

SOUTH AFRICA / JUDGMENT

Abrina 1772 (Pty) Ltd and Another v Koukoudis and Another (61404/2009) [2014] ZAGPPHC 368 (10 June 2014)

[2014] ZAGPPHC 368**COURT**

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay

CASE / FILE NUMBER

61404/2009

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 61404/2009****DATE:**

10/6/2014

IN**THE MATTER BETWEEN:**

ABRINA

1772 (PTY)

LTD.....1ST

PLAINTIFF

INTER-ACTIVE

TRADING 626 (PTY)

LTD.....2ND

PLAINTIFF

AND

CHRISTOS

KOUKOUDIS.....1ST

DEFENDANT

PROP

CORP 160 (PTY)

LTD.....2ND

DEFENDANT

JUDGMENT

TOLMAY, J:

INTRODUCTION

- [1] The second plaintiff (Inter-Active Trading 628 (Pty) Ltd) (“Inter-Active”) is the owner of a restaurant trading as and under the name Thunder Ridge Spur (“the restaurant”). The first plaintiff (“Abrina”) is the owner of the immovable property on which the restaurant is presently situated. The two plaintiffs have two directors, Mr Andre George Lubbe (Mr Lubbe snr) and his son, with the same name. The sole shareholder of both Abrina and Inter-Active is the Lubbe Familie Trust.
- [2] The first defendant (Mr Koukoudis) is a director and shareholder of second defendant Proc Corp 160 (Pty) Ltd (“Proc Corp”). The second defendant is the owner of the shopping mall known as the Mall@Reds (the mall). Mr Koukoudis is a 12.88% shareholder in Proc Corp. Ioleni Holdings (Pty) Ltd holds 43.56% shares and the Papodopoulos Family Trust holds the remaining 43.56% shares in Proc Corp. Mr Koukoudis also owns a Biltong Shop in the mall and lives in close proximity to the immovable property and opposite the mall.
- [3] Inter-Active rented premises from Proc Corp at the mall from where it operated a Spur restaurant from 30 April 2003. There were various disputes and problems between Mr Lubbe and the landlord, Proc Corp, which resulted in Abrina buying an immovable property, known as the Remaining Extent of Portion 92 of the farm Swartkop 383, Registration Division JR Gauteng (“the immovable property”) with the view of developing the land and constructing a building from where the restaurant could be operated from. Abrina applied for permission to establish a township on this immovable property as was required by the applicable town planning legislation. Mr Koukoudis lodged objections against the town planning scheme and also appealed when the application was granted. The plaintiffs allege that those objections and appeal were mala fide and resulted in the plaintiffs suffering certain delictual damages, and they allege that the defendants are liable to compensate them for the damages suffered. Initially the claim was for R12 733 383-84 after an amendment it was reduced to R3 643 315-40, this amount was later further reduced and finally in their heads of argument defendants contended that Abrina claims R248 846-08 and Inter-Active R1 134 617-75 from the defendants as damages.
- [4] After the plaintiffs closed their case the defendants brought an application for absolution of the instance which was refused. I will deal with the application later on in the judgment. After the refusal of the application the defendant closed their case without leading any evidence.

THE CLAIM AS SET OUT IN THE PLEADINGS

- [5] The plaintiffs alleged that Mr Koukoudis in his personal capacity and as an agent of Proc Corp lodged objections against the application to establish a township and later appealed against it without valid reason and without reasonable belief in the merits of the objection or appeal. It was alleged that the objection and appeal were noted with an ulterior motive. The objection and appeal were therefore mala fide and intended to cause the plaintiffs financial harm.
- [6] It was furthermore alleged that the objection and appeal were noted with the purpose to delay and frustrate Abrina from exercising its right to develop the immovable property. Plaintiffs claim that the objection and appeal were advanced on frivolous reasons and were without any merit and constituted an infringement on the plaintiffs' rights as enshrined in the Constitution[1] as it was an attempt to prevent the plaintiffs to choose their trade and occupation freely in breach of sec 22 of the Constitution and also breached the plaintiffs rights to fair administrative action as set out in sec 33(1) of the Constitution.
- [7] It is alleged that if Mr Koukoudis did not lodge the objection and noted the appeal thereafter, Abrina would have been able to complete the building by no later than 22 November 2008 and Inter-Active would have been able to obtain occupation and would have commenced trading from the new premises from 23 November 2008.

DAMAGES CLAIMED

- [8] After a final amendment the plaintiffs claim the following damages from the defendant:

In respect of Abrina:

- a) The hire of movable ablution facilities and storeroom R 20 684-70
- b) Storeroom and a guardhouse for a security guard R 132 000-00
- c) Additional costs paid to the architect

R 30 000-00

- d) Costs of the town planner R

7 410-00

- e) Legal costs

R

79 436-08

In respect of Inter-Active:

- a) Loss of profit

R 985 746-75

- b) Wasted salaries

R 175 870-00

TOTAL:

R1 134 616-75

COMMON CAUSE EVENTS IN ACCORDANCE WITH A TIME LINE

- [9] In order to put the evidence in perspective it is helpful to first set out the events that occurred, and which are common cause between the parties, with reference to a time line.
- [10] The restaurant operated by Inter-Active occupied premises at the mall from 30 April 2003. The written lease agreement between Inter-Active and Proc Corp terminated as a result of effluxion of time on 30 April 2008.
- [11] Abrina bought the immovable property on which it wanted to build its own premises to house the restaurant on 9 September 2005. The immovable property was registered in Abrina's name on 25 November 2005. The immovable property, despite being situated in the township of Centurion, was still classified as farm land and in order to get land use rights it had to be proclaimed as a township.
- [12] Abrina applied to the City of Tshwane Metropolitan Municipality ("the municipality"), in whose jurisdiction the immovable property fell, to establish a township on the property with the view to let a portion of the building to Inter- Active to conduct the business of a restaurant from the premises. In order to do so Abrina submitted an application on 24 January 2006 in terms of sec 96 of the Town Planning and Townships Ordinance, 15 of 1986 ("the Ordinance"), to establish a township on the property.
- [13] On 30 January 2006 Mr Koukoudis lodged an objection against the application of Abrina in terms of the provisions of sec 96(3) read with sec 69(7) of the Ordinance. For unknown reasons Abrina was only notified of this objection on 28 September 2006. There were initially also other objectors against the rezoning but these objectors withdrew their objections during the latter part of 2007, and prior to the hearing before the City Planning Development Committee (the Committee) which took place on 12 March
2008. During the hearing the application was approved in terms of sec 98 of the Ordinance.
- [14] On 15 or 18 April 2008 Mr Koukoudis lodged an appeal in terms of sec 104 of the Ordinance, against the approval in terms of sec 98 of the ordinance. The matter then had to be referred to the Townships Board which had to hear the appeal and make a recommendation to the MEC of the Gauteng Provincial government of Economic Affairs, this appeal was heard on 2 October 2008.
- [15] During September 2007 Abrina commenced with the earth works for the building. During January 2008 Abrina commenced with the construction of the building without the necessary approval being obtained as required by sec 4 of the National Building Regulations and Building Standards Act 103 of 1977 ("the Building Standards Act"). On 6 March 2008 the

municipality brought an application against Abrina. Mr Lubbe (snr) and Mr Lubbe (jnr) to stop construction due to the lack of approval. Mr Lubbe (snr) and Mr Lubbe (jnr) agreed to an order to stop construction pending an application in terms of sec 7(6) of the Building Standard Act. The municipality undertook to make a ruling in terms of sec 7(6) within 7 days of the order. Abrina ceased all building works but when the Municipality failed to make a ruling on the Application within the 7 days as agreed Abrina again commenced with the construction of the building.

[16] The application in terms of sec 7(6) was refused by the municipality on 3 June 2008. The application was then renewed by Abrina on 3 July 2009 and granted by the municipality on 22 October 2009. This allowed Abrina to continue and complete construction.

[17] In the meantime and on 30 April 2008 the lease agreement came to an end. Inter-Active for reasons already alluded to, did not extend it. Inter-Active could also not relocate to the immovable property, consequently it kept on occupying the premises at the mall and kept on paying the monthly rental, in terms of a so called holding over clause contained in the lease agreement.

