



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

Case No: **7595/2017**

In the matter between:

**MINERAL SANDS RESOURCES (PTY) LTD**

First Plaintiff

**ZAMILE QUNYA**

Second Plaintiff

and

**CHRISTINE REDDELL**

First Defendant

**TRACEY DAVIES**

Second Defendant

**DAVINE CLOETE**

Third Defendant

Case No: **14658/2016**

In the matter between:

**MINERAL COMMODITIES LIMITED**

First Plaintiff

**MARK VICTOR CARUSO**

Second Plaintiff

and

**MZAMO DLAMINI**

First Defendant

**CORMAC CULLINAN**

Second Defendant

Case No: **12543/2016**

In the matter between:

**MINERAL COMMODITIES LIMITED**

First Plaintiff

**MARK VICTOR CARUSO**

Second Plaintiff

and

**JOHN GERARD INGRAM CLARKE**

Defendant

**Coram:** Goliath DJP

**Judgment delivered**

Delivered electronically: 09 February 2021

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## JUDGMENT

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### **GOLIATH DJP**

*“Like a pebble thrown in water a single SLAPP<sup>1</sup> can have effects far beyond its initial impact”*

Penelope Canan, *The SLAPP from a Sociological Perspective*, 1989.

### **Introduction**

[1] This matter involves exceptions to two special pleas which introduce a novel Strategic Litigation Against Public Participation (SLAPP) defence. Redell, Davies and Cullinan are environmental attorneys. Cloete, Dlamini and Clarke are community activists. In the first set of special pleas the defendants allege that they had been SLAPPED in the context of environmental activism. Two related mining companies

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<sup>1</sup> SLAPP is an acronym for “*Strategic Lawsuits Against Public Participation*” and was created by Professors Penelope Canan and George W. Pring of the University of Denver, who have written widely on this topic. See, e.g., George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3 (1989); Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1989); Penelope Canan and George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC’Y REV. 385 (1988); Penelope Canan and George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988).

and their directors, are suing three environmental attorneys as well as three community activists for defamation, and damages in the in the sum of R14,25 million, alternatively the publication of apologies. The two mining companies are involved in the exploration and development of major mineral sands projects in South Africa, and are referred to as the Tormin Mineral Sands Project and the Xolobeni Mineral Sands Project. Second plaintiffs are in the employ of the mining companies *inter alia* as director and executive chairman. The main issue to be determined in this matter are two substantially identical special pleas raised by the defendants in each of the three separate actions. The respective mining companies in each of these three actions are the excipients to the two special pleas.

### **The Three Actions**

[2] In the Clarke matter it is alleged that Clarke published two defamatory e-books, one during 2014 entitled "*The Promise of Justice*" and another in 2015 entitled "*Survivor: Wild Coast - Before and Beyond the Shore Break*" which is available worldwide. The record reflects that he was actively engaged in criticising the plaintiffs' mining and excavating activities, and its environmental, ecological and economic impact on the development potential of the Wild Coast. In and during 2016 he participated in radio interviews, posted video clips on YouTube, written numerous emails, and had a number of interviews published on various social media platforms online. He also participated in a panel discussion on a television programme 50/50 relating to mining and mineral regulation issues, engaged the Minister of Mineral Resources, posted an article in an online journalism platform called "*Medium*", entitled "*Behind the irony curtain: Blood Diamond, Xolobeni and the real story of MRC*", and created general awareness around his environmental activism.

Summons was issued against him on 18 July 2016. However, he continued with his advocacy work which resulted in further claims and amendments to the summons. The plaintiff provided elaborate details of Clarke's alleged defamatory conduct, which resulted in 27 separate claims, seeking damages in the sum of R10 million.

[3] Prior to issuing Clarke's summons, Dlamini and Cullinan participated in a radio interview on 7 April 2016, which was posted on the station's website. Second plaintiff was also a participant in the said interview. During the interview both Dlamini and Cullinan expressed criticism against the plaintiffs' mining activities, related certain facts, and expressed certain opinions which second plaintiff alleges are wholly defamatory. Summons was issued on 18 August 2016, one month after the issuing of Clarke's summons. The summons was amended on 26 March 2020. The mining company seeks damages in the amount of R1.5 million and the CEO seeks further damages of R1.5 million.

[4] In the Redell matter, first, second and third defendants presented a lecture series entitled "*Mining the Wild and West Coast: 'Development' at what cost?*" on 25 January 2017, at the Summer School Programme of the University of Cape Town. The Tormin mine was the primary focus of these lectures. During the course of the lecture the defendants made various statements, expressed opinions and criticised the plaintiffs' mining operations. According to the plaintiffs the defendants made numerous spurious and defamatory statements implying that the mining operations are conducted in an unlawful and deceitful manner that has a devastating effect on the environment. Summons was issued on 2 May 2017, and amended on 17 August 2017. The mining company seeks damages in the amount of R750 000,00 and the

director seeks further damages of R500 000,00. The summons was effectively issued approximately three months subsequent to the lecture series.

[5] In summary, in each of the actions, the plaintiffs sue the defendants for defamation. Plaintiffs allege that each of the defendants made defamatory statements relating to plaintiffs' mining operations and activities. The plaintiffs seek damages, alternatively, the publication of apologies. In each of the actions the defendants raised a SLAPP defence.

### **The Defendants Special Pleas:**

#### ***First Special Plea***

[6] The defendants plead that the plaintiffs' conduct in bringing each of the actions:

- 6.1 is an abuse of process; and/or
- 6.2 amounts to the use of court process to achieve an improper end and to use litigation to cause the defendants' financial and/or other prejudice in order to silence them; and/or
- 6.3 violates the right to freedom of expression entrenched in section 16<sup>2</sup> of the Constitution of the Republic of South Africa<sup>3</sup> ("the Constitution").

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<sup>2</sup> 16. Freedom of expression

(1) Everyone has the right to freedom of expression, which includes –  
 (a) freedom of the press and other media;  
 (b) freedom to receive or impart information or ideas;  
 (c) freedom of artistic creativity; and  
 (d) academic freedom and freedom of scientific research.

