

Balancing freedom of expression against reputation: The case of defamation claims and public figures

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Abstract

In the growing technological and digital landscape, the expression of ideas, thoughts, and statements has the capacity to reach a larger audience than previously imagined. As a result, reputational damage has become easier to inflict than ever before. This has led to a surplus in defamation claims instituted by public figures – notably the President of the United States, Donald Trump, and the Hollywood personalities Harvey Weinstein and Johnny Depp. A South African example is former President Jacob Zuma. Evidently, defamation claims by public figures are prevalent. This article challenges a public figure's ability to bring such claims by evaluating a recently recognised species of litigation in South African law, known as SLAPP ("strategic litigation against public participation") suits. This is a term used to describe claims that are brought under the guise of a bona fide defamation allegation but whose true agenda is to prevent criticism levelled against a company. This article advocates for this doctrine to apply equally to public figures, and, in so doing, undertakes a comparative analysis of South African and American jurisprudence on defamation. The article argues that public figures have greater means than other people to encroach on freedom of expression in bringing defamation claims and that allowing such claims to succeed can silence legitimate criticism and prevent matters of public importance from ever reaching the public.

Keywords: defamation; reputation; SLAPP suits; freedom of expression; public figures; vexatious litigation

1 INTRODUCTION

The legal concept of defamation draws on the constitutional imperatives of human dignity and the right to freedom of expression.¹ Legally, it is embedded within the personality right of *fama*, otherwise known as reputation, which is actionable under the law of delict.² Conceptually, reputation encompasses the right that persons have to their good name and freedom from unfounded attacks against their character.³

To appreciate the law on defamation, it is necessary to have a historical understanding of the right to human dignity and the right to freedom of expression is necessary, both of which have been constitutionally avowed in post-apartheid South Africa.⁴ Human dignity, enshrined in section 10 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) is regarded as the inherent value that an individual possesses.⁵ Human dignity is also a founding value of the Constitution, enjoying double constitutionality in this regard.⁶ The status of human dignity as a founding value necessitates its involvement in both the limitation and interpretation of other constitutional rights.⁷

Section 10 of the Constitution reads as follows: “Everyone has inherent dignity and the right to have their dignity respected and protected.” Section 16 of the Constitution in turn guarantees freedom of expression as follows:

- 1) Everyone has the right to freedom of expression, which includes-
 - a. freedom of the press and other media;
 - b. freedom to receive or impart information or ideas;
 - c. freedom of artistic creativity; and

¹ *Dikoko v Mokhatla* 2007 (1) BCLR 1 (CC) at para 53.

² Loubser M & Midgley R et al. *The law of delict in South Africa* 3rd ed Cape Town: Oxford University Press (2017) at 86.

³ Loubser & Midgley et al. (2017) at 91.

⁴ Constitution of the Republic of South Africa, 1996, ss 10 and 16.

⁵ Loubser & Midgley et al. (2017) at 86.

⁶ Section 1(a) of the Constitution states that “[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: [h]uman dignity, the achievement of equality and freedoms”.

⁷ The Constitution, ss 36(1) and 39(1)(a). Section 36(1) states that “[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ...” Section 39(1) provides that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.

- d. academic freedom and freedom of scientific research.
- 2) The right in subsection (1) does not extend to –
- a. propaganda for war;
 - b. incitement of imminent violence; or
 - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.⁸

The constitutional right to freedom of expression assumes an important role as part of South Africa's democratic regime, which seeks to uphold accountable governance and facilitate meaningful political discourse.⁹ According to Brand, the institutions typically entrusted with the furtherance of democracy where it concerns political discourse and informing the public are the press and other forms of media – hence their explicit mention in section 16 of the Constitution.¹⁰

In *Khumalo v Holomisa*, the Constitutional Court (CC) acknowledged that the media have a “particular” role in safeguarding freedom of expression in society.¹¹ More specifically, they play a significant role in the context of section 16(1)(b), which concerns the receiving of information and ideas.¹² The CC expounded on the role of the media in a democratic society, confirming that they are responsible for facilitating the exchange of information. As such, it held that they have a “constitutional duty to act with vigour, courage, integrity and responsibility”.¹³

The facts of this case concerned a politician who had brought a defamation claim against a newspaper for publishing a piece about him.¹⁴ The central issue was whether defamation, as it exists under common law, is consistent with the Constitution.¹⁵ This question came before the court after the applicants had argued the point that a failure to allege that a defamatory statement is false would unjustifiably infringe the right to freedom of expression.¹⁶ According

⁸ The Constitution, s 16.

⁹ Brand *R Media law in South Africa* Alphen aan den Rijn: Wolters and Kluwer (2011) at 35.

¹⁰ Brand (2011) at 36.

¹¹ *Khumalo and Others v Holomisa* (5) SA 401 (CC) at para 22 (“*Khumalo*”).

¹² *Khumalo* at para 22.

¹³ *Khumalo* at para 24.

¹⁴ *Khumalo* at para 1.

¹⁵ *Khumalo* at para 4.

¹⁶ *Khumalo* at para 4.

to the CC, defamation, as it pertains to societies founded on democracy, concerns the diverging rights of reputation and the right to freedom of expression.¹⁷

In deciding the issue before it, the CC ultimately held that the applicants in this case did not establish that the common law violated the Constitution. The CC reasoned that the reasonable publication defence (discussed further below) adequately safeguards the constitutional interests of both parties in a defamation suit.¹⁸

Thus, the conundrum that arises in the adjudication of defamation claims is the difficulty of balancing and reconciling these two rights, something which becomes more complex where a public figure is concerned.¹⁹ In this regard, “a public figure” generally means a person who, by virtue of his or her role in society, is exposed to a greater degree of publicity than others.²⁰ Given the largely digitalised space that society occupies today, reputational damage is arguably much easier to inflict than ever before. This is due in part to the growth of the internet and its associated web platforms and applications, which, in the form of social media, have become part of everyday life for billions of people.²¹ The ease with which information can be spread amplifies the danger of reputational injury.²² In essence, the more people the injurious information reaches, the greater the harm suffered.

