**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 225/2016

In the matter between:

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| **HOME TALK DEVELOPMENTS (PTY) LTD** | **FIRST APPELLANT** |
| **AFROPULSE 132 (PTY) LTD** | **SECOND APPELLANT** |
| **KINGTRADE INVEST 100010 (PTY) LTD** | **THIRD APPELLANT** |
| **and** | |
| **EKURHULENI METROPOLITAN MUNICIPALITY** | **RESPONDENT** |

**Neutral citation:** *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (225/2016) [2017] ZASCA 77 (2 June 2017)

**Bench:** Ponnan, Cachalia, Majiedt and Willis JJA and Schippers AJA

**Heard:** 14 March 2017

**Delivered:** 2 June 2017

**Summary: Law of Delict: pure economic loss: whether Municipality liable in delict for pure economic loss arising out of the alleged failure by the Municipal Manager to issue a s 82 certificate in terms of the Town-Planning and Township Ordinance 15 of 1986.**

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**ORDER**

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**On appeal from**: Gauteng Local Division, Johannesburg (Nicholls J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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**JUDGMENT**

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**Ponnan JA (Majiedt and Willis JJA and Schippers AJA concurring):**

[1] The first principle of the law of delict, as Harms JA pointed out in *Telematrix*,[1] is that everyone has to bear the loss that he or she suffers. And, in contrast to instances of physical harm, conduct causing pure economic loss is not prima facie wrongful.[2] Accordingly, a plaintiff suing for the recovery of pure economic loss, is in no position to rely on an inference of wrongfulness flowing from an allegation of physical damage to property (or injury to person),[3] because 'the negligent causation of pure economic loss is prima facie not wrongful in the delictual sense and does not give rise to liability for damages unless policy considerations require that the plaintiff should be recompensed

[1] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; SA 2006 (1) SA 461 (SCA); [2006] 1 All SA 6 (SCA) para 12.
[2] *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA) para 8.
[3] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 26G-H.

by the defendant for the loss suffered.'[4] This case - within an administrative law setting – represents yet a further example in which these limits are being tested.[5]

[2] This appeal, with the leave of the court below (Nicholls J), is against a judgment dismissing the appellants' claims with costs. The basis of each claim is to be found in the allegations that officials (in particular the City Manager) in the employ of the respondent Municipality, owed certain duties to each of the appellants in connection with the exercise of the Municipality's statutory powers and that such officials failed to properly discharge those duties, thereby occasioning the appellants' loss.

[3] The first appellant is Hometalk Developments (Pty) Ltd (Hometalk), the owner of Portion 280 (a portion of Portion 153) of the farm Klipriviersberg 106, which property it proposed developing as Meyersdal Nature Estate, Extension 7 (Ext 7). The second appellant is Afropulse 132 (Pty) Ltd (Afropulse), the owner of portions 282, 286 and 287 (all of them portions of Portion 153) of the farm Klipriviersberg 106, which properties it proposed developing as Meyersdal Nature Estate, Extensions 9, 11 and 12 (Ext 9,11 & 12). The third appellant is Kingtrade Invest 100010 (Pty) Ltd (Kingtrade), the owner of Portions 281 and 283 (both portions of Portion 153) of the farm Klipriviersberg 106, which properties it proposed developing as Meyersdal Nature Estate, Extensions 8 and 10 (Ext 8 & 10). The respondent is the Ekurhuleni Metropolitan Municipality (the Municipality), a Municipality as contemplated by s 151 of the Constitution of the Republic of South Africa, Act 108 of 1996, read with s 12 of the Local Government – Municipal Structures Act of 1998 (Act 117 of 1998).

[4] The disputes between the parties have their genesis in a so-called land swap transaction, pursuant to which a land developer, Sydney Rean Booysen, the controlling mind of the three appellants, and the Municipality, each transferred land respectively owned by them to the other. The Municipality and various interested stakeholders had endeavoured for some time to determine a management framework to conserve, yet

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[4] *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2005] ZASCA 120; 2006 (3) SA 151 (SCA); [2006] 1 All SA 478 para 1.
[5] *Ibid.*

allow, the controlled development of what has come to be described as the Meyersdal Nature area. During July 2000, the Municipality approved in principle, the establishment of the Meyersdal Nature area consisting of certain portions of land, inclusive of land involved in the land swap transaction, which had been acquired by Kingtrade from the Meyer Trust.

[5] On 13 September 2004, Mr. Booysen wrote to the Municipality requesting 'that a certain portion [the Meyer Trust land] . . . which has been appropriated for development, be hereby conserved and exchanged for certain Ekurhuleni land which is developable and which . . . has been regarded as more appropriate for the development from a conservation point of view.' Ext 7, which was not part of the land swap, was purchased from the Municipality on 16 February 2005. On 4 April 2005 the Corporate Affairs Committee (CAC) of the Municipality resolved to approve the land swap. On 23 January 2006 a written agreement of exchange was concluded between Kingtrade and the Municipality and at that stage the Municipality's land was valued at R9 401 000 and the Meyer Trust land at R7 742 000. On 27 June 2006 the City Development Portfolio Committee of the Municipality resolved:

'1. That the application in terms of s 96 of the Town Planning and Townships Ordinance, 1986 . . . for proposed MEYERSDAL NATURE ESTATE EXTENSIONS 7, 8, 9, 10, 11 and 12 be approved . . .'

On 1 October 2007 the Municipality caused Extensions 7, 9, 11 and 12 to be proclaimed as townships by publishing a notice of proclamation in the Provincial Gazette in terms of s 103 of the Town-Planning and Township Ordinance 15 of 1986 (Ordinance), however, for reasons that remain unexplained, Ext 8 & 10 was omitted from the notice. After approval of the townships, Kingtrade sold and transferred Ext 9, 11 & 12 to Afropulse. Mr. Booysen then set up a professional team consisting of an attorney, estate agent, engineers and financiers, with a view to developing the land. Mr. Neil Diamond, a councillor in the Municipality, who is also an estate agent in the area, was approached to assist in marketing Ext 9, 11 & 12. He also took up an offer from Mr. Booysen to acquire a 20% interest in Afropulse and to that end contributed start-up capital of R4,5 million.

[6] On 1 May 2006, Mr. Patrick Flusk was appointed the City Manager of the Municipality. During September of that year the Government Anti-Corruption hotline received an anonymous complaint in the form of an e-mail, which read:

'A land swop transaction by the Alberton council which is part of Ekurhuleni took place which is attracting attention.

A councillor being Mr. Neil Diamond is involved and he is a successful estate agent in Alberton. The details reported in the press are that the Alberton council approved a land swop of 55 hectares they owned in Meyersdal, for 55 hectares of farmland also in the area. The values used for the transaction were based on Agricultural values and appear to be between R8 million and R9 million. The land the council swopped was turned into the Meyersdal Nature Estate by the relevant developer and yielded 330 stands sold for a minimum R800 000 each.

It appears the retail value of the stands are R250 million. Services for such a number of stands would be in the order of R40 million, resulting in a profit of R200 million. Mr. Neil Diamond and the other parties involved may well be completely innocent, but it just appears too co-incidental. Apparently the Alberton council wanted to retain some "green-belt" land and by apparent co-incidence the developer already owned the land the council identified that they would want to swop for. Mr. Diamond was appointed the estate agent for the sale of the stands in the Meyersdal Nature Estate and I would imagine his commissions would approximate R12.5 million. He apparently recused himself from this decision but it appears that the land the council valued at R140,000 per hectare was adjacent to land sold for almost R1.3 million per hectare 2 years before. In my humble opinion a town council should not be able to preside over swopping land worth a net R200 million when the figures in the relevant reports are R8 million. Additionally Mr. Diamond seemed to have such huge vested interests and was the sole agent in the previous sales in the area which call these valuations into doubt? It may well be that he had an obligation to inform the council they weren't doing a clever deal? In any event my parents are poor people living in Alberton and paying exorbitant rates, so it does concern me if council assets were not dealt with properly.'

[7] According to Mr. Flusk, after his appointment as the City Manager, he was informed by the Mayor that Pasco Risk Management (Pty) Ltd (Pasco) had been appointed by the Municipality to undertake certain forensic investigations. When Pasco informed Mr. Flusk that they had come across the hotline complaint in one of the files during the course of their investigation, he took the view that the complaint could not be

ignored and accordingly extended Pasco's mandate to investigate those allegations as well. In the meanwhile, Mr. Tom Peeters, the head of the Municipality's legal department, had secured a legal opinion from Advocates Wim Trengove SC and Kate Hofmeyr appertaining to some 526 land transactions that also included the aforementioned land swap. That opinion concluded – as three earlier legal opinions had done - that the Municipality did not have the power to delegate its function under s 14(2) of the Local Government, Municipal Finance Management Act 56 of 2003 (the MFMA) to its CAC. Accordingly, so stated the opinion, such delegation was unauthorised and thus invalid and consequently, subsequent approvals by the CAC to transfer the Municipality's properties to third parties were also unauthorised and invalid. The opinion recommended that the Municipality ought to take the following steps to rectify the problem:

'39.1 The municipal council must reconsider the transfers in a meeting open to the public in accordance with the provisions of s 14(2). It is a fresh consideration and decision and the municipal council must take care not merely to rubberstamp the earlier invalid decisions of its Committee. If it decides to approve the transfers, then it should proceed as suggested below. If it decides not to approve of any of the transfers, then the circumstances of each of them will have to be reconsidered.

39.2 Once the municipal council has approved the transfers, the municipality must apply to court to validate them or at least to direct that they be allowed to stand. It has to cite the parties to whom the transfers were made and, if the latter have subsequently passed further transfer of the properties, the subsequent registered owners should also be cited.

39.3 The municipality should in the first place ask for an order validating the transfers already made or at least directing that they be allowed to stand. There is in our view a cogent argument to be made that those transfers should not be undone only to be redone for the sake of formality.

39.4 The municipality should however in the alternative ask for an order rectifying the deeds register by declaring the old transfers to be invalid and authorising the municipality to transfer the properties again.'

[8] The Trengove/Hofmeyr opinion served before the first ordinary council meeting of the Municipality on 31 January 2008. The minutes of that meeting, to the extent here relevant, reads:

'Clr PWA Pretorius, seconded by Clr MJ Mason, proposed the addition of the following recommendation 10:

"10. That a quarterly report be submitted to the Corporate Services Portfolio Committee and Council indicating to whom Council land was alienated and at what purchase price."

Clr N Diamond, seconded by Clr NA Mabena, proposed the addition of the following recommendations 11 & 12:

"11. That a further report be submitted to Council after verification of the 526 land transactions approved by the Corporate Affairs Committee from 1st July 2004, and that a legal process be undertaken by approaching the courts to ratify the 526 land transactions and associated decisions taken by the various organs and committees of Council.

12. That it be noted that recommendations may not contradict any policy of Council or any part of the Municipal Finance Management Act, Act 56 of 2003, or any other legislation outlining the responsibilities of Local Government."

Council accepted the above proposals.'

Resolutions:

'5. That Council notes the review of the disposal processes and policies of all capital assets, including land, post 01st July 2004, to ensure compliance with the provisions of the MFMA.

6. That the City Manager or nominee be authorised to take the necessary steps to ensure compliance with the provisions of the MFMA, including any necessary legal steps to protect the interests of Council, and that periodic progress reports be submitted to Council on such steps taken.'

[9] Mr. Booysen took the view that by the end of 2007 he had completed all of the required services and was entitled to a certificate in terms of s 82 of the Ordinance (the s 82 certificate).[6]

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[6] Section 82 headed 'Prohibition of registration of certain deeds of transfer', reads:

'(1) Subject to the provisions of subsection (2), the Registrar shall not register a deed of transfer by which the ownership of an erf in a township –

(*a*) is transferred before the township has been declared an approved township in terms of section 79;

(*b*) which has been declared an approved township in terms of section 79, is transferred by the township owner –

(i) if the Director has notified the Registrar in writing that any condition set out in the schedule contemplated in section 79, other than a condition requiring the transfer of land or the payment of an endowment in cash to the State or a local authority, has not been complied with;

(ii) until such time as –

(*aa*) the provisions of section 81 in respect of the transfer of land to the State or a local authority have

[10] When by March 2008 the s 82 certificate had still not issued, Home Talk and Afropulse applied to the High Court, Pretoria for an order:

'That the Ekurhuleni Metropolitan Municipality, and the Municipal Manager, Ekurhuleni Metropolitan Municipality, Mr. Patrick Flusk, (hereinafter "the first and second respondents") be and are hereby ordered and compelled to certify within 5 days of the date of issue of this order –

2.1 that the first respondent will within a period of 3 (three) months from the date of such certificate as contemplated in s 82 . . . be able to provide the erven in the townships of Meyersdal Nature Estate, Extensions 7, 9, 11 and 12 . . . (hereinafter "the townships") with the necessary engineering services; and

2.2 that the first respondent is prepared to consider applications for the approval of building plans in respect of erven in the townships.

3. In the event that the first and second respondents fails to issue the certificates in terms of s 82 . . . certificate as referred to in paragraph 2.1 above, the third respondent be authorised to register deeds of transfer in terms of his normal duties under the Deeds Registries Act, 47 of 1937 in respect of erven in the townships, notwithstanding the absence of such certificates.

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been complied with, where any conditions set out in the schedule contemplated in section 79 requires such transfer;

(*bb*) the Director or the local authority has notified the Registrar in writing that the provisions of section 81 in respect of the payment of an endowment in cash to the State or a local authority have been complied with, where any condition set out in the schedule contemplated in section 79 requires such payment;

(*cc*) the local authority within whose area of jurisdiction the township is situated has certified that it will, within a period of 3 months from the date of the certificate, be able to provide the erf with such services as it may deem necessary and that it is prepared to consider an application for the approval of a building plan in respect of the erf.

(2) The provisions of –

(*a*) subsection (1)(*b*)(i) shall not apply to the transfer of an erf, if the Director has authorised the Registrar in writing to register the deed of transfer concerned;

(*b*) subsection 1(*b*)(ii)(*bb*) shall not apply to the transfer of an erf to the State or a local authority by virtue of a condition set out in the schedule contemplated in section 79;

(*c*) subsection 1(*b*)(ii)(*cc*) shall not apply to –

(i) the transfer of an erf in a township for the establishment of which application has been made in terms of a repealed law and the registration of the deed of transfer would not have been in conflict with the provisions of that law;

(ii) the transfer of an erf contemplated in paragraph (*b*).

'Subject to the provisions of subsection (2), the registrar shall not register a deed of transfer by which the ownership of an erf in a township –

(*a*) is transferred before the township has been declared an approved township in terms of s 79;

(*b*) which has been declared an approved township in terms of s 79, is transferred by the township owner;

(ii) until such time as –

(*cc*) the local authority within whose area of jurisdiction the township is situated has certified that it will, within a period of three months from the date of the certificate, be able to provide the erf with such services as it may deem necessary and that it is prepared to consider an application for the approval of a building plan in respect of the erf.'

4. Directing the first and second respondents jointly and severally, to pay the applicants' cost of this application on an attorney and own client scale.'

[11] Not only did Mr. Flusk purport to oppose the application on behalf of the Municipality, he also launched a counter application seeking:

'1.1 That the decision of the first applicant Corporate Affairs Committee of 4 April 2005 to approve the land exchange . . . be set aside.

1.2 That the agreement concluded between first applicant and third respondent dated 23 January 2006 and which intended to give effect to the decision referred to in prayer 1.1 be set aside.

1.3 That the 3 land sale agreements concluded between the second respondent and the third respondent dated 2 July 2007 . . . be set aside.

1.4 That the first applicant's resolution dated 26 June 2006 . . . to approve the township applications in respect of . . . Extensions 7 to 12 be set aside.

1.5 That the second and third respondents be directed to transfer to the first applicant the properties identified as . . . Extensions 8 to 12, and that they further be directed to do all such things and sign all such documents, including powers of attorney, within 7 days of date of order, to give effect to the aforegoing transfers.

1.6 That the Sheriff of the above Honourable Court be and is hereby empowered to sign all and any documents identified in paragraph 1.5 above, should the second and third respondents fail or refuse to sign same.

1.7 That the record of decision by the Gauteng Provincial Government: Department of Agriculture, Conservation and Environment No GAUT002/05-06/0125, the proposed change of land use of . . . be set aside.

1.8 That the following proclamations with regard to the aforesaid townships be set aside, being Local Authority Notices 2495 to 2502 as set out in the Provincial Gazette Extraordinary for the province of Gauteng No 273 of 1 October 2007.

1.9 That Mr Rean Booysen be ordered to subject himself to viva voce evidence (including cross examination) with regard to the issues raised in the founding and answering affidavits on a date to be determined by this court.

1.10 That first and second respondents be ordered to pay the costs of this application jointly and severally the one paying the other to be absolved.'

[12] The matter came before Legodi J who, on 20 June 2008, ordered that:

'9.1.1 The main application is hereby struck from the roll due to failure to exhaust internal remedies.

9.1.2 The applicants in the main application are hereby directed to exhaust internal remedies in terms of s 124 of the Ordinance read together with the provisions of s 7 of PAJA.

9.1.3 The second respondent and the Municipality's counter-application is hereby struck off from the roll due to the second respondent's lack of authority to depose to the founding affidavit in the counter-application.

9.1.4 Each party to pay its costs.'

[13] On 17 March 2009 the Executive Mayor wrote to Mr. Flusk informing him that the council of the Municipality had resolved to terminate his employment as the City Manager with effect from that date. Mr. Johan Leibbrand was thereafter appointed the acting City Manager in Mr. Flusk's stead. On 30 October 2008, and in accordance with the order of Legodi J, Home Talk and Afropulse filed a notice of appeal with the Services Appeal Board. On 22 January 2009 the parties concluded a deed of settlement before the Services Appeal Board. That agreement recorded that the only 'contentious matter remaining in issue for determination by the Board is the question of costs'. On 19 February 2009 Home Talk and Afropulse filed a supplementary affidavit with the High Court. They contended that as they had now exhausted their internal remedies, they were entitled to re-enrol the matter for the hearing of the relief originally claimed in their notice of motion.

[14] On 20 March 2009 the parties settled the High Court application. Mr. Leibbrand, who served as the acting City Manager after Mr. Flusk's dismissal, represented the Municipality. In terms of the agreement, the Municipality undertook 'immediately upon signature of this agreement to issue the certificates in terms of s 82 (Ordinance 15 of 1986) in respect of Meyersdal Extensions 7, 9, 11 and 12 not later than 20 March 2009.' The agreement also recorded that:

'Kingtrade has paid a total amount of R3 881 757.81 in respect of rates and taxes pertaining to Meyersdal Extensions 7, 9, 11 and 12 to EMM for a period of seven months. This amount is made up by a payment of R2 756 683.42 paid on or about 27 November 2007, R562 537.18 paid on or about 21 February 2008 and R562 537.18 paid on or about 28 March

2008. It is agreed that an item will be tabled at the next meeting of the full Council of the EMM, to be held on 26 March 2009, recommending that a clearance certificate (which requires no further payment from Kingtrade) in respect of Meyersdal Extension 7, 9, 11 and 12 be issued, valid for a period of seven months from the date that the certificates in terms of s 82 are issued. The parties record their understanding that this paragraph does not bind the Council in any way.'

[15] On 17 March 2010, Home Talk, Afropulse and Kingtrade as the first, second and third plaintiffs respectively caused summons to be issued out of the South Gauteng High Court against the Municipality. The issues of liability and quantum having been separated in terms of Uniform rule 33(4), the matter proceeded to trial in respect of the former before Nicholls J who, on 30 October 2015, dismissed the action with costs including those consequent upon the employment of two counsel. The appeal is with the leave of the learned judge.

[16] In the summons, the claim was originally founded on the allegations that:

'9. The defendant despite its approval of the third plaintiff's township establishment and the instruction by the Registrar of Deeds to do so, wilfully alternatively negligently failed to proclaim Extension 8 and 10 of the Meyersdal Nature Estate (the third plaintiff's development).

10. By December 2007:

. . .

10.3 The plaintiffs had met all the requirements for the issue of s 82 Certificates by the Defendant in respect of Extensions 7, 9, 11 and 12 respectively and were entitled to demand from the Defendant to issue same;

. . .

12. Despite demand and the first and second plaintiffs having met the requirements for the issue thereof, the defendant represented by its duly appointed employees, acting in the course and scope of their employment, over the period November 2007 to 20 March 2009 unlawfully and wilfully, refused to issue the s 82 Certificates in respect of Extensions 7, 9, 11 and 12.

Alternatively the defendant represented as aforesaid, despite demand and the first and second plaintiffs having met the requirements for the issue thereof, over the period November 2007 to 20 March 2009 unlawfully and negligently failed to issue the s 82 Certificates in respect of

Extensions 7, 9, 11 and 12, the defendant having been negligent in one or more of the following respects.'

[17] The particulars of claim underwent a series of further amendments, the most significant of which being some three years later on 23 May 2013 when, for the first time, Mr. Flusk was mentioned by name. It was then contended that he had acted mala fide in withholding the issuance of the s 82 certificate. Common to the claims on behalf of all three appellants were these allegations:

'18. The required s 82 certificate was eventually only issued on 20 March 2009 after first plaintiff had initiated court proceedings in this regard and Flusk's employment terminated on or about 18 March 2009.

19. The failure or refusal aforesaid resulted from a decision to refuse the issue of the said certificate by the defendant's then Municipal Manager, one Flusk, who had earlier managed to procure a resolution by the Council that he alone was to have the power to issue s 82 certificates.

20. In acting as he did, the said Flusk acted as defendant's designated functionary and representative, alternatively as an employee of defendant and within the course and scope of his employment as such.

21. The decision aforesaid and his resultant failure or refusal aforesaid, constituted unlawful and wrongful conduct.

22. The aforesaid conduct was:

22.1 Intentional; and

22.2 *Mala fide* and/or motivated by a *mala fide* ulterior purpose.

22A. As a direct result of the *mala fide* conduct aforesaid, the s 82 certificate was delayed from approximately 15 December 2007 until 20 March 2009.'

[18] The plea of the Municipality to those allegations was:

'11.1 The claims . . . are *aquilian* claims for pure economic loss arising from the alleged delay occasioned by the failure of the defendant to issue certificates in terms of 82 of the Townships and Town Planning Ordinance 15 of 1986 ("the Ordinance").

