercise is one measure that naturally commends itself for adoption whether required by law or not.

[52] At the same time, care must be taken not to stultify or undermine local government's ability to effect the necessary changes by imposing on it too onerous a burden to bear. Flexibility as opposed to cumbersome rigidity ought to be the preferred way to go. As long as public participation is objectively genuine and was deliberately designed to gather as wide a diversity of views as possible for Council to be fully or reasonably well-informed about all the key reasons for objection, form must then never be allowed to prevail over substance. For, these processes should never be a sheer box-ticking exercise. It should never be the quantity but always the substantive quality and representivity of particularly the opposing views that

[33] Section 31 of the Constitution provides that:

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

determine the adequacy or otherwise of the participatory process. It is the wide-ranging quality of opposing views that must be allowed to be properly ventilated and engaged with to avoid unfairness to those opposed to the proposed change.

[53] Because Council imposed upon itself the duty to facilitate presumably a proper public participation process for the removal of old street names and the placement of new ones, we assume without deciding that that process was an essential prelude to the decision to change street names.[34] In principle, it constitutes a sound legal basis to ground a challenge to the validity of Council's decision to remove certain old street names and replace them with new ones, on Council's alleged failure to ensure that there was a proper public participation process. This is especially so because Council itself undertook to consult residents before street names were changed.

[54] All of this seems to meet the interdictory requirement of a *prima facie* right that is nevertheless open to some doubt.

Irreparable harm

[55] Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing.[35] It must not have taken place already. To gain a better understanding of the relevance or appropriateness of Afriforum's best efforts to meet this requirement, it is necessary that the meaning, nature or essence of harm be explored.

[56] Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection. It is the tangible or intangible effect of deprivation or adverse action taken against

[34] We leave open the question whether *Ethekwini* above n 7 was correctly decided.

[35] *OUTA* above n 3 at para 25.

someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection, however much others might doubt its existence, relevance or significance. Ordinarily, the harm sought to be prevented through interim relief must be connected to the grounds in the main application.

[57] Afriforum had to satisfy the High Court of its reasonably entertained belief that harm that is not too complex or mysterious to understand would befall them and others should the interim order not be granted. To this end, the sum-total of their case is that the harm they are exposed to is the gradual loss of place or sense of belonging and association with the direct environment (living space) which is known to be of emotional value to people. Also, that even the temporary removal of the old street names, pending the finalisation of the review proceedings, would cause emotional hurt or suffering to those who cherish them. Old names would in the process fall into disuse and be forgotten. That they say, would disadvantage them on the basis that the horse would have bolted already by the time the review is decided and the review court would thus be reluctant to decide in their favour for that reason alone. Afriforum contends that the refusal to grant the interim order would cause them and like-minded people to suffer irreparable harm, because of the strong emotional connection to the old names or loss of a sense of place and a sense of belonging that would flow from the removal of old names.

[58] The sense of place and sense of belonging contended for by Afriforum is highly insensitive to the sense of belonging of other cultural or racial groups. It is divisive, somewhat selfish and does not seem to have much regard for the centuries-old deprivation of "a sense of place and a sense of belonging" that black people have had to endure. On this logic, victims of the deleterious effect of colonialism and apartheid are entitled to orders directing the authorities to remove names that seem to perpetuate the colonial and apartheid legacy on the basis that they induce irreparable harm. As for the mind-boggling proposition by Afriforum that

harm and toxicity that apparently comes with looking only at the names linked to other racial groups, very little room, if any, seems to be left for the acceptance of black people as fellow human beings deserving of human dignity and equality, talk less of honouring them for their pursuit of justice and freedom in South Africa. It is very difficult to appreciate this kind of harm or apprehended environmental endangerment as deserving of legal protection. Whether Afriforum's preferred enjoyment of the cultural rights leaves room for other communities to enjoy their own and is therefore consistent with other provisions of the Bill of Rights, is a question best left open for another day. That said, even if what Afriforum says constitutes harm does in reality amount to harm, would that harm be irreparable if the interim order were not granted? And when is harm irreparable?

[59] Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot make an order that would effectively undo the harm that would ensue should the interim order not be granted.

[60] That is not the case here. Afriforum and its constituency do not have the right to have the old street names they treasure displayed in perpetuity. On the contrary, Council has the constitutional and statutory power to change them. The only right Afriforum, like all other residents, has is to participate meaningfully in a properly facilitated process leading up to the change of street names. And old street names may still be reinstated if the outcome of the review proceedings be that the public participation process was for example not only obligatory but also flawed in that it was not properly facilitated or was a sham. Additionally, if the cultural right sought to be protected through the interim order would indeed be imperilled by the removal of the old street names pending the recommencement of the name-changing process, that temporary harm could be repaired by the reinstatement of those names if the review succeeds. So, there is adequate alternative remedy available to Afriforum even if it

were not to be granted the interim interdict. It really is a tall order to grasp why the replacement of the old street names with the new would constitute irreparable harm. Part of the problem here, is that the kind of irreparable harm contended for seems to be incapable of ever being cured by a genuine or properly facilitated public participation process. The only appropriate remedy for it is the near-absolute retention of names that give recognition only to the colonial and apartheid legacy or the heritage of the Afrikaner people to the exclusion of all others.

[61] Another difficulty that the order granted presents is that it relates not only to imminent harm but also to past harm. The second leg of the order enjoins Council to reinstate street names that had already been removed. The legal basis for this mandatory order was not stated but it certainly runs against the requirement that the harm be reasonably apprehended to occur in the future. In this case it had taken place already and no case was made out for its grant. That segment of the order should not have been granted.

Balance of convenience

[62] Afriforum is required to establish that the balance of convenience favours the grant of the interim interdict. This requirement recognises that in an application for a temporary restraining order there will invariably be at least two competing interests. And those interests are inextricably linked to the harm a respondent is likely to suffer in the event of the order being granted and the harm likely to be suffered by an applicant if the relief sought is not granted.

[63] We now know that Afriforum and their discrete group fear that the refusal to grant an interim order would cause them emotional harm. This is because they consider the old names to be an integral part of their much-treasured history and heritage. The removal of the old street names would deny them a sense of belonging and weaken their case on review. It must be said though that this must be counter-balanced against another reality of great historical and constitutional consequence. And that is that Pretoria is the capital city of South Africa. Pretoria

does not belong only to the Afrikaners or white South Africans. It equally belongs to all of our people white and black, united in their diversity. All racial groups in this country deserve to have their culture, heritage, history, heroes and heroines respected and honoured by all.

[64] The emotional harm that Afriforum relies on is grounded on a one-sided notion of a sense of belonging. The significance of a change of 25 old street names, out of the many that lauds their heritage, must be taken into account. This is necessary because it also gives some sense of belonging to the previously disadvantaged South Africans who are the overwhelming majority of the citizens of Pretoria and South Africa. Regard must be had to the fact that places like Pretoria were a part of what was known as "white South Africa" during the apartheid era. And it is that legacy that is now sought to be tenaciously held onto with the aid of an interdict. Whatever harm Afriforum would suffer as a result of not granting the interim order, would be significantly neutralised by an equally important sense of belonging of the previously disregarded.

[65] Afriforum's reliance on the Preamble to our Constitution is for reasons outlined in the "essential context" quite important. South Africa must truly give a sense of belonging to all who live in it united in their diversity. Nothing that has the potential to open up wounds and divisions of the past should be glossed over, tolerated or even inadvertently encouraged. Equally important is the need to address in a decisive way, the injustices of the past and to give honour to all South Africans who deserve it irrespective of their colour. Black people like Nelson Mandela, sought to be honoured through the change of street names, are among the many victims of the injustices of the past. The Preamble to our Constitution cannot therefore be legitimately relied on to perpetuate the exclusion of others from respect and honour. And it is thus ironic that Afriforum seeks reliance on this Preamble in the furtherance of the interests of essentially one racial group to the exclusion of all others, even freedom fighters. And that happens to be the irreparable harm on the basis of which the interim interdict was granted and is sought to be preserved.

[66] Public participation in any process is but one of the important aspects of the name-changing process that cannot be legitimately ignored. And it is a process that falls squarely on the shoulders of the relevant organ of State to fashion out, depending on the objective sought to be achieved through it. The facilitation or genuineness of any public participation process is of course subject to judicial scrutiny. It however ought to be only in very rare instances that a public participation process that actually took place but is believed to be flawed for want of adequate facilitation or participation, would serve as the basis for an interim interdict. The propriety of that process must, as is the case with law-making public participation processes that are expressly provided for in the Constitution, be tested through a review process or similar proceedings based on the principle of legality. The challenge to the validity of a parliamentary public participation process is hardly ever preceded by some restraining order while the review is pending. The adequacy of the facilitation of a public participation process is subjected to judicial scrutiny only after the legislative process has run its full course. The same approach of confining the challenges to review proceedings should have been adopted here, regard being had to separation of powers.

