THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 20747/2014

In the matter between:

CHRISTOS KOUKOUDIS	**FIRST APPELLANT**
PROC CORP 160 (PTY) LTD	**SECOND APPELLANT**

And

ABRINA 1772 (PTY) LTD	**FIRST RESPONDENT**
INTER-ACTIVE TRADING 626 (PTY) LTD	**SECOND RESPONDENT**

Neutral Citation: *Koukoudis v Abrina* (20747/2014) [2016] ZASCA 95 (2 June 2016)

Coram: Leach, Majiedt and Pillay JJA and Victor and Baartman AJJA

Heard: 14 March 2016

Delivered: 2 June 2016

Summary: Delict ─ claim for damages for abuse of rights ─ requirements of such a claim ─ requirements not established.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tolmay J sitting as court of first instance):

'1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

(a) The plaintiffs' claims are dismissed.

(b) The plaintiffs are ordered to pay the defendants' costs jointly and severally, the one paying the other to be absolved, such costs to include:

(i) The costs of 27 and 28 January 2014 until 11h30;

(ii) The qualifying expenses of Prof P Botha, Mr S Pienaar, Mr P Dacomb and Mr Regenass.

(c) Each party is to pay its own costs for the period that the matter stood down:

(i) for preparation of the application for absolution of the instance and,

(ii) due to the unavailability of counsel.'

JUDGMENT

Leach JA (Majiedt and Pillay JJA and Victor and Baartman AJJA concurring)

[1] The respondents sued the appellants for damages they had allegedly suffered by reason of a delay in the completion and occupation of new business premises which, so they contended, had been due to the appellants having abused a right to object to the establishment of a township in terms of the Town-planning and Townships Ordinance 15 of 1986 (the Ordinance). Their claim was upheld in the Gauteng Division of the High Court, Pretoria and the appellants were ordered, jointly and severally, to pay the first respondent the sum of R237 644,08 and the second respondent the sum of R985 746,75. Their appeal against that order is with leave of the court a quo.

[2] A myriad of issues were raised in the appeal relating to the cause of action, as well as causation and the damages allegedly suffered. In order to deal with these issues it is necessary to set out the relevant background circumstances in some detail.

[3] On 30 July 2003 the first appellant, Mr Koukoudis, became the registered owner of certain immovable property in Centurion, within the municipal area of the City of Tshwane Metropolitan Municipality (the Municipality) to whom he pays rates and taxes. He also conducts a business known as Mr Biltong at Shop 53 in the Mall@Reds, a shopping centre in Centurion owned by the second appellant, Proc Corp 160 (Pty) Ltd (Proc Corp), a company of which Mr Koukoudis is both a director and a 12% shareholder.

[4] The second respondent, Inter-Active Trading 66 (Pty) Ltd (Inter-Active), is the owner of a steakhouse known as Thunder Ridge Spur which previously carried on business in premises at the Mall@Reds pursuant to a written agreement of lease concluded with Proc Corp with effect from 30 April 2003. Its directors are a Mr A G Lubbe and his son, who share the same forenames. I shall therefore refer to them individually as Mr Lubbe Snr and Mr Lubbe Jnr and collectively as the Lubbes. The sole shareholder of the second respondent is the Lubbe Family Trust. Effectively, Inter-Active is the alter ego of the Lubbes who are also the directors of the first respondent, Abrina 1772 (Pty) Ltd (Abrina) which is also wholly owned by the Lubbe Family Trust.

[5] The relationship between Proc Corp, as landlord, and Inter-Active, as tenant, was not one free of difficulty. From the outset of the lease in 2003, problems arose as the building had not been completed when Inter-Active was due to move in and set up the steakhouse. Inter-Active had to arrange to do certain of the outstanding work, and thought that the cost it had incurred in doing so excused it from paying certain of its rentals as a result. Proc Corp disputed this and, when Inter-Active failed to pay, it cut off its electricity. This led to court proceedings to have the electrical supply restored. Subsequently, Inter-Active issued summons to claim payment of an amount it alleged Proc Corp owed in respect of the cost of completing the building.

[6] Problems also arose in regard to charges levied in respect of rates increases that Proc Corp sought to pass on pro rata to Inter-Active; whether VAT was payable on certain items; whether Proc Corp had provided parking for Inter-Active at the complex as agreed in terms of the lease; and precisely what rentals were due from time to time. In addition, when Inter-Active wanted to sell the steakhouse, Proc Corp was only prepared to consent to the proposed

purchasers taking over the business if certain conditions were met. As a result the sale fell through.

[7] The rights and wrongs of these disputes are unnecessary to decide and are mentioned merely as background circumstances to explain the tension between the two parties. However, the relationship between Proc Corp and Inter-Active soured and, before the lease expired at the end of April 2008, the Lubbes had decided not to renew it.

[8] In the meantime, Mr Lubbe Snr had acquired the immovable property more fully described as the Remaining Extent of Portion 92 of the farm Swartkop 383, Registration Division JR Gauteng (Portion 92). He used Abrina as the business vehicle for doing so, and it became the registered owner of the property on 25 November 2005. Mr Lubbe Snr testified that he decided to erect what he described as 'his own building' on Portion 92 in which to conduct the streakhouse business. I must mention that Portion 92 is also situated in Centurion, and only some 600 metres from the Mall@Reds.

[9] In order to build the envisaged business premises on Portion 92, which was zoned as 'agricultural' at the time, it was necessary to have the property declared a township under the Ordinance.[1] Mr Lubbe Snr testified that the development of a township was something beyond his expertise, and so he sought the assistance of a town planner, Mr Hugo Erasmus. In terms of the provisions of s 69(1) of the Ordinance, it was necessary for the owner of land to apply in writing to the local authority within whose jurisdiction the land is situated to establish a township. Consequently, on 24 January 2006, Mr Erasmus applied to the Municipality on behalf of Abrina to establish a township

[1] In terms of Proclamation No R161 of 31 October 1994, the administration of the Ordinance was assigned to the Gauteng Province from the former Province of the Transvaal.

on Portion 92. Following this, the Municipality published a notice under s 69(6)(*a*) of the Ordinance calling for comment on the application. A few days later, on 30 January 2006, the first appellant, Mr Koukoudis, filed the following written objection to the establishment of the proposed township under s 69(7) of the Ordinance:

'1. The above application including the primary and secondary rights applied for, are objected to.

