IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN, JOHANNEBSURG

Cases CCT 66/21 and CCT 67/21

Case CCT 66/21

In the matter between:

MINERAL SANDS RESOURCES (PTY) LTD	First Applicant
MINERAL COMMODITIES LIMITED	Second Applicant
ZAMILE QUNYA	Third Applicant
MARK VICTOR CARUSO	Fourth Applicant
and	
CHRISTINE REDDELL	First Respondent
TRACEY DAVIES	Second Respondent
DAVINE CLOETE	Third Respondent
MZAMO DLAMINI	Fourth Respondent
CORMAC CULLINAN	Fifth Respondent
JOHN GERRARD INGRAM CLARKE	Sixth Respondent

Case CCT 67/21

In the matter between:

CHRISTINE REDDELL	First Applicant
TRACEY DAVIES	Second Applicant
DAVINE CLOETE	Third Applicant
MZAMO DLAMINI	Fourth Applicant
CORMAC CULLINAN	Fifth Applicant

JOHN GERRARD INGRAM CLARKE	Sixth Applicant
and	
MINERAL SANDS RESOURCES (PTY) LTD	First Respondent
MINERAL COMMODITIES LIMITED	Second Respondent
ZAMILE QUNYA	Third Respondent
MARK VICTOR CARUSO	Fourth Respondent
and	
CENTRE FOR APPLIED LEGAL STUDIES	*Amicus curiae*

CENTRE FOR APPLIED LEGAL STUDIES' WRITTEN SUBMISSIONS

(Amicus Curiae)

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A - INTRODUCTION

1. The above matter, under case number CCT 66/21, raises critical issues concerning how the rights of the public, environmental activists and lawyers may be infringed when legal proceedings are brought against them to silence and or intimidate them through the so-called SLAPP suits.

2. CALS' admission as a friend of the Court was sought in direct response to the issues before this Court, the details of which are not repeated.[1]

3. As appears from the High Court judgment[2], which is the subject of the application for leave to appeal in this matter, CALS made submissions on the nature of SLAPP suits and how they are dealt with in other jurisdictions.[3] In the High Court, CALS sought to emphasise the distinction between abuse of court process and SLAPP suits. This intention subsists.

4. The appeal raises issues squarely pertaining to the nature and requirements of SLAPP suits and the common law abuse of court process, a defence pleaded by the Respondents in the High Court. [4]

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1 Practice note P 3, Para 4.
2 Record P289, High Court judgment para 25.
3 Ibid.
4 Record P194-198, Para 1-7.2

5. In these proceedings, CALS seeks to clarify the foreign law on SLAPPs, focusing on the nature and or test used in cases alleged to be strategic litigation against public participation ("SLAPP")[5].

6. On the above premises, CALS submission will be structured as follows:

   6.1. B-The position adopted by CALS in these proceedings;

   6.2. C-The Constitutional mandate to develop common law;

   6.3. D-Whether this Court can develop the common as proposed by CALS;

   7.6 E- Conclusion and Costs.

7. We deal with these key considerations in turn.

B – THE POSITION ADOPTED BY CALS IN THESE PROCEEDINGS

8. CALS seeks to assist this honourable Court by addressing the novel issues of SLAPP suits in relation to our law. It is the considered view of CALS that SLAPP suits should not be conflated with abuse of court process unless they retain an independent test; we explain the reasons fully later in our submissions.

9. It is critical that the process of identifying and addressing alleged SLAPP suits takes place at an early stage in the proceedings. In genuine SLAPP cases, subjecting defendants to the full court process plays right into the hands of a party that brings a SLAPP suit. Thus the ability to identify and address SLAPP suits early on is crucial.

[5] Murombo, & Valentine, SLAPP suits: an emerging obstacle to public interest environmental litigation in South Africa. (2011) 27 SAJHR

10. It is CALS's considered view that neither the current process of dealing with abuse of process nor the elevation of ulterior motive within the common law abuse of process test is sufficient to deal with SLAPP suits. Critically, not all persons faced with SLAPP suits will be in a position to prove (a) ulterior motive and/or (b) that the party bringing the SLAPP suit habitually and persistently brings vexatious proceedings.

11. In amplification, CALS's view is whether SLAPP suits are recognised as a stand-alone category of cases or simply as matters falling within the abuse of process doctrine, the approach and test to be developed to respond SLAPP suits ought to be distinguished. It is submitted the test be along the following lines:

12. A court may dismiss a SLAPP suit defence—

    12.1. if in the form of a preliminary defence, a defendant fails to satisfy the Court that the claim arises from the defendant's conduct (expression) that was committed in relation to a matter of public interest; and

    12.2. if the plaintiff, in turn, satisfies the Court that its case has prospects of success, that the defendant does not have a *bona fide* defence and that the interests of justice favour that the claim proceeds.

13. In order for a court to perform the interests of justice enquiry, the plaintiff has to show that it has suffered harm as a result of the expression and when conducting the interests of justice enquiry, the Court will consider whether the harm suffered by the plaintiff is of such a nature that the interests of justice favour the prosecution of the claim more than they favour the protection of the expression;

and there is to be no exhaustive list of considerations under the interests of justice enquiry.

14. CALS's position is informed by four key considerations arising from the appeal and Jurisprudence of this Court, namely.

14.1. Firstly, the nature of the SLAPP suit defence in foreign law;

14.2. Secondly, the purpose and test applied in SLAPP suit defences in foreign law;

14.3. Thirdly, the distinction between SLAPPs and abuse of court process in foreign law;

14.4. Lastly, whether common law is inconsistent with the Constitution, in particular, sections 16(1) and falls to be developed for purposes of SLAPP defences;

15. We deal with these considerations in turn.

I **The nature of the SLAPP suit defence in foreign law**

15. The phenomenon of SLAPP suits was first developed in the United States of America. To guard against the chilling effect of SLAPPs, twenty-eight states, the District of Columbia, and one U.S. territory have enacted anti-SLAPP statutes. Furthermore, Congress created Rule 11 among the Federal Rules in 1938 as a way to prevent litigants from filing lawsuits and claims "for any

improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" in federal Courts.[6]

16. The approach adopted by the American legal system is aimed to provide a quick, effective and inexpensive mechanism to combat such suits. Anti-SLAPP laws enable those subject to a SLAPP suit to seek early dismissal and often get financial relief from possible future costs.

17. The common law and constitutional developed in the United States create a high substantive burden to tort and tort-like claims that seek redress for free speech, especially public speech that addresses public concern matters. The common law in many states requires the pleader to state the content of libellous words accurately. In comparison, Constitutional law has provided substantive protection which bars recovery against a first amendment defence except upon clear and convincing evidence that there has been a deliberate or reckless falsehood. For this reason, ferreting out the bad faith SLAPP claim at an early stage of litigation should be accomplished with relative ease. Extension of the SLAPP penalties to factually complex cases, where the substantive standard of proof at common law is lower, presents unique challenges.

18. Minnesota Supreme Court case*, Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim, 784 N.W.2d 834 (Minn. 2010)*[7] establishes a two-step process to determine whether SLAPP procedure should be applied. When the

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6 Pring. SLAPPs: Strategic Lawsuits against Public Participation. (1989) Pace Environmental Law Review Article 11 Volume 7 Issue 1.

