# STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION (SLAPPS)

The Role of the Judiciary, the Media and Parliament in Slapping Back

Inaugural lecture hosted by Freedom Under Law and University of Stellenbosch Department of Journalism

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**Introduction**

I am truly honoured to be speaking to you today in this inaugural lecture to celebrate the important partnership between two iconic entities *Freedom Under Law* and *the University of Stellenbosch Department of Journalism*. I am especially honoured to be sharing a platform with Judge Kriegler, whose contribution to our democracy before, during and after his appointment as a Constitutional Court judge is unparalleled.

The topic I have chosen to discuss today is SLAPPs – strategic litigation against public participation.

I want to illustrate why this type of litigation – against the media but also against all activists and truth tellers - is a major problem for our democracy.

And I want to tell you about how South African courts have in the last few years have crafted a creative, compelling but ultimately only partially helpful common law response to SLAPPS. There are 3 cases in particular that are instructive in relation to abuse of process here – I call them the 3 M's.

Then I want to illustrate briefly the global context and highlight that we are at an inflection point where for various reasons SLAPPs are an issue of great concern in many countries around the world.

And I want to end by challenging parliament and the media to deal decisively with SLAPPs in their spheres of influence.

For journalists and free speech NGOs, I want to argue that a coalition against SLAPPs is critical, and this includes quality journalism in investigating and reporting on the SLAPP itself, as well as debunking the disinformation campaigns that often accompany SLAPPs.

**SLAPPs and democracy**

So what are SLAPPs?

The name and even the acronym is for once a good description – strategic litigation against public participation. An area of the law is weaponized by often rich, powerful plaintiffs to litigate

against those who through public commentary or activism have become thorns in their sides – critics, journalists, human rights defenders, environmentalists and other activists and truth tellers. The legal process is what matters to the slapper not the outcome – it's not about winning the case. The process is instead abused for ulterior purposes.

I think Judge Goliath summarized it well in the first major SLAPP case we had in SA – the first of the M's – Mineral Sands:

"*The signature elements of SLAPP cases is the use of the legal system, usually disguised as an ordinary civil claim, designed to discourage others from speaking on issues of public importance and exploiting the inequality of finances and human resources available to large corporations compared to the targets. These lawsuits are notoriously, long, drawn out, and extremely expensive legal battles, which consume vast amounts of time, energy, money and resources. In essence, SLAPPs are designed to turn the justice system into a weapon to intimidate people who are exercising their constitutional rights, restrain public interest in advocacy and activism; and convert matters of public interest into technical private law disputes.*"

We will see in a moment how Judge Goliath's ruling that a SLAPP defence exists in common law was confirmed by the Constitutional Court.

So to summarise the strategy is not only to financially and emotionally exhaust the target of the lawsuit but also to send a signal to that person and others who might dare to attempt to speak truth to power.

It is a classic illustration of the chilling effect on freedom of expression, and without freedom of expression, as we all know, the light of democracy is extinguished.

I need not regale you with the endless poetry from the courts on the importance of freedom of expression to democracy, but I do find special resonance to this topic in the comments of Judge Sachs in the Laugh It Off case, which of course dealt with whether a parody T-shirt infringed the trademark of South African Breweries. Sachs said this:

> Of more significance from a constitutional point of view is the manner in which even the threat of litigation can stifle legitimate debate. Large businesses have special access to wealth, the media and government.

> The tarnishment theory of trademark dilution … could chill public discourse because trademark law could be used to encourage prospective speakers to engage in undue self-censorship to avoid the negative consequence of speaking– namely, being involved in a ruinous lawsuit. The cost could be inordinately high for an individual faced with a lawsuit aimed at silencing a critic, not only in terms of general litigation expenses, but also through the disruption of families and emotional upheaval. Such protracted vexation can have the effect of discouraging even the hardiest of souls from exercising their free speech rights.

Judge Sachs could easily have been describing the deleterious impact for democracy and free speech of a SLAPP suit.

So I hope I have persuaded you that SLAPPs undermine democracy.

But if the discussion so far doesn't persuade you, I want to talk about a few cases which hopefully will.

**Jacob Zuma v the media**

I start with a classic, a story I have told many times before but that bears retelling in this context; it shows at once the power dynamics at play in this form of lawfare.

The story is about a president who sues his critics in the media.

