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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No.: 5633/2020

In the application of:

CENTRE FOR APPLIED LEGAL STUDIES

Amicus Curiae Applicant

In Re:

CITY OF CAPE TOWN

Applicant

And

**SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

First Respondent

**CHIEF EXECUTIVE OFFICER OF THE
SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

Second Respondent

TAURIQ JENKINS

Third Respondent

ANNIE KIRKE

Fourth Respondent

ANNELIZE VAN WYK

Fifth Respondent

LYSANDRA FLOWERS

Sixth Respondent

LORENZO DAVIDS

Seventh Respondent

CATHERINE WILLIAMS

Eight Respondent

GILLES VAN CUTSEM

Ninth Respondent

JARED SACKS

Tenth Respondent

ZELDA HOLTZMAN

Eleventh Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that the Centre for Applied Legal Studies ("CALS") intends making an application to the above Honourable Court on **14 MAY 2020** at **10:00** or as soon thereafter as counsel may be heard for an order in the following terms:

1. Condoning CALS' non-compliance with rule 16A(5) of the Uniform Rules of Court;
2. Admitting CALS as *amicus curiae*;
3. Granting CALS leave to:
 - 3.1. adduce legal written submissions; and
 - 3.2. present legal oral arguments by means of video-conferencing; and
4. Further and/or alternative relief.

TAKE FURTHER NOTICE that the accompanying affidavit of **PALESA ROSE MADI** together with the annexures attached thereto will be used in support of CALS' application.

TAKE FURTHER NOTICE that the CALS will accept notice and service of all process in these proceedings by email at the following email addresses: sithuthulkile.mkhize@wits.ac.za and thandeka.kathi@wits.ac.za.

TAKE NOTICE FURTHER that if you intend opposing this application you are required to:

- (a) notify CALS in writing on or before 13 May 2020 at 10:00; and
- (b) deliver your answering affidavits, if any, on or before 13 May 2020 at 10:00.

DATED at **JOHANNESBURG** on this **12th** day of **MAY 2020**.

S Mkhize

AMICUS CURIAE'S ATTORNEY
CENTRE FOR APPLIED LEGAL STUDIES
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TO: REGISTRAR OF THIS
HONOURABLE COURT

AND TO: APPLICANT'S ATTORNEYS
FAIRBRIDGE WERTHEIM BECKER ATTORNEYS
 Applicant's Attorneys
 Standard Bank Centre
 16th Floor, Main Tower
 Heerengracht
 Cape Town

Ref:AP/aa/CIT/0046:
Email:apetersen@fairbridges.co.za

AND TO: FIRST TO ELEVENTH RESPONDENTS

Respondent's Attorneys

Legal Resources Centre (Cape Town office)

3rd Floor, Greenmarket Place

54 Shortmarket Street

Cape Town

Ref: COCT//SAHRC & Others

Email: sherylle@lrc.org.za

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Tenth Respondent

ZELDA HOLTZMAN

Eleventh Respondent

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FOUNDING AFFIDAVIT

I, the undersigned,

PALESA ROSE MADI

do hereby make oath and state that:

1. I am a major female attorney and Deputy Director at the Centre for Applied Legal Studies ("CALS") situated at the University of the Witwatersrand ("Wits University") which is located at 1 Jan Smuts Avenue, Braamfontein and in my position as such am duly authorised to depose to this affidavit.
2. The contents of this affidavit are both true and correct and unless the context indicates otherwise fall within my personal knowledge.

NATURE OF CALS

3. CALS is a law clinic registered with the Legal Practice Council ("LPC") and based at the law school of the University of the Witwatersrand in Johannesburg ("Wits University"). It was established in 1978 and has been one of the leading human rights research, advocacy and strategic litigation organisations in South Africa. It has five programmes, namely: Home, Land & Rural Democracy; Business and Human Rights; Environmental Justice; Gender Justice; and Civil and Political Justice.

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4. We believe that CALS is in a unique position to be of assistance to the Honourable Court, particularly in this matter, by virtue of the work done by our Civil and Political Justice Programme ("CPJ Programme"). The CPJ Programme focuses on and aims to further the rule of law and the supremacy of the Constitution through the support and protection of institutions supporting democracy; through the challenging of structural violence and prejudice and the protection of the civil and political rights of all people. This programme further seeks to limit the arbitrary exercise of all forms of power, which seek to undermine the law and infringes on rights of others.
5. As stated above, the CPJ Programme achieves these objectives through both litigation and extensive academic research. Through litigation, CALS has not only independently brought and intervened in a number of constitutional challenge matters before the various levels of Courts, but it has also intervened as *amicus curiae*, at every level of judicial access in order to advance the objective of the rule of law. A list of the specific cases in which CALS has acted both independently, and as *amicus curiae*, can be provided to the Court at the hearing of the matter, should the Court so deem it necessary.
6. CALS submits that the main application before the Court falls within the scope of practice of the CPJ programme. More specifically, this matter raises important constitutional issues about the responsibilities of an organ of state (in this case a Municipality), a Chapter Nine institution (the South African Human Rights Commission ("SAHRC" or "Commission")), the role of oversight bodies in assisting organs of state to abide by and comply with the Constitution.

7. Further consideration needs to be had in examining the interplay between these three all within the context of the declaration of National Disaster and under circumstances where the imposition of a national lockdown in the Country has resulted in the limitations of various Constitutional rights.
8. We believe that our prior experience and expertise in regards to the issues set out below, makes us an appropriate and competent party able to make useful and relevant submissions to the Court for its' consideration and determination of the issues.

PROCEDURAL CONSIDERATIONS & URGENCY

9. As mentioned above, CALS is based at Wits University in Johannesburg. We seek to intervene in this matter as *amicus curiae* in terms of rule 16A of the Uniform Rules of Court which permits an interested party to intervene as such in any matter which raises a constitutional issue. Consent should first be sought from the parties to the matter. Where such consent is not forthcoming an application ought to be made to the Court seeking admission as *amicus curiae*.
10. On the evening of 6 May 2020, CALS became aware of the urgent application as brought by the Applicants. We consulted and instructed our Counsel to begin preparing submissions on the matter.
11. Much later that same evening we became aware that the time frames mentioned in the Applicant's Notice of Motion had become truncated by the parties, seemingly by agreement, meaning that our submissions would need to be before

the Court by 8 May 2020 which was when the matter was scheduled to be heard. The Respondents were scheduled to serve their answering affidavit on 7 May 2020. We were not able to find information about further time frames indicating the return date mentioned in the papers, or about time provisions for the filing of heads of argument.

12. Although we did not have a copy of the Respondent's Answering Affidavit at the time, on the morning of 7 May 2020, out of courtesy to the parties and due to the urgency and lockdown regulations, CALS addressed a letter to the parties wherein it sought their consent to intervene as *amicus curiae*. That letter is attached as "CALS1".
13. Due to the extreme urgency, and the fact that we are based in Johannesburg and therefore could not be physically present at Court due to the lockdown regulations, we similarly sent a letter to the clerks of the Judge's listed as being the Judge's sitting in Court for the 8th of May 2020, out of courtesy to the Judge and all the parties concerned. We could not find anything in the Honourable Court's lockdown directives which related to the urgent applications, and did not want to ambush or delay the proceedings or the hearing. We also sought to request and enquire about the possibility of 'joining' the proceedings by way of video-conference, and wanted to give all parties and the Court adequate notice in case practical arrangements needed to be made. Both the Applicant and Respondent were also carbon-copied in the email to the Judge's clerks.

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14. We were not aware that an urgent application gets allocated by the Judge President, and we seek the Honourable Court's pardon and condonation for any discrepancies in approach or practice.
15. In a letter dated 7 May, the Applicant in the main application, refused our request for consent, seeking costs against us if we proceeded. We had not yet, at that point, received word from the Respondents in the main application. This letter is attached as "CALS 2".
16. Later in the afternoon of 7 May 2020 we became aware that the parties had, also seemingly by agreement, made arrangements that the Respondents' answering affidavit would be filed by 8 May 2020 instead, that the Applicant's replying affidavit would be filed on 11 May 2020, and that the hearing of the matter would be postponed to 12 May 2020.
17. Later we became informed that the matter came before Court on Friday 8 May 2020. We also were informed that the parties agreed that the Respondents' Answering Affidavit would be filed later on 8 May 2020, that the Replying affidavit would be filed by 12 May 2020, and that the matter would be heard on 14 May 2020.
18. We received a copy of the Respondents' answering affidavit in pdf via email on Friday 8 May 2020 at 22:13pm. We have since considered the contents of the answering affidavit, and maintain that the issues which we seek to make submissions on, as outlined above, still raise points novel to the proceedings.

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19. We have also since sent a subsequent letter to both the Applicant and the Respondents requesting their consent to be included as *Amicus Curiae* in the matter, with a copy annexed hereto as annexure "CALS3".
 20. The Respondents have consented to our intervention as *amicus curiae*. The Respondent's letter is attached hereto as "CALS4".
 21. The Applicant has maintained its' refusal for CALS to be admitted as *Amicus*. Its letter of refusal is attached as "CALS5".
 22. As such, CALS hereby makes an application for admission as such to this Court.
 23. Given the urgency of the matter and the truncated timelines within which this application was brought and determined before Court, CALS' application for intervention is brought considerably sooner than the timeframes set out in rule 16A, however we have attempted to work within the existing timeframes of the litigation in order to not impede the process. To the extent that condonation is required for CALS' failure to comply with rule 16A of the Uniform Rules of Court, CALS seeks such condonation and submits that the following factors support the granting thereof:
 - 23.1. In its initial letter refusing CALS' admission as *amicus curiae*, the CoCT stated that such an intervention would delay the hearing of the matter. That was before the matter had been set down for 14 May 2020. In its second letter refusing CALS' admission as *amicus curiae*, the CoCT

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made no allegation that such intervention would delay the hearing of the matter;

23.2. CALS' intervention will not cause prejudice to the parties. To the extent that it does, any prejudice caused is outweighed by the value CALS adds to the adjudication of the matter and thus serves the interest of justice;

23.3. CALS' request for condonation is not driven by a delay in complying with the timeframes set out Rule 16A but the fact that CALS' rapidity in applying for intervention as amicus curiae (i.e. not waiting for the effluxion of the 20 day period as required by rule 16A(5)) which itself is based on the urgency of the Main Application and the truncated timeframes of the same.

24. Both CALS' attorneys and its counsel are based in Johannesburg, Gauteng. The country is currently under lockdown: Alert Level 4 in terms of the Regulations Issued in terms of Section 27(2) of the Disaster Management Act, 2002, GNR480, *Government Gazette* 43258, 29 April 2020. Accordingly, CALS' attorneys and counsel are not permitted to travel to Cape Town to present their oral arguments in person, however we endeavour to assist the court through our heads of argument, and through remote video-conferencing.

OUTLINE OF OUR AMICUS SUBMISSIONS

25. CALS also seeks to make written and oral submissions to this Court through our heads of argument. We submit that our arguments are novel, are of assistance

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to the Court, and in terms of the information which we have before us to date, do not repeat or duplicate those submissions made by either of the parties.

26. Further, we humbly submit that our submissions are relevant to the matter before the Court and will assist the Court in its consideration and determination of the issues between the parties.

