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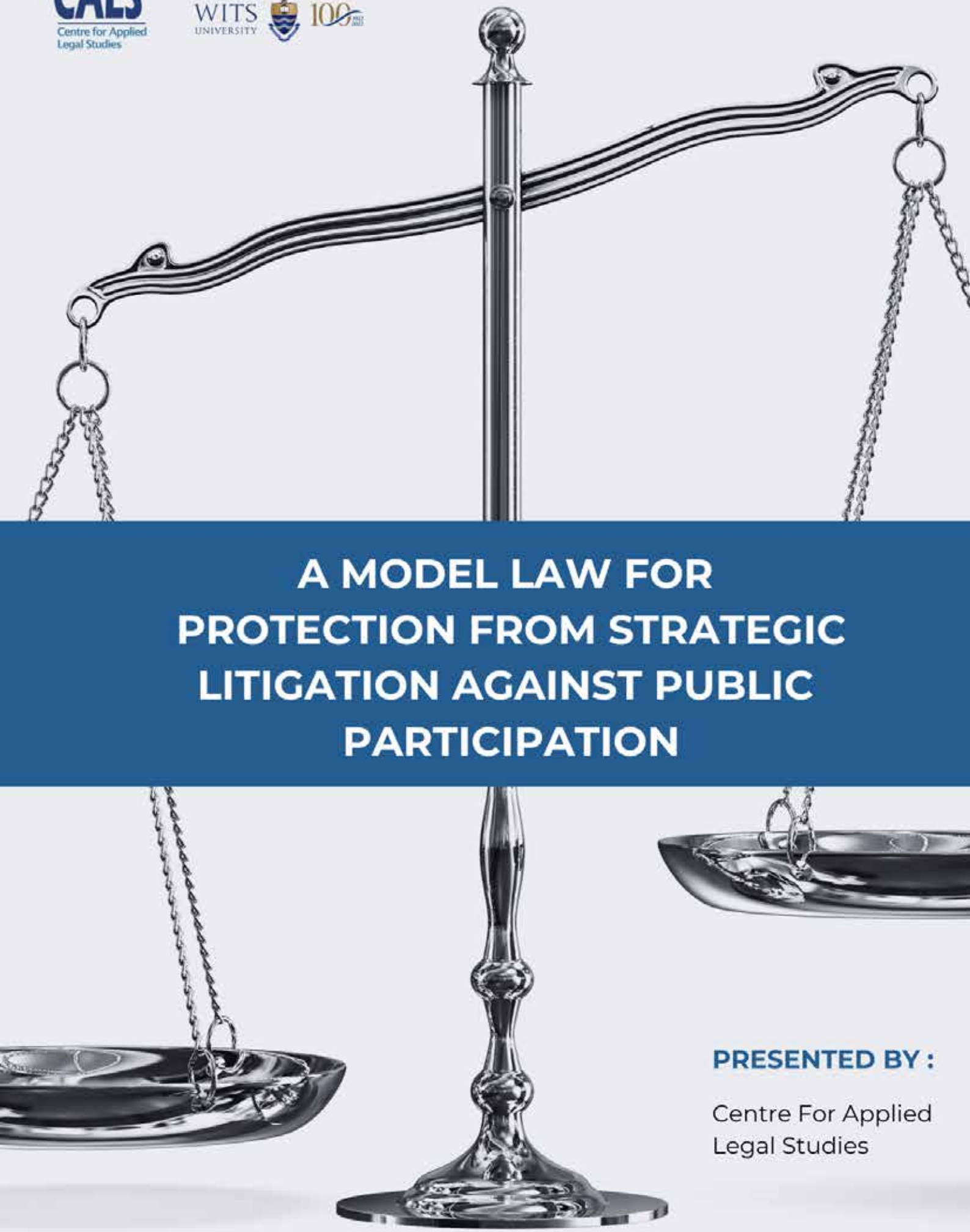

A MODEL LAW FOR PROTECTION FROM STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION

PRESENTED BY :

Centre For Applied Legal Studies

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Foreword

When an activist is faced with strategic litigation against public participation (SLAPP), the chilling effects of that reverberate throughout civil society, causing others to question whether they should speak up, fearful of the consequences. SLAPP suits are intended to have this effect – to scare off both current and future critics – with meritless cases that tie up defendants in litigation for years, and have significant financial and psychological implications.

As environmental public interest lawyers, we were sued for defamation in 2017 by Mineral Sands Resources (MSR) for statements that we made while giving a summer school lecture at the University of Cape Town. The lecture series was about the social and environmental costs of development, and we spoke about the legal work we were doing in relation to MSR's Tormin mineral sands mining operation on the West Coast.

Despite having given the lecture in our capacity as lawyers for the public interest legal organisation, the Centre for Environmental Rights (CER), we were sued in our personal capacities. This is often a feature of a SLAPP suit – deliberately attacking defendants in their personal capacity to make them feel vulnerable.

We were fortunate that CER and its funders supported us through this litigation, recognising its precedent setting potential. We also received the support and advice of *pro bono* lawyers and legal counsel who were willing to work at reduced rates. This is not the case for most SLAPP suit defendants. Even at reduced rates, the costs of this litigation were huge, and would have financially crippled any individual fighting a SLAPP suit on their own.

The costs were not only financial: we were also forced to spend countless hours dealing with the matter, even long after we had both left CER. The SLAPP suit affected our decision-making in our MSR work and in other matters, causing us to filter ourselves in anticipation of what MSR and other companies would do if we criticised their actions. But, in many ways, this litigation transcended us and our personal circumstances, becoming a battle for the rights of activists, which took some of the pressure off us as individuals.

The MSR litigation dragged on for almost six years, with the matter appearing in the High Court and Constitutional Court. The legal arguments and outcomes of the litigation are described in detail in this publication. The Constitutional Court's decision was groundbreaking, recognizing a SLAPP suit defence in our common law for the first time. This recognition, that these kinds of lawsuits are not a legitimate use of the court system and should be seen as an abuse of court processes, vindicated our struggles and the struggles of other activists. We were provided with an alternative path, one that doesn't simply assume the legitimacy of the plaintiff

and their intentions but forces them to demonstrate that their litigation is more than just an attempt to silence critics.

However, as with most groundbreaking litigation, this case didn't chart a clear path forward for our case, leaving it up to future litigants to work through the mechanics of the defence in the lower courts.

Dedicated legislation, in the form of this Anti-SLAPP Model Law, would build on the Constitutional Court's decision in *Mineral Sands Resources* and chart a path forward for activists in a quicker and more predictable manner. The Model Law provides an opportunity for a considered approach, building on the lessons learned from other jurisdictions.

We welcome the comprehensive legal analysis done by CALS in drafting this Model Law. Legislation like this will protect future activists, providing a mechanism to facilitate the early and expeditious dismissal of SLAPP suits. This will spare activists the financial and psychological burden of having to spend years defending spurious claims.

This Model Law also provides remedies for those subjected to SLAPP proceedings which, in addition to protecting individual activists in specific suits, would act as a deterrent to the use of our legal system to undermine the fundamental rights of activists.

Lasting change often requires efforts on multiple fronts, and this Model Law, together with the progress already achieved through litigation and advocacy campaigns like Asina Loyiko, is spurring a movement. We hope to see this momentum continue, and we look forward to watching the success of these, and other efforts to create a safer space for activists in South Africa.

– Tracey Davies & Christine Reddell

Executive summary

Lawsuits that fall into the category of strategic litigation against public participation – otherwise known as "SLAPP" suits – have emerged as a troubling trend that amplifies the need for protective legislation. SLAPP suits are often used by powerful entities to silence activists, journalists or community groups engaged in public-interest advocacy. Through various legal battles, it has become clear that the lack of a formal anti-SLAPP framework in South Africa has left activists vulnerable to intimidation through the courts.

The Model Law for the Protection from Strategic Litigation Against Public Participation builds upon the foundational understanding of SLAPP suits, offering a deeper exploration of the historical context in South Africa and how such lawsuits have been used to suppress activism and public participation.

Chapter 1 provides detailed examples of past legal cases where activists, journalists, and community groups have been targeted by powerful corporations or entities using litigation as a weapon to silence opposition. By examining the trajectory of these cases, this chapter highlights the urgent need for formal recognition of SLAPP suits in South African law.

Chapter 2 draws lessons on anti-SLAPP legislation from foreign jurisdictions. In examining international responses to SLAPP suits, a comparative analysis of anti-SLAPP legislation across key jurisdictions – including Canada; different states in the United States; Australia; the United Kingdom and the European Union – reveals valuable lessons for South Africa in developing its own anti-SLAPP framework. Canada stands out with its advanced anti-SLAPP laws, employing a two-pronged test for identifying meritless lawsuits.

The examination of international responses illustrates critical insights for South Africa's anti-SLAPP framework development. Key themes include the necessity for clear legal definitions, mechanisms for early dismissal, and financial support for victims of SLAPP suits. Learning from these examples, South Africa can ensure its legislation effectively deters SLAPP suits, upholds fundamental rights and strengthens democracy by safeguarding public participation and freedom of expression.

Chapter 3, which lays out the proposed model law, serves as the legislative guide for addressing and preventing SLAPP legal proceedings. It outlines the types of legal actions and behaviours that constitute SLAPP suits, clearly distinguishing these from legitimate legal processes. The chapter also provides a detailed framework for how courts should recognise and adjudicate SLAPP cases, ensuring that they are identified and dismissed early in the litigation process to minimise harm.

In addition, this chapter sets forth remedies available to victims of SLAPP litigation, which may include the dismissal of such cases and potential compensation for

damages suffered. The chapter further introduces measures designed to deter the future institution of SLAPP cases, protecting individuals and organisations who engage in public participation from being subjected to legal intimidation or harassment. In doing so, it ensures that the rights of activists, journalists, and public interest actors are safeguarded, and that public participation is not stifled by abusive legal tactics. Through these provisions, Chapter 3 reinforces the overall goal of the model legislation—to protect constitutionally guaranteed rights and prevent the misuse of the judicial system to suppress dissent and activism.

What is model law?

"Model legislation" may be described as an extensive set of rules concerning a given topic presented to national legislatures as a suggestion for adoption.[1] In many cases, model legislation is adopted at the supranational level and serves as a template to tackle similar issues in different jurisdictions.[2] National legislative bodies may choose to accept the entire text or only certain components of it and, if necessary, adjust the relevant sections to fit local conditions.[3] When new societal issues arise which affect multiple countries but have yet to be addressed by most of the countries' laws, model laws are often implemented.[4]

Model law is frequently conceived to encourage legal consistency and improved legislative methods. Making use of model legislation can be effective in raising awareness and promoting the adoption of the text to address a certain issue.[5] It may be a useful tool for modernisation and harmonisation of legislation and can encourage agreement on the vital importance of discovering a uniform solution to a particular problem.[6] Governments and legislative bodies can use this as a benchmark to assess existing laws and regulations, or to create new ones.[7] The sample laws are not binding but are meant to serve as inspiration and examples for policymakers to draw on.[8]

Examples of model laws and how they have been used

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration is a successful example of international model law. Eighty-eight (88) states within one hundred and twenty-one (121) jurisdictions have adopted legislation based on or inspired by the UNCITRAL Model Law.[9] South Africa only recently adopted it in 2017. The main purpose of the UNCITRAL Model Law is to reduce the discrepancy between the domestic procedural laws affecting international commercial arbitration. As per the Model, the court or any appointed authority has the power to appoint an arbitrator where parties have failed to agree; decide challenges of arbitrators; remove an arbitrator jurisdiction; or set aside an award.

When the Model Law was first introduced, it was thought that the sample text would only be useful to developing countries.[10] However, it has been evident that the Model Law has also been useful to developed countries which have also reformed their law by adopting the Model.[11] Within certain countries, an arbitration law was created that contained the entire UNCITRAL Model Law on Arbitration as an addendum to a domestic act.[12] Other countries have however, opted to adopt the UNCITRAL Model Law by following the same process as making a treaty a positive law.[13]

Model Law on HIV / AIDS in southern Africa

To address the HIV/AIDS pandemic affecting Africa's sub-Saharan Region, the Model Law on HIV in Southern Africa was formulated. This text puts forward the idea that SADC countries should implement comprehensive HIV/AIDS laws:

- Promoting effective strategies, for the prevention, treatment, care and research of HIV and AIDS;
- Ensuring that the human rights of people living with HIV are protected;
- Providing a legal framework for reviewing and reforming HIV-related legislation to ensure conformity with international human rights standards; and
- Stimulating the adoption of special measures to protect HIV-affected vulnerable or marginalised groups.