Between 2006 and 2010, Jacob Zuma – who became president in 2009 - sued the media and other critics for defamation in 15 cases: against eight newspapers, a radio station, two cartoonists, a columnist, op-ed writers, journalists, and an artist and art gallery.

At one stage, the total amount of claims in these cases was around R65 million. When one considers that the Supreme Court of Appeal has referred to an award of R500, 000 as excessive, one appreciates how entirely out of proportion these financial claims were.

But our then president was valuing his reputation very highly indeed.

And what it meant for the media defendants in these cases is that they would face years of litigation, massive legal costs, and emotional pain, to defend themselves.

The claims were in most cases not about factual statements but critical comments and opinions that were expressed: such as the William Gumede column on this slide which criticised Zuma's culture defence in his rape trial (he was acquitted of rape).

These double digit summonses for 7 figure claims were in my view lawsuits intended to intimidate the media: Zuma left the defamation claims to hang over the heads of his targets for years.

His strategy seemed to be to silence his critics and chill speech as the political campaign to unseat then-President Thabo Mbeki was ramped up and he ultimately become the president of the country.

So I believe he never cared about actually getting his day in court.

This SLAPP strategy was going well except that one of his main targets was the cartoonist Zapiro.

Because he had the luxury of being a household name whose publications backed him up, Zapiro was able to double down – for example, calling Zuma his publicist because of these lawsuits, and asking what reputation Zuma was suing over.

And then, backed by the newspaper publication who funded his legal fees, Zapiro adopted a proactive strategy to call the president's bluff in 2012, selecting one of the cases as a test case and dragging the reluctant plaintiff into court kicking and screaming.

I was privileged to represent Zapiro and The Sunday Times in the case.

The case itself was about a cartoon named the rape of justice.

The rape of justice cartoon was created in 2008 when Zuma and his allies waged a political campaign to ensure that corruption charges against him were dropped.

In parallel, his legal team expressly adopted the Stalingrad strategy saying in court that they intended to fight the charges against Zuma "like the Battle of Stalingrad, burning house to house".

Of course we all know that the political and Stalingrad legal strategy succeeded; it was only two years ago in 2021 (some 13 years after Zapiro's cartoon), that Zuma appeared in court and pleaded not guilty to corruption charges – and that case itself has now been progressing at snail's pace, and has led to a SLAPP by Zuma, which I will come to shortly.

So the cartoonist's criticism in 2008 was classic fair comment that Zuma was abusing the justice system, based on the statements made by Zuma and his allies, including that there will be blood on the streets if Zuma was prosecuted for corruption and that the judges of the Constitutional Court were counterrevolutionaries.

But once he was forced to litigate his own case, Zuma dropped his case on the eve of the trial in 2012, when there was nowhere left to hide and he must have known he would likely face damning cross-examination and ultimately lose.

Zuma and his spokesperson tried to spin this: he dropped the case, he said, to avoid setting a precedent against freedom of expression, logic of the most tortured variety on offer.

And a PR campaign such as this is another feature of a typical well-resourced SLAPP case that I want to emphasise – that a campaign of disinformation is often used to buttress the legal strategy.

Now the Zuma v Zapiro case was litigated over a decade ago – while anti-SLAPP laws were well known in countries like the USA, SLAPP terminology and principles were simply not known to our law back then: if they were, the media would have succeeded in my opinion in arguing that most if not all of Zuma's cases were SLAPPs.

But fast forward 17 years after Zuma instituted his first defamation case. Our law has now developed in this area to such a degree that we now get this kind of headline, in the second of the 3 M cases I want to highlight, involving the journalist Karyn Maughan, significantly, one of the few journalists who was on the beat covering Zuma's corruption charges all those years ago and is still doing so now.

**Maughan v Zuma**

So we come full circle with Mr Zuma and his weaponizing of the law against the media.

Having burnt his fingers in trying to SLAPP using defamation law, the now former president tried out a new playbook against the media (and against his own prosecutor, Billy Downer). Having first lodged a criminal complaint, he then embarked upon a private prosecution of legal journalist Karyn Maughan.

Once you know the facts of this case, I would suggest that even a first year law student would know that the prosecution was hopeless. It was all based on a letter from a doctor attached to a court application by Zuma and an affidavit by Downer, supporting a postponement in relation to one of the dates of his criminal trial.

