REPORTABLE

CASE NO.: SA 53/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ANDREAS VAATZ **Appellant**

and

MUNICIPAL COUNCIL OF THE MUNICIPALITY OF WINDHOEK **Respondent**

Coram: MARITZ JA, MAINGA JA and MTAMBANENGWE AJA

Heard: **21 June 2013**

Delivered: **30 September 2016**

APPEAL JUDGMENT

MTAMBANENGWE AJA (MAINGA JA concurring):

[1] This appeal was heard by three judges of the Supreme Court of Namibia (Maritz JA presiding) on 21 June 2013. The presiding judge undertook to write this judgment. To date we have not received a draft judgment on which we may comment nor has there been any indication that a judgment has been prepared or is under way.

[2] We understand from the Chief Justice that after several reminders to the presiding judge no indication has been given that a judgment has been prepared. As a result of this long delay the Chief Justice has asked me to prepare a draft judgment for comment by the other judge, Mainga JA.

[3] This untoward delay has been deprecated in a judgment written under similar circumstances in the South Gauteng Division of the High Court of South Africa where the Presiding Judge Classen J made the following remarks in *Myaka and others v S* (A 5040/2011, 215/2005) ZAGPJHC 174 (21 September 2012):

> '[3] It would be a sad day in the administration of justice in this country if the laches of one member of a three bench tribunal, should cause the stifling of the normal appeal procedures prescribed by law. . . . .
>
> [4] I am respectfully of the view that drastic approaches are sometimes called for as was adopted by the Supreme Court of Appeal in *New Clicks South Africa (Pty) Ltd v Minister of Health and another* 2005 (3) SA 238 (SCA) at pages 249-250, paragraphs 5 – 8. In this regard it was stated in paragraph 31:
>
> > "The Supreme Court Act assumes that the judicial system will operate properly and that a ruling of either aye or nay will follow within a reasonable time. The Act – not surprisingly – does not deal with the situation where there is neither and a party's right to litigate further is frustrated or obstructed. The failure of a lower court to give a ruling within a reasonable time interferes with the process of this court and frustrates the right of an applicant to apply to this court for leave. Inexplicable inaction makes the right to apply for leave from this court illusory. This court has a constitutional duty to protect its processes and to ensure that parties, who in principle have the right to approach it, should not be prevented by an unreasonable delay by a lower court. In

> appropriate circumstances, where there is deliberate obstructionism on the part of a court of first instance or sheer laxity or unjustifiable or inexplicable inaction, or some ulterior motive, this court may be compelled, in the spirit of the Constitution and the obligation to do justice, to entertain an application of the kind presently before us."

There was reference in the above quoted passage to *S v Venter* 1999 (2) SACR 231 (SCA) 'where the trial court took 8 months to enroll an application for leave to appeal a sentence of four years imprisonment which was, ultimately, reduced to six months' imprisonment'. The quotation must be read *mutatis mutandis*. Classen J went on to say:

> '[5] In my respectful view, judges ought not to be the cause for the adage, "justice delayed, is justice denied" to apply to any case.'

[4] This appeal is against the whole of the judgment of Parker J delivered on 22 June 2011. That judgment dealt with the application brought by the applicant dated 26 May 2011 but date-stamped 8 June 2011, the same day respondent's legal representative received a copy thereof. The notice of motion headed:

> 'NOTICE OF MOTION (AS AMENDED)' asks 'for an order in the following terms:
>
> 1. That the respondent be directed and ordered not to rename or in any manner change the name of Gloudina street and Uhland street in Ludwigsdorf and Klein Windhoek respectively without consulting the residents residing or operating a business in the said streets;

2. That the court make a declaratory order to the effect that an existing street name within the Municipality of Windhoek not be changed without consulting the majority of residents residing or operating a business in the said street and thus materially affected by such name change;

3. That the respondent in the event of the court not making an order in terms of paras 2.1 and 2.2 above shall be responsible for all costs and expenses that have to be incurred by the residents of the street the name of which is proposed to be changed and by any other person or company affected thereby (ie those who produce maps or GPR directive systems of Windhoek) in having to rectify and amend and reprint their records, letterheads and notifying their friends, business partners and suppliers and companies attending to services, repairs or deliveries to such address;

4. That the respondent pays the cost of this application if opposed.

5. Further and/or alternative relief.'

On receipt of the above, respondent's legal representative noted:

'I, the undersigned, Nixon Marcus Public Law Office, hereby confirm that I agree that this amended notice of motion correctly reflects the amendments moved at court and on behalf of the respondent, I have no objection against the amendments and this amended notice of motion.'

