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SLAPP SUITS: AN EMERGING OBSTACLE TO PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN SOUTH AFRICA

TUMAI MUROMBO* AND HEINRICH VALENTINE**

ABSTRACT

The constitutional project of South Africa depends on public interest litigation to ensure that rights in the Constitution are protected and fulfilled. The dialectic of promoting socio-economic rights while concomitantly promoting other constitutional interests remains a big challenge. A case in point is the protection of environmental rights, which poses a greater challenge given the tension between development and environmental protection. Among other strategies, the environment can most effectively be protected through public interest environmental litigation supported by democratic participation in environmental decision-making. However, emerging threats to such litigation include strategic litigation against public participation (SLAPP suits). SLAPPs were first identified in the United States. In the US, particularly in California, targeted legislation has been used to deal with SLAPP suits and South Africa may have to consider taking this route to forestall this threat to public interest litigation. In the absence of such targeted legislation, however, courts should use existing procedural and substantive legal tools to protect litigants faced with SLAPP suits.

I INTRODUCTION

While many legal disputes could be resolved before going to court, the unfortunate reality is that many such disputes are ultimately settled through litigation. The drivers of litigation generally include the protection of private interests. There may be cases brought by private individuals to protect the public interest, but undoubtedly most public interest cases are mounted by public-spirited organisations or individuals to protect the public interest.[1] The latter types of cases are often termed public interest litigation.[2] Of late, there has been an increase in public interest litigation brought to protect the environment or to

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1 C Tobias 'Rethinking Intervention in Environmental Litigation' (2000) 78 *Washington Univ LQ* 313, 318 (most environmental cases seek to vindicate important interests that affect the public).

2 Defined by J Razzaque *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* 1 ed (2004) 35–6 as 'a recognised legal mechanism for the enforcement of constitutionally guaranteed rights involving questions pertaining to public interest … a form of legal proceeding in which redress is sought in respect of injury to the public in general. In [such cases] the collective rights of the public are affected and there may be no direct specific injury to any individual member of the public'. The purpose of public interest litigation, she continues citing Bhangwati J, in *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473, 1477–8, 'is to secure observance of constitutional or legal rights, benefits and privileges conferred upon vulnerable sections of the community and to reach social justice to them'.

advance one or more objectives of conservation and sustainable development.[3] These cases, or what one may call public interest *environmental* litigation, have encountered several obstacles despite a new constitutional dispensation in South Africa[4] that has seen a relaxation of some of the orthodox obstacles[5] to public interest environmental litigation.

Strategic litigation against public participation (SLAPP) suits is one of the disturbing emerging threats to public interest environmental litigation. Public interest environmental litigation relies heavily on access to information and public participation in environmental decision-making, both of which are procedurally under threat from SLAPP suits. In this article we discuss both public interest environmental litigation and public participation[6] given that often SLAPP suits are mainly aimed at thwarting public participation in environmental decision-making. At the outset we must emphasise the unique importance of public interest litigation generally in environmental law and policy. Most environmental problems do not implicate private interest but rather the public interest in the sustainable use of natural resources and compliance with environmental laws by developers. Hence, most environmental litigation is brought in the public interest and often by public interest groups. This makes public interest environmental litigation a natural target of SLAPP suits.

In this article we analyse the ramifications of this emerging threat of SLAPP suits specifically on public interest environmental litigation in South Africa with a focus on what potential remedies are available to litigants facing SLAPP suits. We undertake this analysis in the context of the experience with SLAPP suits in the US where they have become a national crisis[7] and a threat to, not only public interest litigation, but also freedom of speech or expression

3 Such cases include *Trustees, Biowatch Trust v Registrar: Genetic Resources* 2005 (4) SA 111 (T); 2009 (6) SA 232 (CC); and unreported case no A831/2005 (6 November 2007); *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W); *Earthlife Africa v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C); and *Director: Mineral Development, Gauteng Region v Save The Vaal Environment* 1999 (2) SA 709 (SCA).

4 Such other obstacles include strict rules on locus standi, archaic rules on legal costs, and technical procedural rules. Most of these obstacles have been researched and will therefore not be analysed in detail in this article except where relevant to SLAPP suits.

5 Obstacles include standing and legal costs, the latter considered in *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) analysed by T Humby 'Reflections on the Biowatch Dispute – Reviewing the Fundamental Rules of Costs in the Light of the Needs of Constitutional and/or Public Interest Litigation' (2009) 1 *Potchefstroom Electronic Law J* 95,166; see also C Tollefson 'Cost and the Public Interest Litigant: Okanagan Indian Band and Beyond' (2006) 19 *Cdn J of Admin Law & Practice* 39, 41; M Kidd 'Greening the Judiciary' (2003) 6 *Potchefstroom Electronic Law J* 1,15 (public interest environmental litigation to succeed should be supported by an environmentally conscious and proactive judiciary).

6 In this article we do not discuss in detail the concept of public participation as such. For a detailed analysis of SLAPP suits see Valentine's unpublished LLM thesis titled 'The Impact of Strategic Lawsuits Against Public Participation (SLAPP) on Public Participation in the Environmental Impact Assessment (EIA) Process In South Africa' submitted to the University of Witwatersrand in 2009 from which this article was developed.

7 L Wright-Pegs 'The Media SLAPP Back: An Analysis of California's Anti-SLAPP Statute and the Media Defendant' (2009) 16 *UCLA Entertainment LR* 323, 329.

(avenues of public participation). The main purpose of our study is to identify the potential impacts of SLAPP suits on public interest environmental litigation in South Africa and identify potential avenues to secure relief from this emerging threat. Discussion of the US experience is done to provide a background and context without exhaustively analysing SLAPP suits in that jurisdiction as such.

(a) Defining SLAPP suits and the legal context in South Africa

A brief explanation of the origins and legal nature of SLAPP suits is necessary before we unravel the impacts of SLAPP suits in South Africa. SLAPP suits originated in the US, but admittedly they have been used in many other jurisdictions under the guise of delictual claims or other frivolous legal actions. A SLAPP suit may be defined as a meritless case 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.[8] SLAPP suits are frequently brought as defamation claims, abuse of process, malicious prosecution, or delictual liability cases.[9]

Quite clearly SLAPP suits are not brought in the context of environmental litigation only but they are a broader problem encountered in all litigation matters where their aim is to intimidate, scare or 'chill' a litigant who has previously brought to light matters of public concern. The media is often subject to defamation SLAPP suits[10] while whistle-blowers are also frequently the subject of SLAPPs by the people or corporations on whom they blew the whistle. Ultimately SLAPP suits, in the context of public interest environmental litigation, evince a deeper conflict in society. This conflict is the struggle between the competing interests of developers pursing their property rights, and government or environmentalists pursing conservation objectives. Also, SLAPP suits broadly show the need for a balance between competing individual rights such as freedom of expression, right to privacy, and the right to property. In this article we focus solely on SLAPP suits in the context of public interest environmental litigation and the interests that are implicated in such litigation. This matter is worth investigating as according to Sive, 'litigation is the most important thing the environmental movement has done …'[11]

8 Ibid 328–9 (SLAPP suits essentially aim to silence those challenging the powerful on issues if public concern'; G Pring & P Canan *SLAPPS: Getting Sued for Speaking Out* (1996) 8–9 (for a case to qualify as a SLAPP suit it must primarily involve communication on a matter of public significance aimed at influencing governmental decisions, which secondarily results in a civil claim/complaint directed at a non-governmental organisation (NGO) or public interest activist).

9 Ibid 328; S Hartzler 'Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant' (2007) 41 *Valparaiso Univ LR* 1235,1240.