This brought about a political dedication to creating legislative norms for the SADC region through adopting the Model Law.[14] The legal reforms that have been put into effect following the Model's proposal suggest that they are based on the Model.[15] To embrace the Model, some countries developed entire texts regarding HIV reform, while others decided to modify and/or supplement their existing laws.[16] It is evident that many countries used the Model Law as the foundation of their legislative change.[17] The move was focused on what appears to be a wider regional drive to ensure that all SADC countries adopt the SADC Model Law, thus guaranteeing dedicated HIV legislation.[18] The Model Law was essential in facilitating the progress made by all countries to counter the devastating and violent epidemic that was sweeping the continent.

Conclusion

It is therefore evident that model law can play a pivotal role in legislating critical areas that laws have not yet addressed. Model law excels in, amongst others:

- Identifying and analysing gaps in the law;
- Highlighting pertinent issues arising from these gaps and recommendations on how laws can address them;
- Driving progressive legislative reform;
- Encouraging sub-regional, regional and international consistency in areas of law; and
- Providing, at minimum, a basis from which legislators can build country-specific laws to address gaps.

This Model Law aims to do this and more in the overlooked but important area of addressing the growing trend of abuse of courts through strategic litigation against public participation (otherwise known as "SLAPP" suits).

Photo by Kgomotso Neto on Behance

Incidences of SLAPP suits in South Africa

Summary

This chapter elaborates on the necessity of anti-SLAPP legislation in South Africa. It does this by contextualising the problem of SLAPP suits and examining SLAPP suit litigation in South Africa. The text asserts that comprehensive anti-SLAPP legislation is essential to discourage and prohibit SLAPP suits and to formulate standards addressing the issues. The chapter stresses the significance of the right to freedom of expression in a constitutional democracy and the important role it plays in individuals' agency and search for the truth.

The importance of protecting human rights defenders is also emphasised, and South Africa's role as a signatory to international and regional instruments is discussed. Furthermore, the chapter highlights the obligation of states to create a conducive environment for public participation, to safeguard human rights defenders, journalists and many others who act in the public interest.

The chapter goes on to review cases that would have been classified as SLAPP suits if SLAPPs had been accepted under South African legal precedent when the cases were brought forward. Close attention is then paid to the *Mineral Sands Resources v Reddell* case, which pioneered the recognition of SLAPP suits in South Africa and introduced a test to analyse future cases.[19]

In addition, the chapter explores a variety of judgments where the courts have determined that the institution of legal proceedings amounted to an abuse of process. To this end, a thorough discussion of judgments that were delivered post-*Mineral Sands Resources* is presented, namely, *Maughan* and *Downer v Zuma*,[20] *Mazetti Management Services and Another v Amabhungane Centre for Investigative Journalism NPC and Others*,[21] and *Sithole and Another v Media 24 (Pty) Ltd and Others*.[22]

The chapter also contends that courts have had to turn to the Vexatious Proceedings Act and abuse of process owing to the lack of anti-SLAPP legislation, thereby highlighting the need for comprehensive legislation that guards against SLAPPs. The difference between abuse of court processes and SLAPP suits is also highlighted, with an argument given for why this distinction is necessary.

While acknowledging that there have been progressive judgments since *Mineral Sands Resources* against litigation that seeks to stifle public participation, it still advocates for specific legislation to address SLAPPs and proposes, through this

While acknowledging that there have been progressive judgments since *Mineral Sands Resources* against litigation that seeks to stifle public participation, it still advocates for specific legislation to address SLAPPs and proposes, through this Model Law, what this legislation can look like.

Background

Research has shown that human rights defenders across the globe are being targeted and attacked for their activism.[23] This phenomenon is also prevalent in South Africa.[24] One of the ways in which human rights defenders are victimised is through the use of litigation to destabilise and disintegrate movements, activism and the expression of dissent in the public interest. It has become increasingly common for these kinds of lawsuits to be instituted, not to necessarily succeed in a claim but for silencing dissent, draining and diverting resources, destabilising movements and deterring others from daring to also act in the public interest.

This weaponisation of the judicial system to repress dissenting voices is the definition of a SLAPP suit. SLAPP, an acronym for strategic litigation against public participation, can be described 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".[25]

SLAPP suits create an impression that the lawsuit constitutes valid legal proceedings such as a defamation claim or interdict,[26] whereas the true objective of such suits is to muzzle opponents or punish those with dissenting views.[27]

The nature of SLAPP suits is such that they are designed to restrict the exercising of rights, including the right to assemble and freedom of expression and association exercised in the public interest. SLAPP suits should therefore be understood as a legal mechanism used to prevent the enforcement of constitutionally guaranteed rights exercised for a greater public good. SLAPPs could also infringe on rights such as freedom and security of person, the right not to be unlawfully detained and the right to privacy and equality before the law.

There is usually a significant discrepancy in power relations between the institutors of SLAPPs and those who are targeted by them. Often, the initiators are resourced corporations, entities, organisations or even high-profile individuals who seek to

escape accountability and transparency or who seek to protect an interest that is causing or may cause harm to the public. The SLAPP suit is therefore instituted to prevent the public and/or those who act in the public interest from exercising a right that threatens this protected interest.[28] The targets of these suits are often vulnerable, under-resourced or simply unable to withstand long and drawn-out legal battles that are financially, emotionally and politically draining.[29] Therefore, in addition to burdening their victims, SLAPP suits also inhibit the promotion of transparency and public participation.

Although SLAPP suits were first identified and found prevalent in other jurisdictions such as the United States of America, they are now a global phenomenon and occur in South Africa as well.[30] For instance, in 2021 South Africa was reported as one of the countries with a high number of SLAPP incidences.[31] Yet, despite this frequency, SLAPP suits are sparingly successfully defended in South African courts. The lack of protective and deterring measures, including anti-SLAPP legislation, has left human rights defenders, social justice activists, journalists and others acting in the public interest without adequate protection against these predatory suits.

The *Mineral Sands Resources (Pty) Ltd v Reddell and Others*[32] judgment was the first to recognise the occurrence of SLAPP suits in South Africa and establish a test by which claims of a SLAPP suit can be evaluated by the courts.[33] Until this, courts have been responding to SLAPP suits in disparate ways including by using the common law and the Vexatious Proceedings Act,[34] amongst others.[35] Although these approaches have in some instances assisted defendants, there remains a deficiency in properly responding to the *sui generis* nature of SLAPP suits.[36]

Over the years, organisations such as the Centre for Applied Legal Studies (CALS), Centre for Environmental Rights (CER) and many others have been advocating for the recognition and regulation of SLAPP suits in South Africa. Resistance to SLAPP suits has also seen coalitions such as 'AsinaLoyiko: United against Corporate Bullying'[37] being formed to raise awareness on the type of threats that activists face and the utilisation of SLAPP suits against human rights defenders.[38] A multipronged approach is, however, imperative not only to support and amplify such resistance efforts, but also to eventually eradicate SLAPP suits in South Africa. Such an approach must include a response from Parliament in the form of the enactment of anti-SLAPP legislation.[39]

The introduction of anti-SLAPP legislation is an effective mechanism for guarding against the chilling effect of SLAPPs as it provides protection against frivolous lawsuits and furnishes a procedural framework that will allow SLAPP suits to be resolved timeously and inexpensively.[40]

Anti-SLAPP laws enable affected parties to seek early dismissal of the suits thereby allowing targeted defendants to quickly escape the effects of a SLAPP suit without incurring high legal costs.

By their nature, SLAPP suits are complex. They manifest in diverse forms and appear as legitimate suits whereas the underlying intention is to silence. Moreover, the impact of SLAPP suits is so detrimental that they can affect the long-term constitutional project of a society.

Comprehensive legislation is therefore needed to, amongst others, discourage and outlaw SLAPP suits; create a test for SLAPPs; determine the onus of proof; create legal mechanisms for adjudication at an early stage in the litigation process; instruct courts on the procedural processes to be undertaken when a SLAPP is alleged; regulate costs and provide effective remedies for victims of SLAPP suits.[41]

The rationale for anti-SLAPP legislation is also supported by international, regional and national instruments. SLAPP suits threaten several rights protected under international law. South Africa is also under an obligation to ensure the protection of rights which includes implementing laws that will safeguard its people from rights violations. South Africa's constitutional dispensation is based on the principles of democracy, transparency, accountability and public participation.[42] The Constitution also provides a protective framework for the array of rights which are infringed upon by SLAPP suits. These include the rights to assemble, to freedom of expression and to freedom of association.

The Constitutional Court has recognised that freedom of expression lies at the heart of democracy.[43] It is valuable in its function as a guarantor of democracy. Its recognition and protection are critical for individuals' agency and it plays an important role in the public's search for truth. The Constitution therefore recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.[44] This is further bolstered by Section 57(1)(b) of the Constitution which encourages the realisation of participatory democracy by calling for active participation by all citizens in matters of public interest.

Activists, human rights defenders and interested individuals who participate in matters of public interest should be able to demonstrate their dissent publicly without reprisal. This also encompasses being able to exercise their freedom to associate with other groups that dissent and oppose powerful entities in society. In supporting the protection and promotion of the freedom of expression, the court has held that these "rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial".[45]

South Africa is a signatory to regional and international instruments that reinforce the protection of the rights of all people, including human rights defenders. Article 9 of the African Charter on Human and Peoples' Rights entitles everyone to the right to receive information and to express and disseminate their opinions within the law.[46] Articles 10 and 11 guarantee the freedom of association and freedom to assemble. Similarly, the UN International Convention for Civil and Political Rights demands that measures be put in place to ensure the rights to freedom of speech, peaceful assembly and protest are promoted and protected.[47]

The right to participate in public affairs is codified in international law under Article 25 of the International Covenant on Civil and Political Rights (ICCPR).[48] In addition, States have a positive obligation to facilitate the exercise of the rights of freedom of expression, peaceful assembly and association, these include, among others, the duty to establish and maintain an enabling environment for civil society to operate freely.[49]

Under the African Union, Member States are encouraged to support civic engagement and public participation in the promotion of rights across Africa.[50] The Kigali Declaration further recognises the important role of civil society organisations and human rights defenders in the promotion and protection of human rights in Africa.[51] It further calls on Member States and regional institutions to protect them and encourage the participation of civil society organisations in decision-making processes.[52]

The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) promotes the protection of human rights defenders. It recognises the rights of defenders to promote and protect universally recognised human rights and fundamental freedoms peacefully and without reprisal.[53] It further protects human right defenders' right to:

- Know, seek, obtain, receive and hold information relating to human rights, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
- Seek the protection and realisation of human rights at the national and international levels;
- Participate in peaceful activities against violations of human rights and fundamental freedoms; and
- Receive adequate protection under national law in reacting against or opposing, through peaceful means, acts or omissions attributable to the state that result in violations of human rights.[54]

Although not binding, the Declaration on Human Rights Defenders encourages states to adopt "such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed."[55] This duty can be interpreted to include the state's duty to enact anti-SLAPP legislation as "a necessary step to ensure that all persons are able to enjoy the rights and freedoms guaranteed" in international law.[56] The

enactment of anti-SLAPP legislation can further be seen as a fulfilment of the South African state's general duty to promote and protect human rights, specifically the rights to freedom of expression, equality and participation in public affairs.[57]

It is against this constitutional framework and international law outlined above, that it becomes imperative to enact anti-SLAPP legislation that would safeguard the threatened rights as well as promote public participation, democracy, transparency and accountability. Victims of repressive tactics such as SLAPP suits should also have a right to remedies which would similarly be catered for in anti-SLAPP legislation.

The Vexatious Proceedings Act and common law abuse of court process

As mentioned above, the lack of anti-SLAPP legislation has left courts to determine, on their own accord, how to deal with SLAPP suits pleaded or disguised as litigation that is vexatious or frivolous. In doing so, courts have turned to the common law abuse of court process and the Vexatious Proceedings Act.[58]

Vexatious litigation is best defined in the Vexatious Proceedings Act. In terms of section 2(1)(b) of the Act, a litigant who persistently brings or in the future intends on bringing litigation or even threatening litigation against a person or persons, for an unreasonable ground(s) in a court is prohibited from instituting such proceedings. As described by the Supreme Court of Appeal in *MEC for the Department of Cooperative Governance and Traditional Affairs v Maphanga*, the Act aims to put a stop to baseless and unjustified litigation against one or more people.[59] The determination of whether the litigation is unjustified lies with the courts.[60]

SLAPP suits are not fully accommodated by the Vexatious Proceedings Act. As will be seen in the case law discussion, vexatious litigation may constitute one aspect of a SLAPP suit. For instance, vexatious litigation only makes provision for suits that are repeatedly brought or threatened to be brought against persons. SLAPP suits, on the other hand, are usually only brought once, and this is enough to meet their purpose of silencing and draining the resources of their target.

Similarly, common law prohibits vexatious and frivolous litigation, through its abuse of court process doctrine. This principle has been developed by the courts over the years. Litigation is categorised as vexatious and frivolous according to common law if the respondent in a matter persistently institutes legal proceedings against an applicant or applicants, such litigation having no reasonable ground.[61]

Vexatious proceedings must be proven as a matter of certainty to be unreasonable and unsustainable.[62] The onus of proof is on the applicant to show that the litigation instituted by a respondent was vexatious and amounts to an abuse of court process. The development of the common law abuse of court process by the court has allowed for the establishment of categories of abuse of court process, depending on the facts, circumstances and severity of the abuse.