Paragraph 4 of appellant's heads of argument reads as follows:

'Despite having granted the amendment, the judge in the court *a quo* still decided the matter based on the relief sought in the original notice of motion. In his judgment the judge deals with paras 2.1, 2.2 and 2.3 which is a clear reference to the original notice of motion, the amended notice of motion not

having any paras 2.1, 2.2 and 2.3. The paragraphs in the amended notice of motion were from paras 1 to 5.'

Foot note 5 to para 4 directs one to 'record p 174-175'. What appears at pages 174-175 is a notice of motion partly reading:

'2. That a *rule nisi* be issued calling upon the respondent to show cause, if any, on a date to be determined by this Honourable Court why the following order should not be made.

2.1 That the respondent be directed and ordered not to rename or in any manner change the name of Gloudina street and Uhland street in Ludwigsdorf and Klein Windhoek respectively;

2.2 That the court makes a declaratory order to the effect that an existing street name in any Municipality in Namibia not be changed without the approval and support for the proposed name change first having been obtained from the majority of residents residing or operating a business in the said street and thus materially effected by such name change;

2.3 That the respondent in the event of the court not making an order in terms of paras 2.1 and 2.2 above shall be responsible for all costs and expenses that have to be incurred by the residents of the street the name of which is proposed to be changed and by any other person or company effected thereby (ie those who produce maps or GPR directive systems of Windhoek) in having to rectify and amend and reprint their records, letterheads and notifying their friends, business partners and suppliers and companies attending to services, repairs or deliveries to such address and that residents of such streets shall not be required to pay any further rates and taxes to the Respondent until the

> Respondent has adjusted its own records, computer program, diagrams, drawings and maps by appropriately inserting the new name in all their records and procuring that other State records held at the Deeds Office and surveyor general are also appropriately amended; . . . .'

Explanatory Note

[5] It seems that at some point after judgment was delivered the appellant realised that there was some confusion on the papers and felt the need to explain things. The purported explanation which is undated appears at pages 173(a)–173(b) of the record. It states:

> '**EXPLANATORY NOTE**
>
> 1. Originally, the application was structured as an urgent application with an interdict to prevent the respondent from following through with the renaming process of Glaudina Street and to stop that process in order to allow the court to make a ruling on the matter before the final stages of the renaming procedure have been completed.
>
> 2. After the application was served, the attorneys for the respondent agreed on behalf of the respondent that the respondent will not continue with the renaming process until there is a final ruling made by the court in this matter. That concession meant that there was no need to obtain an interim interdict order as requested in Para 2 of the original application.
>
> 3. Prior to the hearing of the application, applicant's advocate, Mrs N Bassingthwaighte advised the applicant to make a number of amendments to the application. The applicant accepted that advice and agreed to the proposed amendments being made. The legal practitioner of the respondent, Mr Nixon Marcus, did not object to the proposed amendments. So these amendments were moved before

argument of the matter and the Hon. Judge Parker expressly granted the amendments in open court and requested that he be furnished after the hearing with a retyped notice of motion as amended. He also requested that Mr Marcus as legal practitioner also signs the retyped amended notice of motion to reflect his consent to the amendments. That explains why the notice of motion setting out the order applied for in its amended form as drawn by Adv Bassingthwaighte also contains the statement by Mr Marcus that he agrees that the notice of motion in its amended form sets out correctly the amendment moved at court. The so amended notice of motion appears on pp 1 - 3 of this record.

4. The notice of motion in its original form is annexed hereto as pp 174 – 177. It is annexed because the Hon. Judge Parker in his judgment (pp 178 – 189) appears to have ignored the amendments and without being able to read the original notice of motion one would not be able to understand what the judge refers to in his judgment.'

[6] I ignore the fact that this explanatory note is not a sworn statement because in my view not much is affected by the so-called mistake by the judge *a quo*; it will be noted that paras 2.1 and 2.2 of the original notice of motion are identical to paras 1 and 2 of the amended notice of motion save the fact that the declaratory order asked in para 2 of the amended notice of motion refers to 'the Municipality of Windhoek' only and not to 'any Municipality in Namibia'. In passing I note that the mistake of referring to paras 2.1 and 2.2 is made not only by the judge *a quo* but also by the appellant in his heads of argument before Parker J as well as in respondent's answering affidavit (see para 4 thereof); the mistake was made by everyone'.

[7] Before considering the merits certain other misunderstandings, particularly by appellant, must be noted. In para 11 of her heads of argument Ms Bassingthwaighte who appeared on behalf of appellant states that the appellant will ask this court to make the following order:

> '1. That the renaming of Gloudina street by the respondent to Joseph Ithana on 31 August 2011 and 1 October 2011 is set aside.'

