

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: A155/19

Water Tribunal Case number: WT03/17/MP

In the matter of:

LEGAL RESOURCES CENTRE

First Applicant *Amicus Curiae*

CENTRE FOR APPLIED LEGAL STUDIES

Second Applicant *Amicus Curiae*

SECTION27

Third Applicant *Amicus Curiae*

EQUAL EDUCATION LAW CENTRE

Fourth Applicant *Amicus Curiae*

NDIFUNA UKWAZI

Fifth Applicant *Amicus Curiae*

CENTRE FOR CHILD LAW

Sixth Applicant *Amicus Curiae*

In the application of:

ENDANGERED WILDLIFE TRUST

First Applicant

**FEDERATION FOR A SUSTAINABLE
ENVIRONMENT**

Second Applicant

and

**DIRECTOR-GENERAL (ACTING), DEPARTMENT
OF WATER AND SANITATION**

First Respondent

ATHA-AFRICA VENTURES (PTY) LTD

Second Respondent

**CENTRE FOR APPLIED LEGAL STUDIES:
SUPPORTING AFFIDAVIT**

B
PR

I, the undersigned,

PALESA ROSE MADI

do hereby declare under oath as follows:

- 1 I am a major female attorney and the Acting Deputy Director at the Centre for Applied Legal Studies ("CALS") situated at the University of the Witwatersrand ("Wits University"), which is located at 1 Jan Smuts Avenue, Braamfontein.
- 2 I am duly authorised to depose to this affidavit on behalf of CALS. CALS, as an institution within Wits University does not have a board of directors from whom a resolution is required to prove the authorisation of the deponent to bring the application or to depose to an affidavit.
- 3 The contents of this affidavit are both true and correct and, unless the context indicates otherwise, fall within my personal knowledge.
- 4 CALS seeks to be admitted as the second *amicus curiae* in the main application. Nershan Govender deposed to a main affidavit in support of CALS, and other public interest law centres' applications, to be admitted as *amici curiae* in this matter. I have read that main affidavit and I confirm that the contents thereof are true and correct in so far as they relate to CALS.
- 5 In addition, I seek to make the following submissions in this affidavit:

- 5.1 The importance of public interest litigation organisations and their critical role in facilitating, advocating and realising access to justice.
- 5.2 The nature and impact of Strategic Litigation Against Public Participation (“**SLAAP suits**”) within the South African context, and
- 5.3 Further, to present arguments which outline why the submissions made by the Second Respondent are a form of SLAPP suit, and thus have particularly adverse impact and detrimental consequences to the access to justice of marginalised persons seeking to assert, defend and promote theirs and others’ constitutional rights.

ABOUT CALS

- 6 CALS is a law clinic registered with the Legal Practice Council (“LPC”) and based at the law school of Wits University. It was established in 1978 and has been one of the leading human rights research, advocacy and strategic litigation organisations in South Africa.
- 7 CALS comprises of five specialised programmes, namely: Home, Land & Rural Democracy; Business and Human Rights; Environmental Justice; Gender Justice; and Civil and Political Justice. Through these programmes, CALS has undertaken research, advocacy and strategic litigation that has had a significant impact on the law and its application in South Africa. Through litigation, CALS has not only independently brought and intervened in a number of constitutional challenges before various Courts (including courts of appeal), but it has also

intervened as *amicus curiae*, at every level of the superior courts, in the public interest.

- 8 A few landmark cases that CALS has been involved in include *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 Ltd*¹ where CALS represented the Occupiers of Saratoga Avenue. The successful arguing of our case resulted in the Court creating an obligation on the state to find alternative accommodation for tenants facing eviction if the success of such eviction would result in their homelessness. Another landmark case is *Black Sash Trust v Minister of Social Development*² where CALS represented the human rights organisation Black Sash Trust and successfully argued for the reinstatement of the oversight function of the Constitutional Court to ensure transparency, accountability and the continued payment of social grants for millions of South African. Yet another is where CALS represented the Teddy Bear Clinic in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel*³ which concerned prescription of the right to institute prosecution for sexual offences other than rape or compelled rape in which such prescription was declared unconstitutional.
- 9 CALS has also been involved in *Association of Mineworkers and Construction Union v Minister of Mineral Resources*⁴ where we represented community network Mining Affect Communities United in Action (“MACUA”) and successfully argued for the inclusion of mining affected communities in the creation of national

¹ 2012 (2) SA 104 (CC).

