IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: A155/19
Water Tribunal Case No: WT03/17/MP

In the application of:

LEGAL RESOURCES CENTRE	First *Amicus Curiae*
CENTRE FOR APPLIED LEGAL STUDIES	Second *Amicus Curiae*
SECTION27	Third *Amicus Curiae*
EQUAL EDUCATION LAW CENTRE	Fourth *Amicus Curiae*
NDIFUNA UKWAZI	Fifth *Amicus Curiae*
CENTRE FOR CHILD LAW	Sixth *Amicus Curiae*

In re:

ENDANGERED WILDLIFE TRUST	First Appellant
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	Second Appellant

And

DIRECTOR-GENERAL (ACTING), DEPARTMENT OF WATER AND SANITATION	First Respondent
ATHA-AFRICA VENTURES (PTY) LTD	Second Respondent

FIRST TO SIXTH *AMICI CURIAE* HEADS OF ARGUMENT

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INTRODUCTION

1 On 7 July 2021, this court, per his honourable Justice De Vos, granted an order wherein he admitted the first to sixth *amici curiae* — the Public Interest Law Centres ("**PILCs**") as *amici curiae* in the main appeal. The order also directed that they file written submissions and present oral submissions in the main appeal. These heads of argument have been prepared pursuant to that court order.

2 In light of the PILCs admission as *amici curiae* in the main appeal, these heads of argument will not detail the nature and interest of the PILCs in these proceedings — which submissions are necessary for admission as *amicus curiae*. Those details are already set out in the founding affidavit in the application for admission as *amici curiae.*[1] Instead, these heads of argument:

2.1 Do not pertain to the merits of the main appeal but are instead limited to the statements made by the second respondent, Atha Africa Venture (Pty) Ltd (**"Atha Africa"**) against the Centre for Environmental Rights (**"CER"**), a public interest law centre, who represents the first and second appellants in the main appeal; and

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[1] PILCs Founding Affidavit (FA) in the amicus curiae application, pp 005-14 - 21, paras 17 – 32' pp 005-21 – 28, paras 33 – 49

2.2 Will focus on the submissions sought to be made by the PILCs before this Court.

3 The remarks made by Atha Africa against the CER in its practice note and heads of argument were that the CER is conflicted and ought to have a *de boniis* propiis punitive costs order made against it on the attorney-client scale on the basis that it (the CER) "*profess[ed] to be an attorney of record but with a clear, direct and substantial interest in the proceedings both before the Water Tribunal and before the Court, as well as in the outcome thereof.*"

4 The accusation of a conflict of interest is absurd. CER (like any law clinic which employs attorneys and advocates[2]) may be engaged in multiple strategies including advocacy, research and litigation in order to achieve sustained change in law and social justice for its own purpose and in aid of its clients. This does not constitute a conflict of interest – they are perfectly acceptable strategise in pursuit of transformative constitutionalism. A law clinic acting for a client does not become the client. Nor does it substitute the client. The attorney and the client remain separate.

5 Not only is the accusation absurd, it is also discriminatory against law clinics and public interest law centres. Many commercial law firms would have commercial goals aligned to those of their clients. This does not translate

[2] As per section 34(8) of the Legal Practice Act, 28 of 2014.

into a conflict of interest *per se*. The attorney's interests and those of their clients remain distinguishable.

6 We submit that public interest law centres, are not, presented with a conflict of interest when they represent their clients in litigation, despite having aligned interests with the clients.

7 Atha Africa's prayer for a punitive costs order against the CER as well as its proposed referral of the CER to the Legal Practice Council ("**LPC**") constitute an abuse. They also fit the profile of a strategic litigation against public participation ("**SLAPP Suit**") suit. This would chill the ability of public interest law centres to pursue transformative constitutionalism in aid of its clients and their own interests.

8 The rest of these heads of argument are structured as follows:

8.1 First, we deal with the relief and punitive costs order sought against the CER by Atha Africa and the extent to which such relief would hinder the work of PILCs were it to be granted by this court.

8.2 Second, we discuss 'lawfare' as the lens through which the work of PILC should be viewed. This requires that the work of the CER and PILCs like it be seen as facilitating litigation as a weapon of the weak to resist or endorse conduct that affects their interests. We discuss how this concept of lawfare has been adopted by courts for

decades to assist them in the making and development of the common and constitutional law jurisprudence.

8.3 Third, we discuss the role of PILCs in crafting transformative constitutionalism.

8.4 Fourth, we look at the adverse effect of punitive costs orders on the right of access to courts through a comparative analysis of litigation against public participation in other jurisdictions. In this regard, we critique Atha Africa's adoption of this approach. We rely on this critique to argue that Atha Africa's case against the CER lacks merit and is intended to discourage the vindication of rights by litigants represented by public law centres.

MAIN SUBMISSIONS

Relief sought and submission made by Atha Africa

9 As stated above, the PILCs sought to intervene as *amicus curiae* in the main appeal consequent to Atha Africa's assertions about the CER in its practice note and heads of argument in the main appeal.

10 In its practice note, Atha Africa states that the CER is conflicted and ought to have a *de boniis* punitive costs order made against it on the attorney-

client scale.[3] In its heads of argument, Atha Africa persists with its claim that the CER is conflicted in these proceedings. It makes the following submission at paragraph 7 of its heads of argument:

> *"We have environmental lobbyists (which include the Centre for Environmental Rights, professing to be an attorney of record but with a clear, direct and substantial interest in the proceedings both before the Water Tribunal and before the Court, as well as in the outcome thereof, and which situation constitutes not only a clear and unethical conflict of interest in the case of any other attorney but which also negates any pretence of objectivity on their part) advancing a partisan (and even misleading) case before the Water Tribunal and before the Court, selectively emphasising and exaggerating only the adverse ecological impacts and conveniently ignoring everything else on record - ignoring the factual and expert evidence proving that those impacts are not as serious as the Appellants portray as well as the factual and expert evidence (accepted by the Water Tribunal) regarding the adequacy of approved mitigation measures."*[4]

11 It repeats this submission at paragraph 159 of its heads of argument:

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3 Atha Africa Practice Note, 008-186, para 7.8.