[18] On 6 February 2009 the Township Board recommended the dismissal of the appeal and recommended to the MEC for Finance and Economic

Affairs Gauteng that the immovable property be declared a Town. On 31 March 2009 Mr Koukoudis gave his reasons for opposing the

dismissal. On 2 July 2009 the MEC declared the property a township. On 24 November 2009 a temporary occupation certificate was issued. On 7 December 2009 the township was proclaimed in the Provincial Gazette and on 9 December 2009 the building plans were approved.

THE EVIDENCE ON THE MERITS OF THE CLAIM

[19] The relationship between Mr Lubbe in his capacity as representative of Inter- Active and Proc Corp as landlord was riddled with disputes right from the onset of the lease agreement. Some of the disputes resulted in litigation between the parties.

[20] Proc Corp brought 3 applications in terms of sec 32 of the Magistrate's Court Act 32 of 1944 (Magistrate's Court

Act) in order to attach all the movables of Inter-Active as security for claims of rental and arrear rentals. Inter-Active made payments to Proc Corp for the rentals and remained in occupation of the premises. There was also an application issued for an automatic rent interdict by the defendants in terms of sec 31 of the Magistrate's Court Act. There is also still a pending dispute under case no 29322/2003 between Inter-Active and Proc Corp with relation to the initial instalment costs of the Spur at the mall, dating back to 2003.

[21] Due to the delays primarily caused by the objections Abrina commenced with construction of the building as previously mentioned without approval being obtained as prescribed by legislation. After Abrina commenced with construction on 13 June 2008 Mr Koukoudis launched an urgent application to stop the construction. On 22 August 2008 an interdict was granted against Abrina, Mr Lubbe and his son to stop construction.

[22] During the same period and on 17 June 2008 Proc Corp brought an application that was enrolled for 17 June 2008 seeking the eviction of Inter- Active from the shop it occupied at the mall on an urgent basis, this application was struck from the urgent roll and finally heard during November 2008. Judgment was ultimately given during the first quarter of 2010, by that time however Inter-Active had already moved to its new premises.

[23] Mr Lubbe gave extensive evidence about the history and difficulties experienced during Inter-Active's tenancy at the mall. He explained how these difficulties led to a very acrimonious relationship between himself and Proc Corp's representatives

as well as Anaprop (Pty) Ltds' ("Anaprop") representatives who was Proc Corp's managing agent at the mall.

[24] He testified extensively about the reasons he believes the defendants did not have bona fide objections against the development but merely did it to frustrate the plaintiffs. Mr Erasmus, the town planner who assisted Abrina at the time and Mr Schoeman, the town planner who testified as an expert on behalf of the plaintiffs were of the view that, in the light of the fact that there was a vast difference between the size of the proposed development of Abrina, which was relatively small consisting of $\pm 900\text{m}^2$ and the mall which was at that stage nearly $20\,000\text{m}^2$, that Abrina's proposed

development could not conceivably pose a commercial threat to the mall. Therefore they were of the view that Abrina's development posed no threat to the defendants' commercial interests and the objections were for ulterior purposes. It was put to plaintiffs' witnesses that Proc Corp wanted a Spur at their mall and that by opening one $\pm 600\text{m}$ from the mall defendants would effectively be sterilized from opening a Spur. The defendants however did not come and testify to explain how the lack of a Spur would affect the mall or what influence it had on Proc Corp's or Mr Koukoudis's interest in the mall. Mr Lubbe testified that there were other restaurants at the mall and that the absence of a Spur would not have any effect on the mall.

[25] Town planners who were to testify as experts for both parties , in their joint minutes were in agreement that the objections raised by Mr Koukoudis were tenable town planning issues that were worthy of consideration by the municipality. Mr Schoeman adopted the stance that the delay in order to have the matter heard by the Committee of the Municipality cannot be placed before the door of Mr Koukoudis. Consequently he did not support the plaintiffs' claim as far as it included the period before the lodging of the appeal. This led to the amendment by plaintiffs of the period claimed for. In the summary of Mr Schoeman's evidence he adopted the view that, based on the methodology used by him the date of, but for the appeal lodged by Mr Koukoudis, proclamation would have been 22 November 2008.

Mr Dacomb, the expert of which the Defendants gave notice, in his summary adopted the view that at the earliest the Plaintiffs would have been able to obtain proclamation of the Township was by August 2008. Because Mr Schoeman utilized the actual timeline post dismissal of the appeal, the experts then agreed that

the most probable date of proclamation would have been the date suggested by Mr Schoeman, namely 22 November 2008. Mr Schoeman

was adamant in his evidence that the completion of the project was delayed as a result of the appeal noted by Mr Koukoudis.

[26] Mr Lubbe testified that Mr Koukoudis apart from being a shareholder in Proc Corp also had a Biltong Shop in the mall. His residence was also in close proximity to the immovable property as he lived in a complex opposite the mall and Abrina's new development is situated $\pm$ 600m from the mall. It was common cause that Mr Koukoudis, under these circumstances, had a right to lodge an objection in terms of town planning legislation against the development envisaged by Abrina. Mr Lubbe testified that before the Committee of the Municipality made the decision to approve the Application brought by Abrina, he approached Mr Koukoudis with a view to discuss the objection and to try and persuade Mr Koukoudis to withdraw the objection. The evidence of Mr Lubbe was, that once it became clear to Mr Koukoudis who Mr Lubbe was, and what the purpose for the approach was, he informed Mr Lubbe not to speak to him about the objection but referred him to Mr Anastasiadis. Mr Anastasiades is the managing director of Proc Corp and was according to Mr Lubbe the person behind the objections. He approached Mr Koukoudis a second time but without any success. Mr Erasmus, the town planner also testified that when he went to discuss the objection with Mr Koukoudis he was also referred to Mr Anastasiades. Mr Erasmus met with Mr Anastasiades but could not persuade him to see to the withdrawal of the objections. He was of the view, after this discussion, that Mr Anastasiades's objections had more to do with a vendetta against Mr Lubbe than with town planning concerns. Mr Anastasiades and Mr Koukoudis who attended the proceedings did not come and testify to counter these allegations or clarify the perceptions of Mr Lubbe and Mr Erasmus. It was clear from the evidence that Mr Lubbe and the representatives of the defendants were involved in constant disputes, the detail of these disputes and who was to blame for it, are in my view irrelevant but that they contributed to the objection and appeal is quite obvious, especially in the absence of evidence by the defendants.

[27] Minutes of a director's meeting of Proc Corp held on 3 December 2007 were received as evidence by agreement between the parties. Mr Lubbe's evidence pertaining to Mr Koukoudis's role and the real motive for the objection and appeal is borne out by these minutes. The relevant portions are quoted and read as follows: (my underlining)

"About the risk money also we put a very expensive way to protect our interest here. I mean protecting the shopping centres against other possible business. We go through the provincial gazettes and we check and make objections and we go to court also from a fire risk management we, Anaprop has doing

(sic) everything on that aspect. So from the risk management where we can enhance it is in backups and disaster situations, where it can happen, of course all this things (sic) cost more money continuously and the more we regulate our business, the more money we are going to spend, you must understand that."

"Anastasiadis: And I don't get a salary, secondly it is developments, here we extended that one, two, three now is the fourth time we are going to extend it. Don't expect from the director like , to do that. It's going to that. We protect the interest I think in court this year, not in court in arbitrations to protect the interests here, to delay things, so we can cover the market here. That is not the job of the managing director."