This article, with reference to relevant journal articles and case law, analyses the extent to which public figures are weaponising the law of delict as it relates to defamation. It undertakes a comparative analysis of the legal system of the United States of America (USA) and that of South Africa, with a view to identifying legal reforms which might prove beneficial if incorporated into South African law, to ultimately serve in combatting the weaponisation of defamation claims. The US legal system has been selected in view of its experience in attempting to balance freedom of expression and protection of reputation, especially insofar as this relates to public figures and matters deemed to be in the public interest. The US legal system also recognises a similar set of defences to those in South African position, making it a fitting choice as a comparator. Furthermore, the South African courts have considered certain

¹⁷ *Khumalo* at para 26.

¹⁸ *Khumalo* at para 43.

¹⁹ Robinson & Yoshida (21 October 2022).

²⁰ *Tshabalala-Msimang and another v Makhanya and others* [2008] 1 All SA 509 (W) at para 39.

²¹ Sive D & Price A “Regulating expression on social media” (2019) 136 *South African Law Journal* 51 at 52.

²² Sive & Price (2019) at 52.

principles of US jurisprudence in adjudicating matters before them, a fact which this article will explore in some detail.

2 LEGAL PRINCIPLES RELATING TO DEFAMATION

2.1 The legal theory and principles of defamation

In South Africa, claims of defamation are actionable under the law of delict and instituted under the *actio iniuriarum*.²³ The law of delict is concerned with financially remedying any conduct caused through the fault of one party that results in harm to another.²⁴ The law of delict includes within its ambit of application a cluster of legal entitlements known as personality interests or personality rights, and is typically identified by a predominant trio – *corpus*, *fama* and *dignitas* – with the latter two being reputation and dignity, respectively.²⁵

Defamation and the law surrounding it originates in the common law and was first formulated in the South African context in *Leibenguth v Van Straaten*.²⁶ The landmark judgment under the constitutional dispensation is *Le Roux v Dey*, which characterised defamation by the following five elements: the (1) wrongful, (2) intentional, (3) publication (4) of defamatory material that (5) refers to the plaintiff.²⁷

Although reputation and dignity intersect to a degree,²⁸ there is a well-established distinction between them that must be maintained, one which becomes important upon the adjudication of defamation claims.²⁹ Dignity, as an independent personality right, encompasses the notion of self-esteem.³⁰ Consequently, a claim based on the infringement of the personality interest of dignity is subjective, merely necessitating proof that the plaintiff felt injured by what the defendant said.³¹ Dignity, as a constitutional right, concerns how individuals regard themselves

²³ Brand (2011) at 55.

²⁴ Loubser & Midgley et al. (2017) at 8.

²⁵ Loubser & Midgley et al. (2017) at 87.

²⁶ *Leibenguth v Van Straaten* 1910 TPD 1203. The court in this case had to consider whether the truth of a publication could mitigate the damages payable for the harm caused by the publication. It was of the view that public interest had to be argued in addition to truth in order for damages to be mitigated. See Descheemaeker E “A man of bad character has not so much to lose: Truth as a defence in the South African law of defamation” (2011) 128 *South African Law Journal* 452 at 467.

²⁷ *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae* 2011 (6) BCLR 577 (CC) at para 84.

²⁸ The character, sense of self-worth, or value of an individual, is the point at which reputation and dignity intersect.

²⁹ Loubser & Midgley et al. (2017) at 86.

³⁰ Loubser & Midgley et al. (2017) at 86.

³¹ Loubser & Midgley et al. (2017) at 86.

as well as their reputation, which can be construed as an objective enquiry. However, it can also be seen as subjective given how one views themselves. In addition, the objective component has an impact on the “subjective” impairment of dignity. This is because an external, negative perception of an individual usually results in a decline in that person’s self-worth. In other words, when individuals are aware that other persons believe that a loss of reputation has been suffered, they are naturally inclined to feel that their self-worth has been diminished. The right in the Constitution is therefore much broader than the right in delict.³² In this context, when one’s character is impugned, it can be said to be an encroachment on one’s right to human dignity.

Reputational damage, by contrast, concerns the publication of content which is alleged to be insulting to one’s character.³³ The more distinguishing feature between reputational damage and an infringement of dignity is that, with reputational damage, the defamatory content must be communicated to a third party and not solely between plaintiff and defendant.³⁴ Evidently, the difference lies in the chain of how the insults were conveyed: either solely to the plaintiff or to persons other than the plaintiff.³⁵ The defamatory content should result in a reduction in the status or standing of the plaintiff, where third parties or someone other than the plaintiff begin to view the plaintiff in a less favourable light.³⁶ Therefore, it can be said that dignity concerns injury to one’s self-esteem, whereas reputation concerns injury to one’s public perception. This distinction is important because, as will become apparent upon analysis of case law, defamatory material is assessed objectively, disregarding the defendant’s intended meaning in the publication and considering instead the meaning that a “reasonable reader” would arrive at.³⁷

³² *Le Roux* at para 138.

³³ Loubser & Midgley et al. (2017) at 91.

³⁴ Brand (2011) at 57.

³⁵ See *Ndobe v Gibela Rail Consortium Pty Ltd* (4241/2020) [2024] ZAGPJHC 1215 (27 November 2024) at para 9. The court confirmed that “[p]ublication” means the communication or making known to at least one person other than the plaintiff. In this case, the plaintiff brought a defamation case against his employer. The publication in question was an investigation report which had been circulated to those in attendance at the plaintiff’s disciplinary hearing. The court held that the mere distribution of the investigation report during a disciplinary hearing did not meet the requirement of publication for the purposes of a defamation claim.

³⁶ Loubser & Midgley et al. (2017) at 91.

³⁷ *Katz v Welz and Another* (22440/2014) [2021] ZAWCHC 76 (26 April 2021) at para 21 (“Katz”).

2.2 Case law on defamation claims concerning public figures

In the case of *Katz v Wetz*, the plaintiff instituted and succeeded in a defamation claim against the defendant for a publication that alleged the plaintiff's participation in fraudulent activities in the course of his professional work.³⁸ Interestingly, the plaintiff chose not to produce evidence of his good name and reputation, which would have been used in the estimation of his award for damages.³⁹ Despite this, the court rejected the inference that in the absence of evidence of public esteem one should be entitled to a lesser amount in damages.⁴⁰ This seems to point to a lacuna in the law, namely that even where no reputational damage is evident, a claim for defamation may still succeed. It undoubtedly broadens the scope of liability for defendants in defamation suits. This was reaffirmed in *Le Roux v Dey*, one of the landmark judgments on freedom of expression, dignity, defamation and reputational injury.⁴¹ The majority judgment in the Supreme Court of Appeal (SCA) held that it was not necessary for reputational injury to occur in order for defamation to exist.⁴²

Moreover, it is immaterial whether the public or third parties "believe" the defamatory statement or publication.⁴³ This reasoning appears to conflate the subjective notion of dignity with the more objective approach required when determining whether material is defamatory, given that the court's decision seems to hinge on how the plaintiff perceives the publication. Arguably, greater weight should be given to how third parties view or perceive such a defamatory publication, as this is what defamation is predicated upon (given the requirement of publication). An approach that favours how a plaintiff views the publication amounts to adjudicating the dispute as an infringement of dignity rather than of reputation.