10 Wright-Pegs (note 7 above) in general.

11 D Sive 'The Litigation Process in the Development of Environmental Law' (1995) 13 *Pace Envtl LR* 1, 3.

Public interest litigation supported by public participation is the main tool to ensure effective compliance with environmental laws.[12]

In an emergent economy such as South Africa's, the divide between those fighting for environmental protection and those promoting development is greater given the urgent need for socio-economic development after apartheid. Balancing development and conservation interests is quite a challenge.[13] Often this balance is secured through a number of procedural and substantive guarantees and public participation in environmental decision-making. However, balancing environmental conservation or protection and development interests is a delicate balancing act that is yet to be mastered even by many 'first-world' countries. The recent public spat between heritage conservationists fighting for the Mapungubwe reserve and Coal Africa's Vele coal mine in Limpopo is a reminder.[14] Thus:

> Public participation in administrative and legislative decision-making has become an integral and important aspect of environmental governance in many democratic countries, including a growing number of developing countries. However, striking a good balance between democratic participation and administrative efficiency presents challenges for many governments.[15]

Some legal battles bearing the brand of SLAPP suits have already gone before South African courts. In these cases some developers are ostensibly testing the boundaries of acceptable public participation and asking the judiciary to balance the need for environmental protection, the right to freedom of expression and public participation on the one hand, and their rights to carry on business, use their property or their reputation on the other.[16] The court of public opinion, on the other hand, is asking whether this litigation is not simply corporate hard ball to suppress meaningful, public interrogation of new development activities and their effects on fragile ecosystems, and deter future opposition to similar projects. Shannon Hartzler concurs adding that, 'SLAPP suits are frequently identified with development projects in which citizens petition local government to curtail certain development activity and the developers sue the citizens to discourage their complaints'.[17]

The Constitution of the Republic of South Africa, 1996 guarantees everyone the right to 'an environment not harmful to their health and or wellbeing' and enjoins the state, through legislative and other mechanisms, to protect the

12 RR Kuehn 'Shooting the Messenger: The Ethics of Attacks on Environmental Representation' (2002) 26 *Harv Envtl LR* 417, 418. (Given the complexity of environmental disputes and the role that government entities often play in creating or failing to address environmental problems, litigation has been particularly crucial to advance environmental interests.)

13 See *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) for a recent elaboration by the Constitutional Court of the balance that sustainable development is aimed at achieving.

14 'Mapungubwe Vele Coal Mining Debate', *SABC TV2 50/50* (15 November 2010).

15 Environmental Evaluation Unit 'Public Participation in Environmental Decision-Making in the New South Africa' <http://www.eeu.org.za/thematic-areas/environmental-management-and-sustainability/public-participation-in-environmental-decision-making-in-the-new-south-africa>.

16 Examples include *Petro Props (Pty) Ltd v Barlow* 2006 (5) SA 160 (W).

17 Hartzler (note 9 above) 1236; Pring & Canan (note 8 above) 35.

environment for the use and enjoyment of present and future generations.[18] The Constitution also guarantees every person's right to freedom of expression,[19] but adds the caveat in s 36, that like other rights in the Constitution, this right may be restricted under certain circumstances. Juxtaposed to these rights are the guarantees of the right to property[20] and a cluster of socio-economic rights that heavily depend for their enjoyment and fulfilment on high levels of socio-economic development.[21] Procedurally, the Constitution also establishes a less stringent framework for the enforcement of the rights enshrined in the Bill of Rights.[22]

The constitutional guarantees mentioned above are given further content in legislation and, as far as the focus of this article is concerned, the National Environmental Management Act 107 of 1998 (NEMA) is on point. The NEMA provides that the law should establish procedures and institutions to facilitate and promote public participation in environmental decision-making.[23] Public participation is an essential tool to ensure that decisions that may significantly affect the environment are scrutinised and made from an informed point of view. The principle is recognised internationally as a core component of sustainable development.[24] It is the mechanism and platform provided to those affected, potentially affected by or interested in, the effects of development activities on the environment to air their views. Such participation enables potentially affected parties to challenge decisions that are flawed through public interest environmental litigation. The process of democratic participation and the need for expedited delivery on housing, water, education, health and food are uneasy bedfellows.

It is precisely at this convergence of rights that the South African courts have had to adjudicate novel cases in which developers have taken environmental activists, lobbyists or interested parties to court, because they claim that their vocal challenges to proposed developments (which often delay these developments) cause them financial and reputational harm. These cases have prompted some individuals in the legal profession, environmental sector and media to question the impetus behind the litigation. They caution that, these cases may be attempts to silence those critical of the manner in which unscrupulous developers ignore those with vested interests in the environmental impacts of proposed developments.[25] Before discussing some of the recent cases that are symptoms of the emergence of SLAPP suits in South Africa,

18 Section 24.
19 Section16.
20 Section 25.
21 Sections 25, 26, 27 & 29.
22 Section 38.
23 Section 2(4)(f). ('The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured'.)
24 P Birnie & A Boyle *International Law & the Environment* 2 ed (2002) 86.
25 See detailed discussion under part IV below.

we briefly highlight the legal framework for public participation and public interest environmental litigation in South Africa.

II Key Legal Provisions on Public Participation and Public Interest Environmental Litigation in South Africa

Two key pieces of legislation are of primary importance for public participation and public interest environmental litigation in South Africa, namely the Constitution and the NEMA. The multitude of other sector-specific environmental statutes[26] that also allow for broad consultation in environment-related activities and the procedures governing public participation laid down in NEMA, including the NEMA regulations governing environmental impact assessment (EIA),[27] are not particularly our focus. This is mainly because the general principles of environmental law that underlie most of these statutes as well as the general environmental enforcement provisions are located in the NEMA, the overarching framework environmental law. Similarly, we reiterate that the focus of this article is not public participation in environmental decision-making per se, but SLAPP suits as a threat to litigation that often results from the exercise of such participation.

(a) The Constitution and the NEMA – enabling public interest environmental litigation

As noted above, the Constitution provides a framework for public participation in decision-making generally and creates the foundation on which participation in environmental decision-making is then expanded on in the NEMA.[28] Significantly, s 24 of the Constitution provides that:

> Everyone has the right to:
> (a) an environment which is not harmful to their health or well-being;
> (b) have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that:
> (i) prevent pollution and ecological degradation
> (ii) promote conservation
> (iii) secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.

The nature and scope of s 24 has been dissected by many scholars and the courts, and we shall not belabour that aspect in this article.[29] Particularly sig-

26 These include the National Water Act 36 of 1998; the National Environmental Management: Waste Act 59 of 2008; the National Environmental Management: Biodiversity Act 10 of 2004; the National Environmental Management: Protected Areas Act 57 of 2003; and the National Environmental Management: Air Quality Act 39 of 2004.

27 For which see generally T Murombo 'Beyond Public Participation: The Disjuncture Between South Africa's Environmental Impact Assessment Law and Sustainable Development' (2009) 11 *Potchefstroom Electronic Law J* 1, 31.

28 Section 2(4)(f).

29 For sustained analysis of s 24 see J Glazewski *Environmental Law in South Africa* 2 ed (2005) 7; F du Bois & J Glazewski *The Environment and the Bill of Rights* (2004) 15; and L Feris 'Environmental Rights and Locus Standi' in A Paterson & AJ Kotze *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 129.

nificant is the reference to the principle of sustainable development, which is elaborated on in the NEMA as including the right of the public to participate in environmental decision-making.[30] The duty in s 24(a) of the Constitution applies to public, state and private entities including individuals and is enforceable vertically and horizontally, at the instance of one group, against any other, where applicable.[31]

Importantly for the purposes of this article, s 38 of the Constitution allows certain categories of persons to approach a court with competent jurisdiction to enforce the rights contained in the Bill of Rights including s 24.[32] The categories of persons are:

> anyone acting in their own interest;
> anyone acting on behalf of another person who cannot act in their own name;
> anyone acting as a member of, or *in the interest of, a group or class of persons*;
> anyone acting *in the public interest*; and
> an association acting in the interest of its members. (our emphasis)

In the context of public participation in environmental decision-making, the right to appear before the courts or locus standi becomes indispensable, if anything, because 'it is usually environmental organizations which wish to litigate environmental issues. Previously this litigation was blocked by the requirement that the plaintiff have an interest in the relief claimed'.[33] Section 38 is therefore generally construed as extending the principles of locus standi, to include classes of persons whose rights may not be directly affected by the activity or conduct being challenged.[34] This undoubtedly has been one provision that has opened the space for public interest litigation generally in South Africa, and much has been written about it to warrant any further analysis.[35]