27. As expressed in its letter to the parties seeking their consent for its intervention as *amicus curiae*, CALS seeks to make submissions on the following issues:

27.1. To elucidate on the detrimental nature of Strategic Litigation Against Public Participation (SLAPP suits) in the South African context.

27.2. Further, to present arguments which outline why the litigation instituted by the Applicant is a form of SLAPP suit, and thus has particularly adverse impact and detrimental consequences. We state that this is particularly so as this is the first such suit brought against a Chapter 9 Institution, and the potential precedent setting consequences are far reaching. These adverse consequences include *inter alia*:

27.2.1. the obstruction of the development of Constitutional jurisprudence by attempting to silence potential litigants with adverse costs orders;

27.2.2. threats of litigation, threats of costs orders, and legal precedent becoming an impediment to the work of

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independent human rights monitoring individuals operating in, and accredited or appointed by an oversight body; thereby potentially stifling the work of independent human rights monitors around the country as a whole.

27.3. To present argument concerning the treatment of the balance of convenience element in an application seeking an interim interdict. In particular, to submit that in considering a request for an interim interdict the Court should be mindful of the First Respondent's constitutional obligations and the impact the order will have on its ability to continue with its work independently and impartially, without fear or favour, and to comply therewith. CALS will further submit that the balance of convenience in this case does not favour the CoCT and thus that it has not made a case for the granting of an interim interdict. Accordingly, its application is without merit and falls within the parameters of a SLAPP Suit.

27.4. To emphasize that organs of state such as the Applicant, have a higher duty to abide by, promote, protect and respect the rights enshrined in the Constitution, and that oversight bodies are there to assist organs of state in the achievement to this duty.

28. CALS' submissions therefore fall within two broad categories:

28.1. The nature and impact of SLAPP suits; and

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- 28.2. The responsibilities of organs of state (vis-à-vis oversight bodies and accountability in the context of a State of Disaster.).
29. The submissions CALS will make in respect of each of these categories are succinctly and clearly set out further below.

CALS' INTEREST IN THE MATTER

30. I am aware that both the provisions of Rule 16A, and the jurisprudence relating to the admission of *amicus curiae* discuss the proposed *amicus*' interest in the matter in which it seeks to be admitted. I therefore wish to fully set out below what CALS' interests are, and why we as CALS believe that the Court's decision in this matter may affect these interests.
31. As set out above, CALS is a law clinic with over 40 years of experience in public interest strategic litigation and socially relevant research and advocacy. We have a particular interest in the promotion and facilitation of access to justice, human rights, and legal support and remedy for disenfranchised communities and those vulnerable to the abuse of power. More specifically this includes those persons, such as human rights monitors or community activists, who bring the abuse of human rights and power to the attention of the public at large, repositories of power and constitutional oversight bodies.
32. CALS is not itself a human rights monitor at the Site; it is instead a member of the Commission's statutory advisory committee. However, it was on the basis of

CALS' experience and expertise that it (CALS) was included in the Commission's

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statutory advisory committee (the Committee), together with 26 (twenty six) other organisations from around the country. As mentioned in the Respondent's answering affidavit, this Committee serves to assist in monitoring the implementation of the COVID-19 national lockdown Regulations and its related impact on human rights in South Africa. CALS currently does not have any human rights monitors serving in the Western Cape.

33. As the Honourable Court would have noted, the Applicant seeks an order against the Respondents essentially interdicting the Commission, through its delegated monitors, from carrying out the Commissions' constitutionally mandated function. Herein lies CALS' significant interest in the matter – should the order sought be granted, it will have the detrimental and paralysing effect of intimidating, threatening, and chilling the involvement of activists, monitors and human rights defenders who seek to carry out this constitution-protecting duty without the fear and threat of litigation and its costs, looming over their work and impeding public participation.

34. Simply put, although much of the focus of CALS' work directly and substantially relates to the work of human rights monitors such as the Respondents, CALS' interest in this matter relates to the eventual detrimental legal and public interest fall out impact which such a precedent will set, in the context where a SLAPP Suit is brought by Applicant, an organ of state; against the Respondent, the SAHRC — a Chapter Nine institution.

35. I also wish to state that the date of the preparation of the report on the "Victimisation Experiences of Activists in South Africa" which will be elaborated

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on below, was published in 2018, and as such, has been independently prepared from this matter.

36. CALS will not be making submissions on the veracity of the factual submissions made, but will rather attempt to limit our submissions to the underlying principles which will be effected should such a SLAPP Suit precedent be set.
37. This concern is not some type of fabricated anxiety, but rather emanates from research conducted by CALS, into the intimidation and victimisation of human rights workers around South Africa, which will be elaborated on below and in our heads of argument.

NATURE OF SLAPP SUITS

38. In 2018, CALS conducted research through open-ended semi-structured interviews with various human rights activists which resulted in the development of a report titled "Victimisation Experiences of Activists in South Africa". That report detailed the nature, extent and impact of the victimisation and intimidation of activists, as well as the support received by activists who had been victimised and intimidated. That report is provided to the Honourable Court as annexure "CALS6".
39. Of particular relevance to this matter are two forms of victimisation and intimidation: civil and criminal litigation against human rights monitors, and discreditation. CALS submits that litigation, particularly with its accompanying financial burden and threat of punitive costs, can be, and is often used as, a

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method of silencing activists and those seeking to hold those in power accountable. The litigation threatened may be criminal in nature, but may also civil, as is the case where interdictory relief sought to prevent the protection of human rights, is pursued.

40. CALS' knowledge in this area is further evidenced by its litigation on this issue.

Two current examples of SLAPP suits in South Africa and in which CALS is involved are the following:

40.1. *Mineral Sands Resources and Another v Christine Reddell and Others*,

Case number 7595/2017. This matter is before the High Court of South Africa, Western Cape Division, Cape Town. CALS intervened as institutional *amicus curiae* in what we believe to be a SLAPP Suit against two attorneys at the Centre for Environmental Rights ("CER"). The plaintiffs, a mining company, alleged that the defendants each made defamatory comments that caused them reputational damage. The alleged comments were uttered as part of a series of lectures entitled "Mining the Wild and the West Coast: 'Development' at what costs?" that formed part of the University of Cape Town Summer School in January 2017. CALS is assisting the court with submissions on the chilling effect of SLAPPs as well as the need for the protection of academic freedom.

40.2. *Goldfield Community Forum and Others v Harmony Gold Mining Company and Others*, Case number 813/2020. This is a rescission application before the High Court of South Africa, Free State Division, Bloemfontein. CALS represents all the Applicants in this matter. The

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relief sought by the Applicants is to have a previous order by the court set aside as it was granted in clients' absence, and our clients' have a bona fide defence for their absence. Our clients believe that the order granted against them amounts to a SLAPP Suit aimed at silencing criticism from the forum which represents communities that host the Harmony Gold Mining Company ("Harmony Gold"). Furthermore, our clients are of the view that the final order obtained by Harmony Gold *inter alia* targets the forum and specific activists (who are also members of the forum) by interdicting them from engaging in lawful protest action against the Harmony Gold.

41. A SLAPP Suit of this nature, where relief is sought not only from the SAHRC but also from the monitors themselves could have a devastating effect on: (a) the willingness of people to act as (or continue to act as) monitors for the SAHRC; and (b) the veracity with which those people investigate, speak out against and remediate human rights concerns. For those persons who already serve as human rights defenders and monitors, this SLAPP Suit could potentially serve as the impetus for them to step down in the fear of being saddled with a court order, a costs order, or criminal charges. This obvious effect (of people being hesitant to volunteer, or continue to volunteer, themselves to act as monitors) would cause a ripple effect as it is directly linked to community activism and public participation. In this specific case it relates to the rights of the homeless persons at the site to have their voices heard, and their rights protected.

42. Further, it is only natural that the SAHRC would be reluctant to accredit monitors if this is the kind of response it would have. This, however, is not to suggest that

the SAHRC is or should be beyond reproach. Such reproach however, should in the first instance be warranted and founded on good cause; and in the second instance, not be directed towards individuals who provide support to the SAHRC (and arguably the larger public), by serving as monitors. If this strategy were to prove successful it would create a precedent that SLAPP Suits can successfully be brought by other organs of state or non-state powerful actors against the SAHRC, other Chapter Nine institutions, human rights monitors or human rights defenders not affiliated with Chapter Nine institutions.

43. Human rights monitors are among a class of persons known within the social justice sector as human rights defenders. Other forms of human rights defenders include journalists who expose human rights violations, community activists who use social activism and mobilisation to challenge the human rights violations by repositories of powers, and lawyers who use the law as a means of redress or prevention of the abuse of rights. While all human rights monitors are human rights defenders, not all human rights defenders are monitors. This case concerns only one category of people who fall within that broader class of human rights defenders.

44. In this case the human rights defenders operate under the auspices of the SAHRC, a constitutionally created and legislatively entrusted and empowered body. CALS submits that the Court should be mindful of the fact that apart from the human rights monitors currently before the Court in this case, there are other human rights defenders whose rights may be, or are, being violated in similar ways but who do not fall within the ambit or under the protection of the SAHRC. Using the strategy adopted by the CoCT, other organs of state or non-state

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powerful actors would feel emboldened to interdict the SAHRC and prevent its monitors from carrying out its mandate (this is particularly so at this unprecedented moment when the rights and the welfare of the most vulnerable members of society are at stake or threatened).

45. With the distinction between human rights monitors and defenders in mind, CALS also submits that the orders as sought by the Applicant is particularly broad. The prayers seek to interdict the Respondents from acting as monitors in respect of the site, from publishing or disseminating reports, and culminate in a costs order sought against the Respondents. We submit that this is unreasonably limiting and onerous, and places this application squarely within the definition of a SLAPP suit.
46. CALS submits that definition for a SLAPP suit is a "meritless case mounted to discourage a party from pursuing or vindicating their rights". CALS submits further though that SLAPP suits are not only limited to cases where people attempt to vindicate their own rights but apply equally to cases where people seek to vindicate or protect the rights of others. This type of litigation is apparently aimed at silencing activists, draining them financially, and making their work impossible thereby paralysing the process of vindicating the rights of those whom the activists serve.
47. CALS tests this definition against the CoCT's application in light of: (a) the relief sought by the CoCT; (b) the effect the litigation is intended to have; and (c) the costs order sought by the CoCT against the Respondents, and then further against CALS itself as well.

48. The effect that the SLAPP suit has on the realisation of human rights is a fundamental deviation from the CoCT's obligations as an organ of state in two fundamental respects: (a) its obligation as an organ of the State to assist and protect SAHRC in terms of section 181(3) of the Constitution. (b) to support the democratic principle of accountability.
49. Whilst SLAPP suits tend to be brought against individual activists or civil society organisations, this application is unique as it is being brought against the SAHRC, and its individually mandated monitors.
50. Public participation and freedom of movement are critical to the development and protection of democracy. Democracy is undermined by stifling the work of monitors through the attacks levelled against them. An active citizenry should be encouraged in South Africa since we have chosen a participatory model of democracy. The success and benefits of this model depends on public participation exercised through civil society organisations, communities, and ordinary members of the public. Our courts have repeatedly affirmed that public participation is a critical aspect of our constitutional order that must be embraced and jealously guarded. We submit that the victimisation and threat towards human rights monitors is tantamount to an attack on the right of communities to public participation, and in the case of the homeless residents of the Site, is fundamental to a community of people already marginalised and treated as outcasts of society.
51. In addition to this point, SLAPP suits like the one currently before the Court have the further chilling ripple effect of blocking the expansion of the cannon of public

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interest law emanating from community based organisations and social movements intimidate potential community litigants from seeking a vindication of their rights.