2. The application conflicts with town planning principles and the interests of residents.

3. The application does not comply with and the applicant has not complied with requirements, principles and guidelines regarding land development and the environment provided for in the Constitution, the Development Facilitation Act, 73 of 1998, the National Environmental Affairs Act, 107 of 1998 and others.

4. The application does not address fundamental issues such as; environmental impact assessments, traffic issues, and other requirements of the acts referred to in paragraph 3.

5. The application as lodged cannot proceed until the issues raised have been dealt with and addressed.'

[10] Mr Koukoudis was not the only one who objected to the township. Further objections were filed on behalf of a Mr Pelser by a firm of town planners, as well as by a Mr Swanepoel who, in turn, was supported by another 19 signatories. All these objections, save that of Mr Koukoudis, were subsequently withdrawn. In a written representation to the Municipality dated 17 September 2007, Mr Erasmus stated that 'the fact that the objectors withdrew their objections is also an indication that they have accepted the fact that the area is in the process of change from residential to commercial'. Whether that was an accurate reflection of the true state of affairs, or whether the other objectors had been pressurised into doing so after having been

personally visited by the Lubbes or Mr Erasmus is, at the end of the day, of no consequence in the light of the manner in which the case eventually presented itself.

[11] Be that as it may, both Mr Lubbe Snr and Mr Erasmus went separately to see Mr Koukoudis to attempt to persuade him to withdraw his objection. When Mr Lubbe Snr asked why he was objecting, Mr Koukoudis told him to speak to Mr Anastasiadis. The latter is the managing director of Proc Corp and appears to be its driving force. On a subsequent visit, Mr Lubbe Snr asked Mr Koukoudis what he had against him, to which the reply was 'I have a right to object'. When Mr Lubbe took Mr Koukoudis by the arm he was told in no uncertain terms that he should not touch him, and later he received a letter from an attorney in which it alleged that he had poked Mr Koukoudis with his finger and was informed that any further contact with Mr Koukoudis should take place through the attorney concerned. A visit by Mr Erasmus to Mr Koukoudis was also unsuccessful and he, too, was referred to Mr Anastasiadis.

[12] When approached by Mr Erasmus, Mr Anastasiadis told him that he refuses to withdraw the objection. As in fact Proc Corp had not filed an objection, the utterances of both Mr Anastasiadis and Mr Koukoudis, together with the fact that Mr Koukoudis did not attend the hearing before the municipal committee regarding Abrina's application to develop a township, nor the subsequent appeal proceedings to the Townships Board, (which was attended by a representative of Proc Corp), leads to the inevitable conclusion that the first appellant also acted on behalf of Proc Corp in lodging the objection. I shall refer to this later.

[13] Applications for the development of townships take their time, as was also the case in this instance. The Lubbes appear to have become impatient. In

about September 2007, Abrina started to construct the shopping centre it wished to develop on Portion 92 by doing the necessary earthworks, and in December 2007 it started building. This was premature and unlawful, and on 25 February 2008 the Municipality issued it with a contravention notice in respect of its building activities. This read as follows:

'During an investigation on 25/02/2008 at above-mentioned premises it was found that you are in contravention of s 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 read with regulation A25(10) of the National Building Regulations promulgated by virtue of Section 17(1) read with Section 17(3)(b) of the National Building Regulations and Building Standards Act 103 of 1977.

In that you are erecting a building (NEW RESTAURANT) in prospect of which plans and specifications are to be drawn and submitted in terms of the Act without having obtained the prior approval in writing of the City of Tshwane beforehand.

You, the owner/occupant are hereby ordered in terms of Section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977, read with regulation A25(10) of the National Building Regulations promulgated by virtue of Section 17(1) read with Section 17(3)(b) of the National Building Regulations and Building Standards Act 103 of 1977, to cease all building work immediately and to submit the necessary plans and specifications within 21 days to the City of Tshwane after receipt hereof and obtain written approval, or alternatively to demolish such building and remove the material of which such building consisted and any other material or rubbish from the premises.

Failing compliance with this notice, legal proceedings will be instituted against you without further notice. This notice is final and no extension of time will be granted.'

[14] When this notice was ignored, the Municipality brought proceedings as it had threatened. In Pretoria High Court case 12170/2008, in which Abrina was cited as first respondent and the Lubbes as second and third respondents respectively, the Municipality sought an order directing them to cease all building work. Subsequently, on 18 March 2008, an order was granted by consent, postponing the matter sine die with the respondents (ie Abrina and the Lubbes) undertaking not to conduct any building work on the property pending

a decision of the Municipality's planning department of an application under s 7(6) of the National Building Regulations and Building Standards Act 103 of 1977[2] to permit provisional authorization to proceed with the erection of the building.

[15] Abrina immediately proceeded to apply for such provisional authorisation. But it was not prepared to await the outcome of its application, and notwithstanding its undertaking incorporated in the court order of 18 March 2008, it recommenced its building operations the following month, presumably expecting that its application was a mere formality and would be approved. However its expectations proved to be false as, on 3 June 2008, the Municipality refused the application in the following terms:

'Your application for provisional authorization to carry on with the erection of building work on the above-mentioned property in accordance with Site Development Plan No SDP1/1484/07 and Building Plan No B5/620/08 is hereby declined, due to the following reasons:

1. Site Development Plan is not approved, therefore building plans cannot be recommended for approval.
2. Township not yet promulgated, there is an objection in terms of rights.
3. No service level agreement & guarantees for service in place.
4. Comments from internal departments outstanding.