The most recent development of the common law doctrine of abuse of court process, in relation to SLAPP suits is the Constitutional Court decision of *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* ("*Mineral Sands*

Resources"). In this case, the Constitutional Court held that the common law doctrine of abuse of court process permits a SLAPP suit defence. Put differently, the judgment recognised the SLAPP suit defence within South African law and held that this defence can be accommodated under the developed abuse of court process doctrine. A comprehensive analysis of this case is made below.

Nevertheless, despite this development through both the Vexatious Proceedings Act and the common law, the legislature still needs to enact a detailed and comprehensive position for South African litigation on SLAPP suits.[63]

In the SLAPP cases in which CALS has been involved, courts have responded in a myriad of ways to SLAPPs. In *Mineral Sands Resources*, the defendants who have been fighting the SLAPP for several years were only partially successful in the Constitutional Court. Despite the court recognising for the first time in that matter that the SLAPP suit defence does exist under the abuse of court process doctrine, the matter was referred back to the High Court where the defendants have to satisfy the new SLAPP requirements set out by the court. In *Goldfields Community Forum v Harmony Gold Mine (Pty) Ltd*, we observe how the court refused to recognise SLAPP suits nor acknowledge a wide-ranging interdict as a way in which SLAPP suits can occur. Finally, in *City of Cape Town v South African Human Rights Commission and Others* (Strandfontein Camp), the court simply ignored the defence completely.[64]

Below is an analysis of cases which we believe could have qualified as SLAPP suits had there been recognition of SLAPP suits in South African jurisprudence at the time the matters were heard. We later also analyse the above-mentioned cases that CALS was involved in.

Wraypex (Pty) Ltd v Barnes and Others

Wraypex is regarded as one of the first cases to make mention of the SLAPP suit defence in South Africa.[65] There were two judgments in this case. The first dealt with the defamation suit, where the plaintiff was unsuccessful in its claims against the defendants. The second dealt with the issue of costs.

The matter involved damages claim for a large sum of money (R170 million) based on alleged defamation by four activists who were opposing the development of Blair Atholl luxury estate, a Gary Player-signature golf course and hotel development, near Lanseria.[66] The defendants were each being sued for between R45 million and R50 million in damages for alleged defamation which stemmed from their opposition of the development, which borders the Cradle of Humankind world heritage site.[67] Wraypex pursued this prodigious litigation despite having won the required authorisation to continue with its development from the necessary authorities.[68]

Wraypex argued that the defendants wrongfully and with the intention to injure the company published false and malicious statements concerning it.[69] The statements made were *inter alia* that:

1. Wraypex did not comply with due process and the associated legal requirements regarding the development;
2. It did not submit a comprehensive environmental impact assessment; and
3. It did not hold a public meeting to address the concerns of the interested parties.[70]

The defendant's counsel stated in his opening arguments that the case could be likened to a SLAPP suit. The court, however, held that "no instances of cases so described are to be found in local law reports, but the concept of vexatiousness corresponds very closely with the features of a 'SLAPP' suit."[71]

In the costs proceedings, the court held that "[t]he litigation was purposeless from an economic point of view and if anything was more harmful to the Plaintiff than the words complained of. At the same time, the four defendants were unnecessarily involved in heavy expenditure in defending the cases brought against them."[72] The court dismissed the case and ordered Wraypex to pay R1 million in costs for "vexatious litigation".[73]

PetroProps (Pty) Ltd v Barlow and Another

In an earlier case,[74] an interdict, as well as a claim for R6 million in damages, was brought against a group of environmental activists who had campaigned against the development of a fuel service station on the basis that it was on an ecologically sensitive wetland.[75] Although the SLAPP suit defence was not raised in this case, it was indicative even at that stage of the growing trend of SLAPPs in South Africa and how they have been used as a silencing tactic against activists.

As in the *Wraypex* case, the developer, PetroProps claimed that the campaign amounted to harassment and interference with the use and enjoyment of its property and had caused severe financial loss. The Court held that the activists' "interest and motivation is selfless, being to contribute to environmental protection in the common good."[76] The Court held further that:

> "None of them stands to gain material personal profit. Their *modus operandi* is entirely peaceful. It is mobilised within a self-funding voluntary association. It is geared towards public participation, information gathering and exchange, discussion and the production of community-based mandates. Its accompanying public discourse and media coverage have been fair, with participants and readers presented in a balanced way with all sides' viewpoints. In my view, conduct of that sort earns the support of our Constitution. In this context, it should be borne in mind that the Constitution does not only afford a shield, to be resorted to passively and defensively. It also provides a sword, which groups like the Association can and should draw to empower their initiatives and interests."[77]

Goldfields Community Forum and Others v Harmony Gold Mining Company

In this matter, CALS represented Goldfields Community Forum in Oddendalrus, Free State. The community forum comprised of several community members affected

Harmony Gold Mining Company (the respondents), including the mine's failure to fulfill its mandatory social and labour plans.

In response to a planned protest by the community, the mine approached the High Court and obtained an overly broad interdict against the community forum and its leaders while they were unrepresented. The interdict was sought urgently, and the time provided for the community forum to oppose it was so limited that it was impossible for them to seek and obtain legal assistance from attorneys on time. As a result, the interdict was granted against the community forum in their absence and without the opportunity of being heard. The interdict effectively prohibited the community from exercising their right to protest against the mine.

When the final interdict was heard before the Free State High Court, CALS argued on behalf of the community forum that the overly broad interdict was sought to silence the community from criticising the mine. We argued that the interdict limits their constitutional rights to protest and their right to freedom of expression. As a second leg to their case, the community forum also contended that the litigation instituted by the mine was a form of a SLAPP suit intended to dissuade them from exercising a legitimate right in efforts to hold the mine accountable.

In making these arguments, the community faced a dual challenge: convincing the Court that SLAPP suits should be recognised within South African law and that an overly broad interdict can constitute a SLAPP.

The Court did not engage and entertain the SLAPP defence. In the judgment, the Court stated that the urgent application brought by the mine was a response to the unlawful conduct by the community forum as they engaged in protest action. The Court further held the view that since the community forum invited the mine to institute legal proceedings against them, the mine simply acted on the instructions of the community forum. Both these findings by the Court were unfortunately misplaced.

The community denied engaging in unlawful conduct and because they missed their opportunity to present evidence to the contrary, there wasn't much they could do to counter the stance taken by the Court. It is also doubtful that the community would invite the mine to institute proceedings of the nature that it did, where the community was unable to defend themselves and have their side of the story heard. What the community was asking for was a legal process to ensue which would enable them to provide their side of the story and have the mine account for its failures and the harms it caused.

Nevertheless, the Court granted the final interdict against the community, effectively refusing to incorporate SLAPPs into South African jurisprudence and refusing to recognise an interdict as a possible SLAPP suit. The Court's lack of engagement with the possibility of acknowledging the community's SLAPP suit defence was shocking. In an eight (8) page judgment, all it said about the SLAPP suit defence was effectively that it was misplaced and misconceived by the community forum. The lack of anti-SLAPP legislative guidance for courts can therefore result in SLAPP suits masked as legitimate proceedings to succeed against activists.

City of Cape Town v South African Human Rights Commission

In other instances, the lack of legislative guidance has resulted in unsure courts simply ignoring the defence when it is raised. In the *City of Cape Town v South African Human Rights Commission* (Strandfontein Camp case),[78] the City of Cape Town instituted an urgent application during the hard lockdown period in May 2020 against the South African Human Rights Commission (the Commission). The said application sought to prohibit the Commission and its human rights monitors from conducting site visits at Strandfontein Camp following complaints of human rights violations on site.

The said camp was a quarantine facility for homeless people in the City of Cape Town. The human rights monitors were appointed in terms of section 11 of the South African Human Rights Commission Act,[79] to "monitor the observance of human rights during the government instituted lockdown (and possibly beyond), and report thereon to the SAHRC in terms of the guidelines and rules set by the Committee".[80] The monitors therefore played a significant role in assisting, supporting and promoting the Commission's mandate to curb the violation of human rights during the lockdown period.

The Commission opposed the City's application and CALS joined the matter as *amicus curiae*. CALS argued that the litigation instituted by the City of Cape Town was aimed at preventing the Commission and its monitors from conducting its functions which include investigating and reporting on potential human rights violations occurring on site. This hindrance is a means to silence and limit the Commission from exercising its statutory mandated duties in a time when human rights were at a heightened risk due to the COVID lockdown restrictions. Furthermore, CALS argued that the litigation was meritless and aimed at dissuading the important work done by the monitors and oversight bodies in general. We argued that the litigation was meritless because the City of Cape Town did not meet the requirements of an interdict, especially one that sought to limit the exercise of public power.

CALS further argued that SLAPP suits are not 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 is especially important when vindicating the rights of others is a constitutional and legislative function or mandate.[81]

There were at least three identifiable factors which showed that the interdict sought by the City was a SLAPP suit. The first being the relief sought by the City, secondly, the effect the litigation was intended to have and thirdly, most importantly, the cost order sought by the City against the Commission and its monitors.[82]

The hearing was held in June 2020 at the Western Cape High Court. Between the time in which the matter was heard and when judgment was expected, the matter became moot as the quarantine site in question was shut down. The court thereafter narrowed the matter down to the issue of costs. CALS nonetheless persisted in its arguments that the institution of such litigation against the Commission and its human rights monitors, as a matter of principle, still amounted to a SLAPP suit. Furthermore, this should also be considered when resolving the issue of costs. In an eight-page judgment, received nearly a year later, the Court did not deal with the issues raised by the *amici*. Resultantly, the bid to get SLAPP suits again recognised under South African law and revealing the many ways in which they can occur, failed.

The outcome was nonetheless positive for the Commission and the monitors as the Court held that the interdict intruded and hindered the Commission from exercising its role as mandated by the Constitution and the South African Human Rights Commission Act.[83] It held that the City had not made out a case for the interdict. It further held that the interdict sought to gag the Commission and its monitors from monitoring and reporting on what was happening at the quarantine site.[84]

Disappointingly, the Court did not make any mention in its judgment of the arguments presented by CALS, specifically insofar as they related to the litigation amounting to a SLAPP suit. This, despite CALS being admitted by the court as *amicus* and permitted to present its oral and written submissions. It is unclear why the judgment ignored the SLAPP suit argument. SLAPP suits are a new phenomenon in South Africa and may be unfamiliar territory for the Court. They are not new because they have not existed or because they have not been litigated, but because they have seldom been dealt with by the courts. This position is exacerbated by the lack of guidance in legislation on SLAPP suits.

The Court's recognition of SLAPP suits in South Africa

Mineral Sands Resources (Pty) Ltd v Reddell & Others

The first case which successfully incorporated the SLAPP suit defence in South African law and a good case illustration of the need for anti-SLAPP legislation is presented in the matter of *Mineral Sands Resources (Pty) Ltd v Reddell and Others*.[85] This was also the first SLAPP suit to be decided by the South African courts since the 2011 *Wraypex* case.[86] The *Mineral Sands Resources* case was first decided by the Western Cape High Court with a ground breaking judgment which recognised SLAPP suits in South Africa. It was later appealed by the plaintiffs (Mineral Sands Resources) to the Constitutional Court. Although both decisions concerned the same issues, important legal pronouncements were made that warrant a discussion of both judgments.

The Western Cape High Court decision

A group of environmental lawyers, environmentalists and activists ("the defendants") were sued for defamation by Mineral Sands Resources and Mineral Commodities Limited — an Australian mining company that had been conducting extractive

mining activities along the West and Wild Coasts of South Africa. The defendants, at different instances, publicly criticised the company's mining activities and operations including the adverse impact that the mining activities had on both the environment, people and economy of the affected areas. In turn, the mining company instituted a defamation suit against the defendants and claimed damages amounting to R14,25 million.

The defendants in these matters entered two special pleas, namely that the lawsuits amount to an abuse of process aimed at intimidating the defendants and other members of the public, and that corporations can only bring defamation claims under certain circumstances.[87] The mining company raised an exception to both special pleas.[88]

CALS intervened as *amicus* in the proceedings to advance arguments around the existence of SLAPP suits, their lack of legal recognition in the South African context and, importantly, the need for the recognition of SLAPP suits. CALS focused on the foreign jurisprudence on SLAPP suits, mainly from the United States of America and Canada. CALS argued that the need for the legal recognition of SLAPP suits is important for two reasons, firstly to curtail unnecessary litigation in the courts which is not only meritless but instituted with an ulterior motive. Secondly, to protect our hard-earned democracy and our Bill of Rights, particularly the right to freedom of expression guaranteed in section 16 of the Constitution. In recognising SLAPPs, human right defenders and activists will have the freedom to express themselves on matters of public importance without threat of litigation against them.