<sup>3</sup> The Constitution of the Republic of South Africa, 1996.

[7] The defendants allege that the mining companies' actions are brought for the ulterior purpose of:

- 7.1 discouraging, censoring, intimidating and silencing the defendants in relation to public criticism of the mining companies; and
- 7.2 intimidating and silencing members of civil society, the public and the media in relation to public criticism of the mining companies.

***Second Special Plea:***

[8] The defendants contend that the claims of the mining companies are bad in law because trading corporations, operating for profit, cannot sue for defamation without alleging that:

- 8.1 the defamatory statements are false;
- 8.2 the false defamatory statements were wilfully made; and
- 8.3 the plaintiffs to suffer patrimonial loss arising from the defamatory statements concerned.

[9] It is common cause between the parties that in view of the approach adopted by the Supreme Court of appeal in **Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd**<sup>4</sup> the second special plea cannot be sustained and must be upheld. The defendants have conceded that the current law relating to the requirements of a juristic person to sue for defamation, does not support their contentions. This court therefore only need to determine the exception to the first set of special pleas.

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<sup>4</sup> 2011(5) SA 329 (SCA).

### **Submissions made on behalf of Plaintiffs and Defendants**

[10] Plaintiffs argue that the defendants contend for an abuse of the process, thereby relying entirely and impermissibly on the plaintiff's motives for bringing these actions. According to the plaintiffs, such reliance on motive, to the exclusion of the merits of the plaintiffs' claims, is legally unsound. Not only is it incompetent for the defendants to seek to divorce the merits of the plaintiffs' claims from their motives for bringing the actions, but the plaintiffs motives are irrelevant to the abuse of process debate. Furthermore, the defendants actions amount to a request that the court takes an unprecedented and extraordinary step of shutting its doors on the plaintiffs, thereby denying them their right to access justice in terms of section 34<sup>5</sup> of the Constitution, without having regard to the merits of plaintiffs' claims.

[11] Plaintiffs contend that South African law limits a defendants' protection against an abuse of process, to the Vexatious Proceedings Act 3 of 1956 ("VPA") and the common law. Defendants do not purport to rely on the VPA. However, section 2(1)(b)<sup>6</sup> of the VPA, being the only applicable section of the VPA, requires an application for protection against a vexatious litigant to be brought by a defendant.

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<sup>5</sup> Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

<sup>6</sup> Section 2(1) b of the Vexatious Proceedings Act 3 of 1956 as amended by Act 3 of 1995 provides as follows:

"If, on application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that other person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of that court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings".

Such protection cannot be obtained by filing a plea in which abuse is alleged. In the absence of such an application, the defendants are constrained to make out a case for common law abuse of process.

[12] With reference to **Bisset and Others v Boland Bank Ltd and Others**<sup>7</sup>, and **Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga**<sup>8</sup>, the plaintiffs reminded the court of its inherent and common law power to strike out claims that constitute an abuse of process, emphasising that such powers must be exercised with very great caution based on the merits of the impugned litigation. Plaintiffs contended that in order for such legal proceedings to constitute an abuse of process, those proceedings must have been instituted without reasonable grounds and be obviously unsustainable on their merits as a certainty and not merely on a preponderance of probability.

[13] The merits cannot be ignored in favour of the exclusive reliance on the plaintiffs' motives. Furthermore, with reference to **National Director of Public Prosecutions v Zuma**<sup>9</sup>, and **Zuma v Democratic Alliance and Others**<sup>10</sup>, the plaintiffs submit that ulterior purpose or motive is irrelevant to the abuse of process debate. The plaintiffs contend that the assessment as to whether actions are considered as defamatory, or otherwise, cannot take place without considering the merits of a case. Consequently, by relying on plaintiffs' motives to the exclusion of the merits of the plaintiffs' claims, the defendants' first special plea lacks averments necessary to sustain the defence on which they seek to rely.

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<sup>7</sup> 1991 (4) SA 603 (D) at 608 E-H.

<sup>8</sup> [2020]1 All SA 52 (SCA) at para 25.

<sup>9</sup> 2009 (2) SA 277 (SCA) at para 37.

<sup>10</sup> 2018 (1) SA 200 (SCA) at para 88.



[14] The plaintiffs further aver, in the alternative, that there is no basis for the development of the common law for which the defendants contend. The Defendants must establish that the common law principles applicable to abuse of process are formulated in terms that are inconsistent with a particular constitutional right or otherwise inconsistent with the constitutional value system, thereby triggering the duty to develop the common law. The court is not at liberty to develop the common law so as to reformulate the test for an abuse of process by shifting the focus on motive, let alone to regard ulterior purposes on its own as constituting an abuse of process.

[15] The defendants concede that an application in terms of the Vexatious Proceedings Act 3 of 1956 has not been pursued in this matter. The defendants contend that for the purposes of exception proceedings, each of the allegations made by them in the special plea must be accepted, acknowledged and recognised as correct<sup>11</sup>. Thus it must be accepted that the mining companies do not honestly believe that they have any prospect of recovering the quantum of damages claimed by the defendants, as well as the motives as enumerated by the defendants. It is common cause between the parties that, in determining the exceptions, the allegations pleaded in the defendants' special pleas regarding the mining companies' purpose must be accepted as true.

[16] The defendants referred to various decisions<sup>12</sup> of our courts that make it expressly clear that motive/purpose is relevant to the abuse of process doctrine.

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<sup>11</sup> Stewart and Another v Botha and Another 2008 (6) SA 310 (SCA) at para 4.