4 Atha Africa HoA, 008-195 to 008-196, para 7. Footnotes omitted.

"In the last place we submit that, because of the abuse of litigation by the Appellants and the conflicted Centre for Environmental Rights, this is a matter where the Appellants and the Centre for Environmental Rights de boniis should be ordered to pay the costs of Atha-Africa in this special appeal jointly and severally, the one paying the other to be absolved, on a punitive scale as between attorney and client."[5]

12 At paragraph 227, Atha Africa reiterates to the court the CER's 'conflicted position' and submits that it be referred to the Legal Practice Council.[6]

The PILCs' Submissions

13 The PILCs initially indicated in their founding affidavit that they would advance arguments related to standing in terms of section 38 of the Constitution.[7] Subsequently, the Southern African Human Rights Defenders Network (**"SAHRD Network"**), when they filed their application for *amicus curiae*, also indicated that they would make submissions on these issues. Their submissions echo those that would have been made by the PILCs. In an effort not to repeat arguments that will be advanced by the respective *amici curiae*, the PILCs will no longer address the issue of standing in terms of section 38 of the Constitution in these heads of argument. The PILCs reserve the right to supplement their heads of argument should it become

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5 Atha Africa HoA, 008-308 to 008-309, para 159.

6 Atha Africa HoA, p008-351, para 227.

7 PILC FA, 005-29 to 005-30, para 51.2 and 51.3.

necessary to do so after having had regard to the SAHRD Network's heads of argument.

14 In brief, the PILCs submit that:

14.1 PILCs such as the CER and the *amici curiae* have engaged in lawfare (during and after legislated-Apartheid). Their work was necessary during the era of socio-political oppression. It remains necessary to this date in order to dismantle social and economic patterns of marginalizatioon that have survived despite the adoption of the Constitution, which promises equality;

14.2 PILCs are an essential component of transformative constitutionalism. Their aligned interests with those of their clients, together with their use of multiple strategies of advocacy, research and litigation, serve the ends of transformative constitutionalism; and

14.3 The punitive costs order sought by Atha Africa against the CER and its submission that the CER be referred to the LPC for bringing its application, which is the subject of the appeal in these proceedings, constitutes a SLAPP Suit and should be treated with the circumspection that such a suit deserves. Despite being given a number of opportunities to withdraw the statements, Atha Africa's

attorneys have refused to do so.[8] The PILCs are concerned that an endorsement of this approach will discourage or hinder future public participation of citizens who seek to challenge the conduct of industries or corporations that affect their interests, which we submit they should remain entitled to do in accordance with court rules.

LAWFARE

The meaning of lawfare

15 Corder and Hoexter say the following about lawfare:

> *"'Lawfare' has multiple meanings, but in academic discourse it usually denotes the use or abuse of law by the state to achieve strategic political or military ends. [In this sense it can be] characterised as 'the effort to conquer and control indigenous peoples by the coercive use of legal means'.*
>
> *However, 'lawfare' has also acquired a contrary and nobler meaning: The use of litigation as 'a weapon of the weak'. In this second sense, lawfare is a strategy used by the colonised and oppressed precisely in order to resist rule by law. In South Africa there is a long history of the use of litigation for such purpose by*

[8] EWT Affidavit, 008-364 to 008-365, paras 8 to 10.

non-state actors, and the role of lawfare in the struggle against apartheid is well-documented."[9]

16 Under this second, 'contrary' and 'nobler' meaning of lawfare, public interest litigation was used as a weapon by those rendered weak by authoritarian rule. The law in this context was used not merely as an instrument of oppression by the state but rather as an instrument of resistance and as a tool for agitating for socio-economic and political change by activists.[10]

The use of lawfare during Apartheid

17 In societies charatecterised by deep and structural inequality, such as South Africa, the majority of the poor are unable to afford legal resources. Yet access to the law is most needed by the poor. In the period before apartheid, the law – in its official guise – functioned primarily as a mechanism to pursue the naked racism of the colonial government. Ngcukaitobi[11] points out that Black lawyers in the period before apartheid comprised a committed group of actors, willing to use the instrumentality of the law in aid of the oppressed. Their work extended beyond offering legal assistance to human rights activists and citizens (though not recognised as such at the time) to include the majority Black population who would otherwise have not been able to

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9 H Corder and C Hoexter 'Lawfare in South Africa and Its Effects on the Judiciary' (2017) 10 *African Journal of Legal Studies* 105, at 106.

10 PILC FA, 005-32, para 54.

11 Ngcukaitobi, *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism*.

access the courts but for their legal representatives' creative lawyering.[12] Such lawyers included, amongst others, Pixley ka Isaka Seme, Alfred Mangena, Ismail Mahomed, Felicia Kentridge, Bram Fischer and Arthur Chaskalson. This form of lawyering preceded the rise of public interest law centres.[13]

18 In 1978 and 1979, respectively, after having secured funding, three organisations were founded: the first *amicus curiae*, the Legal Resources Centre, the second *amicus curiae*, the Centre for Applied Legal Studies, and Lawyers for Human Rights.[14] According to Cameron J, the founding of these public interest law centres:

> *"… represented the triumph of an idea — the belief that lawyers had an especial role and a particular responsibility in the fact of gross injustice. That idea was animated by the iniquities of apartheid. But behind it lay a deeper belief about the nature of law itself. These lawyers' opposition to apartheid embodied the insight that law need not only oppress, separate, subordinate and exclude, but could be used and indeed should be used in the fulfilment of a deeper and better ordering of human society: that this is its true role."*[15]

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12 PILC FA, 005-33, para 55.