In its intervention as *amicus curiae*, CALS submitted that these kinds of defamation claims are examples of strategic litigation against public participation, and ought to be struck out if brought for an ulterior purpose. In the alternative, CALS argued that it was necessary for the court to develop the common law doctrine of abuse of court process insofar as these suits infringe section 16 (1) of the Constitution. CALS further contended that an analysis of both the motive (ulterior purpose of the suit) and merits is necessary in determining the presence of a SLAPP suit. Importantly and in contradiction to what the main parties were arguing, CALS insisted that SLAPP suits are different to the typical abuse of court process litigation as found in the common law.

In its February 2021 judgment, the Western Cape High Court upheld the first special plea and agreed with the defendants and CALS that the lawsuits amounted to an abuse of court process by the mining companies.[89] Critically, it acknowledged the existence of a SLAPP suit, although a new phenomenon, and relied on international jurisprudence. The court preferred to adopt the Canadian Supreme Court approach in *1704604 Ontario Ltd v Pointes Protection Association*.[90] This judgment placed emphasis on the merits of the case in determining whether the litigation amounted to a SLAPP suit, and held that a court would not hear a SLAPP suit style case, unless the plaintiff proves that their claim has merits.[91] Furthermore, the court emphasised the significance of issues of public interest such as those raised by the defendants in the matter. It further held that a SLAPP suit has a chilling effect on public participation and the right to freedom of expression.

The court detailed that:

> "corporations should not be allowed to weaponise our legal system against the ordinary citizen and activists in order to intimidate and silence them. It appears that the defamation suit is not genuine and bona fide, but merely a pretext with the only purpose to silence its opponents and critics. Litigation that is not aimed at vindicating legitimate rights but is part of a broad and purposeful strategy to intimidate, distract and silence public criticism constitutes improper use of the judicial process and is vexatious… SLAPP suits constitute an abuse of process, and [are] inconsistent with our constitutional values and scheme".[92]

As evident from the judgment, the High Court decision succeeded in laying the foundation of SLAPP suits in South African law. In previous judgments where mention is made of SLAPP suits, the judgments do not engage with the core issues around SLAPP suits and therefore were not as useful for the development of our common law abuse of court process or for a distinct recognition of SLAPP suits. However, the appeal to the Constitutional Court by the plaintiffs in this matter proved to be even more beneficial for securing precedence in our law regarding SLAPP suits.

The Constitutional Court decision

In the appeal to the Constitutional Court, the mining company submitted that the defendants did not prove the elements of an abuse of court process and further argued that the recognition and regulation process of SLAPPs must be done by Parliament and not the courts.[93] The defendants, on the other hand argued that the suit amounted to an abuse of court process, of which SLAPPs also form part.[94]

CALS was once again admitted as *amicus* by the Constitutional Court, together with the Southern Africa Human Rights Defenders Network.

CALS argued that neither the current common law abuse of court process nor a developed ulterior motive test within the abuse of court process test can adequately encompass SLAPP suits due to their *sui generis* nature. We argued that although SLAPP suits are a form of abuse of court, the doctrine of abuse of court process does not adequately encompass the complexity of a SLAPP suit defence.

CALS advanced arguments based on what foreign jurisdictions such as Canada, the United States of America and some territories in Australia had implemented. We argued that the approach adopted by Canada was the most suitable approach for South Africa because it considers the plaintiffs' and defendants' interests in the test that is used to determine a SLAPP. In the test, the defendant is permitted to raise a SLAPP defence, if they have reason to believe that the litigation instituted against them is tantamount to a SLAPP suit. The defendant would have to show that the litigation is brought as a result of an expression made by it and that such expression concerns an issue which is of public interest.[95] Once satisfied, the burden shifts to the plaintiff who would have the opportunity to show the Court that it has a *prima facie* case against the defendant, that the defendant does not have a bona fide defence and that the interests of justice favour that the claim is proceeded with.[96]

Therefore, CALS's submission balances the rights of the plaintiff to access the court (section 34 of the Constitution) and the defendant's right to exercise freedom of expression (section 16 of the Constitution) CALS's submission were unique to the party's submissions but not impossible for the court to consider.

In its judgment, the Court held that SLAPP suits do indeed have a place in our law.[97] Moreover, that SLAPPs can be accommodated by the common law abuse of court process. It also held that the SLAPP suit defence would require proving the following factors:[98]

- that the suit is an abuse of process of the court; and
- is not brought to vindicate a right; and
- amounts to the use of court process to achieve an improper end; and
- that the litigation is aimed at causing the defendants financial and/or other prejudice for the purpose of silencing them; and
- violates, or is likely to violate, the right to freedom of expression entrenched in section 16 of the Constitution in a material way.[99]

In arriving to the abovementioned factors, the Court did acknowledge that there may be differences presented in various cases and that therefore a case-by-case assessment may always be necessary. Essentially, the court concluded that a SLAPP suit defence would require a satisfaction of at least two elements, the first being that the litigation was brought through an ulterior motive and secondly, that it was meritless.[100] It held that the determination of the motive can only happen during the merits analysis, therefore, contrary to what the parties had argued, both ulterior motive and the merits are essential components of a SLAPP suit.[101] In effect, the court endorsed the approach adopted by Canada which was in line with what

CALS argued. The only difference was that the court decided that the abuse of court process doctrine can accommodate SLAPP suits.

In a country without anti-SLAPP legislation, this judgment does significant work in bridging the *lacuna* in law. Firstly, it cements the recognition of SLAPP suits in South Africa, therefore mandating courts to be attentive and responsive to a SLAPP defence that may be brought before them. Secondly, the judgment creates a test for a SLAPP which provides clarity to victims on how to lodge a meaningful defense against such litigation. The test also provides direction to instituters of suits who may want to prove that their suit is legitimate and not aimed at silencing.

Notwithstanding the progressive judgment, there remains a significant need for anti-SLAPP legislation.[102] The judgment itself does not address all the processes and effects of SLAPP suits that make it such an effective tool for repression. It also does not table a comprehensive civil procedure process that will govern a SLAPP litigation process. These and many other issues can only be dealt with methodically in legislation.

The judgment also does not cure a key characteristic of SLAPP suits – the draining of time and resources of victims. The defamation suit against these defendants was instituted in 2017. Up until 2022 when judgment was delivered by the Constitutional Court, the matter had not been concluded as the defendants were granted an option to refile papers in the High Court to meet the SLAPP test as set out by the Constitutional Court.[103] The protracted legal process may have already drained and diverted the resources of the defendants and had a chilling effect on others.

Maughan and Downer v Zuma

Following the *Mineral Sands* case, there have been several anti-SLAPP judgments emanating from South African courts, the first being the *Maughan v Zuma* case.[104] The former President of the Republic of South Africa, Jacob Zuma, initiated a private prosecution against the legal reporter Karyn Maughan, alleging that she had on 10 August 2021, published documents related to his corruption trial before they were officially presented in court. On September 5, 2022, Maughan was served with a summons instructing her to appear in the Pietermaritzburg High Court on October 10,

2022. The summons cited charges of unlawfully disclosing confidential information and was issued by Zuma in his capacity as a private prosecutor. It later became known that Zuma had pursued a *nolle prosequi* certificate – a certificate affirming that the National Prosecuting Authority (NPA) would not be pursuing charges against the lead prosecutor in Zuma's criminal case, Billy Downer, for disclosing medical information to Maughan. The *nolle prosequi* certificate was granted on June 6, 2022, but it did not reference any prosecution against Maughan.

On March 21, 2023, Maughan and Downer filed an application with the High Court, arguing that the case against them should be dismissed. Their legal representatives argued that the documents they made public, including a medical certificate, had been formally presented to the court by Zuma's own legal team, and there had been no request for these documents to be treated as confidential.

Three organisations dedicated to promoting media freedom – the Campaign for Free Expression, Media Monitoring Africa, and the South African Editors Forum – applied to be admitted as *amici curiae*. Additionally, Democracy in Action, another non-governmental organisation, was also admitted as *amicus curiae*.

Maughan and Downer argued that the private prosecution brought against them constitutes an abuse of process. Downer argued that this abuse of process was consistent with Zuma's "Stalingrad" tactic and that it had been instituted for an ulterior purpose which was to prevent him from carrying out his duties as a prosecutor. Maughan argued that the summons was invalid as there was no *nolle prosequi* certificate issued in respect of prosecutions against her and because Mr Zuma did not have the requisite legal standing to bring a private prosecution.

Maughan argued that the private prosecution was "a gross abuse of process as the summons in the private prosecution has been obtained for the ulterior purpose of intimidating, harassing and preventing her from performing her job as a journalist by freely reporting on Zuma's criminal trial."[105] In support of her argument, she referred to comments made by Zuma's representatives, associates and family and his affidavit which "demonstrates his animosity towards her" as he described her as "the propaganda machine of the media, a tool used by the NPA to perpetuate falsehoods, a hostile journalist who is incapable of balanced reporting and an 'anti-Zuma crusader'."[106] She also submitted that there were no prospects of success of a private prosecution and that it infringed the right of media freedom.

The *amici* – the Campaign for Free Expression, Media Monitoring Africa, and the South African Editors Forum – presented the court with three contextual factors to consider in assessing whether an abuse of process had occurred: the emerging trend of targeting journalists, particularly female journalists; the use of private prosecutions within the context of SLAPP suits; and the exercise of freedom of press under section 41(6) of the National Prosecuting Authority Act.[107] These *amici* contended that "Zuma's private prosecution of Maughan should be examined within the framework of SLAPP suits."[108] Zuma argued that SLAPP suits are not applicable in criminal proceedings, as the leading case (*Mineral Sands Resources*) "did not extend the scope of the defence to criminal matters or beyond the scope on which the United States developed it, it being limited to defamation suits".[109]

The Court found that the *nolle prosequi* certificates did not apply to Maughan and so a private prosecution was invalid.[110] Accordingly, the Court set aside the summons issued against Maughan. However, the Court did address all the other issues raised by Maughan in her attempt to have the matter dismissed. Of relevance is the Court's address of the issue of SLAPP suits.

The Court made reference to the Constitutional Court's decision in *Mineral Sands* on SLAPP suits which had held that "a consideration of both motive and merits play a role in the enquiry into an abuse of process".[111] It added that a court must consider the facts and circumstances of the case, the intention of the legislature in creating the private prosecution provisions, "the prosecutor's conduct, the nature of the alleged offence/s and the effect of the prosecution on the accused", amongst others.[112]

Accordingly, the Court held that when a private prosecution is brought for an ulterior purpose "it constitutes a breach of the principle of legality and amounts to an abuse of the process of the court".[113]

The Court recognised the applicability of SLAPP suits in our law. The Court further concurred with the *amici*'s argument that safeguards against SLAPP suits are imperative in criminal cases, particularly in the context of private prosecutions, given the absence of protective measures present in state-led prosecutions. The Court noted that, lacking these safeguards, criminal proceedings and the mere threat of them are frequently wielded as tools to intimidate, harass, censor, and silence critics.[114]

It agreed with the *amici* that private prosecution:

> "has all the elements of a SLAPP suit in that, it relates to her obligations as a journalist to report on matters in the public interest... It infringes on her right to freedom of expression, specifically, press freedom and the public's right to receive such information and has the effect of intimidating, harassing and silencing her as its ulterior motive".[115]

The Court stressed the importance of freedom of expression and a free press, and that the constitutional protection of this right requires a recognition of the need for protection against SLAPP suits brought against journalists. The Court further noted that South African jurisprudence has recognised that "it is quintessential to

the freedom of expression and freedom of the press to protect [against] abuse… intimidat[ion], censor and silenc[ing] [of] journalists by means of SLAPP suits", and that international bodies such the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Organisation for Security and Cooperation in Europe; the Organisation of American States Special Rapporteur; the African Commission's Special Rapporteur on freedom of expression and access to information and the UN Human Rights Council have recognised such "attacks on journalists, specifically female journalists" and that SLAPP suits are also a way in which journalists are targeted.[116]

Mazetti Management Services and Another v amaBhungane Centre for Investigative Journalism NPC and Others

On 3 July 2023, the High Court in Johannesburg handed down judgment, setting aside the urgent, *ex parte* and *in camera* order which directed amaBhungane, the respondents, to hand over certain documents to the Moti Group and interdicted them from reporting on such material.[117] The Moti Group had argued that the documents were stolen and sought the immediate return of the documents that contain confidential and proprietary information. AmaBhungane sought to have the matter urgently reconsidered, arguing that the order should not have been granted and should be set aside.

The central issue which the Court had to consider was whether the two orders against amaBhungane – that they return the documents and that they cease publishing articles based on the documents – were legitimately granted.