52. The additional stream of victimisation highlighted by the application is one of discreditation of the human rights monitors. In this particular application the Applicant has sought to bar all the Respondents, save for Rev Nissen, from accessing the Site. It is submitted that this distinction and singling out is a form of discrediting the legitimacy of the other human rights monitors. The suppression of activism and efforts of accountability through the discrediting of activists and monitors is particularly devastating because it serves to delegitimise the work of monitors. This delegitimation taints the public image of the activist concerned and thus isolates them from other members of society who would have helped in the struggle for justice.

53. Over and above the aforementioned points, we further submit that the effect of the Interdict as sought by the Applicants in only permitting a single Commissioner to monitor and observe the amount of people within the camp has the effect of, and is akin to positive malperformance. It is intentionally obstructive to the legislated mandate and need for human rights monitoring and defence work. This is especially so when there is such diversity of expertise and qualifications amongst the monitors – it directly impacts public participation and the ability of an oversight body to adequately and efficiently oversee the implementation of rights.

54. In their letter rejecting CALS' request to be admitted as *Amicus*, the Applicants stated that the application before the Court does not amount to a SLAPP suit because *inter alia*:

54.1. "The application by the City does not amount to vexatious litigation which threatens and/or undermines the constitutional right to freedom of expression. There is no attempt to stifle criticism and/or to intimidate."

54.2. "The SAHRC is not a civil society organisation or an NGO with community activists. The SAHRC is legally represented and it is not clear if you are implying that they are not able to defend their case effectively."

54.3. "Chapter 9 institutions face litigation all the time – most notably in recent times against the Office of the Public Protector."

55. Regarding the aforementioned objections by the Applicant, I submit the following.

55.1. We submit that the infringement and constitutional issue being raised specifically by CALS is not only one of freedom of expression, but one of an infringement on, and stifling of public participation.

55.2. Although the SAHRC is not a civil society organisation or an NGO, and even though they are legally represented, the Applicant has also specifically cited 9 (nine) individual respondents who act as human rights monitors for the SAHRC. The costs order sought by the Applicant also

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has implications for the individual human rights monitors. We submit that this falls within the exact definition of a SLAPP suit.

RESPONSIBILITIES OF ORGANS OF STATE

56. It is true that the Constitution is the supreme law of the country (section 2 of the Constitution). In CALS' submission, an organ of state has obligations to not only respect, protect, promote and fulfil the rights in the Bill of Rights specifically (section 7(2) of the Constitution) but also to pass laws (depending on the nature of the organ of state) and conduct itself in a way that complies with the spirit and purpose of the Constitution more broadly (section 2 of the Constitution). We believe that oversight bodies and civil society organisations assist organs of state in achieving this element, because the goal of both organs of state and oversight bodies is the same vis-à-vis the Constitution, and simply put, "not everyone can think of or do everything".
57. As the organ of state responsible for the management and administration of state functions and services in Cape Town, this obligation and duty would naturally flow 'down' to the CoCT who would be tasked with this obligation, and even more so during the national lockdown period where citizen's constitutional rights are already being limited.
58. We submit therefore that the role and function of an oversight body and its monitors, is fundamentally complementary to the organ of state's obligation to give effect to the Constitution, particularly bearing in mind that ours is a

democracy founded on the rule of law subject to the fundamental principles of *"accountability, responsiveness and openness"*.

59. We further submit that seeking to interdict the representatives of an oversight body from carrying out this function, is not only completely antithetical to an organ of state's obligations, but also places that oversight body in a position where its failure to act in terms of its mandate, becomes unlawful and unconstitutional.
60. CALS further submits that the source of CoCT's obligation to abide by human rights also transcend the borders of South Africa.
61. UN Treaties and international legal instruments encourage member states to strengthen national institutions for the promotion and protection of human rights through binding treaties and obligations. Similar obligations have been imposed on South Africa at a regional level (in the African Union). In a communiqué that was sent on 21 April 2020, the UN's Office of the High Commissioner for Human Rights ("OHCHR") "has also advised States to involve national human rights institutions in their efforts to address COVID-19.
62. It follows that the CoCT is duty bound to protect and promote the mandate and activities of the SAHRC. Doing so advances not only the cause for a rights-based society but also one that embraces transparency and accountability. What CoCT is respectfully not permitted to do is obstruct the SAHRC's attempts at preventing the abuse and violation of human rights, and its (SAHRC) concomitant legislated obligation to promote human rights.

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63. Applications such as the one before the Court, aim to thwart the SAHRC in the fulfilment of its Constitutional and legislative obligations and thus deviate from the CoCT's obligations at the domestic, regional and international level.
64. CALS submits that the SAHRC's obligations are even more pressing and precious in the context of an international pandemic and a domestic state of National Disaster and lockdown. We submit that they must be specifically fortified, particularly where they relate to the reporting of human rights abuses and violations of already vulnerable members of our society.

CONCLUSION

65. In conclusion CALS submits that the application brought by the Applicant is a SLAPP Suit and ought to be characterised as such by the Court. The CoCT also has international, constitutional and domestic obligations to aid the SAHRC in its functions and to support the constitutional imperative of accountability. By depriving SAHRC's monitors of access to the Site the CoCT deviates from those responsibilities.

WHEREFORE, CALS prays for the relief set out in its Notice of Motion.



DEPONENT

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at SANDTOWN on this the 12 day of the regulations contained in Government Notice No.R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.


 COMMISSIONER OF OATHS

Name:

KARABO VAN HEERDEN

Title:

Commissioner of Oaths ex officio

Address:

Advocate: KARABO VAN HEERDEN

Advocate of the High Court
of South Africa

1A Protea Place Sandown

Date: 12 MAY 2020

CALS

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6 May 2020

FAIR BRIDGES WERTHEIM BECKER ATTORNEYS

Applicant's Attorneys

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Per Email: apetersen@fairbridges.co.za

Your Ref AP/aa/CIT/0048

LEGAL RESOURCES CENTRE

Respondents' Attorneys

Attention: Sherylle Dass

Per Email: sherylle@lrc.org.za

Your Ref:

RE: CITY OF CAPE TOWN // SOUTH AFRICAN HUMAN RIGHTS & 10 OTHERS CASE
NUMBER : REQUEST FOR CONSENT TO INTERVENE AS AMICUS
CURIAE



1. The Centre for Applied Legal Studies ("CALS") seeks to intervene in the above matter as *amicus curiae* in terms of Rule 16A of the Uniform Rules of Court.
2. CALS is a civil society organisation based at the School of Law at the University of the Witwatersrand in Johannesburg. CALS is also a law clinic registered with the Legal Practice Council ("LPC"). CALS was established in 1978 and has been one of the leading human rights research, advocacy and strategic litigation organisations in South Africa. It has five programmes, namely: Home, Land & Rural Democracy (formerly known as Basic Services); Business and Human Rights, Environmental Justice, Gender Justice, and Civil and Political Rights (formerly known as the Rule of Law Program). CALS's work in its Civil and Political Justice program is the basis for this intervention.
3. The Civil and Political Justice Programme aims further the rule of law and the supremacy of the Constitution through the support and protection of institutions supporting democracy, challenging structural violence, and protecting the civil and political rights of all people. The programme further seeks to strengthen the law, advance inclusiveness and limit the arbitrary exercise of power in any form that seeks to undermine the law and infringes on rights of others.
4. At the time of drafting this letter CALS has considered the papers filed by the Applicant in the matter. The said papers were received by our offices at approximately 17:30 on 5 May 2020. After having sight of the papers and considering the matter in an extremely truncated period of time, CALS is of the view that it is in a position to offer assistance to the Court in the determination of the important issues raised by this application.
5. During unprecedented times where the entire globe is grappling with a global health pandemic this application raises important issues of law arising from the interplay between the needs of society, the role and protection of human rights, a declaration of national disaster and its consequential regulations, and the requirements for the prevention of the spread of the pandemic itself.



pp. 1-11

6. Specifically, the application before Court raises issues around the role of oversight bodies and human rights monitors to oversee and ensure that rights are only limited in reasonable circumstances during times where there are various limitations of constitutional rights due to the requisite health measures.
7. CALS seeks to make submissions which are novel, which we believe will be useful to this Court and to the parties, which are yet to be dealt with by any Court, and which are in the interests and pursuit of justice.
8. These submissions specifically seek to speak to the role, importance, and necessity of Chapter 9 institutions and oversight bodies whose sole mandate is to guard against constitutional violations in a constitutional democratic state where the Constitution of the country remains supreme; within the context of the declaration of National Disaster and under circumstances where the imposition of a national lockdown in the country and other countries has resulted in the limitations of various constitutional rights.
9. In summary, CALS seeks consent from parties to intervene as an *amicus curiae* in the present application, on the following basis:
 - 9.1 To outline the importance of oversight bodies and any other individual appointed by it in furthering its objectives and mandate in promoting and protecting the rights in the Constitution; particularly during unprecedented times such as a national disaster.
 - 9.2 To emphasize the importance of protection of the rights, or the reporting of the violations of the rights of particularly vulnerable groups of people in society, by the oversight bodies.
 - 9.3 To emphasize that organs of state such as the Applicant, have a higher duty to abide by, promote, protect, and respect the rights enshrined in the Constitution, and that oversight bodies are there to assist organs of state in the achievement of this duty.
 - 9.4 To provide an outline of international trends adopted by foreign jurisdictions as measures to guard against human rights violations and unfair abuse of power by states or organs of state;



- 9.5 To elucidate on the detrimental nature and effect of Strategic Litigation Against Public Participation (SLAPP suits) in the South African context and with reference to foreign jurisdictions;
- 9.6 To present arguments which outline why the litigation instituted by the Applicant is a form of SLAPP suit, and thus has adverse impact and consequences not only on the development of Constitutional jurisprudence, but also on individuals operating and appointed by the First Respondent, and other individuals appointed in other contexts, operating under the auspices of an oversight body.
10. The evidence and submissions which CALS seeks to advance are novel and have not, to our knowledge and at this stage, been raised by any of the parties. We believe these submissions are relevant to the application before the Court, and will be of assistance in to the Court in the circumstances
11. We accordingly request that the parties consent to CALS being admitted as *amicus curiae*, to adduce documentary evidence and present written and oral submissions before the Court, by way of remote video access due to the lockdown regulations.
12. Due to the urgent time frames within which this matter has been brought, we kindly request that the parties provide us with a written response by 12:00 on 7 May 2020, by email, to Sithuthukile Mkhize at sithuthukile.mkhize@wits.ac.za and Thandeka Kathi at thandeka.kathi@wits.ac.za.

Yours Faithfully,

Palesa Madi

Deputy Director: Centre for Applied Legal Studies

Email: Palesa.madi@wits.ac.za



PR KMA



FAIRBRIDGES WERTHEIM BECKER

ATTORNEYS
SINCE 1870

Our ref: AP/aa/ CIT125/0046

Your ref: S Mkhize

Date: 7 May 2020

CENTRE FOR APPLIED LEGAL STUDIES
DJ du Plessis Building
University of the Witwatersrand
BRAAMFONTEIN

ATT: S MKHIZE

Via E-Mail: sithuthukile.mkhize@wiis.ac.za

Dear Sirs

**CITY OF CAPE TOWN V SOUTH AFRICAN HUMAN RIGHTS COMMISSION & OTHERS-
REQUEST FOR CONSENT TO INTERVENE AS AMICUS CURIAE**

We refer to the above matter and your letter of even date requesting consent to join the application as an *amicus curiae*. ("amicus")

The City of Cape Town is not prepared to grant your consent for the reasons set out below.

