Cost orders and SLAPP suits as challenges to public interest environmental litigation in South Africa: a jurisprudential critique of recent developments

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DEDICATION

This thesis is dedicated to my mother, the late **Nolusapho P. Nogemane.** Though you never got to see this, you're on every page. To my father, **Norman M Nogemane** for his endless love, support and encouragement.

To my children Munashe, Tinashe and Akuwe. You have made me stronger, better and more fulfilled than I could have imagined. I love you to the moon and back.

The information used and presented in this thesis was correct and up to date on 30 September 2021 when research for this study was concluded. Any later political, social and/or legal developments have not been considered.

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ABSTRACT

Adverse cost orders and strategic litigation/lawsuits against public participation suits are potentially significant challenges to public interest environmental litigation. As a country that is in a developmental stage, there is bound to be clashes between those protecting the environment and those protecting their investments for example. When these two clashes, cost orders and strategic litigation/lawsuits against public participation suits usually enter the fray. This study thus investigates how both aspects have been adjudicated by the courts and how they manifest as challenges to public interest environmental litigation.

Keywords: public interest; public interest environmental litigation; adverse cost orders; SLAPP suits.

LIST OF ABBREVIATIONS AND ACCRONYMS

AU	African Union
CC	Constitutional Court
MPRDA	*Mineral and Petroleum Resources Development*
NEMA	*National Environmental Management Act*.
NEMBA	*National Environmental Management: Biodiversity Act*
NEMPAA	*National Environmental Management: Protected Areas Act*
NGO	Non-governmental organisation
SLAPP suits	Strategic litigation against public participation suits
SALRC	South African Law Reform Commission

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1 INTRODUCTION

1.1 Background

The year is 1965 and Consolidated Edison has obtained Federal Powel Commission authorisation to construct a power plant in New York at Stock King Mountain. This Stock King Mountain is known to be aesthetically scenic. A group of environmentally concerned people gather and challenge this federal decision, which is unfortunately denied on the basis of standing.[1] The issue is brought to the United States Second Circuit Court of Appeals, upon which the court emphatically holds that standing could be granted to these concerned people because they had a "special interest in aesthetic, conservational, and recreational aspects"[2] related to Stock King Mountain:

> In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas must be held to be included in the class of 'aggrieved' parties under s. 313 (b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.[3]

This case is believed to have heralded the development and recognition of Public Interest Environmental Litigation (here after PIEL). Public, or 'social' interest litigation[4] involves the "implementation and enforcement of rights vested in the general public or a segment of it".[5] Whether public or private, there is an acknowledgement that there is something public about the value or rights at stake and that such matters can be legally vindicated.[6] Thus, for a society that might be disillusioned by its government or by private actions, gathering up or having legal challenges through groupings along the lines of 'public interest' is a viable option.[7] This is because, in general, public interest litigation facilitates access to justice and functions as a way of making such access to justice a realisable reality.[8]

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1 *Scenic Hudson Preservation Conference v Federal Power Commission* (354 F2d 608, 1 ERC 1084) (2d Cir 1965), available at https://elr.info/sites/default/files/litigation/1.20292.htm.
2 *Scenic Hudson Preservation Conference v Federal Power Commission*.
3 *Scenic Hudson Preservation Conference v Federal Power Commission*.
4 Sang 2013 *Journal of African Law* 31.
5 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 21.
6 Konkes 2018 *Environmental Communication* 194.
7 Cote and Van Garderen 2011 *South African Journal on Human Rights* 167.
8 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 2.

Generally, public interest litigation is also a process of upholding the rule of law and facilitating public participation.[9] Justice Brian Preston, a globally known Environmental Judge and Chief Justice of the Land and Environment Court of New South Wales has observed that "an essential forum for reasserting [public] participation in the governmental process is in the courtroom".[10] In South Africa, for example, public interest litigation efforts have led to ground-breaking legal developments and the definition of policy choices. For instance, the decriminalisation of sodomy;[11] developments in relation to the treatment of detained illegal immigrants;[12] and the rollout of antiretroviral drugs for HIV/AIDS treatment[13] primarily emerged from public interest litigation. This perhaps serves as the essence of public interest litigation in general, as it could be an avenue through which silent, marginalised and perhaps even stifled voices find expression.