[67] This is so because Afriforum seeks to stall the process of implementing a policy decision taken by Council that flows from the exercise of its constitutional and statutory executive powers. Public participation should not be elevated to co-governance or equal sharing of executive and budgetary responsibilities. Council bears the constitutional[36] and statutory[37] power to run the affairs of the City. For this reason, it cannot serve as the basis for a court to intrude into Council's sole operational space that a segment of those it serves, is displeased with the public participation process Council had otherwise facilitated. The review process is the best avenue to vindicate whatever rights of Afriforum are implicated.

[36] See above n 4.

[37] See above n 5.

[68] Sight should never be lost of the fact that courts are not meant or empowered to shoulder all the governance responsibilities of the South African State. They are co-equal partners with two other arms of State in the discharge of that constitutional mandate. Orders that have the effect of altogether derailing policy-laden and polycentric decisions of the other arms of the State should not be easily made.[38] Comity among branches of Government requires extra vigilance, but obviously not undue self-censorship, against constitutionally-forbidden encroachments into the operational enclosure of the other arms.[39] This is such a case.

[69] Council took a decision that was apparently inspired by the Preamble and foundational values that undergird our constitutional democracy. They evidently sought to give realistic expression to our deliberately self-imposed philosophy, that entails recognition of all deserving compatriots, national unity, reconciliation and healing the divisions of the past. Having, in its view, solicited a diversity of views including those of Afriforum and other concerned residents Council resolved, as it was in law empowered, to replace the identified old street names. It determined and allocated the budget, enlisted the services of a service provider and embarked on the process of implementing its policy decision. The High Court nevertheless granted an order restraining Council from implementing its decision also directing it to reinstate old names at the cost of R2.6 million.

[70] An interim interdict should in these circumstances be granted in the rarest of cases. Intrusion into the sphere of operation reserved only for the other arms of State is an exercise not to be unreflectingly or over-zealously carried out by a court of law. It calls for deeper reflection and caution. The State operates better when due deference is shown by one branch to another, obviously without approaching its obligations so timidly as to incorrectly suggest that there is an undue measure of self-restraint. That said, an attitude that is dismissive of the constitutional fire-wall

[38] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*) at para 95.

[39] See *OUTA* above n 3 at para 71.

around the powers of other arms of State is not conducive to the proper observance of separation of powers and exhibits disregard for comity among the branches of Government.

[71] There is another issue of importance that requires attention. It is the notion that the mere launch of the application for a restraining order or the review proceedings had the legal effect of automatically restraining Council from erecting street signs or removing old street names.

[72] Afriforum contends that Council was not entitled to remove old street names in line with its policy decision, pending the outcome of its application for an interim order. The authority for that proposition is said to be the Supreme Court of Appeal decision of *Gauteng Gambling Board*[40] which placed some reliance on *Li Kui Yu.*[41] *Li Kui Yu* sought to prevent "an offence of a serious kind, namely that of interfering with the administration of justice by taking an action which is bound to prevent the Court granting a remedy."[42] As correctly pointed out by *Gauteng Gambling Board*, *Li Kui Yu* was subsequently qualified on the basis that "for an act to constitute contempt, it was necessary that there be an intention to defeat the course of justice."[43] The effect of this authority is that Afriforum was required to satisfy the Court that Council knew that the interim order was certainly going to be granted and its expeditious execution of the name-changing project was intended to frustrate the enforcement of the anticipated court order and thereby defeat the course of justice. But, this it failed to do.

[73] In any event, it is not clear what the Supreme Court of Appeal eventually made of these decisions. But, it certainly did not regard them as authority for the proposition that an apparently lawful decision may not be implemented purely

[40] *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* [2013] ZASCA 67; 2013 (5) SA 24 (SCA) (*Gauteng Gambling Board*) at para 51.

[41] *Li Kui Yu v Superintendent of Labourers* 1906 TS 181 at 194.

[42] Id.

[43] *Roberts v Chairman, Local Road Transportation Board* 1980 (2) SA 472 (C) at 488.

because an application has been launched either to interdict implementation or to have the underlying decision set aside. Besides, those decisions could not even remotely have provided the legal basis for that conclusion.

[74] In *Gauteng Gambling Board*, the MEC not only harassed the Board to act in a financially irresponsible and unlawful manner, to inappropriately accommodate a private entity in its offices, to vacate its own expensively and recently-acquired official office space and move into rented premises, but she also threatened Board Members and purported to dismiss them for patently unlawful reasons. How that could ever be likened to lawful steps geared at the enforcement of a challengeable but lawfully taken Council policy decision is difficult to understand. It needs to be stated categorically, that no aspect of our law requires of any entity or person to desist from implementing an apparently lawful decision simply because an application, that might even be dismissed, has been launched to hopefully stall that implementation. Any decision to that effect lacks a sound jurisprudential basis and is not part of our law. It is a restraining order itself, as opposed to the sheer hope or fear of one being granted, that can in law restrain. To suggest otherwise, reduces the actual grant of an interdict to a superfluity.

[75] For these reasons, there was no obligation on Council to desist from removing old street names upon becoming aware that an urgent application for a restraining order had been filed. Only sheer choice or discretion, but certainly not any legal obligation or barrier, would lead to action being desisted from in anticipation of a successful challenge or application for an interdict.

[76] In conclusion, Afriforum failed to meet the requirement of irreparable harm. And the balance of convenience weighs heavily in favour of the dismissal of the application for an interim order. Afriforum's case is extremely weak. The interdict was granted and the appeal against it dismissed by the Full Court with little regard for Afriforum's duty to meet the requirements of an interim interdict and considerations of separation of powers. Both Prinsloo J and Jordaan J were unable to explain

satisfactorily how the requirements of irreparable harm and balance of convenience were met. The interim interdict should not have been granted in the first place. And the Supreme Court of Appeal should have granted leave to appeal. Instead it dismissed the application with costs.

[77] Leave to appeal will thus be granted and the appeal upheld.

Order

[78] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders by Prinsloo J and Jordaan J of the Gauteng Division of the High Court, Pretoria are set aside and the application for an interim interdict is dismissed.
4. The order of the Supreme Court of Appeal awarding costs against the Tshwane Metropolitan Municipality is set aside.
5. Each party is to pay its own costs.

FRONEMAN J and CAMERON J:

[79] The wounds of colonialism, racism and apartheid run deep. Understandably so, as the Chief Justice's judgment (first judgment) so passionately shows. And insensitivity to the continuing wounds by many of us who were not subject to these indignities can only exacerbate the fraughtness. So it is with humility that we dissent, but dissent we must.

[80] The first reason for doing so is this. Correction of the injustices of the past is not best served by attenuating well-established and sensible rules and principles for hearing appeals against the grant of temporary interdicts. Granting leave to appeal here extends existing doctrine considerably. Both on the facts and the law we do not consider this justified.

[81] The second reason is that the implication that may be drawn from the first judgment is that any reliance by white South Africans, particularly white Afrikaner people, on a cultural tradition founded in history, finds no recognition in the Constitution, because that history is inevitably rooted in oppression. The oppressive history is there. But the constitutional discountenancing of a cultural history many continue to treasure has momentous implications for a substantial portion of our population. It invites deeper analysis.

[82] It is best to start with the issue of leave to appeal against temporary interdicts.

Leave to appeal

[83] It is by now settled law that the operative standard for determining whether leave to appeal should be granted is "the interests of justice".[44] That the order is temporary is not in itself determinative of whether the interests of justice call for leave to appeal to be granted.[45] A number of cases in this Court have enumerated a collection of non-exclusive factors that need to be considered when determining the interests of justice.[46]

[44] *OUTA* above n 3 at para 25.

[45] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 22.

[46] Id at para 24. See also *Informal Traders* above n 13 at para 20.

[84] One is "whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs".[47] The counterpart of this consideration is whether "the fact that a final determination of the main dispute between the parties, which decisively contributes to its final resolution, might be more expeditious and cost-effective".[48]

[85] In *TAC I*, it was pointed out that the effect of granting leave would "defeat the very purpose" of the interim order:

> "The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a court when it considers that the ordinary rule would render injustice in a particular case. Were the interim order to be the subject of an appeal, that, in turn, would suspend the order."[49]

The judgment continued:

> "[F]or an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted – a matter which would, by definition, have been considered by the court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail."[50]

Although made in the context of interim execution orders, the same principles apply to other temporary orders.[51]

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[47] *Informal Traders* above n 13 at para 20(g).

[48] *Albutt* above n 45 at para 23.

[49] *TAC I* above n 28 at para 5.

[50] Id at para 12.