The underlying principles governing the admission of an *amicus* in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the *amicus* are relevant to the proceedings and raise new contentions which may be useful to the Court.

The role of an *amicus* is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn.

The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court.

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Kwif

The Respondents have not yet filed their answering affidavits and consequently neither you nor our client can assess whether and to what extent the submissions foreshadowed in your request will be canvassed by the Respondents. Your request is thus premature.

It appears at this stage that none of the concerns raised by you are novel and that the content of your letter is generic and unrelated to the specific facts of this matter.

The arguments that you wish to place before the court regarding slap suit litigation is with respect misplaced in the current litigation.

As you are no doubt aware, the Respondents' answering affidavits are due to be filed by 13h00 today and our client's reply by 09h00 tomorrow, with the hearing to take place tomorrow.

We note that your request fails to state when you intend to deliver your submissions. However, your submissions will, given the timeframes agreed upon between the parties, inevitably be delivered in circumstances where our client will have insufficient time to consider and respond to your submissions prior to the hearing.

Consequently your admission as amicus in respect of the hearing tomorrow will likely delay the hearing of the matter and will certainly prejudice our client unreasonably.

We suggest that you consider the Respondents' answering affidavits and if, having done so, you are in a position to make submissions which are novel and have not been canvassed by the parties, we suggest that you deliver a fresh request for admission as amicus timeously in order to make submissions prior to the return date of the application. Such request should naturally provide the requisite detail in respect of the submissions that you would wish to make so that our client can fully consider your request.

We are of the view that such an approach would enable you to raise such issues as you and the Court may deem relevant and would allow all parties sufficient time to deal with the content of your submissions without prejudicing the rights of any parties.

Yours faithfully
FAIRBRIDGES WERTHEIM BECKER



ADELA PETERSEN

E-mail address: apetersen@fairbridges.co.za

Direct line: 021 405-7337



Direct fax: 0866394266



PR *[Handwritten signature]*



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9 May 2020

FAIR BRIDGES WERTHEIM BECKER ATTORNEYS

Applicant's Attorneys

Attention: Adele Peterson

Per Email: apetersen@fairbridges.co.za

Your Ref AP/aa/CIT/0046

CC: LEGAL RESOURCES CENTRE

Respondents' Attorneys

Attention: Sherylle Dass

Per Email: sherylle@irc.org.za

**RE: CITY OF CAPE TOWN // SOUTH AFRICAN HUMAN RIGHTS & 10 OTHERS CASE
NUMBER 5633/2020: REQUEST FOR CONSENT TO INTERVENE AS AMICUS
CURIAE**

1. We refer you to the above matter, our letter dated 7 May requesting consent to intervene in the proceedings as *amicus curiae*, and the Applicant's subsequent response to the said letter.
2. We have considered the contents of the letter, in particular, the refusal by the Applicant to allow CALS to be admitted as *amicus curiae* in the proceedings at that stage of the matter, which we understand to now be proceeding and being heard on 14 May 2020



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3. After having received and considered the Respondent's answering affidavit, we confirm that we intend persisting with our application for admission as *Amicus Curiae*, and would like to outline the submissions we intend on making as follows:

3.1. To elucidate on the detrimental nature of Strategic Litigation Against Public Participation (SLAPP suits) in the South African context. Further, to present arguments which outline why the litigation instituted by the Applicant is a form of SLAPP suit, and thus has particularly adverse impact and detrimental consequences. We state that this is particularly so as this is the first such suit against a Chapter 9 Institution, and the potential precedent set has far reaching consequences. These adverse consequences include *inter alia*:

3.2.1. the obstruction of the development of Constitutional jurisprudence by attempting to silence potential litigants with adverse costs orders,

3.2.2. threats of litigation and legal precedent becoming an impediment to the work of independent human rights monitoring individuals operating in and accredited or appointed by an oversight body, thereby potentially stifling the work of independent human rights monitors around the country as a whole.

3.3. To present argument concerning the treatment of the balance of convenience element in an application seeking an interim interdict. In particular, to submit that in considering a request for an interim interdict the Court should be mindful of the First Respondent's constitutional obligations and the impact the order will have on its ability to continue with its work independently and impartially, without fear or favour, and to comply therewith.

3.4. To emphasize that organs of state such as the Applicant, have a higher duty to abide by, promote, protect and respect the rights enshrined in the Constitution, and that oversight bodies are there to assist organs of state in the achievement to this duty. In particular CALS seeks to make submissions to the effect that this application by the Applicant contradicts its constitutional and legislative obligations in relation to the First Respondent.



PR Kudu

4. In its letter dated 7 May, the Applicant expressed the following concerns regarding our intended intervention:
- 4.2. our request was premature, in the absence of filing of the Respondent's answering affidavit;
 - 4.3. that the arguments we intend making on SLAPP suit litigation are misplaced in the current litigation;
 - 4.4. that our admission as *amicus* would likely delay the hearing of the matter and would prejudice the Applicant unreasonably;
5. In response to each concern outlined above:
- 5.2. we received a copy of the Respondent's final answering affidavit on Friday 8 May 2020 at 22:13pm. We have since considered the contents of such and maintain that the issues which we seek to make submissions on, as outlined above, still raise points novel to the proceedings.
 - 5.3. We maintain that the arguments on SLAPP suits are particularly relevant and applicable to these proceedings. We make these submissions based on our research on the matter, and experience in the way in which these law suits manifest.
 - 5.4. As it stands, the matter will now only be heard on Thursday 14 May 2020. We intend filing our papers on or by Tuesday 12 May, before the Applicant is due to file its replying affidavit. We submit that this will afford the parties sufficient opportunity to consider CALS' submissions and that it will not amount to a delay in the proceedings, nor will there be any prejudice.
6. In light of the above, we would like to ascertain from the Applicant whether it persists in refusing consent for CALS to be admitted as *amicus curiae* in the proceedings. We would also like to ascertain from the First Respondent whether it consents to CALS' application for intervention as *amicus curiae*.

We look forward to hearing from you in this regard.

Yours faithfully,



Centre for Applied Legal Studies

Ms Sithuthukile Mkhize

Email: Sithuthukile.mkhize@wits.ac.za / thandeka.kathi@wits.ac.za



CALS 4

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LRC

Legal Resources Centre

Your Ref:

Our Ref: CoCT // SAHRC and Others

7 May 2020

TO: PALESA MADI
Deputy Director
Centre for Applied Legal Studies Per
email: Palesa.madi@wits.ac.za

AND TO: ADELE PETERSON
Attorney for the Applicant
Fairbridges Wertheim Becker Attorneys
Per email: apetersen@fairbridges.co.za

**RE: CITY OF CAPE TOWN // SOUTH AFRICAN HUMAN RIGHTS
COMMISSION AND 10 OTHERS – CONSENT FOR AMICUS CURIAE
INTERVENTION**

1. We refer the letter sent on 6 May 2020 in which the Centre for Applied Legal Studies requested consent to intervene as amicus curiae in the above matter.
2. We confirm that the Respondents have no objection to this *amicus curiae* intervention and trust that the submissions made by the Centre for Applied Legal Studies will be of assistance to the court in adjudicating this matter.

PP aut

Yours faithfully,
LEGAL RESOURCES CENTRE
Per:

A handwritten signature in dark ink, appearing to be 'Sherylle Dass', written over a light grey rectangular background.

SHERYLLE DASS



CALS 5
44

Our ref: AP/aa/ CIT125/0046

Your ref: S Mkhize

Date 11 May 2020

**CENTRE FOR APPLIED LEGAL
STUDIES DJ du Plessis Building
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BRAAMFONTEIN**

ATT: S MKHIZE

Via E-Mail: sithuthukile.mkhize@wits.ac.za

Dear Sirs,

**CITY OF CAPE TOWN V SOUTH AFRICAN HUMAN RIGHTS COMMISSION & OTHERS-
REQUEST FOR CONSENT TO INTERVENE AS AMICUS CURIAE**

We refer to the above matter and your letter of even date. The City is still not prepared to grant consent for CALS to be admitted as an *amicus*. With respect, it is clear that you do not appreciate what is in issue in the application.

SLAPP SUIT ARGUMENT

We reiterate that this is not a SLAPP suit case. The application by the City does not amount to vexatious litigation which threatens and/or undermines the constitutional right to freedom of expression. There is no attempt to stifle criticism and/or to intimidate.

The SAHRC is not a civil society organisation or an NGO with community activists. These are the hallmarks of SLAPP suit litigation. The SAHRC is legally represented and it is not clear if you are

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implying that they are not able to defend their case effectively. Chapter 9 institutions face litigation all the time – most notably in recent times against the Office of the Public Protector.

BALANCE OF CONVENIENCE ARGUMENT

The respondents have raised this argument and it is not clear what else you will be contributing in this regard. Furthermore, the parties agreed to an interim order pending the hearing that allows the Commissioners and staff access to the site.

HIGHER DUTY ON ORGANS OF STATE ARGUMENT

That with respect is settled law. The City of Cape Town had no choice but to bring this application in compliance with the duty resting upon it.

In the premises, and should you nonetheless persist with bringing the application, it will be opposed and the City of Cape Town will seek an appropriate costs order CALS.

Yours faithfully,

FAIRBRIDGES WERTHEIM BECKER



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CALS 6

46

Victimisation Experiences
of Activists in South Africa
by the Centre for Applied Legal Studies

April 2018

This publication was made possible by grants from the
Ford Foundation and the Raith Foundation



THE RAITH
FOUNDATION

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KUT

CALS

Centre for Applied
Legal Studies

Acknowledgements

The Centre for Applied Legal Studies (CALS) wishes to thank all those who have supported the work outlined in this research report. In particular, we are indebted to the research participants for sharing their stories with us. These stories are often painful ones and we hope that we have done justice to their experiences.

We would also like to thank our funding partners at the Ford Foundation and the Raith Foundation for their support.

CALS is grateful to the following individuals for their valued contribution to the work outlined here:

Colleagues from CALS

Esther Gumbah (Project lead and author)
Phindile Khulu
Omhle Ntshingila
Lubabalo Mabhenxa
Mandla Mkhwanazi
Thandolwethu Jele
Nqubeko Shezi
Basetsona Koitsioe
Lisa Chamberlain
Palesa Madi
Thandeka Kathi

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Executive summary

The risky circumstances in which human rights defenders often work globally is well documented. Activists face various forms of victimisation including death, violence, frivolous litigation and criminalisation of their activities which subjects them to arrest and detention. While there is a considerable body of literature on the attacks against human rights defenders in many parts of the world, there is limited research into the extent and nature of the problem in South Africa.

Given this gap in research, the Centre for Applied Legal Studies (CALS) embarked on a research project that investigated the victimisation experienced by activists in South Africa. Our specific goals for this research were to determine:

- the extent of victimisation of activists in the country;
- the nature of victimisation of activists in the country;
- the impact of victimisation that activists experience on their work and their families; and
- the support received by activists who have been victimised.