<sup>12</sup> Beinash v Wigley & Others 1997 (3) SA 721 (SCA); Phillips v Botha 1999 (2) SA 555 (SCA); Roering NO and Another v Mahlangu and Others 2016 (5) SA 455 (SCA); Lawyers for Human Rights

They argued that the mining companies failed to produce any authority which supports the proposition and contention that the motive behind the initiation of a legally valid claim is generally irrelevant in South African law. Defendants therefore contend that the motive or purpose of the litigation is in fact relevant to abuse of process under our existing common law. The plaintiffs argued that the cases referred to concerns an abuse of the court's procedure for a purpose extraneous to their objectives, which is not analogous to this matter. In the present instance, the issues does not concern abuse of procedures, but with the question of when an abuse of process constitutes a defence to a substantive claim.

[17] Defendants contend that the questions of improper motive do not appear to have been at issue in **Maphanga**. The court did not purport to hold that motive or purpose of litigation was irrelevant to debates about abuse of process. Such a conclusion would in any event have been inconsistent with a number of court decisions in the higher courts such as the SCA and Constitutional Court.

[18] The defendants submit that on the existing common law, firstly the purpose of the litigation is relevant to abuse of process, and secondly, the purpose of intimidating and silencing public criticism is an impermissible one. Consequently, on the existing common law, the exception to the first special plea must be dismissed. The mining companies have not sought interdicts against the impugned expression, but instead seek to achieve the same result via the back door, by instituting a series of damages claims, with the purpose of intimidating and silencing public criticism by the relevant defendants, civil society, the public and the media. According to

defendants the conduct pleaded forms part of a pattern of conduct by the mining companies in which they seek to bring defamation actions for these purposes.

[19] The defendants referred to **Company Secretary of Arcelormittal South Africa Ltd and Another v Vaal Environmental Justice Alliance** where the following was stated:

*“...First, the world, for obvious reasons, is becoming increasingly ecologically sensitive. Second, citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect governments and in relation to corporations. In South Africa, because of our past, the latter aspect has increased significance. . .”*<sup>13</sup>

The SCA went on to emphasise the critical role played by the public in environmental debates:

*“It is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultations and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment . . .”*<sup>14</sup>

It concluded that;

*“Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those*

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<sup>13</sup> 2015 (1) SA 515 (SCA) at paragraph 1.

<sup>14</sup> Id at para 71.

*under discussion, there is no room for secrecy and that constitutional values will be enforced.*<sup>15</sup>

[20] The defendants emphasised that debates arising within the context of mining rights, environmental damage, and economic power of large trading corporations require intense public scrutiny and public engagement. The mining companies' contention that it would be permissible to sue activists for defamation even if "*the only purpose is to silence the activists*" is unsustainable under our constitutional scheme, and which regime advocates for freedom of expression, active public engagement in environmental assessment issues and active public scrutiny of large multinational companies.

[21] Both parties made submissions regarding the origins and development of SLAPP suits in different jurisdictions. The plaintiff submitted that the manner in which SLAPP suits are regulated in the United States is indicative of the complexity involved in drafting legislation and the policy-laden nature of its underpinnings. The Legislature should be left with the choice as to whether this defence should be introduced into South African law.

[22] Defendants submitted that mining companies should not be allowed to bring these proceedings in circumstances where they know they will never have any realistic prospect of recovering the damages they seek and where their purpose is to intimidate and silence civil society, the public and the media. They further assert that courts should not allow the mining companies to use its processes for such ulterior

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<sup>15</sup> Id at para 82.

purposes. They aver that under the existing common law doctrine of abuse of process, the first set of pleas are sustainable in law.

[23] In the alternative the defendants argue that the fact that many other jurisdictions have dealt with this comprehensively by passing legislation, this court is not barred from doing so incrementally via the development of the common law. The defendant cited the example of the development of class action procedures, where our courts have developed procedural rules and the common law to allow for it<sup>16</sup>.

[24] The defendants therefore contend for the development of the common law through the lens of either section 39(2)<sup>17</sup> or section 173<sup>18</sup> of the Constitution, since such development would give proper protection to the right to freedom of expression in the context of environmental debates. It would also be in line with the thinking of jurisdictions which placed protections against what is known as “*SLAPP suits*”. The defendants also took issue with plaintiffs’ late introduction of a procedural contention that, even if one can raise an abuse of process/SLAPP defence, one can only do so by way of an application, not a special plea.

[25] The Centre for Applied Legal Studies (CALs) and the University of Cape Town (UCT) applied and were admitted as amici curiae. CALs made submission on

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<sup>16</sup> Children’s Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) SA 213 (SCA); Mukaddam v Pioneer Foods (Pty) Ltd and Others 2013 (5) SA 89 (CC).

<sup>17</sup> Interpretation of Bill of Rights

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39(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

<sup>18</sup> Inherent power

173 The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

the nature of SLAPP suits and its application in other jurisdictions. They elaborated upon issues relating to abuse of process considerations as well as the development of the common law with reference to Section 39(1)<sup>19</sup> and 8(3)<sup>20</sup> of the Constitution. CALS contends and emphasized that the development of SLAPP suit defences is relatively new in South Africa. They opine that it should be developed and stated that this class of defences is different from an abuse of process.

[26] UCT addressed the issue of the protection of academic freedom as provided for in Section 16(1)d<sup>21</sup> of the Constitution. They contend that the university invited the defendants in their capacity as activists and members of the legal profession as part of an academic project, challenging mining activities on the Wild Coast. They emphasized that academics should not be at risk of liability if a company's reputation is tainted along the way, and corporations should not be allowed to sue activists for defamation for what they had stated during a course and discussions at the university. They stated that pursuit of academic freedom and opinion is vital in our constitutional dispensation and for our democracy. The law should recognize qualified privilege for academic speech and pursuit. Furthermore, they contend that it is indispensable and foreseeable for the common law to be developed and to afford

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<sup>19</sup> Interpretation of Bill of Rights

39(1) When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

<sup>20</sup> 8. Application

...

- (3) When applying a provision of the Bill of Rights to a natural juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

<sup>21</sup> Id at para 6.

academic freedom a greater importance, and to protect academics from exposure to liability in defamation lawsuits instituted by large corporations.

[27] The university contends that SLAPP suits will have a chilling effect on academic activities. It was submitted that SLAPP suits will deter academics from investigating and challenging harmful conduct, more particularly relating to deep questions on environmental issues.