² 2017 (3) SA 335 (CC).

³ 2018 (2) SACR 283 (CC).

⁴ (2020) 41 ILJ 1705 (LC).

Covid-19 prevention codes of practice for mines. CALS intervened as *amicus curiae* in its own name in *Tshabalala v State*⁵ and argued for the inclusion of rape in the application of the doctrine of common purpose and in *Baleni v Regional Manager: Eastern Cape Department of Mineral Resources*⁶ where CALS highlighted the importance of access to information related to mining applications for affected communities and the shortcomings of the access to information legislative framework in this regard.

- 10 CALS submits that the main application before this Court falls squarely within the scope of its expertise. More specifically, this case raises important constitutional issues such as the right to litigate in the public interest, the right to freedom of association and the promotion of access to justice.
- 11 The abovementioned cases are a few of many in which CALS represented a variety of social movements, grassroots organisations, communities, activists and other marginalised actors. CALS therefore has vast knowledge, skills and expertise that make it uniquely placed to assist the Court in the nuances arising in this matter.

CALS' INTEREST IN THE MATTER

- 12 I am aware that the provisions of Rule 16A, and the jurisprudence relating to the admission of *amicus curiae* require that the *amicus* applicant express its interest in the matter in which it seeks to be admitted. I therefore wish to fully set out

⁵ 2020 (5) SA 1 (CC).

⁶ [2020] 4 All SA 374 (GP).

below what CALS' interests are, and why we as CALS believe that the Court's decision in this matter may affect these interests.

- 13 As set out above, CALS is a law clinic with 42 years of experience in public interest strategic litigation and socially relevant research and advocacy. We have a particular interest in the promotion and facilitation of access to justice, human rights, and legal support and remedy for disenfranchised communities and those vulnerable to the abuse of power. More specifically this includes representing persons, communities and organisations who bring the abuse of human rights and power to the attention of the public at large.
- 14 CALS' interest in this matter relates to the eventual detrimental impact a precedent of the nature sought by the second respondent will have on litigation in the public interest. This is especially the case in the context where a SLAPP suit is brought against a public interest litigation organisation representing organisations that seek to assert theirs and others' human rights.
- 15 The threat of a punitive costs order against the attorneys representing the appellants as well as the threat of reporting them to the LPC for unethical conduct has the chilling effect of discouraging public interest litigation organisations from representing organisations, communities and other marginalised actors who may be fighting for rights similar to that which the public interest litigation organisation strive to protect and promote. This has a stifling effect for access to justice for these marginalised actors.
- 16 CALS submits that its existence as a public interest litigation organisation specialising in the above mentioned five programmes and representing

thousands of marginalised actors including social movements, communities, community networks and activists is placed at risk of being discredited by the arguments advanced by the Second Respondent.

CALS' HISTORY & EXPERIENCE IN PUBLIC INTEREST LITIGATION AND MATTERS PERTAINING TO ACCESS TO JUSTICE

- 17 CALS' history and decades of experience in public interest litigation gives it a unique understanding of the importance of public interest litigation organisations in defending the constitutionally protected rights of people. Through acting in their own capacity as well as representing affected and marginalised actors, public interest litigation organisations help ensure that transparency and accountability is demanded from repositories of power.
- 18 It therefore follows that public interest litigation organisations are crucial to realising the right to access justice for a majority of people who would otherwise not have such access to legal services to assert theirs and others' rights.
- 19 Beyond merely getting through the doors of a court and prior to doing so, public interest litigation organisations combine skill and knowledge to conduct extensive research and advocacy work that often aligns with the human rights violations, victimisation and marginalisation experienced by the clients that they serve. Legal representation by public interest litigation organisation with specialised expertise does not equate to a conflict of interest or unethical conduct of the legal representatives. Instead, it promotes the fulfilment of access to justice through quality and specialised legal services.

20 Public interest litigation organisations are vital for a vibrant democracy where public participation is encouraged, protected and promoted. CALS' specialised programme, the Civil and Political Justice programme, additionally focuses on the protection of the right to freedom of expression as well as preventing the criminalisation and victimisation of human rights defenders. This area of focus has allowed CALS to gain expertise in, amongst others, anti-SLAPP suit work. Therefore, the submissions and relief sought by the second respondent constitutes a SLAPP suit and is targeted at discouraging public interest organisations from working meaningfully with social movements, communities, human rights defenders and activist organisations who seek to dissent, advance public participation and assert theirs and others' constitutional rights.