11.2 The operative legislation does not anticipate, either directly or by inference, either compensation or damages to any person aggrieved by the failure of, or delay by, the local authority in the issue of any such certificate.

11.3 Section 119 of the Ordinance requires the installation and provision of engineering services to the satisfaction of the local authority concerned; and the provisions of Section 124 provide for an appeal to a Statutory Services Appeal Board by any person aggrieved by the decision of a local authority in terms of Section 119 or the refusal or unreasonable delay of a local authority to give such a decision.

11.4 In addition, alternatively subject to such appeal provision, persons . . . aggrieved by a failure or unreasonable delay in the certification in terms of Section 82, have the remedies of a mandatory interdict and judicial review.

11.5 The object of Section 82 is not to provide any right or benefit to persons such as the plaintiff[s], but rather to protect members of the public who are purchasers of erven . . . in order to advance the public good.

11.6 The provisions of Section 82(1)(b)(ii)(cc) and Section 119 confer upon the local authority an administrative discretion in decision making.

11.7 The imposition of liability for damages as claimed is likely to have a chilling effect on performance of the local authorities' administrative and statutory function and the achievement of the objects of the statutory provision.

. . .

11.9 The defendant pleads that as a result of the aforegoing:

11.9.1 the statutory duty does not provide a basis for inferring that a duty exists to the first plaintiff at common law; and

11.9.2 neither public policy nor public interest favour the holding of the alleged conduct on the part of the defendant unlawful in the *aquilian* sense and thus susceptible to a remedy in damages.'

[19] Undoubtedly, the appellants were entitled to proper administrative legal proceedings. But, that did not mean that the breach of the administrative duties as set out in the particulars of claim necessarily translated into private law duties giving rise to delictual claims.[7] It must be accepted that an incorrect administrative decision is not *per se* wrongful.[8] It is thus unhelpful to call every administrative error 'unlawful', thereby implying that it is wrongful in the delictual sense, unless one is clear about its nature

[7] *Steenkamp* para 30.

[8] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA); [2006] 1 All SA 6 (SCA) para 23.

and the motive behind it.[9] Administrative law is a system that over centuries has developed its own remedies and, in general, delictual liability will not be imposed for a breach of its rules unless convincing policy considerations point in another direction.[10] The breach of every legal duty, especially one imposed by administrative law, does not necessarily translate into the breach of a delictual duty.[11] If the legal duty invoked is imposed by a statutory provision the focal question is one of statutory interpretation.[12] Whether the existence of an action for damages can be inferred from the controlling legislation depends on its interpretation and it is especially necessary to have regard to the object or purpose of the legislation. This involves a consideration of policy factors which, in the ordinary course, will not differ from those that apply when one determines whether or not a common-law duty existed.[13]

[20] Conduct is wrongful in the delictual sense if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant.[14] It is then that it can be said that the legal convictions of society regard the conduct as wrongful.[15] 'Wrongfulness', the Constitutional Court held, 'typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability'. It

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[9] *Steenkamp* para 24.
[10] *Steenkamp* para 27.
[11] *Steenkamp* para 19.
[12] *Steenkamp* para 20.
[13] *Steenkamp* para 21.
[14] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B: 'dat die gelede skade vergoed behoort te word'. In *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA) para 12, Cameron JA observed: 'Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is "just and reasonable" that a civil claim for damages should be accorded. "The conduct is wrongful, not because of the breach of the statutory duty per se, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right". The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.'
[15] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B.

elaborated: '[wrongfulness] functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue".'[16] What is called for is 'not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.'[17]

[21] In *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 33C-D, Botha JA dealt at length with the general principles underlying delictual liability. He found that considerations of convenience militate strongly against allowing an action for damages because the threat of litigation would unduly hamper the expeditious consideration and disposal of applications by a local authority. With that in mind he set out to interpret the statute in question in order to determine whether the legislature intended another result. He concluded it did not (at 31D-E), an answer fortified by the fact that the legislation in question provided for an appeal procedure (at 31E-F). The importance of an internal appeal procedure is that it may be indicative of an intention that this is the only available remedy for an incorrect decision. For an incorrect decision on appeal there is then no remedy except a judicial review.

[22] In considering the issue of wrongfulness in the delictual sense, the nature of the Municipality's functions certainly require close scrutiny. But it must be appreciated that the nature of its functions is but one of the circumstances calling for consideration in the case. As always, to determine the issue of wrongfulness, all the circumstances of the case fall to be considered. One of the questions in this case is whether the legislature intended a claim for damages in respect of loss caused in addition to the other administrative law remedies available to the appellants. In *Steenkamp* (para 22), Harms JA observed:

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[16] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) para 20.
[17] *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA); [2002] 3 All SA 741 (SCA) para 21.

'It appears to me that if the breach of a statutory duty, on a conspectus of the statute, can give rise to a damages claim, a common-law legal duty cannot arise. If the statute points in the other direction, namely that there is no liability, the common law cannot provide relief to the plaintiff because that would be contrary to the statutory scheme. If no conclusion can be drawn from the statute, it seems unlikely that policy considerations could weigh in favour of granting a common-law remedy.'

[23] As in *Knop's* case, here too the legislature has made provision for an internal appeal. That is the surest indicator that it was not within the contemplation of the legislature that the refusal of a s 82 certificate would, without more, be regarded as a wrong entitling an action for damages against the Municipality. It must be added that the Ordinance is there for the public good. Provisions such as s 82, exist principally for the protection of housing consumers and not property developers in the position of the appellants. In *Knop* (at 31H), Botha JA concluded: '[i]n my judgment it could not have been in the contemplation of the legislature that, apart from the appeal procedure, the refusal of the application was to be regarded as a wrong to the applicant entitling him to bring an action for damages against the local authority.' In arriving at his conclusion, the learned Judge did point out:[18]

'That is not to say that the local authority need not exercise due care in dealing with applications; of course it must, but the point is that it would be contrary to the objective criterion of reasonableness to hold the local authority liable for damages if it should turn out that it acted negligently in refusing an application, when the applicant has a convenient remedy at hand to obtain the approval he is seeking. To allow an action for damages in these circumstances would, I am convinced, offend the legal convictions of the community.'

[24] In comparable circumstances, other Commonwealth jurisdictions appear to have adopted a similar approach. In England, *Jones v Department of Employment*[19] expressed the position thus:

'The question thus is whether, taking all these circumstances into account, it is just and reasonable that the adjudication officer should be under a duty of care at common law to the claimant to benefit. Having regard to the non-judicial nature of the adjudication officer's

[18] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 33D-E.
[19] *Jones v Department of Employment* [1989] Q B 1 (CA) at 22 B-D; [1988] 1 All ER 725 at 736.

responsibilities, and in particular to the fact that the statutory framework provides a right of appeal which, if a point of law arises, can eventually bring the matter to this court, it is my view that the adjudication officer is not under any common law duty of care. In other words, I agree with Mr. Laws that his decision is not susceptible of challenge at common law unless it be shown that he is guilty of misfeasance. Indeed, in my view, it is a general principle that, if a government department or officer, charged with the making of decisions whether certain payments should be made, is subject to a statutory right of appeal against his decisions, he owes no duty of care in private law. Misfeasance apart, he is only susceptible in public law to judicial review or to the right of appeal provided by the statute under which he makes his decision.'

In Australia, *Kitano v The Commonwealth of Australia*,[20] held:

'It was conceded . . . that no civil cause of action lies on the statute for breach of s 122. It seems to me that for the plaintiff to succeed in his special action on the case he must show something more than a mere breach of the statute and consequential damage; he must show something over and above what would ground liability for breach of statutory duty if the action were available.'

And, in Canada, it was stated in *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)* that:[21]

'Decisions taken in the exercise of statutory power will be subject to judicial review, and sometimes a statutory right of appeal. Unlawful decisions can be nullified and the individual relieved of the consequences of such a decision. The existence of these remedies is regarded by the courts as an indicator that no additional remedy in negligence need be provided, particularly where the judicial review or appeal is adequate to rectify matters, and the only real damage suffered by the individual is the delay and possibly the expense involved in establishing that a decision is invalid. This seems in part an axiomatic decision on the part of the court, that there should be a division between public law remedies and private law remedies. Where an *ultra vires* decision can be set aside on appeal or review, there should not normally be any additional liability in damages, unless the individual can establish misfeasance. Simple negligence is insufficient. The fact that the decision may be set aside may also mean that the only damage suffered is the expense involved in challenging the decision.'

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[20] *Kitano v The Commonwealth of Australia* (1973) 129 CLR 151 at 174-175.
[21] *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)* [1995] 2 FC 467, 1995 CanLII 3576 (FCA).

[25] Before leaving the foreign authorities, it needs to be mentioned that in English law 'duty of care' is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in *Trustees, Two Oceans Aquarium Trus[22]t* at 144F, 'duty of care' in English law 'straddles both elements of wrongfulness and negligence'.[23] Accordingly, the phrase 'duty of care' in our legal setting is inherently misleading.

[26] On appeal it was submitted that 'misfeasance in public office' is a convenient label for what we are here concerned with. The following are the essential elements of the tort:

> 'First, there must be an unlawful act or omission done or made in the exercise of power by the public officer. Second, as the essence of the tort is an abuse of power, the act or omission must have been done or made with the required mental element. Third, for the same reason, the act or omission must have been done or made in bad faith. Fourth, as to standing, the claimants must demonstrate that they have a sufficient interest to sue the defendant. Fifth, as causation is an essential element of the cause of action, the act or omission must have caused the claimants' loss.'[24]

That submission hardly need detain us, for, not having been raised by the appellants on the pleadings, those requirements were neither fully ventilated in the evidence, nor dealt with in the judgment of the trial court. Moreover, it must be remembered that the English law of torts, 'though it is freely quoted and often followed in our courts, is not often a safe guide for solving a problem which arises under Roman Dutch Law'.[25]

[27] At home, *Telematrix* (par 26) summed up the legal position thus: 'In different situations courts have found that public policy considerations require that adjudicators of

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[22] *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* (545/2004) [2005] ZASCA 109; [2007] 1 All SA 240 (SCA) (25 November 2005)

[23] *McIntosh v Premier, KwaZulu-Natal & Another* [2008] ZASCA 62; 2008 (6) SA 1 (SCA); [2008] 4 All SA 72 (SCA) para 12, where Scott JA stated: 'As is apparent from the much-quoted dictum of Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The Second is: would the *diligens paterfamilias* take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty.'

[24] *Three Rivers District Council and others v Bank of England (No 3)* [2001] UKHL 16; [2001] 2 All ER 513 para 41.

[25] *Perlman v Zoutendyk* 1934 CPD 151 at 155.

disputes are immune to damages claims in respect of their incorrect and negligent decisions.' That, seems to me to be fatal to the appellants' cause of action in negligence as formulated in the original particulars of claim. Appreciating, it would seem, that 'something more' than a mere negligent statutory breach and consequent economic loss is required to hold [a functionary] delictually liable for the improper performance of an administrative function,[26] prompted, I daresay, the series of further amendments to the particulars of claim. But, what that 'something more' is appears to have occasioned the appellants all manner of difficulty in this case. The formulation ultimately settled on was *'mala fide* and/or motivated by a *mala fide* ulterior purpose' However, precisely what *'mala fide* and/or motivated by a *mala fide* ulterior purpose' was intended to signify, was not disclosed in the pleading. Before us, respondent's counsel complained that the 'greatest difficulty that the [Municipality] had in defending the claim, was the failure by the appellants to commit themselves to a factual theory of their case'. By this I understood counsel to suggest that insufficient particularity was given of the material facts sought to be relied upon by the appellants to support the contention that Mr. Flusk acted *mala fide* and/or with a *mala fide* ulterior purpose.

[28] In a 67 page opening address appellants' counsel, exercising a right under the provisions of Uniform rule 39(5) to 'briefly outline the facts intended to be proved', made no mention of the facts intended to be adduced to establish the alleged mala fides or ulterior purpose. One knows that such address can never be a substitute for pleadings. In any event, it did not serve to forewarn the respondent of the evidence that would eventually be relied upon. What is important is that the pleadings should make clear the general nature of the case of the pleader. They are meant to mark out the parameters of the case sought to be advanced and define the issues between the litigants.[27] In that regard, it is a basic principle that a pleading should be so framed as to enable the other party to fairly and reasonably know the case he or she is called upon to meet. These

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[26] *Steenkamp* para 30 citing the judgment of Mason J in *Kitano v The Commonwealth of Australia* (1973) 129 CLR 151 at 174-175, which was referred to with approval in *Dunlop v Woollahra Municipal Council* [1981] 1 All ER 1202 (PC) at 1208F-G. The case concerned the liability of a local authority in tort for passing of an *ultra vires* resolution.

[27] *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.

requirements in respect of pleadings are the very essence of the adversarial system.[28] The prime function of a judge is to hear evidence in terms of the pleadings, to hear argument and to give his decision accordingly.[29] In *Imprefed (Pty) Ltd v National Transport Co* 1993 (3) SA 94 (A) at 107G-H it was stated:

'At the outset it need hardly be stressed that: "The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed."' (*Durbach v Fairway Hotel Ltd* 1949(3) SA 1081 (SR) at 1082.'

[29] The degree of precision required obviously depends on the circumstances of each case. As a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud.'[30] With regard to fraud, a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. It is important to record, as the following excerpt shows. that during the course of the trial counsel for the appellants specifically disavowed a case based on fraud:

'Mr Peter: I think my learned friend knows better, that when one pleads fraud one has to plead it very carefully, and very expressly. To just say male fide ulterior purpose, the word fraud is not even mentioned here. But now we hear from Mr Diamond's evidence and this witness for the very first time, fraudulent and corrupt activities.

Mr Maritz: I never heard mention, I never heard anyone or anybody mention fraud, and it is not pleaded by us, it is not relied upon.

Court: Well, it is certainly corrupt to be saying . . . [intervene].

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[28] *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623-4.
[29] *Above*.
[30] *Three Rivers District Council and others v Bank of England (No 3)* [2001] UKHL 16; [2001] 2 All ER 513 par 51. As long ago as *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697 Lord Selborne LC said: '. . . general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.'
In a similar vein in *Nedperm Bank Ltd v Verbi Projects CC* 1993 (3) SA 214 (W) at 220B, Zulman J stated: 'At the outset one has to observe that it is trite that fraud is a most serious matter and the type of allegation which is not lightly made and which is not easily established. What is important is that a factual basis must be laid for an allegation of fraud, and it is not sufficient . . . merely to put up speculative propositions or to raise submissions or to advance arguments on probabilities which might indicate a fraud. What is essential is that there should be hard facts, as it were, upon which the court can exercise the discretion.'

Mr Maritz: Corrupt, yes. Corrupt and extortion as to an attempt to extract an extortion is bribe from my client, and that is what the evidence so far had been. That is fully covered by the allegations. The defendant disclosed not to seek further particulars.'

[30] Thus, during the course of the evidence it came to be clarified that the appellants' case rested on extortion. In *Notaris v R* 1903 TS 484, Innes CJ described extortion as 'the taking under colour of office or authority from any person, by means of illegitimate pressure, any money or valuable thing which is not due from him at the time it is taken.'[31] It seems to me though that for the purposes of properly pleading a case in the context of a civil claim the distinction sought to be drawn by counsel for the appellant between fraud, on the one hand, and extortion, on the other, may be a distinction without a difference. For, as *Three Rivers* (par 55) pointed out:[32]

'A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence.'

[31] Of course, allegations of fraud, dishonesty or bad faith must be supported by particulars and the other party is entitled to notice of the particulars on which the allegations are based.[33] 'The proposition that a plaintiff claiming pure economic loss must allege wrongfulness, and plead the facts relied upon to support that essential allegation, is in principle well founded. Whilst it is not necessary, nor indeed appropriate, to plead policy considerations or the *boni mores*, it is incumbent on a plaintiff to plead all the facts on which he wishes to rely to enable the court to decide whether policy considerations and the *boni mores* warrant that liability should extend to the case in question.'[34] In fact, the absence of such allegations may render the particulars of claim

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[31] Cited with approval in *R v Mahomed* 1929 AD 58 at 67. Gardiner and Lansdown *Criminal Law and Procedure* (1970) vol 2 at 1709 describes it thus: 'A person is guilty of the crime of extortion who from improper motives, and by inspiring fear in the mind of another, demands from, and compels the latter to render some advantage which is not due.'

[32] *Three Rivers District Council and others v Bank of England (No 3)* [2001] UKHL 16; [2001] 2 All ER 513.

[33] *Three Rivers* para 55.

[34] *Trope v South African Reserve Bank & Another* 1992 (3) SA 208 (T) at 214D.

excipiable on the basis that no cause of action had been disclosed.[35] But, here the respondent did not file an exception. It would thus be futile to investigate whether an exception, if properly and timeously taken, would have been successful. The question is rather whether, despite the inadequacy of the appellants' pleadings, sufficient facts were adduced to enable a proper determination of the policy considerations pertaining to wrongfulness. Conversely stated, the question is whether the respondent has shown prejudice in the sense that it would have conducted its case in a materially different way, had the appellants' case been properly pleaded.[36] Although by no means persuaded that the respondent's assertion of prejudice is entirely without merit, I prefer to pass over the issue, for it seems to me that this court can, on the facts, such as they are, decide whether as a matter of policy the respondent should be liable for the loss claimed by the appellants.

[32] The evidence of the attempt at extortion rests solely on the say so of Mr. Diamond. According to Mr. Diamond, he was involved since July 2006 in a marketing campaign for the sale of stands in Ext 9,11 &12. During one of their last marketing events in November of that year, Mr. Flusk visited the marketing tent at the proposed development site and signed an offer to purchase a stand. Mr. Diamond testified:

'Mr Maritz: This offer in particular, did it ever come up thereafter in your interaction with Mr Flusk? --- M'Lady, from my position in the Corporate Affairs Committee and the Finance Committee there were interactions with the city manager from time to time and the city manager would enquire as to the progress on the development and the city manager would also request whether we could not do something better as far as the price is concerned, and more specifically ask for a discount. Obviously this was not something I entertained. Initially I just ignored it and brushed it off and later it progressed to be a more firm push from his side that he wanted a reduced price or a discount on his stand.

And how did you react to those increased attempts to obtain such a discount? --- M'Lady I, as indicated, I originally ignored him, I later brushed them off, but the city manager was quite firm in his persistence in obtaining a better price.

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[35] *Fourway Haulage SA (Pty) Ltd v South African National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA); [2009] 1 All SA 525 (SCA) para 14.
[36] *Shill v Milner* 1937 AD 101 at 105; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 198.

And what were the further developments in this regard, regarding you and Mr Flusk? --- M'Lady, in and about January 2008 I had a meeting with the city manager, where the city manager indicated that he does not just want a discount, he would in actual fact like the stand for free. I, at that stage, indicated to the city manager that I cannot entertain such a request, as there were nobody else that received any discounts and that there were definitely no free stands that could be handed out. I think that such an action from my part, or the part of Afro Pulse, would have constituted a bribe and that was definitely not necessary for anything with regards to this development. Everything was on track, the development was progressing well. At that stage the city manager then informed me that he had certain concerns arising from an investigation where there was an alleged whistle blower and that he would institute or has instituted an investigation into the land exchange, M'Lady. The city manager then indicated to me that if I do not concede to his request he can make things as easy or as difficult as he wants with regards to this development, M'Lady.

Was there anything specifically mentioned by him in this regard as to what he was referring to? --- M'Lady, the only outstanding matter at that stage was the issue of a Section 82 certificate. To my knowledge the Section 82 certificates are issued by junior officials once a developer complies with all the service aspects and engineering aspects of a development. So I did not take much notice to the, and I would like to call it a threat from the city manager at that stage as I knew that it was not delegated to him but it was a sub-delegation, the issue of Section 82 certificates to the HOD Corporate and Legal, and in actual fact it was even further down the line where those Section 82 certificates were issued. So I did not really regard it as a credible threat at that stage, M'Lady.

Did he mention anything about Section 82 at all? --- Yes, he did, M'Lady.

What did he say? --- He indicated that he could draw out the issue of a Section 82 indefinitely.

If you say "draw out", do you mean delay? --- Delay, yes, M'Lady.

How did you react to that? --- M'Lady, I did not engage Patrick Flusk any further on that. I did, however, share that with Mr Riaan Booysen and indicated that those were the comments from the city manager or the threats from the city manager. Mr. Booysen assured me that we met with all the engineering requirements for the issue of an 82 certificate and that he could not possibly foresee how council could refuse the issue of the 82 certificate to allow an individual to benefit to the extent to which Patrick Flusk wanted to obtain a benefit, M'Lady.'

[33] Given the pertinence of this evidence to the enquiry, the fact that the appellants did not respond to it by amending their particulars of claim conduced to all sorts of confusion. The parties generated a record of 24 volumes consisting of approximately 3600 pages of evidence and exhibits. As observed in *KPMG Chartered Accountants:* 'It is difficult to understand why the trial judge permitted all of the evidence or overruled the objection to the leading of some of the evidence. Obviously, courts are fully justified in ignoring provisionally objections to evidence if those objections interfere with the flow of the case. It is different if a substantive objection is raised which could affect the scope of the evidence that will follow. In such a case a court should decide the issue and not postpone it.'[37] In allowing the evidence, the trial judge intimated that she would consider what evidential weight to attach to such evidence later. But that, with respect, was to put the cart before the horse because, evidential weight only falls to be considered in respect of evidence that is admissible.

[34] Needless to say, the onus rested upon the appellants to establish, as a matter of probability, the conduct complained of on the part of Mr. Flusk. Foundational to the appellants' claim is the assertion that Mr. Flusk made an offer to purchase one of the stands in the property development on 17 November 2006. The evidence in this regard is a disputed document purporting to be a signed offer to purchase by Mr. Flusk, which was only discovered some two weeks before the commencement of the trial, which itself had previously been postponed almost a year and a half earlier. There appear to me to be several disquieting features about the document. First, the document contained a home telephone number that was several years out of date and related to Mr. Flusk's previous residence. Second, the telephone number contained the prefix 011 at a time prior to the compulsory ten digit dialling coming into effect. Third, despite the fact that Mr. Flusk is married in community of property, none of his spouse's details were included on the information sheet accompanying the alleged offer. Fourth, unlike other such offers, Mr. Flusk's offer was never accepted and although some speculation was advanced, no evidence was proffered as to why it was never accepted. Fifth, the

[37] *KPMG Chartered Accountants (SA) v Securefin Limited & another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA) para 38.

original agreement has never been produced, nor its absence adequately explained. Sixth, Mr. Diamond produced two lists of purchasers – the first list did not reflect Mr. Flusk as a purchaser, the second, provided to the mayor later, did. Seventh, Mr. Diamond initially alleged that Mr. Flusk had made an offer in respect of Erf 38, later he corrected that to Erf 4 and produced a copy of an offer to purchase in respect of that latter stand. Eighth, Erf 4 had in any event already been sold to another buyer in 2007, prior to the alleged extortion attempt.