These issues take on a particularly interesting turn when considered from the perspective of a developing country. Such developing countries are engaged in various development processes and in this fervent quest, environmental justice considerations imperatively become part of the discussions and narratives.[14] Environmental matters are generally of importance to public interest litigation because the environment itself is often described as a 'common concern' or even of 'common heritage' to humanity.[15] Yet, as will be seen below, despite all the monumental milestones, there are some significant challenges to PIEL in South Africa.[16]

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9 Hamman 2015 *QUT Law Review* 173. Also see Schall 2008 *Journal of Environmental Law* 444, where it is held that "PIL helps to exercise control over the public authorities, and the judicial review of any official action strengthens the rule of law."

10 Justice Brian Preston as cited in Kallies and Godden 2008 *Alternative Law Journal* 194.

11 *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* [1998] ZACC 15; 1999 (1) SA 6.

12 *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC).

13 *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15.

14 Dilay, Diduck and Patel 2020 *Impact Assessment and Project Appraisal* 16.

15 Schall 2008 *Journal of Environmental Law* 420.

16 Some studies have also noted that there is a lack of jurisprudence on environmental rights in South Africa, which ultimately is a reflection of the extent to which PIEL is prevalent in South Africa. Chamberlain 2017 *Law Env't & Dev J* 3. Also see general discussions in Murcott 2015 *South African Law Journal* and Dugard and Alcaro 2013 *South African Journal on Human Rights*.

1.2 A synopsis of the challenges to PIEL

In the past, challenges related to public interest litigation included aspects related to sufficient, personal and direct interest in the matter (in relation to the person instituting the action).[17] As will be seen below, these challenges have now been largely addressed. The challenges that presently hinder public interest litigation in general are classified by Cote and Van Garderen as either internal or external challenges, which often overlap.[18] On the one hand, internal challenges could include the lack of expertise or organisational support, while the lack of resources, societal approval and even the political atmosphere of a state can potentially hinder the pursuit of public interest litigation from an external perspective.[19] Within the environmental context, another particularly intersecting challenge is the fact that the lack of a widespread array of expertise in those qualified to quantify potential impacts of environmental activities forces the few available experts to generally avoid being placed on public record.[20] This is because they are usually employed by large corporates and if they go against such entities in public interest cases, then their earning potential might be significantly curtailed. It seems, however, that with the rise of Non-Governmental Organisations (hereafter NGOs), most of the challenges that manifest are external.

However, such challenges must be considered from within their apt and proper context. To be sure, litigation itself, which is carried on usually by NGOs, is generally a measure of a last resort.[21] This is because litigation is expensive, time-consuming and it often results in adversarial contestations.[22] As such, issues that can be resolved with

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17 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 1. Also see Amechi 2015 *African Journal of International and Comparative Law* 395. Cases like *Cabinet for the Territory of South West Africa v Chikane and another* 1989 1 SA 349 (A) confirm this.

18 Cote and Van Garderen 2011 *South African Journal on Human Rights* 167.

19 Cote and Van Garderen 2011 *South African Journal on Human Rights* 167. Also see Budlender, Marcus and Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* 10.

20 Budlender, Marcus and Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* 12; Chamberlain 2017 *Law Env't & Dev J* 6.

21 Hamman 2015 *QUT Law Review* 161. Budlender, Marcus and Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* 23, noted that there are other strategies like political activism which could be used for social change.