NATURE AND IMPACT OF SLAPP SUITS

- 21 In 2018, CALS conducted research through open-ended semi-structured interviews with various human rights activists which resulted in the development of a report titled 'Victimisation Experiences of Activists in South Africa'. That report detailed the nature, extent and impact of the victimisation and intimidation of activists, as well as the support received by activists who had been victimised and intimidated. That report is attached as "CAL S1".
- 22 Of particular relevance to this application are two forms of victimisation and intimidation: civil litigation against a public interest litigation organisation, and discreditation. CALS submits that litigation, particularly with its accompanying financial burden and threat of punitive costs, can be, and is often used as, a method of silencing activists, civil society organisations and those seeking to hold

those in power accountable. The discrediting conduct in this matter is displayed in how the second respondent seeks to refer the attorneys representing the appellants to the LPC for unethical conduct without adducing evidence of such conduct.

- 23 A SLAPP suit may be defined as a “meritless case mounted to discourage a party from pursuing or vindicating their rights, often with the intention not necessarily to win the case, but simply to waste the resources and time of the other party until they abandon their opposition.” CALS submits that SLAPP suits are not only limited to cases where people attempt to vindicate their own rights but apply equally to cases where people seek to vindicate or protect the rights of others. This type of litigation is aimed at curtailing public participation by silencing activists and other actors, draining them financially, and making their work impossible thereby paralysing the process of vindicating the rights of those whom these actors serve.
- 24 The above definition of a SLAPP suit has two elements. Firstly, the case (or arguments) has the intention (ulterior motive) or effect of discouraging the vindication or pursuing of rights; and secondly, the case (or arguments) are meritless.
- 25 CALS submits that the arguments advanced by the second respondent in these proceedings fit the description of a SLAPP suit presented above. In this matter, the Centre for Environmental Rights (“CER”) acts as a public interest litigation organisation that provides *pro bono* legal services to civil society organisations that seek to promote and protect constitutional rights through active citizenry and

public participation. The punitive cost order sought by the second respondents against CER attorneys is based on the ulterior motive of discouraging CER from representing the appellants who are dissenting to the conduct and decisions of the second respondent. Furthermore, it has the chilling effect of dissuading public interest litigation organisations generally from legally representing clients who seek to assert their rights if such assertion is in any way aligned to the work the public interest litigation organisation does.

- 26 CALS respectfully submits that public law centres and other public interest litigation organisations do not work in a vacuum. The very nature of public interest litigation organisations is to work closely with social movements, civil society organisations, communities, community networks and other activists in order to address the human rights violations experienced by them. To argue that this results in a conflict of interest has the effect of silencing marginalised actors and disempowering them of the ability to use the law to vindicate their rights through free legal representation by public interest litigation organisations.
- 27 The position adopted by the second respondent also fulfils the second element of the definition. It is without merit. The very purpose of public interest litigation as stated above is to prevent human rights violations experienced by the clients of public law centres and organisations through using tools such as research, advocacy and strategic litigation. This legal representation has contributed to the achievement of justice, social justice, accountability, regime change and the protection of lives and livelihoods for millions of people. The attack on the integrity of attorneys involved in such work is without merit and is further not substantiated

by any meaningful evidence advanced by the first or second respondents. We therefore submit that it clearly falls within the ulterior motive of silencing dissent.


CONCLUSION

30 The submissions made by the second respondent amount to a SLAPP suit that aims to intimidate and discourage the legal representation of dissenting members of society. It aims to dismantle public interest litigation, access to justice, active citizenry and public participation. Therefore, CALS seeks to be admitted as the *Second Amicus Curiae* in this matter to make submissions as set out in this affidavit.



PALESA ROSE MADI

I hereby certify that the deponent acknowledges that she knows and understands the contents of this Affidavit, which Affidavit was sworn to and signed before me at Parkview SABS on this the 20 day of November 2020 in accordance with the requirements of Regulation 1258 dated 21 July 1972 as amended by Regulation Number 1648 dated 19 August 1977 as further amended by Regulation 1428 dated 11 July 1980, as further amended by Regulation 774 of 23 April 1982.



CSB B. Bhebe
9215152-9

COMMISSIONER OF OATHS

DATE: 2020-11-20
Bongimiso Nene BHENG
CONSTABLE
No 71 Dundalk Avenue

FULL NAME:

DESIGNATION:

ADDR