7 Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim, 784 N.W.2d 834 (Minn. 2010).

local government sued the landowner for breach of settlement, the landowner contended that enforcement of the settlement was a strategic lawsuit against public participation. The Supreme Court rejected that claim and affirmed the District Court's denial of SLAPP relief, holding "The District Court properly denied a motion to dismiss where the underlying claim involved an alleged breach of a settlement agreement that potentially limited the moving party's rights to public participation".

19. In 2020 New York's anti-SLAPP law dramatically expanded protections afforded to defendants in lawsuits brought based on the exercise of free speech rights, which significantly increases the risks to potential plaintiffs bringing defamation and other speech-based claims in New York anti-SLAPP laws.[8] New York's new anti-SLAPP statute now requires plaintiffs to show actual malice by clear and convincing evidence in actions involving "public petition and participation", which involve an issue of public interest or further constitutional speech or petition rights.

20. New York's Civil Rights Law § 70-a, 76-a regime will allow a targeted defendant to quickly escape a bad-faith SLAPP suit without incurring high legal costs.[9] In

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8 N.Y. C.V.R §§ 70-a, 76-a.

9 A defendant targeted by a SLAPP suit with the following tools: 1)Evidence Outside of the Pleadings: Which empowers the courts to decide anti- SLAPP motions not only based on allegations in the pleadings, but also based on facts and documents supported by affidavits. 2)Enhanced Burden of Proof: Meaning that once the defendant has demonstrated that the lawsuit they are facing is an action based on their public communications or other free speech conduct, the plaintiff can only avoid dismissal by demonstrating that their claim has a "substantial basis in law" or is supported by a "substantial argument" for modifying the law. 3)Automatic Stay of Discovery: While the anti-SLAPP motion is pending, all discovery and other hearings or motions (and thus, burdens on the defendant) are now required to be stayed, by default. 5)Mandatory Fee-Shifting: In addition to the procedural hurdles outlined above, the new anti-SLAPP law provides that a defendant that wins a motion to dismiss a SLAPP suit is always entitled to have its costs and attorney's fees paid by the plaintiff.

Rubel v. Daily News[10], the Court dismissed a defamation action against the newspaper on fair report grounds but rejected the argument that the anti-SLAPP statute protected the newspaper, stating that the statute was not intended to protect media defendants.

21. In *Cholowsky v. The Times-Review*,[11] the Court dismissed a defamation complaint under fair report privilege. Still, it remarked that the anti-SLAPP statute does not apply to the press. In this regard, the Court said, "[T]he intent behind the statute was and is to protect citizen activists—not the media—who are at a disadvantage in defending lawsuits brought by financially able public applicants or permittees who seek to quell opposition to their applications by private individuals or non-profit groups who cannot afford to defend such suits."

22. The updated law in New York makes it easier for a defendant to obtain dismissal of a SLAPP suit.[12] A defendant need only file a motion to dismiss, demonstrating that the legal action involves "public petition and participation," and then the burden shifts to the plaintiff to show that the lawsuit "has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law."[13] If the plaintiff does not carry this burden, the Court must dismiss the case.

10 Rubel v Daily News 2010 N.Y Slip Op 32407 (N.Y. Sup. 2010).
11 See Cholowsky v The Times-Review 2007 NY Slip Op 51742 (Sup Ct, Suffolk County 2007).
12 Coleman v. Grand, 18-CV-5663 (ENV) (JBW) (E.D.N.Y. Feb. 22, 2021).
13 N.Y. C.P.L.R. 3211(g)(1) (McKinney).

23. The position on SLAPPs in America is far from uniform; different states apply different statutes; notably, Canada has a far more uniform approach, as demonstrated below.

II The purpose and test applied in SLAPP suit defences in foreign law

24. CALS's stance is that a SLAPP suit is *"a meritless case mounted to discourage a party from pursuing or vindicating their rights"*.[14] SLAPP lawsuits aim to intimidate, scare, or "chill" a person who brings a matter of public concern to light. At the heart of any SLAPP suit is the ulterior intention of the litigator and the purpose of the litigation.[15]

25. Significantly, the intention of SLAPPs is not necessarily to win the case but to waste the resources and time of the other party until they bow out.[16] While there are similarities between SLAPPs and abuse of court process doctrine, we maintain that SLAPPs are not to be equated to abuse of court process since they serve a different purpose in foreign law.

26. CALS accepts that SLAPP suits constitute abuse of process in our law at a purely high level of definition. However, having considered the nature of SLAPPs (with reference to our jurisprudence and comparative foreign jurisprudence) against the scope of abuse of process, CALS' position is that

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14 T Murombo and H Valentine 'SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa' (2011) 27 SAJHR 82, at 84

15 Ibid.

16 Ibid.

SLAPPs are different from abuse of process and ought not to be conflated with our common law abuse of process.

CANADA

27. The purpose of the anti-SLAPP legislation is to encourage public dialogue and debate with broad participation on public interest matters, prevent litigation aimed at stifling public discourse, and prevent a chill from the threat of legal action harming public debate. In 2018 in Canada tested new anti-SLAPP legislation, with six rulings[17], four of which were deemed strategic lawsuits against public participation.

28. *In Daishowa Inc. v. Friends of the Lubicon: From 1995 to 1998, a series of judgements (OJ 1536 1995, OJ 1429 1998 (ONGD)18* established that defendants who had accused a global company of engaging in "genocide" were entitled to recover court costs due to the public interest in the criticism, even if it was rhetorically unjustifiable.

29. *In Fraser v. Saanich (District) 1995, [BCJ 3100 BCSC]* [19] was held explicitly as a SLAPP suit, the first known case to be so described. Justice Singh found the

17 Cases involving SLAPP law: 1704604 Ontario Ltd. v. Pointes Protection Association, 2018 ONCA 685, Able Translations Ltd. v. Express International Translations Inc., 2018 ONCA 690, Armstrong v. Corus Entertainment Inc., 2018 ONCA 689, Fortress Real Developments Inc. v. Rabidoux, 2018 ONCA 686, Platnick v. Bent, 2018 ONCA 687, Veneruzzo v. Storey, 2018 ONCA 688.

18 Daishowa Inc. v. Friends of the Lubicon: From 1995 to 1998 a series of judgements (OJ 1536 1995, OJ 1429 1998 (ONGD).

19 Fraser v. Saanich (District) 1995, [BCJ 3100 BCSC].

plaintiff's conduct to be "reprehensible and deserving of censure", ordering him to pay "special costs."

30. In 2011, in *Robin Scory v. Glen Valley Watersheds Society, a BC*[20] Court ruled that "an order for special costs acts as a deterrent to litigants whose purpose is to interfere with the democratic process", and that "public participation and dissent is an important part of our democratic system." However, such awards remained rare.

31. In *Morris vs Johnson et al. October 22, 2012 ONSC 5824 (CanLII)*[21] during the final weeks of the 2010 municipal election in Aurora, Ontario, a group of town councillors and the incumbent Mayor agreed to use town funds to launch what was later referenced as a private lawsuit fronted by the Mayor, seeking $6M, against both named and anonymous residents who were critical of the local government. Almost one year after the town cut funding and Morris lost a Norwich motion, Morris discontinued her case. The discontinuance cost decision delivered by Master Hawkins reads, per para. 32 (Ontario Superior Court of Justice Court file no.10-CV-412021): "Because I regard this action as SLAPP litigation designed to stifle debate about Mayor Morris' fitness for office, commenced during her re-election campaign, I award Johnson and Hogg special enhanced costs as was done in *Scory v. Krannitz 2011 BCSC 1344 per Bruce J. at para. 31 (B.C.S.C).*" Morris subsequently sued the town for $250,000 in the spring

20 Robin Scory v. Glen Valley Watersheds Society, a BC.

21 Morris vs Johnson et al. October 22, 2012 ONSC 5824 (CanLII).

of 2013 to recover her legal costs for the period after the town cut funding of her case.