22 Chamberlain lists some of the issues that make PIEL troublesome: " the small window of time available in which to take action before irremediable environmental damage is caused, the difficulties in quantifying environmental harm, the challenges in securing scientific experts willing to work 'against' industry, and the need to translate complex technical data into a language accessible to a judge." Chamberlain 2017 *Law Env't & Dev J* 12.

consultations and mediations are generally easier to dispose off faster. Consequently, it should then be obvious that if litigation is considered, then the issues at hand are important for those involved and the issues could at the very least galvanise public interest in environmental matters.[23] This is why costs and strategic litigation/lawsuit against public participation suits (hereafter SLAPP suits) become inhibiting as challenges to PIEL. This is because "the capacity of community groups to undertake effective legal action in the public interest, and not to be unnecessarily impeded by financial and procedural hurdles, goes to the heart of a viable democracy."[24]

A few years back, a group of senior counsels produced a report in which they made the claim that public interest litigation has been experiencing a "backlash" from the period of 2010 onwards:

> This is not unique to South Africa. Other constitutional democracies that have experienced thriving phases of progressive public interest litigation have found that a backlash or conservative resistance often follows an initial period of successful public interest litigation.[25]

PIEL has even gained infamy, with names as 'green lawfare' becoming a term of art and other countries like Australia going as far as making propositions that laws should be changed in a manner that limits the capacity of NGOs to challenge large scale developments in courts.[26] It is these developments, in South Africa and elsewhere, that make it necessary for the judiciary to do all it can to safeguard PIEL and the interests it seeks to protect.[27] How the judiciary does so is the subject matter of this discussion.

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23 Hamman 2015 *QUT Law Review* 161.

24 Kallies and Godden 2008 *Alternative Law Journal* 194. Also see general discussion in Rooney J "Class actions and public interest standing in South Africa: practical and participatory perspectives" 2017 *South African Journal on Human Rights* 406-428, where Rooney argues that litigation (through class actions and public interest) enhances democratic participation, especially when it concerns those who cannot fully participate in democratic processes.

25 Budlender, Marcus and Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* 14.

26 Konkes 2018 *Environmental Communication* 191.

27 Dugard 2008 *South African Journal on Human Rights* 226.

1.3 Research question

This research consequently poses the following question: *What do recent jurisprudential developments reveal about cost orders and SLAPP suits as challenges to public interest environmental litigation in South Africa?*

1.4 Objectives of the study

The primary objective of this study is to evaluate how the courts have dealt with cost orders and SLAPP suits as challenges to PIEL in South Africa. The secondary objectives, upon which the division of this mini-dissertation into chapters is based, include:

- From a generalised perspective, to establish the nature of, objectives, and potential risks associated with PIEL (Chapter 2);
- To evaluate how costs impede PIEL and how recent judicial decisions have dealt with the issue of costs (Chapter 3);
- To evaluate how SLAPP suits impede PIEL and how recent judicial decisions have dealt with the issue of costs (Chapter 4);
- To synthesize the discussion and establish what recent jurisprudential developments reveal about cost orders and SLAPP suits as challenges to PIEL in South Africa (Chapter 5).

1.5 Scope of study

For PIEL to thrive, the *trias politica* arms of state each have a role to play.[28] For example, the legislature has to ensure that there are enabling laws, while the executive has to ensure that they do not engage in practices that restrict participation, and courts then ensure that rights are vindicated. Mindful of how varied these roles could be, the scope of this study is therefore limited to the challenges to PIEL as they appear before the judiciary. Reference is only made to executive or parliamentary roles where necessary and only if context necessitates. Despite a number of challenges being noted above, the analysis for this study is only restricted to the cost orders and SLAPP suits. With the former, the cost orders discussed are those for which guidelines were established through

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[28] Hamman 2015 *QUT Law Review* 160.

what are now known as the *Biowatch* guidelines which were established in *Biowatch Trust v Registrar Genetic Resources and Others* (hereafter *Biowatch*).[29]

1.6 Research methodology

This study employs a desktop-based methodology. This methodology involves the analysis of primary and secondary sources (literature), which will be reviewed within the doctrinal and descriptive methods of analysis.