"Mike: The asset management function does a number of things. Some of them are have been done, (sic) a lot has been by Kiriakos, one of them would be for instance trying to prevent competitive growth in the area, that is definitely something it would do, negotiating

interest rates etc. those are asset management functions. You then"

"Anastasiadis: You are going to have that when you object it. It is up to you guys here and myself to vote if we are going to protect our interest or not, up to now the understanding, everybody was happy that we must go ahead and protect. If, for instance you don't want that then we vote here that we must not object to anybody around here because we are attacked left, right and centre because of the objection. So

Lady: okay, I just want to say Article, media articles. Well it was in the Rapport taking Anaprop particularly and the heading was 'economic saboteur'. They were doing things that were involved in economic sabotage, because yes there were objections some of them invalid and some of them being just not valid at all. Okay, with the point being that it delays the projects of other developers unnecessarily, because it got nothing to do with Anaprop and that in doing so it is causing economic damages, okay. I just, my concern really Kiriakos, and I mean if this was another company I would move that we suspend their services immediately, there is a lot of things at stake here. Number 1 is our reputation as Proc Corp, our business reputation. We have contract (sic) with major nationals, Woolworths, Edgars, clicks, Pick and Pay, you name it, now they reading in the newspaper that we are associated with a company that is, I mean if the media is reporting about it number 1, you got to know that, that is quite big, okay, so do we want to risk our reputation, no wait let me finish, because I think the argument of reputation is important, if this was company ABC and they were involved in some shady dealings that the media was report (sic) and I don't know if it is true or not, I would immediately say no thank you I'll just go to another company because our reputation is at stake. We don't want Pick and pay to think, you know what I'm saying We extending all the time, we need and what the article was clearly saying is that Anaprop is not acting in good faith. The other problem and my biggest concern here, okay this is really a big concern is if there is an objection that is irrelevant and the developer decides to sue, I'm sorry the developer is not going to sue Costas who is Costas Georgiades it is going to sue Proc Corp and we are going to face, that is a potential risk, it really is a risk.

Anastasiadis: That was a decision to object.

Lady: by who? (sic)

Anastasiadis: We won't do it (sic) on the name, it would be on (sic) our name it is our risk as Proc Corp risk. If Anaprop does it in their name it is their risk. So it is clear there is no, what you are saying, it is clear. Where the risk lies, it is clear. Secondly you are talking about the national tenants. The national tenants actually told me I'm doing very well on that. I was talking to Mr Brian Stop them as much as you can, no matter what. The third thing is that I told you if the litigation. If you say, if we say here as a board that we must stop that, we must not object, it's okay. If we say that every objection must go through the board, it (sic) still okay. What I'm trying to tell you is that there are clear cut lines here. We don't do it because we like, it (sic) costs us a lot of money, it costs us a lot of time as Anaprop and we do it as Anaprop now I'm talking for the benefit of Proc Corp. and I suppose we're doing it very well, very very well because there are certain Afrikaners you should have notice (sic), with an Afrikaans name, it was in an Afrikaans newspaper, it was an Afrikaans reporter, it was an Afrikaans So everything was together, they were trying to pressurise us actually to lift objections and we stand on our ground and we said thank you very much. So reports, I tell you about reports, about Gensec for instance, many about Old Mutual, the The one or the other.

About MMP reports are going to come, the thing is if they are going to be valid. We did what we were supposed to do. If you got a problem with that, you should have put that question there and say, put a item here and say we must instruct Anaprop not to object or to object selectively, report back

Lady: When did we ever instruct Anaprop to object like then (sic). I mean ... this is the first time we (sic) discussing this. My other problem is this Kiriakos. Can I just

Anastasiadis: the letter onto (sic) the spec of Anaprop. The spec of Anaprop if you got a problem and you want to take that out you must do it on vote. I am not going to vote for it. I think that Anaprop save (sic) a lot of money

Person: Chairperson, you have moved away from that resolution 8.

Mike: The reason, we haven't moved away is Virginia has proposed that the contract not be approved and that it be cancelled because Anaprop is causing reputational damage to the company and exposing it to litigation.

Person: but when they litigate they litigate (sic) Anaprop, not

Lady: No they are going to litigate Proc Corp.

Anastasiadis: No they are no litigate

Mike: Okay, hold it. Okay the issue of the litigation to put everybody at ease. In big companies the auditor's asked for a, all companies we asked for bank confirmation where the bank communicates directly with us on all matters pertaining to the company. In very big companies

we usually get legal confirmation as well, and I normally do that for my clients but because of the newspaper reports I asked Frans to ask the company lawyer for a legal confirmation, I haven't had it yet so maybe you can just push him a bit on it. That legal confirmation spells out what litigation, if any Proc Corp is involved in and what exposure it's got and I have done that it is a standard part of the auditing procedure, so I think before the final financial statements are issued, if there is any litigation involved, it would appear in the financial statements.

Lady: There is just one other thing that I just want to add that, at a council meeting on the 30th of November that they had regarding one of the objection (sic) that Cost Georgiades made. He went and said and this was his exact words that I have a resolution from Proc Corp saying that I can object. I want to see that resolution.

Anastasiadis: I knew that resolution on the basis that

Lady: no, no you can't give a resolution on behalf of the board Kiriakos, I understand that maybe that you, but that cannot be done

Anastasiadis: Why cannot (sic) be done ... I'm the managing director, I've got the authority to object.

Lady: but we haven't even discussed, that is the other issue We haven't even discussed it, you said that you would send it to us beforehand so we can peruse it. We haven't received that, now he is going there and he is saying Proc Corp told me to do that, who do you think they are going to sue, they are not going sue Costa that puts us at risk. I am not

happy with that.

Anastasiadis: We'll let me put that forward. As Anaprop we will take all the precautions, if they sue.

Lady: So if they sue Proc Corp, how are we going to this.

Mike: Anaprop is indemnifying Proc Corp from any damages on that matter.

Lady: on that particular matter or all matter (sic).

Person: that particular matter.

Anastasiadis: that particular matter (inaudible) and if we can go on and we can see what objections we've got. If you want us to withdraw, the board admits that we must withdraw, we will withdraw it.

Lady: no, I'm not saying, there are certain valid objections, but then there are objections that are not valid and then those

Anastasiadis: So this time was not valid.

Lady: I'm just saying Kiriakos.

Anastasiadis: Say that, that one was not a valid

Lady: no that is not my point, my point is can Costas go and say he has a resolution from Proc Corp.

Anastasiadis: Because I have a resolution to give that ... to give that

[28] 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.

[29] 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. These perceptions and inferences could easily have been corrected if the defendants came to testify and explain exactly why the objections were raised, what their motives were and what interests they were trying to protect.

EVIDENCE PERTAINING TO THE DAMAGES CLAIMED

[30] Mr Lubbe gave a detailed explanation pertaining to the rigid control measures put in place by the Spur head office which ensures that the financial affairs of any Spur restaurant is strictly regulated and not easily manipulated. The reports are created in accordance with the so called Pilot Software system. The sales are properly recorded by this system which is supplied by and controlled by Spur Head Office. The reports created are submitted to Mr Greyling, the plaintiff's auditor, who drafts the financial statements.

[31] Mr Lubbe testified that the restaurant at the new premises was much bigger than the one at the mall. The one at the mall could

accommodate between 267 to 272 people and the new restaurant has 389 seatings. Therefore, if Inter-Active moved earlier it would have been able to increase its profit. Mr Greyling, the auditor of the plaintiffs gave evidence pertaining to the damages allegedly

suffered by Inter-Active because of the delay caused by the objection and appeal. He was requested to calculate the turnover,

costs of sales, expenses and consequently the net profit. He initially based his calculations on the earlier date of 1 May 2008

but during evidence and due to the amendment pertaining to the period now claimed for, he adjusted his calculations to 22 November

2008. He utilised the actual figures of the restaurant on a month to month basis. The amounts were then adjusted in order to obtain the actual figure as it appeared on the audited financial statements. He thereafter utilised the actual figures of the restaurant and the adjusted figures for the relevant period as if the restaurant relocated. Mr Greyling explained in detail how his calculations were done and on what basis he did it. He used the Pilot Software system as well as all relevant financial documents to draft the financial statements. He confirmed the loss of net profit for the relevant period to be R985 746-75. Although his method and calculations were attacked under cross-examination nobody on behalf of the defendants testified in support of the criticism raised against his methods and calculations. In my view, he gave a full account of his calculations based on reliable financial source documents. In the absence of any contradictory evidence the evidence of Mr Greyling should be accepted. What little criticism the Defendants expressed against Mr Greyling[2] does not detract from the manner in which Mr Greyling gave his evidence and the fact that he gave a full account of what he deemed to be the prospective net loss of profit.