Apparently, post the judgment *a quo,* appellant realised that the amended notice of motion did not ask for the appropriate order in para 1 thereof. Hence an attempt to remedy this defect is purported to be made when on 14 March 2012 the following was filed:

> 'NOTICE OF APPLICATION TO AMEND
>
> **BE PLEASED TO TAKE NOTICE** that at the hearing of the above matter the appellant shall apply to the above Honourable Court for an amendment to the Notice of Motion in these proceedings to the following effect:
>
> 1. That paragraph 1 be renamed paragraph 1(b) and that a new paragraph 1 to be named paragraph 1(a) be inserted above the existing paragraph 1 to read as follows:
>
> > "1(a) That the renaming of Gloudina Street by the respondent on the 31st of August 2011 and 1st of October 2011 be set aside."
>
> **AND FURTHER TAKE NOTICE THAT** the affidavit of Andreas Vaatz will be used in support thereof.
>
> **KINDLY** place the matter on the roll accordingly.'

[8] The supporting affidavit for the intended application purports to explain how this situation arose. However, it is not necessary to consider the intended amendment because the record before this court bears no indication that the application was made, and there is no explanation why it was not made.

[9] I now turn to the merits of the matter. The case of the appellant was based on the following allegations or complaints:

> ‘1. That there was no compulsive requirement for the change of name of the street; “I am opposing the proposed name change for this reason and other reasons set out in this affidavit” (para 4 of the affidavit).
>
> 2. The amounts of rates and taxes and municipal fees and other expenses applicant pays per month or per year. Neither the respondent nor Joseph Mukwayu Ithana nor Swapo have made any contribution towards making the street what it is today. “It is for this reason that I submit that the respondent should have at least consulted me” and taken into “account my view and those of all other residents of Gloudina street before making any decision relating to the change of name and should at least have given us an opportunity to oppose or comment on the proposed name change.” (para 5 of the affidavit).
>
> 3. “The respondent has not been fair and reasonable towards us” in taking the decision to change the name of Uhland street and Gloudina street as proposed. I rely on this article of our Constitution (Art 18) (para 5 of the affidavit).
>
> 4. The fact that the street had this name for over thirty (30) years and bears the name and maps of Namibia, all diagrams and all plan registered at the Surveyors office and Deeds office. “Changing the name of the street would be confusing” to all and sundry. “The street name is not offensive to anyone, and

there is no compelling reason whatsoever for the name of that street to be changed." (para 6 of affidavit)

5. There are new developments in Windhoek, respondent could give the name of Joseph Mukwayu Ithana. There is no reason why respondent should agree to the application of Mrs Ithana (para 7 of the affidavit).

6. All those affected in all other streets in Namibian towns should be consulted and should give their approval to any change of the name of their streets (para 8 of the affidavit).

7. The Local Authorities Act 23 of 1992 (s 48 thereof) has no express paragraph allowing local authorities councils to change street names (para 9.1 of the affidavit).

8. The proposed name Joseph Mukwayu Ithana is so long that it is extremely difficult to remember the name. . . . The primary function of naming streets is not to please one or other politician (para 10 of the affidavit)

9. The Respondent has not used the formalities it normally uses for making, such decisions as the renaming of streets (para 11 of the affidavit).'

[10] I have found it necessary to summarise or quote appellant's allegations to show that most of them amount to no more than a repetition of the central theme (complaint) of the appellant: that he and other persons resident or carrying on business in the two streets should have been consulted before the names of the streets were changed.

[11] The chronology of events in this matter was that the amended notice of motion was filed and served on 8 June 2011, a notice of intention to oppose was filed and served on 29 September 2010 (*sic*). After the respondent's answering

affidavit dated 21 October 2010 and received on the same date, appellant filed a supplementary affidavit date-stamped 21 October 2010. That supplementary affidavit is introduced as follows:

> 'I am the Applicant in these proceedings. Since filing and serving my original application, the matter also received some attention in our press. As a result thereof, numerous people who live in Uhland Street and Gloudina Street have indicated their support to my application and their opposition to the name change proposed by the City of Windhoek. I have requested them to express their opposition in writing by signing a standardised declaration in which they express their disapproval of the name change of the two streets, Uhland and Gloudina Street. I now annex hereto these supporting statements by residents in Uhland and Gloudina Streets merely to show that I am not the only person who is opposed to a name change and that there are numerous citizens and rate payers who live in these two streets and who are totally opposed to the name change of the said streets.'