4.1 Regional Spatial Planning

4.2 Transport Engineering

4.3 Roads & Stormwater

4.4 Electricity

5. Rights not being promulgated
6. Bulk service agreement & guarantees not in place for service.'

[2] The section reads as follows:
The provisions of this section shall not be construed so as to prohibit a local authority, before granting or refusing its approval in accordance with subsection (1) in respect of an application, from granting at the written request of the applicant and on such conditions as the local authority may think fit, provisional authorization to an applicant to commence or proceed with the erection of a building to which such application relates.

[16] In the meantime, on 12 March 2008, the Municipality's city planning committee had approved Abrina's application to establish a township. On learning of this, Mr Koukoudis, on 15 April 2008, lodged an appeal to the Townships Board against that decision. Then, on 13 June 2008, after the Municipality had refused Abrina's application for provisional authorisation to build, and in the light of the fact that Abrina had in fact been building from April 2008, Mr Koukoudis instituted interdict proceedings to prevent Abrina from continuing to build in contravention of the existing town planning scheme.

[17] The events of 22 August 2008 are unlikely to be fondly remembered by the Lubbes. The Municipality, presumably aggrieved at the breach of the undertaking incorporated in the court's order of 18 March 2008, set down case number 12170/2008 for further hearing and Vorster AJ issued an order that all construction work cease forthwith. He further ordered Abrina and the Lubbes to submit the necessary plans and specifications within 10 days from the date of a final decision of the Gauteng Townships Board relating to the development of the proposed township and to obtain a written approval of such plans; alternatively should such approval not be granted, to demolish any building on the premises. They were further ordered to pay costs on the scale as between attorney and client.

[18] Not only was the Municipality's application granted against them, but Mr Koukoudis's interdict application, also heard that day by Vorster AJ, was also successful. In that matter, Abrina and the Lubbes were restrained and interdicted from continuing with any building or building related activity on Portion 92 in conflict with the provisions of the Tshwane Town Planning Scheme of 2008. The Municipality was also restrained from granting approval

of any building plans on the property, or from granting provisional authorisation to commence or proceed with the erection of a building on the property in terms of s 7(6) of Act 103 of 1977, in conflict with the Tshwane Town Planning Scheme. Once more, Abrina and the Lubbes were ordered, jointly and severally, to pay the costs of that application on a scale as between attorney and client. A counter-application in which Abrina and the Lubbes sought an order authorising the Municipality to grant an order allowing them to provisionally continue with the building process, was also dismissed.

[19] Abrina and the Lubbes applied for leave to appeal against the interdict granted in the application of Mr Koukoudis. Leave was refused on 9 September 2008, but they did not give up and applied to this Court for its leave to appeal. Unsurprisingly, given the unlawfulness of their actions, that application was dismissed on 26 May 2009. However, despite the terms of interdict, in November 2008 Abrina continued with its building operations, doing plumbing work and certain civil engineering on the site.

[20] In the meantime, on 2 October 2008, Mr Koukoudis's appeal to the Townships Board was heard. On 6 February 2009, the Townships Board recommended to the MEC of the Gauteng Department of Economic Development that the appeal should be dismissed. In response to this, an attorney acting on behalf of Mr Koukoudis made written representations to the MEC in the form of a reply to the Townships Board's reasons. He recorded the premature building construction activities of which Abrina had made itself guilty without approved building plans; argued that Abrina had not established a need for a restaurant and that such issue had not been properly addressed by the Townships Board; and submitted that it was undesirable for there to be a further development in a residential area for a number of reasons, including the impact which the development would have on traffic.

[21] Despite all his efforts, the MEC dismissed Mr Koukoudis's appeal on 2 July 2009. Meanwhile, notwithstanding the court orders against it, Abrina had continued with its building activities on Portion 92. In October 2009 pilot computer software was installed and the branding of the steakhouse it had built was completed. This was all done before 28 October 2009 when the Municipality finally approved the application under s 7(6) of the National Building Regulations and Building Standards Act 103 of 1977 and granted provisional authorisation to build. In addition, on 24 November 2009, acting under s 14(1A) of that Act, the Municipality gave Abrina consent to use the building before a certificate of completion had been issued. Then, by notice of the Provincial Gazette of 7 December 2009, a township was declared on Portion 92. Two days later, approval of the building plans was given. It appears from this that, essentially, most of the building had been erected either unlawfully or in conflict with court orders restraining the building operations.

[22] Having eventually built the new business premises on Portion 92, the Lubbes relocated their steakhouse there. Thereafter, the Lubbes, or more correctly their alter egos, the two respondent companies, instituted action against the appellants, alleging that the initial objection by Mr Koukoudis and the appeal to the MEC when it was over-ruled, had been unlawful, and seeking to recover damages allegedly sustained through the project having been delayed. As mentioned at the outset, this claim was upheld in the court a quo.

[23] On the face of it, Mr Koukoudis had acted in the exercise of rights bestowed upon him by the Ordinance. The respondents, however, alleged that he had acted with the specific intention of frustrating the development and causing them financial harm. In doing so they relied upon the so-called

'doctrine of the abuse of right' which recognises that a right may be used in circumstances which render its exercise unlawful.

[24] The phrase 'abuse of right' has been criticised, because a person who abuses a right in fact acts without a right. See eg Prof J L Neels *Tussen regmatigheid en onregmatigheid: Die leerstuk van oorskrying van regte en bevoeghede (Deel 3)* 2000 TSAR 469 at 487-490 where the suggestion is made that the phrase 'excess of right (or entitlement)' would be more appropriate. Similarly, Planiol and Ripert in their *Traite elementaire de droit civil* commented:

'[T]he formula "abusive use of rights" is playing with words: if I use my right, my act is *legitimate*, and when it is *not legitimate*, I am exceeding my right and *acting wrongfully* . . . *(A) right ceases where an abuse begins*, and there cannot be an "abusive use" of any right for the irrefutable reason that one and the same act cannot be both *in accordance with the right* and *contrary to it*.' (Emphasis in original.)[3]

Thus a person either acts within the limitations of a right, in which event the act shall be lawful, or beyond it bounds, in which event the action will be unlawful.[4] Nevertheless it is a phrase of convenience commonly used in legal parlance and so, despite its strict theoretical short-comings, I shall use it for purposes of this judgment.