The research was conducted through open-ended semi-structured interviews with activists with the guide of a questionnaire. CALS interviewed 59 participants for this project who were drawn from five provinces – Gauteng, KwaZulu Natal, the Eastern Cape, the Western Cape and Limpopo – ranging from rural, peri-urban and urban areas. In the interest of the participants, this report does not disclose their identities. This report outlines the main findings of the research. The findings stress that the victimisation of activists is prevalent in South Africa. This victimisation comes from various sources including companies, police and community members.

The trend of victimisation manifests in various forms in South Africa. These include litigation apparently aimed at silencing activists, draining them financially and making their work impossible. The report also finds that a common tool of victimisation is the subjection of activists to the criminal justice system through arrests, detention and prosecution. This reality leaves activists stigmatised and labelled as criminals. Several activists face death threats against themselves and, in some cases, their families. The victimisation of activists is also evident through the use of threats and actual violence. Activists also suffer loss of personal property as a result of their work, with their homes and other belongings vandalised. The findings also show that the victimisation of activists has a broader impact on the families and other dependents of the activists. The report also highlights that the victimisation of activists is gendered, affecting women in different ways from men. Indeed, women defenders are disproportionately affected by victimisation. As a result women suffer an added dimension of victimisation at a personal level such as sexual violence. Furthermore, the gendered reality of victimisation often impacts young children in cases where the woman activist is forced to go into hiding or is detained.

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1. Introduction

In recent years, there have been reports on the troubling experiences faced by activists across the world.¹ South Africa has not been spared. Indeed, there have been reports of activists who have been killed, assaulted or otherwise victimised as a result of their work.² There is a considerable body of literature on the attacks of activists around the world, including in Africa.³ However, there is limited research into what is happening in South Africa. As a contribution to existing literature, the Centre for Applied Legal Studies (CALS) embarked on a qualitative research project to document the experiences of activists in the country.

CALS is a civil society and public interest legal organisation based at the School of Law at the University of the Witwatersrand, Johannesburg, South Africa. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS practices human rights law and engages in social justice work with a specific focus on five interconnecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law.

The project set out to investigate the nature and prevalence of intimidation of community activists.

The specific aims of this research were to better our understanding of:

- the extent of victimisation of activists in the country;
- the nature of victimisation of activists in the country;
- the impact of victimisation that activists experience on their work and their families; and
- the support received by activists who have been victimised.

To this end, CALS undertook one-on-one semi-structured interviews with activists across the country between November 2017 and April 2018. This report outlines the findings of this research with a view to demonstrate the experiences of activists that reflect a pattern of victimisation in South Africa and the effect that this victimisation has on their work.

For the purposes of this research, the term 'victimisation' is understood to encompass all forms of deliberate activity that negatively impact the work of activists in a way that can be said to have been designed as a tool to suppress their work. The report is structured around the various forms in which victimisation manifests.

2. Methodology

The research was conducted through open-ended semi-structured interviews with activists. CALS developed a questionnaire and later obtained ethical clearance from the University of the Witwatersrand for the project as required by university policy. Guided by a loosely framed set of questions, researchers visited activists mostly in their home areas to conduct the interviews which lasted about an hour.

From the outset, CALS decided that it would be in the best interests of the research participants to anonymise this report. This decision was reached given the nature of the research in that it presented a real possibility of further victimisation should the identity of the participants involved be known. Accordingly, CALS has made every effort to exclude any identifying information that may pose a risk to the safety of the participants. Information excluded to ensure anonymity includes the names of individuals (where necessary, pseudonyms have been used), their communities and other details such as identities of people with whom they work or engage in the course of their activism.

The pool of participants for this research was drawn through the network of partners that CALS works with. In some cases, participants were identified through other means such as media reports. A total of 59 participants were interviewed for this project. They were from five provinces – Gauteng, KwaZulu Natal, the Eastern Cape, the Western Cape and Limpopo – ranging from rural, peri-urban and urban areas to get as wide as possible a picture regarding the nature and prevalence of intimidation of community activists.

The majority of the participants interviewed became activists due to the problems and human rights abuses that they and their communities are facing. These are mainly mining communities that suffer the negative consequences of mining activities such as unsatisfactory relocation processes; air, water and noise pollution; cracked houses; and environmental degradation. Some of the activists interviewed are victims of wrongful relocations in the process of which they have suffered great loss such as losing their homesteads, livestock and gumtree fields. Other participants work in relation to the rights of farm workers or to enhance community safety, hence the findings in this regard document their experiences in their struggle for greater respect for the rights of farm workers and efforts to rid their communities of ills such as gangsterism and drugs.

This report aims to contribute to a growing body of knowledge about the conditions under which activists work, and therefore to support the development of appropriate responses. Research like this is inherently limited due to the sample size of participants but we hope that it nevertheless contributes to a more nuanced understanding of the prevalence and forms of victimisation that activists are subjected to in South Africa.

PR K214

3. General overview of the victimisation of activists

The victimisation of activists around the world is quite well documented.⁴ Global statistics on the nature and extent of victimisation of activists paint a dark picture of the atmosphere in which most activists often work. In its 2017 report, Front Line Defenders notes that in 2017 more than 312 human rights defenders were murdered in 27 countries,⁵ of which "67% were engaged in the defence of land, environmental and indigenous peoples' rights and nearly always in the context of mega projects, extractive industry and big business".⁶ The report indicates that about 84% of the activists killed had received death threats prior to their death.⁷ Noting that only 12% of the cases saw the arrest of suspects, the report stresses that impunity for acts of violence against activists remains an enabler of an environment of frequent killings.⁸ About four environmental activists were killed every week in 2017 across the world.⁹

The Front Line Defenders report also cites criminalisation as a common tool of suppression of activism where activists are spuriously charged.¹⁰ Criminalisation is inevitably accompanied by phenomena such as stigmatisation and delegitimisation of human rights defenders. As eloquently explained by Protection International:

[s]tigmatisation seeks to attack the image of the movements or organisational processes involved in the defence of human rights, or their activities. It may also be organised in such a way that it questions the personal or professional integrity of the [human rights defenders] it targets. In other cases stigmatisation involves statements that seek to portray [human rights defenders], and the causes and protests they promote, as criminal, for example, or as being obstacles to development or opposing national unity. Thus, attempts are made to delegitimise the actions of persons who promote and defend human rights. Even more seriously, this approach ends up playing a vital role in the development of policies that are designed to criminalise social protest and [human rights defenders] alike.¹¹

Of further concern to the work of activists is the policing of protests which is often characterised by arrests, the use of force and violence by the police against peaceful protesters.¹² Other forms of victimisation that have been flagged are defamation, intimidation and threats.¹³

Victimisation can also manifest through the use of litigation which can at times be used to silence activists. Commonly known as strategic litigation against public participation (SLAPP) suits, these cases may be defined as "meritless cases mounted to discourage a party from pursuing or vindicating their rights, often with the intention not necessarily to win the case, but simply to waste the resources and time of the other party until they bow out".¹⁴ The term 'SLAPP suits' originated in the United States of America and this litigation is frequently brought in the form of defamation claims, abuse of process, malicious prosecution, or delictual liability cases.¹⁵ The victimisation

of activists also often manifests as physical threats or intimidation that may include the use of violence and indeed killings.

The nature and impact of victimisation of activists is also gender specific, disproportionately harming women. Existing research indicates that women human rights defenders face additional human rights violations as women and as activists.¹⁶ Attacks on women activists are often linked to "the use of gender and sexual stereotypes to harm [their] reputation and delegitimise their work".¹⁷ These attacks "often take gender specific forms, including gendered verbal abuse based on their sex, sexual abuse and rape".¹⁸ Unsurprisingly then, research has shown that women defenders are more vulnerable to victimisation that involves the use of sexual violence or the threat of sexual violence.¹⁹ This at times occurs in the context of attacks that on their face may be seen to affect men and women equally. For instance, sexual violence can be an added form of attack on women who are detained in what are otherwise the same conditions as their male counterparts.

The victimisation of women also adversely affects their children and families given the role women play in most societies as primary caregivers. For instance, the arrest of a woman activist with young children has a greater impact on the children and dependents who are thereby deprived of care. Further, the experience of victimisation and human rights violations experienced by activists have gender specific manifestations and a gender-specific impact on women human rights defenders. For instance, pregnant women and women with young children who are detained in custody suffer more than their male counterparts detained in similar conditions.²⁰

Moreover, the lives and health of their children are also negatively impacted since they accompany their mothers or caregivers. While separation from their children spares the children from experiencing detention, this comes with other consequences. For example, a breastfeeding mother will be forced to stop breastfeeding her child if the child is not detained with her. Compared to men, women are also particularly vulnerable to sexist verbal abuse and derogatory accusations.²¹ In its report on women human rights defenders in Africa, the African Commission on Human and Peoples' Rights rightly states that women activists are more vulnerable to measures which are not even specifically targeted at women defenders. It highlights the use of emergency legal measures which authorities often use "through backward sexist behaviours to bully" women defenders in public.²²

While there is a rich body of literature at global level concerning the victimisation of activists, the same cannot be said of research that specifically focusses on South Africa. This is despite the fact that instances of victimisation are often reported in the media. In fact, South Africa has had its own share of SLAPP suits.²³ For example, the use of litigation to silence activism in the country has been evident in cases where cost orders have been sought against activists acting in the interests of their communities.²⁴

Overall, reports on the victimisation of activists globally reveal that the atmosphere in which defenders work is not always safe or ideal. It is against this backdrop that CALS undertook this research project into the situation of human rights defenders prevailing in South Africa.

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4. Research findings

The findings of this research show that the experiences of the activists who participated in this research fall within our understanding of victimisation as defined in section 2. This victimisation takes various forms as described below. These forms of victimisation largely echo the findings at a global level as summarised in the previous section. In the sections that follow, the issues identified are organised thematically, but, naturally, different kinds of victimisation are related and should not be understood as occurring in silos.

It is helpful to reiterate that most of the activists who participated in this research work in mining affected communities. As such, our findings relate largely to victimisation in the context of mining related activities. All the names of participants have been changed to ensure anonymity.

4.1 Death threats and actual killings

Possibly the worst form of victimisation that an activist can suffer is death. There have been some media reports of activists killed likely due to their work. Some participants indicated that they live in fear of death because of the death threats they have received on several occasions. These threats take the form of text messages and verbal warnings from individuals who are both known and unknown to the activists. Mpho said that she was once told by a person known to her that although their community organisation may be hailed as heroic, "heroes die as well". Mpho took this as a death threat. Themba was told that if he did not stop his actions against a mine in his area, he would "be wiped away from the face of the earth". Similar threats were issued to Sharon when she attempted to organise a gathering of farmworkers to discuss the poor living conditions they work in. She was warned by the farm manager: "You will see what will happen to you".

Some activists have also received warnings as a result of their pursuit of litigation that is perceived to obstruct mining companies. For instance, Edward has received threatening text messages following the launch of a major case.

Other activists have experienced threats with guns pointed at them. Sharon narrated how she was stopped by a man who pointed a gun at her face on a public road in her community. The man with the gun warned that if she continued her fight against drugs, she would be shot. Other threats to life have manifested through actions that put the life of activists at risk. One such action was the cutting of the petrol pipe in Sharon's car. One morning as she drove out of her driveway, her children alerted her to the liquid that was dripping from under her car. A closer look revealed several cuts on the petrol pipe. The cuts had apparently been done during the night.