The affidavit is accompanied by Annexure 'A', a list of a number of residents of Gloudina and Uhland streets and their street addresses. None of the statements of support are in the form of affidavits except one by one Andreas Limmer who states:

> 'I personally reside at 26 Uhland Street, Windhoek, but I have also gone out to consult other persons staying in Uhland Street to hear what their views are of the matter and all who I consulted and who were opposed to a change of the street name signed the annexed list which I prepared, giving the street address where they stay and their name and signature. All of them who appear in the annexed list made it very clear that they are against the street name change as proposed by the Municipality.'

[12] Respondent's answering affidavit sworn to by one Niilo KambwaTaapopi, its Chief Executive Officer, opposes the application on the following grounds:

> '4.1 The application is not urgent and applicant has failed to comply with the requirements set out in Rule 6(12) of the Rules of the High Court. The application stands to be dismissed on this ground alone;
>
> 4.2 Applicant has failed to satisfy the requirements for the granting of an interim interdict;
>
> 4.3 Alternatively, granting of the relief contained in para 2.1 of the notice of motion would in any event not be appropriate relief.
>
> 4.4 The relief contained in paragraph 2.2 and 2.3 of the notice of motion is incompetent relief.'

[13] The answering affidavit, apart from addressing paragraph by paragraph the allegations made by appellant, went further and told in some detail the various steps taken by respondent to arrive at the decisions of renaming Uhland and Glaudina streets. What is noteworthy in this narrative is the formation of policy guidelines for the respondent to enable it to arrive at the decision to name/rename street/places in Windhoek, and that the process took a number of years and at some point the general public were invited 'to give their input as to how the renaming process in the city of Windhoek should be approached. The invitation was done through the city's March 2005 newsletter, called Aloe which is published and sent monthly to all rate paying residents of the Municipality of Windhoek; it proclaimed in bold capital letters-

> **'FOCUS ON STREET RENAMING/CITY CONSULTS PUBLIC ON STREET RENAMING POLICY' (Annexure 'NT4').**

[14] The policy was adopted on 30 June 2005. To complete the picture, the narrative shows that on 27 February 1997, respondent was already considering the policy issue. Annexure 'NT3' is a copy of the 1997 policy, which reads in part:

> 'RESOLVED
>
> 1. That Council Resolutions 481/09/90, 197/04/91 and 462/11/94 be rescinded.
>
> 2. That the following guidelines for the naming/renaming of streets be approved.'

It is not necessary to quote the rest of that resolution as the rest of its provisions are similar to those of Annexure 'NT2', the policy statement on which the new policy for the naming and renaming of streets in Windhoek is based dated 30 June 2005 when then the Council resolved:

> 'That the proposed policy and process as set out hereunder be approved as principles (*sic*) guidelines and process for naming and renaming streets/places in Windhoek.'

The policy makes it clear that it is a guideline with various considerations that may be had regard to and, as Mr. Marcus, who appeared for the respondent, correctly remarked, it is not required that each factor be considered or given equal weight. Let the policy speak for itself:

> 'Policy objectives
>
> Naming of new streets/places

Criteria for name selection

1. According to Council Resolution 66/02/97 streets should, as a general principle, be names after persons, places, events and things related primarily to the City and its citizens and secondly to Namibia at large. In addition to the guidelines (provided in Council Resolution 66/02/97) for proposing new street names, proposed names should meet one or more of the following criteria: (my emphasis).

    - To commemorate noteworthy persons associated with the City, Namibia and international;

    - To commemorate local history, places, events or culture;

    - To promote names with powerful positive meanings for people, so as to provide opportunities to promote Community harmony;

    - To recognise native wildlife, flora, fauna or natural features related to the community and the City of Windhoek;

    - To recognize communities which contribute to the ethno-racial diversity of Windhoek City;

    - To strengthen community identity;

    - To use names that can serve as locational tools and navigational aids for a predictable, manageable, and orderly environment (names are the beginnings of journeys or destination); and

    - To use names that creates a sense of place.

2. Preference shall be given to names of local area or historical significance.

3. Names of living persons should only be used in exceptional circumstances such as to celebrate Windhoek's rich heritage of struggle for a democratic, non-

racial society and to acknowledge the contribution that many of the City's residents have made to the development of the City or Namibia.

4. Only a person's first name and surname should be used as a street name unless additional identification is necessary to prevent duplication with an existing street name in Windhoek.

5. Names should be grouped in categories for use in the same areas, for instance, the names of birds are used in certain extensions of Khomasdal, whilst the names of historical figures are used in other townships; new developments can accommodate new trends in the naming of streets.

. . .

In addition to the guidelines that were resolved by Council Resolution 66/02/97, attached as pages 346 – 347 to the agenda the City will consider the following when renaming the City's streets.