[25] The unlawfulness of an action purportedly performed in terms of a right, but for an improper purpose, has been recognised by the courts of this country. For example, in *Van Eck*[5] this court had to deal with the seizure of bags of rice, not for the purpose allowed in terms of a war measure regulation, namely, to afford evidence of a contravention, but in order to obtain possession of the rice

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[3] *Traite elementaire de droit civil* (10th ed. 1926), t. 2 at No. 871, p. 298, this translation being cited by the Canadian Supreme Court in *Houle v Canadian National Bank* [1990] 3 SCR 122;1990 SCR Lexis 710, 1990 CANLII 58 (SCC).

[4] See eg J Neethling T M Potgieter P J Visser *Law of Delict* 5ed (2006) at 102-103 on the authorities there cited.

[5] *Van Eck NO, and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A).

so as to further a food distribution scheme. In finding this to have been unlawful, Davis AJA, in giving the unanimous judgment of this Court, said:

'Mr Milne also argued that the motive with which the seizure was effected was irrelevant, for, he contended, if a man has a right to do an act, then the motive from which he exercises that right is immaterial; even if he did it from a wrong motive, that cannot affect the validity of his act. That proposition is, apparently, as a general rule correct in regard to the English law . . . But it is of more doubtful application in our law. *Gothofredus*, in his Commentary on the *Regula Juris*, "*Jure suo qui utitur, nil dolo facit*" (*D*.50.17.53), points out (p. 245 *in fin*.) that there may be an exception to this rule in the case where "*nocendi, tantum animo jure suo quis utatur, neque enim malitiis hominum indulgendum est*" (where anyone uses his right only with the intent to injure another, for people's malice is not to be favoured). *Voet*, 39.3.4, *Schorer*, Note 58, and *D*.39.3.1.12; 39.3.2.9 may be cited in favour of the existence of this exception; and see *Smith v. Smith* (1914, A.D. 257, at p. 272 *in fin*.); *Union Government v Marais* (1920, AD 240 at 247). I shall not, however, pursue this matter . . . for Mr. *Milne's* proposition can have no application to the present case. We are here not dealing with an unlimited right to seize, conferred by law on the appellants and their officers and employed by them from improper motives; we are dealing with a limited right, conferred on them by law for one purpose only. *While professing to have exercised that right for the purpose for which alone it was conferred, in reality they have used it to effect quite a different purpose, for which the law gave them no right to use it ─ a purpose indeed which that law by clear implication forbade.*' (Emphasis added.)

[26] It has also been held to have been unlawful for a competitor to induce a rival's employers to terminate their employment, not in order to benefit from such employees' services but to cripple or eliminate the business of the commercial adversary.[6] And in *Bress Designs*[7](albeit in the field of alleged unlawful competition rather than administrative law) Van Dijkhorst J stated, correctly in my view, that:

'. . . a clear line should be drawn between acts of interference with the interests of another when the object is the advancement of a person's own interest and such acts whose sole or

[6] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & others* 1981 (2) SA 173 (T) at 200F-G.
[7] *Bress Designs (Pty) Ltd v G Y Lounge Suite Manufacturers (Pty) Ltd & Another* 1991 (2) SA 455 (W) at 475H - 476A.

dominant purpose is the infliction of harm for its own sake. Whereas in law the advancement of one's own economic interest is, generally speaking, a legitimate motive for action, there can be no doubt that the community would condemn as *contra bonos mores* the malicious destruction or jeopardising of a sound business through the marketing of identical furniture at cut-throat prices for reasons of personal vindictiveness. I have no doubt that not only by the community in general but also in the field of ethics and morality of the furniture manufacturers such conduct is not acceptable, though copying each other's products may be the order of the day.'

[27] The question of acting in pursuance of a right solely to harm another was also addressed by this court in *Millward v Glaser* 1949 (4) SA 931 (A) where, by way of example (the facts were very different[8]) the following was said in regard to the law relating to neighbours:[9]

'If I dig a well upon my property, I may be fully aware of the fact that by doing so I am going to diminish the supply in my neighbour's well. . . . If I do so with the expected result, for the advancement of my own interests, my neighbour will have no ground of complaint. Where, however, I do so not to further my own interests but in order to injure him, he may have a remedy.'[10]

[28] In regard to the requirements of a claim for abuse of right, Prof van der Walt has said the following:

'It is difficult to formulate a general criterion for determining whether an abuse has been committed. No hard-and-fast rules can be enunciated. Generally speaking there is an abuse when the defendant has acted with the sole (or predominant) motive of harming another . . . and without advancing a significant interest of his or her own. The subjective requirement of a harmful motive can, it is submitted, convert a prima facie lawful act into a wrongful one only if there is a substantial discrepancy between the harm suffered by the plaintiff and the advantage gained by the defendant . . . . Where . . . the defendant's conduct serves to advance

[8] The wife of a deceased alleged that her late husband's mistress had by deliberate and intentional acts of persuasion made a will leaving his estate to her.
[9] At 942.
[10] A similar comment is to be found in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 107G-108A.

a reasonable interest of his or her own, a bad motive is not in itself sufficient to indicate wrongful conduct.'[11]