1.7 Chapter outline

This study takes the following structure:

1. Introduction
2. Public Interest Environmental Litigation
3. Cost orders in PIEL
4. SLAPP suits in South Africa
5. Conclusion

[29] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC). The case will be discussed under chapter 3 below. The discussion does not also differentiate between costs in constitutional litigation or general costs in superior courts. For specific comments on costs in constitutional litigation, see generally Ncube *The personal liability of public officials for constitutional litigation costs*.

2 PUBLIC INTEREST ENVIRONMENTAL LITIGATION

2.1 Introduction

The last chapter introduced the study and sought to give a broad overview of the aspects to be discussed in this study. This chapter seeks to, from a generalised perspective, establish the nature of, objectives, and potential risks associated with PIEL. The point of departure for this chapter is a generalised analysis of PIEL and how it plays out in South Africa. It further explores how it would create the necessary foundational basis for analysing how cost orders and SLAPP suits are legitimate challenges for PIEL. Consequently, this chapter seeks to answer the question: *Why is PIEL important and what is the legal framework supporting PIEL in South Africa?* This question is answered by a discussion of the following broad aspects:

- The notion of PIEL;[30]
- The legal framework supportive of PIEL;[31] and
- Potential associated costs of PIEL;[32]

These issues are in turn addressed below.

2.2 The notion of public interest litigation

2.2.1 Defining public interest litigation

Public interest litigation is known by various names, including 'test case litigation', 'social action litigation', 'human rights litigation', 'social change litigation', 'impact litigation' and also 'strategic litigation'.[33] As a result of this multiplicity of descriptions, it is difficult to have one singular definition. The South African Law Reform Commission[34] (hereafter SALRC) has endeavoured to describe public interest litigation as:

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30 Section 2.2.
31 Section 2.3.
32 Section 2.4.
33 Karim 2019 *Environmental Policy and Law* 146.
34 Formerly known as the South African Law Commission. This was the name of the Commission at the time of the report cited below.

> An action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. Judgment of the court in respect of a public interest action shall not be binding (res judicata) on the persons in whose interest the action is brought.[35]

Thus, one could state that public interest litigation relates to some concern that is common and of interest to the well-being of the public, or as Sang calls it, public welfare.[36] Sang goes on to describe public interest litigation as a process where "public-spirited individuals, interest groups or communities" institute proceedings for the purposes of enforcing the public's interest in a particular issue.[37] From within the environmental context, this is what others would call 'environmental citizen suits', which describe "any proceeding brought by either a public-spirited citizen or an NGO seeking to enforce the rights or obligations created by environmental laws."[38]

Ultimately, if a list is to be created on what constitutes public interest litigation, it could probably include the following:[39]

- The public would have an interest in the outcome of such a case;
- The applicant(s) would generally not have personal pecuniary interest in whatever outcome of the case; and importantly,
- The issues raised by the case go beyond the immediate interest of the parties.

2.2.2 The necessity of PIEL

South Africa has a history of a political setup that marginalised people. Because of this, the idea of public interest litigation was never an avenue that was available to such marginalised people, let alone groups (in the form of public interest groups).[40] This is precisely why the Apartheid system of governance and its policies survived for so long. In other words, when legal actions are pursued for the benefit of a large group in the

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35 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 24.
36 Sang 2013 *Journal of African Law* 31.
37 Sang 2013 *Journal of African Law* 31. Also see Konkes 2018 *Environmental Communication* 192, were its held that "as legal proceedings where a successful outcome is intended to extend beyond the parties to have positive consequences for broader society". Also see Rooney 2017 *South African Journal on Human Rights* 411.
38 Amechi 2015 *African Journal of International and Comparative Law* 388.
39 Schall 2008 *Journal of Environmental Law* 419.
40 Cote and Van Garderen 2011 *South African Journal on Human Rights* 170.

form of a public interest cause, change could happen. Although they were writing specifically on public interest litigation in relation to migrants, Cote and Van Garderen state as follows:

> By their very nature individuals are often very mobile, poor and forced to weigh up seeing litigation through to the end with finding work to support their families. Their issues, however, often affect large numbers of people and a declaration of the action as unlawful may have a benefit for the wider community in general.[41]

Ideally then, public interest cases are suited for instances where a number of people or a section of society has similar claims or defences.[42] The SALRC was aware of this, and was ultimately of the view that there had to be a specific and dedicated statute dealing specifically with public interest litigation.[43] While this did not eventually happen, there is a case to be made for the necessity of PIEL.