[32] Mr Lubbe testified that due to the fact that they were moving to a bigger restaurant extra personnel was needed, these people had to be employed and trained prior to the actual opening of the new restaurant at the bigger premises as he did not know when he would be able to open the restaurant. These people had to remain in employment pending the opening of the restaurant. These included kitchen staff and cleaning personnel. This he testified, resulted in the wasted salaries being paid, which is also claimed as part of the damages. I find it strange that Mr Greyling the auditor, who must have had knowledge of these expenses didn't give any evidence pertaining to this aspect. No evidence was led to explain the necessity and details pertaining to the employment of these people. No evidence was led on why exactly it was necessary to employ these people so far in advance and why they could not at least have been used at the existing premises to some extent. Consequently I am not satisfied that Inter-Active proved these damages on a balance of probabilities.

[33] Mr Lubbe testified as follows pertaining to the damages suffered by Abrina:

- (a) As the building was not completed due to the delays referred to he could not obtain insurance for the premises. This led to the necessity to hire ablution facilities, a storeroom and a guardhouse for the security guard. Therefore these costs had to be incurred to secure the premises in the amounts of R20 684-70 and R132 000-00 respectively.

- (b) Legal costs had to be incurred to oppose the appeal, in the end the amount was limited to R79 436-08. I am satisfied that these costs were incurred to finance the legal costs pertaining to the appeal.
- (c) He confirmed that he had to pay Mr Erasmus R7 410-00 to assist him with the objection and appeal, however a portion of the account, according to Mr Erasmus, was incurred pertaining to the hearing before the Township Board and not the appeal, consequently only an amount of R5 523-30 should be allowed in this regard.
- (d) That he had to employ an expert architect to assist him with the objection and appeal. Although he paid the amount it was clearly done in his capacity as director of Abrina. Mr Greaves the expert architect, called by the plaintiff, confirmed that R30 000-00 was paid to him in respect of his services pertaining to the objection but testified that he and his office had no part in the appeal at all. In the light thereof I am of the view that the plaintiffs didn't prove that defendants are liable for this expense.

ABSOLUTION OF THE INSTANCE

[34] At the end of plaintiffs' case the defendants brought an application for absolution of the instance. I refused the

application and stated that I would give reasons in my judgment at the end of the case. I proceed to give those reasons now.

[35] The test that should be applied if an application for absolution of the instance is brought at this stage of the proceedings is trite, a plaintiff has to make out a prima facie case in the sense that there has to be evidence on which a reasonable court "might" or "could" (not "should" or "ought to") find for the plaintiff[3].

[36] The question is thus whether, at this stage, one could draw a reasonable inference of delictual liability on the part of the

defendants, in the sense that there was evidence relating to all the elements of the claim.

[37] Absolution at the end of a plaintiff's case will be granted sparingly, but it will be granted in appropriate circumstances,

where a court should grant it in the interest of justice[4]. The court has to exercise a discretion whether to grant absolution or not taking into consideration also the complexity of the facts and the legal position as was stated[5]:

"But where the factual situation is complex and the legal position uncertain, the interest of justice will often better be served by the exercise of the discretion that the Trial Judge has to refuse absolution. If this is done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in light of all the circumstances of the case, with due regard to all relevant factors. This has the merit of avoiding the determination of issues on the basis of what might prove to be hypothetical facts. It also ensures that there is a full and complete record on which the dispute can be determined with finality not only by the trial Court, but by an appeal Court required to deal with the

matter. This may curtail rather than prolong litigation”.[6]

[38] It was found, in complex matters it is more prudent to refuse an absolution application because:

“..... (T)he facts would still have to be determined and they might prove to be materially different from those evaluated at the absolution

stage. It is not desirable that a case as complex as this should be dealt with on the basis of what the facts might be rather than what they are[7]”.

[39] In the light of the evidence which was led by plaintiff I was of the view that the requirements of a prima facie case were met. My reasoning in this regard will become apparent later on when I discuss the applicable legal principles. The complexity of the matter further persuaded me to exercise my discretion in favour of the plaintiffs. The doctrine of abuse of rights, which find application in this matter, has so far not been applied in any South African judgment as part of the ratio decidendi of a case[8]. This case may also have far reaching implications in town planning law as it may impact on an objector’s right to object in terms of the applicable town planning legislation. For all of the above reasons I refused the application for absolution of the instance.

[40] The costs of the application should follow the result but the matter stood down in order to enable counsel to prepare for the application. The parties were in agreement that it should stand down and I am of the view that each party should pay its own costs pertaining to this period.

APPLICABLE LEGAL PRINCIPLES

[41] It is common cause that the plaintiffs carry the onus to prove, on a balance of probabilities, all the requirements and elements of delictual liability. The evidence illustrates that the defendants’ objections were not related to town planning issues and were done for ulterior purposes but it needs still to be determined whether delictual liability should follow.

[42] It is common cause that the defendants had a statutory right to object to the development of Abrina. The question that needs to be answered in casu, is whether the exercise of a statutory right is absolute or whether it could become unlawful if it is found to be abused. In order to answer this question one must consider the doctrine of abuse of rights (the doctrine).

[43] The notion of the doctrine is the principle that the exercise of a right or power may take place in a manner or under circumstances

that renders the exercise thereof wrongful[9]. It consequently needs to be determined whether the defendants acted wrongfully when they objected and appealed to plaintiffs’

development.

- [44] One finds reference to the doctrine in Roman, Roman Dutch and Dutch Law[10]. The origin of the doctrine is to be found in the views of Ulpianus as contained in D 39.3.1.12 (Lawson's translation):

"Then Marcellus writes that no action can be brought against one who by digging on his own land intercepts another's spring, not even the actio doli; and certainly he ought not to have it, if he did it, not with the intention of hurting his neighbour but of making his own land better."

- [45] After a discussion of the various views and comments of the writers on our common law, Scholtens[11] comes to the following conclusion on the requirements of the doctrine in the common law: (own underlining added for the sake of emphasis)

"It is further suggested that in order to constitute an abuse of rights in our law both the subjective requirement that an act to be done with the sole or predominant intention to harm another and the objective requirement that the act serve no or anyhow no appreciable or legitimate interest should be present."[12]

- [46] The learned author Van der Walt[13] (my underlining) states as follows:

"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 (ad aemulationem, animus vicino nocendi) 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 no interest of his or her own, or only an insignificant interest, and at the same time infringes upon a reasonably substantial interest of the plaintiff, the defendant's improper motive could conceivably indicate unreasonable and therefor wrongful conduct. Where, however, the defendant's conduct serves to advance a reasonable interest of his or her own, a bad motive is not in itself sufficient to indicate wrongful conduct."

- [47] According to the common law, in order to determine whether there was an abuse of a right one needs to look at the mental

disposition of the actor and at the same time determine whether his conduct serves to protect a reasonable interest. One furthermore

needs to compare the interest that is sought to be protected with the effect it will have on the objector. If the harm done to the objector significantly outweighs the interest being protected the act may be regarded as unlawful.

- [48] It follows that the common law, and the application of the doctrine should be considered in the context of the Constitution. The author Jan L Neels[14] dealt extensively with the history, development and application of the doctrine in context of our Constitution in three informative and helpful articles on the subject, he states inter alia as follows[15]:

“Binne die genoemde tendens van ‘n toename van belangrikheid van redelikheid en billikheid in die Suid-Afrikaanse reg, kan ook ‘n verdere ontwikkeling van die in beginsel reeds erkende leerstuk van oorskryding van regte en bevoegdhede verwag word. Die leerstuk moet naamlik gesien word as ‘n uitvloeisel van die korrigerende werking van redelikheid en billikheid”.

