

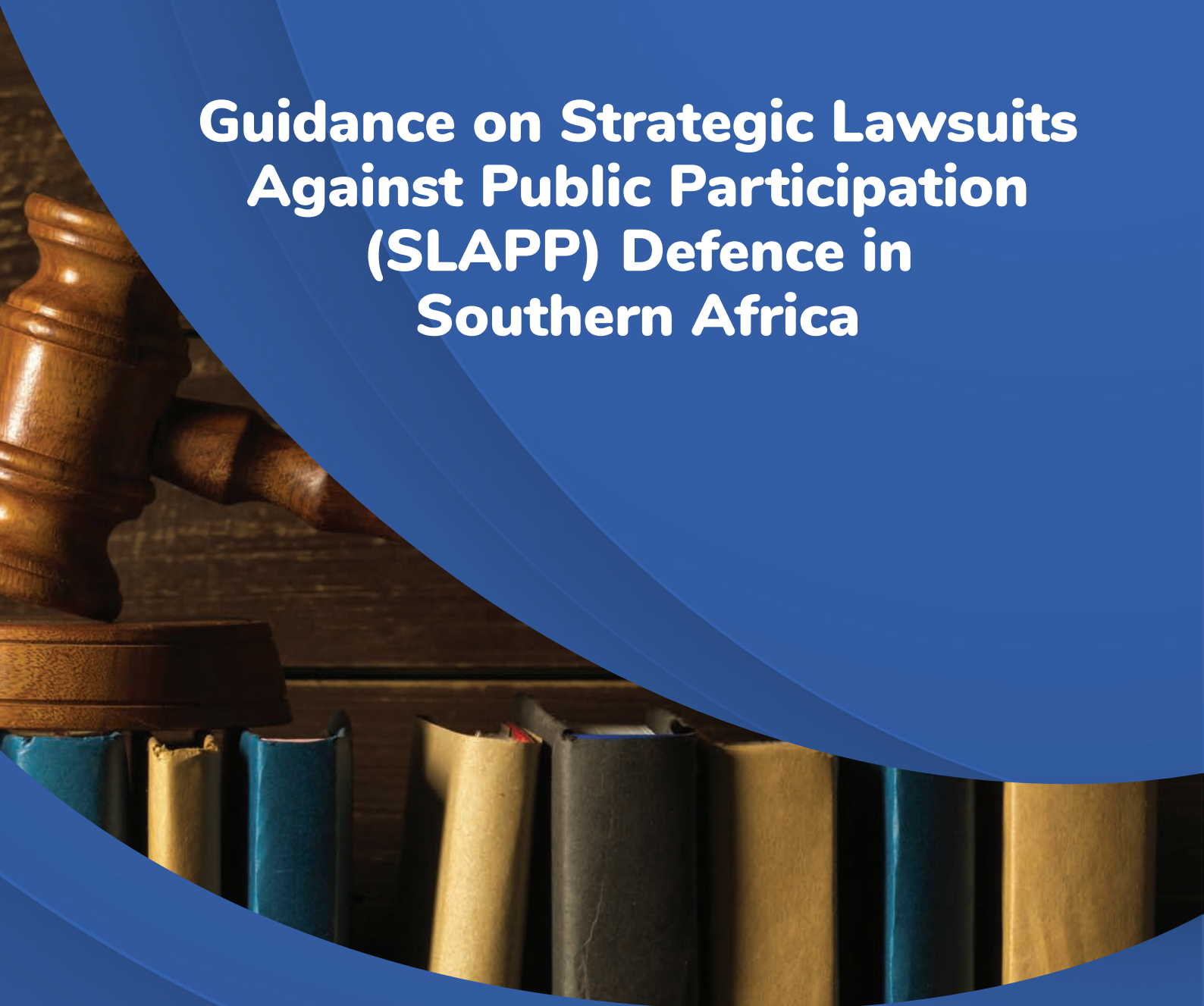


International Senior  
Lawyers Project



PROMOTING **FREE EXPRESSION** IN SOUTHERN AFRICA

# Guidance on Strategic Lawsuits Against Public Participation (SLAPP) Defence in Southern Africa



## About ISLP

The International Senior Lawyers Project (ISLP) is an independent and politically neutral 501(c)(3) US non-profit and non-governmental organization founded in 2000. ISLP's mission is to mobilize pro bono legal support for governments, civil society organizations, and social enterprises, on matters that advance the rule of law and economic development.

ISLP's global work aims to complement vital local expertise and to meaningfully contribute to locally-led initiatives and positive systems change, where legal and regulatory frameworks are made more transparent, equitable, and sustainable. ISLP's focus areas include: accountability and transparency; freedom of expression and media law; investment, trade, and tax; innovative finance and social enterprises; civil society engagement; energy; natural resource management; and responsible technology.

ISLP's Winfield Freedom of Expression Initiative supports journalists and watchdog non-governmental organizations that investigate, report on, and litigate against human rights violations and harmful practices related to economic development. Our work on this publication emerges from our ongoing collaboration with MISA and local advocates in the Southern African region. Our work together has highlighted the importance of broadening a deeper understanding of SLAPPs, particularly through the exchange of practical insights and resources, to better equip civil society to protect free expression.

We earnestly thank our partners at MISA for their extraordinary partnership and collaboration, and for your tireless leadership in the defense of free expression. Thank you to the A4ID ROLE UK Programme for the important technical and financial support that made this project possible. And of course a very special thanks to each of our volunteer lawyers, Jenny Arlington, Anna Storer, Jasmine Alexander, and Ondine Meyer from Akin Gump LLP, Max Du Plessis of Doughty Street Chambers, Toni Palmer of Ubunye Chambers and Samuel Rowe of 5RB, Dave Schulz of Ballard Spahr LLP, for the many hours they dedicated to developing this publication and related activities under this joint initiative.

We hope that advocates around the world may benefit from the comparative experience and guidance provided in this publication. Please feel free to share this publication and learning with others who may find it useful.

We welcome you to contact ISLP at [info@islp.org](mailto:info@islp.org) and visit our website: <https://islp.org>.

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## Foreword by Media Institute of Southern Africa (MISA)

Strategic Lawsuits Against Public Participation (SLAPPs) are lawsuits designed to silence critics, often by burdening them with the cost of defending themselves. These lawsuits can be viewed in the context of other forms of stifling expression, such as book censorship, artist persecution, suppression of dissent, and information control.

There is evidence that SLAPPs have been noted to target marginalised communities disproportionately. Brave individuals, who often work tirelessly to address critical social, economic, and environmental issues, are subjected to costly and time-consuming legal battles that drain their resources. Ultimately, this undermines their ability and confidence to express concerns.

SLAPPs have a chilling and devastating effect on civil society and citizens at large, as they discourage others from speaking out for fear of similar reprisals. This undermines freedom of expression, which is a cornerstone of any democratic society. Free expression allows for the open exchange of ideas, promotes public debate, and holds powerful entities accountable when they are bad actors. However, SLAPPs are an abuse of free expression. In Southern Africa, where there is a robust civil society and a flourishing media landscape, SLAPPs pose a significant threat to civil liberties. They can be used to intimidate journalists, activists, whistleblowers, and everyday citizens who speak out on matters of public interest.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) states that, under international law, states must respect, protect, and fulfil human rights.