[51] *Informal Traders* above n 13 at para 21. See also *Machele and Others v Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) (*Machele*) at paras 22-5; and *Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd* [1996] ZASCA 38; 1996 (3) SA 686 (SCA) (*Cronshaw*) at 691C-F.

[86] With these statements in mind it is necessary to return to some of the more prosaic facts, not dealt with extensively in the first judgment. The *status quo ante* (pre-existing situation) when Afriforum launched the review application on 12 December 2012 was that the contested street signs displayed both the proposed new names (at the top of the sign) and the old names (crossed out below them). After Tshwane's Mayor announced the go-ahead for the permanent removal of the old, crossed-out names on 5 April 2013, Afriforum launched its second application for a temporary interdict to prohibit their removal.

[87] After the application was launched but before it was heard, the applicant (Municipality) removed the old, crossed-out signs virtually overnight. This necessitated an amendment to the relief sought, namely to *restore* the pre-existing boards, so as to contain both the old and new names, as before.

[88] On 19 April 2013 the High Court granted a temporary interdict. That contained two parts. A prohibitory part which restrained the Municipality from further removing old, crossed-out names from street and road signs. And a mandatory part which ordered the Municipality to restore those crossed-out street and road signs that had already been removed. The Supreme Court of Appeal granted leave to appeal against this order to the Full Court. The Full Court dismissed the appeal with costs on 26 May 2015. A further application to the Supreme Court of Appeal, for special leave, was dismissed on 3 August 2015. After that the Municipality approached this Court for leave to appeal. The review application has still not been heard, close to four years after it was launched.

[89] The temporary interdict the High Court granted has thus not been put into operation. By utilising an appeal process against what was supposed to be a temporary order pending finalisation of the real dispute between the parties, in the review application, the Municipality has managed to implicate judicial resources in the Supreme Court of Appeal (twice), the High Court (twice, before a total of four judges) and now seeks to do so again in this Court. And if it succeeds here, the relief

it may obtain will still not be final. So, after more than three years of litigation about the temporary order, the resolution of the real, substantive issue between the parties in the main review application still awaits its turn through the judicial process.

[90] We can hardly think of an example that more fittingly illustrates the unnecessary prolongation of litigation and the wasteful expense of judicial resources and costs. All would have been better served by a speedy final determination of the main dispute between the parties. That would have contributed decisively to a final resolution of the parties' real dispute. And it would have been infinitely more expeditious and cost-effective.

[91] This sorry history of stop-start litigation is sufficient reason, on its own, not to grant leave. But there are other reasons too.

[92] As we have seen, this Court's jurisprudence requires the Municipality to show that irreparable harm would result if this interim appeal is not granted.[52] The application for leave is against the order of the Full Court, but that makes little difference, because the Full Court confirmed the High Court's temporary order. The application for leave remains one for leave against a temporary order, not a final one. The fact that leave to appeal was granted and an appeal heard by the Full Court is a further factor counting against granting leave, rather than prolonging the process even further.

[93] The irreparable harm the Municipality alleges it will sustain is the R2.6 million it would allegedly cost for it to restore the old, crossed-out signs. This, it says, is part of the temporary interdict that is final in effect. There are a number of reasons why this argument cannot avail the Municipality.

[94] First, the expenditure to restore the crossed-out signs is not "final in effect" in the manner hitherto required by our courts in relation to the appealability of the

[52] *TAC I* above n 28 and *Machele* above n 51.

granting of temporary orders. For well over sixty years, since the decision in *Pretoria Garrison Institutes*,[53] the test for appealability of an interim order has been this: the order is purely interlocutory and not appealable—

> "unless it is such to 'dispose of any issue or any portion of the issue *in the main action or suit*' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes *some of the relief which would or might be given at the hearing*'. The earlier judgments were interpreted in that case and a clear distinction was given that regard should be had, not to whether one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but *to whether the order bears directly upon and in that way affects the decision in the main suit*."[54]

[95] The R2.6 million expenditure, which has its origin in the Municipality's own removal of the old, crossed-out signs, virtually overnight, after the proceedings were launched, will not feature as an issue in the main review application at all. Under the authorities its effect therefore does not qualify as "final in effect".

[96] There is another reason why that order is not final in effect. It was always open to the Municipality to approach the High Court, after the initial granting of the interim order, to show that the order would work great hardship on it or that circumstances have changed materially.[55] The High Court would have been entitled to reconsider its earlier order, and rescind or amend it. One of the options that might have been open to it was to make the order conditional on Afriforum indemnifying the Municipality for the damages it might suffer if the Municipality prevails in the main proceedings.[56] That is what the Municipality should have done, rather than enmeshing the successful applicant, and the courts, in a series of exhausting appeals.

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[53] *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A).

[54] Id at 870. See also *Cronshaw* above n 51 at 690D-G; and *African Wanderers F.C. v Wanderers F.C.* 1977 (2) SA 38 (AD) at 48B-H.

[55] *Atkin v Botes* [2011] ZASCA 125; 2011 (6) SA 231 (SCA) at para 12; and *Informal Traders* above n 13 at para 17.

[56] C*ronshaw* above n 51 at 690I-691A.

[97] But, as we saw, finality and appealability are no longer dispositive. The broader interests of justice are. It is common cause that the Municipality took down the crossed-out old signs and erected the new signs, without the crossed-out old ones, in a hurry after it became aware that the second application for a temporary interdict had been launched. Nowhere in its extensive affidavits has it explained why it did this. The inference that it was done in order to thwart the order is natural and probable. If done for that purpose, the Municipality's conduct would have been in contempt of court.[57] But that is not the present point. The point is that, in doing what it did, the Municipality knowingly took a risk. That was the risk that, in accordance with existing law, it might have to bear the consequences of its hasty intervention. In other words, the Municipality itself created the irreparable harm it now complains of.

[98] The first judgment also appears to regard the reasoning of the Full Court in the appeal, to the effect that it considered Afriforum's contentions on the lack of public participation as unassailable, as showing the finality and hence appealability of that order.[58] We disagree. It is not the reasoning, but the order itself that determines appealability.[59] And the order at issue confirms the High Court's *temporary* order. That order remains temporary – and the review court is not bound by the findings or reasoning of the Full Court on the merits of the review application.

[99] We have now had the opportunity of reading the separate concurrence of Jafta J (third judgment). He seeks to counter our perspective that to grant leave here attenuates well-established, sensible rules and principles for hearing appeals against the grant of temporary interdicts and that it considerably extends existing doctrine. The third judgment holds that because leave was granted to the Full Court, which heard the appeal, appealability issues in relation to the grant of temporary orders disappear. We differ. The first appeal simply makes matters worse. The Full Court order itself is a temporary order. In accordance with this Court's jurisprudence, the

[57] *SA Reserve Bank v Khumalo* [2010] ZASCA 53; 2010 (5) SA 449 (SCA) (*Khumalo*).

[58] First judgment at [46].

[59] *Khumalo* above n 57 at para 4.

burden on the Municipality – to show irreparable harm before interests of justice considerations could permit an appeal against a temporary order – is more difficult, not easier. The Municipality in the appeal before the Full Court had (an unusual) second bite at the cherry. It now wants a third.

[100] At the end of all this, nineteen judges – four in the High Court, four in the Supreme Court of Appeal (in the applications for leave), and eleven in this Court – would have been involved in deciding a preliminary, temporary order. We hope this does not become the norm.

[101] That brings one to the contention that the temporary order infringed upon the Municipality's executive or legislative powers. We have difficulty in discerning how.

[102] The interdict does not order the new names to be removed. It seeks merely to preserve the situation existing at the time the main review application was brought in December 2012. That was that the street or road signs with both the new names and the crossed-out old names below them should remain. So, until the review application is heard and finally determined, there is no infringement of any constitutional or legislative competence of the Municipality. It is entirely free to determine the names of streets and roads. The new names are there for all to see, with the crossed-out ones indicating what the old names were.

[103] The High Court merely restored the *status quo ante* – the mandatory interdict did not meddle in the domain of the Executive. In fact, it showed deference to the position as it existed at the point the review was brought. The order does not trench on the Municipality's constitutional and statutory powers. It merely plays the role a temporary interdict should, which is to maintain the status quo.

[104] There is thus no "serious, immediate, ongoing and irreparable [harm]"[60] to the Municipality's constitutional and legislative powers, nor is the impact of the order "immediate, ongoing and substantial"[61] in relation to those powers.

[105] But apart from this purely factual aspect, the separation of powers argument suffers from a further fracture. As far as we are aware, there has been no case in this Court where leave to appeal has been granted against the granting of a temporary order where the exercise of executive or legislative power requires public participation and the proper extent of public participation is at the heart of the parties' dispute.