Another shortfall is evident in *Heroldt v Wills*, where the court gave further content to the defence of truth in the public interest where a public figure is concerned.⁴⁴ The High Court in this case held that the defence does not operate without qualification and cannot be invoked to cover the publication of all information, albeit true, regarding public figures.⁴⁵ This reasoning,

³⁸ *Katz* at para 1.

³⁹ *Katz* at para 212.

⁴⁰ *Katz* at para 215.

⁴¹ *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae* 2011 (6) BCLR 577 (CC) at para 1 ("*Le Roux*").

⁴² *Le Roux* at para 216.

⁴³ *Le Roux* at para 216.

⁴⁴ *Heroldt v Wills* 2013 (2) SA 530 (GSJ) at para 45 ("*Heroldt*").

⁴⁵ *Heroldt* at para 45. The court clarified that, in the context of this defence, "it is not in the public interest that every titbit of information and not every morsel of salacious gossip about a public figure be made publicly known".

however, undermines the very criteria upon which the truth-for-public-interest defence is premised and creates uncertainty about the circumstances in which this defence would apply even if truth and public interest are satisfied. In particular, the court did not outline the parameters or limits of this defence in sufficient detail, as the concepts of “salacious gossip” and “every titbit of information”⁴⁶ may be construed broadly.⁴⁷ This makes it difficult to ascertain what kind of information would qualify for protection under this defence.

As is evident from the judgment in *Heroldt v Wills*, the courts have endorsed a view which seeks to guard against unearthing the past of a public figure.⁴⁸ This implies that an arbitrary time limit be adhered to when publishing information about public figures.⁴⁹ For example, where a public figure has been accused of sexual assault after a period of time has elapsed, would this disentitle a person to the use of available remedies because it amounts to a mere exposure of past conduct? This makes defamation defences malleably open to redefinition in the context of each case, in turn resulting in uncertain and inconsistent scope of application.

Defamation, though typically instituted by way of civil action, previously existed as a crime in South African law.⁵⁰ In this regard, criminal defamation was recognised as a common law crime.⁵¹ If instituted by way of criminal proceedings, the ramifications would undoubtedly be far more serious and even disproportionate. In particular, the common law crime of defamation carried a sanction of imprisonment or payment of a fine, whereas defamation, as a delict, would usually carry with it the payment of compensation in the form of damages for the harm suffered by the plaintiff.⁵²

Criminal defamation was considered by the country’s courts most recently in the 2015 judgment in *Motsepe v S*.⁵³ This case concerned an appeal against the conviction of the crime

⁴⁶ In *Heroldt*, the court made the point that the mere status of a person as a public figure, does not mean that every aspect of their life is a matter of the public interest. In other words, “salacious gossip” or frivolous information about a public figure, will not automatically meet the criteria of the truth for public interest defence.

⁴⁷ *Heroldt* at para 45.

⁴⁸ *Lyon v Steyn* 1931 TDP 247.

⁴⁹ *Lyon v Steyn* 1931 TDP 247 at para 30, where the court held that “[i]t could not be in the public interest to rake up the ashes of the dead past and accuse a man of having done something 30 years ago”.

⁵⁰ Loubser & Midgley et al. (2017) at 413.

⁵¹ See Snyman C *Criminal law* 6th ed Cape Town: LexisNexis (2014) at 467–468, where the author notes that criminal defamation originates in both Roman-Dutch and English law.

⁵² Manentsa T “Repealing legal barriers: A triumph for freedom of expression in South Africa” (5 June 2024) *Adams & Adams* available at <https://www.adams.africa/commercial-litigation/repealing-legal-barriers-a-triumph-for-freedom-of-expression-in-south-africa> (accessed 1 March 2026).

⁵³ *Motsepe v S* (A 816/2013) [2014] ZAGPPHC 1016; 2015 (2) SACR 125 (GP); 2015 (5) SA 126 (GP) (5 November 2014) (“*Motsepe*”).

of defamation in which the appellant had been sentenced by the court *a quo* to a fine of R10,000 or 10 months' imprisonment.⁵⁴ The court, quoting *S v Hoho*, confirmed that criminal defamation was a crime that encompassed the "unlawful and intentional publication of matter concerning another which tends to injure his reputation".⁵⁵ To be convicted on a criminal charge of defamation, the publisher of the alleged defamatory material must have had the knowledge that such publication was, or would be, unlawful.⁵⁶ In this case, the court went on to state that the criminalisation of defamation is not unconstitutional, even though it may conflict with the right to freedom of expression in section 16 of the Constitution.⁵⁷ The legislature has since intervened on this issue and, as of 2024, the crime of defamation no longer exists in South African law.⁵⁸

The decriminalisation of defamation marks a shift in South African legal jurisprudence. To allow defamation to continue to exist as a crime would, in my view, do more harm than good. In the age of information, it would discourage the general public from speaking up when they feel inclined to do so or even from sharing their opinions or corroborating stories on certain matters. Furthermore, the media would arguably also refrain from reporting on important matters for fear of criminal consequences, which would then hamper the essential role they play in society.

Nonetheless, the case law expounded upon above still indicates the inadequacies of the civil wrong of defamation. In particular, the courts' view that reputational injury is not required to be a relevant criterion in compensating for defamation is, in my view, flawed. Such an approach makes it unclear what exactly the compensation is geared towards. It would rather seem to be punitive (for the defendant) and not restorative (for the loss, professional or otherwise, suffered by the plaintiff). A further inadequacy is the apparent protection or indemnity afforded to the past conduct of public figures. This approach generates uncertainty as to exactly when an allegation is considered "recent" enough to qualify for protection under one of the recognised defences and will discourage legitimate information from being brought to the attention of the public. These principles from the cases discussed above highlight some of the shortcomings of

⁵⁴ *Motsepe* at para 1.