The OHCHR stresses that:

“Under those obligations, States shall not only refrain from engaging in abusive lawsuits but also take positive measures to ensure that third parties do not use SLAPPs as tools to silence those exerting legitimately their rights to freedom of opinion and expression as well as freedom of peaceful assembly and association.”

This guideline document is, therefore, a crucial practical resource for navigating the complexities of SLAPPs in the Southern African region, where most countries lack anti-SLAPP legislation. It aims to empower individuals and organisations targeted by such lawsuits by clearly defining their rights and available legal defences following international and regional instruments. Hence, urgent legislative reforms are crucial to safeguarding fundamental rights and establishing a level playing field for everyone.

Comprehensive anti-SLAPP laws that provide swift and effective remedies for victims, deter frivolous lawsuits, and safeguard the public interest should be enacted.

On the other hand, comprehensive anti-SLAPP laws can provide swift and effective remedies for victims, deter frivolous lawsuits, and safeguard the public interest. Legislative reforms are needed to safeguard fundamental rights and help establish a level playing field. By strengthening our legal frameworks and fostering a culture of accountability, we can empower citizens to participate meaningfully in public discourse without fear of reprisal. Citizens can be empowered to defend their rights and hold accountable those who seek to undermine democracy by raising awareness and understanding of the nature of SLAPPs and the strategies employed to combat them. A multi-stakeholder approach is

vital for collaboratively establishing and enforcing a legal framework that safeguards free speech and promotes civic engagement.

I commend the authors for their commitment to this significant work and for offering this invaluable resource to the public.

This Guideline is not a substitute for legal advice, but rather a tool to equip citizens and legal professionals alike with the necessary knowledge to identify and effectively combat SLAPPs.

By promoting awareness and fostering collaboration, we can safeguard freedom of expression and ensure a vibrant democratic space in Southern Africa.

**Golden Maunganidze**

**Chairperson**

**MISA Regional**



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## SLAPPs Guidance: Southern Africa

1. This document is designed to provide guidance for anyone interested in or facing a Strategic Lawsuits Against Public Participation ("SLAPPs"), both generally and specifically in southern Africa, and is also designed to propose practical strategies when facing a SLAPP. This guidance document also aims to add to the discussion for suggested solutions to reduce and deter SLAPPs.
2. The commentary draws on approaches from the UK, as a jurisdiction in which SLAPPs have faced increasing scrutiny in recent years, as well as the European Union and South Africa.
3. First, in **Part A**, SLAPPs will be discussed in general terms, including defining what a SLAPP is and global trends in SLAPPs. In **Part B**, the legal principles applicable to, or engaged in, SLAPPs will be discussed. In **Part C**, we address practical issues and recommendations, should you be the subject of a SLAPP. In **Part D**, we discuss potential responses and solutions to the problem of SLAPPs. Finally, an addendum with references to helpful resources can be found at the end of this document.

## PART A: Introduction to SLAPPs

### What is a SLAPP?

4. There is no single definition for what conduct constitutes a SLAPP. Rather SLAPPs can better be categorised by their main aim or purpose, which is to misuse the judicial process for a purpose other than genuinely asserting, vindicating or exercising a right and instead to use it for the purpose of reducing, undermining or attaching negative consequences to the person's public participation, in order to prevent and/or preclude critique.
5. SLAPPs are often brought by powerful private, corporate or political actors who have the resources to litigate extensively. SLAPPs most often target people or entities who speak out on matters of public concern and interest, such as journalists, media organisations, activists and non-governmental organisations, and who may be less well-resourced.
6. There is therefore usually an inequality of arms between the parties to a SLAPP, giving the SLAPP pursuer an upper hand to deploy significant resources to weaponise the court and lawyers to achieve the desired end. By doing so, matters that are of public concern (on which the person who is subject of the SLAPP is expressing a view or "participating") becomes the subject of a private legal dispute.
7. While undermining the purpose, use and legitimacy of the court and its officers (lawyers), SLAPPs pose a threat to democracy, the rule of law, human rights and the proper functioning of civil societies. The use and threat of SLAPPs may have a chilling effect on communication, free speech, and all forms of public participation and therefore impact on the manner in which all rights are exercised.
8. A significant number of SLAPPs are successful before any formal form of litigation has been issued, and merely through the making of high-handed legal threats i.e. the SLAPP pursuer achieves his aim of silencing the prospective defendant without the public even being aware that the subject has been silenced.
9. SLAPPs are not limited to specific types of legal claims and can be both criminal and civil in nature. However, the categories of claim that are most commonly deployed are claims for defamation, breach of privacy, breach of data protection laws and copyright infringement.
10. Regardless of the form the SLAPP takes, it will routinely contain an exaggerated or unfounded claim for damages. The threat alone of a court imposing significant, unfounded liability on the subject of the suit may discourage the subject's genuine exercise of his or her right to public participation. SLAPP pursuers may also institute their claims in multi-jurisdictions in order to deplete a defendant's resources and increase the psychological impact of the SLAPP.
11. Against that background, it is unhelpful to define a SLAPP too strictly: an overly stringent definition may exclude abusive conduct from the definition (and therefore be under-inclusive) or provide a ready defence to SLAPP pursuers.<sup>1</sup> However, global trends (discussed below) provide a helpful picture of the key features of a SLAPP.

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<sup>1</sup> For further discussion on this point, see Part C and discussion of the UK's introduction of the Economic Crime and Corporate Transparency Act 2023, and other legislative enactments. The discussion is not exhaustive.



## Current global trends

12. The global trends suggest that SLAPPs are on the rise, and with this rise has come increased global attention on the use of SLAPPs and their threat to democracy and essential human rights. A report published in December 2024 by the Coalition Against SLAPPs in Europe (“CASE”) in conjunction with the Daphne Caruana Galizia Foundation identifies a total of 1,049 SLAPPs cases in Europe between 2010-2023.<sup>2</sup> As a result of the rise in SLAPPs, there has been greater awareness and attention brought to how to deal with SLAPPs, with legislation and regulatory amendments being contemplated in various jurisdictions.
13. The Council of Europe has implemented a Europe-wide campaign to mobilise governments to review national legislation and identify weak points in terms of supporting and protecting civil society from SLAPPs.<sup>3</sup> This has been more effective in some countries than others; Poland, for example, was yet to appoint a focal point for the campaign as of 25 April 2024, while other countries had developed multi-stakeholder campaigns.<sup>4</sup>
14. The issue of SLAPPs has caused the Council of Europe’s Committee of Ministers of Member States on 5 April 2024 to adopt a recommendation on countering the use of SLAPPs (the **“CoE Recommendation”**) which follows closely in the footsteps of the European Union Directive colloquially known as ‘Daphne’s Law’, discussed below.<sup>5</sup> The CoE Recommendation helpfully identifies “SLAPP indicators” as follows:
  - 14.1. the claimant tries to exploit an imbalance of power, such as their financial advantage or political or societal influence, to put pressure on the person who is the subject of the claim;
  - 14.2. the arguments put forward by the claimant are partially or fully unfounded;
  - 14.3. the remedies requested by the claimant are disproportionate, excessive or unreasonable;
  - 14.4. the claims amount to abuse of laws or procedures;
  - 14.5. the claimant engages in procedural and litigation tactics designed to drive up costs for the defendant, such as delaying proceedings, selecting a forum that is unfavourable to public participation or vexatious to the defendant, provoking an onerous workload and pursuing appeals with little or no prospect of success;
  - 14.6. the legal action deliberately targets individuals rather than the organisations responsible for the challenged action;
  - 14.7. the legal action is accompanied by a public relations offensive designed to bully, discredit or intimidate actors participating in public debate or aimed at diverting attention from the