[106] *OUTA*,[62] upon which the first judgment relies, was very far from the case before us now. It involved a decision by the South African National Roads Agency that had to be made within the framework of government policy decided by the National Cabinet.[63] It was not and could not be contended that the determination of policy by the Cabinet required public participation of the sort to which the Municipality committed itself here. Though notice requirements in promulgating the toll road system were at issue in the main review, the issue before the High Court was the balance of convenience between motorists, who would pay tolls that may eventually be found unlawful,[64] and government, that needed to recoup the costs of the roads sought to be tolled:

> "The harm and inconvenience to motorists, which the High Court relies on, result from a national executive decision about the ordering of public resources, over which the executive government disposes and *for which it, and it alone*, has the public responsibility. Thus, the duty of determining how public resources are to be drawn

[60] *OUTA* above n 3 at para 25.

[61] Id at para 27.

[62] Id.

[63] Id at para 2.

[64] Though they were not – the Supreme Court of Appeal dismissed the review application against the tolls, and there was no appeal to this Court: *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA).

> upon and re-ordered lies *in the heartland of executive-government function and domain*."[65]

[107] Nor were *ITAC*,[66] *UDM*,[67] or *Glenister I*[68] anything like this case. The powers at issue in each all lay within the exclusive competencies of either the National Executive or Legislature.[69] Of course, this Court has recognised that public participation may be a requirement of our participative democracy, starting with *Doctors for Life.*[70] But none of those cases involved appeals against temporary orders where public participation was a prized value.[71]

[108] The Municipality raises no challenge to its own requirement of public participation in the renaming process for streets or roads. Nowhere in its affidavits does it backtrack. It stands by the process. Rightly so. Public participation in a municipal council's naming of streets has been recognised by the Supreme Court of Appeal in *Ethekwini*[72] as a requirement that may be challenged on the principle of legality.[73]

[109] Public participation in street-renaming as a requirement of the principle of legality is thus unchallenged. That being so, separation of powers vanishes as a

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[65] *OUTA* above n 3 at para 67.

[66] *ITAC* above n 38.

[67] *President of the Republic of South Africa and Others v United Democratic Movement and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) (*UDM*).

[68] *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (*Glenister I*).

[69] Id at para 2; *ITAC* above n 38 at paras 4-7 and *UDM* above n 67 at para 5.

[70] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at paras 89, 101 and 111.

[71] For cases dealing with the importance and value of public participation, see *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* [2011] ZACC 27; 2011 (11) BCLR 1158 (CC); *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC); and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele*).

[72] *Ethekwini* above n 7 at paras 23-4.

[73] Id at paras 18-21.

premise in granting leave. That must follow, since otherwise it predetermines the very question that is the subject of the review application. And *OUTA* tells us that should not be done.[74]

[110] The temporary order does not infringe upon the Municipality's budgetary powers at all. The Municipality's budget may be affected by the ultimate decision in the review application – but that consequence cannot restrict a court's determination of a disputed legal issue. As stated in *Blue Moonlight*:

> "This court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that *may well have resulted from a mistaken understanding of constitutional or statutory obligations*."[75]

[111] Hence the temporary order nowise infringes on the Municipality's legislative or executive competences. But even if it did, granting leave against a temporary order creates further difficulties.

[112] This case involves an organ of State at local government level. The decision on whether it is in the interests of justice for this Court to grant leave when a municipality's decision to rename streets is temporarily interdicted cannot, it seems to us, depend on what the names were before the proposed change and what they may be after.

[113] Nor can it depend on how big the municipality is. So it seems to us that the preliminary question whether it is in the interests of justice to grant leave must be the same whether the changes are of the kind here, namely highly contentious, or much less contentious.

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[74] *OUTA* above n 3 at paras 48 and 52.

[75] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*) at para 74.

[114] Postulate this situation. All the facts and court processes are similar to those here, with only this exception. The case involves a small municipality. And it has decided to rename its streets, previously known as First to Twenty-sixth Streets, A to Z Streets. The proportion of the budget it uses to do this is the same as in the present case. A group of residents seek a temporary order to prevent this, pending a review application. The municipality reacts in the same way as here. Assume further that the court that initially granted the temporary interdict did so wrongly.

[115] Would we grant leave? Surely not. But we have to treat like cases alike. So on our understanding of the first judgment we would have to.

[116] Perhaps then the thrust of the first judgment is that intervention on appeal will be countenanced only where the objection to the renaming impedes the transformation to which the Constitution commands our society.

[117] That brings us to the second reason for this dissent. This is the implication that any reliance by white South Africans, particularly white Afrikaner people, on a cultural tradition founded in history finds no recognition in the Constitution, because that history is rooted in oppression.

Is culture inevitably tainted by historical injustice?

[118] The broad premise of the first judgment is that the time has come to stop objections to name changes based on a cultural heritage that is rooted in a history of colonialism, racism and apartheid.

[119] Afriforum may protest at the first judgment's characterisation of their historically rooted sense of place and belonging as "highly insensitive to the sense of belonging of other racial groups". It will jib at the suggestion that it "is divisive, somewhat selfish and does not seem to have much regard for the centuries-old deprivation of 'a sense of place and a sense of belonging' that black people have had to endure".

[120] But for that Afriforum has largely itself to blame. In its founding affidavit Afriforum repeatedly refers to the Municipality's attempts at correcting "*so-called* 'historical injustices of the past'". It supplies evidence that the old street names were of—

> "historical figures of Pretoria, artisans, business people, surveyors who played a central role in the layout as it currently exists, prominent figures in history (most have made their contributions long before the *so-called* apartheid), city fathers and legal practitioners (including attorneys, advocates, magistrates and even a judge). It is clear that these people played a direct and positive role in the city as it exists today. It would therefore be grossly inaccurate to suggest that these persons have a direct connection with the *so-called* historical injustices."

[121] So-called! This embodies the kind of insensitivity that poisons our society. There *were* historical injustices. Apartheid was all too real. And it was profoundly pernicious. These facts are not "so-called" figments of black people's imagination. Pretoria was created as the capital of an Afrikaner Republic that expressly subordinated black people.[76] It became the capital city of a South Africa that grossly magnified that discrimination by systematic segregation and exclusion. Until just decades ago, black people could not own and live in property along Pretoria's beautiful jacaranda-lined streets. The historical figures after which those streets were named benefited directly from the fact that they, unlike black people, could own and live on city properties.

[122] Those benefits have not dissipated. They still accrue primarily to white residents. Their historical advantage in acquiring property in the past dwells on, in deep systemic privilege and injustice. To deny these realities or avert one's eyes to

[76] Article 9 of the Constitution of the South African [Transvaal] Republic provided:

> "The people are not prepared to allow any equality of the non-white with the white inhabitants, either in Church or State."

them lays one open to a charge that what one seeks to protect is not culture, but a heritage rooted in racism. The Constitution protects culture, yes, but not racism.[77]

[123] So we disagree profoundly with Afriforum's view of history. And we think it would be better for white Afrikaans people, and indeed everyone else, to find their sense of place and belonging, not only in the past, but also in a shared future, one the Constitution nurtures and guards for all of us, together, united in our diversity. But does that entitle us to say that Afriforum members' sense of belonging, place and loss is not real and that it should not *also* be recognised under the Constitution? The answer is No.

[124] And that is where we must part from the first judgment. On general principle, we think the Constitution creates scope for recognising an interest or right based on a sense of belonging to the place where one lives, rooted in its particular history, and to be involved in decisions affecting that sense of place and belonging. Whether that strictly falls within the cultural, environmental or citizenship rights in the Bill of

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[77] In *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* [1996] ZACC 4; 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) at paras 39 and 40, Kriegler J remarked in relation to the use of the Afrikaans language in education:

> "Dit is en bly egter 'n skans teen verswelging van enige minderheid se gemeenskaplike kultuur, taal of godsdiens. Solank 'n minderheid daadwerklik wagstaan oor sy gemeenskaplike erfgoed, solank is dit sy onvervreembare reg om eie onderwysinstellings ter behoud van kultuur, taal of godsdiens tot stand te bring.
>
> Daar is egter twee belangrike voorbehoude. Ten eerste is die slotwoorde van die betrokke subartikel ondubbelsinnig; daar mag geen diskriminasie op grond van ras wees nie. Die Grondwet bied dus geen beskerming vir rassevooroordeel op die onderwysterrein nie. 'n Gemeenskaplike kultuur, taal of godsdiens met rassisme as 'n wesenselement het geen konstitusionele aanspraak op die vestiging van afsonderlike onderwysinstellings nie. Die Grondwet beskerm verskeidenheid, nie rassediskriminasie nie."

Translation:

> "However, it is and remains a bulwark against the swamping of any minority's common culture, language or religion. For as long as a minority actually guards its common heritage, for so long will it be its inalienable right to establish educational institutions for the preservation of its culture, language or religion. There are, however, two important qualifications. Firstly, the concluding words of the subsection in question are unequivocal; there must be no discrimination on the ground of race. The Constitution gives no protection therefore against racial prejudice in the field of education. A common culture, language or religion having racism as an essential element has no constitutional claim to the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination."