⁵⁵ *Motsepe* at para 5.

⁵⁶ *Motsepe* at para 6.

⁵⁷ *Motsepe v S* (A 816/2013) [2014] ZAGPPHC 1016; 2015 (2) SACR 125 (GP); 2015 (5) SA 126 (GP) (5 November 2014) at para 39.

⁵⁸ Section 34 of the Judicial Matters Amendment Act 15 of 2023 states: "(1) The common law relating to the crime of defamation is hereby repealed. (2) Subsection (1) does not affect civil liability in terms of the common law based on defamation."

the legal framework governing public-figure defamation (particularly the unsuitability of the defences) and thus point to the need to revise the legal response in this regard.

2.3 Defences against claims of personality infringements

Specific defences or grounds of justification are available where reputational injury or defamation is concerned, defences which seek to negate wrongfulness. These are fair comment, truth for public interest, and privileged occasion.⁵⁹ An additional fourth ground of justification has been established, namely the defence of reasonable publication, which is available only to media conglomerates.⁶⁰ Fair comment is characterised by its rather more lenient application which protects a statement that might not be completely true, provided that the facts which lay the basis for the statement, are actually true.⁶¹ Where reliance is placed on this defence, the defendant must, among other criteria,⁶² prove that the statement was clearly made as an opinion and that the information upon which it is based is true.⁶³

The truth-for-public benefit defence consists of a two-fold criterion: that the statement is indeed true⁶⁴ and that it was made in the interests of the public.⁶⁵ This defence is commonly invoked in relation to public figures. A further distinction can be made between voluntary and involuntary public figures. Voluntary public figures are deemed to be those who have chosen or consented to a life that may attract public attention.⁶⁶ This includes politicians and celebrities. An involuntary public figure, by contrast, is someone who enters the public eye despite not intending to do so.⁶⁷ This may be through his or her involvement in a matter which has been reported on in the media.⁶⁸

⁵⁹ Brand (2011) at 63.

⁶⁰ Loubser & Midgley et al. (2017) at 440.

⁶¹ Loubser & Midgley et al. (2017) at 443.

⁶² The additional criteria under this defence are that the allegedly defamatory publication was “fair”, that the factual allegations themselves were true, and that the comment made in relation to it was in the public interest. In defining what “fair comment” entails, the CC stated in *The Citizen 1978 (Pty) Ltd and Others v McBride* at para 81 that “the opinion must be one that a fair person, however extreme, might honestly hold, even if the views are extravagant, exaggerated or even prejudiced”.

⁶³ *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others as Amici Curiae)* 2011 (8) BCLR 816 (CC) at para 80.

⁶⁴ Loubser & Midgley et al. (2017) at 440.

⁶⁵ Loubser & Midgley et al. (2017) at 440.

⁶⁶ LegalClarity Team “What is a public figure in legal terms?” (21 January 2025) *LegalClarity* available at <https://legalclarity.org/what-is-a-public-figure-in-legal-terms/> (accessed 24 September 2025).

⁶⁷ LegalClarity Team (21 January 2025).

⁶⁸ LegalClarity Team (21 January 2025).

As far as public figures are concerned, statements made about them are deemed to be a matter of public interest. However, early judicial precedent has held that anything levelled against a public figure, albeit true, cannot be protected under this defence if it happened decades ago.⁶⁹ This principle has seen a slight modification in more recent judgments, one of which was *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others as Amici Curiae)*. Here the CC stated that “absent any public interest in the subject matter, past mistakes should not be raked up after a long period of time has elapsed”.⁷⁰ The public interest evidently plays a crucial role in determining whether a statement will be regarded as defamatory or not. However, it is unclear what qualifies as a “mistake”, as this concept may differ from person to person. Mistakes are arguably subjective: from a moral perspective, some have a more forgiving attitude than others to what count as mistakes. Similarly, a “long period of time” is not easy to quantify either. It may well be that even if an incident took place 30 years ago, it would still be relevant and in the public interest once reported on. In this regard, the Prescription Act 68 of 1969 specifically provides that that defamation claims prescribe one year from the date on which the plaintiff first became aware of the publication.⁷¹

The defence of privileged occasion protects certain statements from being susceptible to claims of defamation based on the setting in which they are made.⁷² This defence applies to comments made in parliamentary or other proceedings (known as absolute privilege). It is also applicable to comments that a defendant contends should be protected on the basis that they were made for a social, legal or moral purpose (known as qualified privilege).⁷³

The defence of reasonable publication operates to protect allegedly defamatory statements or publications, even those which are proven to be false.⁷⁴ This defence was comprehensively dealt with by the SCA in *National Media Ltd v Bogoshi*.⁷⁵ This case concerned an appeal after the judge in the court *a quo* declined to allow the appellant to amend its plea.⁷⁶ The facts

⁶⁹ *Lyon v Steyn* 1931 TDP 247 at paras 251–252.

⁷⁰ *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others as Amici Curiae)* 2011 (8) BCLR 816 (CC) at footnote 84.

⁷¹ Prescription Act 68 of 1969, s 3(2)(b) read with s 5(1)(a)(i).

⁷² Loubser & Midgley et al. (2017) at 448.

⁷³ Loubser & Midgley et al. (2017) at 449.

⁷⁴ Article 19 “Briefing note on international and comparative defamation standards” (February 2004) available at <https://www.article19.org/data/files/pdfs/analysis/defamation-standards.pdf> (accessed 29 December 2025) at 9.

⁷⁵ *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) (“*Bogoshi*”).