[29] Moreover, as Neethling, Potgieter and Visser also point out[12] the basic question is one of wrongfulness. In that regard it must be remembered that our law is generally reluctant to recognise claims for pure economic loss, such as the claim with which we are here dealing, as there always being the risk of indeterminate liability to a wide array of persons.[13] The element of wrongfulness functions to curb such liability. It requires the conduct to be of such a nature that public or legal policy considerations require it to be actionable.[14] As stated by the Constitutional Court in *Le Roux*, wrongfulness 'ultimately depends on a judicial determination of whether . . . it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct' that 'would in turn depend on considerations of public and legal policy in accordance with constitutional norms'. [15]

[30] The weight of academic opinion is to the effect that conduct should not be regarded as being unlawful where it advances a legitimate right of the person exercising it, even if in doing so another may be prejudiced. This is apparent from the comment of Prof van der Walt quoted above.[16] Furthermore Prof J E Scholtens, after an exhaustive examination of the old authorities and the law in several other jurisdictions, concluded: [17]

'[T]hat in order to constitute an abused right in our law both the subjective requirement that an act be done with the sole or predominant intention to harm another and the objective

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[11] M van der Walt *Delict: Principles and Cases* 2 ed (1979) para 77.
[12] J Neethling T M Potgieter P J Visser *Law of Delict* (5 ed) at 107.
[13] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) para 24 and the cases there cited.
[14] *Country Cloud* paras 23-25.
[15] *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* [2016] ZACC 4;2011 (3) SA 374 (CC) 2011(6) BCLR 577 CC para 122.
[16] See further Neels '*Tussen regmatigheid en onregmatigheid: Die leerstuk van oorskrying van regte en bevoegdhede*' *(Deel 4)* (2000) TSAR 643 at 645-649.
[17] J E Scholtens *Abuse of Rights* (1958) 75 SALJ 39 at 49.

requirement that the act serve no or anyhow no appreciable or legitimate interest should be present.

The question is tentatively put forward whether there should not be a further requirement, viz that no man would have reasonably acted in the manner complained of but for the intention to injure. This would exclude liability for acts which a man is reasonably at liberty to do, for instance refusing access to his property to a neighbour. Under this requirement there would be no liability even if the refusal of access would harm the neighbour and were inspired by malicious motives. Abuse of right is essentially an excess of right. What constitutes this excess will depend on the nature of the right and circumstances of the case.'

[31] This in my view is a correct reflection of our law, certainly in regard to the first two requirements ─ as stated, albeit obiter, by this court in *Brummer v Gorfil Brothers*.[18] In this case it is unnecessary to go further and to consider the further requirement tentatively advanced by Prof Scholtens as the matter may be resolved by considering the first two. In considering the question of the appellants' liability, one must therefore have regard, first, to the subjective requirement, namely, whether the objection to the development was done with the sole or predominant intention to harm the respondents (or the Lubbes); and then, second, the objective requirement, namely, whether the objection served no appreciable or legitimate interest of the appellants.

[32] Before doing so, however, one further aspect needs to be addressed. Counsel for the appellant argued, initially with confessed hesitation but with waxing enthusiasm, that a claim could not lie where the right allegedly abused was one bestowed by statute. In developing this contention, reliance was placed upon comments of the late Prof R McKerron in his seminal work *The Law of Delict* to the effect that liability would flow from an abuse of a proprietary right but not from the abuse of other rights.[19] This would appear to be the position in

[18] *Brummer v Gorfil Brothers Investments (Pty) Ltd & andere* 1999 (3) SA 389 (SCA) at 412A-C.
[19] R G McKerron *The Law of Delict* 7ed (1971) at 49-50.

certain Continental jurisdictions, in particular France and the Netherlands.[20] Reference was also made to the views of the French author, Josserand, who distinguished between three categories of rights: first, an absolute right in respect of which the interests of society demand that there shall be no check on its exercise so that, in their regard, the question of abuse cannot arise; second, an egoistic right which may be exercised at will provided some material interest is promoted; and third, a so-called altruistic right which can only be exercised with due regard to the interest of others.[21]

[33] The active engagement of communities in the affairs of municipalities is encouraged in our democratic constitutional system.[22] In matters of local government, including municipal land use planning, the right to object to the establishment of a township and the right to appeal against the approval of a township form part of a legislative scheme, founded upon the Constitution, that both entitles and encourages individual members of society to actively participate in municipal decision-taking. In the light of this, it was argued by the appellants that the rights they had exercised fall within the category of 'absolute rights' as envisaged by Josserand; that the interest of society demands that such may be used without any fear of recourse; and that insofar as their exercise might cause a delay, that is the price to be paid for arriving at an informed decision on future land use development as contemplated by the legal framework in a demographic system of participatory governance.

[34] The argument is not without its attraction and is in line with the view that 'courts would embark on a very perilous and questionable course should they enter into an inquiry as to motives, when the act which has caused injury is

[20] Scholtens at p 48.
[21] See H C 'Gutteridge *Abuse of Rights*' 15 (1933-1935) *Cambridge Law Journal* 22 at 27-29.
[22] See eg s 152 of the Constitution and the Local Government: Municipal Systems Act 32 of 2000.

permitted by law.'[23] The contrary standpoint is that, in all circumstances, it should be regarded as wrongful to exercise a right with the sole or predominant intention to cause harm to another and without appreciably advancing a legitimate interest. Thus Prof Paul-Andre Crepeau has argued that:

'Essentially it must be recognized that, whatever its origin, a right can never be absolute. Every right has a particular purpose: it is conferred to meet social imperatives or economic needs, not to assuage instincts of vengeance or spitefulness. . . . A legal order, which is a pale reflection of the moral order, unavoidably must accommodate egoism; in no case should it tolerate malice.'[24]

[35] My prima facie opinion is that no right, whether statutory or otherwise, should be regarded as absolute and capable of being exercised solely to cause harm without fear of the actor being held liable for abuse. For present purposes, I am therefore prepared to accept, without finally deciding, that the abuse of a statutory right is actionable and that, in the context of the present dispute, the fact that Mr Koukoudis exercised a statutory right is in itself no bar to the appellants being held liable. But due to the facts of this case, for the reasons that follow no final decision need be taken on this issue.