Rights, or a combination of them, still needs to be explored.[78] At this, still-interim, stage, the existence of the right in this broad form is enough.

[125] But once it is accepted that a right or interest of that kind may exist, it cannot be negated by either saying that the basis of the sense of belonging does not advance society as a whole, or that its enjoyment is so ephemeral that its loss can never be irreparable. The first judgment does both.

[126] In asserting their right to a sense of belonging and place based on historical affinity to Pretoria, Afriforum's members have done no wrong. They have committed no crime. The Preamble to the Constitution states that South Africa belongs to all who live in it, united indeed, but "in our diversity". Indeed, recognising and preserving cultural rights is important in our constitutional society. This helps ensure that minorities, including cultural, linguistic or ethnic minorities, feel included and protected. This is not only to safeguard their interests. It is to preserve cultural diversity that is of value to the country's identity. Cultural rights, whether of the Islamic community, the VhaVenda, or seTswana speakers, are integral to a sense of identity, self-worth and dignity.

[127] The third judgment takes us to task for what we have said in relation to cultural rights.[79] These statements were "not necessary", because our judgment "proceeds to make a number of conclusions on associational cultural rights which go beyond the question whether the Full Court's order was appealable".[80] As is apparent from what we have stated, this is not accurate.

[78] For a general discussion see Firoz and Cachalia "Right to Culture" in Cheadle, Davis and Haysom (eds) *South African Constitutional Law – The Bill of Rights* (Butterworths, Durban 2002) at 25.3; Chaskalson et al *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2005) chapter 58 and Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) chapter 28.

[79] See [172] of the third judgment, citing [121] to [124] .

[80] Id.

[128] We make no definite conclusions on associational rights under the Constitution. We state merely that, on general principle, the Constitution creates scope for recognising an interest or right based on a sense of belonging to the place where one lives, rooted in its particular history. From this may flow a right to be involved in decisions affecting that sense of place and belonging. But whether that falls within the cultural, environmental or citizenship rights in the Bill of Rights, or a combination of them, remains to be explored.[81] That is precisely why these proceedings are inapposite and premature.

[129] It is a grave insinuation that we seek to justify the protection of cultural rights under the guise of racism.[82] We explicitly state that "[t]he Constitution protects culture, yes, but not racism".[83] We find it regrettable that the third judgment then proceeds to state that "there can be no justification for recognition of cultural traditions or interests 'based on a sense of belonging to the place where one lives' if those interests are rooted in the shameful racist past," as if that was what we sought to justify. We leave history to assess the warrant for that charge.

[130] What does concern us is the broad statement in the third judgment that embraces the implication of the first judgment, that any reliance by white South Africans, particularly white Afrikaner people, on any historically-rooted cultural tradition finds no recognition in the Constitution, because that history is inevitably rooted in oppression.[84]

[131] What does that mean in practical terms? Does it entail that, as a general proposition, white Afrikaner people and white South Africans have no cultural rights that pre-date 1994, unless they can be shown not to be rooted in oppression? How must that be done? Must all organisations with white South Africans or Afrikaners as

[81] See above n 78.

[82] See [169] of the third judgment.

[83] See [122].

[84] See [164] of the third judgment.

members now have to demonstrate that they have no historical roots in our oppressive past? Who decides that, and on what standard?

[132] This will be of concern not only to white South Africans, or to Afrikaners. It may also be of concern to those who take pride in the achievements of King Shaka Zulu, despite the controversy about his reign,[85] and those who nurture the memory of Mahatma Gandhi's struggles in South Africa, despite some repugnant statements about black Africans.[86] Our country has a rich and complex history. It has meaning for each of us, in diverse ways, which the Constitution accommodates and respects. The complexities of history cannot be wiped away, and the Constitution does not ask that we do so.

[133] What is more, no case was made that Afriforum was a racist organisation, or that its members are all racists. They were never called to defend that accusation on the papers, nor in oral argument. The first and third judgments appear to assume that they are. Does this entail that, from now on, Afriforum and its members are branded as racist? If they are, they have not been given an opportunity to contest that allegation.

[134] There are many cultural, religious or associational organisations that have roots in our divided and oppressive past. Are they all now constitutional outcasts, merely

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[85] Thompson *A History of South Africa* 4 ed (Yale University Press, New Haven & London 2014) at 87:

> "In transforming the farming society of south-eastern Africa, the Mfecane wrought great suffering. Thousands died violent deaths. Thousands more were uprooted from their homes. Village communities and chiefdoms were eliminated. A century later, Solomon Tshekiso Plaatje, a Motswana, started his novel *Mhudi* with tragic events in the Mfecane. Yet, in Thomas Mokopu Mofole's well known novel *Chaka*, written in Sesotho and translated into English, German, French, and Italian, and in an epic poem by Masizi Kunene, the name of Shaka has passed into African literature and the consciousness of modern Africans as a symbol of African heroism and power."

[86] The sometimes ghastly racist things Mahatma Gandhi said about black South Africans are collated from his collected works at: http://atlantablackstar.com/2015/03/31/not-all-peaceful-13-racist-quotes-gandhi-said-about-black-people/ accessed on 1 July 2016.

Despite this, under the democratic government a square in Johannesburg was formally and ceremoniously named after Gandhi.

because of a history tainted by bloodshed or racism? If that is what the Constitution demands, we would wish to see a longer, gentler and more accommodating debate than happened here.

[135] The first judgment asserts that this diversity—

> "ought to highlight the need for unity rather than reinforce the inclination to stand aloof and be separatist".[87]

That kind of unity, it says, can be achieved partly—

> "by removing from our cities, towns, 'dorpies', streets, parks, game reserves and institutions, names that exalt elements of our past that cause grief to other racial groups or reopen their supposedly healing wounds. Also, by removing even some innocuous names that give recognition only to the history, language, culture or people of one race, so as to make way for the heritage and deserving heroes and heroines of the previously excluded."[88]

And—

> "[a]ll peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision must embrace the African philosophy of 'ubuntu'. 'Motho ke motho ka batho ba bangwe' or 'umuntu ngumumtu ngabantu' (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must enjoy prominence in our approach and attitudes to all matters of importance in this country, including name-changing. White South Africans must enjoy a sense of belonging. But unlike before, that cannot and should never again be allowed to override all other people's interests."[89]

[87] See [7] of the first judgment.

[88] Id at [8].

[89] Id at [11].

[136] With much of this we agree. But from a perspective of constitutional rights and values, these assertions are highly problematic. The Constitution allows the Executive and Legislature at national, provincial and local levels to formulate policies, legislate them into law, and execute and administer them when so done. They may choose to do so by changing the names of cities, towns and streets to reflect our diversity. Or they may decide not to do so. The Constitution allows them to make their own choice; it does not prescribe what choice to make. And the Constitution certainly does not allow the Judiciary to prescribe those choices.

[137] Again, we agree that it would be beneficial if all South Africans approached matters with appreciation and respect for others. But the Constitution does not impose that as an obligation on citizens, either by enjoining the adoption of the ubuntu world-view, or otherwise. And, again, the Constitution does not allow the Judiciary to impose that obligation generally, least in the naming of streets, which falls within local authorities' constitutional competence.

[138] There are other portions of the first judgment that suggest that the national project of attaining inclusivity, unity in diversity and reconciliation makes suspicious or doubtful the kind of sense of space and belonging that Afriforum claims. We have already pointed out that the Constitution generally does not mandate the imposition of a particular conception of this national project by the courts, and particularly not in relation to a local government competency to rename streets. But, on its own terms, this conception also carries within it the destruction of its objective of inclusivity.

[139] Consider this. What is the effect of a failure to embrace ubuntu, by evincing appreciation of and respect for others? Does the person lose his or her constitutional protections? The first judgment seems to suggest Yes. This lies in its finding that even if Afriforum members had the kind of right they claimed – a sense of historic belonging and space – their loss of that sense can never qualify as irreparable harm. But this denial of that kind of possibly irreparable harm is not extended in our law to other infringements of rights whose loss cannot be quantified in material terms.

Did Afriforum establish irreparable harm?

[140] In cases where money is not at stake, the harm consists, when interim relief is considered, in the applicant's temporary disablement from enjoying the right.[90] During the oral hearing, counsel for the Municipality was asked whether a parent claiming access to a child for a weekend a fortnight before the trial determination of the parents' respective rights of access would suffer irreparable harm if that access was thwarted. He said No. Consonantly with his case, he had to.