2 Daphne Caruana Galizia Foundation, New SLAPPs report shows urgent need for effective anti-SLAPP legislation: <https://www.daphne.foundation/en/2024/12/10/slapp-report#:~:text=New%20SLAPPs%20report%20shows%20urgent%20need%20for%20effective%20anti%20SLAPP%20legislation,-10%20December%202024&text=166%-20Strategic%20Lawsuits%20Against%20Public,2024%20SLAPPs%20report%20has%20found.>

3 Anti-SLAPP Conference on 25 April 2024, [https://www.youtube.com/watch?v=8PQq0-ojgZw&list=PL3WN3cWuRO-n6AQYxg6LGZ21cgD\\_eUvY\\_c&t=721s](https://www.youtube.com/watch?v=8PQq0-ojgZw&list=PL3WN3cWuRO-n6AQYxg6LGZ21cgD_eUvY_c&t=721s).

4 Anti-SLAPP Conference on 25 April 2024, [https://www.youtube.com/watch?v=8PQq0-ojgZw&list=PL3WN3cWuRO-n6AQYxg6LGZ21cgD\\_eUvY\\_c&t=721s](https://www.youtube.com/watch?v=8PQq0-ojgZw&list=PL3WN3cWuRO-n6AQYxg6LGZ21cgD_eUvY_c&t=721s).

5 Available at <https://rm.coe.int/0900001680af2805>; Anti-SLAPP Conference on 25 April 2024, [https://www.youtube.com/watch?v=8PQq0-ojgZw&list=PL3WN3cWuRO-n6AQYxg6LGZ21cgD\\_eUvY\\_c&t=721s](https://www.youtube.com/watch?v=8PQq0-ojgZw&list=PL3WN3cWuRO-n6AQYxg6LGZ21cgD_eUvY_c&t=721s).

substantial issue at stake;

14.8. the claimant or their representatives engage in legal intimidation, harassment or threats, or have a history of doing so;

14.9. the claimant or associated parties engage in multiple and co-ordinated or cross-border legal actions on the basis of the same set of facts or in relation to similar matters;

14.10. the claimant systematically refuses to engage with non-judicial mechanisms to resolve the claim.

15. To address SLAPPs, the CoE Recommendation proposes that the Council of Europe's Member States ensure that their national legal systems and their implementation provide a comprehensive legal framework and coherent set of structural and procedural safeguards to prevent and minimise the harmful effects of SLAPPs, as well as a full set of remedies and support measures for the harms caused by SLAPPs. It aims to encourage public authorities to undertake a holistic policy approach to minimising the effects of SLAPPs, to help those who are attacked, and to support the legal community in being able to identify appropriately whether a lawsuit is a SLAPP.<sup>6</sup>

16. Procedural safeguards highlighted in the CoE Recommendation include effective case management, such as early dismissing of claims against public participation (either where courts, on their own initiative, are enabled to dismiss a claim as a SLAPP early in the proceedings, or where defendants are enabled to file applications for early dismissal of claims against public participation, in order to counter the harmful effects of SLAPPs on debate of public interest matters).

17. These proposed procedural safeguards would also include a court being empowered to:

17.1. grant a stay of proceedings; and/or

17.2. implement measures in relation to costs as against the claimants. In court proceedings against public participation, such measures could ensure that judicial and other competent authorities have the power to require the claimant to provide security for procedural costs, or for procedural costs and damages, if they consider such security appropriate in view of the presence of SLAPP indicators. The courts may also be empowered to grant restitution of legal costs, such as to enable them, upon determination that a legal claim constitutes a SLAPP, to order the claimant to bear all the costs of the proceedings, including the full costs of legal representation incurred by the defendant.

18. The proposed remedies would also include:

18.1. minimising costs associated with, and arising out of, SLAPP claims;

18.2. provision for SLAPP victims to be acknowledged as such and to be fully compensated for damages incurred as a result of the SLAPP, covering both pecuniary and non-pecuniary damages, such as loss of income and emotional distress as well as compensation for costs and expenses, for example to cover legal and administrative costs;

18.3. the capping of the amount of damages, in order to pre-empt or dissuade abusive or disproportionate financial penalties for the defendants, which would have a chilling effect on their public participation, and to avoid creating financial incentives for filing legal action; and

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<sup>6</sup> Anti-SLAPP Conference on 25 April 2024, [https://www.youtube.com/watch?v=l0S0rFC5Oy-g&list=PL3WN3cwuROn6AQYxg6LGZ21cgD\\_eUvY\\_c&index=4](https://www.youtube.com/watch?v=l0S0rFC5Oy-g&list=PL3WN3cwuROn6AQYxg6LGZ21cgD_eUvY_c&index=4)

- 18.4. other dissuasive measures, such as the dissemination of information concerning the court's decision, including publishing it in full or in part and the names of the legal or natural persons who filed the SLAPP.
19. The global trends on SLAPPs are novel and changing, in response to which creative and practical solutions are being sought the world over. Accordingly, the above presents a variety of options and strategies which may helpfully be considered in the Southern African context, while recognising the different legal environments and climates around the world and to which such strategies must respond. This is dealt with further in Part D.
20. The United Kingdom also has some helpful teachings, recently arising from the High Court of Northern Ireland, which on 8 January 2024 handed down the first judgment in a court in the United Kingdom striking down a claim because it amounts to a SLAPP, in the case is *Kelly v O'Doherty* [2024] NIMaster 1 (the "**Kelly** decision"). That case arose from a defamation claim in response to two radio interviews during which Malachi O'Doherty, a journalist and author, claimed that Gerry Kelly, an IRA prisoner who escaped from the Maze prison in 1983 and who is now a politician, had shot a prison officer during the escape. Mr Kelly brought a libel (defamation) claim against Mr O'Doherty.
21. The High Court struck out the claim as a SLAPP. In doing so, the court considered the absence of any defamation proceedings over several years brought in respect of the story, and the fact that proceedings were instituted only against these two particular freelance journalists. The Court found that this suggests that, rather than being a genuine attempt to defend a reputation which has been damaged by an untruth, the proceedings are what has been referred to as a SLAPP.
22. The Court could not see any valid reason why the proceedings were brought after Mr Kelly had himself admitted in his own book that during the prison break, he had been armed with a gun and had threatened to shoot a prison officer, although he had not admitted to firing the gun. He had also been named widely as the individual who had fired the shots that hit the officer. The Court also noted that the claim had been targeted at individuals where other corporate defendants were more appropriate.
23. The Court found that "the abuse of process in this case is so blatant that it would be utterly unjust if the court were to allow the proceedings to continue". As is clear from its reasoning, the Court employed and identified certain of the SLAPP indicators, which the Council of Europe itself has already highlighted in the CoE Recommendation (see above) and which share common features with other SLAPPs, including cases in South Africa, discussed below.
24. Further insight may be gleaned from the decision emanating from the complaint filed by Dan Neidle against Nadhim Zahawi, the former chancellor of the exchequer, and his lawyers.<sup>7</sup> Mr Neidle, a former Clifford Chance (the international law firm) partner and current head of think tank Tax Policy Associates, had shared information online alleging Mr Zahawi avoided almost £4 million of capital gains tax.<sup>8</sup> Mr Zahawi's solicitor sent Mr Neidle a 'confidential and without prejudice' email on behalf of Mr Zahawi accusing Mr Neidle of libel and ordering him to retract his statements. The email

<sup>7</sup> <https://www.lawgazette.co.uk/news/zahawi-solicitor-fined-50k-but-tribunal-dismisses-slapp-framing/5121881.article>.