The findings of this research have shown that the use of death threats against activists continues to be a common tactic to suppress their work.

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4.2 Forced hiding

Some activists have paid the ultimate price for their work, losing their lives for their cause. These deaths have a ripple effect on other activists. One of the participants shared how a number of activists in her area have been forced into hiding, leaving their families behind. Other activists have scaled down their involvement in activist work or stopped altogether. Mpho herself had to leave her homestead and family, including her young child. She remains in hiding, visiting her home and family every now and again.

Khotso also recalled his 12 month stay in hiding prompted by the harassment and threats to his family as a result of his work. During this time, he relied on family and friends for his daily needs. He was able to make intermittent visits to his family during this time but failed to properly provide for his wife and children.

The victimisation of activists therefore extends to their families. Situations in which they are forced to leave home or spend considerable amounts of time away mean that their children and other dependents are left alone to suffer without the care of the activist concerned. Where women activists are involved, these situations mean that children are often left suffering without the presence of primary caregivers.

Forced hiding is an extreme consequence of the victimisation of activists particularly because it deprives their families of support and care. In addition, forced hiding takes activists away from their sources of income and support structure, leaving them to often depend on others for their needs, at a time when they are particularly vulnerable.

4.3 Use and threats of violence

The actual use and threats of violence have also emerged as a common tool of suppression against activists in the country. The gendered nature of the effects of violence on women is evident. The experiences of violence on women activists have a different dimension from those of men. Children are also particularly vulnerable. For instance, Mpho recounted an experience where a group of people invaded her village one night and started randomly firing gunshots for a prolonged period of time. Villagers, some with their children, had to seek refuge in the bushes and maize field nearby until the firing stopped. One of the women went into labour and gave birth in the bushes due to the panic and shock. Although no one was physically hurt, the experience left many of the villagers traumatised. The incident was reported to the police but no investigation took place and the case has since been suspended.

Activists may also be victimised by security officers working for mines. Khotso explained how, as gatekeepers, security personnel struggle to keep activists away from the mining sites and in this process at times use violence including firing gunshots at protesters. He said that in his community, these security officers have evolved from bearing a duty to simply protect the mines to being harassers of activists. He also shared an incident where he was beaten

up by security officers for organising a peaceful march against the mine. This beating landed him in hospital for a day. The march never took place as several community members who had initially planned to be involved withdrew in the face of the assault. This is not the only incident where Khotso has suffered physical violence because of his activism. Indeed, at another meeting, he was chased away with weapons by security personnel of a nearby mine. Community members who attended his village meetings were also harassed and chased away in the same manner. On another occasion, Khotso was beaten with weapons by security personnel when he attended a community meeting where he was labelled a troublemaker. The matter was reported to the police but the prosecution was unsuccessful as the mine defended the actions of the mine employers saying that Khotso was beaten up for disturbing the meeting.

Violence does not only come from security personnel. Our findings indicate that fellow community members at times also victimise activists. For example, in another mining community we visited, an elderly woman was stabbed by a fellow community member in front of the community for speaking out against a mining company in the area during a village meeting to discuss community concerns about the operations of the mine. Fortunately, she survived her injuries. Khotso was also once beaten up by community members at a public gathering after he was labelled a troublemaker for his activist work which was deemed by traditional leaders as undermining their authority. The incident left him bruised on the face and hospitalised for three days.

These experiences indicate that violence is at times used to victimise activists. In some instances, this results in them spending time away from their work and incurring medical costs.

4.4 Threats and impact on families of activists

In some instances, the victimisation directed at activists has also extended to their families. Security personnel from a mine in one of the mining communities we visited during the course of the research threatened to kill the wife of a lead community activist. They said they would kill her as a lesson to other people that their opposition to mining activities in the area put their entire families at risk.

Some of the activists have witnessed threats that have been levelled against their children as well. For instance, Sharon recounted an incident where a group of people opposed to how she was fighting home ownership issues, drugs and gangsterism in her community marched to her house while her children were home. The group burnt tyres and removed poles. This incident instilled fear in her family, leading Sharon to ensure extra security at home.

The impact of victimisation on other members of the family can be more subtle at times. Khotso shared that due to his inability to properly provide for his family during the time he was in hiding, his wife left him and took some of the children with her. He explained that a major contributing factor to the divorce was a lack of consensus on why his community work was

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indispensable when it undermined the safety and wellbeing of his family. The other child who stayed behind was taken in by family and later friends until his return. Khotso detailed that his child's education was negatively impacted and that his relationship with her is still on the mend.

In some cases, family members of activists are denied an equal opportunity in the community services and job market created by the mines. For example, Dumisa shared that in his community, close family members of activists are not able to get jobs in the mines. In another incident, an activist talked about how his son was chased away from a community borehole by community members who said that he had no right to share in the benefits of the mine when his father is against the mining activities in the area.

Another example of the impact of victimisation on the families of activists is that of Martin. His wife, who was pregnant at the time, was on several occasions verbally abused by the staff at the maternity section of a clinic that was built by the mining company operating in the area. This continued on most of her visits to the clinic.

The use of threats and victimisation of family members of activists serves as an indirect way of forcing activists to quit their work. It also has the potential to undermine family support that activists have for their work. This may in turn cause rifts within families.

4.5 Civil and criminal litigation

Litigation has proven to be a major tool in silencing activists. The financial burden that comes with lawsuits is a key concern since a number of the participants are full time activists. These lawsuits present a great financial burden to activists as some of them are often indigent and unemployed with no major source of income.

Khotso is an activist and leader of a community organisation. He has been blacklisted and is unable to find work. Khotso explained how he has been the subject of an interdict at the instance of the mining company in his community. The interdict application came in the wake of protests that the community had staged against the mine demanding their right to compensation for their cracked houses and forced relocations, better management of mining waste and pollution in the area. The mine sought an interdict to keep Khotso and other activists away from the mine premises. Khotso was unable to afford a lawyer to represent him and his colleagues. He tried to borrow money from colleagues to pay a lawyer. They were only able to secure a lawyer on the last day of hearing. As a result, they lost the case and now have an interdict against them that prohibits them from entering the mining premises or getting close to it. This interdict applies to all the lead activists in the community organisation. On top of this, Khotso and his colleagues also have a debt to repay for the legal representation they received. Since the interdict was put in place, some of the leaders have left the organisation for fear of further victimisation. Khotso recounts how some of these leaders are now working in support of the mining company amid allegations that they have been bribed by the mine.

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Other activists have been more fortunate in securing funding for legal costs. For instance, Mpho has had the support of local and international organisations that have helped cover legal costs. She and other activists in her community were arrested for blockading a road to keep mine vehicles and security personnel from entering their community. They were charged with public violence and inciting violence. With the aid of local and international organisations, the group received legal representation and was able to secure bail. This matter has not been concluded because the state has been quite slow in prosecuting it. The delay in prosecuting this case raises questions about the strength of the case and the motive for bringing the charges against the activist in the first place. A situation where activists are made to go through lengthy trial processes adds a layer of victimisation as this means they are labelled accused persons for as the entire period of the trial.

Dumisa, an activist in another mining community, spends a considerable amount of his time in court fighting charges brought against him by mining companies. He is fortunate to have the support of various civil society organisations that help him with legal representation. In one of his cases, the mining company sought and obtained a cost order against him. The cost order related to the granting of an interim interdict against Dumisa. These proceedings were a reaction by the mining company to the legitimate concerns that he and the community had against the mine. These concerns had led to a peaceful march against the mine. In response, the mine obtained an interim interdict and a cost order against Dumisa. Thankfully, with the aid of legal representation, the order was overturned.

The activist work that Sharon is engaged in has also triggered civil action against her. In 2008, one of her subordinates wrote an article criticising what she described as ill advice that some lawyers representing farmers were giving that endorsed the eviction of children from their homes. Sharon, who held the same view as her subordinate, did not take any action against her despite requests to do so from some of the parties concerned. As a result of her inaction, Sharon was subsequently sued for failure to discipline her colleague. Her colleague was charged with defamation while Sharon faced a claim for damages due to what was termed her failure to act against her subordinate. The matter was settled out of court after lawyers from both parties held talks.

These narrations by activists of how litigation has been used against them shows that the law is ironically one of the major mechanisms used to victimise them.

A common theme of the nature of victimisation is the involvement of police as a tool of suppression. Participants reported being arrested and charged criminally for their activism. While criminal behaviour should be dealt with when a crime is committed, the use of the criminal law in the instances reported was questionable. In this context, activists are often charged with offences such as public violence and incitement to violence. The use of trumped up criminal charges is a major tactic used to silence community activists.

We were informed that, in 2017, 70 people were arrested at the instance of a mine in one of the areas we visited during this research. Some of the participants were amongst the people arrested at the time. They reported that they went to the mine to demand that it fulfil its promises and obligations that were due to them as a community. Among their demands were better pay; reasonable, equitable and justifiable compensation to the affected members of the community who were relocated by the mine; proper consultation with the community prior to relocations and transfer of the graves of their departed loved ones; and that the mine must develop the community economically and socially. When these demands were presented to the mining company through a peaceful protest, the community members involved were arrested and charged with inciting violence. The charges were later dropped.

Edward, another activist from a mining community, detailed how unidentified police officers in his area would come to his home at night and forcefully take him with them. They would then drive him away to a secluded place and leave him there with no money. He would then have to find his way home at his own expense. Edward has also been arrested several times and released without bail. On one occasion, he was arrested and detained for three days at a police station for leading a march against mining companies in his area. Benjamin had a similar story to tell. In his case, police officers stormed into his homestead after he and other activists had participated in a march to the mining company in their area to deliver a memorandum of demands. He was released without charge or bail after spending three days in police custody.

Phumzile, a community activist in an area where a mining company relocated a community without consultations or compensation, recounted how she and her colleagues were beaten up by the police when they approached the mine for redress. The group was demanding compensation for their relocation and the trauma caused by the wrongful manner in which the graves of their beloved ones had been moved without their consent. The group had tried to engage the mining company on several occasions through letters but got no response. On the material day, the group decided to physically go to the mine and demand to be addressed. When they got to the mine, they were ordered to leave by the police who had already blocked off the entrance. When they refused, the officers arrested them. Some of the members were beaten up and suffered bruises during the arrests. They were later released on the same day without charge.

Securing the release of arrested activists often poses a financial burden on the activists concerned as they have to raise money for their release. In some cases, community members are able to pull their resources together to raise funds. However, activists at times have to borrow money for their bail. This was the case with Khotso who had to borrow a substantial amount of money from community members to secure a lawyer to help with the release of his colleagues who had been arrested at one of the mines in the community. The arrests had occurred after nine community members had driven their trucks to the mine gates anticipating that they would be hired to ferry coal according to an earlier agreement between the mine and the community. Instead, the drivers were arrested by the police and detained.

The trucks were later damaged when they were towed to the police station. The community members have been unable to secure a lawyer to get compensation for the damage.