32. At the heart of a SLAPPs is litigation mounted to discourage a party from pursuing or vindicating their rights. SLAPP suits are often aimed at silencing activists, draining them financially, and making their work impossible, thereby paralysing the process of vindicating the rights of the activists and/or those they serve.

USA

33. The United States of America does not deal with SLAPP suits in the same way as Canada. To avoid burdening the Court, these submissions do not deal with all the various tests and/or approaches to SLAPP suit regulation in foreign law. Instead, we summarise some key approaches applied in various US states and Australia.

34. In Pennsylvania, the legislation governing SLAPP suits is Title 27, sections 7707[22] read with sections 8301 to 8303. Sections 8302 and 8303 deal with the nature of protection provided to a person who made the relevant expression and the right to a hearing provided to the parties.

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22 It provides:
"§ 7707. Participation in environmental law or regulation.
A person that successfully defends against an action under Chapter 83 (relating to participation in environmental law or regulation) shall be awarded reasonable attorney fees and the costs of litigation. If the person prevails in part, the court may make a full award or a proportionate award."

35. In terms of section 8302, a person may claim immunity from civil liability if they file an action in the relevant courts, pursuant to Federal or State law, to enforce an environmental law or regulation or if they make an oral or written communication to a government agency relating to the enforcement or implementation of environmental law or regulation, provided that the action or communication is aimed at procuring favourable government action.[23]

36. In Connecticut, SLAPP suits are regulated under Section 52-196.[24] In terms of section 53-196(b)[25] and (e)(3),[26] a court may dismiss a claim on motion if the defendant shows, on a preponderance of the evidence, that the plaintiff's claim

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[23] Section 8302 provides:
"§ 8302. Immunity.
(a) General rule.--Except as provided in subsection (b), a person that, pursuant to Federal or State law, files an action in the courts of this Commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favorable governmental action.
(b) Exceptions.--A person shall not be immune under this section if the allegation in the action or any communication to the government is not relevant or material to the enforcement or implementation of an environmental law or regulation and:
(1) the allegation in the action or communication is knowingly false, deliberately misleading or made with malicious and reckless disregard for the truth or falsity;
(2) the allegation in the action or communication is made for the sole purpose of interfering with existing or proposed business relationships; or
(3) the oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation is later determined to be a wrongful use of process or an abuse of process."

[24] 2018 Connecticut General Statutes Title 52 - Civil Actions Chapter 900 - Court Practice and Procedure.

[25] Section 52-196(b) provides that:
"(b) In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim."

[26] Section 52-196(e)(3) provides that:
"(3) The court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint, counterclaim or cross claim sets forth with particularity the circumstances giving rise to the complaint, counterclaim or cross claim and demonstrates to the court that there is probable cause, considering all valid defences, that the party will prevail on the merits of the complaint, counterclaim or cross claim"

is based on the defendant's exercise of its right to free speech, right to petition government or right to association in connection with a matter of public concern. The plaintiff would then be required to set forth the circumstances giving rise to the claim and demonstrate that there is probable cause, considering all valid defences, that the plaintiff will prevail on the merits of its claim.

37. In Tennessee, SLAPP suits are regulated under the Tennessee Code 20-17-104(a).[27] It also provides protection – in the form of a dismissal of legal action – to a party who becomes the subject of legal action following that party's exercise of its right to free speech, right to petition or right of association. The Court must dismiss the legal action unless the party who instituted the legal action establishes a prima facie case for each essential element of the claim in the legal action.[28] Even then, the Court may still dismiss the legal action if the defendant establishes a valid defence.[29]

38. In Utah, SLAPP suits are regulated through the Utah Code78B-6-1401 to 1405. In terms of 78B-6-1403, the protection is afforded to a defendant who believes that the plaintiff's claim is primarily based on, relates to, or is in response to the defendant's participation in the process of government and that the claim is intended mainly to harass the defendant.[30] If the Court finds that the primary

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27 It provides:
"(a) If a legal action is filed in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action.
(b) Such a petition may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court's discretion, at any later time that the court deems proper.
(c) A response to the petition, including any opposing affidavits, may be served and filed by the opposing party no less than five (5) days before the hearing or, in the court's discretion, at any earlier time that the court deems proper."

28 Tennessee Code 20-17-105(b).

29 Tennessee Code 20-17-105(c).

30 The section provides:
"78B-6-1403. Applicability.

purpose of the claim is to prevent, interfere with or chill the defendant's proper participation in the process of government, then it dismisses the claim.[31]

AUSTRALIA

39. The Protection of Public Participation Act 2008, applicable in the Australian Capital Territory, provides for a civil penalty against a plaintiff who commences or maintains legal process against a defendant in relation to the defendant's conduct that constitutes public participation. The Court must be satisfied that the legal process was commenced or maintained for an improper purpose.[32] However, the Act does not apply in relation to a cause of action for defamation.[33]

40. From the above, the following is clear:

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(1) A defendant in an action who believes that the action is primarily based on, relates to, or is in response to an act of the defendant while participating in the process of government and is done primarily to harass the defendant, may file:
(a) an answer supported by an affidavit of the defendant detailing his belief that the action is designed to prevent, interfere with, or chill public participation in the process of government, and specifying in detail the conduct asserted to be the participation in the process of government believed to give rise to the complaint; and
(b) a motion for judgment on the pleadings in accordance with the Utah Rules of Civil Procedure Rule 12(c).
(2) Affidavits detailing activity not adequately detailed in the answer may be fled with the motion".

31 Utah Code 78B-6-1404(2) provides:
"(2) The court shall grant the motion and dismiss the action upon a finding that the primary purpose of the action is to prevent, interfere with, or chill the moving party's proper participation in the process of government."

32 Section 9 of the Protection of Public Participation Act, 2008 provides:
"(1) This section applies if—
(a) a person (the plaintiff) starts or maintains a proceeding to which this Act applies against someone else (the defendant) in relation to the defendant's conduct; and
(b) the court is satisfied that—
(i) the defendant's conduct is public participation; and
(ii) the proceeding is started or maintained against the defendant for an improper purpose.
(2) The court may order the plaintiff to pay to the Territory a financial penalty of not more than the amount (if any) prescribed by regulation."

33 Section 8(2) of the Protection of Public Participation Act, 2008.

40.1. Various jurisdictions have recognised the existence of SLAPP suits and have sought to regulate them. In some jurisdictions, the scope of protection afforded to freedom of expression on matters of public interest is limited. That is, expressions made to journalists or on social media are not protected. In other jurisdictions, expressions on public participation matters are protected regardless of the entity to whom they are made.

41. With the varying approaches to SLAPP defence, we submit that the Canadian approach in *Pointes* is more favourable for the following reasons:

41.1. Not only was this approach endorsed by the Court a quo,[34] but it also ensures that there is a process of identifying SLAPP suits, considering the merits of the claim, and determining whether the interests of justice require the claim to continue or be halted.

41.2. It protects the rights of both the plaintiff and the defendant. This is in keeping with the protection of both sections 16 (of the defendant) and 34 (of the plaintiff) rights.