<sup>8</sup> [https://www.linkedin.com/posts/danneidle\\_next-week-nadhim-zahawis-former-libel-lawyer-activity-7272171047427158016-t1WE/](https://www.linkedin.com/posts/danneidle_next-week-nadhim-zahawis-former-libel-lawyer-activity-7272171047427158016-t1WE/).



stated *“It is up to you whether you respond to this email but you are not entitled to publish it or refer to it other than for the purposes of seeking legal advice. That would be a serious matter as you know.”*<sup>9</sup>

25. Mr Neidle claimed that the email, and other follow up correspondence sent to him, were SLAPPs, and filed a complaint with the Solicitors Regulation Authority, the regulatory body of solicitors in England and Wales (the **“SRA”**). The SRA referred Mr Zahawi’s solicitor to the Solicitor’s Disciplinary Tribunal, an independent statutory tribunal which hears cases of alleged misconduct by solicitors (the **“SDT”**), which launched an investigation, with a public hearing held in December 2024.
26. The SDT found that the email referred to above, but not the other correspondence, was in breach of the SRA Code of Conduct as it violated guidelines by misusing a ‘without prejudice’ heading and accordingly imposed a fine of £50,000 and ordered recovery of costs in the amount of £360,000. However, the SDT held that this was not a SLAPP suit against Mr Neidle because **“no attempt”** was made by Mr Zahawi’s solicitor **“to prevent scrutiny of Mr Zahawi’s tax affairs per se. [The conduct] was not seeking to stop Mr Neidle asking questions based on facts as he saw them”**.<sup>10</sup>
27. Although the SDT determined this not to be a case of SLAPPs, the case highlights the rules applicable to lawyers when addressing pre-litigation correspondence to ensure that such correspondence does not mislead recipients into thinking that the correspondence is legally privileged when it is not, as outlined in the SRA guidance (discussed further below).
28. In another case which may shed further light on global trends, on 7 June 2023, the English High Court in **Amersi v Leslie** [2023] EWHC 1368 (KB) struck out a libel claim brought by Mr Amersi, a businessman and Conservative Party donor against Ms Leslie, a former Conservative MP. The Court’s judgment did not address the question of the case being a SLAPP, although it referred to the defendant’s contention that it was, and the claimant’s vigorous denial thereof. However, it dealt with the unmeritorious nature of the claim (it found that the particulars of claim failed to adequately plead serious harm to reputation, and that the claimant’s case relied on a composite and speculative argument rather than specifying the harm caused by each publication, which involved 15 memos sent to a limited audience). Further, the Court criticised the claimant’s conduct, noting delays, excessive litigation tactics, and a possible ulterior motive beyond seeking genuine vindication. The decision was upheld on appeal ([2023] EWCA Civ 1468). While the issue of SLAPPs and the purported abusive conduct did not form part of the Court of Appeal’s decision, the Court did note that the judge below **“may have gone further than was strictly necessary in what he said at [240] about the claimant’s intentions and other states of mind. But his decision was squarely based on objective factors and in particular the outward effects of the claimant’s conduct on the consumption of the court’s resources”** (at [59]).
29. In the House of Commons, the lower chamber of the UK Parliament, the Amersi case was labelled a SLAPP by MP David Davis who stated that the claim was **“clearly an attempt to bully, intimidate and financially ruin Ms Leslie in order to suppress the truth”**.<sup>11</sup>

<sup>9</sup> See Dan Neidle’s publication of letters from legal representatives of the former UK Chancellor of the Exchequer, Nadhim Zahawi (<https://taxpolicy.org.uk/2022/08/23/sra2/>).

<sup>10</sup> <https://www.lawgazette.co.uk/news/zahawi-solicitor-fined-50k-but-tribunal-dismisses-slapp-fragment/5121881.article>

<sup>11</sup> <https://hansard.parliament.uk/Commons/2023-06-29/debates/AB9B8F81-7AE0-446A-81E8-6F50DFE-7BCC2/Lawfare>.

30. MP Davis' comments labelling **Amersi** a SLAPP were also featured in a Research Briefing (the "**Briefing**") by the House of Commons on SLAPPs.<sup>12</sup> The Briefing was published on 21 February 2024 in preparation for the second reading of the Strategic Litigation Against Public Participation Bill (the "**Bill**"), which ultimately did not pass into law (see below). The Bill was seeking to expressly enable the English court to "**strike out a SLAPP claim where the claimant has failed to show that it is more likely than not that the claim would succeed at trial**".<sup>13</sup> This was partly to curb what the Briefing calls "Libel Tourism", where a claimant may be able to bring a defamation case against a defendant, even if neither party is domiciled in England and Wales. The Briefing confirmed that SLAPPs cause the courts to be used to conduct a "**hybrid war**" or "**lawfare**", and that overall SLAPPs are used by individuals with "**deep pockets who can use British... courts to suppress the publication of information that is clearly in the public interest**" – a sentiment with global applicability.

## SLAPPs in Southern Africa

31. The global trend in increasing SLAPPs appears to be mirrored in Southern Africa. While difficult to accurately determine figures given the nature of SLAPPs, and acknowledging the lack of robust assessment metric in practice, research by the Business and Human Rights Centre reports that on one view SLAPPs brought in Africa may amount to approximately 8.5% of the total global number of SLAPPs between 2015 to mid-2021, with the majority coming from South Africa.<sup>14</sup> The types of SLAPP typically advanced in Southern Africa are claims of defamation (both civil and criminal) and claims for other non-defamation damages.
32. These figures demonstrate the SLAPPs are not a phenomenon from which Southern Africa is exempt. It is a reality to which Southern African states must be aware, and respond, appropriately and in a manner suitable for its context.
33. While the development of SLAPP specific measures and remedies is not at an advanced stage, legal principles and materials which are relevant already helpfully exist and can be employed in dealing with SLAPPs. These are dealt with below.

<sup>12</sup> <https://researchbriefings.files.parliament.uk/documents/CBP-9962/CBP-9962.pdf>, page 5.

<sup>13</sup> <https://researchbriefings.files.parliament.uk/documents/CBP-9962/CBP-9962.pdf>, page 12.