There are also civil and political rights in the Constitution that often reinforce the enforcement of environmental rights. These include, for instance, the right to human dignity,[36] the right to life,[37] the right to privacy,[38] administrative justice[39] and the right of access to information,[40] but we do not venture to discuss these other rights in the context of the narrow focus of this article. To augment this package of rights the Constitution also provides for socio-economic rights

30 Section 2(4)(f).
31 Glazewski (note 29 above) 74.
32 Section 38 is further given content specific to public interest environmental litigation in s 32 of the NEMA, which adds that such standing is awarded to persons who want to sue in the interests of protecting the environment.
33 C Loots 'The Impact of the Constitution on Environmental Law' (1997) 4 *SAJELP* 57, 64; see also L Feris (note 29 above) 129 and authorities there cited; standing remains a challenge in our comparator jurisdiction the US, for which see generally M Banda '*Summers v Earth Island Institute*' (2010) 34 *Harv Envtl LR* 321, 333; and T Murombo 'Strengthening Locus Standi in Public Interest Environmental Litigation: Has Leadership Moved from the United States to South Africa?' (2010) 6 *Law Envt & Dev J* 165 and authorities there cited.
34 Glazewski (note 29 above) 121.
35 See note 5 above and authorities there cited.
36 Section 10.
37 Section 11.
38 Section 14.
39 Section 33.
40 Section 32.

including the right of access to health services, the right to access to sufficient food and water.[41] Again we do not seek to discuss these rights exhaustively in this article, but focus only on SLAPP suits as an impediment to litigation to enforce compliance with, particularly environmental rights (seen by some as part of socio-economic rights). Morne van der Linde and Ernst Basson correctly observe that:

> Section 24 possesses characteristics of both civil rights and socio economic rights … As a socio-economic right, government is under a constitutional obligation to take positive action in order to promote, protect and fulfil the enjoyment of the right. Subsection (b) places a duty on the state to take certain measures with the view of full realization of this right through sound management strategies, conservation, environmental education and an integrated approach to resource utilization. These ends must be achieved through either legislation or other measures including, but not limited to, policies, programmes of action, strategies and guidelines.[42]

In a discussion on public participation in the enforcement of environmental rights through public interest litigation, it is necessary briefly to highlight the significance of ss 32 and 33 of the Constitution. Section 32 allows citizens access to information held by the state or by other persons or organisations, and required by the applicant in the exercise or protection of a right. It is trite that there can be no effective participation in environmental decision-making, without access to information, and consequently there cannot be effective public interest environmental litigation without the necessary information (evidence) required to sustain any legal claims.[43]

The difference, therefore, between an informed and an uninformed participant goes to the root of the rationale behind public participation, namely to have the public add value to the consultative decision-making process, not just voice. The legislature has breathed life into this clause by passing the Promotion of Access to Information Act 2 of 2000 (PAIA), which sets out the principles and processes to be followed in exercising this right.[44]

Section 33 demands just administrative action from decision-makers categorised as organs of state. Again, the legislators have passed the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which gives effect to this right, and which provides in the preamble to the Act that everyone is entitled

41 Section 27.

42 M van der Linde & E Basson 'Environment' in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2002) 50; see also the cases in note 3 above for the courts' elaboration of s 24 rights.

43 W du Plessis 'Access to information' in Paterson & Kotze (note 29 above) 138; see also M Kidd 'The National Environmental Management Act and Public Participation' (1999) 6 *SAJELP* 21, 26 who observes that '[t]he right of access to environmental information is a cornerstone of public participation in environmental governance. It is vital that people be informed as to the state of the environment and of issues which may affect the environment in order that their participation is meaningful'.

44 Whether or not the PAIA has improved access to information is debatable, see Centre for Applied Legal Studies (CALS) & Wits Law School 'Coal Mining and Communities – An Environmental Rights Perspective' (2009) (noting from an empirical study that getting information on mining in Ermelo is a nightmare). This was corroborated on *SABC TV2 50/50* (9 August 2010) (where environmentalists highlighted the struggle they have been engaged in to obtain information about the environmental impact assessment (EIA) and the environmental management plan (EMP) for the new Coal Africa Vele coal mine in Limpopo).

to administrative action which is lawful, reasonable and procedurally fair. The right also envisages that the decision-making process will be transparent and the decision-makers held to account in the exercise of their discretion:

> The courts have in the past reviewed administrative action only on very limited grounds, namely mala fides, failure to apply one's mind and at times gross unreasonableness. The administrative justice clause in the Bill of Rights has substantially changed the position and section 33 offers potentially greater scope for challenging the merits of administrative decisions affecting the environment.[45]

Finally, the provisions of s 36, the Limitations Clause, in the Bill of Rights are also an important consideration when analysing the environmental rights contained in s 24 of the Constitution. Environmental rights, as with all other rights, can only be limited 'if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[46] It may be noted here that some SLAPP suits may seek to enforce one or more versions of limits to the rights that public interest litigators seek to vindicate.[47]

When viewed from above, the blueprint provided by the Constitution for broad public engagement in environmental affairs seems more than adequate and well suited to sustain public interest litigation premised on such participation. The above constitutional provisions are given further specific content in the NEMA, enacted in pursuit of s 24(b) of the Constitution. The NEMA promotes the principle of public participation in environmental governance in s 2(4)(f). Among other provisions, s 24(4)(d) of NEMA provides as follows, with regard to public participation:

> (4) Procedures for the investigation, assessment and communication of the potential impact of activities must ensure, as a minimum, with respect to every application for an environmental authorisation –
> *(d)* public information and participation which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in such information and participation procedures.

It is clear that the principles of the NEMA demand public participation in all environmental decisions that have the potential to impact upon the environment. As noted earlier on this participation, among other procedures is a key vehicle through which public interest cases are built.

An important provision of the NEMA is s 32,[48] which provides for further expanded rules on standing and other procedural reforms to support public

45 *Petro Props* (note 16 above) 124.
46 Constitution s 36(1).
47 See *Petro* Props (note 16 above) analysed below.
48 In full s 32 provides that:

> (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources –
> (a) in that person's or group of person's own interest;
> (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

interest environmental litigation. Complementing and augmenting s 38 of the Constitution, s 32 of the NEMA is the linchpin supporting public interest environmental litigation in South Africa.

Firstly, it alleviates some of the traditional obstacles to public interest litigation such as unfavourable rules on costs following the-costs-follow-the-cause rules of civil procedure, and the issue of locus standi.[49] Secondly, it creates a special enforcement procedure for environmental matters, a difficult thing under ordinary rules of the common law, and civil and criminal procedure. Most importantly, it provides a tool that can at present be used to defend SLAPP suits that target prolonging litigation and saddling the public interest environmental litigant with a huge costs bill.

However, on its own s 32 is not sufficient to deter potential SLAPP suitors in South Africa. It may be necessary for South African courts and public interest environmental litigators to look to other jurisdictions to see how the SLAPP suits have been averted. In this respect we chose to discuss the experience of the US with SLAPP suits in general and in environmental matters to highlight how the legislature and public interest attorneys have confronted the adverse impacts of SLAPP suits.

III The US Experience with Slapp Suits

In our discussion of SLAPP suits in the US we do not intend digressing by dwelling on all the differences in the legal systems between the US and South African jurisdictions, rather we focus merely on those which are pertinent to the issue under examination. The US is obviously the comparative jurisdiction of first choice given that it is the birthplace of, not only 'SLAPP suits', but also of the modern environmental movement. We take cognisance of the vast

> (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
> (d) in the *public interest*; and
> (e) in the *interest of protecting the environment*.
>
> (2) A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons *acted reasonably* out of a concern for the public interest or in the interest of protecting the environment and *had made due efforts to use other means reasonably available for obtaining the relief sought*.
>
> (3) Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of this Act, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment, a court may on application –
> (a) award costs on an appropriate scale to any person or persons entitled to practice as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings; and
> (b) order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings. (our emphasis)

49 Humby (note 5 above) 124; see also Kuehn (note 12 above) 418 (lawyers who bring citizen suits in the US can also claim favourable costs orders and indication of the public interest nature of bringing statutorily mandated citizen suits).

social, economic and political contextual differences that inevitably shape the nature, frequency and prevalence of the use of SLAPP suits to deter public interest environmental litigants. In general the US society is more litigious compared to South African society.