41.3. We submit it can easily be adopted in South Africa without much difficulty.

42. The Supreme Court of Canada in *Pointes*[35] and *Bent*[36] interpreted and applied section 137(1) of the Ontario Courts of Justice Act[37]. The section was intended to mitigate the effects of strategic lawsuits against public participation.

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34 Court a quo judgment para 56, Record p304.

35 *1704604 Ontario Limited v Pointes Protection Association and Others* 2020 SCC 22.

36 *Bent v Platnick* 2020 SCC 23.

37 RSO 1990, c C.43.

43. In *Pointes,* a non-profit corporation and its members brought a pre-trial motion to have an action brought against them by a land developer dismissed. They relied on section 137(1) of the Ontario Courts of Justice Act.

44. In its judgment, the Court started by highlighting that freedom of expression is a fundamental right and value and that the ability to express oneself and exchange ideas fosters a pluralistic and healthy democracy. In this regard, the Court emphasised the role of public participation in civil society in the fruitful public discourse necessary for a healthy democracy.[38]

45. Section 137 sets out the purpose of the section[39] , and the relevant, operational part of the section provides:

> *"(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.*
>
> *(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,*
>
> 1.1.1. *there are grounds to believe that,*
>
> 1.1.1.1. *the proceeding has substantial merit, and*
>
> 1.1.1.2. *the moving party has no valid defence in the proceeding; and*

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38 *Pointes* para 1.

39 The purpose of the section is captured in section 137(1) as follows:
"*137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,*
(a) to encourage individuals to express themselves on matters of public interest;
(b) to promote broad participation in debates on matters of public interest;
(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action."

1.1.2. *the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that*

1.1.3. *the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression*."

46. In setting out how the section works, the Court said the following:

> "*[18] In brief, s. 137.1 places an initial burden on the moving party — the defendant in a lawsuit — to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that showing is made, the burden shifts to the responding party — the plaintiff — to satisfy the motion judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If the responding party cannot satisfy the motion judge that it has met its burden, then the s. 137.1 motion will be granted and the underlying proceeding will be consequently dismissed.*"

47. As to the practicalities concerning the application of section 137(1):

47.1. The standard for showing that an expression relates to a matter of public interest is the balance of probabilities.[40] This standard applies to our law as well. [41]

47.2. There must be "*grounds to believe*" that the plaintiff's claim has "*substantial merit*" and that the defendant has no "*valid defence*".

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[40] Pointes para 23.

[41] See International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1) 1955 (2) SA 1 (W) where, at p39, the Court said: "In Ley v. Ley's Executors and Others, 1951 (3) S.A. 186 at p. 192 (A.D.), CENTLIVRES, C.J., said:

> 'All those cases show that no matter how serious an allegation of fact may be, the onus of proving the fact is, in civil cases, discharged on a preponderance of probability . . .'
> That is the test which I propose to apply, with the realisation that the onus is on the plaintiff to prove the statements alleged." (Emphasis added.)

48. The Court in *Pointes* said the "*grounds to believe* requires a basis in the record and the law, taking into account the stage of the litigation at which the motion (SLAPP defence) is brought, for a finding that the plaintiff's claim has substantial merit and there is no valid defence. The Court went further to state that this is "*something more than mere suspicion, but less than . . . proof on the balance of probabilities*".[42]

49. It is submitted that the words "*substantial merit*", in relation to the plaintiff's claim, refer to a real prospect of success that may not amount to a demonstrated likelihood of success.[43] The Court went further to state that:

> *"[50] … A real prospect of success means that the plaintiff's success is more than a possibility; it requires more than an arguable case. As I said in the preceding paragraph, a real prospect of success requires that the claim have a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff.*"

50. It is submitted that—

50.1. The determination of whether or not a plaintiff's claim has substantial merits is similar to our "prospects of success" standard applied in leave to appeal matters.[44]

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42 Id at paras 39-40.

43 Id at para 49.

44 See, for instance, Member of Executive Council for Health, Eastern Cape v Mkhitha and Another [2016] ZASCA 176; [2016] JOL 36940 (SCA) where the Supreme Court of Appeal said:
"[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal." (Emphasis added.)

50.2. The determination of whether the defendant has a valid defence[45] is akin to the determination, in our law, of whether a defendant has a *bona fide* defence.[46]

50.3. The requirement for a plaintiff to show that the public interest in permitting the action to continue outweighs the public interest in protecting the expression requires a court to conduct a weighing exercise between the need to continue with the action, on the one hand, and the need to protect the expression that led to the action, on the other hand.[47] This exercise, it is submitted, would be appropriately located within our interests of justice inquiry.[48]

51. In *Bent,* the Court endorsed the interpretation of section 137(1) by *Pointes* and stated the following:[49]

> "*[74] Section 137.1 of the CJA is intended "to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest*

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45 Pointes para 58.

46 The Supreme Court of Appeal in Van Heerden v Bronkhorst (846/19) [2020] ZASCA 147, said the following in the context of a rescission:
"[26] A bona fide defence needed to be established prima facie only. It was accordingly not necessary to deal fully with the merits of the case in order to prove the case. It would be sufficient to set out facts, which if established at the trial, would constitute a defence valid in law. The facts alleged, as in any other application, must be primary facts. As Harms explained: 'Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Secondary facts, in the absence of primary facts on which they are based, are nothing more than the deponents own conclusions". (Emphasis added.)

47 Pointes para 61.

48 It is to be noted that the interests of justice inquiry, usually applied by the Constitutional Court, has in some instances been applied by the High Court and the Supreme Court of Appeal. See, for instance, Western Areas Ltd and Others v S [2005] 3 All SA 541 (SCA) at paras 25, 26 and 29 in the context of the appealability of interlocutory rulings in criminal proceedings; and United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others [2021] 2 All SA 90 (SCA) at para 8 in the context of the appealability of orders in civil matters.

49 See also, Bent para 76.

through the identification and pre-trial dismissal of such actions": Pointes Protection, at para. 16. However, in addition to protecting expression on matters of public interest, s. 137.1 must also "ensur[e] that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it": para. 46."

52. Regarding the approach to SLAPP suits as set out in *Pointes* and *Bent*, the Court a quo in this matter, said the following:

> "*[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 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.*" (Emphasis added.)

53. When the *Pointes* and *Bent* approach is adapted for application in the South African context, which is the development of the common law advocated for by CALS, it will apply as follows:

53.1. If a plaintiff brings proceedings against a defendant and the defendant is of the view that the proceedings constitute a SLAPP suit, then—

53.1.1. the defendant ought to be able to bring preliminary defence (for instance, in the form of a special plea) in terms of which the defendant would have to satisfy the Court that the claim brought by the plaintiff arises from the defendant's conduct (expression) that was committed in relation to a matter of public interest; and

53.1.2. the plaintiff, in turn, would have to satisfy the Court that (1) it has a prima facie case against the defendant, that (2) the defendant does not have a bona fide defence and that (3) the interests of justice favour that the claim is proceeded with.