Another example of the questionable use of the criminal law relates to the arrest of 16 members of another mining community. The members were part of an activist community organisation advocating for their rights. The first seven arrests were made when the members went to the mine to ask for work. They were arrested for blocking the entrance to the mine and preventing vehicles from moving in and out of the gate. Their grievances were the same as always: forced relocations, promised jobs and training which have not materialised in 10 years. No one from the mine came out to speak to the community members. Instead, when the police arrived, one of the bosses came out and ordered them to make arrests. Prior to the police arriving, someone on the inside of the gates took close-up photos of everyone in the peaceful protest. These photos were later given to the prosecutor to help prove his case. Although the event was neither destructive nor violent, the group was arrested and charged with public violence. Their legal representative secured their release on bail with a warning. Mine representatives came to court with an agreement that they wanted the accused to sign as a condition for the charges to be dropped. They gave a copy of the agreement to the prosecutor who handed a copy to the defence lawyer. Incidents like this raise issues around the involvement of some mining companies in the prosecution of cases against community members charged in relation to their work against the companies concerned. It is the state which has the authority to determine whether to enter into agreements with accused persons and what those agreements should entail.

The same day the group was arrested, their relatives (six women and one man) went to the mine to ask why they had been arrested. They were also arrested. This group was released the same day 'at the request of mine management'. The charges of public violence against all of them were later dropped. One of the arguments the defence successfully put forward was that there was no evidence of violence during the protest, a key element of the offence of public violence.

The actions of the police against activists have at times affected the community as a whole, including children. For example, a group of activists was arrested after they blocked a contingent of police and mining vehicles from entering the area for mining related activities. Following the incident, there was heavy police presence in the community. This affected the daily activities of the entire community, including children who were unable to go to school.

Sharon has also been subjected to the criminal justice system. Due to her work in defending vulnerable people against unlawful evictions from farms, she was arrested between 2009 and 2010. She was charged with hate speech and intimidation after she organised protest action in conjunction with other partners against racist tendencies experienced at farms, at a medical practice and at the police station in her area. During the protest, she had said that "we will hit farmers where it hurts most", referring to their

markets. The case against her did not succeed. Around the same time, Sharon was again arrested and charged in connection with her actions in returning an evicted family to the house they had been removed from. The family, together with their children, was evicted in winter from a house which they had been promised to be given ownership of. In response to the eviction, Sharon brought the family back to the house, gaining access by breaking pieces of wood nailed across the door. She was arrested and charged with trespassing, contempt of court and malicious damage to property. Thanks to the free legal representation she had, the matter ended in an acquittal. Sharon explained how she felt during the criminal process: "I felt like a criminal and it was a bad feeling".

The findings of this research show that there is a perception that the police often do not do enough to investigate matters brought to their attention by activists. A number of activists said that there is no follow up on community-aid grievances. Indeed, despite reporting their experiences to the police, none of the activists interviewed has had a positive response or outcome. The activists thus generally consider the lack of support from the police as another layer of victimisation.

Dumisa stated that in his experience, the police are at times afraid of acting on the issues he brings to their attention. He related an incident where he reported a matter to the police but was referred to the public protector's office, about 500 km away, when the issue was a criminal matter that fell under the jurisdiction of the police.

In some cases, the police have been divided on whether to act against activists or not. This is particularly the case where the officers hail from the same community as the activists or community members concerned. As a result, some officers end up on the side of activists and identified with their cause. Mpho recalled an incident in which this was the case. Community members had decided to gather and protest at a government function to launch the commencement of mining in the area following the grant of a mining right.

The community was unhappy with the award of this right because it had been granted despite their objection to mining in the area. The protests disrupted the event, prompting the minister and the mayor to order the police to arrest the protesters. Some officers arrested some of the protestors while other officers refused to arrest anyone due to their connections to the communities they serve.

The use of criminal law is one of the greatest tools at the disposal of those who seek to suppress activists in the country. This is concerning given the ramifications of going through the criminal process regardless of the outcome of any case. Indeed, as noted earlier, the criminal justice system inherently exposes those who are processed through it to stigmatisation and delegitimisation. It is also disheartening that police often fail to follow through with investigations into allegations brought by activists and community members. This failure fosters impunity and lends credence to the assertion that the police are complicit in the victimisation of activists.

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4.6 Limitation of participation and freedom of movement

Public participation and freedom of movement are critical to the success of activism in the country. Without it, activists would be unable to consult their communities and mobilise them to action. In the rural areas we visited, traditional leaders have extensive influence over the extent of public participation and freedom of movement enjoyed by community members. It is therefore necessary to describe the role that these leaders play in relation to mining developments in their areas.

In rural communities, the relationship between community organisations, chiefs and the mines in their areas is a complex one. Some activists explained how they first heard that mining would come to their area from the chief during village meetings which were also attended by representatives of the company. The participants noted that it was apparent from these meetings that the chief was in favour of mining and that the community was not being consulted but rather simply informed of what was to happen. At these meetings, the chief and the representatives of the mining companies would emphasise the benefits that the mine would bring to the community such as jobs, infrastructure and services. As a result, any opposition to the mining activities is often easily construed as opposition to these community benefits in general. Further, where a community decides to challenge mining activities in its area, chiefs are likely to support the mining company. The support of the chief also entails that he or she is able to exercise his powers to dissuade community members from engaging in actions that are deemed to be at odds with the mining activities in the area.

This relationship between mines and traditional leaders poses a challenge to the work of community activists. For instance, some of the participants reported that the chiefs in their areas have banned them from full participation in community forums. Themba, an activist working in one of the mining communities, said that the chief of his community has forbidden him from attending meetings because of his activism. Themba's freedom of movement has also been restricted as he has been prohibited from visiting certain villages in his area. This development has taken a toll on him as he is now unable to fully engage in discussions with some of the villagers who are negatively affected by the mining activities in his area. Another activist, Edward, has been banned from coming to the chief's residence. This means he cannot attend meetings held at the residence even when they relate to mining matters, his area of activism.

In other cases, chiefs have allowed activists to attend public meetings but not to engage in any meaningful discussions. For instance, John is still free to attend community meetings but is barred from participating in the discussions or even asking any questions at these meetings due to threats from other community members.

Another way in which public participation is limited, is by prohibiting activists from making use of community halls and other communal places of assembly. Steve said that in the early days of his activism, he had the support of the majority of community members and was able to use the community hall for consultation meetings with them. However, when complaints against him in

relation to a protest that he had organised to the mines were taken to the chief, he was informed that he could no longer use the hall. This move has made it difficult to hold meetings with community members. Other activists are denied office space in communal buildings in their communities. The result is that they have had to work from their homes in confined spaces. This also makes it difficult to hold meetings with community members.

In peri-urban areas, the nexus described above between chiefs and the community is evident in how those in other kinds of positions of authority are able to use their power to victimise activists. For instance, some activists have also experienced pushback from community forums such as sport committees due to their activist work. One activist was asked to leave a sport committee he was a member of so that the team could get sponsorship from a mine in the area. Despite leaving the committee, the sponsorship never came through.

During our interview, Sharon also described how she is denied entry onto some farms and thus unable to hold meetings with farmworkers who are experiencing gross human rights violations. She had called for the meeting but was unable to address it. Later, when a news outlet wrote an article about the plight of the farmworkers concerned, the farm manager put up pictures of her at the farm with a notice that she should not be allowed onto the farm under any circumstances.

These incidences highlight that persons in positions of authority are also a source of victimisation in that they deprive activists of the means to reach community members and express themselves.

4.7 Discreditation attempts

The victimisation of activists has also affected their reputation in instances where they have been depicted as acting contrary to the interests of their communities. Several participants narrated how they have been alienated from their colleagues and others because their names have been tarnished. In some cases, activists are labelled by traditional leaders as 'anti-development' for their opposition to developments such as mining. This labelling obscures the real grievance of the concerned activist which relate to the adverse effects of the developments such as mining and the exclusion of communities from decision making processes.

Dumisa narrates how community members aligned to the mining company in the area have fed the chief with false information against him. Other participants said they have been labelled problematic and trouble makers who are anti-development by the leaders. These mischaracterisations alienate the activists from the community, reducing local support for their work. The activists concerned see this as an attempt to turn the communities against them as other community members disassociate themselves from them. Our interview with Dumisa was actually cut short when the owner of the premises we were using chased us away after she noticed his car in the parking lot.

Activists have also reported being unnecessarily called out at public gatherings in a manner that casts them as opponents to community development. Khotso, for instance, recalled how he was referred to as a 'disturber' at a village committee meeting. A mining activist advocating for the right of mining communities to benefit from the resources, he was accused of undermining the traditional authority and working against the mine and development in the area. This allegation related to the march that Khotso and his community organisation had held against the traditional authority demanding accountability from him on the development projects undertaken by the mine in the area. The characterisation of Khotso as anti-development strained his relationship with community members who started disassociating themselves from him and his organisation.

The suppression of activism through the discrediting of activists is particularly devastating because it serves to delegitimise the work of activists. This delegitimation taints the public image of the activist concerned and thus isolates them from other members of society who would have helped in the struggle for justice. In addition, it increases the vulnerability of activists as they are likely to be shunned by sectors of society who believe the mischaracterisation imputed on the activist.

4.8 Surveillance

A common form of victimisation shared by some participants was that their movements are monitored by people unknown to them. For instance, Sibusiso said that he was once followed around by strange cars. Dumisa narrated a similar incident. He is at times followed by men in strange cars and he believes that his phone has been tapped by the mining company in his area. He also said that a security car belonging to this company always follows him around to check on his whereabouts. Dumisa is also harassed by the police in his community from time to time.

Edward related his experience since the launching of a major mining case that his community is part of. He explained that since he signed court papers for this case, he is physically monitored by mining security personnel. In addition, an unknown car also parks at his gate, no one alights from it or communicates his or her intentions in any way. Edward believes he is a target of this surveillance because of the ongoing case.

The phenomenon of surveillance poses a hindrance to activism in the country as it serves as a constant reminder that mining companies are watching their every move. Moreover, the actions likely come within the scope of the crime of harassment.²⁵

4.9 The gendered impact of victimisation of activists

As noted in section 3, the victimisation of activists is gender specific. The experiences of women human rights defenders are different from those of men defenders. As noted in section 3 above, women experience greater victimisation as they are vulnerable to additional forms of victimisation. The role of women defenders as mothers and caregivers can be used as a means

to attack them.²⁶ Gender-based discrediting is also exemplified where women defenders are "family wreckers" and "man-haters" for campaigning for abortion laws.²⁷ Further, the impact of an incident of victimisation against a woman activist often extends beyond the activist herself because of the caregiving role that women play in society. This gendered aspect of victimisation is evident in our findings.

As described above, a good example of this gendered impact emerges from an account of how a group of unknown men attacked a village at night and started firing randomly into the air. The village is known for its activism against mining developments in their area. The commotion forced many families to run and hide in the bushes surrounding the village. One of the women went into labour and gave birth in the bushes due to the panic and shock. Another woman activist narrated how she had to leave her young child behind and relocate to a place of safety when there was a heightened risk to activists in the community. This move deprives children of motherly care and support.

One of the women participants observed that, in general, women activists in her community tend to be targeted disproportionately. She stressed that while she has been victimised on several occasions for her activist work, her male colleagues who are involved in the same work have suffered to a lesser degree. Citing an incident where community members demonstrated at her place and another where she was stopped on a public road at gun point, the activist stated that male activists have not reported such experiences.

Some activists noted that women activists appear to be more at risk of victimisation than their male counterparts. Sharon, for instance, noted that in her fight against drugs, male activists she works with have not been victimised to the same extent as she has.