[36] As already mentioned, the respondents' claim for damages is founded upon an allegation that Mr Koukoudis opposed the development not to advance any self-interest (the objective requirement of a claim for abuse) but solely to inflict harm upon the respondents (the subjective element). In the event of both these elements being established, considerations of public and legal policy would in my view regard such conduct as being unlawful and actionable. Indeed I understood it to be accepted by the appellants that if the respondents

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[23] P M Mignault Pierre Basile *'The Modern Evolution of Civil Responsibility*' (1927), 5 Can. Bar Rev. 1 at 12 also cited in *Houle*.

[24] P A Crepeau *'Le contenu obligationnel d'un contrat'* (1965) 43 Can Bar Rev 1 at 26 – a translation cited in *Houle.*

had discharged the onus of proving that to have been the case, liability would follow.

[37] Dealing first with the subjective requirement. The respondents placed considerable emphasis upon the contents of the minutes of a board meeting held by Proc Corp on 3 December 2007, from which it appeared that Proc Corp's management regularly scrutinised the Gazette for notices relating to proposed developments in the area and, if there were any, objected to such developments. These objections were not made in Proc Corp's name but were lodged either in the name of its associated property management company, Anaprop, or as happened in the instant case, in the name of one of its members. On the strength of this, it was argued that Proc Corp would have acted in its own name had it not been motivated by an ulterior purpose and that its predominant intention had been in the past to object to and delay other developers in order to allow it to make provision in its own shopping mall for the amenities envisaged in any new development, thereby keeping other developers 'out of the market'. This, so the argument went, was what happened in this case as well.

[38] The court a quo placed considerable reliance upon this, stating the following in its judgment:

'A perusal of these minutes makes it clear that Proc Corp, through their managing agent Anaprop had a strategy to object to developments that it regarded as competition, with the purpose to delay those developments in order to stifle competition. There was a difference of opinion between the directors of Proc Corp pertaining to the strategy followed. Some of the directors were concerned that these objections could be perceived as economic sabotage. It is clear that there were often no *bona fide* town planning issues at stake in these objections. These minutes confirm Mr Lubbe and Mr Erasmus's testimony that the objections were made with ulterior purposes. It also supports the evidence that Mr Anastasiadis was, in his capacity as managing director of Proc Corp, behind these objections. It can therefore be accepted that Proc Corp used Mr Koukoudis to object in the same way as Anaprop was used to oppose

developments as set out in the minutes. On an analysis of the evidence it would seem that the only logical inference is that Mr Koukoudis lodged his objections to benefit Proc Corp. The question that will ultimately have to be answered is if this strategy was lawful.
From the above the only logical inference that can be drawn is that the objections and appeal were lodged with an ulterior purpose to delay and frustrate other developers and specifically the plaintiffs.'

[39] In my view, however, although correct in concluding that the objection was intended to benefit Proc Corp, the court a quo erred in reaching the conclusion that there was an ulterior purpose. The fact that Proc Corp had attempted to cover the market on previous occasions does not mean that it was not seeking to protect its own investment in the Mall@Reds but attempting to ruin the Lubbes. Even if its actions in relation to other developers were questionable, an issue not ripe for issue in these proceedings, the issue was not whether it had always acted unlawfully but whether it acted unlawfully and in abuse of its rights in the present case.

[40] When Mr Lubbe Snr testified he specifically alleged that the first appellant had objected in order to destroy him.[25] This may have been his suspicion, but it was clearly an inference of fact that fell solely within the domain of the trial court to determine in the light of the evidence placed before it. His statement that the first appellant wished to destroy him was, without a factual basis having been laid, clearly inadmissible. Significantly, in an affidavit opposing an application brought by Proc Corp in June 2008 to evict Inter-Active from the leased premises at the Mall@Reds after the lease had expired, Mr Lubbe Snr stated that Proc Corp's intention was 'to financially ruin' Inter-Active and the companies he controlled 'which intention they have on numerous occasions verbally conveyed to me'. Despite this, when he testified in the court a quo he made no mention of any such threats. He would surely have

[25] He used the Afrikaans expression 'wou my vernietig'.

done so if they had been made, and the inevitable inference is that the 'numerous occasions' to which he had referred in the previous proceedings were figments of his imagination.

[41] In any event, without direct evidence of such threats, whatever suspicions Mr Lubbe Snr may have harboured as to Mr Koukoudis's motive in objecting were irrelevant, and the trial court ought neither to have admitted his evidence in that regard nor had any regard thereto. Similarly, the statement of Mr Erasmus that he assumed that there may have been a vendetta between Mr Lubbe Snr and Mr Anastasiadis, was pure speculation and lacked evidential value. Despite this, as appears from the passage from the judgment quoted above, the court a quo accepted the allegations of both Mr Lubbe Snr and Mr Erasmus which it felt had been 'confirmed' by the minutes. In this it misdirected itself.

[42] For the reasons already given, it can be accepted that Mr Koukoudis, both in objecting and appealing, acted not only on his own behalf but also on behalf of Proc Corp. In the light of this, the respondents argued that the fact that Proc Corp relied upon Mr Koukoudis to lodge the objection, and that Mr Koukoudis failed to attend the hearings before either the Municipal Planning Committee or the appeal to the Townships Board, showed that he had acted with an ulterior purpose. But Mr Koukoudis himself had a not insubstantial shareholding in Proc Corp and there was thus a mutuality of interest between them. In the light of this common interest, it is irrelevant whether Mr Koukoudis or the representatives of Proc Corp conducted the actual prosecution of the objection proceedings. The fact that Proc Corp did not object in its own name is, in these circumstances, no reason to infer that the objection was motivated by malice or ulterior purpose.