[49] In an article in the Advocate Brand AJ deals as follows with the influence of the Constitution on the Law of Delict[16] he states as follows:

“However, time-honoured as it may be, our law of delict is now rendered subject to what has been described as the objective normative value system contained in the Bill of Rights, by section 8(1) of the Constitution. Moreover, the influence of this normative value system on the common law is mandated by section 39(2) of the Constitution. It is with reference to the matrix of this value system that the principles of the common law must be adapted or changed and, if necessary, discarded[17];

And further:

“What is demonstrated by all this, I believe, is that although the overt purpose of the law of delict is to compensate, it also plays a covert role which it prescribes a set of ethical rules for social interaction. As a natural consequence, the law of delict is underpinned by a sense of morality and fairness. In this light it seems logical that constitutional values would have a dramatic

impact on delict, but that the impact would be through the application rather than the amendment of established principles.[18]”

[50] The doctrine is recognised as being part of the general policies and principles of our common law but it is also in harmony with our constitution. Ultimately, the doctrine finds its origin in the dictates of fairness and reasonableness, which is also the very foundation of our Constitution, therefore it should find application. The fact is that a right taken too far might become an injustice and a Court should not hesitate to intervene in such a situation to prevent the harmful effect that may follow.

[51] Once it has been determined that the doctrine finds application, one needs to proceed to determine whether the requirements set by the common law should apply, and whether those requirements provide sufficient safeguards to ensure that there are no undue inroads into an individual's right to participate in a democratic government.

[52] With reference to the subjective requirement Neethling, Potgieter & Visser[19] deals with the important role that the mental disposition of an actor plays. Malice may be an indication of wrongfulness but the reasonable use of one's property (or exercise of one's statutory right) cannot be termed unreasonable merely because of an intention to prejudice another, conduct with the exclusive aim of harming another is, as a general rule, wrongful so that any improper motive renders an act, which would have been lawful, wrongful if it prejudices another without benefitting the actor's reasonable interest.[20] Therefore, one needs not only to look at the motives of the defendants, but also at whether they were protecting their own reasonable interests. The doctrine of abuse of rights would seem to entail to allow for the possibility that an act which would seem to be prima facie lawful is regarded as

unlawful[21]. It is of course so that on the face value of it Mr Koukoudis was exercising a right granted to him in terms of Section 69(7) of the Ordinance, namely to lodge an objection in respect of the application to establish a township. However the mere fact that a person acts in a particular manner permissible in law does not mean that the act is necessarily lawful. In our jurisprudence a cause of action is acknowledged if the act is performed not for the purpose of protecting the right but abusing that right[22]. The question then is, did Mr Koukoudis's objection and appeal become unlawful because of harmful intent coupled with a lack of advancement of a reasonable interest. This can be determined by evaluating the evidence.

- [53] The boni mores will undoubtedly play a role in determining whether there was, in specific circumstances an abuse of rights[23]. There is a very good reason of public policy and/or public interest for working with both a subjective requirement as well as an objective requirement, which reason already appears from *Beckenstrater v Rottcher & Theunissen*: [24] in modern day constitutional parlance this reason will be referred to as the chilling effect on the exercise of a right but in 1955 the Supreme Court of Appeal expressed it in terms of a policy against deterrence:

“The inclusion of absence of reasonable and probable cause among the matters to be proved by the plaintiff was unquestionably part of the ratio decidendi of the case (see pp. 323 to 325) and is binding upon us, unless, indeed, we were satisfied of its incorrectness. I am certainly not so satisfied. Assuming that upon a re-examination of the authorities it might be possible to question the reasoning

whereby the law has come to be stated as it has been, that would be far from establishing the conclusion that such statement was wrong. And in fact, if I may respectfully say so, the requirement of proof of absence of reasonable and probable cause seems to be a most sensible one. For it is of importance to the community that persons who have reasonable and probable cause for prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect or improper motives.”

- [54] The question whether an interest was protected must be answered with reasonableness and fairness in mind. Reasonableness is a relative concept and implies the weighing-up of the benefits that the exercise of the right has for the Defendants, as against the prejudice suffered by the Plaintiff as a result thereof.[25] The reasonableness of the conduct thus depends upon the degree of disproportion between the benefit on the one hand, and the prejudice on the other hand.[26] Malice may be a good or persuasive indication of the unreasonableness of the conduct.[27]
- [55] Consequently, where the benefit which the Defendants derived from their conduct was exceptionally slight but, on the other hand the nature of their conduct was drastic and the harm caused relatively serious, the bounds of reasonableness were exceeded and the act was wrongful.[28]

[56] It is useful and relevant to consider the positive law on what can be termed concrete manifestations of the doctrine of abuse of right in our law. This doctrine has manifested in inter alia cases of neighbour law, malicious prosecution, labour law and wrongful sequestrations. The way that our courts have dealt with abuse of rights under these headings provide useful guidance towards the approach that should be followed in the application of the doctrine, when a statutory right is abused.

[57] The dispute, normally in neighbour law matters, centres on the question whether the defendant exceeded his powers of ownership,

i.e. abused his right of ownership, and therefore acted wrongfully in relation to his neighbour. The owner of land is not entitled to use his land not for the purpose of deriving benefit therefrom, but with the intent to prejudice his neighbour.[29] “In my view a clear line should be drawn between acts of interference with the interest of another when the object is the advancement of a person’s own interest and such acts whose sole or 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 manufacturers such conduct is not acceptable, though copying of each other’s products may be the order of the day.” [30]

[58] In the context of labour law the right of freedom of expression, if used for the purpose of embarrassing a firm of attorneys in assisting clients in labour disputes with the trade union was held to be an unlawful exercise of the right, which ultimately would constitute an abuse[31].

[59] If a businessman systematically induces his competitors’ employees to leave, his conduct would not necessarily be lawful.

In my view, public policy would dictate that, where the aim in inducing a competitor’s employees to terminate their employment is not to benefit from their services but to cripple or eliminate the business competitor, this action be banded as unlawful competition.” [32]

[60] Where a person applies for a Warrant of arrest on the pretext that it is for the assigned purpose to secure the appearance of an accused person before Court, but in fact the purpose was not that but for something else unauthorized, then that person acts mala fide and thus in fraudem legis.[33]

[61] Another example is the case of wrongful sequestration. Here the leading case is that of *Estate Logie v Priest*,^[34] in which the court decided that it was not improper for a creditor to bring an application for sequestration of the estate of a debtor with the purpose to obtain payment of his own debt and not to affect a *concursum creditorum*.

[62] It would seem that in all the instances referred to our Courts have applied the test of a subjective and objective requirement that

need to be met before liability would follow. The doctrine has already manifested itself as part of our law and in my view should

equally apply when the exercise of a statutory right comes under scrutiny.

[63] In order to further enlighten our approach it is helpful to attend to a comparative analysis of the application of the doctrine in other jurisdictions, as it may guide and inform our approach to its application.

[64] Commentators on the Canadian Law of Torts do not, as far as could be ascertained, discuss a doctrine of abuse of rights either as a separate cause of action or as part of general principles and no discussion of the interaction of this doctrine with the

constitutional law of Canada could be found^[35]. However in the matter of *Houle v Canadian National Bank*

[36] a decision from the Supreme Court of Canada, where the matter was concerned with the abuse of contractual rights and delictual liability, the following which was *inter alia* stated by the Court may give an indication of the approach of the Canadian Courts pertaining to abuse of rights in general:

1. “A right taken too far becomes an injustice”;
2. “No right may be exercised with the intent of injuring another or, without a serious and legitimate interest, in a way that is to his prejudice”;
3. “No person may exercise a right with the intent of injuring another, or in any way that may cause damage out of proportion to the benefit he may derive”.

[65] In the matter of *Attorney-General Manitoba & Swan Valley Municipal Airport Commission v Campbell*

[37] the Court was concerned with an Appeal relating to a counter claim and a punitive cost order made against a landowner. The following which was stated regarding the principles of abuse of rights may be relevant:

“On the other hand, if the Defendants’ conduct is wholly devoid of social utility, as where the sole purpose is to cause annoyance and harm, he may be liable for an invasion that might otherwise be privileged” [38].

[66] The aforesaid quotations resonate with our common law as well as with the way that the doctrine has been applied in our jurisprudence.

Interestingly enough the objective and subjective requirements were also applied to determine whether an abuse occurred.

[67] As far as could be determined no assistance could be found in the Australian Law and the commentators in their law of torts do not, as far as can be ascertained discuss a doctrine of abuse of rights as a separate cause of action or as part of general principles[39].