53.2. In order for a court to perform the interests of justice enquiry, the plaintiff would have to show that it has suffered harm as a result of the expression and when conducting the interests of justice enquiry, the Court will consider whether the harm suffered by the plaintiff is of a nature that the interests of justice favour the prosecution of the claim more than they favour the protection of the expression; and

53.3. There is no exhaustive list of considerations under the interests of justice enquiry.

III <u>The distinction between SLAPPs and abuse of court process in foreign law;</u>

54. To support an abuse of process claim, in some states in the USA, a claimant must show "(1) an ulterior motive by the [party abusing the process] other than resolving a legal dispute, and (2) a willful act in the use of the legal process not

proper in the regular conduct of the proceeding. Thus, the claimant must provide facts rather than conjecture, showing that the party intended to use the legal process to further an ulterior motive.

55. In *Land Baron Invs., Inc. v. Bonnie Springs Family LP*[50] (Nevada), an appeal arose from a failed land sale contract between Plaintiff and Defendant. After a trial, the jury returned a unanimous verdict for the defendant on its nuisance and abuse of process counterclaims. The Supreme Court affirmed in part and reversed in part, holding: (1) The district court did not err in denying plaintiff's motion for summary judgment on its mutual mistake rescission claim, as a mutual mistake will not provide a ground for rescission where one of the parties bears the risk of mistake (2) An abuse of process claim may not be supported by a complaint to an administrative agency instead of one involving a legal process, and therefore, defendant failed to establish the elements of abuse of process (ulterior motive); and (3) a nuisance claim seeking only emotional distress damages does not require proof of physical harm, and the facts, in this case, supported the damages award arising under defendant's nuisance counterclaim. The Court held that where a party presented only conjecture and no evidence that the opposing party actually intended to improperly use the legal process for a purpose other than to solve the legal dispute, there was no abuse of process.

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50 Land Baron Invs. v. Bonnie Springs Family LP, 131 Nev. Adv. Op. 69 (Sept. 17, 2015)

56. While the abuse of court process defence in our law is a general defence, SLAPP suit defences are not.

57. Suppose the test for identifying SLAPP suits rests primarily on the elevation of ulterior purpose (whether on the law as it stands or as developed). In that case, future litigants would likely have difficulties proving the requirement of ulterior motive whilst meritorious cases may be struck-off without the merits being considered.

58. SLAPP defences are evidently limited; there is a category of people who often face SLAPPs. There is a common and existing class of persons these suits are launched against. The class may vary from human rights defenders, journalists who expose human rights violations, community activists who use social activism and mobilisation to challenge the human rights violations by repositories of powers, and lawyers who use the law as a means of redress or prevention. (Emphasis)

59. In Canada, the abuse of process doctrine provides courts with the authority to order that a proceeding be stayed on the basis that they are unfair or otherwise sufficiently undermine the judicial system's integrity.[51] The doctrine of abuse of process exists both at common law and under s. 7 of the Charter. However, the doctrine is entirely encompassed by the Charter for most practical purposes.[52] The purpose of the doctrine is "to preserve the integrity of the process through which justice is administered in the community, not to provide a remedy for the

[51] R v Regan, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, per LeBel J

[52] R v Schacher, 2003 ABCA 313, 179 CCC (3d) 561, per Ritter JA, at para 10
R v O'Connor, 1995 CanLII (SCC), [1995] 4 SCR 411, at paras 70 to 71

breach of individual rights". [53] The doctrine intends to "protect the integrity of the courts' process and the administration of justice from disrepute"[54].

60. The doctrine arises out of two protections within s. 7 of the Charter. It protects against two categories of abuses consisting of:[55]

60.1. conduct affecting the "fair trial" rights under s. 7, or

60.2. conduct that falls into the "residual" protection of s. 7 of the "integrity of the judicial system".

61. Where abuse is found, the judge has "wide discretion to issue a remedy – including the exclusion of evidence or a stay of proceedings – we're doing so is necessary to preserve the integrity of the justice system for the fairness of trial".[56] The Crown conduct warranting a stay must be "egregious and seriously compromis[e] trial fairness and/or the integrity of the justice system".[57] Notably, for an application under either category, the applicant must establish the following:[58]

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53 R v Light, 1993 CanLII 1023 (BC CA), 78 CCC (3d) 221, per Wood J

54 R v Campbell, 1999 CanLII 676 (SCC), [1999] 1 SCR 565, per Binnie J

55 R v Nixon, 2011 SCC 34 (CanLII), [2011] 2 SCR 566, per Charron J, at paras 36 and 42
R v Zarinchang, 2010 ONCA 286 (CanLII), 254 CCC (3d) 133, per curiam Regan, supra
R v Babos, 2014 SCC 16 (CanLII), [2014] 1 SCR 309, per Moldaver J, at para 31
R v Howley, 2021 ONCA 386 (CanLII), per curiam, at para 51

56 Babos, supra, at 32

57 R v Anderson, 2014 SCC 41 (CanLII), [2014] 2 SCR 167, per Moldaver J, at para 50

58 Regan, supra, at para 57 Zarinchang, supra, at para 56
R v Babos, 2014 SCC 16 (CanLII), [2014] 1 SCR 309, per Moldaver J, at para 32

61.1. There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";

61.2. There must be no alternative remedy capable of redressing the prejudice; and

61.3. Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the Court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (, *ibid.*, at para 57). Proceedings should be stayed for abuse of process in only the "clearest of cases".[59]

IV Whether common law is inconsistent with the Constitution, in particular, sections 16(1) and falls to be developed for purposes of SLAPP defences;

62. In its first judgment dealing with freedom of expression[60], this Court unanimously articulated the values underlying the guarantee of freedom of expression in the following way: Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of individuals' moral agency in our society, and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that

59 Keyowski, supra, at para 2 Young, supra Babos, supra

60 South African National Defence Union v Minister of Defence & Another 1999 (4) SA 469 (CC) at para 7

individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."

63. The common law abuse of process is not satisfactory to deal with SLAPP suits for the following reasons:

63.1. First, the test for what constitutes an abuse of process at common law, as articulated by the Supreme Court of Appeal judgment in *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga* [2020] 1 All SA 52 (SCA), at paragraph 25 articulates the common law position as requiring, among others, that a person accused of abuse of process must be shown to have "*habitually and persistently instituted vexatious legal proceedings without reasonable grounds*".

63.2. Second, not all persons faced with SLAPP suits will be in a position to prove that:

63.2.1. the party bringing the SLAPP suit habitually and persistently institutes vexatious proceedings;

63.2.2. the party bringing the SLAPP suit does so for an ulterior purpose;

63.2.3. proving the motive of another party is innately difficult, especially in relation to the institution of proceedings which – on the face of it – may appear legitimate. Assuming this is the current position, it makes the

SLAPP suit test far more strenuous, contrary to the purpose of a SLAPP suit defence.

64. The principles laid down by this Court in various judgments suggest that this matter is fertile ground for the development of the common law. Put differently, whether the legal position regarding what is determinative of abuse of court process is articulated by the Applicants or by the Respondents, the development of the common law is warranted.

65. The common law should be developed to protect freedom of expression by specifically recognising the SLAPP suit defence and developing an approach for identifying and dealing with matters alleged to constitute SLAPP suits outside of the abuse of process doctrine.

66. In the alternative, the common law of abuse of process ought to be developed to recognise the types of cases constituting SLAPP suits (this would be an incremental development of the common law) and an approach – within the common law abuse of process – for dealing with matters alleged to constitute SLAPP suits

C- THE CONSTITUTIONAL MANDATE TO DEVELOP COMMON LAW

67. SLAPPs have a tendency to pit various sets of fundamental constitutional rights against each other: (1) Defendants' rights of freedom of expression[61], the plaintiff's rights to (2) Access to Court.[62]

68. Evidently, South Africa does not have specific legislation dealing with SLAPP suits. However, there are emerging threats to such litigation. Courts ought to, on this premises, use existing procedural and substantive legal tools to protect litigants faced with SLAPP suits.[63]

69. What follows is an inquiry on whether there is a duty on courts to develop the common law, and if so, whether this Court can develop the common law in the circumstances of this case.