2.2.2.1 PIEL partially evens out the regulatory playfield

PIEL is necessitated by the existence of power imbalances. Horizontally, corporate bodies have power and financial resources enough to fight most legal battles against individuals and among themeselves. States also have power and resources and could get away with weak regulation.[44] Worse still, incidents of 'capture' do at times exist, where "regulating agencies develop relationships with regulated industries such that they are incentivized to overlook violations", with a result that "citizen enforcement actions can correct such excessive cooperation and supplement agency enforcement."[45] Thus, when grouped together under a 'common' issue/aspect that affects the general 'public', the cliché of 'strength in numbers' opens up possibilities. Public interest thus partially evens out the playfield and contributes to citizens also having their voices heard in courts.[46] As noted earlier, it was indeed through the combined efforts of a multiplicity of actors that

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41 Cote and Van Garderen 2011 *South African Journal on Human Rights* 171.

42 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 2.

43 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 5.

44 Goldman 2006 *Vt J Envtl L* 261.

45 Chu 2018 *Ecology LQ* 504. Also see Konkes who argues that "[l]itigation is also undertaken to apply political pressure by revealing the complicity of governments and other stakeholders to break and breach laws in a way that contributes to environ- mental harm", Konkes 2018 *Environmental Communication* 199. Another equally important factor is where governance simply fails on the part of the executive. Courts could thus act as an avenue for enforcing existing laws and even bringing those who violate rights to account. See Frynas 2004 *The Journal of Modern African Studies* 365.

46 Goldman 2006 *Vt J Envtl L* 261; Brennecke *Facilitating public interest environmental litigation through locus standi: a comparative analysis of South Africa and Germany* 8.

developments in HIV and AIDS medications[47] or developments in laws against sodomy;[48] etc. were developed in South Africa.

2.2.2.2 PIEL facilitates accountability

Related to the above, and because of the power imbalances, PIEL could arguably be considered as a facilitator for the pursuit of sustainable development, which could facilitate accountability. For example, if a state engages in a process that seems to favour economic or social considerations at the expense of the environment,[49] or if a company refuses to release information that could be used to enforce environmental rights,[50] then concerned groups or citizens can institute actions for redress and in line with the dictates of sustainable development. One could state that NGOs, through public interest litigation, are the watchdogs on behalf of society: "public interest litigation has proven itself a useful tool in shaping public policy and giving a voice to vulnerable and marginalised individuals and communities."[51] If anything, PIEL is also an indirect form of governance in that it prompts "more aggressive enforcement action by enforcement agencies."[52] What this ensures is that environmental governance is pursued within the prism of the rule of law. As Amechi states, PIEL ensures that "the environmental decision-making process is governed by the rule of law and not the rule of bureaucrats and Ministers".[53]

2.2.2.3 PIEL facilitates public participation

Related to the above, PIEL facilitates public participation.[54] This can happen through a variety of ways. For example, PIEL can allow for citizen participation through its potential

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47 In cases like *Minister of Health and Others v Treatment Action Campaign and Others*.

48 In cases like *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others*.

49 See for example the case of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC). Here, a group of fuel retailers challenged the decision of the environmental authority to grant a license for a service station on the basis that the balancing of interests (within the meaning of sustainable development) was not done appropriately.

50 See for example the case of *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA). In this case, Arcelormittal had refused to give the concerned group information related to their environmental management plan, which information contained the company's plans on how to remediate environmental damage as well as its overall environmental plan in relation to its operations.