[43] Nor does the fact that Standard Bank was prepared to take up the premises in the Mall@Reds vacated by Inter-Active, at a high rental, show an ulterior motive on behalf of the appellants, as the respondents further contended. From Mr Lubbe Snr's own evidence, Standard Bank became a potential lessee (and indeed took over the premises in due course) in 2008. This was more than two years after the written objection had been filed by Mr Koukoudis. It appears to be an irrelevant consideration in regard to whether the objection in itself had been lodged for an ulterior purpose.

[44] The respondents also argued that the terms of the objection as originally lodged, and the manner in which the matter proceeded thereafter, serve to indicate an ulterior motive on the part of Mr Koukoudis. The objection read as follows:

'1. The above application including the primary and secondary rights applied for, are objected to.

2. The application conflicts with town planning principles and the interests of residents.

3. The application does not comply with and the applicant has not complied with requirements, principles and guidelines regarding land development and the environment provided for in the Constitution, the Development Facilitation Act, 73 of 1998, the National Environmental Affairs Act, 107 of 1998 and others.

4. The application does not address fundamental issues such as; environmental impact assessments, traffic issues, and other requirements of the acts referred to in paragraph 3.

5. The application as lodged cannot proceed until the issues raised have been dealt with and addressed.'

The respondents stressed that Mr Koukoudis had not proceeded with the objection in these terms but ultimately based it squarely on the absence of need, desirability and sustainability of the proposed township, those being requirements found in the regulations promulgated under the Ordinance. In addition, they relied on the fact that Mr Koukoudis had deviated from the

original objection, but had argued that there was no need for a further restaurant in the vicinity although, so Mr Lubbe Snr testified, whilst the application was pending Proc Corp had allowed a number of food outlets to be opened in its shopping mall. All of this, so it was argued, justified an inference of malice.

[45] I am unable to accept this argument. The application to establish a township was terse in itself, and it could hardly have been expected of the appellants to object in detail to issues which were not known to them. And the fact that they did so by way of what was, effectively, a standard form that they had used in the past, is in itself no reason to find that they had acted maliciously with intent to cause harm. Moreover, the evidence of the respondents' own town planner, Mr Schoeman, who was called as an expert, was that objections are as a matter of course filed in broad terms and without the objectors 'doing their homework' and that the relevant issues crystallise as part of the process that includes appeals against township board decisions. And even if the appellants allowed other food dispensing outlets to be established in their mall, their objection does not lead to the most probable inference being that they wished to do the respondents harm.

[46] Importantly, in October 2007, Mr Lubbe Snr was approached by Proc Corp through its managing agent and reminded of the option that Inter-Active had to renew its lease for the premises it was renting in the Mall@Reds. And when Mr Lubbe Snr testified, he stated that after the expiry of the lease, Proc Corp had made an offer to Inter-Active to allow it to remain in the premises until they were needed.[26] At the end of the day, Inter-Active remained in occupation of the premises in the Mall@Reds until November 2009. These facts appear to me to be wholly inconsistent with an inference that the appellants intended to destroy Inter-Active's business. Had that been the intention, rather

[26] Volume 14 at 2675.

than seeking Inter-Active's business and allowing it to continue trading, one would have expected Proc Corp to have refused to make rental space available to Inter-Active to conduct business after its lease had expired.

[47] Indeed, Proc Corp clearly desired to have a Spur restaurant in the Mall@Reds. Spur is a countrywide franchise having family appeal, and the evidence of Mr Lubbe Snr establishes that the Thunder Ridge Spur had proved to be extremely popular. A popular and successful franchise restaurant would obviously attract custom, and the number of people passing through a shopping mall carries the advantage of potential customers for all businesses conducted there. It is therefore understandable that Proc Corp invited Inter-Active to conclude a fresh lease shortly before its lease expired and that, after the expiry, Proc Corp allowed Inter-active to stay on in its mall. None of this speaks of an intention to injure.

[48] This also has important consequences relevant to the objective requirement that has to be established by the respondents, to which I now turn. Portion 92, to which the Lubbes eventually relocated to the Thunder Ridge Spur, is only some 600 metres from the Mall@Reds. It is common cause that the franchisor of the Spur steakhouse chain, Spur Group (Pty) Ltd, had set its face in principle against Spur steakhouses being situated close to each other, presumably for the reason that franchisees competing for custom devalue each other's franchise. Indeed the franchise agreement the Lubbes had with the Spur Group granted the Lubbe Family Trust, as franchisee, a right of first refusal in respect of the grant of any other Spur steakhouse situated within a radius of one kilometre from the Thunder Ridge Spur. One of the consequences of relocating the Thunder Ridge Spur to Portion 92 would be, as appellants' counsel put it, to 'sanitise' the Mall@Reds for another Spur steakhouse. Taken with the popularity of the Thunder Ridge Spur, as firmly established by the respondents'

own evidence, this would clearly be detrimental to the volume of foot traffic through the Mall@Reds. Simply put, customers who would have been drawn to a Spur steakhouse in the Mall@Reds would instead go to Portion 92, a few hundred metres away. Consequently, the objection, if successful, would have held a substantial commercial advantage to the appellants. And as the Mall@Reds represented a capital investment by the appellants of some R320 million, the objection served as an attempt to preserve the advantages of this substantial asset.

[49] In order to attempt to bolster their case, the respondents relied on the fact that neither Mr Koukoudis nor Mr Anastasiadis gave evidence. In the light of this, and relying upon well-known authorities,[27] it was argued that the motive as to why they had objected to the development was within their exclusive knowledge and that their failure to testify justified an inference that their evidence would damage their own case. Failure to testify by a party who is available and whose actions lie at the core of the dispute is, of course, a factor to be taken into account, but in doing so regard must be had to the strength or otherwise of the case that party has to meet.[28] Whilst less evidence may well suffice to establish a prima facie case where the issue at stake is peculiarly within the knowledge of the opposing party, as is here the case, that cannot convert a case founded upon pure speculation and faulty inferential reasoning into a prima facie case. In my view the respondents case was so devoid of cogency that there is no justification to draw any so-called 'adverse inference' against the appellants for failing to testify nor to conclude as a result that they had intended to harm the respondents and had not in fact sought to protect their commercial interest in the Mall@Reds.