In assessing the appropriateness of the *ex parte* order, the Court made reference to the principle of "*audi alterem partem*," which essentially means that no adverse decision should be reached without affording the affected party an opportunity to be heard. It accepted that *ex parte* orders can be granted, but only in exceptional circumstances "when the giving of notice that a particular order is sought would defeat the legitimate object of the order".[118]

The South African National Editors' Forum, the Media Monitoring Africa Trust, and the Campaign for Free Expression were admitted as *amici curiae* and argued *inter alia* on the impact and harm of *in camera* and *ex parte* applications and orders in the context of investigative journalism, inclusive of the potential for discouraging the participation of the media in debates over matters of legitimate public interest; the potential for abuse of process or SLAPP suits; practical considerations around digital journalistic sources; and the availability of alternative remedies.

In finding that there was an abuse of process in seeking and obtaining the *ex parte* order, the Court stated that:

> "[t]he elephant in this case is not press freedom or a violation of privacy… it is a most egregious abuse of the process of court."[119]

The Court found that there was no justification for the Moti Group's belief that amaBhungane may destroy the documents because "there remains the inherent improbability of a journalist alienating the very evidence necessary to justify the publication of defamatory statements".[120]

The Court concluded by stating that:

> "a journalist who has received information in confidence is justified in refusing to perform an act which would unmask the source unless the refusal would be inconsistent with the public interest"[121] and that, "an interdict to restrain or forbid an intended publication by a journalist must be brought on appropriate notice to the journalist".[122]

The Court also reiterated that there had been an abuse of process and that "no cogent case" had been made out to compel amaBhungane to surrender the documents or for the Court to interdict amaBhungane from publishing any further articles based on those documents.[123] Accordingly, the Court set aside the original order in its entirety.

Sithole v News24

In July 2023, two South African businessmen, Lemane Bridgman Sithole and Michael Maile approached the High Court in Johannesburg, on an urgent basis, seeking an interdict against news media publication, News24 and a number of named journalists. The businessmen asked the Court to prohibit the journalists from referring to them as members of the "Alex Mafia". They claimed that this term was defamatory. In a scathing judgment that upheld freedom of expression and freedom of the press, the High Court dismissed the urgent application.[124]

During the apartheid era in South Africa, the Alexandra Youth Congress emerged as a significant political organisation actively participating in the struggle for a democratic South Africa.[125] Alexandra, often referred to as "Alex," is a township located in Johannesburg. Notably, the current Deputy President of South Africa, Paul Mashatile (Mashatile), was a member of the Alexandra Youth Congress, as were Sithole and Maile. When Mashatile held a position in the provincial executive during the 2000s, Sithole and Maile assumed prominent political roles. In 2004, they established three investment companies together with Mashatile and other former members of the Alexandra Youth Congress. These companies received benefits

from provincial tenders awarded during Mashatile's tenure in the provincial government.

On various occasions, Mashatile, Sithole and Maile have been referred to as part of the "Alex Mafia" by South African media.[126] In August 2022, Mashatile was cited in a Financial Times piece, characterising the "Alex Mafia" as a term that essentially described a collective of individuals who were comrades in the 1980s and later assumed government roles. According to Mashatile this term indicated a political association rather than any illicit activities.[127] A confidential source with direct and detailed knowledge of Mr Mashatile's history and the inner workings of the group known as "Alex Mafia", confirmed to Mr Pieter du Toit, a journalist at News24, that they are widely known as members of the group, and further stated: "Everyone calls them the 'Alex mafia'. They call themselves that. People in Alex call them that."[128]

The main issue to be determined was whether the urgent, interim interdict could be legitimately granted. In justifying the need for an expedited hearing, Sithole and Maile contended that while the term had been used previously, it was only in Adriaan Basson's August 2022 article for News24 that he introduced words like "gang," "mob," and "notorious", which necessitated bringing the application on an urgent basis.

The Court noted that Sithole and Maile had not instituted any legal proceedings in 2007 or August 2022, and that no defamation lawsuit had been instituted in August 2023. Accordingly, the Court held that the matter was not urgent. It said that "if the term 'Alex Mafia' was innocuous until the words 'gang', 'mob' and 'notorious' were added, then the relief sought should address this, which it does not".[129]

The Court determined that "this application is an abusive attempt by two politically-connected businessmen to gag a targeted newsroom from using a nickname – 'Alex Mafia' – by which [Sithole and Maile] are popularly known and called by the public, politicians, political commentators, other newsrooms, and themselves – and have been for at least 16 years".[130] It found that Sithole and Maile "have abused the court process, by claiming urgency where there is none, by materially altering their case in reply, and by seeking relief which will have no purpose other than to improperly punish and make a chilling example of [News24 and the journalists]."[131] The Court further noted that no action was taken against the other media houses which had also used the term "Alex Mafia".

The Court acknowledged that the case did not exhibit all the characteristics of a SLAPP suit but did display two of them, notably the "the ulterior objectives of punishment and deterrence".[132]

It added that, irrespective of the SLAPP nature of the case, "it is an abuse of process to bring a civil action or application for any purpose ulterior to the genuine protection or vindication of a right".[133]

Conclusion

Opposition to the work of human rights defenders is a global issue, that is also found in South Africa, where SLAPP suits are used to repress dissenting voices, destabilise and disintegrate movements. SLAPP suits are the misuse of the judicial system to intimidate, distract and silence public criticism through the improper use of the judicial process.

While SLAPP suits were first identified and found prevalent in other jurisdictions, they also occur in South Africa. In 2021, South Africa was reported as one of the countries with a high number of SLAPP incidences. However, very few people have successfully defended themselves against SLAPP suits. In instances where SLAPP suits have been litigated, the Courts have had to rely on the common law and Vexatious Proceedings Act to address litigation that stifles public participation. It is argued that this approach is deficient in properly responding to the *sui generis* nature of SLAPP suits.

While the *Mineral Sands* case was a good start in developing the common law doctrine of abuse of court process to include a SLAPP suit defence, there is a need for specific legislation to guide the courts in handling SLAPPs. The post-*Mineral Sands* cases discussed in this chapter not only demonstrate progressive jurisprudence on SLAPP suits but are also indicative of the need for anti-SLAPP legislation. Comprehensive anti-SLAPP legislation is recommended as an effective mechanism to discourage and outlaw SLAPP suits; create a test for SLAPPs; determine the onus of proof; create legal mechanisms for adjudication at an early stage in the litigation process; instruct courts on the procedural processes to be undertaken when a SLAPP is alleged; regulate costs and provide effective remedies for victims of SLAPP suits. The rationale for anti-SLAPP legislation is also supported by international, regional and national instruments.

The protection of public participation and advancement of the fundamental constitutional principles of a free and open society require that there be measures in place to protect human rights defenders, activists, journalists and public interest actors and their fundamental right to freedom of expression. These measures, we submit, must include the enactment of comprehensive anti-SLAPP legislation.

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Lessons on anti-SLAPP legislation from foreign jurisdictions

Summary

This section conducts a comparative analysis of anti-SLAPP legislation in foreign jurisdictions. It evaluates enacted and proposed anti-SLAPP laws in five distinct regions, namely: Canada, the United States of America (California & New York), Australia, the United Kingdom, and the European Union. In investigating these anti-SLAPP laws, the chapter also critically analyses how these laws have been applied in different jurisdictions.

This culminates in key lessons for South Africa from each jurisdiction. These lessons range from important aspects of anti-SLAPP laws that South Africa should consider, to what our country should avoid or be vigilant about. The foreign jurisdictions are a source of inspiration and guidance for South Africa's quest to implement its own comprehensive anti-SLAPP laws.

Canada is highlighted as the most progressive country in implementing anti-SLAPP legislation and South Africa is encouraged to draw inspiration from Canada for many reasons, one of which being its two-pronged test for SLAPPs.

The chapter canvases anti-SLAPP legislation across different Canadian territories. Ontario's Protection of Public Participation Act (PPP Act) obliges courts to terminate proceedings arising from public interest expression unless the plaintiff can prove merit and public interest. Alternatively, Quebec's Code of Civil Procedure allows the party against whom a lawsuit is brought to file a motion to dismiss where the lawsuit aims to silence public debate on issues of public interest. Canada passed the Federal anti-SLAPP law, in December 2020, which is applicable to any lawsuits lodged in the federal court.

This chapter also examines how the courts have interpreted New York's anti-SLAPP legislation, especially its retrospective application. The question of retrospectivity arises from the amendment of its previous (and narrower) legislation to one that has wider application and broader protection. New York courts have differed on various grounds about whether the new legislation can apply to suits occurring prior to its amendment. In examining another state, the chapter commends California for being one of the first states in the United States of America to enact anti-SLAPP laws. It, however, criticizes Californian laws for their lack of protection of rights beyond freedom of speech. Still, it is recognised that California has one of the

rights beyond freedom of speech. Still, it is recognised that California has one of the strongest anti-SLAPP statutes in the United States.

The chapter is also apprehensive towards the Australian statute on anti-SLAPP. It argues that it is restricted in its application to civil proceedings concerning public participation and fails to cover defamation suits, which are the most common form of SLAPPs. Furthermore, no definitions are included in the Act, making its interpretation a significant challenge.

The United Kingdom recently adopted new anti-SLAPP legislation while the European Union is yet to follow suit. Both the United Kingdom and European Union have previously attempted to address the problem of SLAPP suits through already existing laws. In the United Kingdom, this has resulted in a mix of results. The chapter investigates some of these efforts as well as its newly adopted anti-SLAPP legislation. The European Union, on the other hand, has issued a directive which acts as a guideline for what anti-SLAPP legislation should look like in its Member State countries. These recommendations are also analysed in this chapter.

Background

In the quest for South Africa to enact effective legislation to fight SLAPP suits, it is imperative to look at legislation adopted in foreign jurisdictions. The Constitution in section 39 provides that courts must consider international law and may consider foreign law when interpreting rights in the Bill of Rights.[134] Furthermore, section 233 obliges courts to consider international law when interpreting any legislation to prefer a reasonable interpretation that is consonant with international law.[135] The above obligations entrusted upon courts show that drafters of the Constitution were intentional about allowing the infusion of both international and foreign law, when adjudicating disputes relating to either the Bill of Rights or legislation. Below is an evaluation and critical analysis of the anti-SLAPP laws and proposed laws in five jurisdictions, namely Australia, the United States of America: California & New York, Canada, the United Kingdom and the European Union.

Canada

Canada is one of the leading countries in the enactment and implementation of comprehensive anti-SLAPP laws. Section 137(1)of Canada's Courts of Justice Act sets out Ontario's new anti-SLAPP law. This section stipulates that judges ought to dismiss proceedings arising from public interest expression unless the plaintiff proves, first, that there is merit to his/her claim and, secondly, that proceeding with the claim is in the interest of the public.[136]

Ontario's anti-SLAPP legislation titled the Protection of Public Participation Act ("PPP Act") provides a mechanism for parties defending a lawsuit to ask the court to dismiss the claim if it finds that the lawsuit is a SLAPP. The court may also award the defending party costs. Similar to Ontario, Quebec also enacted the Code of Civil Procedure which allows a party defending a lawsuit to file a motion to dismiss the claim aimed at silencing public discussion on a matter of public interest. If the court finds that the lawsuit is a SLAPP suit, the court may dismiss it and award costs to the defendant.

Other Canadian provinces and territories are also considering implementing similar laws to protect against SLAPP suits. In the case of *Ontario Limited v Pointes Protection Association* from 2020, the Supreme Court of Canada released its first decision regarding the interpretation of Ontario's law on SLAPPs. The Court found that the right to freedom of expression is a fundamental right that allows individuals to express themselves for the safeguarding of a healthy democracy in the context of a democratic nation.[137]

It further found that section 137(1) of the Court of Justice Act was enacted to regulate SLAPP proceedings to protect the right to freedom of expression and the fundamental value of public participation in a democracy.[138] As a result, the Court found in favour of the Pointes Protection Association who pleaded that a developer's lawsuit instituted against them for opposing the developer's proposed subdivision development, which would result in ecological and environmental damage to the region, constituted a SLAPP suit and stood to be dismissed. This judgement was the first to give guidance to Canadian courts on the interpretation of anti-SLAPP legislation.[139]

In December 2020, Canada passed the Federal Anti-SLAPP law which applies to lawsuits filed in the federal court in Canada. This law also allows parties defending a suit to ask the court to dismiss a lawsuit intended to silence public discussion on matters pertaining to public interest. This law further extends to the provision of recovery of costs and damages for those who have been subjected to SLAPP suits. In Canada, courts use a two-part test to establish whether a lawsuit is a SLAPP suit. This test was established in the Supreme Court judgment of *Grant v Torstar Corp*.