<sup>14</sup> Of the cases the Business and Human Rights Centre globally identified as bearing the hallmark of SLAPPs between 2015 and mid-2021, approximately 8.5% were reported in Africa, with a majority coming from South Africa. However, as the research notes, this is likely to be just the tip of the iceberg due to the challenges in identifying SLAPPs. The Business and Human Rights Centre research was focussed primarily on SLAPPs brought or initiated by business actors. (see: [https://www.business-humanrights.org/documents/36315/2021\\_SLAPPs\\_Briefing\\_EN\\_v657.pdf](https://www.business-humanrights.org/documents/36315/2021_SLAPPs_Briefing_EN_v657.pdf)).



## PART B: Legal material relevant to SLAPPs

34. While no Southern African country has enacted direct or specific anti-SLAPP legislation, there are various treaties on both an international and regional level that contain provisions which reflect and protect the rights at stake and which are imperilled by SLAPPs – in particular, the right to freedom of expression and information.
35. These rights exist in both international and regional instruments applicable to Southern African states. Those invoking these legal instruments may do so as sources of international law, but should do so conscious that the status and application of international law and the specific international instruments within the legal system of the Southern African country in question may vary.

### International principles and conventions that may be relevant to SLAPPs

36. Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”) states as follows:

*“1. Everyone shall have the right to hold opinions without interference.*

*2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

*3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

*(a) For respect of the rights or reputations of others;*

*(b) For the protection of national security or of public order (ordre public), or of public health or morals.” (emphasis added)*

37. The ICCPR has been ratified by all Southern African countries, so can be relied on as a source of international law in those countries (although the status and application of international law may vary).

### Regional instruments that may be relevant to SLAPPs

38. The right to receive information and express views is a right of particular importance in Southern Africa.
39. This has been recognised by Faith Pansy Tlakula, Chairperson and Special Rapporteur on Freedom of Expression and Access to Information in Africa, who noted:

*“Judicial and quasi-judicial human rights mechanisms in Africa, such as the African Court on Human and Peoples’ Rights and the African Commission on Human and Peoples’ Rights, play an essential role to foster the rule of law in Africa, and notably for the respect of freedom of expression, safety of journalists and the end of impunity”.<sup>15</sup>*

40. The right to expression and information is also reflected in regional instruments. Article 9 of the African Charter on Human and Peoples’ Rights states that:

*“1. Every individual shall have the right to receive information.*

<sup>15</sup> <https://www.african-court.org/wpafc/unesco-and-the-african-court-on-human-and-peoples-rights-partner-to-fight-impunity-for-crimes-against-journalists/>.

*2. Every individual shall have the right to express and disseminate his opinions within the law.” (emphasis added)*

41. The Declaration of Principles of Freedom of Expression and Access to Information in Africa (the **“Declaration”**), which was adopted by the African Commission on Human and Peoples’ Rights (the **“African Commission”**) on 10 November 2019 in Banjul, The Gambia, also affirms the rights to freedom of expression and access to information on the basis of Article 9 of the African Charter on Human and Peoples’ Rights.
42. While these rights are general in their application (not a provision dealing specifically with SLAPPs), they recognise every individual’s entitlement to free expression within the law, the right which is commonly threatened by a SLAPP.
43. As explained above, these instruments are not domestic law, but can be relied on persuasively in courts in Southern African countries in which the regional instruments are effective as a source of international law. Typically, however, a court will be interested in adjudicating a matter based on local domestic laws – unless a litigant has approached the African Court on Human and Peoples’ Rights (the **“African Court”**).
44. Approaching an international Court like the African Court is not a measure readily available to most people; the African Court can be approached only once all domestic courts in the country in question have been exhausted first and if the relevant state has permitted individual complaints to be addressed to the African Court. The African Court provides an additional forum for the exercise of rights, and it has considered cases involving the right to freedom of expression previously and handled the matters robustly.
45. In this regard, the African Court delivered a landmark judgment in its first case concerning freedom of the press in October 2013.<sup>16</sup> The judgment overruled the conviction of the journalist Lohé Issa Konaté, who had faced harsh criminal penalties levied by Burkina Faso following charges of defamation for publishing several newspaper articles that alleged corruption by a state prosecutor.
46. The African Court found that the conviction was a disproportionate interference with Konaté’s guaranteed rights to freedom of expression. It also noted that public figures such as prosecutors must tolerate more criticism than private individuals.
47. Furthermore, the African Court ordered Burkina Faso to amend its legislation on defamation in order to make it compliant with international standards by repealing custodial sentences for acts of defamation; and to adapt its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality, in accordance with the country’s international obligations.
48. The African Court can accordingly give far-reaching decisions, which should be respected by the African state to whom they are directed.

## Guidance from domestic cases

49. Previously decided cases in courts in the country in question also provide helpful guidance for anyone facing a SLAPP, when they are before a domestic forum (i.e. a court).

<sup>16</sup> <https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf>.

50. The approach adopted in this guidance will focus on South African caselaw, because its cases are regularly used outside of South Africa persuasively. South African law can be encouraged as applicable or as reflecting principles which are applicable in Southern African counties outside of South Africa.
51. Moreover, a recent report from the Future of Free Speech project, which analysed 22 of the world's open democracies,<sup>17</sup> has highlighted actions undertaken to protect speech – many of which have occurred through the courts. South Africa, in particular, is one of the leading countries under analysis with respect to its use of the courts to challenge incursions on free speech, with the report describing the Constitutional Court as a **“sophisticated and influential supreme court on expression matters”** – despite the fact, as we will show, that South Africa has not adopted any legislative measures to address SLAPPs to date.
52. To illustrate how South African courts have handled SLAPPs, we have set out some important cases handed down by South African courts.
53. In the first, the South African Constitutional Court in 2022 delivered a landmark judgment on SLAPP suits in Mineral Sands I.<sup>18</sup> The facts of Mineral Sands I are as follows:
- 53.1. Mineral Sands I concerned an action instituted against environmental attorneys and community activists who actively engaged in criticising the mining and excavating activities of Mineral Sands and its executives for Mineral Sands' environmental, ecological and economic impact on the development potential of the Wild Coast.
- 53.2. The mining companies instituted proceedings against the environmental attorneys and community activists for defamation and claimed damages for many millions.
- 53.3. The environmental activists delivered special pleas alleging that the suit was a SLAPP.
- 53.4. The mining companies asserted – by way of exceptions to those pleadings – that a SLAPP suit defence is not available in South African law.
54. The matter ultimately came before the highest appeal court in South Africa, the Constitutional Court.
- 54.1. The Constitutional Court first tackled the threshold question of determining what constitutes a SLAPP. SLAPP suits are, as explained by the Constitutional Court, **“primarily legal proceedings that are intended to silence critics by burdening them with the cost of litigation in the hope that their criticism or opposition will be abandoned or weakened”**.
- 54.2. Confirming the commentary above, the Constitutional Court recognised that SLAPP suits **“take a wide range of forms”**.
- 54.3. While resisting an all-embracing definition, the Constitutional Court recognised certain distinctive features of SLAPPs, notably that those most commonly targeted by SLAPPs suits are **“media institutions, whistleblowers, and activists”**; that the merits of a suit are relevant to determining whether it constitutes a SLAPP suit; and that SLAPP suits limit public participation

17 [https://futurefreespeech.org/wp-content/uploads/2023/12/Report\\_The-Free-Speech-Recession-Hits-Home\\_30112023.pdf](https://futurefreespeech.org/wp-content/uploads/2023/12/Report_The-Free-Speech-Recession-Hits-Home_30112023.pdf).