The US has a strong set of environmental legislative tools[50] and a history of environmental activism that is deep-rooted. The citizens of the US hold dearly, the concept of environmental protection, and their constitutional right to freedom of speech and freedom of the press, among other rights. The US is also responsible for starting the war against environmental contamination. The juxtaposition of deep-pocketed corporations and uncharacteristically deep-pocketed environmental activists make this a fertile ground for interesting litigation. This contrasts sharply with the often shallow-pocketed environmental activists, and NGOs that usually assume the role of environmental stewards in South Africa and many developing countries. Precisely this point makes SLAPP suits an even more potent threat in the South Africa context, as SLAPP suitors have the 'right' defendants whose pockets can easily be exhausted and enable SLAPP suitors quickly to achieve their objective.[51]

(a) SLAPP suits in the US – a brief analysis

The phenomenon of SLAPP suits first developed in the US. As noted in the introduction, Pring and Canan in their seminal work first coined the term in the early 1990s.[52] The First Amendment in the US Constitution guarantees its citizens the right to freedom of expression. However, these two academics tracked over a number of years, a trend of litigious matters involving civic-minded individuals or groups who wished to influence government policy or attract attention to the activities of large corporations, which effectively put the brakes on the exercise of this right:

> Over the years we reported how this practice struck at the very core of democracy. It resulted in politically chilling thousands of civically involved citizens, and it wreaked personal and financial havoc on most targets as well as having troublesome 'ripple effects' on other citizens' willingness to participate in civic discourse. We named the practice Strategic Lawsuits Against Public Participation (or SLAPPs).[53]

50 Examples include the use of 'citizens suit' provisions in environmental legislation, such as the Clean Water Act 33 USC s 1365 (1994) and the Clean Air Act 42 USC s 7604 (1994), to give ordinary citizens the mandate to sue to enforce environmental laws aimed at securing the public interest in environmental protection.

51 Wright-Pegs (note 7 above) 327 (the aim of a SLAPP is to burden the activists with cost of defence until they abandon their case); *Gordon v Morrone* 590 NY S 2d 649, 656 (NY SC 1992) (the longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success).

52 Pring & Canan (note 8 above) 8–9.

53 FJ Donson *Legal Intimidation: A SLAPP in the Face of Democracy* (2000). See also *Price v Stossel* 620 F 3d 992 (9th Cir 2010); *Tosco Corporation v Communities for a Better Environment (CBE)* 236 F 3d 495 (9th Cir 2001); and *United States ex rel Newsham v Lockheed Missiles & Space Co* 190 F 3d 963, 970 (9th Cir 1999) for instance where US courts have grappled with SLAPP suits. Detailed analysis of these and other cases is beyond the limited scope of this article but some are discussed further below.

Pring and Canan identified a common thread with matters which they termed SLAPP suits – namely that the aim of the litigation was not to enforce a legitimate right (even though the action had a basis in law and sometimes may be launched in good faith). The aim was often to silence or frighten the opponent, tie them up with paperwork or bankrupt them with legal costs.[54] They recognise that the right to freedom of expression must be weighed against the right not to be defamed (the usual action on which SLAPP filers rely on).[55]

Most SLAPP suits that have been filed in the US are seldom successful on the merits.[56] In fact, in most cases the court finds for the defendant, but as mentioned above, the aim of SLAPP suits is not to actually take a winnable claim to court.

One trial judge pointed out:

> The conceptual thread that binds [SLAPPs] is that they are suits without substantial merit that are brought by private interests to 'stop citizens from exercising their political rights or to punish them for having done so' … The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism.[57]

The Court in *Price v Stossel*[58] affirms this conception of SLAPP suits by stating that:

> The hallmark of a SLAPP suit is that it lacks merit, and that it is brought with the goals of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party's case will be weakened or abandoned. The anti-SLAPP statute attempts to counteract the chilling effect of strategic suits by providing that such suits should be dismissed under a special motion to strike.

An example of a well-known example of a SLAPP suit against an environmental interest group in the US is *Tosco Corporation v Communities for a Better Environment (CBE)*[59] where the plaintiff, an oil refining company filed a suit against a California-based non-profit organisation in the Federal Court. The litigation arose because of CBE's persistent litigation against Tosco and other alleged polluters over a number of years for various infringements of environmental pollution control legislation. After being ordered to clean up their act in a number of decisions, Tosco decided to sue CBE claiming that the non-profit organisation was maliciously prosecuting and defaming the

54 See cases in note 53 above for instance.

55 Pring & Canan (note 8 above) 8; see also the Californian Anti-SLAPP Project website 'Survival Guide for SLAPP Victims' <http://www.casp.net/slapps/survival.html> (SLAPP filers frequently use lawsuits based on ordinary civil claims such as defamation, conspiracy, malicious prosecution, nuisance, interference with contract and/or economic advantage, as a means of transforming public debate into lawsuits.)

56 See for instance *Tosco Corporation v Communities for a Better Environment (CBE*) 236 F 3d 495 (9th Cir 2001) and cases relied on by the Court therein; *and Metabolife Int Inc v Wornick* 264 F 3d 832, 839 (9th Cir 2001) 840.

57 S Beder 'SLAPPs – Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You' (1995) 72 *Current Affairs Bulletin* 22–9 <http://www.uow.edu.au/arts/sts/sbeder/SLAPPS.html>.

58 620 F 3d 992 (9th Cir 2010).

59 *Tosco Corporation* (note 56 above).

corporation. The Court recognised the veiled attempt to circumvent the tough Californian state anti-SLAPP legislation[60] and ruled against the corporation. Some attorneys claim that this case showed the Court's alertness to the abuse of court process to stymie public interest litigation.[61] The lawsuit tied CBE up in court for over five years, and in 2004, the non-profit group decided to file suit against Tosco under the Californian anti-SLAPP law for damages, including legal fees, incurred in defending the case.

In 1993 California enacted s 425.16 of the Code of Civil Procedure specifically to protect people from SLAPPs. This progressive legislation in California allows a defendant to an action, which she or he suspects to be a SLAPP suit, to file an early motion for the action to be dismissed and apply for costs of the suit. The judicial officer must at an early stage apply his or her mind to the merits and determine whether the plaintiff has any chance of success, were the matter to proceed to trial.[62] If the judge finds that there is little or no prospect of success, the suit must be dismissed. California passed two amendments to the above statute, being the Code of Civil Procedure s 425.17 adopted in 2003 and s 425.18 passed in October 2005. The first amendment aims to guard against the abuse of the anti-SLAPP mechanism[63] and the second is aimed at allowing victims of SLAPP suits to recover the costs of defending such an action.[64] Due to the attention that was drawn to this type of litigation in the US, several US states have passed anti-SLAPP legislation.[65]

Pring and Canan argue that Minnesota's anti-SLAPP law goes further as it does not leave loopholes for official SLAPPs.[66] Canan notes that:

60 California Code Civ Proc s 425.16(a); see also Wright-Pegs (note 7 above) 325.

61 'Federal Judge Throws out Tosca SLAPP Suit against CBE – Environmentalists Vindicated' <http://www.mapcruzin.com/scruztri/docs/news02021.htm>.

62 See *United States ex rel Newsham v Lockheed Missiles & Space Co* 190 F 3d 963, 970 (9th Cir 1999) for the anti-SLAPP suit legislation in action; see also *Masson v New Yorker Magazine, Inc* 501 US 496, 111 SC 2419, 115 L Ed 2d 447 (1991) (the trial judge must apply his/her mind to the merits of the action before dismissing a potential defamation claim).