[35] Obviously, if it is accepted – as I think it must be – that the offer to purchase is not genuine, then it must follow that the alleged extortion cannot be sustained. It bears noting that Mr. Flusk had called for the list of purchasers in the development in order to prove that there was an unhealthy relationship between the developer, on the one hand, and councillors and officials of the Municipality, on the other. That being so, it is incomprehensible that he would have made such a demand in circumstances where he knew that he himself had made an offer to purchase and that his name would feature on the list. There are, in addition, several probabilities that point away from the extortion demand having been made. Prior to the evidence given by Mr. Diamond, there was simply no suggestion anywhere on the record as to the alleged extortion attempt made by Mr. Flusk. This attempt was also never pleaded in any of the iterations of the particulars of claim from 2010 to the date of the trial. In this regard the first time that Mr. Flusk and the term mala fides were ever mentioned was in the amendment to the particulars of claim in May 2013. Significantly, no mention of this was made in the High Court application that came before Legodi J. In fact, the allegation first saw the light of day some seven years after the fact during the course of the trial.

[36] The explanation of Mr. Diamond and Mr. Booysen that they did not want to complicate the matter with ‘side issues’ or antagonise Mr. Flusk ring hollow. By the time the review application was launched, their relationship with Mr. Flusk was already antagonistic. Furthermore, when challenged in this regard, they stated that they had no proof other than Mr. Diamond’s say-so. That had not changed by the time of the trial. By then, as Mr. Booysen conceded under cross examination, the alleged extortion had

gone from being a side issue to the central issue in the case. By Mr. Diamond's own admission, he ought to have lodged a complaint with the mayor and speaker. Had it been raised with them, given the extent of the impropriety, it may have had the effect of disqualifying Mr. Flusk from further participation in the matter. Mr. Diamond suggested that he could not have reported the matter because he did not have 'adequate proof'. Implicit in this is that his mere say-so did not constitute 'adequate proof'. Why he thought that the proof that was inadequate then had suddenly become adequate by the time of the trial, is not explained.

[37] At the time that the alleged attempt was made, the land transaction had been the subject matter of a forensic investigation for at least six months. A legal opinion had been sought and obtained from counsel, which was to the effect that the land swap transaction was null and void for want of compliance with s 14(2) of the MFMA, which everyone, including the members of the Municipal Council, accepted as correct. In fact it was then accepted by everyone concerned that the land transaction process had to commence *de novo* and follow all the procedures set out in s 14(2) of the MFMA. There was a serious question mark over the manner in which the land was alienated – by swap – which was unique, as opposed to a sale by public tender.

[38] There was, as well, continuing controversy relating to the value of the Municipality's land. The minutes of the Corporate and Legal Committee of the Municipality reflect that a further property valuation was secured, that valued the Municipality's land much higher than the earlier valuation secured at the time of the swap. Mr. Flusk persisted in demanding lists of purchasers to demonstrate the irregularity of the transaction and the 'closeness' of councillors and officials to the developer. Mr. Diamond's own evidence was that his reaction to a complaint of misconduct before the regional office of the ANC, which he believed Mr. Flusk had initiated, was that he was disappointed because until then (being October 2008) he had regarded Mr. Flusk as a man of integrity. This evidence is completely at odds with his assertion that some nine months earlier, Mr. Flusk had been attempting to extort a free stand from him under the threat of the misuse of his administrative authority.

[39] It is important that the alleged extortion not be allowed to add further colour to the matter. An alternative case was advanced before us founded upon inference. As best as I could discern the argument, the inference that we were asked to draw is that in purporting to withhold the s 82 certificate, Mr. Flusk was motivated by an ulterior purpose. From the bar in this court, we were pointed to the following evidence of Mr. Diamond and other similar passages as proof that Mr. Flusk was actuated by an ulterior purpose:

'What took place there? --- The city manager indicated to me that his main concern was, or amongst his concerns, but his main concern was my involvement in the development and that the city manager felt that I would be benefiting from this development. The city manager then indicated to me that should I transfer my shares in the company [Afropulse] to an NGO of his choice he would immediately release the s 82 certificate.'

Mr. Flusk's responded to this allegation thus:

'What was Mr. Diamond's attitude when you confronted him about his shareholding in Afropulse? --- Well, in fact, the discussion started from the unlawfulness of the alienation, and he was saying that it is water under the bridge and there is nothing that we can do about it, other than to implement Council's resolution in line with his recommendation to Council. I said "Well, you are mistaken. There are a number of things that Council can do to rectify these issues, particularly based on the opinion of Wim Trengrove, including the fact that it is an unlawful alienation and for us to rectify it." Mr. Diamond's involvement, or benefit through Afropulse? --- Well, I am aware of what he said, My Lady, so.

Well, let me put it to you. He said that you wanted him to transfer his shares to an NGO. --- That is a blatant lie, My Lady, because he was saying to me it is water under the bridge. I said to him one of the things Council can do is to recover, the MFMA allows the Council to recover undue profit that has emanated through Council's assets, that people unduly benefitted from, in this case a land alienation. The MFMA allows us to recover those costs, My Lady.'

Elsewhere, Mr. Flusk added:

'I am saying to you therefore it is totally irrelevant, it would have been totally irrelevant whether Mr. Booysens and the township developers had complied with the services agreement requirements or anything else, because even if they had fully you would still not have issued that certificate. --- I just cannot see My Lady, how they could have fully complied with the

ordinance, because there cannot be a delink between the MFMA and the ordinance, for example. So I cannot see how they could have had full compliance with the ordinance.'

[40] The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. In this context it is important to emphasise: notwithstanding Mr. Booysen's say-so that by 15 December 2007 all requirements had been met and the s 82 certificate should have been issued thereafter, as at March 2008, when the high court application was launched, the external sewer connection was yet to be finalised. Mr. Groenewald, the chief engineer for water and sanitation in the Municipality testified:

'And the date of his signature, can you identify that date? --- That one was the 19th of August 2008.

Can you tell us why Mr Pierson appears to have signed it only on the 19th of August 2008 and not in May 2008? --- My Lady, during an inspection held on the internal network constructed, they found that a sewer line on the . . . just north of the southern boundary of Extension 10, had a back fall on and it was not correct and Craig did not sign it, because we asked them to rectify that back fall on the sewer, before he can sign this.'

Mr. Flusk's evidence (irrespective of whether it might be objectively determined that he was right or wrong in his belief) was that he was acting in the best interests of the municipality. One gains the impression that having received a complaint from national government arising from a tipoff in relation to a land transaction, as the accounting officer, he felt obliged to investigate those allegations. He appointed investigators who, again whether rightly or wrongly, questioned the propriety of the transaction and its value. A legal opinion was obtained, and accepted as correct, that the land transaction was tainted by invalidity and was a nullity and that the council had to reconsider the matter. The Municipal Council accepted the legal opinion as correct and required a process of ratification, which, according to the legal opinion, could not amount to a mere rubberstamping of the transaction.

[41] The issuing of a s 82 certificate in those circumstances, even if it were to be accepted that all the other requirements had been met, may have resulted in the land

being transferred to third parties despite invalidity for non-compliance with the provisions of s 14(2) of the MFMA. Even Mr Leibbrand accepted:

'I just want to you to comment on this, is it not correct that the moment you give a s 82 Certificate, that is the last bar that stops transfer happening in the Deeds Registry, that is why Mr. Booysen wanted them? Are you aware of that? --- Ja, that is my understanding.
On the one hand Mr. Flusk is now launching . . . he also has in his mind to launch a mission against setting aside this land transaction, but he also knows that if he issues a s 82 Certificate, setting aside the land swop is going to be very difficult because now you have got hundreds of other people who just bought the land, and taken transfer from Mr. Booysen's company. From a managerial practical perspective do you see that difficulty? --- That My Lady, is a . . . if you look at what comes first and what follows in terms of that, I think that is a valid argument. That he would like to first deal with the actual transaction. My only concern was it took very long to get that point and then who was consulted, and whether we should have actually cancelled the transaction based on what? That was my only concern, but dealing with that point first, I agree.'

[42] Any inference sought to be drawn must be 'consistent with all the proved facts: If it is not, then the inference cannot be drawn', moreover, 'it must be the "more natural, or plausible, conclusion from amongst several conceivable ones' when measured against the probabilities.[38] In this respect, it is important to distinguish inference from conjecture or speculation.[39] Here, Mr. Diamond, a councillor in the Municipality, stood to make a substantial profit. He was entitled to a fixed percentage of three per cent (of an estimated R 181 million) described in the agreements as an 'agent's commission'. Those agreements were prohibited by the Ordinance. In these circumstances, the city manager, as the accounting officer of the Municipality, had good cause for concern. I am accordingly not persuaded that when the evidence is viewed in its proper context, it can be concluded by a process of inferential reasoning that Mr. Flusk was actuated by an ulterior purpose. In any event, having found that the extortion does not survive scrutiny, precisely what that purpose is, remains unclear.

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[38] *South African Post Office v De Lacy & another* [2009] ZASCA 45; 2009 (5) SA 255 (SCA); [2009] 3 ALL SA 437 (SCA) para 35.
[39] *S v Essack* 1974 (1) SA 1 (A) at 16D.

[43] The principal complaint of the appellants is that they have suffered pure economic loss, for the most part, in being deprived of investment opportunities by reason of the delay in the issuance of the s 82 certificate. For this, they seek to hold the respondent vicariously liable. Throughout the period of the delay, the appellants were, on their own version, fully aware of the alleged extortion attempt and true motivation for Mr. Flusk's actions but kept this to themselves. They permitted Mr. Flusk to continue to broadcast his ostensible honesty to his employers. In the light of these facts, to hold the respondent liable on the basis of vicarious liability when the appellants could have but failed, to afford the respondent the opportunity of remedying the wrong complained of, may well be to impose an additional unwarranted burden on the respondent.[40] Basic notions of fairness would have required the appellants to raise their voices in complaint against the alleged conduct of Mr. Flusk and to afford the Municipality an opportunity of dealing with it. To shroud his alleged dishonesty in secrecy for as long as they did, and to thereafter seek to hold his employer liable in damages, may well be antithetical to notions of decency and fairness.

[44] The considerations of legal and public policy alluded to above compel me to the conclusion that the Municipality did not act wrongfully in the delictual sense and was not in breach of any legal duty owed by it to the appellants. That means that the Municipality enjoys immunity against liability for damages resulting from the conduct complained of. This conclusion makes it strictly unnecessary to consider the further contentions debated before us in argument. However, for the sake of completeness and particularly because causation also poses certain difficulties for the appellants, I shall briefly touch on that issue.

[45] Causation involves two distinct enquiries.[41] The first is a factual one and relates to the question as to whether the defendant's wrongful act was the cause of the

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[40] *Fourway Haulage* par 26.

[41] In *International Shipping Company (Pty) Ltd v Bentley* [1989] ZASCA 138; 1990 (1) SA 680 (A); [1990] 1 All SA 498 (A) para 64-66, Corbett CJ expressed the position thus: '. . . in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for"

plaintiff's loss. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test. The second enquiry then arises, namely whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. In this regard it is important to recognise that broadly speaking wrongfulness and remoteness perform the same function. They are both measures of control.[42]

[46] The summons particularised each of the appellants' claims as follows:

'First plaintiffs claim:

7. During approximately January 2006, first plaintiff applied for the approval of township development on first plaintiff's property aforesaid.

8. The development was called Extension 7 of Meyersdal Nature Estate and comprised a mix of residential and office development on three erven and was to comprise a townhouse development on two erven and an office block on the third erf.

9. Defendant duly approved the establishment of the aforesaid township.

. . .

11. By December 2007, first plaintiff had either fully installed all of the required engineering services or had furnished proper guarantees for the completion of outstanding items.

. . .

13. By December 2007, first plaintiff had accordingly satisfied all the requirements for the issue by Defendant of a certificate under s 82 of the Ordinance.

. . .

16. In the reasonable and legitimate expectation that a s 82 certificate aforesaid would be issued and that the building plans would subsequently be formally approved:

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test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in g[q]uestion. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".'

[42] *Fourway Haulage* para 231.

16.1 First plaintiff, in January 2008, commenced with the erection of the office block on Erf 392, which was completed during or about the end of September 2008.

16.2 First plaintiff, in January 2008, commenced with the erection of 47 townhouses on Erf 390, which was completed during or about the end of June 2008.

17. Notwithstanding repeated demands by first plaintiff, which demands were both oral and in writing, defendant failed or refused to issue the required s 82 certificate with the consequence that the building plans were also not formally approved.

23. If it had not been for the *mala fide* conduct aforesaid:

23.1 The building plans in respect of the office block erected on Erf 392 would have been approved;

23.1A Construction of the office block would have commenced by approximately mid-February 2008 and would have been completed by approximately the end of September 2008.

23.2 The building plans in respect of the 47 townhouses erected on Erf 390 would have been approved;

23.2A Construction of the 47 townhouses would have commenced by approximately mid-February 2008 and would have been completed by approximately the end of June 2008;

23.3 An occupation certificate would have been issued in respect of both the office block and the 47 townhouses aforesaid on the completion dates aforesaid;

23.4 First plaintiff would have transferred the land (i.e. Erf 392), by then already sold, and would have invested the proceeds in an interest-bearing investment by no later than 1 March 2008;

23.5 First plaintiff would have transferred the land (i.e. Erf 390), by then already sold, and would have invested the proceeds in an interest-bearing investment by no later than 1 March 2008;

23.6 First plaintiff would have been able to sell Erf 391 and to invest the proceeds in an interest-bearing investment by no later than 1 March 2008;

23.7 First plaintiff, on completion of the office block, would have been refunded the construction costs of the office block aforesaid in terms of an oral agreement with the purchaser of the land (Erf 392) and would have invested such refunded amount in an interest-bearing investment by no later than end September 2008;

23.8 First plaintiff, on completion of the 47 townhouses, would have been paid the aggregate of the selling prices of the 47 townhouses by then already sold, less the price of the land in terms of an oral agreement with the purchaser of the land (Erf 390) aforesaid and would have invested such amount in an interest-bearing investment by no later than end June 2008.

24. As a direct result of Defendant's conduct aforesaid:

24.1 The required s 82 certificate was delayed from December 2007 until 20 March 2009 and the formal approval of the building plans was similarly delayed.

24.2 First plaintiff was precluded from transferring Erf 392, from receiving the proceeds of the sale and from investing such proceeds as aforesaid until 13 July 2009.

24.3 First plaintiff was precluded from transferring Erf 390, from receiving the proceeds of the sale and investing it as aforesaid until July 2009.

24.4 First plaintiff was, for the period 1 March 2098 to 30 June 2009, precluded from selling Erf 391 and from investing the proceeds in an interest-bearing investment.

24.5 First plaintiff was in law obliged to pay the rates and taxes in respect of all three erven for the period from when transfer would ordinarily and otherwise have been effected of the three erven into the names of the purchasers (new owners) until the dates when after the eventual issue of the s 82 certificate, transfer could reasonably be effected into the names of the purchasers.

24.6 First plaintiff was precluded from receiving the refund of the construction costs relating to the office block aforesaid and from investing it as aforesaid until 13 July 2009.

24.7 First plaintiff was precluded from receiving the aggregate of the selling prices of the 47 townhouses until July 2009.

25. As a result of the defendant's *mala fide* conduct aforesaid and the consequences thereof as set out above, first plaintiff suffered damages in an amount of R10 406 058 calculated as set out in annexure "A" hereto.

Second plaintiff's claim:

'28. During approximately January 2006, second plaintiff applied for the approval of a township development on second plaintiff's property aforesaid.

29. The development was called Extensions 9, 11 and 12 of the Meyersdal Nature Estate and comprised a residential township development consisting of 289 erven.

30. Defendant duly approved the establishment of the township.

. . .

41. If it had not been for the *mala fide* conduct and resultant delay aforesaid, second plaintiff would have been able:

41.1 To effect transfer of all 289 erven to the purchasers, alternatively, and to the extent that the existing concluded deeds of sale were void and the purchasers were not prepared to

proceed with the transactions, to sell all the erven and to effect transfer thereof into the names of the purchasers;

41.2 To receive payment of the purchase price of each erf at the then total market value for all the erven of R181 475 000; and

41.3 To invest the proceeds in an interest-bearing investment by no later than 1 March 2008.

42. As a direct result of the defendant's *mala fide* conduct aforesaid:

42.1 Second plaintiff was, for the period 1 March 2008 to 30 June 2009, precluded from effecting transfer of 289 erven into the names of the purchasers and from receiving the proceeds from the sales.

42.2 As a result of the delay aforesaid, second plaintiff suffered a loss of interest on the sum of R181 475 000 for the period 1 March 2008 to 30 June 2009.

42.3 Second plaintiff was only able to effect transfer and so to realise the proceeds of the development substantially later, by which time the market value was at least 10% lower than what it was and what plaintiff would have received had it not been for the delay aforesaid.

42.4 Second plaintiff accordingly suffered a loss, the equivalent of the 10% drop in market value, in the amount of R18 147 500.

42.5 Second plaintiff, in addition, suffered a loss in that second plaintiff was obliged to continue paying rates and taxes in respect of the 289 erven over the period of delay until transfer was in each case given to the new purchaser, which rates and taxes would otherwise have been payable by the new owners had there not been a delay as aforesaid.

43. As a result of the defendant's *mala fide* conduct aforesaid and the consequence thereof as set out above, second plaintiff suffered damages in the amount of R47 667 975 calculated as set out in annexure "C" hereto.

Third plaintiff's claim:

44. At all times relevant hereto and during the period 1 October 2007 to 21 March 2009, third plaintiff was the owner of Portions 281 and 283 (portions of Portion 153) of the farm Klipriviersberg 106 ("third plaintiff's property").

45. Third plaintiff's property aforesaid fell within the municipal area of defendant.

46. During approximately January 2006, third plaintiff applied for the approval of a township development on third plaintiff's property aforesaid.

47. The development was called Extension 8 and 10 of Meyersdal Nature Estate and comprised a high density residential township development.

48. Defendant duly approved the establishment of the township.

49. The township register was thereafter duly opened by the Registrar of Deeds.

50. Notwithstanding notification by the Registrar of Deeds that the township register had been duly opened, defendant failed to cause the aforesaid townships to be proclaimed as such in terms of Section 103 of the Ordinance.

51. Defendant's Chief Engineer had, during the course of 2007, taken a decision that Extensions 7 to 12 be regarded as one for purposes of the installation of services.

52. As a result of the *mala fide* conduct set out in paragraphs 19 to 22 . . . above, it was clear that even if Extensions 8 and 10 were duly proclaimed, the said Flusk would similarly refuse to issue the s 82 certificates in regard to Extensions 8 and 10.

53. In order to mitigate its damages, third plaintiff did not take any steps to compel proclamation by defendant of Extensions 8 and 10 as such proclamation would have resulted in third plaintiff becoming liable for the payment of rates and taxes on all of the erven in the proclaimed townships from date of proclamation onwards, under circumstances where the third plaintiff would, as in the case of Extensions 7, 9, 11 and 12, not have been able to obtain the necessary Section 82 certificates so as to enable it to effect transfer to any purchaser.

54. If it had not been for the *mala fide* conduct aforesaid:

54.1 The township would have been proclaimed by 1 October 2007, alternatively by 15 December 2007.

54.2 All requirements for the issue of a s 82 certificate would have been complied with by third plaintiff by 15 December 2007.

54.3 The s 82 certificate would have been issued by 31 December 2007.

54.4 Third plaintiff would have been able to sell the land at the then market value to effect transfer and to invest the proceeds in an interest-bearing investment, all of which would have happened by no later than 1 March 2008.

55. As a direct result of the defendant's *mala fide* conduct aforesaid:

55.1 There was such a delay with the proclamation of the township that by the time that defendant indicated that it was not prepared to proclaim the township the property market experienced such a collapse that the development was no longer economically viable.

55.2 The third plaintiff was precluded from selling and effecting transfer of land sold and from receiving and investing the proceeds of sales as otherwise would have happened.

55.3 The third plaintiff was for the period 1 March 2008 to at earliest 30 June 2009 precluded from investing such proceeds of sales which otherwise would have happened.

55.4 The third plaintiff consequently suffered a loss equivalent the loss of interest which third plaintiff would have received from such investment.

55.5 The third plaintiff in addition suffered a loss as a result of at least a 10% drop in market value of land in the development aforesaid.

56. As a result of the Defendant's *mala fide* conduct aforesaid, and the consequence thereof as set out above, third plaintiff suffered damages in the sum of R10 625 330 calculated as set out in annexure "D" hereto.'

[47] The appellants' pleaded case rests on several assumptions. As I see it, at core, many of the wounds for which the appellants seek to hold the Municipality liable are self-inflicted. The first appellant's claim was predicated on the fact that it was kept out of its money as a result of the delay in selling the 47 townhouses and letting the office block. According to Mr. Booysen, in the expectation of the grant of the s 82 certificate, he went out to tender for the construction of the 47 residential townhouses and the office block of approximately 5000 square meters. When the s 82 certificate did not issue as he had anticipated, he simply decided to proceed with the construction. At that stage the building plans had been submitted but had not yet – and could not – have been approved, until the s 82 certificate had issued.