18 *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* (CCT 66/21) [2022] ZACC 37; 2023 (2) SA 68 (CC); 2023 (7) BCLR 779 (CC) (14 November 2022).



and the constitutional right of freedom of expression **“by abusing the legal process to silence and deter public participation”**.

54.4. The Constitutional Court held that a SLAPP suit special plea did provide a proper defence in South African law to a defamation claim. The Court recognised the SLAPP suit defence as a species of the common law doctrine of abuse of process, with the consequence that a court may reject a suit if the defendant can prove, in the special plea proceedings, that the suit is lacking in merits and is brought with the intention not to vindicate a right, but to silence the defendant.

54.5. The Constitutional Court also recognised that SLAPPs impinge upon the integrity of the courts, pervert the course of justice and violate fundamental rights, and held that courts have not only the power, but a duty, to prevent this type of abuse.

54.6. According to the Constitutional Court, the recognition of the SLAPP suit defence as part of South African law **“ensures that courts can protect their own integrity by guarding over the use of their processes” and “ensures that the law serves its primary purpose, to see that justice is done, and not to be abused for odious, ulterior purposes”**.

54.7. Finally, the judgment recognised that abusive litigation in the form of a SLAPP suit **“has nothing to do with the right of access to courts in [the Constitution]”**. While the South African Constitution guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, the judgment makes it clear that upholding a SLAPP suit defence does not limit the constitutional right of access to courts. That is because, properly understood, access to court is not implicated by rejecting a meritless case brought with the intention not of defending a right.

55. From the Mineral Sands I judgment, it is clear that the South African response to the threat of SLAPPS has been – thus far at least – dealt with through judicial craftsmanship, rather than a legislative approach. It should therefore be possible to address the problem of SLAPPs within the existing power of the courts to prevent abuses of their processes. This presents a ready remedy available to litigants in Southern African countries whose countries have likewise not enacted protective legislation.

56. The second example is Maughan v Zuma and Others 2023 (5) SA 467 (KZP). The case arose soon after the Mineral Sands I judgment, when former President Jacob Zuma, who has faced a long-delayed and much reported-on criminal trial for corruption and fraud, instituted an abusive private prosecution of the senior legal journalist reporting on his criminal trial, along with the prosecutor prosecuting his criminal case, on bogus charges.

57. The Court in Maughan v Zuma, heard the case urgently, constituted a full court of three judges (reserved for serious matters within the division), admitted amici curiae interventions and heard arguments from interested groups, and delivered a judgment which set aside Mr Zuma’s private prosecution as a SLAPP.

58. In so doing, the KwaZulu-Natal Full Bench embraced and applied the principles from Mineral Sands I (developed in the context of abusive civil proceedings), holding that they were broad enough to find application to a criminal private prosecution where criminal proceedings were abused in the same way.

59. In doing so, KwaZulu-Natal Full Bench demonstrated the growing significance of international law principles in the context of SLAPPs, through its admission of **amici curiae** to assist the Court with relevant submissions contextualising the matter through reference to international legal instruments, such as the UN Human Rights Council, which have recognised “**attacks on journalists, specifically female journalists**” and which have highlighted the need for SLAPP suits to be dealt with (and disposed of) expeditiously to mitigate the risk posed through their abusive institution.
60. The KwaZulu-Natal Full Bench found that the private prosecution had no merit and had been brought solely for the purpose of intimidating and harassing the journalist, Ms Maughan, due to her reporting specifically on Mr Zuma’s criminal cases. Such reporting, the Court noted, was essential to ensure that the public learns the truth about criminal allegations, sees justice being done, and maintains trust in the criminal justice system.
61. The KwaZulu-Natal Full Bench went further – it refused Mr Zuma’s leave to appeal application, and granted an order that its judgment was immediately executable, notwithstanding any further appeals made by Mr Zuma (which would otherwise have suspended the orders and permitted the abuse to continue). The KwaZulu-Natal Full Bench thus firmly put an end to Mr Zuma’s judicial abuse and harassment of Ms Maughan.
62. The third example is **Sithole and Another v Media24 (Pty) Ltd and Others** (2023/070374) [2023] ZAGPJHC 884 (8 August 2023), another urgent matter in which the Court rejected outright the attempt by politically-connected friends of the Deputy President of South Africa to restrain the media and journalists from referring to them as members of the ‘Alex Mafia,’ pending an action to be instituted.
63. The Court found that the applicants had abused the court process by claiming urgency where there is none and by seeking relief which would have no purpose other than to improperly punish and make a chilling example of the media and journalists.
64. In a matter with a number of parallels with the **Kelly** decision in the High Court of Northern Ireland and the CoE Recommendation on SLAPP indicators, the South African urgent Court recognised various factors which rendered the litigation abusive. These include that the applicants:
- 64.1. had approached the urgent court after they had long been referred to in the media as the “Alex Mafia”, despite having taken no steps against any other media houses who had referred to them as such and when the allegations were already in the public domain;
  - 64.2. had approached the urgent court without having attempted to obtain relief at the Press Council of South Africa, the body recognised by statute as an effective regulator, and instead seeking court relief; and
  - 64.3. cited and sought relief against the journalists in their individual capacities, when their employers could have been cited.
65. The Court ultimately found that “while the application does not bear all of the hallmarks of a SLAPP”, it bore certain of them – in particular, the ulterior objectives of punishment and deterrence. The Court accordingly struck the matter off the roll, and granted a punitive costs order against the abusive litigants.



## PART C: Practical issues arising when defending a SLAPP

66. As is clear from the discussion above, the primary aim of a SLAPP pursuer is to exert as much power over, and create as much fear in, the subject of the suit as possible.
67. There are numerous practical ways in which a SLAPP may exacerbate and compound harm to the subject of the suit. For example, a defendant may be sued out of multiple jurisdictions,<sup>19</sup> including those where the defendant is not a resident, and may not even speak the relevant language, or in different courts or tribunals. This forces the defendant to find and hire legal advisers in various, sometimes foreign, jurisdictions and to divert time and attention towards dealing with various courts, compounding logistical and financial hurdles in defending each case.
68. Doing so inevitably comes at significant cost, as well as requiring the defendant to devote a substantial amount of time to defending the SLAPP, including travel to outside jurisdictions, consulting legal practitioners and collecting and preserving exculpatory evidence, fund raising and managing public relations consequences. This is all by design: the defendant's attention is diverted, so they are no longer able to spend time pursuing their right to public participation, and they are silenced, through being out-litigated.
69. The further consequences of facing a SLAPP may be far reaching and varied. A SLAPP defendant may feel personally threatened and intimidated, or at risk of economic harm (such as through adverse employment consequences) or the besmirching of the subject's reputation or goodwill.
70. Again, by design, a defendant may ultimately elect to self-censor. Self-censorship arises not only as a result of the SLAPP, but even the spectre or threats of being SLAPP'ed may have a chilling effect.<sup>20</sup> Such self-censoring may be subconscious, but the result is the undermining of freedom of expression and weaker information/sources available for public consumption.
71. Not all SLAPPs make it to court. That does not make them any less odious – far from it, they are even more of a threat to the public because they escape the scrutiny of the Court. In a study published by the Foreign Policy Centre in November 2020, Susan Coughtrie succinctly summarises the position: ***“[o]ne of the biggest issues with vexatious legal threats or SLAPP suits is that it has been a largely hidden problem. Usually they are communicated through letters from lawyers marked ‘private and confidential’ and, if successful in achieving their aim, the public will never know.”***<sup>21</sup>
72. This legal strategy appears to be in full force in Southern Africa. Those respondents to the Foreign Policy Centre's study referred to above who were from Africa all cited having received written legal threats at some point during their career.
73. Below are suggested practical steps which can be taken should you be facing a SLAPP or a threat of a SLAPP.