These gendered manifestations of victimisation are important to highlight as they reveal the additional adverse experiences that women human rights defenders endure in their activism. They also show that the victimisation of women activists impacts negatively on their children and families, in ways that are different to their male colleagues.

4.10 Loss of personal property

The research findings indicate that some activists have paid dearly for their work in the form of loss of or damage to their personal property. For instance, Khotso had his car burnt by unknown people after he led marches against the traditional authority and the mine in his community demanding accountability for mining projects. On the same night the car was burnt, his construction equipment was also stolen. The matter was reported to the police, but nothing has come of it.

Khotso also had his house stoned during the night after he and his colleagues confronted their chief demanding a change in the way the mining company in their area was conducting its activities. Their concerns related to the failure of the mine to pay compensation to relocated families and to provide satisfactory housing in the areas the families had been moved to.

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There were also concerns around the inconveniences and loss of income brought about by the relocations. For instance, some families had been moved to areas where there was no nearby source of water while others could no longer access their grazing land for the livestock.

These experiences where property is stolen or damaged are a costly setback to activists who have to repair their homes and replace stolen or broken property. The impact of this on the family concerned cannot be gainsaid. For instance, during the stoning incident of his house, the activist's wife and child were terrified and fearful.

5. Impact of victimisation on activism

Many participants indicated that their victimisation has at times made community members shy away from them. For instance, Jabu noted that after she and other activists were arrested during a march to one of the mines in the community, the level of community participation in their meetings dropped. Fewer people attended their village meetings and turned up for their marches.

This trend was confirmed by other activists as well. Viola described how a planned march to the offices of the municipality regarding the operations of the mine in her area was cancelled after community members received threatening text messages warning them not to participate in the march. There has since been a drop in the number of community members attending their weekly meetings and activities against the mine. Even where members continue to turn up in their numbers, the level of their engagement in discussions has dwindled. In one community, Sharon noted that following treatment of some of the activists in the area, people are more careful about what they say in meetings because they are afraid of repercussions.

In some cases, activists have had to part ways with their friends as they do not want to associate with them for fear of being implicated in the activist work. Other activists have been left traumatised by their experiences. For example, after years of victimisation, one of the activists interviewed retreated into isolation for a while and had to go for counselling.

However, some participants reiterated that despite the negative experiences that they have endured in the course of their work, they remain committed to the cause that is the foundation of their activism. For instance, Viola emphasised that she and most of her colleagues are determined to continue fighting for their rights and standing up to the mining company in their community. Khotso also expressed similar sentiments, noting that while he had suffered a great deal because of his activism, he was not dissuaded by incidents such as the burning of his car because he had known from the start that the activist work he had embarked on would be a struggle after he heard of the suffering of other mining activists in the country. He added that while other people initially part of the community organisation have since disassociated themselves from the activist work, he and others continue with the fight.

A similar resolution was evident in our interview with Mpho. She stressed that despite having to stay in hiding and move from one place to another away from her family, she remains committed to her work because it is in the best interests of her community that members should be consulted before mining activities commence. She vowed that as long as the mining company is present in her community, she and other activists will continue their fight until their demands are met.

Several other activists maintained that the threats and other forms of victimisation that they endure have made them stronger. Sharon insists that threats do not make her back down and that she is able to withstand them. She admitted that she has thought of giving up her work, especially for her children as she fears for their lives. A constant concern for Sharon is the thought of being killed for her work. She remains hopeful that publicity about her work and victimisation works in her interest, in that those who oppose her work may be restrained by the fact that if anything happens to her, it will be easy for the public to implicate them. Her commitment to the struggles in her community continues. "Activism is in my blood," she says. "And it is not going to change. I cannot sit and not do anything, I cannot imagine my life without it. There is such a reward from activism when what you are fighting for comes right".

Phumzile, a community activist in an area where mining has taken its toll on the environment, said that regardless of what she goes through as a result of her activism, she "would rather die than give up on this worthwhile cause". In her view, all the suffering she endures in the course of her work fortifies her conviction that she is doing the right thing.

The resilience of activists in the midst of various attacks underscores their commitment to their work propelled by the rightness and importance of their cause. However, democracy is undermined by stifling the work of these activists through the attacks levelled against them. An active citizenry should be encouraged in South Africa since we have chosen a participatory model of democracy. This model depends on public participation exercised through civil society and communities. Our courts have repeatedly affirmed that public participation is a critical aspect of our constitutional order that must be embraced and jealously guarded.²⁸ The courts have noted that in a participatory democracy, every person and community has the right to participate in the determination of matters affecting them. A case in point is that of the Constitutional Court in *Doctors for Life International v The Speaker of the National Assembly*²⁹ which emphasised the importance of public participation in South Africa in view of our history of segregation and exclusion. Similarly, in *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance*,³⁰ the Supreme Court of Appeal recognised the right of communities to be consulted and to participate in environmental matters that affect them. Here, the court ordered the appellant to release documents related to pollution levels caused by its activities and its plans to address this pollution. This recognition of the right of communities is important because public participation is a tool used to ensure that the views of affected parties are considered in the decision-making process and that there is effective compliance with relevant laws.³¹ Ultimately, public participation sits at the core of sustainable development and is the bedrock of public interest litigation.³²

Therefore, the victimisation of activists is tantamount to an attack on the right of communities to public participation and has the potential to stifle sustainable development.

6. Surviving victimisation

While victimisation has taken its toll on activists, and, in some cases, their families, the general view is that their commitment to activism remains strong. Fortunately, many activists have also been able to survive victimisation through a strong network of individual activists and organisations both locally and internationally. These support networks have provided strategic advice, legal representation and at times personal security to some of the activists. The networks have also helped activists to raise awareness about the struggles of mining communities and to escalate urgent issues to the relevant authorities. Although they are not always able to help with funds when required, these support networks are a strong pillar that activists are able to lean on for support. Many activists interviewed indicated that without this support, they would have drowned in the legal costs necessary to ensure their victory in cases brought against them.

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7. Conclusion

This research project set out to investigate the victimisation experiences of activists in South Africa. Our focus was on the extent and nature of victimisation of activists; the impact of victimisation that activists experience on their work and their families; and the support they receive following such victimisation. The main research findings stress that the victimisation of activists is prevalent in South Africa. This victimisation comes from various sources including companies, police and community members. The trend of victimisation manifests in various forms in South Africa. These include litigation apparently aimed at silencing activists, draining them financially and making their work impossible. The report also finds that a common tool of victimisation is the subjection of activists to the criminal justice system through arrest, detention and prosecution. This reality leaves activists stigmatised and labelled as criminals. Some activists face death threats against themselves and, in some cases, their families. The victimisation of activists is also evident through the use of threats and actual violence. Activists also suffer loss of personal property as a result of their work, with their homes and other belongings vandalised. Surveillance is another tool that is used against activists. This involves the unlawful monitoring the movements of activists. The findings also show that the victimisation of activists has a broader impact on the families and other dependents of the activists. The report also highlights that the victimisation of activists is gendered, affecting women in different ways from men. Indeed, women defenders are disproportionately affected by victimisation. As a result women suffer an added dimension of victimisation at a personal level such as sexual violence. Furthermore, the gendered reality of victimisation often impacts young children in cases where the woman activist is forced to go into hiding or is detained.

However, despite the many challenges they face, activists in the country remain vigilant in standing up for their cause. They continue their struggle with full knowledge of the risks involved. This continued determination is partly possible due to the continued support that activists receive from their local and international counterparts. Ultimately, activists in South Africa seem to be demonstrating remarkable resilience in increasingly trying times.

Activists play a critical role in our democracy through the exercise of the right to public participation. They ensure that decision-making processes are informed by views of communities and that resulting decisions are regularly scrutinised to ensure that they continue to comply with the law as well as serve the interests of the people and their communities. Hence, it is disheartening that activists in South Africa are subjected to victimisation from various sources, including from institutions that must be at the forefront of protecting them. The protection of activists in the country will bolster the rights of communities and contribute significantly to sustainable development. Key role players in this regard include traditional leaders, business, the police and the judiciary.

Endnotes

¹ See, for instance, Front Line Defenders *Annual Report on human rights defenders at risk in 2017* (2017); Protection International *Criminalisation of human rights defenders: Categorisation of the problem and measures in response* (2015); Association for Women's Rights in Development *Our right to safety: Women human rights defenders' holistic approach to protection* (2014); International Service for Human Rights *Defending human rights defenders: A short guide* (undated); Office of the Commissioner for Human Rights *Round-table on the situation of human rights defenders in the member states of the Council of Europe* (2009); African Commission on Human and Peoples' Rights *Report of the study on the situation of women human rights defenders in Africa* (undated); Amnesty International *Between a rock and a hard place: Women human rights defenders at risk* (2007).

² See, for instance, G Nicolson 'Goodbye Bazooka: Wild Coast anti-mining activist killed' 24 March 2016.

³ See African Commission on Human and Peoples' Rights (undated).

⁴ See, for instance, Front Line Defenders (2017); International Service for Human Rights (undated); Protection International (2015); Association for Women's Rights in Development (2014).

⁵ Front Line Defenders (2017) 6.

⁶ Front Line Defenders (2017) 6.

⁷ Front Line Defenders (2017) 6.

⁸ Front Line Defenders (2017) 6.

⁹ See The Guardian 'Almost four environmental defenders a week killed in 2017' 2 February 2018, available at https://www.theguardian.com/environment/2018/feb/02/almost-four-environmental-defenders-a-week-killed-in-2017?CMP=share_btn_tw (accessed 12 February 2018).

¹⁰ Front Line Defenders (2017) 6.

¹¹ Protection International (2015) 6.

¹² Front Line Defenders (2017) 7.

¹³ Front Line Defenders (2017) 7.

¹⁴ See T Murombo and H Valentine 'SLAPP suits: An emerging obstacle to public interest environmental litigation in South Africa' (2011) 27 *South African Journal on Human Rights* 82, 84.

¹⁵ Murombo and Valentine (2011) 84.

¹⁶ See, for instance, African Commission on Human and Peoples' Rights (2007).

¹⁷ Association for Women's Rights in Development (2014) 8.

¹⁸ Association for Women's Rights in Development (2014) 8.

¹⁹ Association for Women's Rights in Development (2014) 8 and 9.

²⁰ Association for Women's Rights in Development (2014).

²¹ Amnesty International (2007) 3.

²² African Commission on Human and Peoples' Rights para 155.

²³ Murombo and Valentine (2011) 84.

²⁴ See, for instance, L Bruce 'Victory for community activist victimised by mine' 28 June 2017; L Bruce 'Community activist victimized by mine' 3 February 2017.

²⁵ Section 1 of the Protection from Harassment Act 17 of 2011 reads:

"'harassment' means directly or indirectly engaging in conduct that the respondent knows or ought to know –

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably –

(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be".

²⁶ Association for Women's Rights in Development *Our right to safety: Women human rights defenders' holistic approach to protection* (2014) 8.

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²⁷ Association for Women's Rights in Development *Our right to safety: Women human rights defenders' holistic approach to protection* (2014) 9.

²⁸ See, for instance, *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC); *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (10) BCLR 968 (CC).

²⁹ 2006 (12) BCLR 1399 (CC).

³⁰ 2015 (1) SA 515 (SCA).

³¹ *Murombo and Valentine* (2011) 85.

³² *Murombo and Valentine* (2011) 86-87.

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