[48] But, it gets worse for the first appellant. Under cross examination, Mr. Booysen admitted that in terms of an internal company arrangement it was not the first appellant, but rather two sister companies, that would be entitled to the rental for the office block and the purchase price flowing from the sale of the 47 townhouses. In re-examination it emerged that: (a) the first related company, Chestnut Hill Investment 213 (Pty) Ltd (Chestnut Hill) had purchased Erf 390, on which the 47 townhouses were to be built, from the first appellant on 8 November 2006 for the sum of R 7 million; and (b) the second related company, Armadillo Developments 505 (Pty) Ltd (Armadillo), had purchased the stand on which the office block was to be built from the first appellant on 21 August 2007 for the sum of R 10 million. The first appellant's claim thus changed from its amended form to belatedly allege that it suffered loss in two forms: first, as a result of the delay in the implementation of the land sale agreements to Chestnut Hill and Armadillo; and, second, the delay in recovering remuneration in respect of construction contracts with those two companies to erect the townhouses and office block. Both sale agreements were concluded after the application for the establishment of the township but prior to its proclamation as such in terms of s 103 of the

Ordinance.[43] Accordingly, both sale agreements fall foul of and are contrary to the provisions of s 67 of the Ordinance.[44] The claim of the first appellant is to be put in the same position that it would have been in had the illegal and void agreements been timeously and properly performed.[45] The mere expression of the proposition demonstrates its absurdity.

[49] Insofar as the second appellant is concerned, Mr. Diamond testified:

'And those cancellations as far as those properties are concerned, where they, to what extend were they successfully resold to other purchasers? --- My Lady, all properties were resold. The reality, however was, that the total marketing environment change from 2006 to 2009. There was a global crash of the property market in late 2008 in the US and in Europe, it resulted in South Africa with the credit crunch in 2009, so where credit was easily available and people could very comfortably afford properties and buy property and invest in real estate. This

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[43] 103. Notice declaring township an approved township
(1) After the provisions of sections 72, 75, 99 and 101 have been complied with and the authorised local authority to which application has been made in terms of section 96(1) is satisfied that the township is situated within its area of jurisdiction, such local authority shall, by notice in the *Provincial Gazette*, declare the township an approved township and it shall, in a schedule to such notice, set out the conditions on which the township is declared an approved township.
(2) After an authorised local authority has published a notice as contemplated in subsection (1), it shall forward a copy of –
(*a*) the notice;
(*b*) the schedule to the notice; and
(*c*) the general plan of the township, as approved, forthwith to the Director.

[44] 67. Prohibition of certain contracts and options
(1) After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70 –
(*a*) enter into any contract for the sale, exchange or alienation or disposal in any other manner of an erf in the township;
(*b*) grant an option to purchase or otherwise acquire an erf in the township,
Until such time as the township is declared an approved township: Provided that the provisions of this subsection shall not be construed as prohibiting any person from purchasing land on which he wishes to establish a township subject to a condition that upon the declaration of the township as an approved township, one or more of the erven therein will be transferred to the seller.
(2) Any contract entered into in conflict with the provisions of subsection (1) shall be of no force and effect.
(3) Any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence.
(4) For the purposes of subsection (1) –
(*a*) "steps" includes steps preceding an application in terms of section 69(1) or 96(1);
(*b*) "any contract" includes a contract which is subject to any condition, including a suspensive condition.

[45] In *Schierhout v Minister of Justice* Innes CJ said:
'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect . . . (*Code* 1.14.5). So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done — and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act.'

resulted in 2009 that we sat with 110 properties approximately that was very difficult to sell. I think our marketing exercise took us more than a year to conclude sale agreements on those 110 properties. My Lady, it was so difficult for our company to actually sell these properties that we solicited the services of other agents within our area and in surrounds to participate and join us in our marketing effort and we threw the net as far as wide as possible to ensure that we could sell these properties. Notwithstanding, My Lady, there were many purchasers that could not conclude transactions due to credit that was not available to them anymore and it was a very tough market environment in 2009, My Lady.'

However, both Mr. Booysen and Mr. Diamond conceded that the sales of the stands foundational to the second appellant's claim occurred in contravention of s 67(1) of the Ordinance. Both were aware of the prohibition. In that regard Mr. Booysen testified:

'It is your right to decline any question which may intend to incriminate you. Mr. Booysen, I am sure as an attorney you are aware of that. The other aspect, while we are on your agreement, you referred to as a pretty harsh deposit clause, where the standard term is that a deposit must be paid, and it is a non-refundable deposit. --- That is correct, My Lady.

Not only is the deposit payable, but it is to be kept in an attorney's trust account, and into an interest bearing one in terms of s 78(2)(A) of the Attorney's Act, and the interest is to accrued for the developer, the seller, not for the purchaser who pays the deposit. --- That is correct, My Lady. My Lady, if I can just mention while we are on the clause, I do not think that that clause is in any way ambiguous or that any purchaser who buys from us is confused on what the provisions of that clause is. So, I do not think any purchaser is being misled by that clause. They know exactly what is meant. So, I am not sure what Mr Peter's inference is by confirming the provisions of that clause. There is no misunderstanding if I read it, and apparently so when Mr. Peter reads it, there is no misleading statement in that, My Lady.

I am just pointing out what your agreement provides, Mr. Booysen. --- Thank you, Mr Peter.

But, nowhere in s 19 is there any suggestion that consent was obtained. You agree with that. --- My Lady . . . [intervene].

Clause 19 agreement. --- My Lady, I am advised that Clause 19 complies with s 70, and I do not want to further be asked.'

Like Mr. Booysen, when being cross examined about these agreements, Mr. Diamond also chose not to answer questions that might incriminate him.

[50] Clause 2.1 of the agreement signed by prospective purchasers reads:

'On date of signature hereof by the Purchaser, the Purchaser shall pay in full a non-refundable deposit of R40,000 (Forty Thousand) which shall be paid to the Seller's conveyancers and will be invested in an interest bearing trust account, interest to accrue to the Seller, in terms of Sec 78(2A) of the Attorneys Act.'

And, clause 19.1.1 of the agreement provided:

'It is recorded that the erfs are not registerable at present as the township has not been proclaimed and the purchaser undertakes not to cancel the agreement at any stage, despite the provisions of s 67 of the Township and Town Planning Ordinance 15 of 1985.'

Those clauses appear to me to be inimical to the interests of the community and may well be contrary to public policy.[46] But, it is not necessary to dwell on this because, as with the first appellant, these agreements are also *contra legem*.

[51] The third appellant's claim stands on a slightly different footing – it is founded on a depreciation of the value of the stands in an unproclaimed township. The wrongful act complained of appears to be what can only be described as the inadvertent failure by the Municipality to proclaim the townships in respect of Ext 8 & 10 at the same time that the other townships were proclaimed. It is difficult to see the causal nexus between the failure to proclaim the township, the s 82 certificate and the asserted loss. Absent proclamation, the third appellant was not entitled to a s 82 certificate. No doubt that is the reason why the failed review application that came before Legodi J did not relate at all to Hometalk or Ext 8 & 10. What is more is that Mr. Booysen chose not to insist on the township being proclaimed because, he then considered it financially advantageous not to do so. In that regard he testified:

'Okay. But, your evidence was different. Your evidence was they did not proclaim the township, nobody knows why it was not proclaimed at this same time as the other townships. But, you did not push the issue because you did not want to incur rates and taxes while you were fighting with Mr Flusk. --- That was my evidence, My Lady.'

[52] Applying the test formulated by Corbett CJ in *International Shipping v Bentley,* I am by no means persuaded that the conduct complained of was indeed the cause of

[46] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); [1989] 1 All SA 347 (A).

the appellants' asserted loss. For this reason as well, no legal liability can arise. But, even assuming factual causation in the appellants' favour, serious difficulties with remoteness remain. Mr. Diamond testified:

'And you will also agree with me that nobody saw the global financial crises coming? --- Definitely not me, My Lady. You an expert in the [indistinct]. Okay, any other estate agents you know of, or property experts that could see this crash coming, is going to wack the South African property market so badly? --- My Lady, if the US financial gurus on Wallstreet did not see it coming there was no ways that the best of the best that we have locally would have envisaged that, My Lady.'

It goes without saying that the vicissitudes of markets are notoriously difficult to foresee.

[53] In the result, I would accordingly dismiss the appeal with costs, such costs to include those consequent upon the employment of two counsel.

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V M Ponnan

Judge of Appeal

**Schippers AJA (Majiedt JA concur):**

[54] I have had the advantage of reading the judgment of my colleague Ponnan JA. I agree with it for the reasons he has given. I wish however, to add the following observations. First, the appellants have not established causation: that the withholding of the relevant certificates in the circumstances, caused them to suffer loss. Second, they have not proved damage: a basic element of a delictual action.

[55] The appellants' case, in summary, is this. By December 2007, they had satisfied all the requirements for the issue of certificates under s 82 of the Town Planning and Townships Ordinance No 15 of 1986 (the Ordinance). The respondent, acting through its City Manager, Mr Patrick Flusk, wrongfully, intentionally and mala fide, or motivated by a mala fide or ulterior purpose, delayed the issue of the s 82 certificates from 15 December 2007 until 20 March 2009, which caused the appellants to suffer economic loss.

**Causation**

[56] In *Skosana*,[47] Corbett JA said:

'Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question whether the negligent act or omission in question caused or materially contributed to . . . the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part.'

[57] This court has held that the test for legal causation, 'is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their

[47] *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E-G. See also *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-I; *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 65.

part'.[48] In *Fourway Haulage*,[49] Brand JA cautioned that these factors, 'should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable'.

[58] It is settled that a plaintiff needs 'only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics'.[50]

[59] The first appellant claims that it has suffered economic loss of some R10 million, comprising largely interest it would have earned on investments. The particulars of claim state that but for the mala fide conduct of Mr Flusk, the first appellant would have transferred Erf 390 and Erf 392; and it would have received a refund of the construction costs of an office block erected on Erf 392 and the aggregate of the selling prices of 47 townhouses erected on Erf 390. It would have invested the proceeds from the sales of these erven, the aggregate of the selling prices of the townhouses, the refund of the construction costs and the proceeds from the sale of Erf 391, in an interest-bearing investment. As a result of the mala fide conduct on the part of the respondent, the first appellant was precluded from doing so and was obliged to pay rates and taxes on Erf 390, Erf 391 and Erf 392, between the date on which transfer would ordinarily have taken place and the date on which transfer could reasonably be effected into the names of the purchasers, after the s 82 certificates were issued.

[60] The respondent denied these allegations and pleaded that the first appellant entered into the relevant agreements of sale prior to publication of a notice under s 103 of the Ordinance, in terms of which a township is declared an approved township,[51] in contravention of s 67 thereof.

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[48] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764I-765A.
[49] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 2009 (2) SA 150 (SCA) para 34.
[50] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 25.
[51] Section 103(1) of the Ordinance reads:
'After the provisions of sections 72, 75, 99 and 101 have been complied with and the authorised local

[61] Mr Sydney Rean Booysen, an attorney and a director of the first and second appellants, testified that in January 2006 he submitted an application, in terms of s 96 of the Ordinance, for the establishment of a township known as 'Meyersdal Nature Estate Extension 7'. One application, called 'Extension 7', was submitted, which encompassed Extensions 7, 8, 9, 10, 11 and 12; and it stated that the township would be phased in, as shown on the layout plan. The township comprised, inter alia, a total of 296 residential 1 stands in respect of Extensions 7, 8, 9, 11 and 12; and one office stand, and high density sites (on which townhouses could be built) on Extension 7. Extensions 7, 9, 11, and 12 were proclaimed as approved townships. Mr Booysen said that he did not know why Extensions 8 and 10 had not been declared approved townships simultaneously with the other Extensions, but he did not insist on those declarations, because then the third appellant would have been liable for rates and taxes, which it wanted to avoid. I revert to these aspects below.

[62] It is common ground that prior to proclamation of the township on 1 October 2007 in terms of s 103 of the Ordinance, the first appellant sold Erf 390, on which the 47 townhouses were built, and Erf 392. Mr Booysen testified that Erf 390 had been sold to Chestnut Hill Investments 213 (Pty) Ltd (Chestnut Hill) in November 2006; and Erf 392, to Armidillo Developments 505 (Pty) Ltd (Armidillo) in August 2007. Mr Neil Diamond, a director of the second appellant, said that there were some 300 stands in the whole development; that by November 2006, 90 per cent of these stands had been sold; that by January 2007, all had been sold; and that all these sales were done in contravention of the Ordinance. The first appellant's claims for economic loss arise from these contracts: it would have invested the proceeds and earned interest on those amounts.

[63] Section 67 of the Ordinance reads:

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authority to which application has been made in terms of section 96(1) is satisfied that the township is situated within its area of jurisdiction, such local authority shall, by notice in the *Provincial Gazette*, declare the township an approved township and it shall, in a schedule to such notice, set out the conditions in which the township is declared an approved township.'

'**Prohibition of certain contracts and options:-** (1) After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70-

(*a*) enter into any contract for the sale, exchange or alienation or disposal in any other manner of an erf in the township;

(*b*) grant an option to purchase or otherwise acquire an erf in the township, until such time as the township is declared an approved township: Provided that the provisions of this subsection shall not be construed as prohibiting any person from purchasing land on which he wishes to establish a township subject to a condition that upon the declaration of the township as an approved township, one or more of the erven therein will be transferred to the seller.

(2) Any contract entered into in conflict with the provisions of subsection (1) shall be of no force and effect.

(3) Any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence.

(*4*) For the purpose of subsection (1)-

*(a)* "steps" includes steps preceding an application in terms of section 69(1) or 96(1);

*(b)* "any contract" includes a contract which is subject to any condition, including a suspensive condition.'

[64] Section 70 of the Ordinance permits an owner of land who has applied to establish a township, to apply to the Director (an officer in the provincial government designated to perform functions under the Ordinance) to enter into a contract or grant an option contemplated in s 67(1), prior to proclamation of a township as an approved township. Section 70 points to the manifest purpose of s 67 of the Ordinance: to protect members of the public from buying an erf in an unproclaimed township; and to ensure that township owners provide appropriate guarantees for the installation of the requisite engineering services contemplated in Chapter V of the Ordinance, before selling any erf in that township.[52]

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[52] The relevant provisions of s 70 of the Ordinance read as follows:

'(1) After an owner of land has applied in terms of section 69(1) to establish a township, he may apply to the Director for consent to enter into any contract contemplated in section 67(1) or to grant any option contemplated in the latter section, and the Director may-

(*a*) in the case where the owner applied to establish a residential township, in consultation with the local authority concerned;

(*b*) in any other case, in his discretion,

consent to the entering into of such contact or the granting of such option subject to any condition the Director may deem expedient, and thereupon the Director shall notify the owner and, where applicable,

[65] None of the appellants applied to the Director, in terms of s 70 of the Ordinance, for permission to enter into any contract prior to the proclamation of Extensions 7, 9, 11, and 12 as townships. Indeed, when cross examined as to whether the appellants obtained such consent, Mr Booysen declined to answer any further questions regarding s 67 or 70 of the Ordinance, because, as he put it, he was 'not on trial for [not] complying with Section 67 or with Section 70'. However, Mr Booysen was aware of these provisions. So too, Mr Diamond. He said that since he became an estate agent, 22 years before the trial, he knew that s 67 of the Ordinance prohibited the sale of erven in an unproclaimed township, but that its disregard is 'common practice within the real estate industry.'

[66] Contracts concluded in conflict with a statutory prohibition are generally void. A classic statement of the position was given by Innes CJ in *Schierhout*:[53]

> 'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect . . . So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done . . . '.

[67] The plain wording, context and purpose of s 67 of the Ordinance,[54] make it clear that where, as in this case, any contract of sale entered into in respect of any erf in a township which has not been declared an approved township, is a nullity. The language of s 67(2) is unambiguous and places it beyond question that invalidity was intended: such a contract shall be of no force and effect; and any person who enters into the contract, is guilty of an offence.

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the local authority in writing thereof and of any condition imposed.
(2) On receipt of a notice contemplated in subsection (1) the applicant shall, before entering into the contract or granting the option, but within a period of 6 months from the date of the consent, furnish to the local authority a guarantee of such type and for such amount as the local authority may determine and which is otherwise to its satisfaction that he will fulfil his duties in respect of the engineering services contemplated in Chapter V, and if he fails to do so the consent shall lapse.'

[53] *Schierhout v Minister of Justice* 1926 AD 99 at 109; *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* [2015] ZASCA 70; 2016 (1) SA 202 (SCA) para 22.

[54] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[68] It follows that the contracts of sale in respect of Erf 390 and Erf 392 - entered into in November 2006 and August 2007, respectively, are null and void because they were concluded in violation of s 67(1) of the Ordinance. So too, the contracts of sale in respect of some 300 townhouses - the bulk of which were entered into by November 2006 and by latest, January 2007. The first appellant's case is that it would have deposited the income derived from all these illegal contracts into interest-bearing investments. But the illegal contracts must be regarded as never having been concluded.[55] That being so, any conduct on the part of Mr Flusk, even if it were mala fide, logically, could have no effect on a contract which the law regards as never having been entered into. Put differently, the demand by Mr Flusk in 2008 for a free stand in the township; or that Mr Diamond transfer his shares in the second appellant to a non-governmental organisation, is not the factual cause of the first appellant's loss: it did not contribute, let alone materially contribute, to the first appellant's loss.

[69] And it is no answer to say that the first appellant entered into the illegal and void contracts in anticipation that the respondent would issue the s 82 certificates in respect of Extensions 7, 9, 11, and 12. If this Court were to uphold such an argument it would not only render s 67 of the Ordinance nugatory, but this Court would also give legal sanction to a claim founded on a transaction that the lawgiver has expressly prohibited. This, it cannot do. In our democratic order the courts have a duty to apply and enforce legislation.[56]

[70] In *Pottie*,[57] Fagan JA said:

'The usual reason for holding a prohibited act to be invalid is not the inference of any intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent.'

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[55] *Schierhout* fn 3 above.
[56] *Cool Ideas 1186 CC v Hubbard & another* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 99.
[57] *Pottie v Kotze* 1954 (3) SA 719 at 726H.

[71] In *Cool Ideas*,[58] a majority of the Constitutional Court held that a court of law cannot be expected to disregard a clear statutory prohibition; and recognition by a court of a statutory prohibition backed by a criminal sanction, would be contrary to public policy and amount to sanctioning an illegality, which is inimical to the principle of legality and the rule of law.

[72] Consequently, recognition of the first appellant's claims for loss of interest, founded squarely on contracts concluded in violation of an express statutory provision which declares those contracts to be of no force and effect, would result in the court lending its aid to the enforcement of illegal acts.[59]

[73] This brings me to legal causation: whether the mala fide conduct on the part of the respondent is linked sufficiently closely or directly to the first appellant's economic loss, for legal liability to ensue. This issue is also referred to as remoteness of damage.[60] As was said in *Fourway Haulage*:[61]

'In the final analysis, the issue of remoteness is again determined by considerations of policy. Broadly speaking, wrongfulness - in the case of omissions and pure economic loss - on the one hand and remoteness on the other, perform the same function. They are both measures of control. They both serve as a 'longstop' where most right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability.'

[74] Likewise, in *Country Cloud*,[62] the Constitutional Court said:

'So the element of wrongfulness provides the necessary check on liability in these circumstances. It functions in this context to curb liability and, in doing so, to ensure that unmanageably wide or indeterminate liability does not eventuate and that liability is not inappropriately allocated. But it should be noted - and this was unfortunately given little attention in argument - that the element of causation (particularly legal causation, which is itself based on

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[58] *Cool Ideas* fn 10 above paras 53, 55, 61 and 98-99.
[59] *Cool Ideas* fn 10 above para 77.
[60] *Skosana* fn 1 above at 34G; *Fourway Haulage* fn 3 above para 30.
[61] *Fourway Haulage* fn 3 above para 31.
[62] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC) para 25.

policy considerations) is also a mechanism of control in pure economic loss cases that can work in tandem with wrongfulness.'

[75] The appellants' claims fail on this basis also. A strong policy consideration which militates against the imposition of liability in this case, is that the economic loss is inextricably linked to acts done in direct contravention of a statutory prohibition, backed by a criminal sanction. This in itself, in my view, negates legal causation and should non-suit the first and second appellants. Apart from this, the mala fide conduct on the part of the respondent is not linked sufficiently closely or directly to the loss that the appellants are alleged to have suffered. And the relationship between the respondent and the appellants is not sufficiently proximate: under the Ordinance, a municipality's duties are overwhelmingly public in nature; and those duties are to the public at large and not to an individual developer. Indeed, the Ordinance imposes no explicit duties on a municipality to a property developer. Further, the loss is of such a kind that it was not reasonably foreseeable to a person in the position of the respondent, a local authority - a lost opportunity of making an investment in an interest-bearing account, because an official in its employ withheld a document; and, in the case of the second and third appellants, reduction in the value of property on account of a global financial crisis which nobody saw coming. In the circumstances, the imposition of liability on the respondent would not only be untenable, but also give rise to indeterminate liability.

[76] The first appellant's claim for interest relating to the construction costs of an office block on Erf 392 likewise cannot succeed, because it is directly founded on an act performed in violation of the law. The particulars of claim state that but for Mr Flusk's mala fide conduct, the building plans for the office block would have been approved; and its construction would have commenced by mid-February 2008 and been completed by the end of September 2008. On completion of the office block, the first appellant would have been refunded the construction costs thereof in terms of an oral agreement with the purchaser of Erf 392; and would have invested the refunded amount in an interest-bearing investment by the end of September 2008. The respondent pleaded that the appellants were precluded from relying on these facts to claim

damage, because their conduct was contrary to s 4 of the National Building Regulations and Building Standards Act 103 of 1977 (the Building Regulations and Standards Act).

[77] It is common ground that construction of the office block commenced in January 2008, without building plans having been approved by the respondent. Section 4(1) of the Building Regulations and Standards Act provides that no person shall erect any building in respect of which plans and specifications are to be drawn and submitted under the Act, without prior written approval of the local authority concerned. Section 4(4) makes it clear that any person who erects a building in contravention of s 4(1) is guilty of an offence and liable on conviction to a fine not exceeding R100 for each day of illegal construction of the building. A contract in violation of a statute which imposes a criminal sanction is void.[63] So, any refund of construction costs would have been made pursuant to actual construction undertaken in contravention of the Building Regulations and Standards Act. As already stated, a court cannot sanction a claim which arises from a flagrant violation of the law.

[78] It follows that the argument of Mr Maritz, who with Mr de Koning appeared for the appellants, that the contracts entered into in contravention of s 67 of the Ordinance, and the Building Regulations and Standards Act, are 'technically unlawful' and that the court should adopt a 'pragmatic approach' to the appellants' claims for damage because the illegal contracts were completed after proclamation of the township, is untenable.