[68] The legal position in England appears to be governed by *Corporation of Bradford v Pickles* 1895 AC 587 (HL)[40] and that is that there is no room for a doctrine of abuse of rights in the law of torts. Gutteridge advocated however for its application as far back as 1935 and stated as follows in an article in the *Cambridge Law Journal*[41]:

“The possibility that a legal right may be exercised with impunity in a spirit of malevolence or selfishness is one of the unsatisfactory

features of our law, and there would appear to be a prima facie case for reform in this direction, a belief which is strengthened by the fact that ours is the only modern system which has not endeavoured to evolve some means by which it may be ensured that a rule of law shall not be transformed into an instrument for the gratification of private spite or the promotion of chicanery.”

He goes further to quote M Josserand a French professor of Law at the time and states as follows:

“In his brilliant treatise on the relativity of rights he advanced the view that the exercise of a right must be governed by its conformity to the social purpose of the rule of law which creates the right. Law is brought into being for the benefit of the community and not for the advantage of the individual. M Josserand cites with approval the statement of Duguit that man, as an isolated being, cannot have any rights so that it is only as a member of an organized community that it is possible for him to acquire a legal personality[42].”

[69] These statements echo the principles of the doctrine of abuse of rights, namely that no right should be exercised with impunity regardless of the harmful effect it may have on others. If a right is exercised with the intent to injure another and without a reasonable legitimate interest being protected it does indeed become an injustice and the Court will be justified in intervening.

[70] I am of the view for all the above reasons, that even statutory rights could never be absolute and in this regard the doctrine of abuse of rights, within the context of the law of delict, presents a limitation on the scope and ambit of the exercise of statutory rights. The doctrine must however be applied with restraint in order to prevent serious inroads on individual rights. Mckerron[43] expressed the same idea:

“But the indiscriminate application of the doctrine [of abuse of rights] is open to the objection that it is likely to get out of hand and result in serious inroads on individual liberty of action ...”

In the application of the doctrine a cautious approach is therefor called for. The application of the objective and subjective

requirements that need to be met to determine whether an abuse has occurred, will in my view, go a long way in ensuring that the necessary restraint is applied. Whether these requirements were met and whether the doctrine should find application should be determined by the facts of each case. If a court apply the doctrine with due regard to the requirements, whilst keeping in mind the Constitutional importance of a participatory democratic government, the application of the doctrine will not unduly prevent proper participation by citizens.

[71] I am of the view that it is appropriate to deal with the matter of Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation

and Environment, Mpumalanga Province and Others[44] in that matter the Constitutional Court dealt with the nature and scope of the obligations of environmental authorities when they make decisions that may have substantial and detrimental impact on the environment. An objection was raised against the construction of a filling station the following that was stated may be relevant to this case:

“[100] The other matter relates to the attitude of the environmental authorities to the objection of the applicant to the construction of the proposed filling station. In the Supreme Court of Appeal they argued that the applicant's opposition to the application for authorisation was motivated by the desire to stifle competition which was 'thinly disguised as a desire to protect the environment'.

In this regard, they pointed to the fact that the main deponent on behalf of the applicant, Mr Le Roux, owns other filling stations in the area. The Supreme Court of Appeal found that 'there appears to be some merit in the contention'. Whatever the merits of the criticism may be, a matter on which it is not necessary to express an opinion, an environmental authority whose duty it is to protect the environment should welcome every opportunity to consider and assess issues that may adversely affect the environment.

[101] Similarly, the duty of a court of law when the decision of an environmental authority is brought on review is to evaluate the soundness or otherwise of the objections raised. In doing so, the court must apply the applicable legal principles. If upon a proper application of the legal principles the objections are valid, the court has no option but to uphold the objections. That is the duty that is imposed on a court by the Constitution, which is to uphold the Constitution and the law which they '... must apply impartially and without fear, favour or prejudice'. Neither the identity of the litigant who raises the objection nor the motive is relevant.[45]”

[72] One might be tempted to argue that the Constitutional Court, in this matter, found that the motive of an objector is irrelevant thus negating the subjective requirement and also the application of the doctrine. In my view however Fuel Retailers should be distinguished as it deals with the obligation of the authorities to deal with complaints and not with a party's right to sue as a result of an abuse. The principle in that case, in my view, places an obligation on the appropriate authority to consider an objection irrespective of the motive. The doctrine of abuse of rights and its application in South African law were not considered at all.

[73] I now proceed to deal with the consequences of the defendants' decision not to lead any evidence. In this case the motive and the state of mind of the defendants and the interests that they sought to protect were crucial. The plaintiffs led evidence to the mala fide intent and lack of reasonable interest. The defendants' choice to close their case without leading any evidence, has in my view serious consequences. In the light of the failure to lead evidence the following will apply as was stated in *Galante v Dickson*[46]:

In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisors are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination[47].”

[74] As well as:

“In a situation such as this, it was said (that) the state of mind of the purchaser during the stages leading up to the sale is very material and his own evidence thereon may be of great importance. In Sampson v Pim (1918 A.D. 657, 662), which was an action arising out of a collusion, the plaintiff's passenger had been subpoenaed and was available but was not put into the box. Solomon, J.A., observed:

“The inference is irresistible that his evidence would not have supported the plaintiff's case. It might of course have been negative, as he may not have been keeping a look-out and so may not have been able to assist the Court one way or the other. But if he could have given evidence favourable to the Plaintiff it is inconceivable that he would not have been called.” [48]

[75] If however there was nothing to answer to, the defendants would not have been obliged to lead evidence[49]. This is however not the case here.

[76] The question whether the Defendants were bona fide and wanted to protect a legitimate right namely their commercial interest in the mall was put to the plaintiffs' witnesses under cross examination, but the defendants never led any evidence about what actually needed protection. In the light of the fact that a relatively small development was objected to it is inconceivable that a development having one restaurant could pose any commercial or any other reasonable threat to the defendants' interests. This view is confirmed and supported by the evidence of the town planners, Mr Schoeman and Erasmus who testified that usually

objections are raised when the developments are comparable. These are also borne out by the minutes of Proc Corp's meeting.

- [77] The plaintiffs will not have direct knowledge of the defendants' motives and therefore plaintiffs can't provide such evidence. Instances where a plaintiff may face such a challenge in providing the necessary evidence were dealt with in *Gericke v Sack*[50] where the following was said:

"However, the Courts take cognisance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held, as was pointed out by Innes, J., in 'Union Government (Minister of Railways)

- v. Sykes, 1913 A.D. 156 at p. 173 that

'Less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.'" [51]

- [78] I am of the view that the only inference that can be drawn from the failure of the Defendants to adduce any evidence is that the Defendants would not have been able to gainsay what was said by the plaintiffs' witnesses and that they would have given evidence adverse to the defendants' case.

- [79] The objections and appeal were raised to frustrate plaintiffs' plans to move their restaurant to the new development and were caused by the vendetta between the parties. The benefit which the Defendants wanted to derive, namely a possible delay in the matter as against the potential harm to the Plaintiffs namely the financial demise of the Plaintiffs are so disproportionate that the conduct of the Defendants must be branded both unreasonable and wrongful. Having regard to the evidence set out hereinbefore it is clear that the Defendants acted with the predominant intent of causing harm to the plaintiffs. At the very least the conduct of the Defendants fall far short of that of the reasonable man, and it is therefore evident that the necessary blame is to be laid at the door of the Defendants.

- [80] According to the evidence Abrina's development of its property, the approval of the building plans, the construction of and occupation of the building was delayed for the period between 23 November 2008 until 24 November 2009. Inter-Active was also not able to vacate the premises at the mall for that period.

- [81] The evidence of the auditor, Mr Greyling, was adduced solely on the question of damages with specific reference to the loss of net profit which I already indicated was accepted.