⁷⁶ *Bogoshi* at 2.

concerned the publication of allegedly defamatory articles pertaining to Mr Bogoshi.⁷⁷ The articles in dispute alleged that Mr Bogoshi (an attorney) was defrauding his clients and touting for professional work.⁷⁸ In this case, the court noted that the essential inquiry where this defence is raised is whether the publication of the information was reasonable.⁷⁹

In *Khumalo v Holomisa*, the court pronounced further on this defence, stating that the defendant is required to prove the veracity and public interest nature of the statement in order to succeed with this defence.⁸⁰ However, if it is impractical to do so, then the defendant must instead lead evidence to indicate that “in all the circumstances, the publication was reasonable”.⁸¹ Essentially, it must be proven that the defendant was not reckless or irresponsible in publishing the statement and that proactive steps were taken to verify the truthfulness of the statement.⁸²

The SCA in *National Media Ltd v Bogoshi* added another criterion to the reasonableness assessment, stating that the defendant should also invite comment from the allegedly defamed person and take steps to publish his or her response.⁸³ In practice, this would require a media publication to reach out to the defendant ahead of publication and ensure that his or her views are reflected in their public communications. This would result in publications offering a dual perspective from both the reporter and the person being reported on. This defence is thus commonly resorted to in the context of publications where the affairs of a public figure form the subject matter.⁸⁴

3 SLAPP SUITS: AN ADDITIONAL DEFENCE AGAINST DEFAMATION?

3.1 The definition and elements of a SLAPP suit

SLAPP lawsuits (“strategic litigation against public participation”) are claims of defamation which are instituted with the covert intention of silencing the author of the allegedly defamatory material to prevent public criticism and constrain him or her from publishing information that casts them in a negative light.⁸⁵ Such lawsuits are often characterised by their lack of merit,

⁷⁷ *Bogoshi* at 2.

⁷⁸ *Bogoshi* at 5–6.

⁷⁹ *Bogoshi* at 30–31.

⁸⁰ *Khumalo* at para 44.

⁸¹ *Khumalo* at para 43.

⁸² Brand (2011) at 68.

⁸³ *Bogoshi* at 28.

⁸⁴ Loubser & Midgley et al. (2017) at 452.

⁸⁵ Singh A “Silencing through litigation: Why South Africa needs anti-SLAPP legislation” (November 2025) *De Rebus* available at <https://www.derebus.org.za/silencing-through-litigation-why-south-africa-needs-anti-slapp-legislation/> (accessed 29 December 2025).

with their main goal being to force the defendant into silence rather than to advance a legitimate right or interest.⁸⁶ The ability to exercise free speech forms part of any democratic project that seeks to give effect to accountable governance and encourage healthy and constructive public debate; facilitating such debate is the large the role of the press and other media.⁸⁷ Typically, SLAPP suits are instituted against those who use their freedom of expression to draw attention to or advocate for deserving causes or matters deemed to be in the public interest.⁸⁸

Although SLAPP suits were already topical in various jurisdictions around the world,⁸⁹ it was not until the CC case of *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* (“*Mineral Sands case*”) in 2022 that SLAPP lawsuits were recognised in South Africa.⁹⁰ In this case, a series of defamation claims was instituted by the applicant against the respondents, a human rights-based organisation, for voicing their discontent about the applicant company’s mining activities.⁹¹ The court was tasked with determining whether SLAPP orders should be awarded independent legal recognition as a defence in South African law.⁹² It conceptualised SLAPP suits as a type of lawsuit directed at those who protest vocally on a matter deemed to be in the interests of the public.⁹³ This adds a specific distinguishing aspect to such a suit. Notably, the court added that such lawsuits are instituted under the guise of a legitimate right or interest worthy of being defended, whilst the true intention behind them is to sanction those who speak out in respect of public interest matters.⁹⁴

The respondents argued the following two points in defence of the defamation claim. The first was that merely instituting proceedings falls within the ambit of a SLAPP suit and that on this basis the applicants should not be successful.⁹⁵ The second was that a profit-run company cannot claim damages under the action of defamation unless it can prove that the statement was

⁸⁶ *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* 2023 (7) BCLR 779 (CC) at para 43 (“*Mineral Sands*”).

⁸⁷ Brand (2011) at 35.

⁸⁸ Safstrom J & Riedmueller R “What is a SLAPP suit? Legal experts explain how these lawsuits suppress free speech” (11 March 2025) *The Conversation* available at <https://theconversation.com/what-is-a-slapp-suit-legal-experts-explain-how-these-lawsuits-suppress-free-speech-251098> (accessed 25 September 2025).

⁸⁹ For more information on the prevalence of SLAPP suits in various international jurisdictions, see, for example, Muhs L et al. “The silent war before COP30: How corporations are weaponising the law to muzzle climate defenders” (11 November 2025) *forus* available at <https://www.forus-international.org/en/news/the-silent-war-before-cop30-how-corporations-are-weaponising-the-law-to-muzzle-climate-defenders-202322> (accessed 26 February 2026).

⁹⁰ Chamberlain (2021).

⁹¹ Chamberlain (2021).

⁹² *Mineral Sands* at para 7.

⁹³ *Mineral Sands* at para 2.

⁹⁴ *Mineral Sands* at para 2.

⁹⁵ *Mineral Sands* at para 14.

indeed false (this point was not adjudicated on in this judgment).⁹⁶ One of the elements of a SLAPP claim, as set out in the judgment, is that the purpose of the lawsuit is to exhaust defendants financially and embroil them in litigation to get them to retract their criticism.⁹⁷

The court also detailed the context in which such suits arise, namely where the matter is of public interest and the targets are the media and social justice advocacy groups.⁹⁸ Other identifying elements have also been recognised by scholars such as Chamberlain, who records them as follows:

- the plaintiff institutes an action for defamation on the basis that the defendant's publication has resulted in an infringement of the plaintiff's reputation;⁹⁹
- the plaintiff is usually financially and economically powerful or has a position of status in society and thus seeks to preserve those interests;¹⁰⁰
- the defendant is usually attempting to advance a social or human rights cause (as such, they are likely be either a non-governmental organisation or a media conglomerate);¹⁰¹
- the plaintiff, in instituting the SLAPP lawsuit, is doing so in an attempt to silence those who speak out against it or to prevent criticism against itself from being publicised;¹⁰² and
- the SLAPP lawsuit is accompanied by a claim for an excessive amount in damages.¹⁰³

Although these elements are not a closed list as to what constitutes a SLAPP suit, they serve as useful pointers for courts in determining whether a defamation claim is *bona fide* in nature or aimed at suppressing criticism.

The court in the *Mineral Sands* case held that the tactic of using the court to silence a defendant “undermines the Constitution” and amounts to “abusive litigation”.¹⁰⁴ This is so because if such lawsuits are successful, freedom of expression would be stifled. The lawsuits are also abusive in that the claim is brought neither in good faith nor with the intent to vindicate a right which

⁹⁶ *Mineral Sands* at para 7.

⁹⁷ *Mineral Sands* at para 43.

⁹⁸ *Mineral Sands* at para 44.

⁹⁹ Chamberlain (2021) at 417.

¹⁰⁰ Chamberlain (2021) at 417.