### **Legal Framework:**

[28] The common law affords the courts the inherent power to stop frivolous and vexatious proceedings when they amount to an abuse of its processes<sup>22</sup>. In **Lawyers for Human Rights v Minister in the Presidency**<sup>23</sup> the Constitutional Court reiterated that the courts have the power and indeed a duty to prevent the abuse of their process. The power to strike out must be exercised with very great caution, and only in a clear case.<sup>24</sup>

[29] Section 173<sup>25</sup> of the Constitution vests in the judiciary the authority and power to prevent any possible abuse of process.<sup>26</sup> In **Phillips and Others v National Director of Public Prosecutions**<sup>27</sup>, the Constitutional Court held that ordinarily the

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<sup>22</sup> *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565 D-E; *Cohen v Cohen and Another* 2003 (1) SA 103 (C) para 14.

<sup>23</sup> 2017(4) BCLR 445 (CC) at para 20.

<sup>24</sup> *Bisset and Others v Boland Bank Ltd and Others supra*; at para 12; *Phillips v Botha* 1999 (2) SA 555 (SCA) at 565 F-H.

<sup>25</sup> *Id* at para 24.

<sup>26</sup> *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 90.

<sup>27</sup> 2006 (2) BCLR 274 (CC) at para 47.

power in section 173 to protect and regulate relates to the process of court and arises when there is a legislative lacuna in the process.

[30] In **Beinash v Wixley**<sup>28</sup> Mohamed, CJ stated that there could not be an all-encompassing definition of the concept of “*abuse of process*”, but it could be said in general terms that an abuse of process takes place “*where procedures permitted by the Rules of Court to facilitate the pursuit of the truth are used for a purpose extraneous to the objective*”. What constitutes an abuse of process of the court is a matter which needs to be determined by the specific circumstances of each case. The abuse of process is therefore fact specific.

[31] In **Cohen v Cohen and Another**<sup>29</sup> the court, with reference to **Beinash v Wixley** stated that at common law the courts enjoyed an inherent power to strike out claims that were vexatious, opining that meant claims that were “*frivolous, improper, instituted without sufficient ground, to serve solely, as an annoyance to the defendant.*” Vexatious litigation must be clear, appear as a certainty and not merely on a preponderance of probability.

[32] Our courts have repeatedly referred to the purpose or motive of the litigation as being relevant to the question of abuse of process. In **Phillips v Botha**<sup>30</sup>, the court endorsed the following definition of abuse of process from an Australian decision. The court cited with approval the matter of *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 91:

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<sup>28</sup> 1997 (3) SA 721 (SCA) at 734 D-H.

<sup>29</sup> Cohen v Cohen 2003 (1) SA 103 (C) at para 14.

<sup>30</sup> 1999 (2) SA 555 (SCA) at 565 E-H.



*“(T)he term ‘abuse of process’ connotes that the process is employed for some purpose other than the attainment of the claim in action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose...”*

The SCA proceeded to add that *“where the court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the Court’s duty to prevent such abuse.”*

[33] In **Gold Fields Ltd and Others v Motley Rice**<sup>31</sup>, Mojapelo DJP held that a matter might amount to an abuse of process where *“the litigation is frivolous, or vexatious or where litigation is being pursued for an ulterior motive”*. In **Roering NO and Another v Mahlangu and Others**<sup>32</sup>, the SCA endorsed another Australian decision that:

*“Whether there will be, in a particular case, a use of the process or an abuse of it will depend upon purpose rather than result...”*

[34] In **Price Waterhouse Coopers Inc. and Others v National Potato Co-Operative Ltd**<sup>33</sup> the Supreme Court of Appeal summarised the relevant authorities on the point as follows:

*“50. It has long been recognised in South Africa that a court is entitled to protect itself and others against abuse of its process (see Western Assurance Co v*

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<sup>31</sup> 2015 (4) SA 299 (GJ).

<sup>32</sup> 2016 (5) SA 455 (SCA) at para 37.

<sup>33</sup> [2004] 3 All SA 20 (SCA) at para 50.

*Caldwell's Trustee* **1918 AD 262** at 271; *Corderoy v Union Government (Minister of Finance)* **1918 AD 512** at 517; *Hudson v Hudson and another* **1927 AD 259** at 268; *Beinash v Wixley* **[1997] ZASCA 32; 1997 (3) SA 721** (A) at 734D; *Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* **1999 (3) SA 389** (SCA) at 412C-D, but no all embracing definition of 'abuse of process' has been formulated. Frivolous or vexatious litigation has been held to be an abuse of process (per Innes CJ in *Western Assurance v Caldwell's Trustee supra* at 271 and in *Corderoy v Union Government (Minister of Finance) supra* at 517) and it has been said that 'an attempt made to use for ulterior purposes machinery devised for the better administration of justice' would constitute an abuse of the process (*Hudson v Hudson and another supra* at 268). In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of mala fides. In order to prove mala fides a further inference that an improper result was intended is required. Such an application for a court procedure (for a purpose other than that for which it was primarily intended) is therefore a characteristic, rather than a definition, of mala fides. Purpose or motive, even a mischievous or malicious motive, is not in general a criteria for unlawfulness or invalidity. An improper motive may however be a factor where the abuse of court process is in issue. (*Brummer v Gorfil Brothers Investments (Pty) Ltd en andere supra* at 412I-J and 416B). Accordingly, a plaintiff who has no bona fide claim but intends to use litigation to cause the defendant financial (or other) prejudice will be abusing the process (see *Beinash and another v Ernst & Young and others* **1999 (2) SA 116** (CC) para 13). Nevertheless it is important to bear in mind that courts of law are open to all and it is only in exceptional cases that a court will close its doors to anyone who wishes to prosecute an action (per Solomon JA in *Western Assurance Co v*