[79] In any event, the first appellant presented no evidence of any construction agreement showing the construction costs which allegedly would have been refunded to the purchaser of Erf 392, or of any loss occasioned by the delay in receiving payment pursuant to such an agreement, aside from Mr Booysen's say-so in re-examination, when the appellants presented a substantially different case regarding their alleged loss, from that originally pleaded. And it is inconceivable that the first appellant, a company, would have entered into an 'oral' contract with another company, Armidillo,

[63] *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) at 188G.

for a refund of the construction costs of an office block. There is simply no evidence of such an agreement.

[80] The appellants' claims for economic loss in relation to rates and taxes for the period during which the s 82 certificates were delayed, are incompetent. On their own showing, these claims were finally settled with the respondent in a settlement agreement, pursuant to the review proceedings in which the appellants sought an order compelling the respondent to issue the s 82 certificates. Moreover, the claims for rates and taxes were never intended to form part of the appellants' damages claim. That much is clear from Mr Booysen's evidence:

'But what we see here in Clause 3 at least, something addressing your complaint about having paid rates and taxes over this delayed period --- I see that in the clause. Is there a question . . . ?

Yes, because it seems to me that your damages claim that you are envisaging, or that you have in mind, is something different from the rates and taxes --- That is correct . . .

So, the rates and taxes and your complaint for the rates and taxes for the period delayed, is being addressed in the settlement agreement --- That is correct . . . '

[81] Mr Booysen confirmed this in a letter to the respondent dated 27 March 2009, in which he said:

'We refer to the above matter and are advised that the item confirming that the rates and taxes be written off was referred back and no decision was taken at the council meeting of 26 March 2009.

We have been handed the item and wish to record that this is in breach of the Settlement Agreement as the item <u>does not recommend that the rates and taxes be written off as agreed</u>. This is not only in breach of the Settlement Agreement but also not in the spirit of the negotiations around the settlement agreement. We hereby request your urgent feedback and advices as to how you intend to rectify this breach' (Emphasis in the original).'

[82] In any event, the first appellant's claim for loss of interest in relation to rates and taxes fails, because the relevant erven were sold in contravention of s 67(1) of the

Ordinance. Its claim for interest regarding the aggregate of the selling prices of the 47 townhouses that it would have received, falls into the same category.

[83] I come now to the second appellant's claim. It contends that it would have been able to effect transfer of 289 erven in the township (all of which had been sold contrary to the provisions of s 67 of the Ordinance) to purchasers, but for the respondent's mala fide conduct. Alternatively, and to the extent that those deeds of sale were void, the second appellant would (thereafter) have sold all the erven, received payment of the purchase price of each erf at the then total market value of R181 475 000 and invested the proceeds in an interest-bearing investment. I interpose to say that this is an acknowledgement by the second appellant that the relevant deeds of sale were null and void because they were concluded in contravention of s 67 of the Ordinance. This underscores the fact that at the relevant times, Mr Booysen knew that those contracts were illegal and a nullity. To return to the particulars of claim: as a result of the delay, the second appellant suffered a loss of interest on the sum of R181 475 000 for the period 1 March 2008 to 30 June 2009. Then it is said that the second appellant was able to effect transfer and realise the proceeds of the development only substantially later, by which time it suffered a loss equivalent to a 10 per cent drop in the market value of the erven, amounting to R18 147 500. The second appellant also claims to have suffered loss because it was obliged to continue to pay rates and taxes in respect of the 289 erven during the period of delay until transfer was given to the respective purchasers. The second appellant alleges that it suffered a total loss of R47 667 975.

[84] The respondent denied that the second appellant suffered any loss. In amplification of that denial it pleaded that the second appellant entered into the agreements of sale contrary to the provisions of s 67 of the Ordinance; and that the drop in market value, the changing economic conditions and the loss alleged were neither foreseen nor reasonably foreseeable.

[85] The second appellant's claim for the alleged economic loss also fails because the 289 erven were sold in contravention of s 67 of the Ordinance. Its claim for loss of

interest is inextricably bound up with those sales, which are null and void. The mala fide conduct on the part of the respondent, was not a factual cause of this second appellant's loss, for the reasons advanced above. Further, the second appellant appears to acknowledge that the relevant deeds of sale are indeed void, but contends that it would have sold the 289 erven to other purchasers. However, there is no evidence to support this. On the contrary, the facts point the other way. As already stated, Mr Diamond testified that there were some 300 stands in the whole development, all of which were sold by January 2007 prior to proclamation of the township, in contravention of s 67 of the Ordinance. The second appellant's claim for rates and taxes likewise fails for these reasons; and because it formed part of the settlement agreement.

[86] Finally as regards the second appellant's claim, there is no evidence to support the alleged loss equivalent to a 10 per cent drop in the market value of the 289 erven – Mr Booysen was simply not qualified to express an opinion on this topic. But in any event, the alleged loss in market value does not begin to meet the test for legal causation: it is too remote. Mr Booysen conceded that nobody saw the global financial crisis coming, nor its impact on the South African property market. He said:

> 'If the US financial gurus on Wall Street did not see coming there was no way that the best of the best that we have locally would have envisaged that . . . .'

[87] The third appellant's claim for an alleged loss of some R11 million, relating to Extensions 8 and 10 of Meyersdal Nature Estate which is registered in its name, may be summarised as follows. The respondent 'failed to cause the aforesaid townships to be proclaimed as such in terms of Section 103 of the Ordinance'. The third appellant, 'in order to mitigate its damages', did not take any steps to compel proclamation of Extensions 8 and 10, because it would then have been liable for rates and taxes on all the erven in the proclaimed townships. Even if Extensions 8 and 10 had been duly proclaimed, Mr Flusk would have refused to issue the s 82 certificates in respect of these townships. As a result of Mr Flusk's mala fide conduct, there was such a delay in the proclamation of the township that by the time the respondent indicated that it was

not prepared to proclaim the township, the property market experienced a collapse that the development was no longer economically viable. The third appellant was precluded from selling and effecting transfer of land sold and from investing the proceeds of those sales; and it suffered loss of interest from such investment as well as a loss of at least a 10 per cent drop in the market value of land.

[88] On the facts, the third appellant likewise did not prove causation. The cause of whatever loss it is alleged to have suffered cannot be attributed to the failure to issue the s 82 certificates. Put another way, the failure to issue the s 82 certificates was not the factual cause of the loss.[64] Mr Booysen himself testified that he could not ask for a s 82 certificate because Extensions 8 and 10 had not been proclaimed and that he did not push for proclamation of Extensions 8 and 10, because third appellant did not want to incur liability for payment of rates and taxes. So, the alleged delay in the proclamation of Extensions 8 and 10 did not come about as a result of the failure to issue the s 82 certificates. In fact, Mr Booysen never asked for the certificates in respect of Extensions 8 and 10. Instead, the alleged delay was caused by Mr Booysen's deliberate decision not to insist upon proclamation of the township, so as to avoid liability for rates and taxes. Thus, there can be no talk of 'mitigation of damages'.

[89] In addition, there is simply no evidence that the respondent had indicated that it was not prepared to proclaim Extensions 8 and 10 as townships. On the contrary, Mr Booysen testified that nobody knew why Extensions 8 and 10 were not proclaimed at the same time as the other extensions in Meyersdal Nature Estate. Unsurprisingly, the third appellant abandoned its claim for damages for some R14.7 million initially brought against the respondent, on the basis that the latter had 'wilfully alternatively negligently failed to proclaim Extensions 8 and 10 of the Meyersdal Nature Estate'.

[90] Aside from this, it is common ground that there were certain issues outstanding which prevented Extensions 8 and 10 from being proclaimed as townships. These issues were recorded in the settlement agreement. They included the following. The

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[64] *International Shipping Company* fn 1 above at 700E-I.

developer (the third appellant) had to prove to the respondent's satisfaction that the application for the opening of township registers had been properly submitted, that those registers had indeed been opened and the third appellant was given an extension of time in terms of s 101(2) of the Ordinance to comply with those requirements. A notice under s 103, declaring a township an approved township, can only be promulgated if the provisions of inter alia, s 101 have been complied with.[65] Moreover, the third appellant acknowledged that its entitlement to the proclamations of Extensions 8 and 10 was subject to the conditions contained in paragraphs 9-17 of the settlement agreement.

[91] The third appellant has also not proved legal causation, for the reasons advanced above. On its own evidence, the alleged loss as a result of the collapse in the property market was not reasonably foreseeable. Mr Booysen confirmed that nobody could have foreseen the 2008 global financial crisis, neither its impact on the South African property market. Mr Diamond said that the marketing environment changed from 2006 to 2009; and there was a global crash of the property market in late 2008 in the United States and Europe, resulting in a credit crunch in South Africa in 2009.

[92] Finally, the evidence discloses that at the time of the trial, in July 2015, Extension 8 had not been developed at all, and Extension 10 had been developed two years before. The third appellant did not sell any erven in those extensions, and still has them. Leaving aside the remoteness and foreseeability of any theoretical loss which the third appellant might have sustained had it sold those erven, Mr Booysen's evidence was that the property market after the global financial crisis was better; and that any loss it might have sustained would have been recovered by the time of the trial - six years later. Therefore, on the probabilities, and accepting for the purpose of argument that it has proved causation and damage, the third appellant has not sustained any loss.

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[65] See s 103(1) of the Ordinance, fn 5 above.

**Damage**

[93] Proof of damage is fundamental to a delictual claim.[66] Assessment of damage is not the same as quantifying damage. Before quantifying damage, one must ascertain whether any loss has in fact been suffered.[67] A plaintiff must produce sufficient evidence to enable a court to reasonably find that it is has suffered damage.[68] Damage is assessed by comparing the utility value of a plaintiff's patrimony before and after a damage-causing event.[69]

[94] In its plea, the respondent denied that the appellants had suffered damage, and they were thus required to prove that they had suffered loss. Common to the claims of all three appellants, is Mr Booysen's say-so that they had lost revenue: interest they were expecting to receive. His evidence as to the economic loss which the first appellant suffered, reads as follows:

'As a result of the delay, Mr Booysen, with the issuing of the Section 82 certificates what were the consequences to these three companies, first, second and third plaintiffs? --- M'Lady firstly in respect of Extension 7, we . . . now had a completed office block, which was completed around September 2008 and we could not rent out these buildings . . .

The office space inside the buildings? --- Or the office space inside the buildings and therefore . . . the damages that we suffered is that we had this completed building which we could not let. [I]n respect of the office block Extension 7. In respect of the townhouses on stand 390 . . . there were 47 townhouses completed in June 2008 and we could not sell or transfer those stand[s], or those sectional title unit[s] and therefore we lost interest on receiving the revenue of those sales . . .

. . .

And had you been able to receive rental income from the letting of those premises what would have happened to the income? ---

. . .

Well we would have put it in the bank and earn[ed] interest on it . . .

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[66] Neethling et al *Law of Delict* (2015) 7ed at 221; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838H-839A.
[67] J C Van der Walt and J R Midgley *Principles of Delict* (2016) 4ed at 304.
[68] *De Klerk v Absa Bank Ltd & others* 2003 (4) SA 315 (SCA) para 26.
[69] Neethling fn 20 at 246.

As far as Extension 7 is concerned, was there any, the remainder of that extension that was not utilised, that you were going to deal with in some way or another? --- M'Lady, we had a third stand . . . and at that point in time the property market was very buoyant and we would have been able to sell that stand to other developers around that time, as it was zoned for offices and residential and we were able, would be able to sell those stands to other developers.
And what would you have done with the revenue received from such transaction? --- We would also put that in the bank and earn interest on it M'Lady.'

[95] Mr Booysen's evidence regarding the economic loss suffered by the second appellant, reads:

'We deal now next with the consequences relating to Extensions 9, 11 and 12? --- M'Lady, those stands were mostly sold towards the end, during the second half of 2007. We would have been able to transfer those stands to its various purchasers, received the revenue on those stands and that revenue in a bank earns interest and that is how we calculated the damages we suffered in that regard. We took investment interest, not interest one would earn if you borrowed money.'

[96] Mr Booysen described the economic loss which the third appellant suffered, as follows:

'M'Lady, in respect of Extensions 8 and 10 . . . [t]he municipality did not proceed to proclaim those two townships despite that request. The implication of that is, as stated before, the market was very buoyant and we would have been able to sell those stands to other developers for substantial prices in that time. There was a very high demand in that area, as you can see from the rate [at] which we sold the stands, there was a very high demand for townhouses as well, and therefore, because it was not proclaimed we could not ask for the Section 82 certificate, and therefore we could not receive the revenue on those stands to put into the bank and receive interest on it. . . .'

[97] All the appellants are companies. But there is not a shred of evidence, nor a single document or piece of paper to show any investments by the appellants in any interest-bearing accounts, to indicate that they probably could, let alone would, have made an investment, but that they were deprived of that opportunity and of earning

interest; and consequently that they suffered damage. In this regard, the appellants have produced no evidence of their assets, more specifically, cash invested in short- or long-term investments, to show a policy or track record of interest-bearing investments that points to actual damage suffered. Indeed, there is no evidence to show that the amounts which the appellants expected to receive from rental (which turned out to be wrong), or the proceeds from the sales of the 47 townhouses or erven, constituted surplus cash which they could have invested, to begin with. The demand for proof in a case such as this, in my opinion, is more exigent – the appellants claim that they would have deposited funds into interest-bearing investments, instead of utilising those funds elsewhere, or in their ordinary business operations.

[98] *De Klerk v Absa Bank*[70] is instructive on proof of damage. De Klerk, an attorney, sued Absa Bank based on a fraudulent or negligent misrepresentation, which caused him to make a poor investment with an assurer. His claim was based on his averment that, had he put the money invested with the assurer in some alternative investment, he would have been much better off. The damage which he claimed was the difference between what his investment with the assurer had yielded and the return that he would have received had the money been otherwise invested. The court a quo granted absolution from the instance on the basis that De Klerk did not adduce any evidence to prove his loss, more specifically that he did not prove that he would have invested elsewhere had the money been available to him.[71]

[99] After analysing the evidence presented by an actuary called by De Klerk, who concluded that De Klerk would have invested two thirds in growth stocks (unit trusts or shares), one sixth in taxable interest-bearing investments and one sixth in redemption of an interest-bearing debt such as a mortgage bond; and that he had suffered a loss of R111 800,[72] Schutz JA then turned to De Klerk's evidence as regards proof of damage. He said:

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[70] *De Klerk* fn 22.
[71] *Ibid* para 2.
[72] *Ibid* paras 16-19.

'[21] From the nature of his practice as an attorney he had to invest his clients' money daily, in transactions generally, including those related to property and deceased estates. Some of the investment would be in call accounts, others in notice deposits, and others in deposits for fixed terms of various durations. Concerning his own affairs, he had life policies, endowment policies and annuities, the latter two payable when he turned 60 or 65. An old friend was his broker and each year before 28 February, they would review his affairs so as to ensure that he took out insurance and annuities in a way that would minimise his tax liability. He had insurance policies other than the one with Commercial Union. Then comes a passage which Mr Maritz, De Klerk's counsel (who did not appear in the court below), emphasised heavily in argument. Some time in 1996, to his great shock, he learned for the first time that Commercial Union intended paying him much less then he believed he had been promised. In a letter to United Bank dated 15 November 1996 he said, with reference to the scheme:

'Ek het die skema by u aanvaar met die *uitsluitlike bedoeling om my aftredingsannuïteit te versterk'* ( my emphasis added).

De Klerk confirmed this intention in his evidence. This statement, said Mr Maritz, expressly tells us that his client was bent on investment and, he submitted, it is reasonable to infer that had he not invested in the scheme he would have invested similar amounts elsewhere. Generally annuities, he said, are not speculative investments. Add to this that not only did De Klerk in fact invest in the scheme but he saw the matter through for the whole of ten years, notwithstanding that in 1996 he found it difficult to keep up its payments. Indeed, by 1998, when the ten years had run he had not only paid all the interest but had repaid some R10,000 of the loan, without any obligation to have done so.

[22] Two arguments are raised by the respondents. One is that the fact that De Klerk's circumstances were straitened in 1996 indicates that he would not, in all likelihood, have invested the full R199 230,42 elsewhere. The other is that it was Du Toit's active marketing that caused De Klerk to invest, so that it is not to be assumed that, Du Toit absent, he would have invested. As I shall seek to explain later these points may be relevant when it comes to quantification of the damages, but they do not in themselves negate a reasonably possible inference that De Klerk would have invested elsewhere.'

[100] Consequently, Schutz JA found that the statement by the court a quo that there was no evidence to support a conclusion that De Klerk would have made alternative investments was wrong: the evidence showed that De Klerk was a knowledgeable and active investor; and the actuary's evidence could reasonably be interpreted to mean that he had considered a spread of investments. The appeal was upheld, and the order granting absolution from the instance was set aside.

[101] In the instant case, the appellants, by contrast, presented no evidence to show that they have a history of investing generally, let alone investing the proceeds from the sales of property in interest-bearing investments. Neither did they place any facts before the court from which an intention to invest such proceeds may be inferred. There is also no evidence of any of the appellants' assets or liabilities to show any cash surplus capable of being invested. Their evidence, at its highest, is Mr Booysen's say-so that they would have invested in interest-bearing investments.

[102] In any event, on his own showing, Mr Booysen's evidence as to the economic loss which the appellants suffered, is unreliable, opportunistic and improbable. As appears from his evidence quoted above, the first appellant's claim was prosecuted on the basis that it was the landlord of the completed office block and the vendor of the 47 townhouses; and that it was deprived of rental and the proceeds from the sale of the 47 townhouses, for the period during which the issue of the s 82 certificates was delayed. However, in cross-examination Mr Booysen conceded that the first appellant was not a landlord, neither a vendor of townhouses. Instead, Armidillo was the landlord and Chestnut Hill, the vendor. In short, the first appellant's initial claim was roundly refuted. The particulars of claim were then amended to claim loss of interest on the proceeds of the sales of Erf 390 and 392, and a refund of construction costs of an office block. Mr Booysen knew that the appellants' claims for rates and taxes could not, and did not, form part of their damages claim: they were settled in accordance with the settlement agreement. The claims for rates and taxes are opportunistic and contrived. As regards the second appellant, Mr Booysen knew that the sale of the 289 erven were null and void, hence the alternative claim that if they were void, that the second appellant would

thereafter have sold those erven and invested the proceeds in an interest-bearing investment. As already stated, there is no evidence that the 289 erven were subsequently sold to new purchasers, which demonstrates the unreliability and improbability of the second appellant's version. The third appellant's claim outlined above, on the facts, is plainly untenable: there is no evidence that the respondent refused to proclaim Extensions 8 and 10 as townships; and, on the probabilities, the third appellant suffered no loss.

[103] Finally as regards proof of damage, a plaintiff with no right to earn lost income from an illegal act, cannot prove that it has suffered damage in delict. In this regard, Neethling and Potgieter say:[73]

'Reinecke correctly argues that the existence of damage does not depend on wrongfulness, but adds that the frustration of an expectancy to earn income from an illegal activity (caused by bodily injuries) cannot be seen as *damage*, since an expectation of a benefit which is contrary to law is not recognised. Although criticism has been expressed that his approach implies that wrongfulness is elevated to a prerequisite for damage, Reinecke's theory appears to be sound. In this kind of situation, it is not only damage that is absent, but also wrongfulness, as the plaintiff had *no right to earn* the lost income. However, the reason for the absence of damage is not because wrongfulness has not been proved; it is because no asset of the plaintiff's patrimony (estate) has been impaired.' (Emphasis in the original.)

[104] The first and second appellant's claims for economic loss - interest they would have derived from the proceeds of illegal and unenforceable contracts - cannot be regarded as damage: it is an expectation of a benefit which is contrary to law and, in the circumstances, cannot be recognised.

[105] In conclusion, the appellants have not established causation: that the alleged conduct on the part of the respondent caused them to suffer economic loss. They have also not proved that they suffered damage.

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[73] Neethling fn 20 at 227, footnotes omitted.

[106] I would accordingly dismiss the appeal.

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A Schippers

Acting Judge of Appeal

**Cachalia JA (Dissenting Judgment)**

[107] I have had the benefit of reading the judgments of Ponnan JA ('the first judgment') and Schippers AJA ('the second judgment'). The first judgment concludes that the appellants have not established that the Municipality acted wrongfully in delaying the issue of the s 82 certificates, nor suffered any loss as a result of the delay. The second judgment also concludes that no loss was established. I regret that I am unable to agree with their conclusions. I would uphold the appeal.

[108] The appellants, to whom it shall be convenient to refer collectively as 'the developer', seek to hold the Municipality vicariously liable in delict for pure economic loss caused by its City Manager, Mr Flusk. The essential allegation in the particulars of claim is that he intentionally and mala fide – and therefore, wrongfully – withheld the issue of s 82 township certificates in a township development. Their case is that Mr Flusk did so, on spurious and dishonest grounds, over a period of 15 months thereby causing them to suffer patrimonial loss. The certificates were ultimately issued after the Municipality dismissed him.

[109] In addition, the developer seeks to prove that Mr Flusk was motivated by an ulterior purpose in that he had attempted, in return for the issue of these certificates, to extort:

(a) A bribe by demanding that Mr Diamond gave him a stand in one of the developments without paying for it;

(b) The production of a sales list of people who had bought property in these developments; and

(c) A transfer of Mr Diamond's shareholding in the second appellant to a non-governmental organisation (NGO) of his choice.

[110] The facts upon which these allegations were founded were not pleaded, which caused the Municipality to complain – both in the court a quo and in this court – that it had difficulty defending the claim. The contention has some merit, but it does not avail

the Municipality in this case. For, the Municipality did not seek further particulars to prepare for trial, as it was entitled to, under rule 21 of the Uniform Rules. The factual disputes were thus widened and canvassed fully in the evidence. It therefore behoves this court to deal with the appeal on this basis and not only on the pleaded case.[74]

[111] It is important to understand the significance of s 82 certificates in the township development process before considering the disputes in this appeal. Once a developer has secured land and completed environmental impact studies, approval is sought for the approval of a township in terms of The Town-Planning and Townships Ordinance 15 of 1986 (The Ordinance). (Here, the township approval for various extensions, namely extensions 7 to 12, was granted in June 2007.) The developer must then comply with the pre-proclamation conditions, the most important of which is to secure a general plan from the surveyor-general. A certificate in terms of s 101 of the Ordinance is then obtained from the Municipality indicating such compliance. The Registrar of Deeds notifies the Municipality that a township register has been opened and that the township may be proclaimed in the provincial gazette. Once proclaimed the developer becomes liable for rates and taxes. In this case the townships, with the exception of extensions 8 and 10, were proclaimed on 1 October 2007. The omission in respect of the two extensions was apparently an oversight on the part of the Municipality.