70. As a starting point, we reiterate that South African "Superior Courts have always had inherent power to develop the common law to reflect the changing social, moral and economic make of the society".[64]

71. The Constitutional Court has expressed the view that the Constitution gives a general mandate to Courts to develop the common law. This position was strongly conveyed in *Carmichele v Minister of Safety and Security*[65] as follows:

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61 Section 16 of the constitution: (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.

62 Section 24 of the constitution: Access to courts-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.

63 Murombo, & Valentine, SLAPP suits: an emerging obstacle to public interest environmental litigation in South Africa. (2011) 27 SAJHR.

64 *S vTheus* 2003 6 SA 505(CC) para31.

65 *Carmichele v Minister of Safety and Security)* 2001 4 SA 938 (CC) paras 54-6; *Napier v Barkhuizen* 2006 4 SA 1 (SCA); Barkhuizen v Napier 2007 5 SA 323 (CC) para 39

"It needs to be stressed that the obligation of Courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the Courts are under a general obligation to develop it appropriately." [66]

72. In *K v Minister of Safety and Security,* [67] this Court said, when fulfilling the mandate or obligation to develop the common law, Courts of law do not have to wait for a perfect opportunity or a moment where "some startling development of the common law is in issue, but in all cases where the incremental development of a common-law rule is in issue". In addition, where a Court realises the need to develop the common law in a particular case to fill a gap in the law, such a Court does not always have to rely on litigants to make a relevant allegation regarding the need to develop a common-law rule in the interests of justice, but can under certain circumstances intervene of its own accord. What is expected of the Courts in keeping with their constitutional mandate to develop the common law is to be at all times "alert to the normative framework of the Constitution". (own emphasis)

73. The Courts' "obligation" to develop the common law to promote the objectives of sections 39(2) and 173[68] of the Constitution is to be found from within the Bill of Rights in sections that come earlier than sections 39(2) and 173.

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66 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) paras 54-6; *Napier v Barkhuizen* 2006 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 28-9; *Brisley v Drotsky* 2002 4 SA 1 (SCA).

67 *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 17.

68 S 173 provides as follows: "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."

74. The clearest of the mandate on Courts to develop the common law when applying the Bill of Rights to a practical situation where violation of a right is alleged comes from section 8(3).[69]

75. There is ample authority that deals with the Courts developing the common law differently. In a number of decisions, the Court has held that it is not barred from developing the common law, that it is in fact empowered to do so in terms of section 39 (2) and section 173 of the Constitution and other provisions in the Constitution.[70]

76. In *Pharmaceutical Manufacturers,*[71] the Court held: "*Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution (and that need not be decided in this case the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control*".

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69 Section 8(3)(a) states that "When applying a provision of the Bill of Rights to a natural or juristic person in terms of the subsection (2), a Court –
(a) In order to give effect to a right in the Bill of Rights, the Court must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right;
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)".

70 see Makate v Vodacom (Pty) Ltd [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC).

71 Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) para 45-49.

77. *Carmichele*[72] dealt with the question of whether the Court could develop the common law of delict to be extended to include the duty of members of the SAPS and prosecutors to protect the applicant's right. The Court's initial remarks on this issue were: "*Section 173 of the Constitution gives to all higher courts, including this Court, the inherent power to develop the common law, taking into account the interests of justice.16 In section 7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the state to respect, promote and fulfil these rights. Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary as well as on the legislature and executive. Section 39(2) of the Constitution provides that when developing the common law, every Court must promote the spirit, purport and objects of the Bill of Rights".*

78. On this premises, we submit there is a general duty on this Court to develop the common law in this matter.

D- CAN THIS COURT DEVELOP THE COMMON LAW AS ADVOCATED BY CALS

79. As a point of departure, one notes that in considering an exception, a Court commences from the premise that the allegations contained therein are correct and then considers the pleadings as a whole. An Excipient will have to show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it, wherefore the onus rests upon the Excipient.

[72] Carmichele v Minister of Safety and Security (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001) at para 33.

80. If we moved from that premises, one assumes that the claims were brought for ulterior purposes, i.e. SLAPP. The question that follows is whether our law as it stands protects public participation and freedom of expression.

81. A SLAPP defence is necessary for our constitutional democracy to protect public participation and freedom of expression. This assertion is located within the context of the constitutional framework.

81.1. Section 39(1)(b) of the Constitution provides that when it interprets the Bill of Rights, Courts "*must consider international law*". This includes both binding and non-binding international law.[73]

82. CALS submits our current legislative framework does not cater to the SLAPP gap in our law. The Vexatious Proceedings Act[74] seeks to provide relief to applicants that can demonstrate that a respondent has persistently instituted legal proceedings without reasonable grounds. Furthermore, the Act aims to protect an applicant who is subjected to costs and unmeritorious litigation and the functioning of the Courts to proceed unimpeded by groundless proceedings.

83. According to Nicholas J in *Fisheries Development Corp v Jorgensen*:[75] *"In its legal sense, vexatious means frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant. Vexatious proceedings would also*

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73 Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19; 2001 (1) SA 46 (CC) at paras 29-31; Motswagae and Others v Rustenburg Local Municipality and Another [2013] ZACC 1; 2013 (3) BCLR 271 (CC); 2013 (2) SA 613 (CC) at fn 6; Doctors for Life International v Speaker of the National Assembly and Others [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at paras 95-6.

74 The Vexatious Proceedings Act, No 3 of 1956.

75 Fisheries Development Corp v Jorgensen 1979 (3) SA 1331 (W) at 1339E-F

no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant, abuse connotes a misuse, an improper use, a use mala fide, and a use for an ulterior motive".

84. In *Beinash and Another v Ernst and Young,*[76] *the Court considered the constitutionality of section 2 (1) (b) of the Act. The Court confirmed that: "The provision does limit a person's right of access to Court. However, such limitation is reasonable and justifiable. While the right of access to Court is important, other equally important purposes justify the limitation created by the Act. These purposes include the effective functioning of the courts, the administration of justice, and the interests of innocent parties subjected to vexatious litigation. Such purposes are served by ensuring that the courts are neither swamped by matters without any merit, nor abused in order to victimise other members of society".*

85. *In Christensen NO v Richter*[77] the Court consequently, in summary, stated the following appears to be the position: *"The only manner by which the institution of future vexatious proceedings can be prevented is to rely on the provisions of the Act, the only manner to stay, strike out or otherwise deal with vexatious proceedings which have already been instituted or to deal with any process or action or inaction leading up to, or during or subsequent to, any legal proceeding or proceedings already instituted, and which constitutes an abuse of process, or generally brings the administration of justice into disrepute, shall be done in terms of the applicable common law principles and the court's inherent power to apply same".*

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76 Beinash and Another v Ernst and Young and Others 1999 (2) SA 116 (CC).

77 In Christensen NO v Richter 2017 JDR 1637 (GP).

86. The Act and common law are limited in addressing the nuances which arise from a SLAPP suit defence.

87. CALS submits this is fertile soil to rely directly on the constitution section 39(1) and 173 for the development of common law. On this score, the question regarding the principle of constitutional subsidiarity[78] arises.