¹⁰¹ Chamberlain (2021) at 417.

¹⁰² Chamberlain (2021) at 417.

¹⁰³ Chamberlain (2021) at 417.

¹⁰⁴ *Mineral Sands* at para 94.

has been infringed. The court noted, furthermore, that South Africa's legal landscape can and should recognise SLAPP lawsuits.¹⁰⁵ The key principle emanating from this judgment is the recourse it now offers to those on the receiving end of these unfounded defamation claims. In essence, by recognising a special plea of SLAPP, a case may be dismissed at an earlier stage, to prevent further legal expenses.¹⁰⁶

The impact of the judgment was illustrated in the case of *Maughan and Another v Zuma*.¹⁰⁷ The respondent was former president Jacob Zuma, the subject of a number of controversies over the years.¹⁰⁸ The issue in this case was whether the summons he had brought against Maughan (and another, namely Downer) could be set aside.¹⁰⁹ The summons was for the purpose of instituting a private prosecution of Maughan and Downer.¹¹⁰ The basis on which Zuma sought to prosecute Maughan and Downer was that they had allegedly made certain unauthorised information known.¹¹¹ This information pertained to the contents of a medical letter that Maughan published on *News24* in regard to Zuma's hospitalisation amidst his contempt-of-court trial.¹¹² Both Maughan and Downer argued that the summons was an abuse of process.¹¹³ In particular, Maughan stated that it was not instituted in good faith and was rather a means to frustrate and hamper the performance of her job as a journalist.¹¹⁴

The court ultimately found that the summons was an abuse of process.¹¹⁵ It is worth noting that at this point Maughan was one of the only journalists to have continued reporting on Zuma's affairs, given that journalists had abandoned doing so due to legal action Zuma was threatening them with.¹¹⁶ This undertaking is synonymous with a SLAPP suit because, as the CC acknowledged in an *obiter*, "even the threat of litigation can stifle legitimate debate".¹¹⁷

¹⁰⁵ *Mineral Sands* at para 95.

¹⁰⁶ Chamberlain (2021) at 420.

¹⁰⁷ *Maughan and Another v Zuma* 2023 (2) SACR 435 (KZP) ("*Maughan*"). See also Harber A "SLAPPs in South Africa: The Karyn Maughan case" (10 July 2023) *Media Defence* available at <https://www.mediadefence.org/news/slapp-south-africa-karyn-maughan/> (accessed 16 October 2023).

¹⁰⁸ Wingard J "Freedom of expression" (29 October 2012) *In Focus* available at <https://www.dw.com/en/zuma-drops-rape-cartoon-case/a-16341023> (accessed 28 January 2024).

¹⁰⁹ *Maughan* at para 1.

¹¹⁰ *Maughan* at para 1.

¹¹¹ *Maughan* at para 15.

¹¹² *Maughan* at para 16.

¹¹³ *Maughan* at para 65.

¹¹⁴ *Maughan* at para 66.

¹¹⁵ *Maughan* at para 197.

¹¹⁶ *Maughan* at para 126.

¹¹⁷ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC) at para 105.

3.2 Public figures and defamation law

The lead-up to the aforementioned case highlights the need for the recognition of SLAPP suits. Political and other entertainment figures in South Africa have also instituted or threatened their own defamation claims.¹¹⁸ One such example is a defamation claim brought by the TV and radio personality Gareth Cliff against M-Net.¹¹⁹ Cliff was seeking R25 million in damages following his dismissal by the television network as a result of a comment made on the social media platform X (formerly Twitter) that led some people to label him as racist.¹²⁰ The comment in question pertained to a tweet to which Cliff had responded. The original post, made by Penny Sparrow, referred to black people as monkeys.¹²¹ In response, Cliff remarked that “[p]eople really don’t understand free speech at all”. In Cliff’s application before the court, he sought interdictory relief in the form of his immediate reinstatement at M-Net.¹²² This raises the question of whether the threat of defamation was merely a coercive tactic to ensure that M-Net would reinstate his employment.

Evidently, the threat of legal action through defamation is as harmful as instituting the claim itself, as it deters those who wish to exercise their freedom of expression by raising the fear of being embroiled in litigation. Thus, there is sufficient evidence to suggest, as has been outlined above, that public figures have tended to abuse the law of defamation, something necessitating a comprehensive legal framework to govern SLAPP claims.¹²³ The court noted further that instituting a defamation claim does not necessarily guard against or combat the reputational injury which has already occurred.¹²⁴ Ultimately, Cliff did not end up pursuing his defamation claim against M-Net when the latter reinstated his employment.¹²⁵

¹¹⁸ See, for example, Helen Zille’s defamation lawsuits against Julius Malema – “Zille pushes ahead with Malema defamation action” (5 April 2026) *Legal Brief Today* available at <https://legalbrief.co.za/diary/legalbrief-today/story/zille-pushes-ahead-with-malema-defamation-action/print/> (accessed 29 December 2025). See also Nonyane M “Zille slaps CoJ Speaker Makhubele with R200 000 lawsuit over defamatory article” (14 December 2022) *News24* available at <https://www.news24.com/citypress/news/zille-slaps-coj-speaker-makhubele-with-r200-000-lawsuit-over-defamatory-artice-20221214> (accessed 29 December 2025).

¹¹⁹ “Gareth Cliff’s lawyers call off R25 million lawsuit” (31 January 2016) *BusinessTech* available at <https://businesstech.co.za/news/media/110863/gareth-cliffs-lawyers-call-off-r25-million-lawsuit/> (accessed 29 January 2024).

¹²⁰ *BusinessTech* (31 January 2016).

¹²¹ *Cliff v Electronic Media Network (Pty) Ltd and another* [2016] JOL 35104 (GJ) at para 8 (“Cliff”).

¹²² *Cliff* at para 2.

¹²³ Emmamally Z “Slapping down SLAPP suits in South Africa: The need for legislative protection and civil society action” (2022) 139 *South African Law Journal* 1.

¹²⁴ *Cliff* at para 27.

¹²⁵ *BusinessTech* (31 January 2016).

This showcases how defamation claims, in and of themselves, do not necessarily vindicate the rights of the claimant. In other words, a mere finding of defamation does not restore the reputation of the defamed person. It does not serve to undo or erase that which has already come to the knowledge of certain members of the public. Defamation claims do, however, result in certain information or allegedly defamatory content being removed or taken down. This highlights how defamation claims do more to encroach on freedom of expression than to serve the rights and interests of their claimant.