The test is as follows:

1. The defendant must prove that the lawsuit arises as a result of an expression made by the defendant that relates to a matter of public interest.
2. If the defendant can prove the first leg of the test, the burden then shifts to the plaintiff to show that:

- There are grounds to prove that the plaintiff has a valid claim; and
- The harm suffered by the plaintiff because of the expression is serious enough to outweigh the public interest in protecting expression

Lessons for South Africa

South Africa should look to Canada for inspiration for its anti-SLAPP legislation. Canada's anti-SLAPP legislation provides a two-fold approach to address SLAPP suits. First, it identifies these frivolous suits at an early stage. When a defendant believes they are being silenced through a SLAPP suit, they can request an interlocutory process during the main litigation. This allows a court to assess whether the case is indeed a SLAPP suit, whether it has merit, and if it should proceed to a full trial.

This interlocutory process serves as a crucial safeguard, preventing the misuse of legal proceedings to stifle public participation. It offers an effective means to dispose of SLAPP suits before they can cause further harm to freedom of expression and public engagement.

In South Africa, we do not have a similar system in place. Instituted suits therefore undergo a protracted legal process, resulting in an undue burden on those targeted by the SLAPP. Therefore, South Africa can adopt both the two-pronged approach as inspired by Canada as well as the ability to facilitate a process for the early dismissal of SLAPPs.

United States of America: California

California was the first state to enact anti-SLAPP legislation in 1992 and, since then, its law has been considered one of the strongest in the United States. The anti-SLAPP legislation in this jurisdiction provides a broad scope of protection in that it provides protection to individuals and organisations engaged in a wide range of speech related to matters of public interest. This includes speech made in connection with political, social, or environmental issues, as well as speech made in the context of scientific or consumer protection issues.

California's anti-SLAPP legislation also provides a level playing field that helps ensure individuals and organisations who speak out on matters of public interest are not silenced by the threat of a lawsuit. The law ensures that defendants are not burdened with the costs of defending themselves against meritless claims and that plaintiffs are not able to use the legal system to harass or intimidate their critics.

California's anti-SLAPP law is contained in the Code of Civil Procedure section 425(16) To challenge a SLAPP suit in California, a defendant must show that they are being sued for

> "any act... in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue."[140]

To evaluate an anti-SLAPP special motion to strike, courts use a two-part analytical framework. The first part is known as the "protected activity" prong, and it requires the defendant to demonstrate that the activity that led to the plaintiff's legal action falls within one of the below four categories specified in section 425(16)(I)

1. any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
2. any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
3. any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or
4. any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Once the first part is satisfied, the burden of proof shifts to the plaintiff to establish the second prong, which requires them to demonstrate that there is a likelihood of success on the claim.[141] Additionally, if the defendant prevails on a SLAPP special

motion to strike, they are entitled to recover their attorneys' fees and costs incurred in bringing the motion, which reinforces the strength of the law.[142]

California courts look at factors such as whether the subject of the disputed statement was a person or entity in the public eye, whether the statement involved conduct that could affect large numbers of people beyond the direct participants, and whether the statement contributed to debate on a topic of widespread public interest. Certainly, statements educating the public about or taking a position on a controversial issue in local, state, national, or international politics would qualify.

Overall, the anti-SLAPP legislation in California is widely regarded as one of the most potent in the United States and has played a crucial role in safeguarding the freedom of speech and petition and preventing people and entities from being silenced by meritless lawsuits.

Lessons for South Africa

Some of the important contributions that the California legislation brings to anti-SLAPP jurisprudence include:

- Introducing an amendment to the legislation that emphasises the importance of allowing for a broader interpretation of anti-SLAPP legislation;
- Providing a set of categories in which conduct is eligible to be considered a SLAPP;
- Shifting the burden of proof from the defendant to the plaintiff once any one of the requirements has been proven; and
- Creating a provision for the recovery of attorney fees and costs for successful SLAPP defences.

The legislation is, however, not without its flaws. It mainly protects freedom of speech, thereby paying limited attention to other rights that may be exercised in the public interest and yet curtailed through SLAPP suits. It also has a high burden of proof for plaintiffs, requiring that they prove a likelihood of success.

It has been argued that the legislation also has limited protection for commercial speech, limited protection for individual defendants and is open to the potential of abuse due to the broadness of the legislation and lack of uniformity with other states.

United States of America: New York

In 2020, the New York Governor amended its anti-SLAPP legislation which was first enacted in 1992 to address the "threat of personal damages and litigation costs" from SLAPP suits used as "a method of stifling" participation in public affairs.[143] Prior to the 2020 amendments, the New York anti-SLAPP legislation was limited to cases brought by plaintiffs seeking public permits, zoning changes, or other entitlements from a government body. The New York anti-SLAPP laws have since broadened and now apply to claims "based upon… lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition".[144] In this regard, "an issue of public interest" would mean "any subject other than a purely private matter." The new amendment potentially widens the claims under the anti-SLAPP law to include meritless defamation claims against *inter alia* whistleblowers, journalists, and sexual misconduct claimants.

New York's previous anti-SLAPP law suffered from two major flaws. Firstly, the law was too narrow in that it applied only to lawsuits where parties were seeking permits, zoning changes, or other public permissions from New York State. This meant that the statute didn't apply to claims against defendants based on the exercise of their free speech. Secondly, it did not provide a meaningful remedy to defendants named in lawsuits within the scope of the statute. The initial New York Civil Rights Law Section 70-a(1)(a) gave parties the potential to recover damages and attorney fees when "the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of law".[145]

The 2020 amendment brought the following notable changes to the New York anti-SLAPP protections:

- Expanding the statute beyond actions "brought by a public applicant or permittee," to apply to any action based on a "communication in a... public forum in connection with an issue of public interest" or "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition";[146]
- Confirming that "public interest" should be construed broadly, including anything other than a "purely private matter";[147]
- Requiring courts to consider anti-SLAPP motions to dismiss based on the pleadings and "supporting and opposing affidavits stating the facts upon which the action or defense is based";[148]
- Providing for a stay of all proceedings—including discovery, hearings, and motions—pending determination of a motion to dismiss an action under the anti-SLAPP law, except that the court may order limited discovery where necessary to allow a plaintiff to respond to an anti-SLAPP motion.[149]

In another recent development, on May 12, 2022, Senator Hoylman introduced a new bill to modify the New York anti-SLAPP law, with the objective of providing clarity regarding its retroactive applicability by adding language that explicitly

establishes retroactive effect.[150] The newly proposed amendments are still in the early stages of the legislative process, and it is uncertain whether they will garner enough support in the legislature to become law and receive the Governor's approval, or if so, how long it will take for them to take effect. The current version of the amended anti-SLAPP law was initially introduced on January 9, 2019, passed on July 22, 2020, and came into force on November 10, 2020.[151]

Lessons for South Africa

One of the important aspects in the interpretation of the New York anti-SLAPP laws by the courts is the question of retrospectivity. This may also be an important aspect for the South African Legislature to consider. In *Palin v. New York Times Company*, for instance, when initially passed, there were concerns about whether the amended legislation would apply to actions already pending at the time it became effective, or if it would only have effect in subsequently filed actions. Commentators noted that due to the recent amendments, the courts would need to determine whether the revised statute would have a retroactive effect.

The Court found that the amended anti-SLAPP law did apply retroactively to actions pending as of the date the amendments were passed.[152] The Court held:

> "It is clear that the [amended law] is a remediate statute" that "should be given retroactive effect in order to effectuate its beneficial purpose" and that "[o]ther factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be."[153]

Over the following 14 months preceding the amendments to the legislation, almost 20 other state and federal courts had to consider the same question and came to the same conclusion. However, on March 10, 2022, the First Department deviated from the established consensus and ruled that the changes made to New York's anti-SLAPP law in 2020 would not have retroactive applicability.[154] In *Gottwald v. Sebert*, a case involving defamation claims brought by music producer Lukas Gottwald, known as Dr. Luke, against the pop star Kesha Rose Sebert, known as Kesha, the First Department held that the anti-SLAPP law does not apply to claims commenced before the November 2020 amendments were passed.[155]

According to the Court, there was not enough evidence to support the notion that the legislature intended for the recent amendments to the anti-SLAPP law to be applicable retroactively to pending claims, such as those made by Dr. Luke against Kesha.[156] The Court further held that clear evidence indicating that a law was intended to have retroactive application would be necessary to overcome the strong presumption against retroactive application of laws. The court explained that, although there was evidence suggesting that the amendments were meant to expand the prior anti-SLAPP provision, the retroactive application of new statutes is generally discouraged to such a degree that it must be expressly stated in the statutory text.[157]

This highlights another important lesson for South Africa – our anti-SLAPP laws must, from the onset, be broad enough in their scope to anticipate the various ways in which SLAPPs can occur and to adequately respond to the issues brought about by SLAPP suits.

Australia

Australia partially recognises SLAPP suits through its anti-SLAPP legislation: the Protection of Public Participation Act, 2008 ("the Act"). The Act was passed by the Australian Capital Territory ("ACT"), just one state in Australia. According to research conducted, other jurisdictions in Australia are yet to pass similar or comparable legislation.

The Act was passed after vast media coverage on a high-profile case by a Tasmanian timber company against some environmental activists and individuals.[158] This led to an outcry by various parties including public interest lawyers and activists in the mining sector, that government should take positive steps to address and deal with such lawsuits to protect public participation which was under major threat.

This was, however, not the only SLAPP litigation aimed at silencing activists and quashing public participation. There were several other cases before this that were documented such as the case of *Takhar v Animal Liberation SA*,[159] and *Australian Wool Innovation Ltd v Newkirk*. Importantly, when the Act was under development, the government was sure to follow public consultation and, in this, it relied heavily on views expressed by the Wilderness Society (environmental activists involved in the Tasmanian case mentioned above). This is an important lesson to be learnt for South Africa. In the enactment of South African anti-SLAPP laws, the public participation process should involve activists, community-based organisations, NGOs and all other relevant parties who have experienced, are at threat of experiencing or have been affected by SLAPP suits.

The Protection of Public Participation Act, 2008 came into effect in 2016 and its main purpose is to protect public participation as well as dissuade or discourage civil proceedings which would objectively (when considered by a reasonable person) be considered as hindering and interfering with public participation and engagement.

Unfortunately, the Act does not have a "definitions" section which would have defined important terms used in the Act. This is a disadvantage because it makes it more difficult to navigate through the content and get an understanding and interpretation of the terms. This also leaves defining terms in the Act to the discretion of the court without any guidance, which can be problematic.

The Act does not, however, apply to defamation suits, which are some of the most common manifestations of SLAPP suits. Defamation suits make up a majority of SLAPP suit claims, along with damages claim particularly instituted by private companies . Claims covered by the Act are thus very limited. An advantage to the narrow legislation, however, is the ease with which courts can interpret it due to its limited focus and application.

Section 9 of the Act imposes a civil penalty to a plaintiff if the court is satisfied that the defendant's conduct constituted or amounted to public participation and that the proceedings were started or maintained against the defendant for an improper purpose. The amount payable in section 9 differs from case to case but is set out in the regulations.

The penalty is, however, paid to the Territory and not the defendant. If the defendant is successful in defending the claim, they would only be entitled to legal costs incurred for defending the claim. The penalty imposed on the plaintiff could be a good deterrent to instituting such claims.

Lessons for South Africa

The most notable feature of the Australian anti-SLAPP Act is that the court may order the plaintiff to pay a financial penalty if it is indeed proven that the litigation was brought for an improper purpose. However, this penalty is not payable to the defendants but to the Territory. A costs order can however be paid to the defendants by the plaintiff for legal costs incurred in defending the action, if the matter does proceed and is heard in court. This could be useful within the South African context.

The Act has, however, also been criticized for its lack of effectiveness. There are several reasons for this. Firstly, it has been argued that the Act fails to provide timeous relief to defendants faced with SLAPP suits, after having engaged in public participation. The argument is supported by the following factors:

- Most SLAPP suit actions are settled amongst the parties and do not proceed in court, and thus an assessment of the merits cannot be done;
- SLAPPs are often put forward as "legitimate claims"; and
- Defamation suits are not covered by the Act, which is the most common type of SLAPP suit.

On the other hand, it is possible that the enactment of the Act itself may have discouraged corporations from instituting SLAPP suits against parties. Finally, there may not have been any dispute which has yet led to or required the Act to be invoked. From research conducted, there is still no case law available which has applied provisions of the Act and this makes it difficult to determine its effectiveness. The Act has been reviewed on several occasions and it has even been republished in 2016. Yet, there has still been no sign of litigation where it has been invoked.

The onus of proof in the Act is unfortunately on the defendant. It is also upon the defendant to prove that the plaintiff's purpose was improper. This is very onerous and difficult to prove. Instead of the Act providing relief to targets of SLAPP suits,

who include whistleblowers, activists, journalists and others, it places an additional burden upon them. It is highly probable that this is the core reason of activists' non-reliance on the Act and thus the Act's redundancy.

This is a powerful lesson for South Africa to learn in how it crafts its legislation. The anti-SLAPP legislation should not be unduly burdensome on those who need the Act's protection the most. Furthermore, the Act must be comprehensive in nature and balance competing rights and freedoms.