[141] But the answer was wrong. The harm is irreparable. This follows from the nature of interim interdict proceedings. The first requisite is that a "right" must be established, even if open to doubt. If not, then there can be no interim interdict, just as there cannot be a final interdict in due course. If the right is established, albeit open to doubt, then the next question arises. The second requisite is that that right is being breached, or that a breach of it is anticipated. If no breach, again, no interdict. If a breach is occurring, or is anticipated, the next question arises. The third requisite is that the grant of a final interdict or other relief in the main proceedings will not be able to make good the interference with that right in the period until the right is finally established. It is in this sense that the harm must be irreparable.

[142] This question arises only because there is a right, and because it is being breached, or its breach is feared, with the consequence that an interdict will be granted. Without the first two findings there can be no interdict.

[143] The third question – about irreparability – arises only because it has already been found, albeit open to some doubt, that there has been an unlawful act that will warrant a final interdict in due course. So the third question is not: is there harm?

[90] *Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd* 1993 (1) SA 853 (C) at 857J-858J; *Bamford v Minister of Community Development* 1981 (3) SA 1054 (C); and *Braham v Wood* 1956 (1) SA 651 (D&CLD) at 655A-C and H.

That has already been established. The question is: will the *prima facie* established harm suffered in the interim be reparable once a final interdict is granted?

[144] To return to the question put to counsel – that parent will never have that weekend again, nor will the child. The fact that the trial is imminent changes nothing. Nor does the fact that a final interdict will in due course ensure that no further harm is done. Subject to the balance of convenience, it is not up to a court to pronounce upon the value to be placed on the deprivation of the parent's *prima facie* established right to see the child. Indeed, the fact that a final interdict will be granted should the right be finally established, itself demonstrates that harm has been suffered until that time. The question, thus, is whether the harm that has been suffered until a final interdict is granted is capable of being reversed then.

[145] If the right is vindicated in the later trial, in other words, if the parent lost the right to have the child for that weekend, the harm suffered by the parent by not having the child *that weekend* can never be repaired. If the right exists, subject to balance of convenience considerations, the harm is in being deprived of that right. And it is irreparable if the deprivation of that right in the interim cannot be repaired once a final interdict is granted. This will seldom be the case where the harm is not manifested in pecuniary terms.

[146] It is for these reasons that in vindicatory proceedings the deprivation in the interim of the right of ownership is presumed to be irreparable.[91] A court does not evaluate the qualitative value to the applicant of the right of ownership of a picture pending a final determination of its ownership. Whether the picture would have been hanging on a wall, and whether a court sees value in viewing it, or even whether the picture would have been held under lock and key in a cupboard, is all immaterial to irreparable harm. Once it is found that the right of ownership of the picture has been

[91] *Stern & Ruskin NO v Appleson* 1951 (3) SA 800 (W) at 813B; and *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 384F-G.

prima facie established, the loss of the right to hang it on the wall, or to hide it from view, are not capable of being restored.

[147] And we do not think, in general terms, that it is appropriate for a court to do a qualitative evaluation of the harm an applicant asserts when weighing whether the harm asserted is irreparable. The court may not ask, "what harm will you suffer if you don't see your child this weekend?", or "what harm will you suffer if you do not have the picture, which is in the cupboard anyhow?" "If you win at the trial, you'll see the same child again, or have your picture back in the cupboard." The harm is that the parent is denied the right to see the child *that weekend*, or denied the right to have the picture, whether in the cupboard or elsewhere, while the first proceedings are underway. That harm is irreparable even if the court places no value on seeing children or having pictures in cupboards – and even if the child in question were to be obnoxious or the cupboard were to be permanently locked.

[148] That weighing is properly and necessarily done when the balance of convenience is assessed. It is there that the extent of the interim harm to the applicant, if final relief is in due course granted, is weighed against the interim harm to the respondent, if final relief is refused. That weighing lies within the discretion of the lower court, and, as we have shown, is rarely appealable.

[149] It is the loss in the interim of the rights attaching to ownership, or to parenthood, that cannot be repaired. A court does not evaluate the worth of enjoying that right. It is the loss of the rights attaching to ownership, or parenthood, in themselves, that are presumed to be irreparable, because in fact they can never be restored.

[150] The question the first judgment poses is not whether the harm will be reparable, but whether there is any harm at all. In effect, it asks: "where is the harm?"[92] But if there is no harm, there are no grounds for a final interdict, because the unlawful

[92] See [56] to [58] of the first judgment.

breach of the applicant's right inflicts no harm. If Afriforum establishes in the main proceedings that the Municipality acted unlawfully, there can be little doubt that it may be finally interdicted from acting on its unlawful decision. That being so, the harm is established, and the question before us is whether its unlawful act that endures in the interim can be undone. The fact that further harm to the applicant's right to lawful action can be prevented for the future is immaterial.

[151] So, in our view, this Court should not be asking the question "where is the harm?" If it has been established, although open to some doubt, that the Municipality is obliged to follow certain procedures in changing the street names, and that it has not done so, then the harm is the unlawful act itself.

[152] And, as we have suggested, the implications are broader than street names, important as they are. It is an issue of the rule of law. Afriforum has a right to adherence by the Municipality to the rule of law. And it is entitled to insist upon it from the time its right to adherence to the rule is established, even though open to some doubt, and not only from the time adherence to the rule is finally established. The Court should not suggest that adherence to the rule of law in some cases is of no value. It is always of value. And non-adherence is not capable of reversal.

[153] That will be relevant when weighing the balance of convenience – the harm to the applicant if he or she ultimately succeeds in obtaining a final interdict, against the harm to the respondent if the claim does not succeed, but that is a different matter, falling within the discretion of the court from which the interdict is sought, and is not the inquiry before us. The duty of a court in the present context, subject to balance of convenience considerations, is to uphold a *prima facie* established right, not to discount it as having no value. The value lies in upholding rights.

[154] The first judgment denies this logical consequence in relation to Afriforum's asserted right. It does so, first, because of its characterisation of the nature and extent

of the right and, second, because the content of the right is not consonant with its conception of how best unity in diversity is achieved. Neither is justified.

Afriforum's asserted right of cultural and historic belonging

[155] The first judgment approaches Afriforum's asserted right of cultural and historic belonging as an assertion of an entitlement in perpetuity. This cannot be, it says: "Afriforum and its constituency do not have the right to have the old street names they treasure displayed in perpetuity."[93] If that was indeed what Afriforum's case was, we would agree that it cannot be sustained. But it is not.

[156] As we understand its case it is much more modest in nature. It contends that its cultural and historical sense of belonging gives it the additional kind of right or interest, outside that relied upon in the review application, which *OUTA* requires in applications for temporary orders.[94] Afriforum did not deny that the Municipality was entitled to change the street names. What it says is that it must do so properly – and that, until it does so, its members are entitled to the cultural entitlements that flow from the existing street names that have so much meaning for them. It bears repetition that it did not ask for the temporary removal of the new names, only that the old crossed-out ones remain below them. It is the taking away of the old names that causes the harm, not the remaining of the new names. And the period during which the old names were removed and they felt the loss of belonging can never be restored, just as in the case of the parent and child in which that parent will never have that weekend again, nor the child. Recognising this does not imply that the harm must in all cases trump the other requirements for temporary orders. If the picture would have been in the cupboard anyway, the court takes that into account in weighing the balance of convenience. The balancing exercise between the harm suffered and other considerations must be done in the "balance of convenience" exercise and the ultimate discretion in deciding whether to grant a temporary interdict.

[93] See [60] of the first judgment.

[94] *OUTA* above n 3 at para 41.

[157] So, to deny the harm is really to assert that there can be no right of the kind Afriforum relies on. It is better, we think, to confront the issue of recognition of the kind of right Afriforum asserts head on. Then the nuances and difficulties of the "dilemma of difference"; the idea of different fundamental rights underlying a broader notion of equal citizenship; and the interrelation between individual and community in asserting reliance on cultural rights,[95] may be openly addressed. All this is by-passed by the first judgment's assertion that there is only one proper way to achieve unity in diversity under the Constitution.

[158] In so doing it excludes Afriforum's members not only from the judicial process, as is the case here, but also from their concerns being respected in the Municipality's own participation process. This is not an inevitable choice that the Constitution requires. The Constitution is broad and inclusive enough for our unity in diversity to survive even by recognising and including those who differ radically and wrongly from the one espoused in the first judgment, and for recognition that the historical past of white people also includes much not to be ashamed of.[96]

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[95] See the discussions referred to above n 78.

[96] In his famous "I am an African" speech in Parliament at the adoption of the Constitution, then Deputy President Mbeki included these people and features of history:

> "I am an African.
>
> …
>
> I am formed of the migrants who left Europe to find a new home on our native land. Whatever their own actions, they remain still, part of me.
>
> …
>
> I am the grandchild who lays fresh flowers on the Boer graves at St Helena and the Bahamas, who sees in the mind's eye and suffers the suffering of a simple peasant folk, death, concentration camps, destroyed homesteads, a dream in ruins.
>
> …
>
> I am he who made it possible to trade in the world markets in diamonds, in gold, in the same food for which my stomach yearns."