The doctor's letter was fairly innocuous – it did not disclose Zuma's medical condition and simply said that he was being monitored following an emergency procedure. Maughan got access to the affidavit attaching the letter through the prosecutors and published a story about the postponement, referencing the letter. She did what legal journalists do every day.

Yet Zuma argued this conduct was so egregious that it warranted criminal prosecution and potential imprisonment – he dusted off a section of the National Prosecuting Authority Act which says that documents in the possession of the NPA cannot be disclosed without the NDPP's permission.

But this obviously cannot apply to a document filed in court. So it is no surprise that among other bases, the full court in Pietermaritzburg set the criminal summons aside on the basis that the merits were bad. This was not least because Zuma had not asked the court to keep the letter confidential.

But the court went further – accepting the submissions of three media amici (Campaign for Free Expression, SANEF and Media Monitoring Africa) it ruled that Zuma's summons amounted to an abuse of process and amounted to a SLAPP suit. The court also awarded punitive costs against Zuma.

Once again, it was not only the lawsuit itself that was used to intimidate Maughan – she faced disgraceful, vicious social media attacks, by Zuma's supporters.

Zuma has applied for leave to appeal.

Now the reason that the court could adopt the SLAPP terminology in the Maughan case was because of the leading case decided by the Constitutional Court last year in the Mineral Sands case, which I have briefly touched on.

**Mineral Sands in the Constitutional Court**

The mining activities of the Australian mining company, Mineral Commodities Limited, and its various South African companies including Mineral Sands have been of public concern for a number of years.

Among the voices who participate in the public discourse about the impact of mining on the environment, and specifically these companies' mining operations, were three environmental attorneys and three activists.

They criticised the corporates in e-books, radio interviews and, in the case of two of the attorneys, presenting a lecture at the Summer School at University of Cape Town.
The response of the corporates and some of their officers was to bring defamation actions against the six, claiming that its corporate reputation and the reputation of some of its directors have been damaged to the tune of over R14 million in total. The social worker activist was sued for 28 different publications.

Our firm took on the case on a pro bono basis.

We pleaded a substantive SLAPP defence – unchartered territory in our law. We argued that the mining companies' conduct in bringing these cases amounted to a SLAPP, which should be recognised as a defence under common law even in the absence of legislation.

This is because courts have had powers to ensure that their processes can't be abused. The allegation was that the companies' cases were brought for the ulterior purpose of chilling criticism. The companies argued that a SLAPP defence couldn't be used because it would have to be created in legislation and couldn't be developed in the common law.

The Constitutional Court agreed that an anti-SLAPP defence exists in our common law, as a species of abuse of process.

The Court made it clear that to qualify as a SLAPP, the merits of the case as well as the motive of the plaintiff must be considered. So bad motive + bad merits = one fat SLAPP.

Now the case did not find as a fact that the defence succeeded or that the mining corporations had launched a SLAPP: it was a case about whether the defence is in principle available, and whether or not the case was in fact a SLAPP is determined at the next stage.

But as we have seen its recognition of a SLAPP defence has already been developed in the criminal private prosecution context in the Karyn Maughan case.

This brings me to the final M, a case decided a few weeks ago – Mazetti v AmaBhungane.

**Mazetti and Aretti v Ambhungane**

Picture the scene – it's 8:30 pm and you are having a glass of wine after a long day at the law office. A WhatsApp alerts you to a court order that has just been emailed to you. The court order is one granted ex parte – that is without your journalist clients having had any opportunity to argue their side of the story – and it requires that the journalists must within 48 hours return documents leaked to them and on which they have been publishing articles in the public interest for several weeks.

More, the court order interdicts the journalists from publishing any further stories based on the documents until a return day, set for 4 months' time.

This is exactly what happened to amaBhungane in June this year following a series of articles.

In my view, the court order obtained by Mazetti undermined the cardinal principle of audi alteram partem – hearing the other side, which is fundamental to the legitimacy of adjudication itself. It is a rule departed from only exceptionally.

In my view, the court order also undermined three cardinal principles of media law:

- it effectively compelled amaBhungane to reveal its sources and source documents;
- secondly it sought to do so on the basis that its possession of these leaked documents meant it had committed theft; and
- thirdly, it enforced a prior restraint – a gagging order – against publication using the leaked documents.

