

Strategic Lawsuits against Public Participation (SLAPPs) in sub-Saharan Africa

Strategic Lawsuits against Public Participation (SLAPPs) are vexatious and meritless legal action, often taken against journalists and human rights activists who have expressed a critical opinion.¹ They are intended to distract from the reporting, intimidate and discourage them from voicing their opinions, and divert resources from public interest reporting to defending the abusive suits.²

SLAPPs can take many forms including defamation claims, criminal and civil suits, fabricated charges and claims for damages.³ Often, they are filed under the guise of protecting individual rights, but actually exploit the legal system, utilising it as a tool for infringing on the freedom of expression, access to information and public participation.⁴ Journalists targeted by SLAPPs often experience detrimental impacts, including emotional distress, damage to their reputation, threat of employment, diversion of funds, and decreased motivation to engage in public discourse.⁵

The use of SLAPPs is widespread in regions such as Latin and North America and Europe and constitutes a growing challenge in Sub-Saharan Africa. 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.⁶

SLAPPs in sub-Saharan Africa

SLAPPs in Sub-Saharan Africa have taken many forms, including defamation suits and claims for damages.

Defamation suits

Defamation suits are a common form of SLAPPs where an entity files a civil or criminal suit against an individual, claiming that their written or oral comments made in relation to the organization's activities damaged its reputation.⁷

¹ Judit Bayer and others, 'Strategic Lawsuits against Public Participation (SLAPP) in the European Union. A Comparative Study' [2021] SSRN Electronic Journal

<<https://deliverypdf.ssm.com/delivery.php?ID=954020088007066022001088082021004070007012064010087068076007023072073013101092013071027102040034061127107013017094005029086100117042055041008011097088114003000066056069060092013105113076007070088024126026116078066069125114010070006014101070095122006&EXT=pdf&INDEX=TRUE>> accessed 14 September 2023.

² Samantha Brown and Mark Goldowitz, 'The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits against Public Participation in the USA' (2010) 19 Review of European Community & International Environmental Law 3.

³ The Centre for Applied Legal Studies, 'Victimization Experiences of Activists in South Africa' (2018) <<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/Victimisation%20Experiences%20of%20Activists%20in%20South%20Africa%202022.pdf>> accessed 14 September 2023

⁴ The Business and Human Rights Centre, 'SLAPPed but not silenced: Defending human rights in the face of legal risks' (2021) <https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v657.pdf> accessed 19 September 2023

⁵ Samantha Brown and Mark Goldowitz, 'The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits against Public Participation in the USA' (2010) 19 Review of European Community & International Environmental Law 3.

⁶ Ibid.

⁷ Greenpeace, 'Sued into Silence; How the Rich and Powerful Use Legal Tactics to Shut Critics Up' (2020) <<https://www.greenpeace.org/eu-unit/issues/democracy-europe/4059/how-the-rich-and-powerful-use-legal-tactics-to-shut>>

For instance, in Sierra Leone, the agro-industrial group SOCFIN has on at least two separate instances, filed civil defamation suits against an environmental advocacy organization Green Scenery and its executive director for their critical reporting. The first suit was filed in 2013, seeking damages for Green Scenery's reports which alleged corruption and poor working conditions for employees in SOCFIN. This case was dismissed after SOCFIN failed to pursue it. A second complaint was filed in 2019, based on another report by Green Scenery on the human rights implications of SOCFIN's local activities. Proceedings in this matter are still ongoing.⁸

SLAPPs in the form of defamation suits have been targeting not only journalists and activists, but also their lawyers. For instance, in 2017, the mining company Mineral Commodities Ltd (MRC) sued the former attorneys of the Center for Environmental Rights and a community activist, claiming their comments on the alleged environmental harms caused by a subsidiary of MRC amounted to defamating and claiming R250 000 (US\$16,000) in damages from each defender. The Cape Town High Court dismissed the lawsuits, holding that they constituted an abuse of process.⁹

Claims for damages

Companies also file civil suits and claim excessive and exaggerated damages based on comments made by an individual,¹⁰ intending to divert resources from public interest reporting to defending these unfounded suits, ultimately silencing critical voices and creating a chilling effect for the media.

For instance, in 2008, an activist based in South Africa was sued for damages for an article written by her subordinate. This article claimed that lawyers had given ill advice to the farmers they were representing regarding the eviction of their families from their homes. As the activist did not take action against her subordinate, she was sued for damages. The matter was eventually settled out of court.¹¹

Regional Regulations around SLAPPs in sub-Saharan Africa

So far, there are no regional conventions in Sub-Saharan Africa in place to prevent and deter SLAPPs. However, there have been gradual efforts to ensure and protect the freedom of expression and the right to access to information and promote the harmonization of laws.

Article 9 of the African Charter on Human and People's Rights (The Banjul Charter) provides that

[critics-up/](#) accessed 19 September 2023.

⁸ International Center for Not-for-Profit Law (ICNL), 'Protecting Activists From Abusive Litigation SLAPPs in the Global South and how to Respond' (2020) <<https://www.icnl.org/wp-content/uploads/SLAPPs-in-the-Global-South-vf.pdf>> accessed 19 September 2023.