[112] Following upon the proclamation, s 116 of the Ordinance provides for necessary internal and external engineering services in a development. Internal services, which are the responsibility of the developer, are those inside the boundary of the development such as: roads and storm water; water and sewerage; electrical installation and reticulation. External services are those outside the boundary, such as the bulk sewer line, main electricity and bulk water supply and are generally the responsibility of the Municipality.

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[74] *Shill v Milner* 1937 AD 101 at 105. (See noter-up for repeated application of this authority.)

[113] In regard to the installation of internal services, the procedure is that the developer's engineer submits the design and diagrams to the Municipality's chief engineer for approval. Here, the Municipality accepted the designs and confirmed that there were sufficient bulk services available for the proposed township development to go ahead. The developer then procured contractors to provide the services.

[114] From February 2007, various services were installed and meetings held with municipal officials, who were kept abreast of developments. By 11 October 2007 the water, sewerage and roads were 100 per cent complete with only minor snags needing correction. Electrical reticulation was incomplete but all extensions were to be completed by the end of November 2007. By 15 December 2007 the services were practically or substantially completed. The developer had provided a guarantee that the installation would be complete by mid-April, 2008. There was therefore no legal impediment to the s 82 certificates being issued. The court a quo was clearly correct in making this finding and in this court the Municipality did not take issue with it.

[115] It is important to note that until the s 82 certificate is issued, a developer cannot register its ownership of an erf in a township. Registration may only take place, in the words of the Ordinance, once the Municipality has 'certified that it will within a period of three months from the date of the certificate, be able to provide the erf with such services as it may deem necessary and that it is prepared to consider an application for the approval of a building plan in respect of the erf'. Only then may a developer transfer erven in a development to purchasers. It is evident therefore that any delay in the issue of certificates may potentially have serious financial implications for a developer. It is the developer's case that this is precisely what happened here.

[116] Mr Flusk became the City Manager on 1 May 2006. For present purposes I accept that Mr Flusk initiated the Pasco investigation into the circumstances by which the developer acquired the land in issue in this appeal after he became aware of an anonymous tip-off that raised questions concerning the probity of a land swap transaction by which the developer acquired land, which is the subject of the present

dispute, from the Municipality in 2005. And that some of the steps he took afterwards, including obtaining an opinion from senior counsel regarding the Municipality's failure to comply with s 14 of the Municipal Finance Management Act 56 of 2003 (the MFMA), were actuated by this concern. I accept too that he probably believed that Mr Diamond had acquired an interest in the development improperly, although this was never proved. These matters are dealt with in some detail in the judgment of the court a quo and in the first judgment. However, what is in issue in this appeal is whether Mr Flusk's conduct in withholding the s 82 of the certificates was mala fide, despite his initial concerns.

[117] On Mr Flusk's own evidence, but unbeknown to the developer, he had decided, by the end of December 2007, not to issue the certificates because of these concerns. However, as will become apparent from what follows, the evidence, in my view, showed that in withholding these certificates he unlawfully abused his authority. What followed over the next fifteen months was wilful and mala fide conduct by him to prevent the certificates from being issued. In so doing he realised that his conduct would cause harm to the developer.

[118] It is beyond dispute that by the end of December 2007, the developer had met the requirements for the certificates to be issued. In January 2008 the developer, represented by Mr Booysen, who was unaware that Mr Flusk had initiated investigation into the probity of the 2005 land transaction, wrote to the Municipality to issue the certificates urgently. The delay, he pointed out, was 'causing substantial financial losses daily'. On 31 January 2008 the Municipality's Council passed a resolution authorising the City Manager to regularise the land transaction following a legal opinion (the Trengove opinion), that the position be reconsidered and that the courts be approached to validate the transaction. Mr Flusk did not act on the resolution, even though, as Mr Leibbrandt, the Deputy City Manager testified, he was obliged to.

[119] Mr Leibbrandt was an excellent witness and had no reason not to tell the truth. None of his evidence was impugned in cross-examination. He was aware of Mr Flusk's

concerns regarding the land transaction and Mr Diamond's interest in the development. His advice to Mr Flusk was to ring-fence these issues and not to make them a condition for granting the certificates. In other words, if Mr Flusk wished to pursue these matters he should do so through a separate process. Mr Flusk denied that Mr Leibbrandt had given him this advice, but he cannot be believed, for it can hardly be disputed that he was not a credible witness.

[120] Mr Booysen pressed on trying to secure the certificates and met with Mr Flusk and his staff on 26 February 2008. He arrived at the meeting with documentation from the Municipality showing that the requirements for the issue of the certificates had been met. Despite this, Mr Flusk was not prepared to issue the certificates. The only reason given on this occasion was that he had a problem with the land valuation. Mr Booysen's view was that the developer had acquired the land from the Municipality properly and that the certificates could not be withheld for an unrelated and unsubstantiated reason. It is also apparent that whatever Mr Flusk's concerns with the land valuations were, he now had an obligation, following the Council resolution, to regularise the land transaction. Mr Booysen was, therefore, justified in insisting that if Mr Flusk did not issue the certificates he would have no option but to seek relief in court.

[121] The developer's threat to seek relief in court only emboldened Mr Flusk. On 28 February 2008, he procured an extraordinary resolution from Council authorising only him to issue s 82 certificates. Until then an official below the City Manager had delegated authority to perform this function; for good reason: the determination of whether engineering services were practically completed was a technical question hardly warranting the attention of the City Manager. It is apparent that Mr Flusk took this unusual step to obstruct the developer's attempts to obtain the certificates. Mr Flusk's evidence was that he had done this because Mr Booysen was putting the officials under pressure to issue the certificates. But there is, however, no suggestion that Mr Booysen had done anything untoward. His approach to various officials was aimed at expediting the issue of the certificates to which the developer was lawfully entitled.

[122] On 14 March 2008, Mr Booysen filed papers in the North Gauteng Division of the High Court to compel the Municipality to issue the certificates. He alleged that all the requirements for the issue of the s 82 certificates had been met and that Mr Flusk was abusing his powers by withholding them. Mr Flusk opposed the application and filed a counter-application without having obtained the authority of the Council to do so. Despite being aware of his officials' advice that the requirements for the issue of the certificates had been met he suggested, falsely, that the services had not been satisfactory completed. His main grounds for opposing the order sought on the merits related to the two irregularities in the land transaction: the first was that the transaction had been approved by the Municipality's Corporate Affairs Committee irregularly as it had no power to make this decision, and secondly, that the s 14(2) of the MFMA had not been complied with. These were also the main grounds upon which he relied to have the transaction set aside. Both these matters were dealt with by the Trengove opinion of November 2007 in which the Municipality was advised how to proceed to regularise the transaction. The Council of the Municipality, as I have mentioned, authorised the City Manager (Mr Flusk) to take the necessary steps towards this end. This was a crucially important fact that Mr Flusk was obliged to have disclosed in his papers, but did not, which is probably why he attempted to institute the counter-application without having obtained the authority of Council.

[123] Mr Flusk also opposed the relief claimed on the ground that the developer had failed to use internal appeal remedies in terms of s 124 of the Ordinance. As I will demonstrate below, this defence was also not bona fide. In the result, on 20 June 2008, the court dismissed the application because of the developer's failure to use the internal appeal appeal remedies, and Mr Flusk's counter-application for lack of authority.

[124] The developer then began pursuing an internal appeal before the Services Appeal Board (SAB), established in term of s 123 of the Ordinance. The SAB may decide various services-related disputes. The appeal was under s 124(1)*(c)*, which concerns decisions made under s 119 pertaining to whether engineering services have been installed to the satisfaction of a local authority. To prepare for the appeal Mr

Booysen needed specific details for why the installed services were deficient and did not satisfy the Municipality. This is because the grounds of appeal must, in terms of s 124(1)*(c)* of the Ordinance, relate to a decision made in terms of s 119, and not to any other dispute.

[125] Thus on 1 July 2008, Mr Booysen secured a meeting with Mr Flusk to establish why he had stated in his affidavit before the high court that the services were incomplete. At the meeting Mr Flusk told him to put his complaint in writing and assured him that he shall respond by 8 July 2008. Mr Booysen's attorneys delivered the letter to him later that day. It said that the developer had been directed to comply with the internal appeal procedures. Pursuant thereto it was requesting confirmation of the decision to refuse to grant a certificate for Extension 7 and the reasons for the refusal to enable their client to lodge the appeal.

[126] On 8 July 2008, Mr Flusk responded in a manner that can only be described as obscurantist. The letter stated tersely that the reasons provided in his affidavits before the high court remain the same. The attorneys responded the following day saying that neither what he had averred in his affidavits, nor in his letter clarifies what is still required in respect of the 'Section 82 Certificate, the services agreement, the stakeholder's agreement . . . , the status of the services and the reasons for not issuing same . . . .' Mr Flusk was put on terms to furnish proper reasons by 11 July 2008. The letter further stated that the content of his letter is 'once again an indication of mala fides in dealing with this matter and your failure to work towards the finalisation hereof'. In this regard the observation in the first judgment that the first time that the developer mentioned mala fides in connection with Mr Flusk was in an amendment to the pleadings is, with respect, not correct.

[127] Mr Booysen testified that, in the light of Mr Flusk's obscure response, he was still not in a position to proceed with the internal appeal. So he set up a further meeting with Mr Flusk shortly afterwards. He took his attorney along in the hope that Mr Flusk would provide a more reasonable response this time. Mr Diamond also attended the meeting.

Mr Diamond testified that when Mr Booysen asked for the reasons for refusing to issue the certificates, Mr Flusk responded by saying that he had already arranged to have them typed and that they were only awaiting his signature. Both Mr Booysen and Mr Diamond testified that Mr Flusk told them that some officials and councillors may have bought land in this development and that he would only issue the certificates that were awaiting his signature if they gave him the sales list indicating who had bought land in the development. Mr Booysen responded that his request for the sales list was not a requirement for the issue of the s 82 certificate, and he was therefore not prepared to give it to him. Mr Diamond felt that the request for the list was a 'witch-hunt' on Mr Flusk's part.

[128] In his testimony, Mr Flusk admitted asking for the sales list, because, as he said, he wanted to uncover the 'unhealthy relationship' between some municipal officials, councillors and the developer. Under cross-examination he denied having told them why he wanted the sales list. His explanation for this, which I find not only improbable but untruthful, was that that they knew why he wanted the list. Neither Mr Booysen's nor Mr Diamond's evidence to the effect that Mr Flusk had told them that he would issue the certificates once they gave him the sales list was challenged under cross-examination. It was only when Mr Flusk was cross-examined, did he, for the first time, deny it. In the light of the rule relating to cross-examination that it is not open to a litigant to argue a proposition that was not put to the opposing witnesses, it must accordingly be found that the meeting did take place and that Mr Flusk made the statements attributed to him.[75]

[129] Both Mr Diamond and Mr Booysen testified that a week or two later, but unknown to Mr Booysen at the time, Mr Diamond gave the list to Mr Flusk, but still, no certificates were forthcoming. Mr Flusk had no authority to demand the production of a sales list as a condition for issuing a certificate. The unavoidable conclusion is that Mr Flusk was mala fide and abused his power by extorting the production of the sales list from the developer and Mr Diamond. In its judgment, the court a quo mentions the meeting, but other than noting that Mr Flusk denied it, does not deal with the evidence, which in my

[75] *President of the RSA v South African Rugby Union* 2000 (1) SA 1 (CC) paras 58-72.

view constitutes a material misdirection. The first judgment also disregards this evidence even though the issue was fully ventilated in this court.

[130] I return to the chronology. Nothing further happened in July 2008. Mr Booysen, as the court a quo observed, had now become desperate and turned to the new Mayor, Ms Ntombi Mekgwe, for assistance. Mr Booysen took her on a site visit in August 2008 to show her that the engineering services had been completed. They were accompanied by officials who were familiar with the development and had also confirmed this earlier. Still, Mr Flusk would not issue the certificates. Mr Booysen then phoned the Mayor to assist with the conundrum. She was unable to help him but advised him to set up another meeting with Mr Flusk, and to request the then Deputy City Manager, Mr Sibeko, to attend the meeting.

[131] The meeting took place on 15 August 2008. Mr Flusk, Mr Sibeko and Mr Booysen were present. According to Mr Booysen, Mr Flusk repeated the issues he had previously mentioned: that some councillors, particularly Mr Diamond, had an interest in the development and the reduced price that the developer had paid for the land it had acquired from the Municipality in 2005. Again, he gave no specific details. The meeting left Mr Booysen none the wiser on what was required to make a case to the SAB.

[132] On 12 September 2008, Mr Flusk wrote to the Mayor purporting to provide a summary of the discussion he had had with Mr Booysen on the 15th of August. The letter was not shared with Mr Booysen, and he was not aware of its existence until it was discovered before the trial.

[133] The letter, as emerged in Mr Booysen's testimony, and Mr Flusk's cross-examination, is littered with demonstrable falsehoods and the non-disclosure of material facts. It says, for example, that the Municipality's officials had advised him that there are 'several material reasons' why the certificates cannot be issued. And that his officials had advised him that the services had not been installed to the satisfaction of the

Municipality. Mr Leibbrandt, he said, had only advised him two weeks earlier that the services had been satisfactorily installed.

[134] Mr Leibbrandt denied this and his testimony in this regard was not challenged. When cross-examined on this aspect, Mr Flusk accused Mr Leibbrandt of lying. The evidence, however, was that not a single official had given Mr Flusk such advice. On the contrary, several officials, including Mr Leibbrandt, had advised him that there were no legal grounds to withhold the certificates. The documentary evidence also supports this. For the reasons given earlier pertaining to the rule regarding the failure to put Mr Flusk's version to Mr Leibbrandt, it must be accepted that his evidence in this respect was also untruthful and that what had he reported to the Mayor in this regard was, likewise, false.

[135] The letter also says that the land exchange transaction had, as the Trengove opinion had advised, contravened the MFMA and the Municipality's land exchange policy. But what it omits is a reference to the Council resolution of 31 January 2008, which required Mr Flusk to regularise the transaction. It was not a ground that could legitimately be relied upon to prevent the issue of the certificates. Further, the letter states, misleadingly, that Mr Diamond was a member of the Committee, which had authorised the land alienation, the suggestion being that he had a non-disclosed conflict of interest when the decision was made. But Mr Diamond had in fact recused himself from the deliberations of the Committee.

[136] The letter further makes a very serious allegation that two unnamed councillors acquired interests in these developments without payment. Apart from the fact that he did not name the councillors, Mr Booysen was emphatic that the allegation was untrue. His evidence in this regard was not disputed.

[137] The letter concludes by saying that the developer has consistently refused to pay market related prices for the land it 'unlawfully obtained' or to comply with the provisions of the MFMA. And, it adds, again misleadingly, that it continues to put pressure on the Municipality to irregularly issue the certificates. It also gives the assurance that he will

try to settle the dispute with the developer. It bears mentioning, however, that Mr Flusk had never made a specific demand for any market related payment to be made as a condition for the issue of the certificates, which would also have been improper. Nor did he make compliance with the MFMA such a condition. Moreover, instead of engaging in bona fide attempts to settle the matter and issue the certificates as was his obligation, his conduct was one of obstinate resistance.

[138] What the content of the letter indicates is that he gave false reasons to the Mayor, which he also withheld from the developer, in the hope of misleading her regarding the delay with the issue of the certificates. Once again this is indicative of mala fides on his part.

[139] Mr Leibbrandt testified that, in August or September 2008, the Mayor asked him for a progress report regarding the 31 January 2008 Council resolution, which required the City Manager to take steps to regularise the land swap transaction. The Mayor's request, he said, left him and other officials 'red faced' because they were unable to comply. He advised the Mayor, as he had Mr Flusk, that the certificates had to be issued and that the other matters should be ring-fenced so as not to prevent this. The Mayor passed the information on to Mr Flusk.

[140] When Mr Flusk discovered that Mr Leibbrandt had given this advice to the Mayor it provoked a backlash from him. He wrote to Mr Leibbrandt on 3 October 2008 accusing him of, among other things, communicating with the Mayor without informing him and also of creating tension between himself and the Mayor. Mr Flusk informed him that he intended suspending him and invited him to respond within three days, failing which he would do so. On 6 October 2008 Mr Leibbrandt met with Mr Flusk and told him that that there was no basis to suspend him. Among the reasons he gave to Mr Flusk was that the City Manager may only suspend the Deputy City Manager after consulting the Mayor, which he had not done.

[141] To protect himself Mr Leibbrandt informed the Mayor of his threatened suspension. The Mayor responded by sending him a text message indicating that she had informed Mr Flusk that if he suspended Mr Leibbrandt, she would in turn suspend him. In the result Mr Flusk had no option but to abandon his unlawful attempt to suspend Mr Leibbrandt.

[142] What this exchange shows is that Mr Flusk's vindictive behaviour extended beyond the developer to a senior official who was only trying to do his work professionally. It is also apparent that the Mayor was having difficulties with Mr Flusk's conduct and the manner in which he was dealing with the developer.

[143] In October 2008, Mr Booysen secured yet another meeting with Mr Flusk at the request of the Mayor to resolve the outstanding issues. Mr Booysen's attorney was present, as was a Mr Mokoena from Mr Flusk's office. The purpose of the meeting, once again, was to establish in which respects the developer had not complied with s 82 of the Ordinance.

[144] According to Mr Booysen, Mr Flusk was not only unhelpful, but made a new demand of them. In addition to the land valuation issue, Mr Flusk now said that he was prepared to issue the certificates if Mr Diamond transferred his shareholding in the development to an 'NGO'. Mr Booysen was perplexed, he said, because he did not know what an NGO was. So he asked Mr Flusk to explain it to him. When Mr Flusk explained that it referred to a non-governmental organisation, Mr Booysen, understandably, became indignant. He told Mr Flusk firmly that Mr Diamond's shareholding was irrelevant to the issue of the certificates, and that if he wished to discuss this issue further he would have to do so in Mr Diamond's presence as he (Mr Booysen) was not in a position to transfer Mr Diamond's shareholding to anybody. This evidence was not challenged in cross-examination.

[145] The meeting agreed that Mr Flusk would prepare a list of 'exhaustive' reasons specifying why he was refusing to issue the certificates. The agreement was confirmed

in a letter to Mr Flusk and was copied to the Mayor. Mr Booysen made no mention of the NGO issue because, as he testified, he ‘did not want to become involved in a personal battle with Mr Flusk’. He therefore recorded that the meeting had agreed on the way forward in relation to the issue of the certificates.

[146] On 24 October 2008 Mr Mokoena replied to the letter ‘on instruction from the City Manager’. His letter did not provide any specific reasons why the certificates were not being issued. Instead, it adopted the same unresponsive stance that had characterised Mr Flusk’s conduct throughout. The crux of the response is contained in the concluding paragraph, which reads: ‘The reasons for not issuing the s 82 certificates were contained within the affidavit related to our counter application (in response to) your application and clearly explains our position on all issues you have raised in your correspondence.’

[147] It is convenient at this stage to deal with the evidence pertaining to the attempt to extort a transfer of Mr Diamond’s shareholding in the second appellant to an NGO of his choice, as this is one of the grounds relied upon by the developer to prove Mr Flusk’s mala fide conduct.

[148] Mr Leibbrandt testified that at a meeting between himself and Mr Flusk sometime during 2008 – the month was not mentioned – Mr Flusk had said that his main concern with issuing the certificates was Mr Diamond’s interest in the development, and that the problem would be removed if Mr Diamond was prepared to transfer his shareholding to an NGO. This evidence was not challenged in cross-examination.

[149] Mr Diamond’s evidence was that in a meeting between him and Mr Flusk in August or September 2008, Mr Flusk also told him that his main concern with issuing the certificates was Mr Diamond’s interest in the development, and that he would immediately release the certificates if he transferred his interest in the second appellant to an NGO of Mr Flusk’s choice. When Mr Diamond was cross-examined the following was put to him:

‘At some stage Mr Flusk wanted you to give up that interest because he, as far as he was concerned you had unduly benefitted and that was Mr Flusk’s attitude?’
And later:
‘You see your version to Mr Flusk was that the land transaction is water under the bridge and could not and should not be reversed and Mr Flusk said well the public you should not have personally benefitted as a public official from the land swop.’
And further:
‘That was the dispute. It was not that you had to give this up to an NGO.’

[150] It is apparent from the statement put to Mr Diamond, that Mr Flusk did discuss his interest in the development with him, that he was unhappy with it and that he wanted him to forego it. The only dispute was over whether he had to give it up to an NGO. However, in the course of Mr Flusk’s evidence in chief, and when referred to Mr Diamond’s evidence above, he dismissed it as a ‘blatant lie’. No mention was made of Mr Leibbrandt’s evidence, nor of Mr Booysen’s.

[151] Under cross-examination Mr Flusk denied having had any discussion with Mr Diamond about his shareholding, which completely contradicted what was put to Mr Diamond. He also dismissed both Mr Leibbrandt’s and Mr Booysen’s testimony in this regard as untrue.

[152] It can therefore hardly be disputed that Mr Flusk’s evidence on this aspect must also be rejected as false: First, it is at odds with what was put to Mr Diamond in cross-examination; secondly, and as I have found in relation to the sales list, because neither Mr Leibbrandt’s nor Mr Booysen’s evidence was disputed under cross-examination, it must be accepted; thirdly, Mr Diamond’s evidence is corroborated by both these witnesses, and finally, it is clear from the evidence that Mr Flusk had a huge problem with Mr Diamond’s shareholding. The probabilities therefore support the developer’s case.

[153] I conclude, therefore, as I did regarding the sales list, that Mr Flusk abused his power by attempting to extort a transfer of Mr Diamond's shareholding in the second appellant to an NGO of his choice. This constitutes an independent ground for holding, as I do, that his conduct was mala fide, and was exercised for an ulterior purpose. The court a quo wrongly disregarded this evidence.

[154] I once again return to the chronology. Following receipt of Mr Mokoena's unresponsive letter on 24 October 2008, Mr Booysen applied for a hearing to the SAB on 30 October 2008. The hearing was scheduled for 28 November, but it was postponed at the instance of the Municipality's attorneys, without the developer's knowledge.