AmaBhungane had to act quickly to reverse this. First it went to court before the 48 hour deadline expired and successfully varied the order. Secondly it then urgently applied for the court to reconsider the ex parte order. That was heard by DJP Sutherland, who issued a scathing ruling against the applicants, represented by 8 counsel. He vindicated all four cardinal principles that had been breached by the applicants.

And he awarded costs on a punitive scale for the abuse of process.

Judge Sutherland did not label the conduct of the applicants in this case a SLAPP, although this was the argument made by the media amici in the case: "SLAPP suits are part of an eroding climate for media freedom. The Holland-Muter J order (the judge who granted the ex parte order) coupled with the persistence of the litigation and the counter-application, collectively amount to a weaponization of our courts and pose serious threats to media freedom".

The judge found that the applicants had engaged in an egregious abuse of process and awarded punitive costs.

The applicants have now appealed to the Constitutional Court.

**Global context**

I want to now zoom back out to the global context and suggest that an important project is to document empirical research on SLAPPs in South Africa. This aids the law reform process, strategic litigation and activism to counter SLAPPs.

The value of empirical research is clear – as the significant research in the EU shows, and the call for evidence on SLAPPs by the UK government.

In the last few years, the move for anti-SLAPP legislation in a number of countries has gained momentum.

There's Daphne's Law in the European Union, which is the name given to a draft directive issued in April last year against SLAPPs winding its way through the EU Parliamentary processes. It takes its name from Daphne Galizia a top investigative journalist in Malta who in 2017 was assassinated by a car bomb. At the time of her death, she was facing over 40 civil

defamation lawsuits and five criminal defamation cases. These were initiated by mostly Maltese government officials and businessmen.

The invasion of Ukraine by Russia brought into sharp focus the ugly truth that many Russian oligarchs weaponize English defamation law to threaten, bully and intimidate their critics – London is, after all, the libel capital of the world.

Following this analysis, in July of 2022, the United Kingdom announced its intention to implement anti-SLAPP legislation.

Just a few weeks ago, the House of Lords proposed amendments to the Economic Crime and Corporate Transparency Bill to incorporate anti-SLAPP regulation.

Furthermore, the UK's Solicitors Regulatory Authority issued guidance for solicitors to discourage them in taking SLAPP cases.

In the USA, there is a move to get states to adopt the uniform anti-SLAPP statute.

And the European Court of Human Rights and Inter-American Court of Human Rights have both in the last two years adopted SLAPP terminology in some of their judgments.

Of course there are also the existing and legacy anti SLAPP laws in Canada and 2/3rds of US states.

So where to now as I draw to a close?

While it is fantastic that the common law has SLAPPED back in SA, there is no doubt that the gold standard is a comprehensive anti-SLAPP statute – as the Constitutional Court itself hinted at. This to my mind is where our focus and energies should now turn to, even as we celebrate and make use of the anti-SLAPP defence gifted to us by the Constitutional Court in the Mineral Sands case.

I think there are at least 3 components that such a law should exhibit:

First, it is essential to allow an early dismissal procedure, empowering courts to dismiss a case as a SLAPP without the need for the case to go to a full trial or oral evidence – where the emotional and financial costs are particularly draining.

Second, the onus should be on the plaintiff to show they are likely to succeed at trial – not on the defendant to show the opposite.

And third, full costs should be awarded to the defendant if they succeed in dismissing the case as a SLAPP, and no costs should be awarded against a defendant if they don't succeed.

The media and media NGOs to my mind also have an important role to play in combatting SLAPPs – in accurately reporting on SLAPPs, but also on debunking the disinformation that accompanies SLAPPs.

In conclusion, I hope I have made good on my promise to illustrate why the issue of addressing SLAPPS is a burning one for our democracy.

SLAPPs operate within a broader legal context and it is encouraging on that front to also acknowledge two other developments which will help us fight SLAPPs.

The first is that in a companion judgment to the Mineral Sands case, the Constitutional Court held that trading corporations should generally not be awarded damages for defamation in public interest matters.

Secondly, there is currently a bill winding its way through our parliament which will abolish criminal defamation. These are both welcome developments, as is the common law recognition of the SLAPP defence.

But if the international experience teaches us anything, it is that law is only one piece of the anti-SLAPP puzzle. It takes a village to fight a SLAPP and I invite all of you in your different capacities to take up residency in that village. I thank you.