13 PILC FA 005-29, para 51.1.

14 J Brickhill 'Introduction: the Past, Present and Promise of Public Interest Litigation in South Africa' in J Brickhill (ed) *Public Interest Law in South Africa* (2018) (hereinafter "Brickhill"), 12.

15 E Cameron 'Remarks at the celebration of the founding of CALS, the LRC and LHR at the Public Interest Law Gathering' 24 July 2014, quoted at Brickhill, 12.

THE ROLE OF PILCs IN TRANSFORMATIVE CONSTITUTIONALISM

19 The South African constitution is transformative. It is, and was intended to be a break from the past. This is made evident by the language employed in both the Interim Constitution[16] and Final Constitution.

20 The Interim Constitution was founded on the *"need to create a new order"*[17] and serves as a —

> *"historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."*[18]

21 It set out a list of Constitutional Principles that were to be complied with in the formulation of the Final Constitution.[19] Listed among them is Constitutional Principle IV, which provides that *"[t]he Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government."*[20]

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16 Constitution of the Republic of South Africa Act 200 of 1993.

17 Preamble, Interim Constitution.

18 Postamble, Interim Constitution.

19 Section 71(1)(a) of the Interim Constitution.

20 Constitutional Principle IV, Schedule 4, Interim Constitution.

22 The Final Constitution recognises the injustices of our past and seeks to *"[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights"*.[21]

23 The transformative nature of the Constitution was acknowledged earlier on into the democratic dispensation by the Constitutional Court in *Makwanyane*[22] and *Du Plessis*.[23]

The meaning of transformative constitutionalism

24 Albertyn and Goldblatt define transformative constitutionalism as follows:

> *"[W]e understand transformation to require a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relations."*[24]

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21 Preamble, Constitution.

22 *S v Makwanyane* 1995 (3) SA 391 (CC), para 262.

23 *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), para 157.

24 C Albertyn and B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal for Human Rights* 248, at 249.

25 Klare defines it as:

> *"a long term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."*[25]

26 Chief Justice Langa (as he then was) said that the aspiration of transformative constitutionalism *"is a magnificent goal"*. At its core, he said, it requires that *"we must change"*. Emphatically, he noted that Transformative Constitutionalism *"is a social and an economic revolution."*[26] Deputy Chief Justice Moseneke (as he then was) described it as a *"constitutional revolution"*.[27]

Requirements for transformative constitutionalism

27 Transformative constitutionalism demands accountability. For Chief Justice Langa it has at least three components: first, economic transformation;

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25 K Klare 'Legal Culture and Transformative Constitutionalism'(1998) 14 *South African Journal of Human Rights* 146, at 150.

26 P Langa, 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 351 (hereinafter "Langa"), at 3522.

27 D Moseneke, 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 *Stellenbosch Law Review* 3 (hereinafter "Moseneke"), at 4.

second, change in legal culture; and third, the permanence of transformation.[28]

28 Chief Justice Langa acknowledges the lack of access to justice as one of the challenges to transformative constitutionalism. Of this he said:

> *"Legal representation remains beyond the financial reach of many South Africans and it is true that more money ensures better representation. That is not equal access to justice and the challenge we face is what strategies we should adopt to rectify the position. The Constitution should not become a tool of the rich. Equal justice means that the fruits of justice are there for all to enjoy. The provision of equal access to justice is therefore a priority in reaching our transformative goal."*[29]

29 Legal education is also a requirement of transformative constitutionalism; it requires not only a change in laws but a change in mindset.[30]

PILCs' litigious contribution to transformative constitutionalism

30 In the course of a speech in 2007, Deputy Chief Justice Moseneke iterated the results of a survey conducted on Constitutional Court decisions handed down in the 12 years prior (i.e. from 1995 to 2007). He stated that the

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28 Langa, at 354 and 355.

29 Langa, at 355.

30 Langa, at 356.

jurisprudence of the Constitutional Court over this period fell broadly into three categories: (a) rights in the Bill of Rights; (b) jurisdiction; and (c) the exercise of power by other courts or branches of government.[31]

31 According to Deputy Chief Justice Moseneke, claims concerning dignity and equality dominated the Constitutional Court's rights jurisprudence. He continued:

> *"The most prominent of our equality cases relate to employment discrimination against an HIV positive person, discrimination arising from criminal prohibition of sodomy between consenting adult males, legislative discrimination against same sex life partners on rights related to immigration issues, unfair exclusion of same sex partners from state remuneration benefits, and unjustified exclusion of same sex partners from adoption of children. In the category of gender inequality we have struck down legislation or rules of the common law or customary law which favour patriarchy within the family or home."*

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31 D Moseneke, 'Transformative Adjudication in Post-Apartheid South Africa – Taking Stock after a Decade'(2007) 21(1) *Speculum Juris* 2, at 8.