63 For instance where in fact there was defamation and the defendant attempts to hide behind anti-SLAPP legislation, thus in *Masson* (note 62 above) the Supreme Court remanded the case to the lower court for further proceedings having noted that the lower court had cursorily given the defendant the benefit of anti-SLAPP suit legislation when in fact there was evidence of defamation.

64 *Metabolife* (note 56 above) ([a] defendant's anti-SLAPP motion should be granted when a plaintiff presents an insufficient legal basis for the claims or when no evidence of sufficient substantiality exists to support a judgment for the plaintiff).

65 Hartzler (note 9 above) 1241–2, 1248 (identifying the different types of statutes that US states have passed to deal with SLAPP suits. These range from 'narrow' to 'broad' with an intermediate 'moderate' type of anti-SLAPP legislation. These categories depend on the scope of protection offered by the legislation, for example some protect specific actions while some protect defendants participating in specific types of public processes only). To date, approximately 24 states and territories of the US have also passed some sort of statutory protection/s against SLAPPs. Amongst them, Washington and New York, which have 'anti-SLAPP' statutes similar to the Californian laws: Washington revised code ss 4.24.500–20; New York Civil Practice Law, rules 3211(g) & 3212(h); and New York Civil Rights Law ss 70-a and 76-a. The Colorado SC has also ruled that citizens of that state are protected from SLAPPs; see also First Amendment Project, the Anti-SLAPP Resource Centre <http://www.thefirstamendment.org/antislappresourcecenter.html>.

66 Pring & Canan (note 8 above) 201 (noting that California anti-SLAPP laws had a loophole that actually allowed the police to file SLAPP suits).

> [t]oday SLAPP targets are more likely to sue back for loss of political rights and win both compensatory and punitive damage awards against filers. About 20 American states have passed anti-SLAPP laws that aim to turn the tide against would-be SLAPP filers. Yet the practice continues.[67]

In practice most anti-SLAPP legislation requires the plaintiff, at a preliminary, to prove the potential of his claim, and that the case is not frivolous and vexatious. As stated by the Court in *Equilon Enterprises v Consumer Cause, Inc* anti-SLAPP statutes typically requires the defendant to establish that:

> the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech; from that fact the court may effectively presume the purpose of the action was to chill the defendant's exercise of First Amendment rights.[68]

Once the defendant discharges this onus the plaintiff must rebut the presumption by proving that his or her case carries prospects of success on the merits.[69]

Interestingly SLAPP suits have not only been identified in the public law arenas such as environmental law field, where activists are being silenced.[70] SLAPP attacks may take other pre-litigation forms to intimidate even the attorneys and law school clinics representing litigants in public interest environmental matters.[71] These trends include debates about the extent to which one's private interests can be protected and seems to arise whenever there are opportunities for a David and Goliath like battle. For instance where an individual or a rights group criticises a particular practice of a larger corporate entity or an arm of government and the right exercised is a personal one to freedom of expression, as a consumer. These issues are highly relevant as public interest litigation heavily depends on the flow of funding towards public interest organisations.

In the US there is a new surge in suits filed against Internet posts that allegedly defame or damage the business interests of corporations. New web and blog sites are listed everyday and more and more individuals are trying to

67 P Canan in a review of FJL Donson's book *Legal Intimidation: A SLAPP in the Face of Democracy* (2000) <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/donson.htm>.

68 29 Cal 4th 53, 52 P 3d 685 (Cal 2002) 690.

69 The Court in *Equilon* relied heavily on *Fox Searchlight Pictures, Inc v Paladino* 89 Cal App 4th 294, 106 Cal Rptr 2d 906 (Cal App 2 Dist 2001) for the onus aspect of the decision.

70 *Tosco Corporation* (note 56 above); *Masson* (note 62 above); *Vess v Ciba-Geigy Corp* US 317 F 3d 1097 (9th Cir 2003); *South Middlesex Opportunity Council, Inc v Town of Framingham* US Dist LEXIS 85764 (2008) (applying the Massachusetts anti-SLAPP statute – Mass Gen Laws ch 231 s 59H); *Eastern Ky Resources v Arnett*, 892 SW 2d 617, 618 (Ky App 1995) (a US$2-million damages claim brought by company against public interest litigators who challenged a solid waste facility); *Westfield Partners, Ltd v Hogan,* 740 F Supp 523, 525 (ND Ill 1990); *Gordon v Marrone* 155 Misc 2d 726, 590 NY S 2d 649, 656 (SC 1992); *Levin v King* 271 Ill App 3d 728, 648 NE 2d 1109 (1995).

71 Kuehn (note 12 above) 423; see also 'Law School Clinics Face Backlash' *New York Times* (3 April 2010) <http://www.nytimes.com/2010/04/04/us/04lawschool.html> (detailing how many law school clinics faced the threat of funding withdrawal to prevent them from taking on public interest matters against state governments or corporations that have the support of state governments. In Maryland a law clinic almost lost funding when it brought an environmental action against a poultry company polluting the Chesapeake Bay but had the backing of the state government).

make their voices heard.[72] Journalists and columnists are increasingly falling victim to SLAPP suits because of the nature of their jobs:

> The San Francisco Chronicle, for example, has successfully used the anti-SLAPP laws several times to ward off what it believed to be frivolous lawsuits. In one case, it had written a long investigative piece on More University, an alternate life-style college in California offering courses on 'sensuality', 'mutual pleasurable stimulation', and 'niceness/meanness'. More University sued for libel and the paper was able to defeat the lawsuit by using the California Anti-SLAPP law.[73]

Although anti-SLAPP legislation may be a handy tool in the hands of writers who intend no malice, and publishers who often have to pay large amounts of money to protect their right to make fair comment, it should be limited to its proper purpose, namely to promote public participation in matters of public interest. We argue below that there are important lessons for South Africa to learn from the experience of some US states with SLAPP attacks. Although the California model represents the extreme side of the scale of what could be implemented to enforce the right to participate freely in environmental decision-making, it should not be dismissed out of hand. The prospect of having the merits of a matter weighed up before incurring the heavy costs of litigation would not only streamline the already congested legal apparatus, but also encourage legitimate and reasonable dissent.[74] One of the key negatives, however, must be that this could lead to an opening of the 'floodgates' and stifle necessary development in the South African context.[75] The floodgates argument has since been disproven especially in the context of the non-litigious society of South Africa.

The US states that have adopted anti-SLAPP legislation have done so through trial and error, and have tried to develop the law so that it curbs abuses of the legal process to jeopardise public interest litigation. However, SLAPP suits continue to be a problem despite targeted legislative interventions, which are often abused.[76] Statutory intervention will not necessarily stamp out the practice. The US experience does show that it is worthwhile trying legislative interventions, but that such interventions must have provisos to guard against potential abuse. In addition to direct legislative intervention, we argue below that the recent South African SLAPP suits and how the courts have dealt with them indicate that the judiciary can also use existing rules of procedure to forestall potential SLAPP actions. Indeed, even in the US the courts have been

72 J Goodale 'SLAPP and Black Hole of Internet' (1998) 52(3) *Nieman Reports*.

73 Ibid.

74 It can be argued that s 32 of the NEMA and the statutory provisions on costs are sufficient to ensure that no opening of floodgates occurs as well as that frivolous and vexatious actions by busy bodies do not masquerade as genuine public interest environmental litigation.

75 The floodgates argument was also previously raised against opening up rules on locus standi (see *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa* 1996 3 SA 1095 (Tk), but to date we have not seen the courts being flooded with frivolous public interest cases; see also generally Murombo (note 33 above).

76 Masson (note 62 above).

creative outside the framework of the anti-SLAPP statutes[77] using procedural rules to dismiss SLAPP suits, but their record has not been entirely positively consistent.[78] With these lessons in mind we now consider the recent trends in South Africa.