4 A COMPARATIVE VIEW ON “SLAPP” LAWSUITS

4.1 Public figure defamation in the US

To appreciate the shortcomings of how defamation claims are treated in South Africa, it is useful to analyse the treatment of these claims by other jurisdictions in the world. As noted above, the US legal system has been selected for study in this article due to its experience in balancing freedom of expression and reputation when it comes to public figures and matters deemed to be in the public interest, given that the US is prominent on the global stage of entertainment, politics and general public interest matters.¹²⁶ The US judicial view will therefore highlight some of the markers that ought to be considered in South Africa in regard to defamation litigation.

In recent years, claims of reputational injury in the US have largely been termed “retaliatory defamation” claims.¹²⁷ The most notable example is the current US President, Donald Trump, whose threats to sue the women who accused him of sexual assault had the chilling effect of preventing them from speaking out against him for fear of litigation.¹²⁸ In fact, Trump did follow through on a defamation suit of this nature against E Jean Carroll, who alleged that Trump had sexually assaulted her.¹²⁹ Similarly, the Hollywood actor Johnny Depp successfully instituted a defamation claim against his former girlfriend, Amber Heard.¹³⁰ The claim was brought as a result of an article she published in which she detailed her experience of domestic

¹²⁶ See Usman M “The domination of global narratives by the US” (9 February 2026) *The Gazelle* available at <https://www.thegazelle.org/issue/52/usman-15> (accessed 29 December 2025).

¹²⁷ Whynot C “Retaliatory defamation suits: The legal silencing of the MeToo Movement” (2020) 94 *Tulane Law Review* Online 1 at 2.

¹²⁸ Whynot (2020) at 2.

¹²⁹ Scannell K “Donald Trump sues E. Jean Carroll for defamation” (28 June 2023) *CNN* available at <https://edition.cnn.com/2023/06/28/politics/trump-e-jean-carroll-defamation> (accessed 1 March 2026).

¹³⁰ *John C Depp II v Amber Laura Heard*, CL-2019-2911.

and sexual abuse by Depp.¹³¹ The outcome of this case has set a dangerous precedent in which, by merely speaking out, one opens oneself up to litigation and, as a result, has to recount events of traumatic weight, all in defence of the right to freedom of expression.¹³² The weaponisation of defamation is thus as equally prevalent in the USA as it is in South Africa.

4.2 The US legal perspective on defamation

There are a few parallels between the legal frameworks governing defamation in the USA and South Africa, namely the availability of truth as a defence. However, this defence has been shown to be unsuitable where it concerns subject matter as sensitive as sexual assault.¹³³ This unsuitability is due to the onus the defence places on victims of sexual assault to prove their allegations of sexual assault to succeed with this defence.¹³⁴

The defence of privileged comment is also recognised under the US legal system.¹³⁵ This refers to statements made in connection with (for example) court proceedings.¹³⁶ Such privilege would extend to any statement made during legal proceedings, whether by a judge or witness.¹³⁷ By virtue of being privileged, the statements cannot form the subject of a defamation claim.¹³⁸ The landmark case in the greater conversation regarding the defamation of public figures is *New York Times v Sullivan*.¹³⁹ This decision from the Supreme Court of the USA set an onerous standard to be met when proving defamation, especially where the person alleging defamation is a public figure.¹⁴⁰ The standard is termed “actual malice” and entails that, to succeed in proving defamation, a public figure must prove that the alleged defamatory

¹³¹ Covert B “Years after #MeToo, defamation cases increasingly target victims who can’t afford to speak out” (22 July 2023) *The Intercept* available at <https://theintercept.com/2023/07/22/metoo-defamation-lawsuits-slapp/> (accessed 30 January 2024).

¹³² Robinson & Yoshida (21 October 2022).

¹³³ Whynot (2020) at 26.

¹³⁴ This becomes the logical route to follow. To defend against a defamation action, the defendant (in this instance, the victim of assault) is placed in a position where he or she must prove or testify explicitly to the incident of assault in order to raise the defence of truth in particular.

¹³⁵ Jackson MD “The corporate defamation plaintiff in the era of SLAPPs: Revisiting *New York Times v Sullivan*” (2001) 9 *William & Mary Bill of Rights Journal* 493 at 496.

¹³⁶ Jackson (2001) at 496.

¹³⁷ LegalClarity Team “What is absolute privilege and when does it apply?” (8 August 2025) *LegalClarity* available at <https://legalclarity.org/what-is-absolute-privilege-and-when-does-it-apply/> (accessed 1 March 2026).

¹³⁸ Jackson (2001) at 496.

¹³⁹ Jackson (2001) at 491.

¹⁴⁰ Jackson (2001) at 491.

material was published with knowledge that it was false or without proper consideration as to whether the statement could be false.¹⁴¹

The court, in formulating this standard, emphasised that it is common practice for false ideas and statements to circulate in societies and an inevitable compromise if freedom of expression is to hold any legal worth.¹⁴² Here, it is important to note that, like South Africa, the USA recognises the right to freedom of speech, which is enshrined under the First Amendment of its Constitution.¹⁴³ It is also worth noting the similarities between the US and South African legal and judicial order. The USA has a constitution and, like South Africa, a bill of rights, institutions with which all other statutes and laws must be aligned.¹⁴⁴ Yet the difference between the First Amendment and section 16 of the Constitution is apparent from their phrasing. In the case of the First Amendment, the wording prohibits the US government from making any law that would limit freedom of speech or the press. South Africa's equivalent guarantees the right for all persons, subject only to instances where that freedom of speech may amount to hate speech.¹⁴⁵ The USA, in any event, also prohibits hate speech, but this is not expressly dealt with in the provision itself relating to free speech.¹⁴⁶

The rationale for assigning a heavier standard of proof to public figures stems from two factors that were laid out by the court in *Gertz v Robert Welch, Inc.* and which have been used as a test in determining whether a party constitutes a public figure.¹⁴⁷ First, public figures are in a better position than others to guard against their own defamation due to the influential positions they occupy and their ready access to the media, which could enable them to control the defamatory

¹⁴¹ *New York Times v Sullivan* 376 US 254 (1964) at paras 278–279.

¹⁴² Jackson (2001) at 497.