*Caldwell's Trustee 1918 AD 262 at 273-274). The importance of the right of access to courts enshrined by section 34 of the Constitution has already been referred to. However, where a litigant abuses the process this right will be restricted to protect and secure the right of access for those with bona fide disputes (Beinash and Another v Ernst & Young and others supra para 17)."*

[35] Furthermore, in **Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others**<sup>34</sup> the Constitutional Court reiterated that "*Abuse of process concerns are motivated by the need to protect 'the integrity of the adjudicative functions of courts,' doing so ensures that procedures permitted by the rules of court are not used for a purpose extraneous to the truth-seeking objective inherent to the judicial process.*"

[36] Section 16<sup>35</sup> of the Constitution protects the broader concept of freedom of expression, which includes academic freedom. Section 24 of the Constitution guarantees the right of everyone to an environment not harmful to one's health and wellbeing, and also the right to have the environment protected from pollution and ecological degradation, which promotes conservation and secures ecologically sustainable development. The importance of free engagement and debate on matters of public importance is confirmed in **Khumalo and Others v Holomisa**<sup>36</sup>, in which the Constitutional Court held that the right to freedom of expression is "*integral to a democratic society for many reasons*", including the reason that the right is constitutive of the dignity and autonomy of human beings and because, without it,

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<sup>34</sup> 2020 (1) SA 327 (CC) at para 40 the court referred with approval to Beinash v Wigley 1997 (3) SA 721 (SCA) in this regard. Plaintiff contends that this case is not relevant to the use of the abuse doctrine as a defence to a substantive claim, and the statement was *obiter*.

<sup>35</sup> *Id* at para 6.

<sup>36</sup> 2002 (5) 401 (CC) at para 21; Also see Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International and Another 2005 (8) BCLR 743 (CC) at para 45.

the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.

[37] In **SANDU v Minister of Defence**<sup>37</sup> the importance of the right was stated as follows:

*“freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution 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.”*

[38] For these reasons elaborated above our highest courts have recognised that an order preventing a person from making allegedly defamatory statements is a *“drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice”*<sup>38</sup>. Such an order affects not just the constitutional rights of the speaker to express himself, but also the constitutional rights of the public to hear the statements concerned. Such an order is therefore granted only in extremely circumscribed and narrow circumstances, and only after considering the prejudice to the public.

### **The Features of SLAPP**

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<sup>37</sup> South African National Defence Union v Minister of Defence & Another 1999(4) 469 (CC) at para 7.

<sup>38</sup> Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape) 2007 (5) SA 540 (SCA) at para 15; Print Media South Africa and Another v Minister of Home Affairs and Another 2012 (6) SA 443 (CC) at para 44.

[39] SLAPPs are Strategic Lawsuits or Litigation Against Public Participation, meritless or exaggerated lawsuits intended to intimidate civil society advocates, human rights defenders, journalists, academics and individuals as well as organisations acting in the public interest. They are litigated into silence by corporations and often times drained of their resources. The term SLAPP was first coined by Professor George W Pring and Penelope Canan<sup>39</sup>. Pring and Canan initially described the classic SLAPP lawsuit as a civil claim targeting a “non-government party” on an issue of considerable social importance involving local citizens who take a position on a particular public issue and express their views in the public arena<sup>40</sup>. SLAPP suits are still a relatively new phenomenon in most jurisdictions. Essentially its aim is to silence those challenging powerful corporates on issues of public concern. In essence the main purpose of the suit is to punish or retaliate against citizens who have spoken out against the plaintiffs<sup>41</sup>.

[40] The signature elements of SLAPP cases is the use of the legal system, usually disguised as an ordinary civil claim, designed to discourage others from speaking on issues of public importance and exploiting the inequality of finances and human resources available to large corporations compared to the targets. These lawsuits are notoriously, long drawn out, and extremely expensive legal battles, which consume vast amounts of time, energy, money and resources. In essence, SLAPPs are designed to turn the justice system into a weapon to intimidate people

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<sup>39</sup> G Pring & P Canan SLAPPs: Getting Sued for Speaking Out (1996) 8-9.

<sup>40</sup> P Canan and GW Pring (1988), “Strategic Lawsuits Against Public Participation”, *Social Problems*, Vol. 35 No. 5, pp. 506-519; P Canan (1989), “The SLAPP from, a Sociological Perspective”, *Pace Environmental Law Review*, Vol. 7 No. 1, pp. 23-32; GW Pring (1989), “SLAPPs: Strategic Lawsuits against Public Participation”, *Pace Environmental Law Review*, Vol. 7, No. 1, pp. 3-22.

<sup>41</sup> Murombo & Valentine, SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa 2011 27 SAJHR 82 at 86.

who are exercising their constitutional rights, restrain public interest in advocacy and activism; and convert matters of public interest into technical private law disputes.

[41] The person instituting the SLAPP generally have more resources to sustain litigation against their targets. The plaintiff is generally aware of its advantage, and may seek to protect business or economic interest. Targets are typically individuals, local community groups, activists or non-profit organisations who are advancing a social interest of some significance. Many targets often act without any personal profit or commercial advantage. In some instances, the plaintiffs propose settlements which include a damages payment, an agreement to stop the activism that prompted the litigation, and an undertaking not to discuss the terms of the settlement.

[42] Generally, exorbitant damages claims are part of the strategy chilling public participation and sending a clear message to activists that there are unaffordable financial risks attached to public participation<sup>42</sup>. The emotional and financial harm caused by the SLAPP may result in the withdrawal from actions involving public participation. For this reason, some jurisdictions prefer not to focus on the elements of the legal action in the SLAPP, but rather on the effect of public participation.

[43] A SLAPP does not need to be successful in court to have its intended effect. Proceedings can be continued until the desired effect and impact is achieved. Prolonging and dragging out proceedings and shifting the debate out of the public domain to the courts can fulfil the intended objective. The mere threat of being sued is sometimes sufficient to engender fear and intimidate the target.

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<sup>42</sup> Id at para 84.

