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AN OBJECTION TO THE REZONING OF A PROPERTY MAY IN CERTAIN CIRCUMSTANCES CONSTITUTE AN ABUSE OF THE RIGHT TO OBJECT

In terms of section 33 of the Town-planning and Townships Ordinance 15 of 1986, “(a)ny person may, within a period of 28 days from the date of the first publication of the notice ... lodge an objection with or make representations in writing to the Director in respect of the interim scheme.” However, such a right to object to the interim scheme may in certain circumstances be considered to be an abuse of a right as the consequences may include unnecessary delays in the approving the rezoning of a property. For the purposes of this article we will consider when such exercising of a right to object is considered to be an abuse of the right to object and may result in the objector being liable for damages.

In the case of *Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another 2016*, the Supreme Court of Appeal (hereinafter referred to as the “SCA”) held that an objection to the rezoning of a property, even though it is a statutory right, may constitute an abuse of the right to object (in terms of delictual principles), if both the subjective and the objective tests are met. The subjective test involves the question whether the intention of the objector is the sole or predominant intention to harm. The objective requirement includes the question whether the objection served no appreciable or legitimate interest of the person(s) objecting to the rezoning. The SCA did refer to authority (Prof Van der Walt) in terms of which it noted that it is difficult to formulate a general criterion for determining whether an abuse has been committed and that no hard and fast rules can be enunciated in this regard.

The first respondent, Abrina (hereinafter referred to as “A”), was the owner of a property which was zoned “agricultural”. A applied for the rezoning of the property into a township as A wanted to develop it into a shopping centre. The first appellant, Koukoudis (hereinafter referred to as “K”), lodged an objection to the rezoning. He based his objection on reasons such as A failing to address fundamental issues such as environment impact assessments, traffic issues and requirements of statutes such as the National Environmental Affairs Act and the like. However, K and A had a strained relationship based on a previous commercial lease in terms of which the relationship between A and K had soured and certain litigious proceedings had resulted. It later transpired that the real reason behind K’s objection was to prevent the establishment of a shopping centre in the vicinity of a shopping mall. The shopping mall was owned by companies in which K was a director and shareholder. The purpose of K’s objection was thus to protect the commercial interests of K and his companies.

The approval to establish the shopping centre was later granted and A then instituted a claim for damages against K and one of his companies. A alleged that their objection to the rezoning was an abuse of the right to object and further resulted in financial loss by A since K’s objection had delayed the commencement of A’s business activities. A further alleged that K had acted with the specific intention of frustrating development of the shopping centre and causing financial harm.

The High Court upheld the claim for damages instituted by A against K and an appeal against the High Court order to the SCA was upheld with a cost order against A. It was held that the weight of academic opinion was that conduct should not be regarded as being unlawful where it advanced a legitimate right of the person exercising it, even if in doing so another could be prejudiced. In order to constitute an abusive right (in this instance, the right to object to the rezoning of a property), both the following subjective and objective requirements need to be met:-

- a) the subjective requirement being whether the objection to rezoning is with the sole or predominant intention to harm; and
- b) the objective requirement being whether the objection served no appreciable or legitimate interest.

Accordingly, in considering the question of **K**'s liability one had to have regard to the subjective requirement that the objection to the development was the sole or predominant intention to harm **A**; and, secondly the objective requirement that **K**'s objection served no appreciative or legitimate interest of **K**. **A** was unable to prove that the subjective and the objective requirements were present. Accordingly, **A** had thus failed to prove that **K** had abused the right to object to the rezoning the property due to the fact that **K** could be viewed to merely be protecting his commercial interests and that of the company. The SCA in an obiter noted that it is the courts "opinion ... 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".

Although difficult to prove, the court noted that the basic question to be established in each case of an abuse of a right, or excess of a right, is one of wrongfulness, which requires the conduct to be of such a nature that public or legal policy considerations require it to be actionable. In addition to this, if one is able to prove the subjective and objective elements associated with an abuse of the right to object in respect of the re-zoning of a property or other applicable laws, it appears in terms of the SCA case that a claim would arise against a third parties which maliciously objects to a re-zoning application without seeking to protect an appreciable or legitimate interest.

This newsflash has been prepared for information purposes only and does not constitute legal advice, or a legal opinion, the practical application of the provisions of this newsflash will vary depending on the facts of each case.

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