¹⁴³ The First Amendment of the US Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

¹⁴⁴ Motala Z “Independence of the judiciary, prospects and limitations of judicial review in terms of the United States model in a new South African order: Towards an alternative judicial” (1991) *Comparative and International Law Journal of Southern Africa* 285 at 288. See also section 39(2) of the Constitution, which requires all South African law to be interpreted in line with the Constitution: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

¹⁴⁵ Mhlakwana NP “The limitations of freedom of expression: South African and international studies” (2 December 2025) *Record of Law* available at <https://recordoflaw.in/the-limitations-of-freedom-of-expression-southafrican-and-international-studies/> (accessed 1 March 2026)

¹⁴⁶ Mhlakwana (2 December 2025).

¹⁴⁷ Jackson (2001) at 514.

narrative.¹⁴⁸ Secondly, public figures tacitly agree to a “voluntary assumption of risk” that includes the possibility of defamation or public criticism.¹⁴⁹

Turning to more current legal efforts to curb the weaponisation of defamation, is the USA’s recognition of anti-SLAPP lawsuits. These legal frameworks differ from state to state but align on a fundamental basis in that they each recognise a need for SLAPP suits.¹⁵⁰ Briefly, the US legal system can be understood as two-fold and comprising federal law and state law.¹⁵¹

The State of Louisiana, in the formulation of its own anti-SLAPP legislation and determination of whether a case falls to be dismissed because it constitutes a SLAPP claim,¹⁵² places the onus on persons bringing the defamation claim to prove that their claims are *bona fide* and that there is a prospect that the court will rule in their favour.¹⁵³ The State of California has also passed its own anti-SLAPP laws; these are contained in California’s Code of Civil Procedure, which protects comments made in the public interest.¹⁵⁴ Ancillary to this is a requirement that the person allegedly defamed prove that it is in the public interest that his or her case be heard.¹⁵⁵ As such, public interest would be established if the case appears to have merit, regardless of motive.¹⁵⁶ Whether a matter is in the public interest has little to do with the motive behind bringing the claim. The motive may be to stifle criticism or vindicate a right which has legitimately been infringed. Irrespective of which it is, the public-interest dimension of the matter is a separate issue for determination.

5 RECOMMENDATIONS

In the US context, the perception is that there has been a weaponisation of defamation claims. Nonetheless, the US courts have demonstrated an ability to address this through the “actual malice” standard and formulate the “public figure” test. These concepts have not been explored before South African courts in the adjudication of defamation claims. From a reform point of

¹⁴⁸ *Gertz v Robert Welch, Inc.*, 418 US 323 (1974) at para 344.

¹⁴⁹ *Gertz v Robert Welch, Inc.* at para 345.

¹⁵⁰ Whynot (2020) at 23.

¹⁵¹ “Federal law” refers to laws which are applicable across all the states of America, whilst state law applies only to a particular state. See further Mangope K & Alberts W “Something old, something new: Aspects of personality rights in the United States and South Africa” (2023) *Nelson Mandela University Law Journal* 43(3) 416 at 417.

¹⁵² La Civ Code Ann art. 2315 (2010).

¹⁵³ Whynot (2020) at 24.

¹⁵⁴ Whynot (2020) at 20.

¹⁵⁵ Whynot (2020) at 22.

¹⁵⁶ Whynot (2020) at 22.

view, California's anti-SLAPP legislative framework could be beneficial if applied in South Africa, which would ensure that all speech in the public interest is protected and thus promote freedom of expression.¹⁵⁷ Anti-SLAPP legislation aims to prevent the financial costs that would result from unfounded defamation claims.¹⁵⁸ Accordingly, when the defamation claim is instituted, the defendant may raise a special plea of SLAPP to have the matter dismissed before it reaches trial.¹⁵⁹ The onus then shifts to the party that instituted the defamation claim to show there is no improper motive on their part; that there is substance or value to their case; or that the public interest weighs in favour of allowing the case to be heard.¹⁶⁰

Furthermore, the public-figure doctrine¹⁶¹ recognised in American jurisprudence and *New York Times v Sullivan* as well as *Gertz v Robert Welch Inc* should be considered under South African law. This doctrine seeks to ensure that inequality in wealth and resources is curbed when it comes to the institution of SLAPP lawsuits. In addition, it would qualify the instances in which a party must be expected to tolerate heightened scrutiny. The actual malice standard of proof should also be employed. This standard goes further than the reasonable publication defence by taking the onus away from the defendant to prove the reasonableness of the publication and shifting it to the applicant to prove a deliberate or malicious intention to injure him or her. In addition, proof of reputational injury should be adduced when claiming damages.

SLAPP suits are a species of vexatious litigation, as highlighted in the *Mineral Sands* case's conceptualisation of SLAPP suits as a form of abuse of process; as such, the most suitable piece of legislation under which to deal with such claims is the Vexatious Proceedings Act, which would afford a speedier remedy compared to SLAPP suits.¹⁶² The Act entitles the High Court to bar a person from initiating legal proceedings where that person does not have adequate cause or where he or she is bringing the application for an illegitimate reason.¹⁶³ A new subsection could therefore be added to the Act to allow the High Court to similarly bar the initiation of legal proceedings where the claim fits the criteria of a SLAPP suit. Through enacting laws that guard against SLAPP suits, the threat of them is curbed as well.

¹⁵⁷ Whynot (2020) at 31.

¹⁵⁸ Emmamally (2022) at 24.

¹⁵⁹ Emmamally (2022) at 24.

¹⁶⁰ Emmamally (2022) at 31.

¹⁶¹ Which calls for a harsher degree of criticism to be tolerated by those in the public eye.

¹⁶² Emmamally (2022) at 31.

¹⁶³ Vexatious Proceedings Act 3 of 1956, s 2(1)(a).

6 CONCLUSION

Defamation claims are a frequent resort by those with public-figure status. It is thus clear that without explicit legislative proscription, the avenues for abuse of such claims are open, as the mere threat of defamation is as harmful as the institution of a defamation claim itself – both harm freedom of expression. US jurisprudence and legal frameworks reveal insight into the issue of abusive defamation claims and recognise the need for a higher standard of scrutiny to be applied to public figures. Without a clear framework in place to guard against bad-faith lawsuits, freedom of expression will suffer, thereby hindering the greater project of achieving a well-functioning democratic society. The enactment of anti-SLAPP legislation would thus provide greater certainty on the right to freedom of expression and simultaneously enhance this constitutional right, effectively closing the current gap that exists in South African law.

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