32 The cases to which Deputy Chief Justice Moseneke refers are listed below.[32]

32.1 ***Hoffman*** where the first *amicus curiae* in this matter, the LRC acted for the appellant and CALS (the second *amicus curiae* in this matter) acted for *amicus curiae* — AIDS Law Project.[33] The court stated that it was indebted to the AIDS Law project and counsel for their submissions in that matter.[34]

32.2 ***National Coalition-Justice*** where CALS intervened as *amicus curiae*.[35] According to the Constitutional Court, CALS presented an "interesting argument" on the relationship between the right to human dignity and the right to equality.[36]

32.3 ***National Coalition-Home Affairs,*** where the LRC acted for the appellants.[37] The appellants were largely successful in their appeal

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32 Other cases to which Moseneke DCJ referred were: *Satchwell v The President of the Republic of South Africa* 2003 (4) SA 266 (CC); *Van der Merwe v RAF* 2006 (4) SA 230 (CC) (in which the Woman's Legal Centre intervened as amicus curiae; *S v Baloyi* 2000 (2) SA 425 (CC) in which the Commission for Gender Equality intervened as a party; and *Daniels v Campbell NO* 2004 (5) SA 331 (CC) in which the Woman's Legal Centre acted for the applicant.

33 Hoffmann v South African Airways 2001 (1) SA 1 (CC), paras 3 and 4.

34 Hoffmann, para 4.

35 National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (CC), para 6.

36 National Coalition-Justice, para 120.

37 National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC).

and obtained an order which corrected the unconstitutional provisions of the impugned legislation.

32.4 ***Du Toit,*** where CALS acted for the *amicus curiae.*[38] While the court did agree with the submission made by the *amicus curiae* it held that the impugned legislation would best cure the unconstitutionality. It was accordingly of the view that the court could attenuate the unconstitutionality in the interim.[39]

32.5 **Brink v Kitshoff,** where CALS intervened as *amicus curiae*.[40] The Court stated that CALS *"presented a detailed and helpful argument as to the manner in which section 8 [the equality provision in the Interim Constitution] should be interpreted".*[41]

32.6 ***Bhe,*** where the LRC acted for one of the applicants.[42] The Court stated that the direct access submissions that were made by the applicants *"helpfully broaden[ed] the scope of the constitutional investigation".*[43]

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38 Du Toit v The Minister of Welfare and Population Development 2003 (2) SA 198 (CC).

39 Du Toit, paras 40 and 41.

40 Brink v Kitshoff 1996 (4) SA 197 (CC).

41 Brink v Kitshoff, para 32.

42 Bhe v Magistrate Khayelitsha 2005 (1) SA 580 (CC).

43 *Bhe*, para 33.

33 The cases mentioned above are merely a few of dozens of Constitutional Court decisions in which public interest law centres have played a role. Others include:

33.1 **Makwanyan***e*[44] where the LRC represented the applicants. This decision fundamentally changed the South African legal landscape by removing the death penalty from our criminal justice system.[45] The LRC has also contributed to other important decisions related to corporal punishment in schools, healthcare and environmental justice and land and education rights. The list is endless.

33.2 **Minerals Council**[46] where CALS ensured that individuals, communities and organisations affected by mining would be included in litigation affecting that subject matter. CALS accordingly advanced the agency and rights of participation of affected persons in matters that affect them and furthered our jurisprudence on the principle of non-joinder.[47]

33.3 **Minister of Basic Education and Others v Basic Education for All and Other *("*the *Textbooks Case")***[48] where the third *amicus*

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44 S v Makwanyane 1995 (3) SA 391 (CC).

45 PILC FA, 005-15, para 19.

46 *Minerals Council South Africa v Minister of Mineral Resources and Another* [2020] 4 All SA 150 (GP).

47 PILC FA, 005-16, para 22.

48 *Minister of Basic Education and Others v Basic Education for All and Others* 2016 (4) SA 63 (SCA).

curiae in this matter, SECTION27 represented the interests of children's right to basic education, which was infringed by the Department of Education's failure to provide textbooks to the learners at the schools. This case contributed to the South African jurisprudence on defining the components of the right to education and the state's positive obligations as set out in the Bill of Rights.[49]

33.4 **Equal Education**[50] where the fourth *amicus curiae* in this matter, Equal Education Law Centre (**"EELC"**) obtained an order, on its behalf, compelling the Minister of Education to prescribe minimum norms and standards for school infrastructure. The application demonstrated in vivid and personal detail how many learners and teachers have been left in unsafe environments that are not conducive to learning, which have also undermined the ability of the learners to achieve in the classroom and fully realise their rights to an adequate education, equality and dignity.[51]

33.5 **Growthpoint Properties**[52] wherein the fifth *amicus curiae* in this matter, Ndifuna Ukwazi (**"NU"**) assisted occupiers in discharging an order obtained without their participation. In doing so, NU sought

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49 PILC FA, 005-17, para 24.

50 *Equal Education & Others v Minister of Basic Education and Others* 2019 (1) SA 421 (ECB).

51 PILC FA, 005-18, para 26.

52 *Growthpoint Properties Ltd v All persons intending to occupy Erf 165639, Cape Town and Others* [2019] 3 All SA 759 (WCC).

to disrupt the reproduction of spatial inequality and segregation by compelling government to meet its obligations to use well-located land to provide affordable housing.[53]

33.6 **Centre for Child Law**[54] where the sixth *amicus curiae* in this matter, **("CCL")** successfully advanced submissions on the potential harmful effects that the publication of the names of children implicated in legal proceedings. In so doing it served the interest of children and advanced the constitutional project of respecting, protecting and advancing the rights of children.[55]

34 The Constitutional Court has also recognised the important role that PILCs play in constitutional litigation. This has in turn motivated courts not to grant adverse costs orders against law centres where litigation is launched in a serious attempt to further constitutional rights even where these centres are unsuccessful.