[155] On 26 November 2008 the developer's attorneys wrote to the Municipality's attorneys to register its protest at the fact that the matter had been postponed without its knowledge. The letter reiterated that all the engineering services had been installed and the maintenance guarantees given by December 2007. It stated further that the Municipality had refused to furnish any reasons for withholding the certificates and was constantly delaying the matter being finalised, which was mala fide. It reminded the Municipality that the delay was causing a loss to the developer of R100 000 per day. I point out that this is another reference to Mr Flusk's mala fides preceding the issue of the summons.

[156] The SAB hearing was set down for 22 January 2009. The Municipality's attorneys wrote to the developer's attorneys on 13 January 2009 regarding the issues that would be disputed before the SAB. Significantly, the Municipality accepted that the issues that had been raised in the counterclaim in respect of the land swap and alienation of land in April 2005 were not a bar to the proceedings before the SAB. It, however, reserved the Municipality's right to pursue the counterclaim 'at some later stage.' It is noteworthy that this had been Mr Leibbrandt's advice from the very beginning.

[157] On 14 January 2009, for the first time since the judgment of the North Gauteng High Court on 20 June 2008, and no doubt acting on legal advice, Mr Flusk attempted to obtain a Council resolution authorising him to pursue the counterclaim. Unsurprisingly, the attempt failed.

[158] The SAB hearing took place, as scheduled, on 22 January 2009. The Municipality did not oppose the relief claimed. Both parties agreed that a further Services Agreement was unnecessary as the levels and standards of the services have been agreed on and completed to the satisfaction of the Municipality. On the following day the developer's attorneys then wrote to the Municipality noting that 'it was indicated by your legal team that you are still refusing to issue a Section 82 Certificate and advise that your action is unlawful'. The Municipality was also alerted to the fact that the sales agreement the developer had entered into with buyers would lapse on 31 March 2009, 18 months after proclamation. This would result in damages amounting to a further R180 million in respect of 241 sales, which would then lapse. In the circumstances it was demanded that the certificate be issued by no later than 30 January 2009.

[159] On 23 January 2009 Mr Flusk made a second unsuccessful attempt to reverse the 31 January 2008 Council resolution. He was placed on leave in February 2009, and on 17 March dismissed as City Manager. According to Mr Leibbrandt, whose evidence I have indicated was unimpeachable, Mr Flusk was dismissed because of his persistent refusal to issue the certificates. Mr Leibbrandt was appointed to act in his stead. On 20 March 2009 the Municipality capitulated and issued certificates for Extensions 7, 9, 11 and 12 soon after. The proclamations for Extensions 8 and 10 took place on 30 September 2009, but no certificates were issued then.

[160] To summarise the position thus far: The developer established that Mr Flusk wilfully and mala fide delayed issuing the certificates over a period of 15 months. During this period he:

(i) instituted a counterclaim to set aside the 2005 land swap transaction without the authority of Council and in the face of a Council resolution on 31 January 2008 to regularise the transaction;

(ii) defended the application to compel the issue of the s 82 certificates in the high court on the false ground that the developer had failed to install the engineering services to the satisfaction of the Municipality;

(iii) Improperly procured the striking-off from the roll of the developer's application on the ground that that it had failed to prosecute an appeal to the SAB regarding the alleged deficiency with the installation of the engineering services;

(iv) ignored the advice of municipal officials, particularly Mr Leibbrandt's, to issue the certificates because there was no lawful basis to withhold them;

(v) threatened to suspend Mr Leibbrandt because he had given the same advice to the Mayor;

(vi) improperly procured a Council resolution giving him the sole authority to issue s 82 certificates for the purpose of preventing the developer from obtaining them;

(vii) misled the Mayor and the developer by giving false reasons for withholding the certificates;

(viii) was unresponsive and obstructionist when asked by the developer repeatedly to provide proper reasons for not issuing the certificates;

(ix) caused the delay in the SAB hearing without good reason;

(x) improperly, and for an ulterior purpose, demanded a sales list from Mr Booysen and Mr Diamond in return for the issue of the certificates;

(xi) improperly, and for an ulterior purpose, demanded that Mr Diamond give up his shareholding in the second appellant before he would issue the certificates;

(xii) generally abused his public power by obstructing the developer from acquiring the certificates and by giving false and spurious reasons for doing so.

[161] In the light of the overwhelming evidence of mala fides on the part of Mr Flusk, it is not strictly necessary to deal with the further allegation that he also improperly attempted to extort the bribe of a free stand in the development in return for the issue of

the certificates. However, both the court a quo and the first judgment treat this allegation as pivotal or foundational to the developer's allegation of mala fides. In my respectful view it was not. The first judgment confirms the finding of the court a quo that the allegation was untrue and therefore that the developer had not proved that Mr Flusk's conduct, which is imputed to the Municipality, was wrongful. I shall for the sake of fullness deal with it as well.

[162] Mr Diamond's evidence was that during January 2008, Mr Flusk, told him that he wanted a stand in the development without having to pay for it and that he would delay the issue of the certificates indefinitely until he acceded to his request. Mr Diamond shared this information with Mr Booysen, who assured him not to worry about the threat because the Municipality could not withhold the certificates simply because Mr Flusk wished to benefit from it. Mr Booysen corroborated Mr Diamond's evidence in this regard. The attempted bribe has its genesis in another allegation, which is that Mr Flusk signed an 'Offer to Purchase' (OTP) a stand in the development on 17 November 2006, long before he had apparently become concerned about the probity of the land transaction. Mr Flusk denied signing the OTP. Both the court a quo and the first judgment implicitly conclude that the witnesses who testified on behalf of the developer conspired to forge a document purporting to be the OTP. In the case of Mr Diamond, the court a quo found that he had committed fraud by forging the document.

[163] The evidence as to what occurred on 17 November 2006 was given nine years after the incident. On behalf of the developer, Mr Diamond testified that Mr Flusk attended one of his sales marketing events, which was held in a marketing tent in the late afternoon. There were about ten people, including Mr Booysen, in attendance. Ms Martha Boshoff, who worked for Mr Diamond as an estate agent, assisted Mr Flusk to choose a stand. He then concluded an OTP, which he signed in Mr Diamond's presence. The offer was to purchase Erf 4 in Extension 12 for the sum of R710 000. After concluding the OTP, Mr Diamond offered him a glass of wine, which he accepted. Mr Flusk remained at the event for some time and even made 'friendly advances to

some of the people' meaning that he had flirted with the guests. They all left at about 21h00.

[164] Mr Diamond testified that in response to a query from the African National Congress (ANC), of which he is a member and Councillor, and which had become aware of the dispute between Mr Flusk and himself, he submitted a written report and the original OTP to them on 28 October 2008. On 3 November 2008 he submitted a further document correcting the erf description from Erf 38 in the report to Erf 4.

[165] Under cross-examination he testified that the offer was turned down 'administratively' because Mr Flusk had not paid the deposit. However, when it was put to him that the clause relating to the payment of a deposit was deleted, which meant that this could not have been the reason for the sale being turned down, Mr Diamond maintained that it was. Later, he testified that Mr Booysen was aware that the deposit clause was deleted and that only he had the discretion to cancel the deposit requirement. He also testified that the OTP was not processed because of Mr Flusk's insistence on a discounted price. It was also put to him that there was no explanation why Mr Flusk had left the space on the offer providing for the details of the buyer's spouse blank because he was married in community of property.

[166] In her testimony, Ms Boshoff recalled the incident vividly. She said it was a Friday evening at about 18h00, before dusk when Mr Flusk arrived at the event in a gold-coloured Mercedes Benz motor-vehicle. She was standing at a model of one of the stands and asked if she could help him while he was looking at a township model. Mr Flusk asked her whether these were all the stands, at which point Mr Diamond approached them and introduced Mr Flusk to her as the City Manager. She testified that she did not actually see him filling out the paperwork but she did see him and Mr Diamond sitting at one of the tables where the paperwork for these offers was done. Mr Diamond did the paperwork. She recalled specifically when Mr Flusk left the event because he departed in his motor-vehicle just before she did.

[167] Under cross-examination she described Mr Flusk as a ‘bit taller’ than counsel, Mr Peter, that he spoke in English, that his complexion was ‘coloured, but not dark’. When asked whether he was not dark, she responded: ‘Ja, quite fair’. She recalled that Mr Flusk and Mr Diamond sat at the table for ‘quite a while’ while doing the paperwork. And that Mr Diamond had offered him something to eat and a glass of wine. It was put to her that Mr Flusk declined the offer of wine to which she responded that she saw him with a glass of wine in his hand. When asked whether anything that evening stuck out in her memory – a case of one question too many – she said that he had made sexual advances to Ms Irene Botha, who was present at the event. The incident annoyed Ms Botha’s son. Mr Flusk left about three quarters of an hour after Mr Diamond, but she was not sure of the time.

[168] Mr Booysen testified that he was present that evening and recalled being introduced to Mr Flusk and congratulating him on having bought a stand, which was a reference to his having signed the OTP. He said that he had had numerous discussions with him that evening. As to how the deposit clause came to be deleted, he testified that he could not remember why this had happened. But, he explained the way they managed the process, administratively, was that once the documents had been signed, they were evaluated at Mr Diamond’s office, and then sent over to his office. His father, Mr Syd Booysen, who is a retired banker, was responsible for signing these OTP’s on behalf of the seller, which explains why his father’s signature was on the document. If the document needed amendment this would be discussed with him personally. It was not unusual for the deposit clause to be deleted, because it was a rather harsh non-refundable provision, but this would be done subsequently and not on site. Under cross-examination it was put to Mr Booysen that Mr Flusk denied having signed the OTP.

[169] Ms Karen Pienaar was the last witness for the developer on this issue. She testified that Mr Diamond faxed the OTP through to her office on 29 January 2009. She gave the original document, which was filed with the ‘not accepted offers’, to Mr Diamond in October 2008. She also testified that the inscription ‘P Flusk’ at the top right-hand corner of the OTP was the handwriting of Mr Syd Booysen. She did not keep

a copy of the agreement because it had not been accepted and there was no need to keep it. Under cross-examination it was put to her that there never was any signed original agreement. Her response was emphatic that she had seen the original. She also testified that she had tried to find it in her office and had also phoned the ANC because she was aware that Mr Diamond had given the document to them.

[170] Mr Flusk was the only witness for the Municipality. He testified in chief that he had attended the function in November 2006, very briefly. He left after ten minutes when he realised that this was not a meeting of Mr Diamond's constituents, which Mr Diamond had led him to believe was the nature of the function he was attending. He had nothing to drink that evening, did not spend any time there – no more than ten minutes – and did not sign an OTP before leaving.

[171] He also testified that the telephone number on the OTP was one that he had last used in 2002, and is not one he presently uses. He described his complexion as being dark. The court was asked to note that Mr Peter was 'considerably taller' than Mr Flusk. And he confirmed that he was married in community of property.

[172] He was cross-examined at length on the incident. He testified that even though he does own a gold-coloured Mercedes, he was with his driver that evening and was using a white kombi, and not his own vehicle. He was on his way home from another function that was nearby Mr Diamond's. Mr Diamond approached him outside the tent and invited him in to meet his political constituents. When he walked into the tent he noticed that there were drinks and alcohol and that this was a marketing event for the sale of properties, and not a meeting of Mr Diamond's constituents. There were three or four people there. He immediately realised that Mr Diamond had 'actively misled' him as to the nature of the function, but he did not mention this to him. He denied having had a look at the model of the township at all. Mr Diamond offered him a glass of wine, which he declined, and then left, 'almost immediately.'

[173] When asked to say for how long he had been there, he answered that it was ‘not more than five minutes’. When it was put to him that in his evidence in chief, he said that he had been there for ten minutes, he insisted, incorrectly, that he had said five to ten minutes. He was then asked what he had done at the event for the truncated period of five minutes while he was there. His answer, which contradicted his earlier evidence, was that he said to Mr Diamond: ‘this is not your constituents . . . where are the people?’ to which Mr Diamond responded that they were ‘coming and going’.

[174] He testified further that he had not sat at any table to fill out documentation. And that Ms Boshoff’s evidence in this regard was a lie. It was put to him that Ms Boshoff had testified that she had spoken to him that evening to which he responded that he could not recall this. But, he added, ‘it might have happened’. When asked whether he had looked at one of the township models he insisted emphatically that she was ‘lying’. As to why none of this evidence was disputed with the witnesses, he could not explain. As to whether he had made advances to Ms Botha, he said that this was another lie. And regarding his introduction to Mr Booysen that evening or having had a discussion with him he repeated: ‘Another lie’. He had never met Mr Booysen before December 2007. There was, however, no denial that Mr Booysen had been there.

[175] When it was put to Mr Flusk whether he was suggesting that Mr Booysen and Mr Diamond were party to a conspiracy to discredit him by forging the document, he answered in the affirmative. He added that Ms Pienaar, whose evidence was to the effect that she had also seen the original document, was also part of the conspiracy, as was Ms Boshoff. Regarding the apparent differences in his signatures on some of the documents he was asked whether he accepted that his signature sometimes dipped instead of rising in the last line, while at other times the opposite occurred. To this he agreed. And finally, in response to Mr Flusk’s evidence that he had not used the telephone number on the OTP after 2002, it was put to him that it appeared from a ‘Consumer Trace Report’ dated 13 August 2015, that he was using this number even in 2013. His response, once again was: ‘that is a lie’.

[176] The nub of the factual dispute between the parties is whether Mr Flusk had signed the OTP on the 17 November 2006. To decide where the truth lies, a court must have regard to all the evidence and make findings (a) on the credibility of the witnesses; (b) their reliability; and (c) the probabilities of each version.[76] The process of reasoning is integrated with credibility and reliability being assessed, not in isolation, but in the light of the proven facts and the probabilities.[77] The final step is to determine whether the party burdened with the onus of proof has discharged it.

[177] The court a quo found that the OTP was not genuine but, rather, a 'clumsy and amateurish fraud concocted by Diamond in late 2008 when facing disciplinary charges by his political party'. And that there were no probabilities pointing to the attempted extortion for a free stand. There are, with respect, some serious difficulties with the learned judge's reasoning. First, to sustain this finding there would have to have been a conspiracy between all the witnesses who testified on behalf of the developer to fabricate what happened on the evening in question, as Mr Flusk insisted there was. But no such suggestion was made to any of the developer's witnesses. Second, her finding that Mr Diamond was a poor witness while Mr Flusk's evidence, though not without fault, was consistent on this aspect is, with respect, not borne out by the record, as I shall demonstrate below. Third, in determining the probabilities, what was required was a weighing of all the evidence, without disregarding any of it. It is, however, apparent, as I shall also demonstrate, that the court a quo failed to analyse the evidence of all the witnesses, in particular that of Mr Flusk, and ignored material evidence.

[178] I turn to an evaluation of the competing versions. To have signed the OTP Mr Flusk would have had to have spent some time at the event. It is apparent from the evidence of all the developer's witnesses that Mr Flusk spent at least two hours there having arrived at about 18h00 and departed closer to 21h00. They remembered several important details regarding his presence. Both Mr Diamond and Ms Boshoff remembered him having a glass of wine and that he had flirted inappropriately with one

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[76] *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA) para 5.
[77] *Santam BPK v Biddulph* 2004 (5) SA 586 (SCA) para 5.

of the guests. Significantly, Ms Boshoff's recollection of the incident, which was very clear, was prompted by a question that was put to her in cross-examination.

[179] Ms Boshoff remembered too that Mr Flusk had sat at one of the tables with Mr Diamond and filled out documents, and that he had arrived and departed alone in a gold-coloured Mercedes. Mr Booysen recalled congratulating Mr Flusk on his purchase and then having had several discussions with him. His evidence was not impugned, and there are no grounds to disregard it or disbelieve him.

[180] Other than disputing the evidence that Mr Flusk had taken a glass of wine, none of the other details were disputed. In particular no suggestion was made to any of the witnesses that he had left after spending only five to ten minutes there. The developer's evidence regarding the considerable time that he had spent at the event must therefore be accepted.

[181] By contrast Mr Flusk's evidence was clearly not credible. He first testified that he had been at the event for only ten minutes. When cross-examined on what he had done during this period, he adjusted his evidence to having been there for five to ten minutes. When it was put to him that his earlier evidence was that he had been there for ten minutes, he insisted that his answer had been five to ten minutes, which was incorrect. The impression gained from his evidence was that he was attempting to reduce the time he had spent at the event, in order to decrease the likelihood that he was present for long enough to sign the OTP. He also contradicted himself on whether he had mentioned to Mr Diamond that the event was not a constituency meeting. The contradiction gives the lie to his evidence that he thought he was attending a meeting of Mr Diamond's political constituency. If Mr Diamond had deliberately misled him as to what the purpose of the event was to secure his presence there and was the reason he left promptly when he realised this was the case, this assertion would have featured pertinently in Mr Flusk's evidence in chief and in Mr Diamond's cross-examination. But no mention was made of it.

[182] Also noteworthy is his evidence that he had been driven to the event by his driver in a different motor-vehicle, and not in his Mercedes. Ms Boshoff, having met him for the first time, would have had no reason to identify his vehicle as being the gold-coloured Mercedes. The fact that she remembered this important detail shows that it is probable that he did arrive and depart in this vehicle and that his evidence in this regard also falls to be rejected, as does his evidence pertaining to the glass of wine and the fact that he had flirted with one the guests. Ms Boshoff's evidence regarding the Mercedes was also not challenged.

[183] One of the points of criticism that the court a quo made relating to Ms Boshoff's evidence was that her description of Mr Flusk's appearance, nine years later, was inaccurate. The criticism is, with respect, unfair. Ms Boshoff's evidence was not rejected, nor was any credibility finding made against her. She was a good witness and her detailed recollection of what transpired that evening was impressive. And as I have previously mentioned most of her evidence was unchallenged.

[184] As far as the signing of the OTP itself is concerned, Mr Diamond's evidence was that Mr Flusk had signed the document in his presence. Ms Boshoff had not seen the document but her evidence that the two men were sitting and doing some paper work at one of the sales tables was also not questioned. Her evidence had a ring of truth to it. She could quite easily have adjusted her evidence to suggest that she had seen Mr Flusk signing the document. Again, I think her evidence in this regard should have been accepted.

[185] Ms Pienaar confirmed that she had seen the original OTP. Her evidence was given clearly and without hesitation. It was not suggested to her that she was party to a conspiracy to forge the OTP, but this is the necessary implication from the court a quo having disbelieved her. Her evidence was rejected on the ground that her memory that she had handed the original document to Mr Diamond in October 2008 was irreconcilable with her evidence that she had searched the office a few days before she testified to try to find it. But this finding overlooks her explanation that she had left her

employment with Mr Booysen for a period of eight months and that she therefore thought that the document may have been returned in her absence. Her evidence that she had phoned the ANC to establish whether they still had the document, which was also overlooked, is also consistent with her version. In my view her testimony also supports the existence of the OTP.

[186] In regard to the content of the OTP, Mr Diamond's evidence as to why the deposit clause had been deleted, was unclear and not satisfactory. The court a quo's criticism of this aspect of his evidence is not without merit. However, Mr Booysen's testimony as to how OTP's were managed, first through Mr Diamond's office and then by his father, Mr Syd Booysen, and why the deposit provision was usually deleted, overcame some of the difficulty. The true reason for why the offer had been refused was, however, not clarified. Also not clarified in the evidence was when Mr Flusk became aware that his OTP had been rejected.

[187] The court a quo considered it significant, as pointers to the OTP's questionable authenticity, that the telephone numbers on the document 'supposedly' given by Mr Flusk were out of date and that the space for the purchaser's marital status was left blank, whereas he was married in community of property. However, in regard to the telephone numbers it was pointed out in cross-examination that the telephone numbers were not out of date. Importantly, this allegation was not put to Mr Diamond. And the fact that the space for marital status was not filled in is itself not significant, much less indicative of fraud. There are often innocent explanations for inaccuracies and omissions on pro forma documents. I do not think it fair or justified for the court a quo to have made a far-reaching finding of fraud on these grounds.

[188] One of the 'difficulties' pointed out by the court a quo regarding Mr Diamond's allegation that Mr Flusk signed the OTP was the confusion as to whether he had purchased Erf 4, in Extension 12, as appeared from the OTP, or Erf 38, which was the allegation Mr Diamond made to the ANC in October 2008. Mr Diamond then informed the ANC that Mr Flusk had in fact signed for Erf 38 and not for Erf 4. There is, however,

nothing improbable in Mr Diamond's explanation for the error in the description of the two properties.

[189] Neither party led expert evidence on the authenticity of the signature purporting to be Mr Flusk's on the OTP. However, an important indication of the authenticity of the OTP is the confirmation of Mr Syd Booysen's signature on a copy of the document, by both Mr Booysen and Ms Pienaar, which the court a quo overlooked. There can be no gainsaying the fact that that Mr Syd Booysen's signature on the document is authentic. The authenticity of the document is further demonstrated by the fax particulars on the document dated January 2009, which refutes the court a quo's finding that the document was fabricated after summons was issued in March 2009. The document's authenticity was therefore proved on a balance of probabilities. It follows that I am unable to agree that the document was not genuine.

[190] However, it does not follow that because the OTP was genuine that the developer had also proved the attempt to extort the bribe. I turn to consider the evidence on this aspect. Mr Diamond's evidence was that after Mr Flusk had signed the OTP, he, from time to time, asked for a discount on the stand, which he brushed aside. Then, at a meeting in January 2008, for the first – and apparently the only – time he demanded the stand 'for free' adding, that if Mr Diamond did not accede to the request, he would make it difficult for the development to go ahead. Mr Diamond testified that he informed Mr Booysen, who advised him to ignore this as there was no basis for the Municipality to legitimately prevent the development from going ahead. Mr Booysen confirmed this communication during the course of his testimony. As I have mentioned earlier, Mr Booysen was a good witness and there was no reason to reject his evidence in this regard. Mr Flusk emphatically denied Mr Diamond's evidence.

[191] Among the reasons that the court a quo rejected the bribery allegation was because, if true, it would have featured in the application before the North Gauteng High Court. The developer's explanation for not making the allegation in the papers that it did not want to complicate the case with side issues, was rejected as implausible. But, with

respect, it is not implausible for the developer to have decided to omit this issue from the application to compel the Municipality to issue the certificates. Mr Booysen believed, correctly, that there no proper grounds for the Municipality to withhold the issue of the certificates. Furthermore, Mr Diamond was not party to the proceedings. The developer was represented by eminent counsel in those proceedings. It is clear that all that would have happened had the bribery allegation been made in the papers was that Mr Flusk would have denied it. This would have resulted in a dispute of fact on the papers and could only have further delayed the issue of the certificates.