<sup>19</sup> Research published by the European Parliament's Policy Department for Citizen's Rights and Constitutional Affairs dated November 2023 refers to 91.4% of legal actions initiated between 1 January 2022 and 31 August 2023 within the EU as having a cross-border element.

<sup>20</sup> Research from the Foreign Policy Centre in 2020 found that 70% of respondents to its survey reported that they had self-censored to some degree due to the risk of legal action or threats.

<sup>21</sup> <https://fpc.org.uk/wp-content/uploads/2020/11/Unsafe-for-Scrutiny-November-2020.pdf> (page 12).

## Suggested steps to be taken

### Determine if your case is a SLAPP

74. Having regard to the “SLAPP indicators”, give consideration to whether the proceedings constitute a SLAPP.
75. Bear in mind, court proceedings are generally never enjoyable experiences, but ask yourself whether there are additional features in that the matter has been instituted for the purpose of using the law and legal proceedings to stop you from exercising your rights, or whether some or other of the “SLAPP indicators” apply in your matter.

### Seek legal advice

76. Facing a SLAPP or the threat of a SLAPP can be a daunting prospect.
77. We suggest that legal advice is sought as soon as possible, ideally from someone with previous experience and knowledge of defending a SLAPP. However, we acknowledge that this may involve costs and/or such advice may not always be easily accessible. Access to pro-bono and/or legal aid type programs, that are available specifically to defend SLAPPs, should be encouraged. There are also legal clinics and other resources available, as summarised at the end of this guidance document.
78. We recommend that, if such resources are not available to you, you discuss the matter with a legal colleague or friend, or an official at the court (if you have been served with legal process) who can point you in the right direction, to obtain legal advice. We recommend that you ask if there are free legal services available to people who require them, or better, and if your matter has features of being a SLAPP, endeavour to enlist a seasoned SLAPP suit legal team to fight your case and seek its expeditious dismissal with punitive costs.
79. It is generally not advisable to ignore court summons and simply to fail to attend court or defend an action in which relief is claimed against you, even if you believe it lacks merit and even if attending court is costly or inconvenient. You risk having findings made against you, or a judgment granted against you, or having your rights prejudiced in the proceedings, and the Court will be entitled to accept that you do not wish to challenge those allegations (i.e. that you accept the truth of the allegations against you). Even if you are only self-represented, it is better to attend court and make your position known to a judge, or to explain why you need more time to deal with the matter, including through securing a lawyer to assist you, than simply to not come to court at all. Judges and court staff are usually very helpful to lay/ in-person litigants. The court does not want to see court processes being misused against people.

### Request official documents

80. Another defensive step can be to request documents from official institutions and to gather and retain evidence.
81. This is because often the truth is recorded in official documents and obtaining such records can act as powerful corroborating evidence that supports claims being made against those pursuing a SLAPP which are based on factual inaccuracies.
82. Helpful facts can commonly be found in documents recording judicial criticism of a person (or his or

her actions), or in official records of steps taken against a relevant individual, such as disqualification as a company director.

83. The ability to access to such documentation underlines the need to ensure the general transparency of official records so that SLAPP pursuers cannot benefit from a veil of secrecy surrounding their actions. Retaining such evidence, through requests for official documents, ensures such transparency and retention of evidence in general may be critical to establishing the merits of any defence.

### Go public

84. As has been demonstrated recently in Malta, the UK and South Africa,<sup>22</sup> a helpful defensive tool can be “going public” with the SLAPP pursuer’s actions, such as on social media sites or websites, to expose the abusive conduct.
85. Publication of the written legal threats you have received can be a very effective way to (i) shine a spotlight on a particular SLAPP pursuer’s conduct; (ii) galvanise public support; and (iii) enhance public pressure on the SLAPP pursuer to withdraw their claim / threat, or not to pursue it in Court.
86. In general, there is no preclusion to you publishing letters or communication you have received, unless they are “without prejudice” or it is clear from the context that they are expected to be treated confidentially, or if they contain personal information of other persons who have not consented to the disclosure of the information.
87. The SLAPP pursuer’s legal representatives may seek to convince you that legal letters cannot be published, so as to avoid scrutiny or public “outing” and to maintain a veil of secrecy which keeps the subject of the claim isolated and unable to ask for help from anyone other than a lawyer. We recommend that you get appropriate advice on the issue if there is any chance that exceptions apply. The reasons for the contention that the letter cannot be disclosed would need to be carefully considered but the point to be highlighted is that one should not be bullied or misled by any lawyer, whether one acting for you or against you.
88. Lawyers have a duty not to mislead litigants, as they have a special role in the administration of justice. They should not lie or threaten you, or abuse you, as mentioned above. Such conduct would not be professional. In November 2022, the SRA published a warning notice to all practicing solicitors in relation to SLAPPs. This particular point was highlighted in the notice, as the SRA made it clear that solicitors in England and Wales should **“ensure that [they] do not mislead recipients of [their] correspondence, and to take particular care in this regard where that recipient may be vulnerable or unrepresented. One way this can happen in this context is by labelling or marking correspondence ‘not for publication’, ‘strictly private and confidential’ and/or ‘without prejudice’ when the conditions for using those terms are not fulfilled.”**<sup>23</sup>
89. The same is true in South Africa (where the Legal Practice Council regulate all legal practitioners)

22 See Dan Neidle’s publication of letters from legal representatives of the former UK Chancellor of the Exchequer, Nadhim Zahawi (<https://taxpolicy.org.uk/2022/08/23/sra2/>); see The Shift News’ publication of a letter from the legal representatives of Azerbaijani-British businessman, Turab Musayev (<https://theshift-news.com/2020/07/07/slapp-threat-from-azerbaijani-british-national-turab-musayev/>); and see The Daily Maverick’s publication and accompanying editorial (<https://www.dailymaverick.co.za/article/2022-10-20-groundup-and-daily-maverick-sued-by-iqbal-surve-but-only-for-a-cool-r5-million/>).

23 <https://www.sra.org.uk/solicitors/guidance/slapps-warning-notice/>

and other regulatory bodies in Southern African states which maintain professional and ethical standards of legal practitioners, and to which complaints may be addressed where concerns arise that such ethical standards have not been maintained.

90. In the Addendum hereto, the names of various legal resources appears, which provides the names of organisations to which reference can be made when exploring the above options.