⁹ The Business and Human Rights Centre, 'SLAPPED but not silenced: Defending human rights in the face of legal risks' (2021) <https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v657.pdf> accessed 19 September 2023; Business and Human Rights Centre, 'S. Africa: Court slams mining giant for attempting to use a SLAPP suit to silence criticism and environmental activism' (10 February 2021) < <https://www.business-humanrights.org/en/latest-news/s-africa-court-slams-mining-giant-for-attempting-to-use-a-slapp-suit-to-silence-criticism-and-environmental-activism/>> accessed 19 September 2023.

¹⁰ Judit Bayer and others, 'Strategic Lawsuits against Public Participation (SLAPP) in the European Union' (2021) <<https://deliverypdf.ssrn.com/delivery.php?ID=954020088007066022001088082021004070007012064010087068076007023072073013101092013071027102040034061127107013017094005029086100117042055041008011097088114003000066056069060092013105113076007070088024126026116078066069125114010070006014101070095122006&EXT=pdf&INDEX=TRUE>> accessed 19 September 2023.

¹¹ The Centre for Applied Legal Studies, 'Victimization Experiences of Activists in South Africa' (2018) <<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/Victimisation%20Experiences%20of%20Activists%20in%20South%20Africa%202022.pdf>> accessed 19 September 2023.

every person has the right to disseminate and express their opinion within the law. This recognition of the freedom of expression denotes the primacy given to the freedom to express opinions without any censorship or arbitrary limitation. SLAPPs infringe on these guarantees by their nature and violate freedom of expression. While the African Court on Human and Peoples' Rights has not pronounced itself on SLAPPs yet, it has found in a Burkinabe case the imposition of a custodial sentence under criminal defamation laws to be disproportionate and incompatible with Article 9 of the African Charter.¹² In addition, in 2010, the member states to the African Union (AU) adopted a resolution in which they committed to repeal any criminal defamation laws that limit the freedom of speech and to further avoid imposing restrictions on the freedom of speech.¹³ However, in light of the deteriorating press freedom in some parts of Africa, there is need to enact anti-SLAPP conventions.

National Initiatives

While none of the following countries have enacted specific anti-SLAPP legislation on a domestic level, freedom of expression and the right to access information is provided for in their constitutions. At the same time, defamation is still criminalised, opening the door for abuse and the filing of SLAPPs.

South Africa

South African courts have taken a progressive stance on SLAPPs. The ground-breaking case *Mineral Sands Resources (Pty) Ltd v Reddell*,¹⁴ in which a mining company sued a group of environmental lawyers and activists for defamation, the High Court of South Africa has accepted the "SLAPP defence" for the first time, stating that the claim was not aimed at obtaining monetary damages but rather at "vindicating a right". This position was reiterated by the Constitutional Court, arguing that the SLAPP defence could be accommodated within the common law doctrine of abuse of process.¹⁵ In addition, the Pietermaritzburg High Court recently dismissed a criminal case initiated by former President Jacob Zuma against journalist Karyn Maughan, arguing that it had been filed with the "intent to intimidate and harass her" and opening up the option for the anti-SLAPP defence in criminal cases.¹⁶

Nigeria

The lodging of SLAPPs is also prevalent in Nigeria. In 2019, for example, journalist Agba Jalingo, was arrested after having published an article, demanding accountability for public funds earmarked for a bank project,. The charges of treasonable felony, terrorism, and cybercrime against the journalist were ultimately dismissed in March 2022 after a 30-months long trial.¹⁷

Kenya

Kenya has enacted a Defamation Act to provide for libel and slander. However, its provisions do not

¹² ACtHPR, Lohé Issa Konaté v The Republic of Burkina Faso, App. No. 004/2013, 5 December 2014.

¹³ 169 Resolution on Repealing Criminal Defamation Laws in Africa - ACHPR/Res.169(XLVIII)10.

¹⁴ Western Cape High Court, *Mineral Sands Resources (Pty) Ltd v Reddell* 2021 JDR 0209 (WCC).

¹⁵ South African Constitutional Court, *Mineral Sands Resources (Pty) and Others v Reddell and Others* [2022] ZACC 37 para 100.

¹⁶ Kawzulu-Natal High Court, Pietermaritzburg, *Maughan v Zuma and Others* (12770/22P;13062/22P) [2023] ZAKZPHC 59 (7 June 2023).

¹⁷ Marianna Tzabiras, 'The Growing SLAPP in the Face of Nigeria's Press Freedom - IFEX' *IFEX* (8 June 2022) <<https://ifex.org/the-growing-slapp-in-the-face-of-nigerias-press-freedom/>> accessed 19 September 2023.

offer sufficient directions on the conduct, award of damages and information on the preliminary dismissal of SLAPP defamation claims.

Conclusion

There is growing awareness in Sub-Saharan Africa of the need to protect the independence of the media and the freedom of expression from abusive SLAPPs. The guarantee of freedom of expression, access to information and public participation in constitutional texts and the Banjul Charter provide a basis upon which to defend against these abusive lawsuits. However, to effectively prevent their occurrence, it would be beneficial for Sub-Saharan African countries to enact explicit anti-SLAPP legislation on a regional or domestic level. Such laws can for instance provide for the preliminary dismissal of SLAPP suits, the imposition of sanctions for plaintiffs and the recovery of litigation costs for defendants. When a sensible balance with the right to access justice is ensured, such provisions provide a tool to promote freedom of expression and strengthen public participation.

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