35 In **Merafong** the Constitutional Court, in coming to the decision of not ordering costs against an unsuccessful applicant noted that the Court

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53 PILC FA, 005-19, para 28.

54 *Centre for Child Law and Others v Media 24 Limited and Others* 2020 (4) SA 319 (CC).

55 PILC FA, 005-21, para 31.

was*"… assisted by a public interest law institution with a history of campaigning for the recognition and protection of human rights"*.[56]

36 The lengthy and useful record of the LRC was noted by the SCA in **Changing Tides**.[57]

37 In ***Biowatch,*** the Constitutional Court expressed its appreciation for the work done by PILCs. This recognition led to the formulation of what is now commonly referred to as the *Biowatch Principle* (where the Court emphasised that judicial officers should caution themselves against discouraging those trying to vindicate their constitutional rights by risk of adverse costs orders if they lose on the merits). Sachs J said the following about the role of public law centres:

> *"A perusal of the law reports shows how vital the participation of public interest groups has been to the development of this Court's jurisprudence. Interventions by public interests groups have led to important decisions concerning the rights of the homeless, refugees, prisoners on death row, prisoners generally, prisoners imprisoned for civil debt and the landless. There has also been pioneering litigation brought by groups concerned with gender equality, the rights of the child, cases concerned with upholding the*

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56 *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC), para 117.

57 *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (SCA)* 2012 (6) SA 294 (SCA), para 48.

constitutional rights of gay men and lesbian women, and in relation to freedom of expression. Similarly, the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest."[58]

38 A few months later, in **Mazibuko,** the Constitutional Court expressed support for the work done by public interest law centres saying:

"It is true that litigation of this sort is expensive and requires great expertise. South Africa is fortunate to have a range of non-governmental organisations working in the legal arena seeking improvement in the lives of poor South Africans. Long may that be so. These organisations have developed an expertise in litigating in the interests of the poor to the great benefit of our society. The approach to costs in constitutional matters means that litigation launched in a serious attempt to further constitutional rights, even if unsuccessful, will not result in an adverse costs order. The challenges posed by social and economic rights litigation are significant, but given the benefits that it can offer, it should be pursued."[59]

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58 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), para 19; footnotes omitted.

59 *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC), para 165; footnote omitted.

39 From the aforegoing it is clear that PILCs have, since the dawn of our democratic constitutionalism, advanced the cause for transformative constitutionalism. Their role in doing so cannot be gainsaid. Their contributions have been acknowledged over and over by the courts. It is also no exaggeration to say that without the participation of PILCs parties' legal representatives, many of the progressive ideals of the Constitution would not have been realised.

PILCs' use of research and advocacy to advance transformative constitutionalism

40 PILCs use a combination of methods to advance the project of transformative constitutionalism. Litigation is just one of those techniques. Others include research and advocacy.

41 In fact, in a research report commissioned by Atlantic Philanthropies ("**2008 PIL Report**"), authors advocates Marcus SC and Budlender (as he then was) found that four strategies should be employed to achieve social change: (a) public information campaigns; (b) advice and assistance in order to enable people to claim their rights; (c) social mobilisation and advocacy; and (d) public interest litigation.[60]

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60 PILC FA, 005-22, para 36.

42 The authors stated that public information campaigns inform ordinary people of their rights and are an essential component to achieve social mobilisation on a rights issue.[61] The 2008 PIL Report continues —

> *"without such campaigns, those conducting the public interest litigation are unlikely to be able to obtain the required information to launch the successful litigation, to generate substantial support from ordinary persons which plays an important role in perceptions of the litigation by courts, the public and the government, or to transform any litigation victory into concrete progress on the ground."*[62]

43 Of social mobilisation and advocacy the 2008 PIL Report said that —

> *"[r]ights have to be asserted both outside and inside the courts. Some form of social movement is necessary to identify issues, mobilise support around them, make use of political pressure, engage in litigation where necessary, and monitor and enforce favourable laws and orders by the courts."*[63]

44 Finally, in relation to research the 2008 PIL Report states:

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61 PILC FA, annexure FA4, 005-71, para 296.1.

62 PILC FA, annexure FA4, 005-72, para 296.1.

63 PILC FA, annexure FA4, 005-72 to 005-73, para 296.3.

> *"A critical, and often neglected facet of successful public interest litigation is the need for detailed research in advance of, and during, the litigation. Legal research, including using foreign law and international law, is essential if public interest litigation is to be given a proper theoretical foundation. The need for access to proper factual research, particularly in socio-economic rights cases, is just as acute. Those involved in running such litigation must have access to such research capabilities — either within their own organisation or via alliances with other organisations."*[64]

45 Atha-Africa asserts that PILCs' engagement and participation in advocacy and litigation creates a conflict of interest. However, the contrary is true. The advocacy and research that PILCs conduct aid the project for transformative constitutionalism. They contribute positively to the litigation process, advance the interests of their clients and in so doing have the effect to improving the jurisprudence flowing from the courts.

46 The research conducted by PILCs helps to uncover the various ways in which repositories of power infringe on the rights of marginalised people and the impacts that these infringements have. It also serves to unveil the legal, structural basis for such infringement of human rights. This research has

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64 PILC FA, annexure FA4, 005-75, para 297.5.

the effect of focusing the legal issues to be determined at court and the remedies that would be effective in remediating such harm.

47 'Advocacy' in the current context is a broad terms that includes community engagement, social mobilisation, community legal education, engagements with decision markers, media advocacy. According to Heywood, as illustrated by the **TAC,**[65] the use of litigation together with social mobilisation brought about tangible to people's lives.[66]

48 Advocacy enables those adversely affected to form a community and use the force of their masses to advocate for change. It also ensures that marginalised people maintain their agency and are the voices for the issues they face.