United Kingdom

A recent development, since October 2023 has resulted in a partial recognition of SLAPP suits in the UK. The Economic Crime and Corporate Transparency Act[160] was amended to provide for protection against SLAPP suits as they relate to economic crimes. Although very limited and narrow, this protection is a significant first step towards full recognition of SLAPPs in legislation which most say is sorely needed. The new legislation provides for the early dismissal of cases involving economic crimes if a presiding officer in court is of the view that a claim amounts to an abuse of court process.[161]

Furthermore, in providing protection, the law offers a definition of a SLAPP suit as well as cost protection for victims of these suits.[162] There are plans by the UK government to provide for a more comprehensive protection that is not limited to SLAPPs involving economic crimes. The main reason the government decided to prioritise problems arising from economic crimes is that statistics have shown that SLAPPs are more common with cases concerning economic crimes.[163]

The UK government describes SLAPPs as "an abuse of the legal process, where the primary objective is to harass, intimidate and financially and psychologically exhaust one's opponent via improper means" to "evade scrutiny in the public interest".[164]

The United Kingdom does not have specific anti-SLAPP laws at a national level designed to prevent individuals or organisations from using lawsuits to silence or intimidate critics, activists and whistle-blowers.[165] It is important to note that there were some provisions within other pieces of existing legislation, other than in the Economic Crimes and Corporate Transparency Act that offer some form of protection against SLAPP suits.[166] One of these laws is the Defamation Act of 2013. This law reformed the laws of the territories of England and Wales by introducing

a new "serious harm" test in claims of defamation.[167] This test requires a claimant in a case of defamation to prove that a statement caused harm or is likely to cause harm to their reputation rather than merely stating that a statement is defamatory.[168]

The concept of serious harm has transformed the laws around defamation in England and Wales by establishing a key provision in the Act. The Defamation Act of 2013 does not define "serious harm", though the courts have offered guidance in establishing what "serious harm" means or entails. In the case of *Lachaux v Independent Print Ltd and Another* [2019] UKSC, the Supreme Court of the United Kingdom held that "serious harm" means harm that is "more than trivial" and that it must be "substantial" in order to meet the threshold for a defamation claim.[169] Furthermore, the Court also noted that the seriousness of the harm can be determined by looking at the nature of the statement, the extent of its publication, and the gravity of its impact on the claimants' reputation.[170] Essentially, the court will look at the statement made and the effect the statement has had on the claimant in order to establish the degree of seriousness.[171]

The Civil Procedure Rules of the UK provide for a costs sanction in cases where a party engages in unreasonable behaviour.[172] This behaviour includes unmeritorious claims or making frivolous applications to the courts.[173] These provisions in the Civil Procedure Rules are interpreted to deter parties from bringing SLAPP suits.[174]

Prior to the Defamation Act of 2013, courts had to determine on a case-by-case basis a balancing of rights in defamation suits. In *Lord Aldington v. Tolstoy, Watts QBD 30 Nov 1989* for instance, the Claimant, Toby Low, 1st Baron Aldington, brought a suit against defendants, Count Nikolai Tolstoy and Nigel Watts for accusations of war crimes. The court found in favour of the claimant and awarded damages of 1.5 million pounds which bankrupted the defendants. The European Court of Human Rights overturned the award due to its excessive nature, ruling that such excess fails to balance the freedom of expression with reputational protections.

In *Reynolds v. Times Newspapers Ltd*. [2001] 2 AC 127, the Court established a 10-factor test for determining the qualifications for the defence of qualified privilege. In this matter, Taoiseach (Prime Minister) Reynolds of Ireland brought a suit against The Times for defamation. The ten factors for the defence of qualified privilege to be considered are: 1) the seriousness of allegation, 2) the nature of the information, 3) the source of the information, 4) steps taken to verify information, 5) status of the information, 6) urgency of the matter, 7) whether comment was sought from plaintiff, 8) whether article contained perspective of plaintiff, 9) the tone of the article, and 10) the circumstances of the publication including timing. These 10 factors were later abolished by the Defamation Act of 2013.

Lessons for South Africa

There are various strengths to the proposed anti-SLAPP measures in the United Kingdom. The requirement that harm suffered must be "serious harm" creates a higher threshold for defamation suits. This disqualifies claims that fail to provide evidence of serious harm and may therefore be a SLAPP. However, it is important to note that those who are subjected to SLAPPs nevertheless incur the financial liability

of trial and this makes activists and journalists vulnerable to SLAPPs. The defences in the Defamation Act also provide protection for activists, human rights defenders, and journalists. If they can provide evidence for any of the defences, then the SLAPP can be dismissed by the court. However, providing evidence for a defence is a lengthy process that has the effect of delaying the work done by human rights defenders, journalists and activists. Furthermore, during this lengthy process, costs accumulate thus burdening defendants.

An important lesson that can be learnt is that there should be a standard or threshold for harm in cases of defamation. This will result in various legal actions being dismissed. It is important to note that in South Africa, activists are often under-resourced and may not have the funds to adequately defend legal proceedings. The Economic Crimes and Corporate Transparency Act provides a significant lesson for South Africa as it also addresses SLAPP suits manifesting through criminal matters. While criminal forms of SLAPPs are common, anti-SLAPP legislation addressing it is not, even in other foreign jurisdictions. The Act therefore presents a significant development to the legislative protections against SLAPPs. As South Africa navigates SLAPP suits and as we begin to imagine what protections against SLAPP suits should look like, we need to consider both civil and criminal forms of SLAPPs and provide protection against both.

European Union

Although there is no formal recognition of SLAPP suits through legislation amongst several member states in the EU, SLAPP suits exist, nonetheless. SLAPP suits have been tracked as more prevalent in countries such as Italy, Poland, France, Romania, Portugal, Bulgaria, Belgium, Slovenia and Spain. A regionwide response has therefore become necessary to deal with this increasing trend. It has become clear that the lack of a procedural system, which serves as a safeguard against SLAPP suits in the EU, not only strains the judicial system, but also renders victims of SLAPPs vulnerable. It is insufficient for the victims of SLAPPs to rely on the general, unstructured defences offered for actions or applications of a different nature.

The proposal for issuing a Directive on SLAPPs is a response to the prevalence of SLAPP suits and the need for states to respond. From a European Union context, a directive is a legislative mechanism designed to address a specific goal that EU countries need to work towards reaching or achieving. EU directives are not designed to be prescriptive for countries as it remains within the country's prerogative as to how to craft the law to meet this common goal. An anti-SLAPP directive is therefore aimed at protecting rights such as the right to free speech which may come under threat when a specific lawsuit is instituted, particularly on issues in the public interest.

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at protecting rights such as the right to free speech which may come under threat when a specific lawsuit is instituted, particularly on issues in the public interest.

The proposed EU Directive on SLAPP suits is intended to encompass and address SLAPP suits in all EU states providing procedural and substantive guidance in dealing with SLAPP suits to the EU. Through the Directive, SLAPP suits would be litigated in European Courts with cross border implications.

Reports by NGOs, specifically the Coalition Against SLAPPS in Europe (CASE) reported that at least 570 SLAPP suits have been filed in approximately 30 EU states in the period between 2010 – 2021.[175] The courts may treat these cases differently, not only because of the difference in nature and jurisdiction, but more importantly, because there is no formal legal recognition of SLAPP suits in legislation. Similarly, an organisation called Article 19 conducted research in 11 countries across the EU and reported the rising trend of SLAPP suits in the EU.[176]

One of the well-known cases in the EU is that of an investigative Maltese journalist, Daphne Caruana Galizia. She was assassinated in 2017 but faced approximately forty (40) civil and criminal defamation lawsuits, in the US, the UK and Malta prior to her unfortunate death. The pending suits were handed over to her immediate family. It was reported that her premature death was closely linked to her work and the SLAPP suits against her. This is a tragic example of the resultant effects of SLAPP suits. Galizia's death prompted the EU to take decisive steps towards legislating against these abusive suits. Another example of persisting SLAPPs aimed at silencing journalism is that of Polish Newspaper, Gazeta Wyborcza, who was reportedly facing approximately 60 defamation lawsuits by the end of 2021.

Several other journalists, activists, human rights defenders and NGOs are under the same threat as that of the above examples. Although states have set some standards on protecting journalists and other activists against SLAPPs, these are undoubtedly insufficient.

Despite the absence of anti-SLAPP legislation, the European Court of Human Rights has recognised the importance of journalists and the dual role they play of providing information to members of the public on issues that are of public interest, and acting as a public watchdog. As a result, the Court has acknowledged that members of the press deserve a higher level of protection of their right to freedom of expression (article 10). This was demonstrated in the *Axel Springer AG v Germany* decision.[177]

In *Axel Springer AG v Germany*, the applicant, a media company, published an article on controversial dealings between Germany and Russian state authorities on the German-Russian consortium NEGP. The consortium was controlled by a Russian company with a registered office in Switzerland. The company was to build a gas pipeline for Russia to supply Germany with gas. The agreement between the two states appeared unlawful and concluded without adequate consultation. It also appeared to be a rushed deal as it was passed by the German government before the national elections, to avoid it being passed to the new government, should the current officials not be re-elected. The published article exposed the German Federal chancellor Mr. Schroder for concluding the deal for his personal benefit. Mr. Schroder approached the court seeking an order prohibiting the further publishing of certain portions of the article. The matter was argued in lower courts.

The European Court of Human Rights acknowledged the important role played by journalists and media houses in strengthening democracy. It held that:

> "Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".[178]

In *Magyar Helsinki Bizottag v Hungary*,[179] the European Court of Human Rights acknowledged that NGOs, researchers and bloggers and even social media users also enjoy the same or similar protection as that of journalists and media houses. It held that such entities also perform a relevant social watchdog function, and thus essential to the public's access to information in the public interest.[180] The above-mentioned cases are indicative of the vulnerability of journalists, human rights defenders, activists and NGOs against SLAPP suits and highlight the essential role they play in the furthering of human rights such as the right to freedom of expression. The need to enact legislation for the EU therefore cannot be gainsaid.

Lessons for South Africa

There are key themes that emerge from the proposed legislation for the EU that could be instructive for South Africa. These include:

- A clear motivation for enacting anti-SLAPP legislation: Consistency and uniformity amongst all member states; a clear gap in legal protection (safeguards) for victims; the misuses of defamation suits to silence – SLAPPs usually manifest in defamation suits; recognition of SLAPPs constituting a threat the EU democracy and to legal order; recognition that SLAPP suits directly infringe on fundamental rights such as freedoms of expression, association; and information; protection of the EU law and ensuring its effectiveness across all member states; strengthening judicial cooperation between members states and encourage uniformity when dealing with SLAPP suit disputes.
- Guidelines on the interpretation of the legislation: The legislation should acknowledge the two main elements of SLAPP suits as the effect SLAPP suits have on public participation and secondly, the motive of the suit and its abusive nature; encouraging a balance of rights of parties (the plaintiff and defendant) in the SLAPP suit and ensuring that the rights and interests of both are adequately protected; the legislation offers a broad scope of protection including protection for claims arising out of disputes on civil and commercial matters; the legislation accommodates claims irrespective of the nature of the action and offers an expansive definition of public participation in respect of matters which are of public interest.
- Inclusion of fundamental provisions in the legislation: The proposed legislation offers increased protection and support of SLAPP suit victims, particularly financial support for victims to be able to defend themselves in the suit; ensure that there are safeguards put in place to prevent the abuse of court processes including exceptions where the motion for dismissal would not be possible; rules on the fair distribution of legal costs; prohibiting damages claims exceeding the caps set on cases on the exercise of freedom of expression; procedural mechanisms that allow SLAPP suits to be dismissed at an early stage as a way of addressing the harmful effects of SLAPPs towards victims; providing for claimant to hold the burden of proving the existence of the elements of a valid claim; proposing a fair awarding of legal costs for the victim of the SLAPP suit and similarly for the claimant, in case they have a valid legal claim; deterrent measures are put in place;

Another important provision proposed for the EU anti-SLAPP legislation is the inclusion of remedies for EU defendants for SLAPP suits instituted in other countries outside of the EU. This is particularly progressive. Living within a globalised society, impacts on human rights can take place in any country at the hands of, for instance, a multinational corporation. It is for this reason that it is essential for human rights defenders and others who express dissent, to be protected from SLAPP suits arising because of the expression of dissent. It would also be progressive for South Africa to go a step further by instituting not only remedies for South Africans SLAPPed in another country, but also place an obligation on South African companies and entities to deter them from instituting SLAPP suits beyond our borders.

Conclusion

Various foreign jurisdictions, including Australia, the European Union, the United Kingdom, and the United States, have recognised the pervasive threat of SLAPP suits to public participation, freedom of expression and democracy in general. While Australia has enacted limited anti-SLAPP legislation through the Protection of Public Participation Act in the Australian Capital Territory, its narrow scope and procedural challenges highlight the need for broader and more effective measures.