IV Symptoms of the Ugly Head of Slapp Suits in South Africa

Keeping in mind the characteristics of SLAPP suits as defined by the courts in the US[79] we are easily able to identify some South African cases that show the emerging threat of SLAPPing public interest litigators. As discussed above, this type of action was first documented in the US where the term 'strategic lawsuit against public participation' or 'SLAPP' has been coined. However, the more worrying aspect is that they are new to South Africa and have the potential to cow public interest environmental litigators who are already saddled with other legal obstacles to their advocacy for the environment.[80] A sustained discussion of these other obstacles is beyond the scope of this article and has been exhaustively researched by a number of scholars.[81]

The SLAPP suit is a relatively new term in South Africa.[82] The concept to which it refers is as old as litigation itself (silencing a vocal opponent by threatening to take him to the cleaners). However, the specific type of litigation, which is defined in the introduction and throughout this work, has obvious ties to South Africa's history as a new democracy and the newfound ability of its people to participate in legislative and policy processes.

The first matter that comes to mind is *Petro Props*[83] where the plaintiff, a developer and owner of a piece of land, planned to construct a petrol station in Boksburg in Gauteng. The defendant, a resident of the area and environmental activist, in which capacity she was chairperson of the Libradene Wetland

77 Some SLAPPed litigants have also used SLAPPback action such as malicious prosecution *Soukup v Law Offices of Herbert Hafif, Supreme Court of California* 39 Cal 4th 260; 139 P 3d 30 (2006) (where an employee who had been SLAPPed by her employers later sued them for malicious prosecution and abuse of process). 'SLAPPback' is defined in the Californian code as 'any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Section 425.16 [SLAPP]'.

78 Pring & Canan (note 8 above) 158.

79 See *Tosco Corporation* (note 56 above); *Lockheed Missiles* (note 62 above).

80 See generally Humby (note 5 above); G Marcus & S Budlender 'A Strategic Evaluation of Public Interest Litigation in South Africa' (2008) *Atlantic Philanthropies Report* 15 <http://www.atlanticphilanthropies.org/sites/default/files/uploads/public_interest_litigation_sa.pdf> (there are other broader challenges to public interest litigation and these include lack of funding, expertise and hostile government attitude). As noted earlier on a detailed study of these other obstacles is beyond the focus of this study.

81 See generally Paterson & Kotze (note 29 above); T Field 'Public Participation in Environmental Decision-Making: *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism'* (2005) 122 *SALJ* 748–65; Humby (note 5 above) in general; M Kidd 'Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles' (2010) 13 *Potchefstroom Electronic Law J* 27 (mainly discussing locus standi and how the change brought by s 38 of the Constitution and s 32 of the NEMA have made this a non-issue).

82 Only directly referred to in the recent *Wraypex* costs judgment – *Wraypex (Pty) Ltd v Barnes* 2011 JDR 0084 (GNP) 5.

83 Note 16 above.

Association (the second defendant), launched a publicity campaign against the proposed development, citing that the station would irreparably damage the sensitive ecology of a nearby wetland. The campaign took the form of community meetings, using the media as a means of getting the message across, handing out pamphlets and trying to engage with government. The viability of the construction was dependant on the support of a South African oil and petrochemical company, and the plaintiff claimed that the continued campaign by the defendants had placed that deal in jeopardy. The developer proceeded to court seeking an interdict against what it perceived to be unlawful harassment and infringement of its property rights. It claimed damages against the plaintiff in the amount of R6-million. The Court was asked to weigh up the defendant's right to freedom of expression versus the plaintiff's property rights.

In dismissing the plaintiff's application, the Court found that the defendant had engaged in an activity, which was her civic duty and constitutional right. The Court found that the rights to freedom of expression and the rights embodied in property ownership were not absolute, and could be limited by the provisions of s 36 of the Constitution. However, in this case the peaceful exercise of the defendant's rights to voice her concerns publicly did not constitute an infringement of the plaintiff's property rights.

The Court also found that in granting the relief requested by the plaintiff, it would be hampering a debate that should be heard in the public domain, as it was in the public's interests, ruling that:

> Having regard to these considerations, it is necessary to examine more closely what the 'harassment and interference' is that the applicant complains of and seeks to stop. Neither Ms Barlow nor any other member of the Association has made any attempt physically to impede the construction process. Indeed, other than for a few joint site visits, there is no suggestion that any of them has even entered the building terrain. Put differently, this interdict application is not of the kind where picket lines must be ordered to leave or where respondents must be ordered not to spoil mortar mixes. Instead, what the applicant brings to Court is a situation where *other* persons have found that there is merit in the concerns articulated by the respondents and where those concerns have won substantial popular support.
>
> In effect, the applicant requests this Court to issue an injunction that Ms Barlow and the Association may no longer speak out, may no longer champion their cause, may no longer seek to persuade. *In particular, the applicant wishes to prevent the generation of further public opinion, which could be placed before Sasol and which may finally sway it to withdraw from its contractual nexus with the applicant*. Likewise, the applicant seeks to put an end to any public mobilisation that may encourage the GDACE to address its own approval process. The applicant, similarly, does not wish there to be any further prompts that may move the national Minister, or even Parliament itself, to reach the view that there should be some intervention.[84] (our emphasis)

Finally, the Court also ruled importantly, that the provisions which allowed for appealing decisions made by government officials in the old Environmental Conservation Act of 1998 (ECA) did not operate to the exclusion of the rights

84 Ibid para 56.

held by individuals under the Constitution. The Court concluded by emphasising that:

> In the result, the applicant has not discharged the burden resting on it to demonstrate that the campaign conducted by Ms Barlow and the Association has thus far constituted an unlawful infringement of its rights and that it is entitled, on that basis, to interdict any future expression of that campaign.[85]

Similarly, in *Trustees, Biowatch Trust v Registrar: Genetic Resources* (2005) the Court had to balance the right of access to information and the right of Monsato to protect its trade secrets regarding the development and field trials of genetically modified crop (GMO) varieties in South Africa. Biowatch required the information to challenge the decision by the Registrar to approve field trials in South Africa. In the High Court Biowatch largely succeeded but despite this the Court of first instance, and on appeal the full bench penalised Biowatch with an adverse costs order due to some procedural technicalities.[86] The case was clearly brought in the public interest to protect potential contamination of the environment by GMO varieties. On appeal to the Constitutional Court[87] Biowatch challenged the costs order and the Court agreed with their contention that such an approach to the issue of costs would unduly stifle all public interest litigation. The Court correctly noted the full bench of the High Court had failed properly to place the case into its public interest constitutional context, and advanced no compelling reasons for departing from the ordinary rule that costs should follow the cause.[88] While not directly a SLAPP case, *Biowatch* illustrates the multiple impacts of procedural barriers to public interest litigation. The prospect of SLAPP setting roots in the country aggravates these existing barriers, and therefore must be stopped at an early stage.

More recently in *Anglo Platinum Ltd v Spoor*[89] Anglo Platinum Ltd, Potgietersrust Platinum Mines Ltd, African Rainbow Minerals Ltd, ARM Mining Consortium Ltd and Rustenburg Platinum Mines Ltd, in combined applications, ganged up on the respondent, an attorney and environmental activist who was representing communities and individuals affected by the mining activities of these mining companies in the Limpopo Province. The respondent had made some remarks in the press and in the course of litigation about the applicants' business practices, claiming that they had acted illegally in relation to their dealings with the communities and individuals and also disregarded their obligations under the environmental legislation.

The applicants sought an interdict to prevent the respondent attorney from making any further remarks in the media about the applicants. The respondent raised the defence that what he was reported to have said was both true and in the public interest. Because the defence was raised, a final interdict

85 Ibid para 75.
86 *Trustees for the time being of Biowatch Trust v Registrar: Genetic Resources* GNP case no A831/2005 (6 November 2007) unreported.
87 *Biowatch Trust v Registrar: Genetic Resources* 2009 (6) SA 232 (CC).
88 Ibid paras 42 & 57.
89 2006 JDR 0859 (T).

could not be granted and the Court further found that the requirements for a temporary restraint were not satisfied, refusing the application. Bertelsman J holding that mining is a controversial activity that often clashes with other competing interests, especially environmental causes worldwide, encouragingly observed that:

> One could add to these observations that the more the publication concerns matters of public interest, the sooner a Court should hold that the balance of convenience lies in allowing the debate to continue, unless there is clearly no defence to the defamation. Vigorous exchange of ideas and opinions is the lifeblood of a democratic dispensation. The more autocratic a public order, the sooner freedom of expression will be curtailed.[90]

The Court added that the mining companies had other remedies including importantly responding through the media to counter the claims of the environmental attorney.