49 This case is illustrative of this approach. In aid to its advocacy endeavours, the CER employed media advocacy to publicise the environmental effects that the proposed mining would have. For instance, the CER produced and distributed a media release setting out that legal action had been undertaken and the reasons for it.[67] The CER also produced a factsheet that set out the costs and benefits of the proposed mining.[68]

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65 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC)

66 *M Heywood, 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' (2009) 1(1) Journal of Human Rights Practice, 14.*

67 Atha Africa Affidavit, annexure PT2, 008-487.

68 Atha Africa Affidavit, annexure PT7, 008-502.

THE EFFECT OF PUNITIVE COSTS ORDERS ON ACCESS TO COURTS

50 Two provisions in the Bill of Rights seek to ensure the realisation of the right to justice: section 34 and section 38.

51 Section 34 provides that —

> *"[E]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

52 The other is section 38, which expands the common law of standing where rights in the Bill of Rights have allegedly been infringed. Section 38 says:

> *"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –*
>
> *(a) anyone acting in their own interest;*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) as association acting in the interest of its members".

The nature and purpose of punitive costs orders

53 Atha-Africa seeks a *de boniis propiis* punitive costs order against the CER and EWT on the attorney-client scale jointly and severally, the one paying the other absolved.[69] This request is remarkable in two respects. First, because it calls for costs to be awarded against a party (and its legal representative) seeking to vindicate constitutional rights and secondly, because it seeks those costs on a punitive scale.

54 Costs *de boniis propiis* is awarded against a person acting in a representative capacity.[70] The representative will, in this instance, be order to pay costs out of their own pockets.

55 In **Pheko v Ekurhuleni City**[71] the Constitutional Court held that the courts will make this order (of costs *de boniis propiis*) to mark their displeasure in

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69 Atha Africa, 008-308 to 008-309, para 159.

70 D Harms *Civil Procedure in the Superior Courts* (hereinafter "Harms"), at B70.2.

71 2015 (5) SA 600 (CC), paras 53 to 55

the conduct of a legal practitioner who has committed a gross disregard for their professional responsibilities. This will be in serious cases where a representative has been guilty of wilful, bad faith or professional negligence to a gross degree.

56 Personal costs too are aimed at address litigation in bad faith and with negligence. However, the test is somewhat different in constitutional litigation. In **EFF** the Constitutional Court said that the power of courts to award personal costs against public officials is sourced from the Constitution. It is buttressed by the Constitution and informed by the intention of vindicating the same.[72] It is evident from this, and other cases[73] that personal costs, in Constitutional litigation, are traditionally made against public officials and not private parties, or their legal representatives. It is also clear that the award of personal costs is aimed at vindicating the Constitution and not for the reasons which have been advanced by Atha Africa in this case.

57 Costs on an attorney-client scale *"are the costs, although not strictly speaking 'necessary and proper' but nevertheless reasonable, that an attorney is usually entitled to recover from his client*".[74] They are awarded

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72 *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (8) BCLR 916 (CC), para 89 to 92.

73 *South African Social Security Agency v Minister of Social Development (Corruption Watch (NPC) RF Amicus* 2018 (10) BCLR 1291 (CC), para 37 and *Black Sash Trust v Minister of Social Development (Freedom Under Law intervening)* 2017 (9) BCLR 1089 (CC), paras 5 to 9.

74 Harms, at B70.2.

when it is just to do so having regard to the conduct of the party prior to or during the conduct of the proceedings.[75] According to the Constitutional Court, in **Public Protector v South African Reserve Bank**[76], costs on an attorney and client scale are to be awarded against a party "*where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process."*[77]

58 Therefore, in order to be successful, a request for a punitive cost must be coupled with an iteration of facts in support of that. Those facts must indicate conduct by the party or its representative demonstrating some degree of conduct unbecoming of a litigant or legal practitioner. There is no such conduct either from EWT nor from the CER. Therefore, we submit that there is no basis for awarding costs *de bonis propiis* against the CER or punitive costs against the appellant and the CER on an attorney and client scale. Or any costs against either of them for that matter.

Punitive costs orders are inconsistent with existing jurisprudence

59 The objectives of punitive costs order and the costs regime in constitutional litigation are at odds.

60 According to **Biowatch,** if, in constitutional litigation between the state and a private party, the private party is successful, they (private party) should be

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75 *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597, at 607.

76 2019 (6) SA 253 (CC), para 8

77 *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), para 8.

awarded costs. On the other hand, if the private party is unsuccessful, they should not be mulcted with costs.[78] The main appeal falls within the scope of **Biowatch:** EWT seeks to vindicate its environmental right in terms of section 24 of the Constitution and the Director-General for Water and Sanitation is cited.

61 Both costs *de bonis propriis* and costs on an attorney-client scale are punitive in nature. From their nature, it seems that their objective is either or both of the following: (a) retribution — to punish the party or the legal representative that conducted themselves inappropriately; or (b) restorative — to lessen the financial burden borne by the other party as a consequence of the other's inappropriate conduct.

62 The costs regime established by the Constitutional Court in *Biowatch* does not have the same objective. The reason for this as expressed as follows:

> *"The rationale for this general rule is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing*

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78 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), para 22.

constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."[79]

63 These costs regimes are at odds in the following ways:

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79 *Biowatch*, para 23; emphasis added.

63.1 A punitive order is aimed at preventing litigation, however, the constitutional litigation costs regime is aimed at encouraging litigation.