The EU is moving towards a comprehensive directive-based protection, underscoring the necessity for uniformity and robust safeguards across member states. This proposed directive would provide procedural and substantive guidance, enabling early dismissal of SLAPP suits and protecting cross-border litigants. The high-profile case of Daphne Caruana Galizia illustrates the chilling effect of SLAPP suits on journalism and activism, driving the EU's legislative efforts.

In the UK, reforms such as the Defamation Act of 2013, the Economic Crime and Corporate Transparency Act as well as existing Civil Procedure Rules offer some protection by imposing higher thresholds for defamation claims and penalising frivolous litigation, amongst others.

In the USA, anti-SLAPP laws are more developed, with states enacting legislation to protect individuals from meritless lawsuits intended to silence criticism. These laws typically provide mechanisms for early dismissal, recovery of legal fees, and sanctions against plaintiffs who file SLAPP suits. The state of California is particularly notable for its robust anti-SLAPP statute, which has been effective in dismissing frivolous claims and protecting free speech. However, the lack of a federal anti-SLAPP law means protections vary significantly across states.

These responses in foreign jurisdictions offer critical insights for South Africa in developing its own anti-SLAPP framework. Key themes include the necessity for clear legal definitions, balanced protections for plaintiffs and defendants, mechanisms for early dismissal and financial support for victims of SLAPP suits. Learning from these examples, South Africa can ensure its legislation effectively deters SLAPP suits, upholds fundamental rights and strengthens democracy by safeguarding public participation and freedom of expression.

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Proposed Model Law

A MODEL LAW FOR PROTECTION FROM STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION

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Title

Protection from Strategic Litigation Against Public Participation

Long title

To legislate against the use of strategic litigation against public participation; to provide for the types of legal proceedings and / or conduct that may constitute strategic litigation against public participation ("SLAPP legal proceedings"); to regulate how courts identity and adjudicate these legal proceedings; to provide for remedies for victims of SLAPP legal proceedings; to provide for measures to deter the institution of SLAPP legal proceedings; and to provide for matters that are connected therewith.

Preamble

RECOGNISING THAT:

- South Africa's constitutional democracy is built on the principles of transparency, accountability and public participation;

- The State is obligated to promote and protect constitutionally recognised rights such as the right to dignity, the right to freedom and security of the person, the right to freedom of expression, the right to freely assemble and demonstrate, the right to freedom of association and the right of access to information;

- South Africa is obligated under international law, including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, amongst others, to protect and promote civil and political rights including public participation, freedom of expression and an open and free civic space;

- Strategic litigation against public participation threatens constitutionally protected rights, undermines public participation and negatively affects the constitutional principles of a free and open society; and

- There is often an economic power disparity between those acting in the public interest and powerful actors;

AND AIMING TO:

- Deter legal proceedings aimed at hindering and / or punishing public participation;

- Eradicate the legal repression of activists, journalists and those acting in the public interest; and

- Facilitate the early dismissal of strategic litigation against public participation to minimise the harm caused by such litigation;

AND BEARING IN MIND THAT:

- Everyone has a right to access courts;

- Courts, tribunals and forums have an obligation to promote public participation and the values that underlie an open and democratic society based on human dignity, equality and freedom;

- International and regional obligations mandate South Africa to put measures in place to ensure the rights to freedom of speech, peaceful assembly and protest are promoted and protected;

- The intimidation of activists takes various forms; and

- SLAPP legal proceedings have an adverse impact on activists, journalists and civic space;

AND IN ORDER TO:

- Align South Africa to international standards of the protection of human rights defenders against reprisals and the promotion of public participation which requires a safe and open civic space;

- Promote the protection of members of the public who exercise and uphold a constitutional right in the public interest;

- Prevent abusive court processes; and

- Distinguish SLAPP legal proceedings from other existing laws such as the Vexatious Proceedings Act 3 of 1965.

CHAPTER 1: DEFINITIONS AND PURPOSE

Section 1
Definitions

In this Act, unless the context indicates otherwise –

a. **Amicus curiae**: means "friend of the court". It refers to a person or an organisation who is not a party to a legal case but offers their expertise or opinion to assist the court in understanding complex legal issues or providing additional information that may be relevant to the context of the case.

b. **Applicant**: means the respondent in the lawsuit or the party whom court proceedings are brought against.

c. **Damages**: means the monetary compensation or relief sought by the party who has been wrongfully subjected to a SLAPP suit. The damages may include, but are not limited to, reimbursement for legal costs, compensation for reputational damage, redress for emotional distress, reparation for lost opportunities, and, where appropriate, punitive damages as determined by the court.

d. **Expression**: means any form of speech, communication, or activity that is protected by the right to freedom of expression as guaranteed under Section 16 of the South African Constitution. This can include spoken or written words, opinions, artistic creations, political commentary, peaceful protests, public demonstrations, and other forms of public participation and engagement on matters of public interest.

e. **Intervening party**: means any person entitled to join as a party or liable to be joined as a party in the proceedings.

f. **Public interest**: means any matter that is of concern to the general public. This includes but is not limited to:

    i. Damage or potential risk to public health, safety, the environment, climate, or the enjoyment of fundamental rights;

    ii. Actions of individuals or organisations that draw public attention or pertain to matters of public concern;

    iii. Issues currently under review or consideration by legislative, executive, or judicial bodies, or any other public official proceedings;

iv. Accusations of corruption, fraud, money-laundering, tax evasion, or avoidance; or

v. Criminal activities or any other financial, business, or political wrongdoing.

g. **Public participation**: means the active involvement of individuals or groups in matters of public interest. This includes but is not limited to demonstrations, movement building, public engagements, petitions, complaints, participation in public hearings, academic research, journalism and whistleblowing activities concerned with matters of public interest.

h. **Remedy**: means the manner in which a person who has been wronged can seek justice and be compensated for the harm they have suffered.

i. **Respondent**: means the applicant in the legal proceedings or the party who initiates the proceedings.

j. **Rules board**: means the statutory body established by the Rules Board for Courts of Law Act 107 of 1985, established to amend, review and repeal the rules of court, subject to approval by the Minister of Justice and Constitutional Development or an official designated to carry out their duties

k. **Strategic litigation against public participation (SLAPP)**: means meritless legal proceedings or a threat of legal proceedings brought primarily to delegitimise, silence, harass, punish, drain resources or demobilise and dissuade individuals or organisations that engage in active public participation.

General commentary

These terms are to be interpreted in line with existing legislation and rules governing civil procedure in South Africa.

Section 2
Purpose

The purpose of this Act is to –

1. protect and promote an open and democratic society where individuals and organisations are free to engage in public participation;

2. prevent and deter the use of the legal mechanisms to undermine these fundamental rights through the filing of frivolous and abusive legal proceedings;

3. create comprehensive legislation against SLAPP suits;

4. determine the court procedure for adjudication of allegations of SLAPP legal proceedings;

5. facilitate the expeditious dismissal of SLAPPs in order to minimise the harm they could cause;

6. provide remedies for those exposed or subjected to SLAPP legal proceedings; and

7. provide for matters connected therewith

CHAPTER 2: SCOPE OF APPLICATION

Section 3
Scope of Application

In this Act, unless the context indicates otherwise –

1. This Act applies to civil proceedings that have the effect of infringing on a constitutionally protected right exercised in the public interest.

General commentary

While this recommended law covers only civil legal proceedings, we recognise that there are many instances in which activists are targeted through the institution of criminal proceedings and / or through the abuse of the criminal justice system for purposes of discouraging their public participation. Therefore, we urge Parliament to consider also incorporating these legal proceedings within its efforts of outlawing SLAPP suits.

Section 4
Interpretation

1. In interpreting any provision of this Act, courts, forums and tribunals must prefer any reasonable interpretation that aligns with the Preamble, the purpose of the Act and overall spirit of this Act over any interpretation that is contrary.

2. In determining when this Act can apply, the meaning of 'public interest' and 'public participation' must be interpreted broadly in line with the Constitution.

CHAPTER 3: APPLICATION AND PROCEDURE

Section 5
Application

1. A party against whom SLAPP legal proceedings are brought, may apply for the early dismissal of the proceedings on the basis that it is a SLAPP legal proceeding.

2. The Rules board for courts of law shall establish timeframes for the filing of applications for early dismissal. Such timeframes must be in line with court rules governing interlocutory applications.

Section 6
Test for Strategic Litigation Against Public Participation

1. A strategic litigation against public participation claim will be determined by a court based on the motive and merits of every claim.

2. Both the motive and merits of each claim are relevant and play a decisive role in the determination of each claim by the court.

3. An applicant in court proceedings, who raises the defence that proceedings moved against them constitute strategic litigation against public participation bears the onus to show that:

    a. The proceeding initiated against them arises from engaging in public participation and is aimed at hindering, preventing or dissuading public participation;

    b. The court can use the following non-exhaustive factors to determine whether the legal proceeding in 3(a) constitutes a SLAPP suit:

        i. The scope of the claim, including whether there is a real risk it will deter acts of public participation beyond the issues in dispute;

        ii. The excessive or unreasonable nature of the claim, or part of it, including but not limited to the remedies sought by the claimant;

        iii Any disproportion between the resources deployed by the claimant and the likely legitimate benefit of the proceedings to the claimant if the claim succeeds;

iv. The claimant's litigation conduct, including but not limited to the choice of jurisdiction, the use of dilatory strategies, excessive disclosure requests, or the use of aggressive pre-action legal threats;

v. Any failure to provide answers to good faith requests for pre-publication comment or clarification;

vi. The seriousness of the alleged wrong, and extent of previous publication;

vii. The history of litigation between the parties and previous actions filed by the claimant against this party or others against acts of public participation;

viii. Any refusal without reasonable excuse to resolve the claim through alternative dispute resolution;

ix. Tangential or simultaneous acts in other forums to silence or intimidate the defendant or related parties; and

x. Any feature that suggests the lawsuit has been brought with the purpose of intimidating, harassing, or otherwise forcing the defendant into silence.

4. If the applicant successfully discharges the burden, the burden of proof will shift to the respondent to show the court that –

   a. there are grounds to believe that the underlying proceedings have substantial merit;

   b. the harm likely to result outweighs the public interest in protecting public participation; and

   c. the applicant has no valid legal defence.

5. If the respondent is unable to discharge their burden of proof by satisfying 4 (a) and 4 (b), and (c) the main proceedings falls to be dismissed.

6. If the respondent succeeds in discharging its onus, then the main proceedings instituted against the applicant will proceed.

Section 7
Withdrawal of claims

1. The court shall ensure that in the main application, where there has been a subsequent amendment following an application in terms of section 5 or withdrawal of pleadings or a claim by the claimant, such amendment or withdrawal shall not affect the possibility for the court to consider the court proceedings as abusive in nature and to impose remedies in accordance with section 9.

Section 8
Stay of main proceedings

1. If the applicant moves an application for early dismissal of proceedings in accordance with section 7, the main proceedings shall be stayed, pending the final decision of that application.

2. The court shall ensure that the application for early dismissal shall be accelerated, taking into account the circumstances of the case and the right to an effective remedy.

CHAPTER 4: REMEDIES

Section 9
Remedies

1. A successful applicant is entitled to remedies.

2. Nothing in this section shall limit the court's authority to grant additional or alternative relief deemed just and equitable in the circumstances of the case.

3. These remedies may include:

    a. Damages

        i. In the event that the court dismisses a proceeding under section 5 and determines that the respondent has brought a SLAPP suit as defined in this Act, the court may award the applicant such damages as it considers appropriate.

    b. Compensation

        i In cases where the court determines that a lawsuit brought against the applicant constitutes a SLAPP suit and subsequently dismisses the said suit, the applicant shall be entitled to seek compensation.

        ii. The compensation shall include, but is not limited to, the following:

            a. Actual damages: The applicant shall be entitled to receive compensation for any harm caused to their reputation or infringement of their rights due to SLAPP legal proceedings. The applicant shall also be eligible to claim redress for any financial losses, lost business opportunities, or career setbacks directly resulting from the SLAPP legal proceedings; and

            b. Emotional distress: The applicant may seek compensation for pain and suffering resulting from the stress and burden of facing a SLAPP legal proceeding.

        iii. The court shall determine the amount of compensation based on the specific circumstances of the case and the extent of harm suffered by the applicant.

4. Public apology

    a. If a court determines a lawsuit filed against the applicant to be classified as a SLAPP and subsequently dismisses the said lawsuit, the applicant is entitled to seek a public apology from the respondent as a remedy for the inflicted harm.

    b. The public apology shall be made in the following manner:

        i. in a clear and unambiguous manner, taking into consideration the manner and the extent of the harm suffered;

        ii. explicitly stating that the initial lawsuit was found to be a SLAPP legal proceeding and that the applicant's public participation was unlawfully impeded;

        iii. including an express retraction of the statements that were subject to the lawsuit; and

        iv. can include any other just and equitable relief which is commensurate to the harm suffered

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