For the full version see http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=25146 accessed on 1 July 2016.

[159] We started off this judgment by stating that we write this dissent in a spirit of humility. It is difficult to recognise the rights and entitlements of those who deny the historical injustices of our past and who dub them "so-called" historical injustices. But recognition and tolerance of difference, even radical difference, is what, in our view, the Constitution demands of us. It is not consonant with the values of the Constitution to deny constitutional protections to people because of the content of their beliefs, views and aspirations.

[160] In the context of same-sex marriages, Sachs J declared in *Fourie*:

> "A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. . . . At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.
>
> As was said by this Court in *Christian Education* there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'.

> In each case, space has been found for members of communities to depart from a majoritarian norm."[97]

[161] Should members of Afriforum not be given the same kind of space when renaming streets they hold dear is at issue? Would the transformation of our society under the Constitution be endangered if they were given that space? For our part, we very much doubt it. It may merely suggest the growing power of our democracy.

Conclusion

[162] For these reasons we would refuse leave to appeal.

JAFTA J:

[163] I have had the benefit of reading the judgment of Mogoeng CJ (first judgment) and the joint judgment of Froneman J and Cameron J (second judgment). I agree that leave must be granted and also support the rest of the order proposed by the Chief Justice. I disagree that the granting of leave here attenuates "well-established and sensible rules and principles for hearing appeals against the grant of temporary interdicts" as suggested in the second judgment. Nor do I accept that the granting of leave "here extends existing doctrine considerably". On the contrary, I am persuaded by reasons advanced by the Chief Justice in support of the order. But I propose to add

[97] *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) (*Fourie*) at paras 60-1. See also *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 1, where the Court observed:

> "This case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured."

my own reasons in support of that order. And what is stated in this judgment relates to conclusions made in the second judgment and reasons advanced in their support.

Historically oppressive traditions

[164] I am also troubled by the statement in the second judgment which implies that a cultural tradition founded in history rooted in oppression may find recognition in the Constitution. And it cannot be gainsaid that the oppression we are talking about here was based on race and therefore was racist to the core. Its central and yet false pillar was that the white race was superior to other races. As many authorities show the Constitution creates a clean break from our ugly past of racial oppression by emphatically rejecting discrimination based on race and the humiliation and indignity suffered by black people at the hands of their white compatriots. In the very first case to be heard by this Court Mahomed J said:

> "The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."[98]

[165] How can that unquestionably transformative Constitution be expected to recognise cultural traditions rooted in the racist past? The answer must be, if there is such expectation, that it is misplaced. The fact that the oppressive racist history exists at the level of fact does not mean that it deserves any recognition in the Constitution. Therefore, the implication which the second judgment says may be drawn from the first judgment, would be the correct one.

[98] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262.

[166] In light of our racist past, the prohibition on unfair discrimination, and equality were placed at the centre of our constitutional order. To underscore this point, equality is not only guaranteed as a right but also constitutes an important value underpinning the Constitution and the democratic order.[99] In *Hugo* this Court proclaimed:

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[100]

[167] It was the shameful racist past properly described in the first judgment which led to streets and buildings in every town in this country, including Pretoria, reflecting exclusively the names of white people. Black people were precluded from residing in these areas which constituted nearly 90% of the entire country. They were forced to live in segregated townships designed exclusively for black people and usually far from towns and cities in which they were regarded as providers of labour and nothing more.

[168] In *Brink* this Court declared that the equality clause must be understood in the context of that painful past which was described in these terms:

> "As in other national constitutions, section 8 [in the Interim Constitution] is the product of our own particular history. Perhaps more than any of the other provisions in chapter 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the

[99] See sections 1, 7, 9 and 36 of the Constitution.

[100] *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR (CC) 708 at para 41.

> concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted."[101]

[169] It is against this context that the first judgment must be understood. The cultural rights guaranteed by section 31 of the Constitution must also be construed not only in the context of section 31(2) but also in the setting of our past.[102] Section 31(2) pronounces that the guaranteed cultural rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights. Therefore there can be no justification for recognition of cultural traditions or interests "based on a sense of belonging to the place where one lives" if those interests are rooted in the shameful racist past.

[170] There can be no gainsaying that names like Kaferkraal are so offensive that they have no place in our constitutional order. Yet such names may form part of where one lives and be linked to his or her sense of belonging. The retention of offensive names under the guise of exercising cultural rights should be rejected by all people who embrace our constitutional dispensation. As Mahomed J remarked:

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[101] *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 40.

[102] Section 31 provides:

> "1 Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> 2 The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

> "What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting—
>
> > 'future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.'"[103]

[171] By making many of the remarks which the second judgment finds objectionable, the first judgment articulates the repudiation of the shameful past by the Constitution and its "aspirationally egalitarian ethos" which was affirmed in *Makwanyane* and many other decisions of this Court. It is the Constitution itself which defines how transformation of our society should be pursued and not the first judgment which merely serves as its mouthpiece. It cannot be gainsaid that it is the primary duty of this Court to interpret the Constitution so that the other arms of government which are charged with the responsibility of driving the transformation project may know what exactly those responsibilities entail.[104] When the Court declares what the Constitution envisages, it does not impermissibly intrude into their terrain and "prescribe to them what choices to make".

[172] While the second judgment declares that it does not agree with Afriforum's view of history, it proceeds to make a number of conclusions on associational cultural rights which go beyond the question whether the Full Court's order was appealable.[105] In my respectful view this is not necessary. More so in light of the fact that the second judgment itself is not certain whether what is engaged is an interest or a right. In this regard, the second judgment says:

> "And that is where we must part from the first judgment. On general principle we think the Constitution creates scope for recognising an interest or right based on a sense of belonging to the place where one lives, rooted in its particular history, and to be involved in decisions affecting that sense of place and belonging."[106]

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[103] *Makwanyane* above n 98 at para 262.

[104] Second judgment at [80].

[105] Second judgment at [121] to [124].

[106] Id at [124].

[173] If indeed what is implicated is merely an interest and not a right, its existence did not support the granting of an interdict in the first place, for an interdict is not granted to preserve an interest but a right which may be irreparably harmed, pending the final determination of the parties' rights in the main proceedings. Hence the requirement that the applicant for an interdict must establish at least a *prima facie* right in order to succeed.

[174] Moreover, an examination of sections 30 and 31 of the Constitution does not support the right to a sense of belonging to the place where one lives which is rooted in its particular history. These sections guarantee specific rights. Section 30 guarantees the right to participate in the cultural life of one's choice.[107] Whereas section 31 entrenches the associational right of persons belonging to a cultural community to enjoy their culture.[108] But both sections create internal limitations to the exercise of each of these rights. These rights may not be enjoyed or exercised "in a manner inconsistent with any provision of the Bill of Rights". This means that these rights may not be exercised in a manner that discriminates unfairly or demeans the dignity of other people. That is why racist and oppressive cultural traditions have no place in our constitutional order, even though they may exist in history. In contrast, such traditions belong in the dust-bins of history where they ought to be buried.

[175] The internal modifiers of both rights limit their scope. This is a clear indication that any claim to the enjoyment of culture may not include an entitlement to racist and oppressive cultural traditions of the colonial and apartheid era. Recognition of racist traditions is inconsistent with our constitutional order which seeks to establish "a society in which all human beings will be accorded equal dignity and respect

[107] Section 30 provides:

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[108] See above n 102.

regardless of their membership of particular groups". And thus in *Makwanyane* Sachs J pronounced:

> "Constitutionalism in our country also arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance. When reviewing the past, the framers of our Constitution rejected not only the laws and practices that imposed domination and kept people apart, but those that prevented free discourse and rational debate, and those that brutalised us as people and diminished our respect for life."[109]

[176] Therefore an interpretation of our Constitution advanced in the second judgment, to the effect that "the Constitution creates scope for recognising an interest or right based on a sense of belonging to the place where one lives", rooted in oppression is untenable. It does not conform with the clean break from the history characterised by discrimination, humiliation and indignity suffered by black people and which the Constitution loudly rejects. In unmistaken terms the Constitution commits our nation to reject all disgraceful and shameful practices and traditions of the apartheid era and embrace egalitarian ethos in pursuit of transformation of our society into a caring one in which everyone enjoys equal rights and opportunities to realise fully their individual potential as members of society.

Appealability

[177] An impression is created in the second judgment that the first judgment considerably extends existing doctrine on whether leave to appeal should be granted against temporary interdicts. This, concludes the second judgment, is not justified by the facts and the law. In my respectful opinion this conclusion is incorrect.

