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THE APPLICATION OF THE ABUSE OF PROCESS DOCTRINE IN CRIMINAL PROCEEDINGS

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Abstract

In recent years South-African superior courts have held that court processes have been manipulated by a prosecutor in a private prosecution, or an accused or the executive in a criminal matter constituting an abuse of process. The purpose of this paper is to examine whether the doctrine of abuse of process could actually have been applied in such cases. The doctrine is also of interest worldwide in the present time where many types of conduct seem to be loosely labelled as abusive.

The doctrine originated in English law from the inherent jurisdiction of superior courts to protect against contempt of process in a civil matter. The English courts, and in the earlier years the South African courts, were prepared to uphold a submission of abuse of process by a plaintiff but not where the defendant had abused the court proceedings to his own end.

Of late, the application of the abuse of process doctrine in the criminal sphere was confirmed in England, Canada and New Zealand. However, the doctrine has been confined to protection of an accused from abuse of process by the executive.

It is evident that the doctrine of abuse of process has developed or expanded greatly from its early roots. The first issue with this expansion is that it is counterintuitive. Another issue concerns the power of the South African courts to develop the common law. The South African

courts did furthermore not provide any reasons for the expansion of the doctrine. There must also be a need for the expansion and the expansion must be exercised with due regard to the Bill of Rights and the ethos of the Constitution.

Keywords:

Abuse of Process, South African Courts, Criminal Proceedings, Private Prosecution, Common Law, Bill of Rights, Constitutional Law