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DISPUTE RESOLUTION, & ENVIRONMENTAL ALERT

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Legal defence available for those SLAPPED into silence

In what is seen as a landmark decision, the Western Cape High Court, South Africa recently handed down judgment that has received much praise upholding for the first time the defence of Strategic Lawsuit Against Public Participation (SLAPP) against a mining company, albeit in an interlocutory proceeding.

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In what is seen as a landmark decision, the Western Cape High Court, South Africa recently handed down judgment that has received much praise upholding for the first time the defence of Strategic Lawsuit Against Public Participation (SLAPP) against a mining company, albeit in an interlocutory proceeding.

The concept SLAPP in jurisdictions such as the USA typically refers to meritless legal proceedings by powerful corporations that are intended to intimidate and silence civil society and/or organisations such as NGOs that are acting in the public interest. These types of litigation, besides being meritless, are intentionally drawn-out, expensive and designed to drain the financial resources of organisation who challenge matters such as resources projects in the public interest.

In this article, we will have a close look at how the South African High Court approached the concept of SLAPP in South Africa under the common law abuse of process doctrine and broadly what this means for South Africa's corporations involved in legal proceedings that could be tantamount to SLAPP proceedings.

The Facts

The case comprised of an interlocutory hearing turning on the legal point of whether SLAPP is available as a valid legal defence under South African law.

The matter stems from three separate defamation claims, wherein Australian mining company, Mineral Resources Commodities, its South African local subsidiary, Mineral Sands Resources (Pty) Ltd (MSR) and their directors (collectively the Plaintiffs) brought action

proceedings against environmental attorneys and activists (collectively the Defendants), seeking R14,5m in damages or, alternatively, publication of apologies. The common thread underlying all three cases was the Defendants' respective public criticism of the MSR's mining operations along South Africa's Wild Coast, which the Plaintiffs argued constituted defamatory conduct.

The Arguments

Introducing a novel special plea, the Defendants all raised a SLAPP defence, contending that that the proceedings were brought for an ulterior purpose and constituted:

- an abuse of process; and/or
- use of the court process to achieve an improper end, with litigation being used to silence the Defendants at the risk of financial or other prejudice (i.e. a SLAPP suit); and/or
- violates the right to freedom of expression entrenched in section 16 of the Constitution of the Republic of South Africa, 1996.

The Plaintiffs took exception to the Defendants' plea, arguing *inter alia* that it relies wholly on the Plaintiffs' motive to the exclusion of merits. This was contended to be legally unsound and lacking the averments necessary to make out a case for common law abuse of process. In this regard, the Plaintiffs further argued that the court could not develop the common law, as the Defendants had failed to make out a case against the constitutionality of the abuse of process.

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With reference to the interests of justice and recognising the matter at hand as a SLAPP suit in the absence of genuine or *bona fide* claim, the court held the special plea to constitute a valid defence and dismissed the exception.

Decision

Citing several precedents, the High Court highlighted the following points:

- its inherent power and duty to prevent abuse of its process, which must be exercised with caution and only in clear cases;
- the question of abuse of process is dependent on the facts of each case, with motive and purpose being relevant factors; and
- with reference to sections 16 and 24 of the Constitution, the importance of free engagement on matters of public importance, such as the environment; and "*extremely circumscribed and narrow circumstances*" in which the judiciary should prevent the exercise of freedom of expression due to allegations of defamation.

Underlain by an extremely critical narrative, the court went on to explore the features and development of the SLAPP suit in various foreign jurisdictions, recognising the absence of a specific legal mechanisms under South African law catering for SLAPP proceedings. The court summarised several "*key*" aspects that underpin a SLAPP, which all evidently go back to purpose/motive, including:

- meritless, technical and drawn-out lawsuits (most often defamation claims) by corporations "*disguised*" as an ordinary civil claim, with the ulterior purpose of silencing public scrutiny;

- excessive damages claims brought against individuals or entities acting in the public interest, potentially without sufficient resources to litigate; and
- as an alternative to the excessive damages claim, and demand for an apology.

With reference to the interests of justice and recognising the matter at hand as a SLAPP suit in the absence of genuine or *bona fide* claim, the court held the special plea to constitute a valid defence and dismissed the exception.

Discussion

As the matter stands, the High Court's decision has accepted SLAPP as a novel defence in South African law under the auspices of the common law abuse of process doctrine. However, with the case comprising only of an interlocutory hearing and the trial on the merits still to proceed, the court is also being criticised for having evidently decided that the proceedings do, in fact, constitute a SLAPP suit. In our view the criticism is misplaced. It is trite that in deciding an exception a court must accept all allegations of fact made in the pleadings as being true. A dismissal of an exception is not (usually) finally dispositive of the legal issue at stake, unlike the upholding of an exception on the basis that the claim is bad in law. On that basis, the dismissal of the exception does not deprive the Plaintiffs of the opportunity for the merits to be determined after the leading of evidence at the trial.

Legal defence available for those SLAPPED into silence...*continued*

In light hereof, the fundamental right to freedom of speech and the court's decision (as it currently stands), the purpose behind any litigation in respect of public interest matters of this nature will evidently be closely examined.

Thus, with the defamation claims proceedings still to be heard and recent headlines making it clear that the Plaintiffs intend on bringing an appeal against the judgment, the matter is evidently being far from settled.

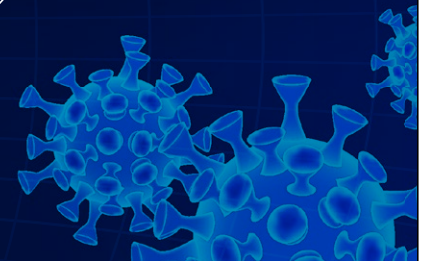
What is otherwise also important to highlight is the court's extensive scrutiny of the Plaintiffs and corporations generally in litigating in respect of public interest matters. Both locally and internationally, it is trite that judicial criticism against corporations within the environmental context is becoming increasingly

pronounced, especially within the realm of public participation. In this regard, it is worth noting that public involvement and interest in environmental matters are fundamental to the South African constitutional and environmental legal framework. In light hereof, the fundamental right to freedom of speech and the court's decision (as it currently stands), the purpose behind any litigation in respect of public interest matters of this nature will evidently be closely examined.

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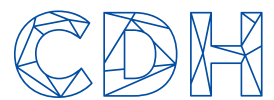
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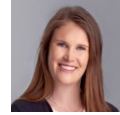
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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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