88. This question has been debated in this Court on several occasions and was left open.[79] It is important to note that even if the principle limits direct reliance on the Constitution, the principle only applies if the legislation purports to give exhaustive effect to the constitutional right in question.[80] If we accept that the Act does not cover the field, the principle does not apply.

89. We submit further that, even if the Court is not with us and it finds that principle of constitutional subsidiarity does apply, the Constitutional Court has made it clear that it is not a hard and fast rule. [81]

90. We submit the current common law abuse of process does not afford litigants protection from SLAPP suits because even if ulterior motive as consideration is

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78 "where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard"

79 See *National Education Health and Allied Workers Union v University of Cape Town and Others [2002] zacc 27, 2003 (3) SA 1 (CC), 2003 (2) BCLR 154(CC) (NEHAWU) at para 17; Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another [2003] ZACC 8, 2003 (4) SA 584 (CC) 2003 (8) BCLR 825(CC) at paras 23-24. Then, in Minister of Health And Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae);* South African National Defence Union v Minister of Defence 2007 (5) SA 400 (CC) at para 51.

80 Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC) paras 74 to 76; My Vote Counts v Speaker of the National Assembly 2016 (1) SA 132 (CC) paras 126 and 136 to 149.

81 My Vote Counts v Speaker of the National Assembly 2016 (1) SA 132 (CC) at para 182

part of our law, it is not, as the foreign law stands sufficient to prove a SLAPP defence. To this extent, the current common law is inconsistent with the constitutional value system, which prospects freedom of speech, particularly regarding public participation. We submit that this is one of those reasons that trigger the duty established in *S v Theus*[82] to develop the common law.

91. It is well established in our law that law-making is the preserve of the legislature. This Court in *Carmichele v Minister of Safety and Security*[83] Court said: *"[36] In exercising their powers to develop the common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary."*

92. However, the Court also acknowledged that the judiciary may develop the common law. It quoted the dictum of Iacobucci J in *R v Salituro*, which Kentridge AJ cited in *Du Plessis v De Klerk,* the relevant part of which reads as follows: *"The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society".*[84]

93. In *DZ obo WZ*[85] ("*DZ*"), this Court effectively held that there are two avenues to developing the common law. Section 39(2) and section 173 of the Constitution.[86] The former applies where the deficiency to be cured by the development offends the Bill of the Rights whilst the latter applies where, even

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82 S v Theus 2003 6 SA 505 (CC) at para 28

83 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) ("Carmichele").

84 Id at para 36.

85 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC).

86 Id at para 32.

if the common law is constitutionally compliant, the broader interests of justice considerations necessitate its development.[87]

94. In either scenario, the Court stated that the approach to the development of the common law requires the following:[88]

94.1. The determination of the existing common law position;

94.2. A consideration of the existing common law's underlying rationale;

94.3. An enquiry into whether the common law rule offends section 39(2) of the Constitution or whether there are broader interests of justice considerations necessitating the development of the common law; and

94.4. A consideration of the broader consequences of the proposed change on the wider area of the law.

95. Notably, the nature of the existing common law position is the subject of contention between the Applicants and the Respondents.

96. The Applicants argue the following:

96.1. The existing common law position on abuse of process allows for a matter to be struck out if it constitutes an abuse of process;[89]

96.2. The test for establishing the defence of abuse of process requires for it to be shown that the party accused of abuse of process habitually and

87 Id.
88 Id at para 31.
89 Relying on *Bissett and Others v Boland Bank Ltd and Others* 1991 (4) SA 603 (D) at 608E-H, Applicants' founding affidavit para 37, Record p329.

persistently instituted vexatious legal proceedings without reasonable grounds, and such proceedings would be vexatious abuse of process if they are obviously unsustainable as a certainty and not merely on a balance of probability[90] was restated by the Supreme Court of Appeal in Bissett and Others v Boland Bank Ltd and Others 1991 (4) SA 603 (D) at 608E-H; and

96.3. In abuse of process matters, the emphasis is on the merits of the impugned claim and not on the motive of the claimant.[91]

97. The Respondents, on the other hand, make the following argument:

97.1. On the existing common law position, the ulterior motive may be determinative of abuse of purpose;[92]

97.2. If the existing common law does not regard ulterior motive as determinative of abuse of process, then it ought to be developed.[93]

98. In either event, the existing common law position does not recognise SLAPP suits either as a self-standing type of cases or as a distinct species of abuse of process. Even if the existing common law position recognises SLAPP suits as

90 Relying on *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga* [2020] 1 All SA 52 (SCA) at para 25, Applicants' founding affidavit para 38, Record p329.

91 Applicants' founding affidavit para 39, Record p330.

92 Relying on *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC), Respondents' answering affidavit para 52, Record p356.

93 Respondents' answering affidavit para 68, Record pp361 to 362.

a type of abuse of process,[94] it does not provide an approach dealing specifically with SLAPP suits.

99. Significantly, on CALS's alternative argument, recognising SLAPP suits within the common law of abuse of process would be an incremental development of the common law. Moreover, it would be an adoption of an approach to deal with SLAPP suits as a species of the common law of abuse of process (without detracting from its intended purpose), which would constitute an incremental development of the common law.

100. If one takes the common law position to be that which is contended for by the applicant,[95] a consideration of *Maphanga* suggests that the underlying rationale must be that (1) abuse of process targets vexatious cases habitually brought by litigants and (2) the courts do not seek to ill-suit litigants with worthy causes.

101. If one takes the common law position to be that which is contended for by the Respondents,[96] then the underlying rationale must be that a matter may constitute an abuse of process based on the underlying motives.

102. It is submitted that a matter may constitute a SLAPP suit even if it is brought for the first time by a party against another party. Moreover, it is not always that a defendant would be in a position to directly prove the underlying motives that led a plaintiff to institute a claim.[97] As a result, the existing common law position does not cater for SLAPP suits. Even if this were the case, a SLAPP defence

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94 In the judgment of the Court *a quo,* the Court at para 66 said "*SLAPP suits constitute an abuse of process and is inconsistent with our constitutional values and scheme."*

95 Applicants' founding affidavit at paras 38 to 39 and 43, Record pp 329 to 330 and 331 to 332.

96 Respondents' answering affidavit at para 52, Record p356.

97 CALS amicus application affidavit in the CC, para 23.4.

serves a different purpose: to protect the right to freedom of expression and safeguard public participation.

103. What follows is whether common law rules offend section 39(2) of the Constitution or are there broader interests of justice considerations necessitating the development of the common law. The implicated rights under the Bill of Rights include the right to freedom of expression. If one is faced with a SLAPP suit and cannot dispel it, either because they cannot prove that the plaintiff habitually brings such cases or they are unable to directly prove the ulterior motives for the plaintiff having brought the claim, then their right to freedom of expression will be violated.