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[27] In particular *Galante v Dickinson* 1950 (2) SA 460 (A) at 465, *Elgin Fireclays Limited v Webb* 1947 (4) SA 744 (A) at 749 and *Gericke v Sack* 1978 (1) SA 821 (A) at 827.
[28] *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (A) at 133E-F.

[50] Counsel for the appellant argued that the intention or motive in objecting to the development 'was obviously and clearly to protect commercial interest by preventing the shopping centre from becoming sterilised for a Spur franchise: every shopping centre wants a Spur restaurant'. That is indeed the most probable inference to be drawn from the evidence. That being so, both the objection and the subsequent appeal against it not being upheld served to protect a legitimate financial and commercial investment that the appellants had in the Mall@Reds. As against that, there is no reason to draw an inference that sole or dominant intention or motive on the appellants' part was to cause personal ruin or financial harm to the respondents.

[51] I should mention that it was argued by the appellant that the social interest which Mr Koukoudis enjoyed and shared with other objectors who, like he, are resident within the municipal area, had not been shown to have been absent. A resident does have a social interest in whatever development may take place, particularly a commercial development, in a residential area, but I did not understand that Mr Koukoudis, in truth, relied upon this in his appeal which was based solely upon the commercial interest he shared with Proc Corp. Consequently, in considering the question of whether he abused his right to object, I have not taken his social interest into account.

[52] In any event, in the light of what I have set out above, the court a quo erred in concluding that the respondents had successfully established that the appellants should be held liable for having abused their right of objection. In reaching that conclusion it found that the question whether an interest was protected by the exercise of a right was to be answered in the light of 'reasonableness and fairness', which 'implies the weighing-up of the benefits that the exercise of the right has for the (appellants) as against the prejudice suffered by the (respondents) as a result thereof'. The authority relied upon in

support of this proposition were cases dealing with nuisance and disputes between neighbours, arising from the impingement of one neighbour's right by the exercise of the right of another. In the present case, of course, the appellants enjoyed the right to object. The respondents, on the other hand, had no right to develop Portion 92 which was impaired by the objection. All they had was the entitlement to apply to develop the land within the statutory prescripts relevant to such an application. The matter therefore did not turn, as the court a quo appears to have thought, on whether bounds of reasonableness had been exceeded and rendered the objection wrongful, but whether the respondents had established both the subjective and objective requirements for an abuse of rights ie whether the appellants had intended to cause the respondents harm and had not acted to advance or protect a legitimate interest. In respect of both requirements the respondents failed to prove an abuse.

[53] The appeal must therefore succeed. As the respondents failed to establish a valid claim, it is unnecessary to deal with the diverse arguments that were ventilated in this court in regard to the questions of causation and damage, and whether the effect of whatever delays caused by the objection were off-set by the respondents' illegal building operations conducted in breach of their statutory obligations and in defiance of court orders granted against them.

[54] Turning to the question of costs, there is no reason for costs not to follow the event. Both sides were agreed, correctly, that the matter was of a nature of the employment of two counsel and was justified. There are however certain particular matters relevant to costs that must be mentioned.

[55] It was recorded in the judgment a quo, that the respondents had conceded that they were liable for the costs of 27 and 28 January 2014 until 11h30. In

paragraph 1 of the order granted by the court a quo, it was specifically ordered that the respondents are to pay those others costs, and that order can stand.

[56] At the end of the respondents' case, the appellants applied unsuccessfully for absolution from the instance. In paragraph 2 of the order of the court a quo, the appellants were ordered to pay the costs of that application jointly and severally, although each party was ordered to pay its own costs for the period that the matter had stood down to allow the parties to prepare for the application. The appellants argued that they should be entitled to those costs as absolution ought to have been granted. The trial judge had a discretion as whether to grant absolution. She probably exercised that discretion on an incorrect factual basis, but it seems to me to be unnecessary to deal with the correctness of her decision in that regard as I see no reason why a specific order as to costs in respect of the absolution proceedings need be made. Applications from the instance and their preparation all form part of the trial proceeding and a specific order relating to those costs seems superfluous. The appellants however suggested that each party should pay its own costs relating to the period the matter stood down for the preparation of the application for absolution. That order operates in favour of the respondents and so, if that's what the appellants wish, I have no difficulty in granting the request.

[57] The court a quo made a specific order that each party should pay its own costs as a result of the matter standing down due to the unavailability of counsel. This was not attacked on appeal. I intend to repeat that provision in the order made below.

[58] The appellants also sought the qualifying expenses of certain expert witnesses in the event of the appeal succeeding. There was no objection by the

respondents to an order in that regard. This, too, will be reflected in the order below.

[59] The following order is made:

'1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

(a) The plaintiffs' claims are dismissed.

(b) The plaintiffs are ordered to pay the defendants' costs jointly and severally, the one paying the other to be absolved, such costs to include:

(i) The costs of 27 and 28 January 2014 until 11h30;

(ii) The qualifying expenses of Prof P Botha, Mr S Pienaar, Mr P Dacomb and Mr Regenass.

(c) Each party is to pay its own costs for the period that the matter stood down:

(i) for preparation of the application for absolution of the instance and,

(ii) due to the unavailability of counsel.'

L E Leach
Judge of Appeal

Appearances:

For the Appellants:	M M Oosthuizen SC Instructed by: Welgemoed Attorneys, Centurion Symington & De Kok, Bloemfontein
For the Respondents:	M C Erasmus SC (with him D J van Heerden) Instructed by: D P Du Plessis Incorporated, Centurion Lovius Block, Bloemfontein