[44] The phenomena of SLAPP suits originated in the United States during the 1980s and has been adopted in a number of comparative jurisdictions. Significantly, anti-SLAPP laws had initially developed primarily from the environmental law context. As at 30 January 2021 there are currently 30 States in the United States<sup>43</sup> that adopted some form of legislation to identify and counter the prevalence of SLAPP suit litigation. Certain provinces in Canada<sup>44</sup> and territories in Australia<sup>45</sup> also have some form of legislation to counter the prevalence of SLAPP suit litigation.

[45] SLAPPs violate American constitutional protection of the right of free speech and the right to petition, which are the usual grounds for defence against SLAPPs. Anti-SLAPP statutes are aimed at providing a quick, effective and inexpensive mechanism to discourage such suits. It authorises expedited procedures to address such suits, prevent the incursion of public participation, protect fundamental rights to freedom of expression and provide protection against the side-effects of SLAPP suits. In the United States there is a variation between the States that have adopted SLAPP suit legislation. The general approach is that public participation in matters of public significance is encouraged, and an “improper purpose test” is applied to determine the context of the litigation. Essentially proof of three elements are required namely that the defendant engaged in public participation on a public issue, plaintiff is pursuing an improper purpose, and that the lawsuit is meritless. The improper purpose must be the main purpose and is established where a reasonable

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<sup>43</sup> See the California Anti-SLAPP Public Participation Project website for an up-to-date list of States with anti-SLAPP measures in place or pending, found at [anti-slap.org](http://anti-slap.org).

<sup>44</sup> For example, the following 3 provinces: Quebec Article 54 of the Code of Civil Procedure; Ontario, Protection of Public Participation Act 2015; British Columbia, Protection of Public Participation Act, 2019.

<sup>45</sup> Australian Uniform National Defamation Laws, 2006 read with Australian Capital Territory’s state legislation, the Protection of Public Participation Act, 2008.

person would consider the main purpose for starting the proceedings or maintaining it is:

- (i) to discourage the defendant or anyone else from engaging in public participation;
- (ii) to divert the defendant's resources away from engagement in public participation; or
- (iii) to punish or disadvantage the defendant for engaging in public participation.

[46] The test is objective and the threshold is relatively high for a defendant to prove the purpose and motivations of the filer. Once a defendant has made out a case for an improper motive based on public participation, the onus thereafter shifts to the Plaintiff to prove that the action has substantial merit. If the plaintiff cannot meet this requirement, the action will be deemed a SLAPP, or the SLAPP will fail if it is established that there is no probability that the plaintiff will "*prevail on the claim.*"<sup>46</sup>

[47] By way of example, in the State of Georgia the purpose of the code is stated as:

*"The General Assembly of Georgia finds and declares that is in the public interest to encourage participation by the citizens of Georgia in matters of public significance and public interest through the exercise of their constitutional rights of petition and freedom of speech. The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of petition and freedom should not be chilled through abuse of the judicial process. To accomplish the*

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<sup>46</sup> Section 425.16(b)(1) of the California Code of Civil Procedure.



*declarations provided for under this subsection, this Code section shall be construed broadly.”<sup>47</sup>*

[48] The broadest scope of US first amendment protections is provided by the California anti-SLAPP Statute, which provides for a mechanism to screen any cause of action arising from protected speech or petition<sup>48</sup>. The California Code of Civil Procedure<sup>49</sup> asserts that:

*“The legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. The legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of judicial process. To this end, this section shall be construed broadly.”*

[49] The Washington anti-SLAPP law provides for an onerous burden of proof for the SLAPP plaintiff in a defamation suit. The defamed party must show by clear and convincing evidence that the defendant did not act in good faith when alleging a SLAPP<sup>50</sup>.

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<sup>47</sup> Section 9 – 11 – 11 – 1 (a) of the Civil Procedure Act.

<sup>48</sup> Subsection 3 (e) of the Code of Civil Procedure covers communication before a legislature, executive, judiciary; any statement made in a public place or public forum in connection with an issue of public interest; or any other conduct in the furtherance of the exercise of the Constitutional right to petition or to free speech in connection with a public issue or issue of public interest.

<sup>49</sup> Section 425.16.

<sup>50</sup> See *Gilman v. McDonald*, 74 Wn. App. 733, 875 P. 2d 697, review denied, 125 Wn. 2d 1010, 889 P. 2d 498 (1994); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn. 2d 370, 46 P. 3d 789 (2002)

[50] On 20 November 2020 New York State strengthened its existing anti-SLAPP laws to expand protections afforded to defendants in lawsuits brought based on the exercise of free speech rights. The amendments broadened the anti-SLAPP law to cover cases involving “*any communication in a place open to the public or 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 ...*”<sup>51</sup>

[51] In Europe, despite strong lobbying from interest groups, SLAPP remains unrecognised. However, the European Union support and actively apply SLAPP-like measures, and anti-SLAPP legislation is actively debated. Notwithstanding the absence of legislative SLAPP interventions, the European Court of Justice considers public interest as a decisive consideration in favour of freedom of expression. In **Handyside v United Kingdom**<sup>52</sup>, Case No. 5493/72, the court stated that a democratic society should tolerate ideas that “*offend, shock, or disturb the State or any sector of the population.*” Furthermore, in **Steel and Morris v United Kingdom**<sup>53</sup>, also known as the McLibel case, the court held that in a democratic society even small and informal campaign groups should be enabled to contribute to public debate on matters of general public interest, such as health and the environment. Academics and journalists who participate in democratic public

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<sup>51</sup> Sections 70-a and 76a of the New York Civil Rights Law.

<sup>52</sup> Handyside v UK, Case No. 5493/72 at para 49.