63.2 Punitive costs will be awarded where the conduct of a party (or their legal representative) is wilful, *mala fides* or grossly negligent. However, costs under **Biowatch** will be refused where conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court.[80]

63.3 Under the constitutional litigation costs regime, the penalty for bringing a vexatious, frivolous, or professionally unbecoming conduct is an adverse costs order at the ordinary party-party scale. Punitive costs (as sought by Atha Africa) go two steps further. They are punitive in two respects — both scale and the responsible party are penalised. This is a significant departure from established principle, which are discussed above.

64 Atha Africa's request for punitive costs contradicts established jurisprudence on costs.

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[80] *Biowatch*, para 18.

Punitive costs would stagnate transformative constitutionalism

65 Most of the PILCs are law clinics registered as such with the Legal Practice Council.[81] In terms of the Legal Practice Act ("**LPA**"),[82] law clinics may be registered in respect of non-profit juristic entities or universities.[83] A number of them are also non-profit and non-governmental organisations.[84] It follows that they do not have the financial means to litigate in the interest of the public if doing so would result in a punitive costs against them.

66 The PILCs argue that a punitive costs order —

> *"would have an adverse impact and chilling effect on these centres. It will also result in the consequential inability of otherwise marginalised and vulnerable litigants to access justice through our courts, where they would otherwise be prevented from doing so because of cost and resource constraints."*[85]

67 This would not only affect the PILCs themselves but more importantly marginalised and vulnerable litigants whom the PILCs represents, who

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81 PILC FA: (1) 005-14, para 17; (2) 005-15, para 20; (3) 005-17, para 25; (4) 005-19, para 27; and (5) 005-20, para 29.

82 Act 28 of 2014.

83 Section 34(8) of the LPA.

84 PILC FA: (1) 005-14, para 17; (2) 005-19, para 27; and (3) 005-20, para 29.

85 PILC FA, 005-11, para 9.3.

would be deprived of their right to access justice through the courts due to the costs and resource constraints associated therewith.[86]

SLAPP SUITS

68 Murombo and Valentine define a SLAPP Suit as *"a meritless case mounted to discourage a party from pursuing or vindicating their rights"*.[87] They state that aim of SLAPP Suits is to intimidate, scare, or "chill" a person who brings a matter of public concern to light.[88]

69 In **Waypex (Pty) Ltd v Barnes and Others***[89]* the court made the following observation:

> *"The defendants also made reference to the belligerent tone of plaintiff's attorney's letters, which were calculated to intimidate and create enmity. There is much justification for this view taken by the defendants.*
>
> *The generally weak merits of the cases became obvious during the trial. The statements complained of were generally made to public*

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86 PILC FA, 005-31 to 005-32, para 51.7 and 005-36, para 63.

87 T Murombo and H Valentine 'SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa' (2011) 27 *South African Journal of Human Rights* 82, at 84.

88 Ibid.

89 2011 (3) SA 205 (GNP), at 207B-207C.

officials, mostly in the course of administrative procedures. In some instances the allegations were trivial."[90]

70 SLAPP Suits were incorporated into South African law in **Mineral Sands Resources (Pty) Ltd and Another v Reddell and Others; Mineral Commodities Limited and Another v Dlamini and Another; Mineral Commodities Limited and Another v Clarke**[91] where the court held as follows:

"… SLAPP suits are still a relatively new phenomenon in most jurisdictions. Essentially its aim is to silence those challenging powerful corporates on issues of public concern. In essence the main purpose of the suit is to punish or retaliate against citizens who have spoken out against the plaintiff."[92]

"… In essence, SLAPPs are designed to turn the justice system into a weapon to intimidate people who are exercising their constitutional rights, restrain public interest in advocacy and activism; and convert matters of public interest into technical private law disputes."[93]

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90 *Waypex (Pty) Ltd v Barnes and Others* 2011 (3) SA 205 (GNP), at 207B-207C.

91 [2021] 2 All SA 183 (WCC)

92 At para 39

93 At para 40

71 A SLAPP Suit has three elements:

71.1 First, that the defendant is engaged in public participation on a public issue;

71.2 Second, that the plaintiff is pursuing an improper purpose (i.e. to (a) discourage the defendant or anyone else from engaging in public participation; (b) divert the defendant's resources away from engagement in public participation; or (c) punish or disadvantage the defendant for engaging in public participation; and

71.3 Third, that the case or lawsuit lacks merit.[94]

72 In **Mineral Sands** the court held that SLAPP suits constitute an abuse of process and are inconsistent with our constitutional values and scheme.[95]

73 The PILCs submit that both the costs order and the referral of the CER to the LPC that is sought by Atha Africa fall within this category of cases and should explicitly be rejected on that basis.

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94 Mineral Sands Resources, at para 45.

95 At paras 66 and 67

This is a case related to a public issue

74 The right to a healthy environment is at the heart of the claim of conflict of interest made by Atha Africa. This is made evident in Atha Africa's heads of argument[96] wherein it bemoans the fact that CER *"emphasis[es] and exaggerate[es] only the adverse ecological impacts and conveniently ignor[es] everything else".*[97]

75 In **Mineral Sands** the court described SLAPP Suits as follows:

> *"The signature elements of SLAPP cases is the use of the legal system, usually disguised as an ordinary civil claim, designed to discourage others from speaking on issues of public importance and exploiting the inequality of finances and human resources available to large corporations compared to the targets. These lawsuits are notoriously, long drawn out, and extremely expensive legal battles, which consume vast amounts of time, energy, money and resources. In essence, SLAPPs are designed to turn the justice system into a weapon to intimidate people who are exercising their constitutional rights, restrain public interest in advocacy and activism; and convert matters of public interest into technical private law disputes."*[98]

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96 At para 7

97 Atha Africa HoA, 008-196, para 7.

98 *Mineral Sands*, para 40.