The Court also quotes with approval from the *Hix Networking Technologies v System Publishers* (*Pty*) *Limited,*[91] where Plewman JA quotes from the judgment of Lord Coleridge CJ in *Bonnard v Perryman*:[92]

> The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.

Continuing, Plewman JA states further:

> S 15 (of the Constitution), of itself, does not, in my view, call for a differentiated approach favouring the press in matters of this kind or for a departure from the well-established rules followed by our Courts in other applications for interim interdicts. When it comes to balancing the conflicting interests of the press and the individual, it seems to me that this process can well be accommodated within the four corners of the established rules.
>
> To the extent to which it may be suggested that there have been cases in which a tendency to unduly restrict the freedom of the press to publish (having, so it was argued, a 'chilling effect' upon the enjoyment of free speech), such cases must, in my view, reflect an incorrect weighing of the countervailing interests of the parties. All that need be said is that the proper recognition of the importance of free speech is a factor that must be given full value in all cases … To sum up, cases involving an attempt to restrain publication must be approached with caution.[93]

Of particular significance is the fact that these illustrative cases were resolved purely on the basis of the ordinary rules of interdicts, namely that the applicants had not proved all the requirements for the Court to grant an interdict. Could this be one of the strategies, which the judiciary could use to shield public interest litigants from frivolous SLAPP suits in the absence of specific anti-SLAPP legislation? Perhaps, but we argue that this will require an

90 2006 JDR 0859 (T) 15.
91 1997 (1) SA 391 (A) 401.
92 [1891] 2 ch 269 (CA) 284.
93 2006 JDR 0859 (T) D 12–3.

environmentally enlightened judiciary[94] alert to the propensity of moneyed corporations to abuse the legal process to silence opponents.

Not to be deterred by this minor setback, Anglo Platinum filed suit against Spoor for damages to their reputation, as is noted on the *Corpse Award News Bulletin*:

> AngloPlatinum has imposed several 'SLAPP' orders – Strategic Litigation Against Public Participation – against the mining communities' legal representative, Richard Spoor. An application by AngloPlatinum for an urgent interim interdict to prevent the attorney from 'defaming' it as a 'racist, thug and bully' was dismissed in mid-2006. However, AngloPlats is proceeding against Spoor with a R3,5 million civil claim for alleged damages caused to the corporation's trading reputation.[95]

Both the above cases were launched in the High Court making the defence to the claims considerably more expensive. This is one of the indicators of a SLAPP suit.

In a more recent case, *Wraypex (Pty) Ltd v Barnes*[96] a property developer, Wraypex (Pty) Ltd issued summons against Barnes a former secretary of the Rhenosterspruit Conservancy and other members separately. The case arose from the conservancy's opposition to a 330-house luxury estate, golf course and hotel development, Blair Atholl in northwest Johannesburg adjacent to the Cradle of Humankind World Heritage Site and the conservancy, which are all environmentally sensitive areas.[97] The plaintiff's claims against the other three conservationists in all totalled R40-million in damages and were based on the same facts.

Among other claims, the plaintiff firstly claimed that all the defendants wrongfully and intentionally published false statements about the plaintiff, implying that the plaintiff had acted illegally, fraudulently or dishonestly.[98] Because of the publication of the statements, the plaintiff claimed that it suffered damage to its reputation and was entitled to damages. This publication was made when the defendants lodged an objection with the administrative authorities tasked with approving the development project. The defendants were entitled in terms of legislation to file such objections.

Secondly, the plaintiff alleged that the defendants, in making the statements, knew that the plaintiff was seeking approval for the development, had incurred costs in obtaining approval and would suffer damages were the approval to be delayed or denied. That the defendants intended to delay or deny the plaintiff approval and that such a delay was in fact occasioned by the defendants. As a result the plaintiff suffered damages as a result of the costs of finance and due to contractual penalties.

94 Kidd (note 5 above) in general calling for a greening of the judiciary to promote sustainable development.

95 University of KwaZulu-Natal, Centre for Civil Society, Corpse Awards for corporate misdeeds (November 2006) <http://www.ukzn.ac.za/ccs/default.asp?2,40,3,1134>.

96 Unreported case no 30739/05; 307230/05; 32648/05 and 32649/05 (Gauteng North High Court).

97 'SA Eco-Activist Faces R40m Suit' *Mail&Guardian* (21 April 2007) <http://www.mg.co.za/articlePage.aspx?articleid=305329&area=/insight/insight__national>.

98 *Wraypex* (note 82 above) 3–4.

In response the defendants raised a number of defences, including that the defendants' statements were true, or substantially true, and their publication was in the public interest. Furthermore, that the statements were fair comment and were made in good faith in the exercise of rights guaranteed by law. The defendants further averred that the publication was reasonable, in that the defendants reasonably believed the statements to be true and were not negligent or reckless in their actions. The defendants further raised the defence, that the statements were protected in terms of statute, namely s 34(4) of the NEMA, and s 33 of the Constitution (the right to freedom of expression),[99] which includes the right to receive or impart information and ideas, and that these ideas were not contrary to the intention or ethos of this section.[100]

In ruling that the plaintiff's claim was a SLAPP action,[101] the Court stated that the indicators that this was not an ordinary suit instituted to claim valid relief is that the four environmental activists were sued separately, and had been allocated separate set-down dates, at the plaintiff's insistence, even though the defendants requested a jointer.[102] Also, the multi-million amount of damages claimed was clearly indicative of the SLAPP nature of the cases.[103] The conservancy is a loose association of people interested in the fate of the unique eco-system in the area, most of them residents in or around the location of the proposed development. None of the defendants could afford the prolonged legal onslaught, and the association did not have the resources of an organisation such as Greenpeace. Fortunately, the conservancy secured the services of a public interest attorney. Before the hearings, the plaintiff company on diverse occasions attempted to entice the defendants to settlements, which included among other things, them stopping their opposition to the development projects.[104] *Wraypex* is a classic case of a SLAPP suit, and, having lodged an appeal we wait with anticipation the Supreme Court of Appeal's opinion on the High Court decision.

Besides the gap between public expectation and the reality of public participation, there is clearly also a gap between what the Constitution envisaged with the environmental right, and the realities of justice that is being meted out by the courts. While the cases discussed above are indicative of the emerging trend of SLAPP suits to silence public interest environmental litigators in South Africa, they also importantly illuminate the ordinary legal rules that can be used to defend oneself against SLAPP suits. The worrying thing is

99 *Wraypex* (note 82 above) 10.

100 Ibid 13 & 17.

101 This the Court said in the cost judgment which was heard separately from the main case: *Wraypex* (the Court also noted that '[t]he acronym [SLAPP] stands for Strategic Litigation Aimed against Public Participation. No instances of cases so described are to be found in local law reports but the concept of vexsatiousness (sic) corresponds very closely with the features of a "SLAPP" suit').

102 For this the plaintiff was penalised by an adverse cost order in a separate case reported as *Wraypex* (note 82 above).

103 Ibid 10.

104 Federation for a Sustainable Environment (FSE) 'Count the Cost of Whistle Blowing: R210 million?' <http://www.fse.org.za/index.php?option=com_content&view=article&id=168:count-the-cost-of-whistle-blowing-r210-million-&catid=35:affiliates&Itemid=53>.

that the defences are based on ordinary rules of procedure often depending on proof and the discretion of the judge concerned. Does this necessarily call for any further directed legislative intervention to prevent SLAPP suits or do we wait to see where the trend goes and assess the sufficiency of the provisions in existing laws including the NEMA and the Constitution? We attempt to answer these questions in part V.

V Remedies Against SLAPP Suits in South African Courts

It cannot be said that the South African courts do not have some legal tools, which could stem the emerging trend of so-called SLAPP suits, at their disposal. There are a number of mechanisms available to the courts that, if deployed, could warn SLAPP suitors.