## PART D. Potential systematic solutions to the SLAPP dilemma

91. While the above practical steps are helpful on an individual, case-by-case basis, what is clear is the need for systematic anti-SLAPP safeguards. As the CoE Recommendation makes clear, there are a variety of responses which can be considered and adopted. The decision as to the best and more suitable and balanced regulatory response may vary from state to state.
92. Certain jurisdictions have already sought to address the problem of SLAPPs through legislative enactments. For example, the UK recently adopted an amendment to the Economic Crime and Corporate Transparency Act 2023 which introduces, for the first time in UK law, anti-SLAPP legislation. However, this anti-SLAPP legislation is limited as it only applies to a defendant's exercise of their right to freedom of speech in relation to publications that are in the public interest of combating economic crime. It does not deal with any aspect of defamation SLAPPs, one of the most often pursued types of SLAPP, for instance.
93. Various debates have taken place in legislative circles in the UK as regards the relative benefits and complexities of introducing anti-SLAPP legislation. In July 2024, the justice spokesman in the House of Lords, Lord Ponsonby of Shulbrede, noted the urgent need for such legislation, following the loss of the previous government's bill to tackle SLAPPs.<sup>24</sup> However, justice minister Heide Alexander MP stated in November 2024 that the UK government would not be introducing legislation against SLAPP-litigation in the 2024/2025 parliamentary session.
94. In the United States, 31 states have anti-SLAPP legislation that is regularly used to obtain early dismissal of claims, or the dismissal of claims with the claimant having to pay the defendant's costs, a position which deviates from the usual costs approach taken to litigation in the United States more generally.
95. The European Parliament recently approved a Directive protecting journalists and human rights advocates from SLAPPs, including provisions for early dismissal of manifestly unfounded cases, compensatory damages for the SLAPP defendant and a broad definition of what constitutes a 'cross-border' case. The new European Union Directive is colloquially known as 'Daphne's Law', named after the Maltese journalist, Daphne Caruana Galizia, who was killed in 2017 and who, at the time of her death, was facing over 40 legal claims, including SLAPPs, some of which survived her death and continued against her estate.
96. The challenge with the introduction of any anti-SLAPP legislation is the need to balance access to the courts and ensure that legislation does not constrain or discourage the bringing of legitimate claims. Concerns have been raised that any anti-SLAPP statute could constrain and suppress legitimate litigation. The argument goes that all litigants must be treated fairly and substantively equally, and the doors of court must remain open to those who intend to pursue worthy cases, irrespective of any perceived or real David-and-Goliath power imbalance. Accordingly, a considered regulatory response must be crafted in which any competing rights and freedoms are balanced.

<sup>24</sup> [https://www.lawgazette.co.uk/news/minister-says-slapps-action-urgent-but-refuses-to-commit/5120477.article?utm\\_source=gazette\\_newsletter&utm\\_medium=email&utm\\_campaign=Minister+refuses+to+commit+to+SLAPPs+action+%7c+Equal+treatment+book+slimmed+down+%7c+Judicial+ADR+activism\\_07%2f26%2f2024](https://www.lawgazette.co.uk/news/minister-says-slapps-action-urgent-but-refuses-to-commit/5120477.article?utm_source=gazette_newsletter&utm_medium=email&utm_campaign=Minister+refuses+to+commit+to+SLAPPs+action+%7c+Equal+treatment+book+slimmed+down+%7c+Judicial+ADR+activism_07%2f26%2f2024).



97. There is also a call for lawyers to themselves recognise a SLAPP or the threat of a SLAPP and consider whether they should decline to act in circumstances where their client wishes to pursue a SLAPP. In its SLAPPs warning notice (see above), the SRA states that it “**expect[s] [all practicing solicitors] to be able to identify proposed courses of action (including pre-action) that could be defined as SLAPPs, or are otherwise abusive, and decline to act in this way. [The SRA] expect[s] [all practicing solicitors] to advise clients against pursuing a course which amounts to abusive conduct, including making any threats in correspondence which are unjustified or illegal**” (emphasis added).<sup>25</sup>
98. Similar approaches could be adopted by other national regulatory bodies. A lawyer has a duty to the court – and if the course of justice is being perverted, that lawyer is not doing his or her duty. Presently, this is not a recognised disciplinary offence in South Africa but this may develop as SLAPPs are given more attention. Legal practitioners in South Africa are required by the Legal Practice Council Code of Conduct to maintain the highest standards of honesty and integrity and in any communication on behalf of a client may not make “any statement that is calculated to mislead or intimidate that other person, and which materially exceeds the legitimate assertion of the rights or entitlement of the attorney’s client”.
99. However, even in the absence of regulatory measures, the Court is well positioned to strike the appropriate balance of competing rights and freedoms.
- 99.1. A court is well-positioned to assess the features of the case, and if it has characteristics of a SLAPP, to label it and respond to it as such.
- 99.2. The Court has the power to determine its processes, including when it is being abused or used for purposes other than the pursuit of justice. The Court can take appropriate steps to put an end to that abuse. It can do so through hearing matters urgently and resolving them expeditiously (including through an early dismissing of a matter before it, if that is what is required), as in Maughan, or striking the proceedings off the urgent roll, as in Sithole.
- 99.3. One way a Court may punish litigants for their behaviour is through a punitive costs orders. A punitive costs order is one intended to penalise a party. Courts have a wide discretion in this regard, and was a strategy used by the Court in Sithole.
- 99.4. A Court may also have the power to grant costs on a personal basis, against public officials and even the lawyers involved, on account of egregious conduct. These are de bonis propriis costs orders, and are reserved for serious matters.
100. Accordingly, in analysing the appropriate systematic response to SLAPPs, policymakers should consider the possibility that the best safeguard against abuse is the Court itself. As the CoE Recommendation already highlighted, empowering the Court (to the extent courts are not already empowered to regulate and protect their own processes from abuse) may provide a flexible, balanced response to the scourge of SLAPPs.

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The prospect of facing a SLAPP can be intimidating and isolating; if you would like further assistance on this topic, please contact ISLP at [info@islp.org](mailto:info@islp.org)

<sup>25</sup> <https://www.sra.org.uk/solicitors/guidance/slapps-warning-notice/>

## ADDENDUM: Useful resources

1. There are numerous organisations who may be willing and able to assist, if you are facing a SLAPP suit. This will depend on which country you are located in, but the best place to find local resources will be by searching online.
2. There may be organisations that are set up to fund and support litigants facing civil suits and/or specifically SLAPP suits, or specific public interests matters (for example, if you are a member of the media or a journalist, media freedom organisations may have a specific interest in your case; if you are involved in environmental advocacy, there may be specific environmental rights organisations with a specific interest in your case).
3. Please find below a list of organisations working in a variety of areas including freedom of expression, which may provide technical assistance that may be useful to you:

- [International Senior Lawyers Project](#)
- [UNSECO Regional Office of Southern Africa](#)
- [Coalition Against SLAPPs in Africa](#)
- [Media Institute of Southern Africa](#)
- [Southern Africa Human Rights Defenders Network](#)
- [The Southern African litigation Centre](#)
- [Freedom Under Law](#)
- [Centre for Environmental Rights](#)
- [Centre for Applied Legal Studies](#)
- [Legal Resources Centre](#)
- [Law clinics, Legal Aid and/or Probono.org](#)
- [Legal Practice Council in South Africa](#)

