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ANTI-SLAPP MODEL LAW FOR SOUTH AFRICA

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Lawyers for Human Rights

Right2Know Campaign

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South African Climate Commission

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Chapter 3: Recommended anti-SLAPP law for South Africa

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 identify 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, freedom and security of persons, freedom of expression, right to freely assemble and demonstrate, freedom of association and the right to access 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;

- There is a power disparity between those acting in the public interest and powerful entities;

AND AIMING TO

- Deter legal proceedings aimed at hindering public participation;
- Eradicate the repression of activists, journalists and those acting in the public interest

AND BEARING IN MIND THAT

- Everyone has a right to access courts;
- Courts, tribunals and forums have an obligation to promote public participation and to promote 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;
- 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;
- To distinguish SLAPP legal proceedings from other existing laws such as the Vexatious Proceedings Act 3 of 1965

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CHAPTER ONE: DEFINITIONS AND PURPOSE

SECTION 1 DEFINITIONS

In this Act, unless the context indicates otherwise –

- a. Applicant:** means the respondent in the legal proceeding or the party whom court proceedings are brought against.
- b. Respondent:** means the applicant in the legal proceedings or the party who initiates the proceedings.
- c. 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;
 - v. Criminal activities or any other financial, business, or political wrongdoing.
- d. 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.
- e. Remedy:** means the manner in which a person who has been wronged can seek justice and be compensated for the harm they have suffered.

- f. **Strategic Legal proceeding Against Public Participation (SLAPP):** means legal proceedings or a threat of legal proceedings brought primarily to silence, harass, punish, drain resources or demobilize and dissuade individuals or organisations that engage in active public participation.
- g. **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.
- h. **Amicus Curiae:** means "friend of the court." It refers to a person or 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 case.
- i. **Intervening Party:** means any person entitled to join as a party or liable to be joined as a party in the proceedings.
- j. **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.

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) to protect and promote an open and democratic society where individuals and organisations are free to engage in public participation.
- (2) to prevent and deter the use of the legal mechanisms to undermine these fundamental rights through the filing of frivolous and abusive legal proceedings.
- (3) to create comprehensive legislation against SLAPP.
- (4) to determine the court procedure for adjudication of allegations of SLAPP legal proceedings.
- (5) to provide remedies for those exposed or subjected to SLAPP legal proceedings
- (6) to provide for matters connected therewith

CHAPTER TWO: SCOPE OF APPLICATION

SECTION 3: SCOPE OF APPLICATION

(1) This Act applies to civil proceedings instituted against those who exercise a constitutionally protected right 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 also consider incorporating these legal proceedings within its efforts of outlawing SLAPPs.

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 THREE: 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 time limits for the filing of applications for early dismissal. Such time limits 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:
 - 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 legal proceeding 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; and
 - (b) that the harm likely to result, outweighs the public interest in protecting public participation;
- (5) If the respondent is unable to discharge their burden of proof by satisfying 4 (a) and 4 (b), the main proceedings fall 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 THE 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 FOUR: 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 legal proceeding brought against the applicant constitutes a SLAPP legal proceeding 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

(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

1. If a court determines a legal proceeding filed against the applicant to be classified as a SLAPP and subsequently dismisses the said legal proceeding, the applicant is entitled to seek a public apology from the respondent as a remedy for the inflicted harm.
2. The public apology shall be made in the following manner:
 - (1) in a clear and unambiguous manner, taking into consideration the manner and the extent of the harm suffered
 - (2) shall explicitly state that the initial legal proceeding was found to be a SLAPP legal proceeding and that the applicant's public participation was unlawfully impeded.
 - (3) shall include an express retraction of the statements that were subject to the legal proceeding.
 - (4) can include any other just and equitable relief which is commensurate to the harm suffered

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