- The historical reasons for the original name;

- The public profile or familiarity of the street's original name;

- The cost associated with changing the street's name; that is, the cost of replacing street and traffic signs;

- The relevance of the proposed new name to the street's main user group; and

- The potential confusion created for emergency and other municipal services, commercial delivery services, and the traveling public.

Renaming of existing streets/places

Recognition of persons

Renaming proposals must recognise persons who, in their lifetime demonstrated outstanding contribution to the City and the country at large. The following criteria must be met:

- Persons nominated dead or alive should have made a substantial contribution directly to the City of Windhoek or Namibia at large;

- The person must have given extensive or distinguished service to the community that goes beyond any doubt to Council;

- The service should be easily recognisable as having a direct benefit to the City of Namibia at large and should be such that it has produced substantial benefit to the well-being of the citizens of the country; and

- Nominees in the case of a Windhoek resident should have lived within the City of Windhoek for a significant number of years (significant usually means at least 15 years) and have had a long and close association and identification with the City.

. . .

‘2 Process by which naming and renaming shall be done

2.1 Any person, Community or organisation in the geographical area of the City of Windhoek shall be entitled to propose the naming of new streets or renaming of an existing street in accordance with the policies and procedures accepted by Council.

2.2 Application for the naming or renaming of streets/places shall be in writing under the name of the person making the proposal, and include details of the affected street, proposed new name, background of the name to be eliminated, and fully motivated reasons which shall include research references, evidence of professional or community support.

2.3 Proposals may include the results of referenda or similar consultation within communities by way of evidence of support or opposition but which Council shall not consider as defining criteria.

2.4 Proposals will be received by the Chief Executive Officer, and forwarded to the Strategic Executive Planning, Urbanisation and Environment for report and preparation of a submission to the Committee.

2.5 The processing shall be strictly according to the proposed procedures provided in the Policy.

2.6 Proposals will be considered by the Street/Places Naming Committee who will make recommendation to Council.

2.7 The full Council of the City of Windhoek will take the final decision.'

[15] The agenda of the Council on 30 June 20015 spells out the rationale for naming/renaming street, it reads:

'[Municipal Council Agenda: 2005-06-30]

HRD.2 [PLA] NEW POLICY FOR NAMING AND RENAMING OF STREETS IN WINDHOEK POLICY
(16/3/7/1)

The names of streets in Windhoek reflect the City's history and character. The City has changed over the past few years, especially since the end of apartheid. However, only a few street names used in the City reflect and pay homage to icons of this new era. Therefore a need exists for a clear co-ordinated and integrated policy to deal with the renaming and naming of streets. A policy that promotes the use of names that celebrate Windhoek's rich heritage of the struggle for a democratic, non-racial society, while acknowledging the contributions of the many of the City's resident and others who helped to make democracy a reality.

The need for such a policy is a result of an influx of applications from individuals and organisation to rename streets in particular areas with which that person or organisation is familiar. The general Policy of the City is that streets should only be renamed in exceptional circumstances. Nonetheless renaming can and has been considered to honor and commemorate noteworthy persons associated with the City and Namibia at large. This can be seen in the numerous streets renamed in the last few years to accommodate the new era the City finds itself.

A prior submission was made to Council for the discussion of the policy through the media, however after consideration by the Division a workshop was organised with the Councillors to workshop the policy. This took place on 1 March 2005 and serious deliberations ensued. Their input has been taken into consideration. In addition invitations were extended to the general public through the Aloe with copies of the policy sent to the Khomas Regional Council and National Monuments Council for input. A period of three months has passed with no feedback from these mentioned parties. It is with this background that this submission is made for the Street Naming and Renaming Policy to be approved as a guiding framework.

The desire to rename streets is attributed mainly to the change in the political landscape of the Country. Prior to independence we had street names that did not recognise the historical contributions of the majority people of the country, especially those who led the struggle for democracy so as to guarantee the majority of Namibians human dignity. This had to change so that those who were disadvantaged by the past street renaming policy can be accommodated. Shortly after Independence, major routes were renamed to include our first President and others who fought for the restoration of human rights for the majority of Namibians.

This exercise is important for street names are place markers and focal points through symbolism, association and remembrance, and therefore must provide an opportunity to celebrate the diversity of our residents. In this, the City will create space for all residents to define themselves as one people with the aim of promoting community harmony.

Therefore the new application for naming streets will be assessed in terms of the proposed Policy as the submission combines the existing street naming guidelines. In conclusion this new policy intends setting out the necessary process and consideration to be given when streets are named and renamed in the City of Windhoek.