<sup>53</sup> See: McDonald’s Corp. v Steel and Morris 1997 [EWHC] QB 366; Steel and Morris v United Kingdom ECHR 2005. Also known as the McLibel case. Two activists distributed leaflets on “What’s wrong with McDonalds?” accusing the company of McCancer, McDisease and McGreed. The allegations related to the negative health consequences of food, bad working conditions, exploitation of children and deforestation. The original case lasted nearly years, which made it the longest running libel case in English history. The McLibel case is widely regarded as a SLAPP because McDonald’s aim was seen as one of silencing its critics with a heavy-handed claim for damages that they could never have expected to recover from the defendants.

discourse are regularly attacked by SLAPP suits in member States. Criminal defamation is still maintained in 23 EU member States. This creates fertile ground for criminal SLAPP suits. EU member States have not yet reached agreement on a legislative proposal to deal with the SLAPP phenomenon<sup>54</sup>.

[52] In **1704604 Ontario Ltd v Pointes Protection Association**<sup>55</sup>, an appeal heard on 12 November 2019 in a matter dealing with the environmental impact of a private development, the Supreme Court of Canada dismissed the developer's suit as a SLAPP suit. The developers sued and claimed damages for CAD\$6 million for defamation and breach of contract. The court emphasised the public interest in SLAPP legislation, noting that the case was *"about what happens when individuals and organisations use litigation as a tool to quell such expression, which, in turn quells participation and engagement in matters of public interest."*<sup>56</sup>

[53] The court approved the principles established and enunciated in **Grant v Torstar Corp.** in determining what constitutes *"a matter of public interest."* Public interest is to be given a broad interpretation. It is irrelevant at the threshold stage whether *"the expression is desirable and deleterious, valuable or vexatious, or whether it helps or hampers the public interest ... the question is only whether the expression pertains to a matter of public interest, defined broadly."*<sup>57</sup>

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<sup>54</sup> See: EU Citizen, SLAPP in EU context, 29 May 2020, Petra Bård, Judit Bayer, Ngo Chun Luk and Lina Vosyliute for an overview of SLAPP and its challenges in the EU.

<sup>55</sup> 2020 SCC 22; *Bent v Platnick*, 2020 SCC 23 [*Bent*]. In *Pointes* and *Bent*, the Court was tasked with interpreting s. 137.1 of the *Ontario Courts of Justice Act*, RSO 1990, c C.43 [CJA], a key provision of the province's "anti-SLAPP" (Strategic Lawsuits Against Public Participation) laws. Section 137.1 allows a defendant to bring a motion to dismiss the action on the grounds that it intends to silence or gag the defendant from speaking about or participating in matters of public interest. As a recent addition to the CJA through the enactment of the *Protection of Public Participation Act, 2015*, SO 2015 c 23, and with counterparts only in BC and Quebec, the Court's analysis in *Pointes* will serve as the guiding precedent for all future s. 137.1 proceedings as it was the Court's first time engaging with any Canadian anti-SLAPP laws.

<sup>56</sup> *Pointes* at para 1.

<sup>57</sup> [2009] 3 S.C.R. 640, 2009 SCC 61 at para 28.

[54] The defendant must demonstrate that the proceedings arise from an expression relating to a matter of public interest. This threshold must be established on a balance of probabilities. Once the defendant meets this threshold burden, the onus shifts on the plaintiff to show why proceedings should not be dismissed. The plaintiff is the required to clear what is referred to as the “*merits based hurdle*” and the “*public interest hurdle*”.<sup>58</sup>

[55] The *merits based* hurdle requires the plaintiff to satisfy the court that there are grounds to believe that the proceedings have substantial merit, and that the defendant has no valid defence in the proceedings. The public interest hurdle requires the plaintiff to satisfy the court that “*the harm likely to be or have been suffered by the [plaintiff] as a result of the [defendant’s] expression is sufficiently serious that the public interest in permitting the proceedings to continue outweighs the public interest in protecting the expression*”.<sup>59</sup> Simply put, the court held that a plaintiff claiming defamation must address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant’s freedom of expression. Significantly, to overcome the public interest hurdle, one consideration must outweigh the other.

[56] The approach adopted by the Canadian Supreme Court demonstrates that speech made in connection with any issue of public interest, or concern has a high level of protection. The Supreme Court confirmed in its ruling that the court will not hear SLAPP style lawsuits unless the plaintiff can pass a rigorous test to show that it

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<sup>58</sup> Section 137.1 (3) and (4) of the Protection of Public Participation Act, 2015 establishes a two pronged test in the determination of a SLAPP suit.

<sup>59</sup> Pointes at para 17.

suffered real harm that outweighs the public interest in the expression of those views. Consequently, the court affirmed the right to participate in environmental activism, and confirmed the importance of protecting freedom of expression on matters of public interest. I am in agreement with the approach adopted in **1704604 Ontario Ltd v Pointes Protection Association**. This approach will align with plaintiffs' arguments that the merits cannot be ignored in the determination of this matter.

[57] Research conducted by Pring and Canan found that defamation is the single most frequent cause of action alleged in SLAPP lawsuits<sup>60</sup>. SLAPP assumes many forms, but the most common is a civil case for defamation in relation to environmental campaigning or protest action. Consequently, a defamation claim is a convenient ground to pursue, with the sole purpose to silence the antagonist.<sup>61</sup> Defamation suits have the characteristics of a SLAPP suit if it is primarily initiated in an attempt to silence criticism and shutting down activism. A common feature of SLAPP suits is therefore a demand for an apology as an alternative to the exorbitant monetary claim. SLAPP filers are generally not interested in monetary compensation to vindicate their claims. SLAPP suits often masquerade as ordinary civil claims such as defamation. It is therefore important to scrutinise defamation suits in order to determine whether or not it is a genuine attempt to protect the reputation of a litigant. A number of US states specifically addressed defamation claims made in the context

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<sup>60</sup> Pring & Canan, 89; Pring & Canan's study found that 53 percent of all SLAPP cases filed in the United States were based on defamation. Also see: Murombo & Valentine, SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa 2011 27 SAJHR 82 at 84.

<sup>61</sup> B Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* Wilfrid Laurier University Press (2014) at p15.

of SLAPP suits by providing for qualified privilege where the statement has been made by a person engaging in public participation.