76 Atha Africa's statements about CER, contained in just three paragraphs of its heads of argument and one paragraph of its practice note has resulted in lengthy interlocutory proceedings, with the exchange of multiple pleadings and the amici applications of both the PILCs and the SAHRD Network. The fact that the case is not self-standing does not make it any less litigious. It still complies with this requirement of a SLAPP suit.

Atha Africa's case lacks merit

77 The basis upon which Atha Africa requests the punitive costs order and referral to the LPC is CER's supposed conflict of interest, which allegedly arises from its aligned interest with that of EWT. Atha Africa bases is allegation of a conflict of interest on the **Theron**[99] decision.[100]

78 At the outset we point out that the **Theron** facts are distinguishable from those of this case. The legal practitioner in that case was the provisional judicial manager for the applicant and had at some point acted as the applicant's attorney of record. He accordingly performed acts that were in conflict with each other.[101] It is evident that the legal practitioner was being pulled in different directions as a consequence of his function. The same cannot be said for the CER. It is not subject to conflicting duties or roles.[102]

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99 *Theron v Natal Markagente (Edms) Bpk* 1978 (4) SA 898 (N).

100 Atha Africa HoA, 008-195, para 7 and fn 15.

101 Theron, at 899G to 899H.

102 CER Affidavit, 008-372, para 30.

It is EWT's attorney of record. Its interest is aligned with that of its client. Its relationship with EWT is a professional one and that is where it ends.

79 The LPC Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Judicial Entities ("**Code of Conduct**")[103] does not prohibit legal practitioners from having objectives aligned with those of their client(s). In fact, it prohibits legal practitioners from placing themselves in situations where their interests are in conflict. Rule 3.5 obliges legal practitioners to:

> *"refrain from doing anything in a manner prohibited by law or by the code of conduct which places or could place them in a position in which a client's interests conflict with their own or those of other clients."*

80 CER's interests are not in conflict with those of EWT. On the contrary, they are aligned and are working together towards the same goal of ensuring environmental rights are realised and protected.

81 The Code of Conduct also provides, at rule 58.1, that legal practitioners should *"guard against becoming personally, as distinct from professionally, associated with the interests of the client."*[104] (Emphasis added)

82 The Code of Conduct prohibits neither the personal or professional association by a legal practitioner with their client's interest. It does however

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103 Notice 198, *Government Gazette* 42364, 29 March 2019.

104 Emphasis added.

instruct legal practitioner to guard against becoming personally associated with the interests of its clients. The legal practitioner's professional association of interests of their client requires no look out from the LPC.

83 As is the case with the PILCs and their clients, the CER's association with the interests of its client is professional in nature. This is borne out by the CER's Memorandum of Incorporation which provides that the object of CER is *"the provision of environmental legal services for poor and needy persons, including other environmental donor-funding public benefit organisations*".[105]

84 Atha Africa has not asserted that CER's association with EWT is personal. It certainly has not averred any facts or presented any evidence in support of such assertion. It cannot do so.

85 As a matter of fact, Atha Africa's concern appear to be related exclusively to the CER's professional interest — being an *"environmental lobbyist"*[106] that Ms Catherin Horsfield is the Programme Head for Mining at CER.[107] That is no basis for alleging or sustaining a complaint of a conflict of interests.

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105 CER Affidavit, annexure CH5, 008-409, clause 3.1.2.

106 Atha Africa HoA, 008-195, para 7.

107 Atha Africa Affidavit, 008-473, para 49 and 008-474, para 50.

86 Atha Africa's case against CER accordingly lack merit.

Intended to discourage the vindication of rights

87 That this is a SLAPP Suit is evidenced by: (a) the relief sought by Atha Africa; and (b) the effect the litigation is intended to have.

88 The first request made by Atha Africa is that the CER be referred to the LPC presumably for the LPC investigate (and possibly discipline) the CER. The investigation alone (whether misconduct is found to have occurred or not) will have the effect of preventing the CER from performing its functions as a public interest law centre. While such investigation is ongoing, it is unlikely that the CER (and many other PILCs like it) would perform the functions that have led to the referral. A referral to the LPC will also tarnish the name and reputation of the CER, thus making it even more difficult for it to assist its clients in the vindication of their rights.

89 The second request made by Atha Africa is that of costs (discussed above). We refer to the submissions that we made above to the effect that adverse costs order have the effect of dissuading PILCs from performing their functions. This is all the more the case where punitive costs orders are sought. This is clearly Atha Africa's intention. If it is not the intention, it is the consequence.

90 Therefore, the third requirement for SLAPP Suits is also satisfied.

91 On that basis, the PILCs submit that this court should affirm that Atha Africa's requests amount to a SLAPP Suit based on its demonstration that (i) the CER is engaged in public participation on a public issue; (ii) the contentions by Atha Africa are without merit, and (iii) they are intended to discourage the vindication of rights.

CONCLUSION

92 In conclusion, we submit that neither the CER, nor any public interest law centre that operates in a manner similar to the CER, acts in conflict of interest when it interests align with those of its clients. This methodology has been in use for decades and has been effective at dismantling legislated-Apartheid and advancing the cause for transformative constitutionalism. Finally, Atha Africa's requests fit the profile of a SLAPP Suit and should be classed and considered as such by the court.

Tembeka Ngcukaitobi SC

Adila Hassim SC

Buhle Lekokotla

Cingashe Tabata

Nomonde Nyembe

First to sixth *amici curiae*'s counsel

Chambers, Sandton

20 July 2021

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