- [82] It is trite that loss of prospective profits is recoverable in delict.[52] Damages, especially pertaining to loss of profit are not that easy to assess as was illustrated in this case. The fact that it cannot be assessed with certainty or precision however does not relieve the wrongdoer of the necessity of paying damages. The question whether damages have been proved depends upon whether a Plaintiff has adduced all the evidence reasonably available to him at the trial.[53] As was stated:

“Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damages has been suffered, the Court is bound to award damages.” [54]

[83] In the matter of Anthony & Another v Cape Town Municipality

[55] the following has been held:

“I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informal guess, for no better system has yet been devised for assessing general damages for future loss;” [56]

[84] Mr Greyling explained how he calculated this loss. He explained how he arrived at his calculations and conceded that the calculation of the prospective loss of profit has an element of gazing into the proverbial crystal ball. It is however not required of a Plaintiff to place evidence on each and every minute aspect, making up his damages, before the Court[57]. Under these circumstances I am satisfied that Inter-Active proved the net loss of profit.

[85] Pertaining to the other damages, Mr Lubbe and the other witnesses testified and explained how these damages occurred. As already

indicated earlier I am not persuaded that the damages pertaining to the architect's costs and salaries allegedly wasted were proven on a balance of probabilities.

CONCLUSION

[86] The doctrine of abuse of rights should find application in our law, it has already been applied in various fields and should apply when a statutory right is abused, subject to the conditions and safeguards already dealt with. I am of the view that the plaintiffs proved that the defendants abused their statutory right. In doing so they acted with malice and they did not do so whilst advancing their own reasonable interest. I am also of the view that Proc Corp was behind these objections and that Mr Koukoudis's actions were motivated to advance Proc Corp's interest and Proc Corp's sole motive was to harm Abrina and Inter-Active.

[87] Consequently the defendants should be ordered to pay the damages of Abrina pertaining to the hire of movable ablution facilities in the amount of R20 684-70, the storeroom and guardhouse for the security guard in the amount of R132 000-00, the costs of the town planner in the amount of R5 523-30 and legal costs in the amount of R79 436-08. Defendants should also be ordered to pay to Inter-Active the amount of R985 746-75 pertaining to the loss of net profit.

COSTS

[88] Plaintiff conceded that they are liable for the costs of 27 and 28 January 2014 until 11:30. Consequently they should pay those costs.

[89] The matter stood down on one occasion from 11:35 as defendants' senior counsel was not well, but on another day plaintiffs'

senior counsel had to attend to a leave to appeal and the Court had to start later. In the light thereof each party should pay its own costs for the time that the matter stood down for these reasons.

[90] Plaintiffs wanted me to make a special order pertaining to the rule 35(3) notice dated 10 September 2010 as it was argued that it was only requested in order to harass and inconvenience plaintiffs. I am however of the view that no such order is justified as parties are entitled to full discovery.

[91] I have already dealt with the costs of the absolution application and the rest of the costs should follow the result.

[92] I make the following order:

The defendants are ordered jointly and severally the one paying the other to be absolved to pay to:

A. FIRST PLAINTIFF

1. The amount of R237 644-08;
2. Interest on the aforesaid amount at the rate of 15,5% per annum from of services of summons to date of payment.

B. SECOND PLAINTIFF

1. The amount of R985 746-75
2. Interest on the aforesaid amount at the rate of 15.5% per annum from date of service of summons to date of payment.

C. COSTS

1. Plaintiffs are ordered jointly and severally the one paying the other to be absolved, to pay the costs of 27 and 28 January 2014 until 11:30;

2. Defendants are ordered jointly and severally the one paying the other to be absolved, to pay the costs of the application for absolution of the instance; but each party is to pay its own costs for the period that the matter stood down for preparation of the application for absolution of the instance.

3. Each party is to pay its own costs as a result of the matter standing down due to the unavailability of counsel.

4. The Defendants are ordered to pay the rest of first plaintiff and second plaintiff's costs of the action jointly and severally

the one paying the other to be absolved.

5. All costs orders are to include the costs consequent to the employment of two counsel.

R G TOLMAY

JUDGE OF THE HIGH COURT

CASE NUMBER: 61404/2009

CASE NAME: ABRINA 1772 (PTY) LTD v CHRISTOS KOUKOUDIS

HEARD ON: 27 JANUARY 2014

FOR APPLCIANT: ADV C ERASMUS (SC); ADV J VAN HEERDEN

INSTRUCTED BY: D P DU PLESSES INC

FOR DEFENDANT: ADV M OOSTHUIZEN (SC); ADV C ALHEIT;

ADV N LOUW

INSTRUCTED BY: WELGEMOED ATTORNEYS

DATE OF JUDGMENT: 10 JUNE 2014

[1] The Constitution of the Republic of South Africa, Act 108 of 1966

[2] That he should not have worked with the cost of sales percentage for the last 5 years but actually from inception of the business of Inter-Active and that he should have included certain other expenses like computer expenses and so forth, which Mr Greyling indicated would have made almost no difference also on the basis that it would be included in both scenarios and therefore basically cancel each other out.

[3]See Gordon Lloyd Page & Associates v Rivera 2001 (1) SA 88 (SCA) par [2] (own underlining added for the sake of emphasis): "[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms: '... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).)' This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2). As far as

inferences from the evidence are concerned, the inference relied

upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (Gascoyne (loc cit)) - a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice."; See also *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) par [10]; Zeffertt & Paizes *The South African Law of Evidence*

(2009) 178-180; Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa: Volume 1* (2009) 918-926 (especially on 920-924); Schmidt & Rademeyer *Bewysreg*

(2000) 90-94.

[3]See *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) par [2] (own underlining added for the sake of emphasis):

"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

'... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).)'

This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied

upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (Gascoyne (loc cit)) - a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the

interests of justice.”;

See also *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) par [10]; Zeffertt & Paizes *The South African Law of Evidence*

(2009) 178-180; Herbststein & Van Winsen *The Civil Practice of the High Courts of South Africa: Volume 1* (2009) 918-926 (especially on 920-924); Schmidt & Rademeyer *Bewysreg*

(2000) 90-94.

[4] Gordon Lloyd, *supra*, p 92 J – 93 A

[5] *Carmichele v Minister of Safety and Security & Another* (Centre for Applied Legal Studies Intervening)

[2001] ZACC 22; 2001 (4) SA 938 (CC), para 26, p 951C-D; Gordon Lloyd *supra*, para [2], pp 92G-J and 93A-B. “This implies that the plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff”

[5] *Carmichele v Minister of Safety and Security & Another* (Centre for Applied Legal Studies Intervening)

[2001] ZACC 22; 2001 (4) SA 938 (CC), para 26, p 951C-D; Gordon Lloyd *supra*, para [2], pp 92G-J and 93A-B.

“This implies that the plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff”

[6] *Carmichele supra*, para’s [80], p 970F-H.

[7] *Carmichele supra* on p 971A-C.

[8] See Scholtens, “Abuse of Rights” 1958 South African Law Journal 39-49; Neethling, Potgieter & Visser, *Law of Delict*

(2006) 103

[9] Neethling J, Potgieter, JN and Visser, PJ – *The Law of Delict*, Ed 6, pp 116-117

[10] Neethling, Potgieter, Visser, *The Law of Delict*, 6th Edition, p 117

[11] See Scholtens “Abuse of rights” 1958 South African Law Journal p39

[12] *Supra*, p 49 The same sentiment is expressed in different words by Mckerron *The law of delict*

(1971) 274 *supra*: “The burden of proving that the defendant was actuated by malice rests, of course, on the plaintiff. To discharge the burden he must show not merely that the defendant intended to damage him in his business or means of livelihood, but also that he

had no legitimate interest in doing so. The burden is not an easy one to discharge. Interference with business relations are ordinarily prompted by economic self-interest, and, whatever the position may be in ethics, in law the advancement of one's own economic interest is always a legitimate motive for action."

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[13] See Van der Walt and Midgley, Principles of Delict, 3rd Ed, p 124

[14] See the Law of Delict, p 117 Jan L Neels, Tussen Regmatigheid en Onregmatigheid: Die Leerstuk van Oorskryding van Regte &

Bevoegdhede (deel 1), TSAR 1999 p 63, Deel 2 TSAR 2000, p 317, Deel 3 (TSAR) 2000 p 469

[15] TSAR 1999, (deel 1) p 63

[16] Advocate, Vol 27, Number 1, April 2014

[17] Supra, p 42

[18] Supra, p 45

[19] See Neethling, Potgieter & Visser, supra, p 116-121 See also Tsose v Minister of Justice and Others 1951 (3) SA 10 (A) 17G-H (own underlining added for the sake of emphasis): "An arrest is, of course, in general a harsher method of initiating a prosecution than citation by way of summons but if the circumstances

exist which make it lawful under a statutory provision to arrest a person as a means of bringing him to court, such an arrest is not unlawful even if it is made because the arrestor believes that arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal."