[58] Distinguishing a SLAPP suit from a conventional civil lawsuit involves competing policy considerations in determining which activities should be protected from legal action. A central feature of environmental activism, is challenging certain activities with regard to the manner in which those activities impact on the environment. Considering the nature of activism, it is inevitable that damaging information or claims are likely to emerge. Environmental activism is centred on providing critical information, even though such information may not always be correct

[59] The claim against the defendants in this matter arises out of their activism in protecting such environmental rights. Clarke published an e-book with a worldwide reach in 2014 and 2015, but no action was instituted against him at the time. It is highly unlikely that the plaintiffs were not aware of Clarke's activism and the existence of the e-books at the time. The two e-books had the potential to cause great harm to the plaintiff's reputation. However, the plaintiff did not deem it necessary to institute action at the time. It is clear that summons was only issued after Clarke continued his environmental campaign in 2016. Clarke, Dlamini and Cullinan were targeted more or less at the same time in 2016, followed thereafter by Redell, Davies and Cloete in 2017.

[60] The plaintiffs are engaged in mining activities and have significant litigation and human resources. Corporations can easily write off legal costs as a business

expense. SLAPP filers, with substantial resources at their disposal, abuse the gross disparity of resources between them and the target. The defendants are activists and attorneys who do not possess the financial resources that the mining companies have. The plaintiffs must be fully aware that resources are important in relation to protest-based litigation. The vertical and unequal power relationship between the parties, is glaringly obvious, where the applicant is in a position of power, and the other individuals are activists and lecturers.

[61] The strategy to target a group of environmental activists more or less at the same time may have the effect of intimidating them to such an extent, that they may withdraw from further engagement after being sued for damages. The impact of SLAPPs can be devastating for targets. This strategy may operate to produce a chilling effect not only on the defendants' constitutional right to freedom of expression, but also on others who considered speaking out on the issue in the future. In fact, entire communities and groups can often be silenced out of fear of being dragged into a perpetual lawsuit.

[62] It is evident that the strategy adopted by the plaintiffs is that the more vocal and critical the activist is, as is the case with Clarke, the higher the damages amount claimed. The mining companies are claiming inexplicably exorbitant amounts for damages, which the defendants can ill-afford. They instituted these proceedings fully aware of the fact that there is no realistic prospect of recovering the damages they seek. This action will without a doubt place an economic burden on the defendants. However, it appears that the action is not aimed at obtaining monetary, or financial damages, but rather vindicating a right, or for some other purpose. The plaintiffs

have indicated that in the alternative, they would be satisfied to dispose of the matter on the basis of a public apology. This is a signature mark of many SLAPP suits. The conclusion is incontrovertible that the lawsuit was initiated against the defendants because they have spoken out and had assumed a specific position in respect of the plaintiffs' mining operations.

[63] Public participation is a key component in environmental activism, and the chilling effect of SLAPP can be detrimental to the enforcement of environmental rights and land use decisions. The present matter arises in the context of debates about whether the mining companies have complied with their legal obligations and whether they have caused environmental damage. Matters such as this, self-evidently require public engagement and public debate. The social and economic power of large trading corporations renders it critically important that they be open to public scrutiny without the inhibiting risk of crippling liability for defamation. As recognised by Baroness Hale in **Jameel (Mohamed) v Wall Street Journal Sprl**:

*“The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government.”*<sup>62</sup>

[64] Individuals or NGO's must have the freedom to respond to issues affecting society, such as those related to the environment and sustainable development. In instances where corporates could be the main cause of damaging and destructive behaviour of the environment and biodiversity, civil society should be allowed to confront and restrain such behaviour. Litigation of this nature pose a serious threat to the defendants' participation in matters of public importance, particularly

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<sup>62</sup> Jameel (Mohamed) v Wall Street Journal Europe Sprl [2007] 1 AC 359 (HL) at para 158.



environmental issues<sup>63</sup>. Public dialogue and debate with broad participation on matters of public interests, such as the environment must be protected and encouraged. Any legal action aimed at stifling public discourse and impairing public debates should be discouraged.

[65] South African law does not have specific legislative mechanisms to deal with SLAPP suits. In the absence of anti-SLAPP legislation, courts have limitations to cure the symptoms of SLAPP. This lack of a legal framework could be exploited by corporates, and in the process render civil society vulnerable when they embark on pursuing legal challenges and raising legal defences. This contributes to the success of the SLAPP, since such legal challenges and defences has a draining effect on public purse and participation. However, the interests of justice should not be compromised due to a lacuna or the lack of legislative framework.

### **Conclusion**

[66] It is trite that legal process is abused when it is used for a purpose other than that for what it has been intended or designed for. 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

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<sup>63</sup> Murombo & Valentine, SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa 2011 27 SAJHR 82 at 84.

criticism, constitutes an improper use of the judicial process and is vexatious. The improper use and abuse of the judicial process interferes with due administration of justice and undermines fundamental notions of justice and the integrity of our judicial process. SLAPP suits constitute an abuse of process, and is inconsistent with our constitutional values and scheme.

[67] The right to freedom of expression, robust public debate and the ability to participate in public debates without fear is essential in any democratic society. I am accordingly satisfied that this action matches the DNA of a SLAPP suit. Consequently, the first set of special pleas (the SLAPP suit defence) constitute a valid defence to the action, and the first set of exceptions falls to be dismissed.

[68] In view of the court's findings, I do not deem it necessary to deal with the issues relating to the development of the common law. With regard to costs, I am of the view that the issues raised by the defendants are novel, involved a matter of public interest and is of genuine constitutional import. The Biowatch<sup>64</sup> principle must prevail.

[69] **In the result the following Order is made:**

- 1. The first set of exceptions are dismissed with costs, including the costs of three counsel.**
- 2. The second set of exceptions are upheld.**
- 3. There shall be no order as to costs in respect of the dismissal of the second set of exceptions.**

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<sup>64</sup> Biowatch Trust v Registrar, Genetic Resources [2009] ZACC; 2009 (10) BCLR 1014 (CC).

**DEPUTY JUDGE PRESIDENT GOLIATH**