104. Thus, on the common law, as it stands (whether as contended for by the Applicants or by the Respondents), and on the common law as developed in line with the Respondents' alternative argument, it still requires development as argued for by CALS. The development would be in terms of section 39(2). To the extent that the Court may find that the common law as it stands (either on the Applicants' or the Respondents' version) or that the development as contended for by the Respondents cures any offence to the right to freedom of expression, then it is submitted that the broader interests of justice considerations necessitate the development of the common law as contended for by CALS. In this regard:

104.1. The requirement for "habitual" "vexatious" cases[98] in the face of SLAPP suits is simply untenable. It would mean that the first person to be sued by

[98] *Maphanga* at para 25.

a particular company after having made public statements concerning the company on a matter of public interest would not be able to fend off the SLAPP suit as constituting an abuse of process. Only those persons who would be sued down the line could potentially raise the abuse of process issue. Even then, what constitutes "habitually" and "persistently" bringing "vexatious" cases is a difficult mountain to climb.

104.2. Importantly, ulterior motive itself is not an easy hurdle to overcome. One has to show that the court process is being used for a different purpose. As was said in *Solomon v Magistrate, Pretoria & Another*[99] at p607:

> *"The process of the Court, provided for a particular purpose, would be used not for that purpose, but the achievement of a different object, namely for the oppression of an adversary. The Court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings."*

104.3. Except, as noted by the Court *a quo,* SLAPP suits appear as ordinary matters. The Court said:

> "*The signature elements of SLAPP cases are the use of/he legal system, usually disguised as an ordinary civil claim, but designed to discourage others from speaking out on issues of public importance, and exploiting the inequality of finances and human resources available to large corporations, as compared to their targets"*[100]

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99 1950 (3) SA 603 (W).

100 Court a quo judgment, para 40, Record p297.

104.4. Moreover, SLAPP suits such as those in the form of defamation claims will generally follow from a particular public expression. Short of the approach contended for by CALS, a defendant would have to wait until the end of the matter to rid themselves of the SLAPP suit.[101] However, the end itself is not always promised, as can be seen from the remarks made by the Court *a quo.*[102]

105. The effect of litigation on defendants, particularly in the context of SLAPP suits where the plaintiff has more resources, cannot be overstated. In a recent High Court judgment in the matter of *Koko v Tanton*[103] the Court said the following:

"[47] … It is common cause that the respondent generally has more resources than the respondent to sustain the litigation. The respondent, who can ill afford the costs of this application, was mulcted in very substantial costs in not only having to file opposing papers, but also having to prepare and deliver heads of argument on all the issues, compel the applicant to deliver his heads of argument and thereafter to enrol this application and attend to the hearing thereof.

[48] The applicant at a very late stage indicated that he has no intention to proceed in this application with the relief sought, save for an order for costs. At that late stage the applicant had already incurred the greater part of her costs and was still obliged to set the matter down for hearing to oppose the applicant's ill-considered quest that she pay his costs of the application." (Emphasis added.) *A consideration of the wider consequences of the proposed change on the wider area of the law.*

106. We submit that the development of the common law to recognise SLAPP suits a self-standing type of cases does not offend the separation of powers principle,

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101 CALS amicus application affidavit in the CC, para 23.4.

102 Court a quo judgment, para 40, Record p297.

103 Unreported judgment, Gauteng Local Division of the High Court, Case number 2021/2212, delivered on 7 September 2021.

and it is not the first time, in South Africa, that a court would be undertaking that kind of development.

107. In *My Vote Counts,*[104] the Court broadly set out the principle of separation of powers and how it has been dealt with in other judgments. It is held that "*This Court has expressed itself thus: "The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense, it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.*"

108. In *National Media Ltd and Others, v Bogoshi*[105] the Supreme Court of Appeal developed the common law to recognise a defamation defence based on an approach from England, Australia, and the Netherlands. In doing so, the Court said: "*It has been said … that the criterion of unlawfulness must be the legal convictions in South Africa and not elsewhere. But the solution of the problem in England, Australia and the Netherlands seems to me to be entirely suitable and acceptable in South Africa. In my judgment we must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.*"[106] (Emphasis added.)

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104 My Vote Counts NPC v Speaker of the National Assembly and Others [2015] ZACC 31

105 1998 (4) SA 1196 (SCA).

106 Id at p1212.

109. The Court went further to set out how the defence would be considered by the Courts.[107]

110. Similarly, the Supreme Court of Appeal in *Trustees for the time being of the Children's Resource Centre Trust and others v Pioneer Food (Pty) Ltd and others (Legal Resources Centre as amicus curiae)*[108] developed the common law, in respect of class actions, in circumstances where the legislature had not regulated class actions.[109]

111. The adoption of suitable approaches followed in foreign jurisprudence is also not alien to our law. This is demonstrated above regarding the Supreme Court of Appeal's approach in both *Bogoshi* and *Children's Resource Centre.* As this Court said in *H v Fetal Assessment Centre,*[110] *"[31] Foreign law has been used by this Court both in the interpretation of legislation and in the development of the common law*."

112. In the premises, whether the Court recognises SLAPP suits as a self-standing type of cases or as a distinct species of abuse of process cases and, in either event, adopts the approach contended for by CALS to dealing with SLAPP suits, the Court would be acting in line with what the Supreme Court of Appeal

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107 "*In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion…, and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper."*

108 [2013] 1 All SA 648 (SCA).

109 Id at paras 15 and 22.

110 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC).

did in *Bogoshi* and *Children's Resource Centre.* Moreover, the development sought by CALS, especially in the alternative argument, constitutes an incremental development of the common law.

113. The development of the common law as argued for by CALS is this —

113.1. In the first instance, for the recognition of SLAPP suits as a self-standing type of cases which ought to be responded to by the adoption of an approach similar to that applied in *Pointes;*

113.2. In the alternative, CALS argues for the development of the common law so that SLAPP suits may be recognised as a distinct type of abuse of process that ought to be responded to by adopting an approach similar to that applied in *Pointes.*

114. The approach contended for by CALS would achieve three essential things:

114.1. First, it would ensure that the common law is not changed excessively as the defendant would first have to prove that they made the impugned expression in relation to a matter of public interest.

114.2. Second, the courts would be in a position to determine whether or not the plaintiff's claim has merit.

114.3. Third, the interests of justice inquiry would allow the courts to weigh up the considerations in favour of either continuing with the claim or dismissing it to protect the right to freedom of expression. This relieves the tension between the two positions argued for by the Applicants (merits over motive) and the Respondents (motive over merits).

E – CONCLUSION AND COSTS

115. If we accept that the principle of constitutional subsidiarity does not apply in this matter, then this Court is not barred from developing the common law incrementally where there is a gap calling for such a development. This Court has done so on several occasions in line with the "spirit, purport and object" of the rights in the Bill of Rights and section 39(2) of the Constitution. [111]

116. CALS's submits the abuse of process doctrine serves a broader purpose in our law. It stands as an inappropriate means of determining cases that constitute SLAPP suits, even if in common law, ulterior motive were definitive in some cases unless a separate were developed within abuse of court process proceedings.

117. Whether this Court agrees with the Applicants or Respondents, we submit it ought to be accepted that once we adopt SLAPP suit defences into our law, Courts will need also adopt some test for how those SLAPPs are to be adjudicated.

131. Ultimately, whether the Court is persuaded by CALS or not, we submit no order of cost should be made against CALS. CALS ought to be protected by the Biowatch Trust v Registrar Genetic Resources and Others rule.[112] However, CALS accepts that this case, unlike *Biowatch*, is not one brought by aggrieved

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111 See *Children's Resource Centre* 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC);

112 Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

individuals against the state and that CALS is acting in this matter as a friend of the Court.

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Keamogetswe Thobakgale

Chambers, Sandton

26 January 2022

Counsel for the Centre for Applied Legal Studies.

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