Policy Statements

The City recognises that the names of streets in Windhoek can have a significant influence on the future development and sense of community within an area. The changing of street names is not without social impact. Thus arbitrarily changing a

> street name is to change one's own address. This is a source of confusion for it affects a whole bunch of documents like drivers license, passport, identification card, insurance policy, land title, maps, stationary, correspondence, among others. In addition to this, the indiscriminate renaming of city street names, in effect, reduces that status of its tax paying citizenry and gives them the impression of being disempowered.
>
> With this in mind, the City is determined that the renaming of its streets will be undertaken in a planned and co-ordinated way, which respects and acknowledges the city's heritage and environment. The City will only consider an application for renaming and naming of a street in terms of its accepted policy and process.'

[16] I note that Ms Bassingthwaighte dwelt at length on the Annexures produced by respondent, all in an effort in support of appellant's case that he and others residing in the two streets should have been consulted before the two streets were renamed. The emphasis in the submission is that respondent failed to comply with its own policy. She however, accepts that 'appellant in his replying affidavit pointed out in what respects the policy was not complied with'. Her reliance on this ground was, correctly in my view, criticised by Mr Marcus who, in the course of his submission pointed out that appellant had not challenged the policy and in fact quoted the appellant as saying, in his replying affidavit – 'I have no problem with the 1997 and the expanded 2005 policy statements framed by the respondent for naming and renaming of streets and places in Windhoek' and that 'the Policy directives are reasonable and fair'. And, to add to that, no-where in his replying affidavit does appellant say he did not receive respondent's said newsletter or that the consultation explicit therein was inadequate.

[17] In para 56 of his heads of argument Mr Marcus points out the further grounds raised by the appellant in his replying affidavit to show that respondent failed to comply with its own policy, and submitted, correctly in my view, that appellant was not entitled to raise those complaints in reply as in motion proceedings an applicant stands and falls by the allegations contained in his founding affidavit and is not allowed to make out a new case in reply (See *Matador Enterprises (Pty) Ltd t/a National Cold Storage v Chairman of the Namibian Agronomic Board* 2010 (1) NR 212 (HC) at 223–224; *Minister of Health and Social Services & others v Medical Association of Namibia Ltd & another* 2012 (2) NR 566 (SC) paras 71–75; *Administrator, Transvaal & others v Theletsane & others* 1991 (2) SA 192 (AD) at 196H-I.

[18] The court *a quo* dismissed the application in respect of the declaratory relief which respondent had described as an incompetent relief. The court ***a quo's*** reasoning in this connection was that appellant had no standing to apply for that relief on behalf of others who could make the application themselves. For that, the court relied on *Wood & others v Ondangwa Tribal Authority & others* 1975 (2) SA 294 (AD). Although the court *a quo* was mistakenly referring to paragraph 2.2 of the original notice of motion the reasoning equally applies to paragraph 2 of the amended notice of motion. Therefore nothing turns on the mistake. In para 23 of her heads of argument counsel for the appellant said:

> 'The court did not however consider the fact that the appellant himself had an interest in the matter as a resident and rate and taxpayer of Windhoek. It is trite that a resident and municipal rate and taxpayer, has a direct and substantial

> interest in the finances of the municipality in whose jurisdiction he resides by virtue of the legal relationship between them.'

Ms Bassingthwaighte, in footnote 19 of the heads of argument, refers to *Grobbelaar & others v Council of the Municipality of Walvis Bay & others* 2007 (1) NR 259 (HC) at 269B-F and the authorities referred to there. Counsel expanded this argument in paras 24–26 of her heads. However, she did not say anything in connection with the invitation extended to the general public in respondent's newsletter of March 2005. More importantly, the argument contained in paras 23–26 of the heads seems to me to amount to an attempt to mislead the court; it completely ignores appellant's case as spelt out both in his founding and replying affidavits. That case is that he and others in the said two streets should have been consulted. Even his motivation for a declaration order shows that Mr Vaatz is acting on behalf of all those persons who appended their names in the so-called supporting statements. The dismissal of the application in this respect cannot be faulted.

[19] Much in contention in this matter was whether the decision by respondent to rename Uhland and Gloudina Streets was an administrative decision subject to the provisions of Art 18 of the Constitution. The opposing views of counsel who appeared in this matter will be considered hereunder. Article 18 provides:

> 'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

To begin with, we were referred by counsel for the respondent to Chapter 12 of the Constitution. Article 102 (3) states:

> 'Every organ of regional and local government shall have a Council as the principal governing body, freely elected in accordance with this Constitutional and the Act of Parliament referred to in Sub-Article (1) hereof, with an executive and administration which shall carry out all lawful resolutions and policies of such Council, subject to this Constitution and any other relevant laws.'

The relevant law in this case is the Local Authorities Act 23 of 1992 which in s 30(1)*(a)* gives the Council power:

> 'to confer honours upon any person who has <u>in the opinion of the local authority council</u> rendered moratorius services to its residents.'(Underlining mine.)