[19] See Neethling, Potgieter & Visser, supra, p 116-121 See also Tsose v Minister of Justice and Others 1951 (3) SA 10 (A) 17G-H (own underlining added for the sake of emphasis):

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20 See *Gien v Gien* 1979 2 SA 1113 (T) 1121E-F: “By die beoordeling van die redelikheid en billikheid, speel die dader, teen wie se handeling beswaar gemaak word, se gesindheid 'n rol (Union Government v Marais 1920 AD 240 te 270; Kirsch v Pincus (supra te 201, 202 en 205); Millward v Glaser 1949 (4) SA 931 (A) te 942; Regal- saak te 107G-108). Terselfdertyd moet in gedagte gehou word dat 'n blote onbehoorlike motief nie 'n andersinds regmatige handeling in 'n onregmatige daad omskep nie (Tsose v Minister of Justice and Others 1951 (3) SA 10 (A) te 17G-H; Vanston v Frost 1930 NPD 121 te 124). Die animus vicino nocendi maak 'n andersinds regmatige handeling onregmatig as dit die buurman benadeel en die dader geen voordeel daaruit trek nie.”

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[21] Neels, supra, (deel 1) p 68

[22] Van Eck, N.O., and Van Rensburg, N.O. v Etna Stores 1947

- (2) SA 984 (AD) In this case the seizure of bags of rice not for the purpose allowed in terms of Regulation 5(1) of War Measure, No.5 of 1944, namely to afford evidence of a contravention, but for the purpose to obtain possession of the rice for furtherance of a food distribution scheme was found to be unlawful. In *Brummer v Gorfil Brothers Inv (Pty) Ltd* 1999
- (3) SA 389 (SCA) the Supreme Court of Appeal held as follows: “Word dit in die breedste sin verstaan, het mens denkbare met die leerstuk van 'misbruik van reg' te doen, iets waarna die advokaat vir die eiser in sy betoog verwys het, maar wat nie in my Ampsbroer se uitspraak genoem word nie. Van daardie leerstuk kan daar in die onderhawige geval in elk geval nie sprake wees nie aangesien die verweerders opgetree het, nie met die uitsluitlike oogmerk om die eiser te na te kom nie, maar om die belange van die vyfde verweerder te bevorder (vgl Neethling et al *Deliktereg* 3de uitg op 112-13).”

23 Neels, supra; *Deneys Reitz v South African Commercial Catering and Allied Workers Union & Others* 1991 (2) SA 685 (WLD) at 693G-I. “When apparently permissible conduct impacts upon others, the assessment of unlawfulness is guided by the sense of fairness of the judiciary (in the wide sense) as the criterion-formulating arm of society. The judiciary responds to the general

sense of justice of the community, frequently displayed by expressions of public opinion, to which vent is given in accordance with sound public policy and good morals in the relevant sphere.”

[24] 1955

(1) SA 129 (A) p 135C-E

[25] Dorland v Smits 2002

(5) SA 374 (C) at 384B-D

[26] Randwaterraad v Bothma en ‘n Ander 1997

(3) SA 120 (O) at 136C-E: “Waar in ‘n bepaalde geval ‘n buurman se bevoegdhede voortspruitend uit sy reg ten aansien van die grond aan die hand van die erkende reëls en beginsels, tot groot nadeel vir die ander buurman sal of kan lei, sal die billikheidsreëling as waarborg dien, dat eersvermelde buurman ‘n deel van die nadeel wat die laasvermelde buurman gelei het, sal dra, of minstens sal sorg dat die nadeel nie sal intree nie. Sodoende word die daadwerklike nadeel of potensiële nadeel eweredig tussen die bure versprei.” and on p 136B-C

[27] Millward v Glaser 1949

(4) SA 931 (A) at 942

[28] Gien v Gien (supra) at 1121, as quoted in paragraph 28.

[29] Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 (AD) at 107G-H

[30] Dress Designs (Pty) Ltd v G Y Lounge Suite Manufacturers (Pty) Ltd & Another 1991 (2) SA 455 (WLD) at 475H-J and 476A

[31] Deneys Reitz supra

[32] Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Others 1981 (2) SA 173 (TPD) at 200F-G

[33] Minister van die Suid-Afrikaanse Polisie en ‘n Ander v Kraatz en ‘n Ander 1973 (3) SA 490 (AD)

[34] 1926 AD 312.

[35] In this regard Klar Tort Law (1991); Linden & Feldthusen Canadian Tort Law (2006); Osborne The law of torts

(2007) were consulted in *AI Enterprises Ltd v Bram Enterprises Ltd* 2014 SCC 12 par [72] the following was found: “[72] I conclude my review by noting the fundamentally different approach which the civil law of Quebec takes to this problem. It offers what is perhaps a more straightforward analysis under the doctrine of “abuse of rights”: see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 24. This doctrine is

rooted in the Civil Code of Québec, S.Q. 1991, c. 64, which provides in art. 6 that “[e]very person is bound to exercise his civil rights in good faith” and in art. 7 that “[n]o right may be exercised with the intent of injuring another”. There is no comparable legislation in South African law. The case of *Lapierre v Attorney General Quebec* [1985] 1 SCR 241 dealt with neighbour law whilst the topic only came up in a dissenting judgment in *Harrison v Carswell* [1976] 2 SCR 200 at 209.

[35] In this regard Klar *Tort Law* (1991); Linden & Feldthusen *Canadian Tort Law* (2006); Osborne *The law of torts*

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There is no comparable legislation in South African law. The case of *Lapierre v Attorney General Quebec* [1985] 1 SCR 241 dealt with neighbour law whilst the topic only came up in a dissenting judgment in *Harrison v Carswell* [1976] 2 SCR 200 at 209.

[36] [1990] 3 S.C.R. 122

[37] 1985 Man. R. (2d) LEXIS 488

[38] *Supra*, para [51], p 9

[39] Barker and Others, *The Law of Torts in Australia* (2007) see also O’Neill

[1994] FCA 1522; 126 ALR 364 but this matter does not deal with the doctrine of abuse of rights but rather the approach that should be followed when faced with competing rights.

[40] followed in *Langbrook Properties Ltd v Surrey City Council*

[1969] 3 All ER 1424 Ch D; applied in *Stephens v Anglian Water Authority*

[1987] 3 All ER 379 CA (with leave to appeal refused by the House of Lords).

[41] *Cambridge Law Journal* 22, 1933-1935 p 22-23

[42] *Cambridge Law Journal*, *supra* p 27

[43] See Mckerron *The law of delict*

(1971) 50.

[44] 2007(6) SA 4 (CC)

- [45] Supra at 465
- [46] 1950(2) SA 460 (AD)
- [47] Supra at 465
- [48] Webranchek v L.K. Jacobs & Co. Ltd 1948 (4) SA 671 (AD) at 681, See also Elgin Fireclays Limited v Webb 1947(4) SA 744 AD at 749
- [49] Macleod V Kwenyiya 2013(6) SA 1, p 146
- [50] 1978
- (1) SA 821 (AD)
- [51] See Gericke v Sack, supra at 827 D-H
- [52] Transnet Ltd v Sechaba Photoscan (Pty) Ltd 2005 (1) SA 299 (SCA), para [17] at 305C-E.
- [53] Esso Standard SA (Pty) Ltd v Katz 1981 (1) SA 964 (AD) at 969J-970A-H.
- [54] Hersman v Shapiro & Co 1926 TPD 367 at 379
- [55] 1967
- (4) SA 445 (A)
- [56] At 451B-D
- [57] Sentrachem Bpk v Wenhold 1995 (4) SA 312 (AA) at 327D-F

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