Firstly, amongst these tools are, the Vexatious Proceedings Act 3 of 1956,[105] adverse costs orders,[106] or orders on a higher scale in terms of the High and Magistrate's Court Acts, security for costs orders, and orders of perpetual silence, to name a few. The reality, though, is that these tools are seldom used in environmental and other public interest litigation. We do not intend at this point to deal extensively with most of these remedies as we have already discussed some of the relevant ones above.[107]

Secondly, we argue that most of these tools have either not been used by the courts, or are ineffectual. The Vexatious Proceedings Act has been before the courts quite often and has been successfully used by the courts to throw away or bar frivolous litigators. Could this Act be a solution to SLAPP filers? Are SLAPP suits – such as *Wraypex* necessarily vexatious? The Vexatious Proceedings Act equips the High Court, on application, with the authority to order that no proceedings may be instituted against a person in any court without the permission of the High Court. In the matter of *Ernst & Young v Beinash*[108] the Court found that:

> vexatious litigation does impair the effectiveness of the courts by clogging the rolls and taking up countless hours of court time and straining all the court's facilities. The staff of the registrar, the taxing master, the judge's clerk and the judge himself shares the burden. A courtroom is monopolised for sometimes hours or days, and even after conclusion of the hearing many hours are spent in drafting and delivering judgments and the almost inevitable hearings of applications for leave to appeal. Thereafter the Chief Justice is burdened with a petition and perhaps the Supreme Court of Appeal and five judges might even become involved. All this means that bona fide disputes of all kinds, whether domestic, family, and commercial or criminal have to simply wait their turn. In order to fulfil the noble aims expressed in section 165 of the Constitution in regard to judicial authority I have no doubt that the weeding out of vexatious litigation by means of the screening process contemplated

105 Enacted after the Court in *In re Anastassiades* 1955 (2) SA 220 (W) ruled that courts did not have inherent powers to impose a general order preventing the abuse of court process when Anastassiades filed 32 cases, some repeatedly in clearly vexatious litigation.

106 Using ordinary rules on costs or in environmental litigation s 32(2) of the NEMA as discussed above.

107 A number of authors have also written on the relevant tools such as adverse costs, see note 5 above and authorities there cited.

108 1999 (1) SA 1114 (W), 1140–1; see also *Beinash v Wixley* 1997 (3) SA 721 (SCA).

> by the [Vexatious Proceedings] Act is consistent with the provisions of the Constitution. Far from the Act amounting to a negation of rights of accessibility, it provides the necessary machinery to ensure that the objectives of section 165 are attained.[109]

In this matter the applicant was applying to Court for an order in terms of the Vexatious Proceedings to prevent the respondent from litigating against it, without leave from the Court. However, at the date of the application, the respondents had already launched 45 different proceedings against the applicant! It was not difficult for the Court to conclude that the respondents had embarked on vexatious litigation and it granted the application. It is hard to imagine the person on the street having the time, resources or energy to deal with one let alone 45 different court applications, but seemingly this is a situation that could still present itself in South Africa, and this time in matters brought in the public interest.

It is arguable that SLAPP suits are not inherently vexatious and relying on the Vexatious Proceedings Act to defend this type of litigation may not be effective. In most cases as shown with the experience in the US a SLAPP case is legally valid and defendable, but what makes it deplorable is the *motive*, or *impact* or *purpose* of the action. Such is not always apparent in the papers.

The High Court also has inherent jurisdiction to stay or dismiss proceedings, which it deems to be oppressive, vexatious or frivolous.[110] As the authors note:

> It would seem that a defence may be summarily dismissed as mala fide; an abuse of the process of the court, vexatious or frivolous, but the court is nonetheless reluctant, even on such grounds, to deprive a defendant of his defence. *The power to stay is exercised sparingly since the courts of law are open to all and the doors will only be closed in 'very exceptional circumstances*'.[111] (emphasis added)

This last line of the quote fundamentally sums up the South African situation. The current situation is exacerbated by what we highlighted elsewhere[112] that prima facie SLAPP suits often have a basis in law, such as defamation or a purported violation of a constitutional right. This makes successfully applying for a stay of proceedings difficult, especially where it is hard to prove that the proceedings are frivolous and vexatious.[113] This makes the Vexatious Proceedings Act an inexact tool to fend off SLAPP suits. Hence the need for specific legislative intervention.

As far as security for costs are concerned, most would-be SLAPP filers have deep pockets to meet such orders, their strategy being to use the money to out suit the public interest litigant. Their aim is to keep the litigation alive; they would in all probability not flinch if such an order were made against them. A more potent tool would be for the courts to use their discretion wisely

109 Ibid 47.

110 WA Joubert et al *LAWSA Civil Procedure* 2ed (2007) 229.

111 Ibid.

112 Note 71 as well as part III(a) above (some SLAPP claims are brought as bona fide claims with legally supported causes of action).

113 In environmental litigation, to succeed in avoiding legal costs under s 32(2) of the NEMA the public interest litigant must prove that they acted reasonably after exhausting other remedies.

when making costs orders in public interest cases, for instance as required by s 32 of the NEMA.

Nevertheless the courts' attitude to costs orders as a deterrent is not impressive.[114] Adverse costs orders, such as awards of costs de bonis propriis, are few and far between. They are the exception and not the rule in public interest litigation matters generally. The same can be said regarding costs orders on a higher scale; these are only ordered at the conclusion of proceedings. By that time it will be of little consolation to the a public interest entity that would have had to work miracles to fund the defence, and is by now too petrified to ever voice an opinion on anything again. As Harms writes:

> Courts are slow to make such an order. The question is pre-eminently one for the discretion of the judge hearing the matter. In exercising this discretion regard is had to the nature or subject-matter of the demand or claim; the likelihood of prejudice to one or the other party and to the balance of convenience as shown by the circumstances of each case; the possibility of evidence being lost; and the measure of delay that has occurred at the time when the application is made.[115]

These intractable legal difficulties spell trouble for those who have been subject to SLAPP suits and those who will face such litigation in the future, unless an objective eye is cast on the current state of South African statutory protections for public interest litigators.

VI Conclusion

The tension between the need for development to fulfil socio-economic rights and the call to protect the environment will continue to see public interest litigation play an important role in South Africa. However, increasing globalisation means that other global problems also find their way into our jurisdiction. SLAPP suits are a serious emerging threat to public interest litigation generally, and more particularly in environmental litigation, yet environmental protection heavily relies on the activities of public interest environmental organisations. While the democratic dispensation also ushered in a new era of democratic participation in environmental decision-making, which could avert a lot of litigation, we conclude that this could become ineffective if no steps are taken to shield the public interest environmental litigant from frivolous actions. South Africa may take a leaf from the various statutory interventions by some US states, but concurrently we exhort the judiciary to do more with existing legal tools to protect public interest environmental litigants in the face of SLAPP onslaughts.

114 See generally Humby (note 5 above) (painting a bleak picture of the traditional rules on legal costs and arguing that new constitutional values must inform the judiciary's approach to the issues of costs more so in public interest matters); see also GP Smith II 'The Environment and the Judiciary: A Need for Co-operation or Reform?' (1974) 3 *Envtl Affrs* 627, 636 (environmental courts are not a solution to improving environmental litigation; rather the focus must be on educating the judiciary on the complexities of environmental cases).

115 LTC Harms *Civil Procedure in the Superior Courts* (2007) 32.

It is apparent that South Africa is falling behind the world trends to prevent the stifling of public interest environmental litigation meant to effectuate public participation. One cannot refuse a prospective litigant access to courts; this would be against the spirit of the Constitution.[116] Even if a litigant's cause of action is weak, this should not prevent them from seeking satisfaction in court, however, courts must recognise the difference between weak causes and cases like *Wraypex* and *Petro Props*, where the applicant's motive is apparently to bankrupt and harass defenders of the public interest.

116 Constitution s 34 (access to justice), see also *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* [2004] 3 All SA 20 (SCA) 50–5.