Mr Marcus submitted that the section grants wide discretionary powers to the council, when deciding to honour persons, and that the exercise of such discretion in *SA Defence and Aid Fund & another v Minister of Justice* 1967 (1) SA 31 (C) at 35A-D was described as follows:

> 'On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed, in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding

> that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter.'

Corbett J (as he then was) referred to a number of decided cases in support of the above statement. The learned judge went on to say at 35E:

> 'It is clear that the pre-requisite to a declaration under s 2 (2) that an organisation is an unlawful organisation falls into the latter of the two above-mentioned categories. Not only does this appear from the opening words of the sub-section, "if the State President is satisfied . . . '"

Compare the wording (quoted above) in that case with the words 'in the opinion of the local council' in the present case. Talking of validity one might add the statement of law that appears in another case – *R v Sachs* 1953 (1) SA 392 (A) at 400C, Centlivres CJ remarks as follows:

> 'The courts will treat as invalid the act of persons to whom powers are entrusted when they have not observed the procedures prescribed by the statute which confers such powers.'

Nowhere in appellant's founding affidavit does he state that respondent in this case acted *mala fide* or from ulterior motive or failed to apply its mind to the matter. On the contrary, appellant himself described the policy on which respondent acted as reasonable and fair.

[20] Mr Marcus further submitted that the council was the arbiter of what acts are beneficial to the common good of its residents and of when to recognise persons who, in its opinion, have, through outstanding service helped to further it; the

definition of the common good involves complex political and socio-economic issues; the decision of what conduct is meritorious will necessarily be coloured by that definition by council; it involves a value judgment on the part of the council which suggest that the decision to confer honours is one of policy and is not administrative in nature. He illustrated this submission in the following paragraphs of his heads:

> '26. Whether or not conduct is meritorious maybe uncontroversial as in sports, where a resident of the city wins a gold medal at the Olympics, or controversial when it comes to the determination of outstanding political achievements. As this case shows: one person's hero is the other person's villain.
>
> 27. To recognise a person for his political achievements maybe a bad political decision. But "bad politics is something for the electorate to decide". It is not the role of the court to interfere with a policy decision by council on that basis or to engage in debates how and where the honour should be conferred.'

In my opinion these submissions have a lot of merit.

[21] Lastly, Mr Marcus referred to *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 146. In that case the Constitutional Court described the power of the President as closely related to policy not administrative in nature. The court said:

> '[146] The remaining s 84(2) powers are discretionary powers conferred upon the President which are not constrained in any express manner by the provisions of the Constitution. Their scope is narrow: the conferral of honours; the appointment of ambassadors; the reception and recognition of foreign diplomatic representatives; the calling of referenda; the appointment of commissions of inquiry and the

> pardoning of offenders. They are closely related to policy; none of them is concerned with the implementation of legislation. Several of them are decisions which result in little or no further action by the government: the conferral of honours, the appointment of ambassadors or the reception of foreign diplomats, for example. It is readily apparent that these responsibilities could not suitably be subjected to s 33.'

[22] One of the complaints raised by appellant in his founding affidavit (part thereof) was that respondent has not used the formalities it normally uses for making such decisions as the renaming of streets. I believe this refers to the provisions of the policy. (See para 44 of appellant's heads of argument). But, as Mr Marcus correctly pointed out, the policy is only a guideline to assist the council in the exercise of its functions and should not be interpreted to become a straight-jacket inhibiting it in the exercise of its wide discretionary powers when it confers honours; any departure from its provisions should not be regarded as fatal; the policy contains various considerations that may be taken into account and it is unavoidable that in given circumstances one consideration will trump another consideration.

[23] I do not intend any disrespect to the efforts put in by counsel for the appellant if I say, as a matter of fact, that the counter argument or submissions she makes to the contrary are not tenable. Ms Bassingthwaighte's main argument centres on Art 18 of the Constitution to say that the respondent is an administrative body as contemplated in terms of Art 18 of the Constitution. She concedes however that Art 18 'does not apply to every act by an administrative body'. She is right to observe that this court in the *Ministry of Finance & others v Ward* 2009 (1) NR 314 (SC) considered the line of cases in which courts in Namibia and South Africa had set guidelines on the approach to determine whether an act of an administrative

body is an administrative act, and that these guidelines are not set in stone and each case must be judged on its own facts and circumstances. She accepts, as has been emphasised in various cases, that determining whether a power or function is public is a notoriously difficult exercise: there is no simple definition or clear test to be applied. It will be to no avail to refer to all the cases counsel mentioned in illustration of the difficulty the courts encounter in determining whether an act is administrative or not. Suffice it to say that counsel accepts that 'Executive action will be reviewable . . . if the functionary acts *mala fide,* misconstrues the nature of its powers, or acts arbitrarily or irrationally'. It can be pointed out again that the founding affidavit of appellant in this matter makes no such allegations against respondent.