[192] I also do not find it improbable that Mr Flusk would have signed the OTP, and also demanded a sales list of the buyers when his name would have appeared on the list. That was the very question that was put to Mr Booysen in cross-examination. But, with respect, I do not find his demand for the sales list difficult to understand. The list was sought, according to Mr Flusk, to uncover the 'unhealthy relationship' between councillors and the Municipality. It is clear from what I have found earlier that he had extorted the list for his own ulterior purpose: the false promise that he would issue the certificates if the list was given to him. It is equally plausible that he wanted the sales list to confirm whether his name was still on it, bearing in mind that he would have learnt at some stage that his offer had been rejected. There is, however, no evidence that the list was to be publicised or made available to anyone else within the Municipality.

[193] The court a quo also made contradictory findings concerning when and why the bribery allegation first surfaced. The one explanation given was that it was a 'recent fabrication' as the plaintiff's case developed through various amendments, in other words as the trial proceeded. The other explanation was that the fraud was concocted late in 2008 in response to disciplinary charges from Mr Diamond's political party. The finding of a 'recent fabrication' is, in my view, not sustainable in light of the evidence that Mr Diamond had already mentioned to the investigators, Pasco, early in 2008, that Mr Flusk had bought a stand in the development. That allegation, which appeared in the Pasco report in May 2008, could only have been made if Mr Flusk had in fact signed an OTP. The evidence that he had made the same allegation to the ANC in October 2008

and had given the original document to them also negates this finding. Furthermore, as I have pointed out earlier, the fax particulars on the document dated January 2009, two months before summons was issued, fully refutes the suggestion that the document was a recent fabrication.

[194] Mr Diamond's evidence was not unblemished. He testified that until October 2008, when he was called to a disciplinary hearing of his political party concerning the allegation against Mr Flusk, he considered Mr Flusk to be a man of integrity. The court a quo found this irreconcilable with his having demanded a bribe in January that year. There is some merit in this criticism. However, to reject his version one would also have to reject Mr Booysen's evidence, and there are no proper grounds for doing so. Another difficulty with the bribery allegation is that it was made on one occasion and never repeated, unlike the allegations pertaining to the demands for the sales list and the shareholding being given up to an NGO. But this is explained by the fact Mr Flusk made several reprehensible demands at different times. And at first blush, while it may seem improbable that Mr Flusk would have made this demand when he was apparently concerned with the probity of the land transaction and Mr Diamond's possibly benefitting improperly from the development, it is not improbable that he would have made this demand, when he made other similar disgraceful demands. The evidence demonstrated that Mr Flusk's behaviour was erratic and his conduct capricious.

[195] Mr Diamond's evidence did not stand alone. His evidence regarding the bribe was corroborated by Mr Booysen, whose evidence I accept. On the other hand Mr Flusk was the only witness for the Municipality, and his evidence, mendacious as it was, could simply not be accepted. Having weighed both versions, which perforce required an assessment of their credibility and reliability, and the probabilities, I am persuaded, on balance, that the developer proved the extortion attempt.

[196] Although the court a quo found that Mr Flusk had deliberately withheld the issue of the certificates and was 'disingenuous' – in other words untruthful and dishonest – in the explanations he gave for his conduct, it found that the 'real reason' for refusing to

issue the certificates was his concern with the 'allegations of corruption surrounding the development and what he believed to be an illegitimate land alienation, which did not comply with the provisions of s 14(2) of the MFMA'. It rejected Mr Diamond's allegation that Mr Flusk had attempted to extort a stand in one of the developments from him in return for the issue of the certificates, and found, as I mentioned previously, that the documentation produced to support the allegation was probably a 'clumsy and amateurish fraud concocted by Diamond'. And further, that even though Mr Flush had intentionally and dishonestly withheld the certificates, the appellants had not shown that he had been 'motivated by greed and financial gain'. It thus concluded that his mala fide conduct – though blameworthy – was not wrongful because it did not include 'an element of fraud and financial gain.'

[197] The learned judge found support for her conclusion that Mr Flusk's conduct was not wrongful in *Country Cloud Trading CC v MEC, Department of Infrastructure Development.*[78] The facts, which arose in a contractual setting, briefly, were these: Country Cloud lent R12 million to a company, iLima, to enable it to perform its contract obligations with the respondent. iLima agreed to repay Country Cloud after it had received payment from the respondent in terms of a loan agreement. The respondent was aware of this arrangement, but before the payment was made one of its officials cancelled the agreement despite being aware that he was not entitled to do so.

[198] The Constitutional Court accepted[79] as did this court[80] that the official concerned acted with intent – at least in the form of *dolus eventualis* – when he cancelled the contract without legitimate grounds, but nevertheless reconciled himself with this possibility and continued to do so regardless of the consequences. It transpired that the official had come under pressure from within the department and from the media for not having put the contract between it and iLima out to tender, and was desperately looking

[78] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 47.
[79] Ibid para 37.
[80] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA).

for an excuse to cancel the contract; and that the grounds he had advanced for taking this action were unfounded.[81]

[199] Referring to *Minister of Finance v* Gore,[82] which Country Cloud had relied upon to support the contention that the official concerned had wilfully – and therefore wrongfully – interfered in the contractual relationship between it and iLima, the Constitutional Court said that in *Gore*, damages were granted against State entities whose employees had through 'fraudulent conduct' prevented the award of a tender of a contract to the plaintiffs. It characterised their dishonesty 'as going to the root of the defendant's conduct'. By contrast, the official's dishonesty, in *Country Cloud*, went no further than the reasons he gave for cancelling the contract, and did therefore not rise to the level of dishonesty or corruption that was present in *Gore.* The official was merely a 'bungling public functionary, not one bent on illicit gain', the court said. So the policy considerations that motivated the imposition of liability in *Gore* were not present in *Country Cloud*.[83] However, by distinguishing *Gore* in this manner the Constitutional Court did not lay down a rule that State entities can only be held liable when the impugned conduct amounts to fraud or an attempt to secure some illicit financial gain. To the extent that the court a quo held that *Country Cloud* had done so, it erred. Before us counsel for the Municipality properly conceded that the court a quo had 'gone too far' in its holding.

[200] The first judgment appears to conclude that the appellants had not established that Mr Flusk's conduct was wrongful mainly on the ground that the attempt to extort the bribe – the free stand – was not proved. But this was only one aspect of the mala fide case the developer had made out. There are four, separate, mutually reinforcing grounds for establishing the mala fides case. The first was that Mr Flusk wilfully delayed the issue of the certificates for a period of 15 months. His conduct was mala fide, it is

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[81] Ibid, paras 21 and 22.
[82] *Minister of Finance v Gore* 2007 (1) SA 111 (SCA).

[83] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 47.

contended, because he gave the developer dishonest and spurious reasons for withholding the certificate. The second, third and fourth grounds all relate to the ulterior purpose sought to be achieved by his mala fide conduct: namely the attempt to extort a bribe in return for a free stand, the attempt to extort a transfer of Mr Diamond's shareholding in the second appellant to an NGO of his choice, and the extortion of the sales list in return for the issue of the certificates. The developer's case, as I understand it, is that it established each of these grounds, but that any one of them would have been sufficient to prove that the wrongfulness element of the delict. We are therefore concerned simply with whether the developer had established wrongfulness on the part of Mr Flusk. In this regard the question is whether considerations of public and legal policy dictate that his conduct should attract delictual liability.

[201] Public policy is, of course, informed by constitutional norms, including and particularly the norm of public accountability. Closely allied with this norm is the duty to act fairly, transparently and responsively. The duty to act accountably in this broad sense requires the State not merely to remain passive but to take positive steps, through its officials, to fulfil the obligations the Constitution imposes upon it.[84] It follows that where the State fails to take these steps or abuses its power it violates the principle of public accountability, which may found a claim for damages against it.[85]

[202] Of course, as Nugent JA pointed out in *Minister of Safety and Security v Van Duivenboden*, whether the norm of accountability translates this constitutional duty into a private law legal duty enforceable by an action for damages must depend on the circumstances of each case.[86] In this regard an important question is whether there are effective remedies, including judicial remedies, other than an action for damages, to vindicate the norm. Where the State's impugned conduct occurs in circumstances that offer no such effective remedy the courts will ordinarily recognise a legal duty unless there are countervailing considerations affecting the public interest that outweigh that

[84] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 19-20.
[85] Compare *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 45.
[86] *Van Duivenboden* (supra) fn 11.

norm. In other words they would find the impugned conduct wrongful. In *Country Cloud*, for example, the plaintiff's reliance on the accountability norm failed mainly because it was a stranger to the contract between the state entity and iLima, and it was thus not able to show that any legal duty was owed to it.[87] In addition the conduct of the official in cancelling the contract, even though done intentionally, did not raise similar public-policy concerns that arose from the conduct that was in issue in *Gore.*[88]

[203] *Van Duivenboden* involved the negligent failure by police officers to deprive a person of firearms in circumstances where they had information that he was unfit to possess them. The court found that the imposition of a legal duty on the police to prevent harm would not have required additional resources or impeded the effecting functioning of the police service. The constitutional norm of accountability therefore required a legal duty to be recognised as there was no other effective way to hold the State accountable other than through an action for damages.[89] In *Gore* it was not even necessary to consider whether there were remedies other than an action for damages because 'the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high.'[90]

[204] The abuse of public power is what we are concerned with in this appeal. The nature of the abuse must enter into a consideration of whether the impugned conduct was wrongful. In England, the abuse of power – misfeasance as it is called – by a public official is a recognised tort on its own. Lord Millet explained the 'core concept' of the abuse of power in *Three Rivers DC v Bank of England (No 3)*[91] as follows:

'[T]he core concept is abuse of power. This … involves other concepts, such as dishonesty, bad faith, and improper purpose. These expressions are often used interchangeably; in some contexts one will be more appropriate, in other contexts, another. They are all subjective states of mind . . .

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[87] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 48.
[88] Ibid paras 46 and 47.
[89] *Van Duivenboden* (supra) fn 11 para 22.
[90] *Gore* (supra) fn 9 para 88.
[91] *Three Rivers District Council & others v Governor and Company of the Bank of England (No 3)* (CA and HL(E)) [2003] 2 AC.

…Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge, or merely self-advancement, is an abuse of power. It is immaterial in such a case whether the official acts exceeds his powers or acts according to the letter of the power: see *Jones v Swansea City Council* [1990] 1 WLR 1453. His deliberate use of the power of his office to injure the plaintiff takes his conduct outside the power (and) constitutes an abuse of the power…'[92]

[205] The relevance of this dictum of the House of Lords to the present appeal is evident. The abuse of power is antithetical to the principle of public accountability. When a public official acts for a private purpose, whether out of spite, revenge, malice or simply self-advancement, he abuses his power. It is immaterial whether or not he derives any personal gain from his conduct: it remains an abuse of power. Under the core concept of the abuse of power are the related concepts of dishonesty, bad faith and improper purpose or ulterior purpose. Once the abuse of power is established liability would usually follow. In the language of wrongfulness, considerations of public or legal policy will generally compel the imposition of delictual liability to loss resulting from the abuse of power.[93] Moreover as Lord Millet emphasised, liability cannot be avoided by showing that the official acted not for his personal purposes but for the benefit of the public.

[206] In the instant case the evidence established, and the court a quo found, with respect correctly, that Mr Flusk intentionally withheld the certificates for fifteen months, and was dishonest (and mala fide) with both the developer and the court in explaining his conduct. The fact that in doing so he may have been acting not for his own personal purposes, but in the belief that he was preventing a corrupt land transaction, as the court a quo also found, does not negate his wrongful conduct. Once it is established

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[92] Ibid at 235-236.

[93] In *Gore* (supra) fn 9 the court said that dishonest conduct will usually attract legal liability; In *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 26 Harms JA said: 'Decisions made in bad faith are . . . unlawful and can give rise to a claim for damages'.

that he used the extraordinary power given to him as the City Manager not for a public purpose, but for another improper purpose, he abused his power.

[207] Assuming, in Mr Flusk's favour, that he genuinely believed that he was a preventing a massive public fraud, an accountable City Manager, acting reasonable and not capriciously, would have disclosed to the developer in December 2007 that he had decided not to issue the certificates. And, he would have disclosed the factual basis and the true reasons to the developer and the Council for not allowing the development to proceed. He would then have promptly taken appropriate steps to have the entire process, commencing with the land transaction in 2005, reviewed and set aside. Instead, with full knowledge that the developer was incurring huge expenditure to comply with s 82 of the Ordinance, he not only adopted an unresponsive stance to its entreaties, but was deceitful in his dealings with the developer, ignored the proper advice of his officials and misled the Mayor.

[208] The developer's numerous attempts – which increasingly became desperate – to obtain the certificates, were met by obdurate resistance on the part of Mr Flusk. He was unable honestly to point out any deficiencies with the engineering services because there were none, which is why his allegations in his court papers before the high court that the services were deficient and his submissions pertaining to the developer's failure to use internal appeal remedies were not bona fide. His letter to the Mayor on 15 August 2008 was replete with falsehoods. Instead, as the court a quo observed, he kept on reverting, impermissibly, to the illegal land swap and the fact that some councillors may have unduly benefitted from the development. This is a textbook case of the mala fide abuse of public power, not the actions of a 'bungling official' merely trying to prevent the consummation of a corrupt land deal. In the absence of any other countervailing public interest considerations, his conduct was wrongful on this basis alone and ought to attract liability.

[209] But, as I have found, Mr Flusk's conduct was even worse. He acted for an ulterior purpose by extorting the sales list from Mr Diamond in return for which he promised to

issue the certificates, demanded that Mr Diamond transfer his interest in the second appellant to an NGO of his choice and attempted to extort a bribe from Mr Diamond. This is irreconcilable with the central finding of the court a quo that Mr Flusk had a genuine belief throughout that he was preventing a massive public fraud. These are all additional grounds for finding that his exercise of public power was mala fide and therefore wrongful. No considerations of public or legal policy can deny the developer delictual remedy in these circumstances.

[210] What remains is causation. The quantification of the damages stood over for later adjudication. The developer contends that Mr Booysen's evidence that damages were suffered under various heads was established and not really disputed. And that there was a direct causal connection between the mala fide withholding of the certificates, the resultant delay in the township development process and the loss suffered by the appellants.

[211] As appears from the two previous judgments the first appellant's claim arises from the delay in implementing the land sale agreements to Chestnut Hill and Armadillo; and second, the delay in remuneration for the construction contracts with those two companies to erect the town houses and office block. Both judgments hold that because the sale agreements were concluded before the township was proclaimed in terms of s 103 of the Ordinance, and thus contravened s 67 of the Ordinance they were null and void. And that by upholding the claim the court would impermissibly be enforcing these agreements.

[212] In regard to the first appellant's claim for construction costs pursuant to the construction of an office block, the second judgment holds, similarly, that because the construction was undertaken without approved building plans as the National Building Regulations and Building Standards Act 103 of 1977 (Building Standards Act) requires, the court cannot sanction it.

[213] The second appellant's claim relates to the delay in receiving payment pursuant to the sales of properties it had effected and the loss arising from the ten percent drop in the market price in 2008. Here too the two judgments hold that because the sales were completed prior to proclamation and thus null and void by virtue of s 67 of the Ordinance the claim should fail, as should the claim for rates and taxes, which it was obliged to pay during the period of the delay. The second judgment, in addition, holds that the claim arising from the ten percent drop in the value of the property as a result of the global financial crises fails because it was not foreseeable.

[214] The third appellant's claim is for the depreciation in value of the stands in the un-proclaimed townships of Extensions 8 and 10 of the Meyersdal Estate. The Municipality had erroneously not proclaimed these townships at the time it proclaimed the other extensions. When the third appellant discovered this it decided not to compel the proclamation in terms of s 103 of the Ordinance because Mr Flusk would have simply refused to issue the certificates for these extensions. As a result of the delay, by the time the Municipality had indicated that it was not prepared to proclaim the township, the market experienced such a collapse that the development was no longer viable. The third appellant was thus precluded from selling land at the then market value and investing the proceeds before the market collapse. This loss of the value of the land to the tune of ten percent and the loss of interest that would have been received is the measure of the loss claimed.

[215] The first judgment holds that there was no 'causal nexus between the failure to proclaim the township, the s 82 certificate and the asserted loss', and that the loss that resulted from the market failure was not foreseeable. Put simply the third appellant's claim fails because neither factual nor legal causation was established. The second judgment concurs in this reasoning.

[216] There is no dispute that the sale agreements, which are the subject of the first and second appellants' claims, were invalid for want of compliance with s 67 of the Ordinance. Section 67(2) expressly says so, providing that these agreements have 'no

force and effect'. Section 67, read with s 70, has as its purpose, to protect members of public from unscrupulous developers seeking to sell properties in un-proclaimed townships. However, the appellants are not seeking to enforce these admittedly illegal agreements against any purchasers, much less take advantage of unsuspecting buyers, who need the court's protection. Their claim is in delict and the award of damages they seek is to be compensated for the difference between the position that arose as a result of the delict and the hypothetical situation that would have obtained but for Mr Flusk's wrongful conduct. In other words what is sought to be recovered is the amount by which their patrimony has been diminished by reason of Mr Flusk's refusal to issue the certificates when he should have done. Their case is that but for Mr Flusk's mala fide conduct the townships would have been duly proclaimed by December 2007, the appellants would have transferred properties to their purchasers and they would not have suffered any loss.

[217] Once that had occurred and the parties had settled their contractual obligations between them it would not follow that a purchaser could seek to undo the transaction on the ground of the invalidity of the agreement. That principle was enunciated more than a century ago by Innes J in *Wilken v Kohler*:[94]

'It by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would be bound to upset the result of such a contract which the parties had carried through in accordance with its terms. Suppose, for example, an underhand unconditional agreement of sale of fixed property for a definite price, a payment of the purchase price and due transfer of the land. Neither party would be able to upset the concluded transaction on the mere ground that the *causa* stated in the deed of transfer was called a contract of sale, whereas it was in reality an agreement to sell, invalid and unenforceable in law, but which both seller and purchaser proposed to carry out. No good ground of action could be alleged in such a case; neither in the shape of a *restitutio in integrum*, nor by way of a *condictio* could relief be claimed. Neither party could say that he had been enriched at the expense of the other; and the

[94] *Wilken v Kohler* 1913 AD 135 at 144; See also *Taljaardt v T L Botha Properties* 2008 (6) SA 207 (SCA) para 7; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 168.

*traditio* duly made with knowledge of all the facts and with the intent to pass the *dominium*, and the price duly paid with similar knowledge and with the object of acquiring the *dominium* would bind the respective parties.'

[218] Now suppose, on the facts of this case, that the townships had been proclaimed by December 2007, without delay, and that the properties duly transferred to the purchasers in return for payment of the contract price. It seems clear that the parties would not be able to undo the agreement notwithstanding its invalidity. This means that a purchaser, who received fair value, would not be able to extricate himself from the sale agreement by demanding that the seller take back the property. And the developer would, notwithstanding the invalidity of the sale agreement, also not be required to repay the purchase price.

[219] Once it is accepted that a contracting party is unable to undo the consequences of an invalid contract where the parties have carried out their obligations, it must follow that a third party is in an even weaker position to impugn its validity.[95] In the present case, as I have mentioned, we are not even concerned with the enforcement of the contractual obligations flowing from an invalid contract. Instead, we have an attempt by a third party – the Municipality – to invoke the invalidity of the sale agreements in a delictual dispute involving it and the developer to avoid the consequences of the mala fide conduct of its most senior official, the City Manager. Section 67 of the Ordinance can manifestly not serve that purpose. To the extent that the first two judgments come to a contrary conclusion, I respectfully disagree with them, as I do with the second judgment's additional reliance on the Building Standards Act.

[220] I turn to consider the third appellant's claim. In regard to whether factual causation was established the first judgment holds that there was no causal nexus between the failure to proclaim the township and the asserted loss. I respectfully disagree with this conclusion. It is correct that the two extensions in issue here, Extensions 8 and 10 were inadvertently not proclaimed at the time the others were. But

[95] *Aussenkuhr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA) para 26.

this is not the issue. It is clear from the evidence that there were two reasons that the developer did not insist on the proclamation. First, it would have unnecessarily incurred further rates and taxes. Secondly, and more importantly, there was no purpose in proceeding with the proclamation in the face of Mr Flusk's resolute determination not to issue the certificates. In my view the delay in the proclamation of Extensions 8 and 10, which was directly attributable to Mr Flusk's wrongful conduct, was established as the factual cause of the loss.

[221] In regard to legal causation the question is whether the Municipality should be held liable for the harmful consequences or loss of Mr Flusk's conduct. Put differently was Mr Flusk's mala fide conduct sufficiently closely linked to the loss for legal liability to ensue, or was it too remote?[96] The first two judgments hold that if Mr Flusk's conduct was mala fide, the Municipality should nevertheless not be held liable because the loss or harm was the result of the unforeseen market crash of 2008, which caused the market value of the un-proclaimed township to depreciate.

[222] However, my colleagues, I think, conflate the nature of the loss with the extent of the loss. Remoteness is concerned with whether the nature – not the extent – of the loss is too remote or reasonably foreseeable to incur legal liability. The Municipality (and Mr Flusk) was aware that the delay was causing harm to the developer; it was drawn to their attention. Once that is established, as I think it clearly was, the Municipality cannot complain that the loss was far greater than expected because of the unforeseen market crash. In other words once the nature of the loss is reasonably foreseeable or not too remote for liability to ensue, the extent of the loss is immaterial. If it were otherwise it would mean that a smaller loss of, say, a five percent decrease in the market value of a property is compensable, because that is always reasonably foreseeable, but not a ten percent decrease because such a decrease is never foreseeable. That would be an unwieldy horse to saddle. Given the egregious nature of Mr Flusk's mala fide conduct, I

[96] *Minister of Safety and Security v Carmichele* 2002 (6) SA 305 (SCA) 332. See generally J Neethling et al *Law of Delict* 5 ed (2006) at 171-174.

do not think that there are any policy considerations, based on reasonableness, fairness and justice for not holding the Municipality liable in this case.

[223] In the result I would uphold the appeal with costs, including the costs of two counsel.

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A Cachalia

Judge of Appeal

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