[178] Having rightly stated that the standard for determining whether leave should be granted in this Court is that of the interests of justice, the second judgment proceeds to conflate that standard with the common law test to the effect that the order that is

[109] *Makwanyane* above n 98 at para 391.

purely interlocutory is not appealable.[110] In so doing the second judgment overlooks fundamentally that the common law standard does not apply in this Court.

[179] The interests of justice and this standard alone applies to adjudication of applications for leave to this Court.[111] This is so because that standard is prescribed by the Constitution. Section 167(6) of the Constitution provides:

> "National legislation or rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

[180] It is apparent from this provision that all matters whether brought directly to this Court as a court of first instance or on appeal, reach the Court with its leave. Although the Constitution permits legislation and the rules to regulate access to the Court, significantly the constitutional injunction is that such legislation or rules must allow a litigant to bring a matter to this Court subject to two conditions only. These are the interests of justice and the leave of the Court. I agree with the second judgment that by now our law is settled on what the interests of justice entail. The fact that at common law an interlocutory order is generally not appealable is but one of the many factors that go into the pot when determining if in a particular case, it is in the interests of justice to grant leave.

[181] It does not mean that once it is shown that the order appealed against is interlocutory and that it has no final effect, then leave must be refused as a matter of law. Far from it. This Court must still determine whether, despite the nature of the order, it will be in the interests of justice to grant leave. The nature and effect of the order alone are not determinative of the issue. Therefore reliance placed on *Pretoria Garrison Institutes* is misplaced.[112] For obvious reasons that decision was not based

[110] Second judgment at [83] to [98].

[111] *Informal Traders* n 13 above.

[112] See above n 53.

on section 167(6) of the Constitution. Nor did it address legislation or the rules of this Court that give effect to that provision of the Constitution.

[182] But another jurisprudential flaw in applying the common law test is this. Here the temporary interdict granted by Prinsloo J was appealed to the Full Court with leave of the Supreme Court of Appeal. Therefore, the question of its appealability is irrelevant for present purposes. This is because the Supreme Court of Appeal has already determined that issue. It came to the conclusion that the order was appealable and granted leave to the Full Court. That order by the Supreme Court of Appeal is not challenged before us nor could it be impugned, because that horse has long bolted.

[183] Once the Supreme Court of Appeal granted leave, the Full Court was obliged to adjudicate the appeal. The argument that was advanced before that Court on appealability was irrelevant. That Court could not refuse to hear the matter even if it held the view that the order was not appealable. It was bound by the order of the Supreme Court of Appeal that allowed an appeal against Prinsloo J's order.

[184] Moreover the appeal before us, as the first judgment mentions, lies against the order of the Full Court and not of the Court of first instance. The Full Court did not issue a temporary interdict. That was the order of the Court of first instance which was upheld on appeal. In these proceedings the City seeks to appeal against the order of the Full Court in terms of which its appeal was dismissed with costs on a punitive scale of attorney and client. The second judgment overlooks this fundamental point and proceeds on the footing that we are called upon to determine if the temporary interdict is appealable. But that is practically impossible in the present circumstances. We cannot and it is not competent for us to unscramble that egg at this late hour.

[185] It could be open to this Court to consider the appealability point in respect of the interdict if leave was rejected by the other courts and the Full Court did not adjudicate the appeal. Affirming this principle this Court proclaimed in *Mabaso*:

> "[W]here an application for leave to appeal to the Supreme Court of Appeal is refused by the President of the Supreme Court of Appeal, a refusal which is ordinarily unaccompanied by reasons, any subsequent appeal to this Court is considered to be an appeal, not against the decision of the Supreme Court of Appeal, but against the High Court decision, and the time for lodging the appeal is duly extended. This is consistent with the jurisprudence of this Court under the earlier rules."[113]

[186] But even at common law, the principle that an interlocutory order is not appealable is applied flexibly. The rule is that even the so-called purely interlocutory orders are appealable with the leave of the court which had issued the order. Thus in *Oliff* the Appellate Division remarked:

> "This matter must, therefore, stand over to enable the plaintiff to apply within twenty -one days of this judgment to the Court *a quo* for leave to appeal. If that Court grants such leave and the order granting leave is lodged with the Registrar of this Court, we, having heard argument on the merits, will be in a position to deliver a judgment on the merits and to make an appropriate order as to costs. If the Court *a quo* refuses leave to appeal and the order refusing such leave is lodged with the Registrar of the Court, this matter will, without any further order of this Court, be deemed to have been struck off the roll with costs."[114]

[187] In that context the main issue was whether the court of appeal had jurisdiction to entertain an appeal against a temporary order and that it would have the jurisdiction if leave was granted by the court of first instance. Consistent with this principle in *McLean* the Court said:

> "I think a summary judgment under our rule of Court 22 is a purely interlocutory order or judgment. . . . It is an accepted principle of our law that a litigant should exhaust his remedies in the *forum* having jurisdiction before appealing to higher tribunal . . . .

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[113] *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 18; and *Swartbooi and Others v Brink and Another (1)* [2003] ZACC 5; 2003 (5) BCLR 497 (CC) at para 3-4.

[114] *Oliff v Minnie* 1952 (4) SA 369 (A) at 376B-D.

> So here an aggrieved defendant should exhaust his remedies under rule 22 before appealing against a summary judgment unless, for some good reason, he can persuade the Judge *a quo* to give him leave to appeal."[115]

[188] And later the principle was further explained by the Appellate Division in *Engineering Management Services* in these terms:

> "In a wide and general sense the term 'interlocutory' refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper', which do not . . . .
>
> Statutes relating to appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word 'interlocutory', or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation."[116]

[189] Two important issues emerge from this statement of the law. The first is that the genesis of the prohibition against an appeal in relation to an interlocutory order is a statute. The same applies to a limitation that subjects such appeal to the requirement of leave. The second is that this statutory prohibition or limitation applies to simple or purely interlocutory orders only. The final orders and interlocutory orders "having a final and definitive effect", are regarded as falling outside the purview of the prohibition or limitation.

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[115] *Mclean v Wood NO* 1953 (1) SA 215 (C) at 217-18.

[116] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) (*Engineering Management Services*) at 549G – 550A.

[190] This means undoubtedly that final orders and interlocutory orders with final effect are appealable without leave from the court that granted the order subject to an appeal. But for a litigant to appeal against a simple interlocutory order, she requires leave of the court of first instance. Absent that leave there can be no appeal. But if leave is granted, the appeal must be entertained, regardless of the fact that it is against a purely interlocutory order. Here that issue was determined by the Supreme Court of Appeal when it granted leave to the Full Court.

[191] For reasons already mentioned that principle cannot apply to cases brought to this Court because its jurisdiction is not derived from statute but the Constitution itself. It is the Constitution that says access to this Court is subject to leave being granted by the Court. No legislation can change that. In contrast appeals to other courts are subject to leave being granted by a court other than the court to which the appeal lies. For example, the Full Court entertains appeals only where leave is granted by the court of first instance, or, as was the case here, by the Supreme Court of Appeal. The Supreme Court of Appeal in turn adjudicated appeals with leave of the court against whose order the appeal lies or with its own leave. This illustrates that the position of this Court is unique.

[192] But even if the order that was appealed was that of the Court of first instance, that is the temporary interdict itself, I would support the granting of leave here for all the reasons articulated in the first judgment. Just like the Supreme Court of Appeal that granted leave to appeal against the same interim interdict. The common law rule that an appeal against an interim order reaches the appeal court if leave is granted by the court of first instance cannot apply in respect of this Court because no court has authority to grant leave to it. Consequently the judgment extends no principle. Nor was any such rule or principle attenuated by the first judgment to correct injustices of the past. On the contrary the judgment exercises a constitutional power duly conferred on this Court by section 167(6) of the Constitution.

[193] To sum up, the criticisms in the second judgment levelled at the judgment of the Chief Justice cannot be sustained and as a result are not warranted. I have illustrated that a construction of the Constitution as recognising racist cultural traditions is mistaken. Equally ill-conceived is the proposition that by granting leave the Chief Justice extends existing doctrine and attenuates well-established principles precluding appeals against temporary interdicts. This is so for a number of reasons. First, the only standard that applies to applications for leave to this Court is the interests of justice and derives from the Constitution and not the common law. Second, the appeal mounted by the City is against the order of the Full Court and not the temporary interdict. Third, the common law itself does not prohibit an appeal against a temporary order or an interim interdict but requires leave to be granted by the court of first instance. Fourth, that principle cannot apply here because no other court has the power to grant access to the Constitutional Court. Fifth, the decision of the Supreme Court of Appeal to grant leave here still stands, as it was never challenged.

[194] Consequently I support the order made in the first judgment and the reasons advanced to motivate it on the merits.

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