[24] I have studied the thorough discussion of the problem and conclusions of the Constitutional Court in South Africa in the well-known case *South African Rugby Football Union* and I found that discussion extremely helpful and of great pertinence to the present case. I adopt the reasoning in that decision. Consequently I find that Art 18 of the Constitution does not apply.

[25] However, if the conclusion to which I have come is said to be wrong and Art 18 is said to apply, I still feel that the appellant cannot succeed on that basis. One has to look at the Article more closely. I therefore revert to it in order to determine whether the fairness required by it is met in this matter. In the *Theletsane* case above at 206A-B, Smalberger JA referred to a statement by Tucker LJ in *Russell v Duke of Norfolk & others* [1949] 1 ALL ER 109 (CA) at 118, namely.

> 'The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.'
> (See *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646D-F.)

In *Du Preez & another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231H-232E Corbett CJ asked the question as to what the duty to act fairly demanded. The learned Chief Justice went on to quote what Lord Mustill said in *Doody v Secretary of State for the Home Department & other Appeals* [1993] 3 ALL ER 92 (HL), namely:

> What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the Courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) since the person affected usually cannot make worthwhile representations without

> knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.' (Again my emphasis.)

In the same context in the *Theletsane* case at 206C-D Smalberger JA further commented:

> 'What the *audi rule* calls for is a fair hearing. Fairness is often an elusive concept; to determine its existence within a given set of circumstances is not always an easy task. No specific, all-encompassing test can be laid down for determining whether a hearing is fair – everything will depend upon the circumstances of the particular case. There are, however, at least two fundamental requirements that need to be satisfied before a hearing be said to be fair: there must be notice of the contemplated action and a proper opportunity to be heard.' (My emphasis.)

Applied to the facts of the present matter, Mr Vaatz and all those he purports to speak for, cannot be heard to say they were not given notice of the contemplated renaming of their streets when the possibility of such renaming of their streets was brought to the attention of all residents of Windhoek in the invitation that was sent to them several years before the contemplated action was taken. The appellant and all those affected should have been aware of the consequences that would naturally follow the renaming of a street (which appellant enumerated in his affidavits *ad-nauseum*), they had ample opportunity and indeed a duty, to express their views. To expect the Municipal Council of Windhoek to again give notice to all the residents when a particular street was to be renamed is, in my view, to place an unduly tiresome and onerous burden on the respondent; the complaint that the appellant was not fairly and reasonably treated cannot be sustained. (See *Minister of Mines*

and Energy v Petroneft International 2012 (2) NR 781 (SC) at 794 para 43. Also see *S v Shangase* 1963 (1) SA 132(AD) where at 147C-D Williamson JA referred to the statement by Tindall J in the case of *Sachs v Minister of Justice* 1934 AD 11, at 22, about the general rule in regard to the duty of officials to hear the other side, where he said: 'An executive officer exercising such powers, is not required to follow the methods of procedure followed in a court of law'.

[26] For the above reasons the appeal must fail.

Costs

[27] The court *a quo* exercised its discretion and awarded costs against appellant on a scale as between attorney and client. I have looked at the language used by appellant in describing even persons or parties who were not parties to the proceedings and agree with Parker J's description of his statements in para 15 of his judgment. I find no reasons to interfere with the exercise of the court *a quo's* discretion in this regard. In *Protea Assurance Co Ltd v Januszkiewicz* 1989 (4) SA 293 Goldstone J described as contempt of court and deserving of an order of costs *de bonis propriis* the serious attack made by the opposing attorney upon the honesty and integrity of plaintiff and his attorney. The learned judge referred to *Attorney-General v Crockett* 1911 TPD 893 where Bristowe J said *inter alia* at 926:

> 'The jurisdiction cannot be used to gratify the spleen or vindicate the wounded feelings of a particular individual.'

The whole conduct of Mr Vaatz in the present case, in particular his aspersions on Minister Ithana deserve nothing less than the order made by Parker J; it amounts to nothing other than him venting his spleen.

[28] I make the following order:

The appeal is dismissed with costs.

_____
MTAMBANENGWE AJA

_____
MAINGA JA

APPEARANCES:

Appellant:	N Bassingthwaighte
	Instructed by Andreas Vaatz & Partners
Respondent:	N Marcus
	Instructed by Nixon Marcus Public Law Office