51 *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC)

52 Zinn 2002 *Stan Envtl LJ* 133; Schall 2008 *Journal of Environmental Law* 444.

53 Amechi 2015 *African Journal of International and Comparative Law* 389.

54 Amechi 2015 *African Journal of International and Comparative Law* 388.

to canvas public opinion and perceptions about pressing issues affecting the environment.[55] This could lead to policy reforms, since PIEL "not only develops important legal and administrative principles, but can also provide a focal point for public debate that, in turn, can inform political decision-making and highlight issues for law reform."[56]

Since PIEL is specifically known to be one of those fields of litigation where poor communities are often pitied against powerful corporations or against government authorities.[57] When tied to specific environmental constitutional provisions in bills of rights for example, and given that rights have concomitant obligations, the language of rights arguably creates an impetus for mobilising public awareness along the interest of an environmental cause.[58] Thus, it is clear that on the one hand, PIEL is a 'strategic' form of litigation "often employed strategically as a motor for social change, and particularly aims to advance the cause of minority or disadvantaged groups, or individuals who have no voice".[59] While on the other hand, PIEL is just as equally useful to those with a voice and to those that are not disadvantaged. One could state that public interest litigation is a 'double edged sword', capable of being used in various scenarios by various players in issues that implicate matters of public concern. In this regard, public interest could thus also bring community and perhaps even national attention to policy decisions or private actions that have the potential to impact public policy issues, like environmental protection, for example.

2.2.2.4 PIEL enriches environmental jurisprudence

In countries where there are no environmental rights provisions, environmental protection could be generally pursued through public interest concerns in, for example, land or even water protection matters.[60] This is partly because PIEL shifts emphasis from the protection of private rights to those of the public.[61] Yet even more compelling is the fact that where countries have constitutionalised environmental rights provisions, PIEL

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55 Hamman 2015 *QUT Law Review* 160.

56 Konkes 2018 *Environmental Communication* 192. Konkes further notes that "environmental public interest litigation can create the kind of debate that informs political decisions to adopt, amend or repeal laws in response to the public pressure." Konkes 2018 *Environmental Communication* 199

57 Kallies and Godden 2008 *Alternative Law Journal* 194.

58 van Geel 2017 *Maastricht University Journal of Sustainability Studies* 66.

59 van Geel 2017 *Maastricht University Journal of Sustainability Studies* 57.

60 Sang 2013 *Journal of African Law* 32.

61 Schall 2008 *Journal of Environmental Law* 419; Sang 2013 *Journal of African Law* 32.

could foster the development of environmental rights jurisprudence, while ensuring that governance actors plan through an environmentally conscious framework. There is proof to this. For example, the inclusion of a justiciable environmental right within the *Constitution of the Republic of South Africa*,[62] has meant that environmental issues are now at the forefront and are afforded protection. The Supreme Court affirmed this in *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*[63] where it stated that:

> Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.[64]

Viewed within this light, one could say that PIEL represents an 'ecological awareness' on the part of the public in matters that affect them in ways that implicate the environment.[65] PIEL has thus become commonplace and is even branching out, with one recent study even coming up with the concept of "climate change public interest litigation".[66] This, as some scholars argue, is an indication that there are not enough conversations between industry and government on the one hand and communities on the other in relation to environmental issues/concerns affecting communities.[67] Ultimately, it is clear and evident that when PIEL is used/employed well, it ensures that there is transparent decision-making, law reform where necessary and even an advancement of the rule of law.[68]

It suffices to say that in an age where social media and the internet have become commonplace, it bears repeating that public interest litigation causes have the potential to galvanise public opinion, which could in turn force action on the part of the government

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62 1996.

63 *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA).

64 *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*, para 20.

65 Konkes 2018 *Environmental Communication* 194.

66 See the work van Geel O "Urgenda and Beyond: The past, present and future of climate change public interest litigation" 2017 *Maastricht University Journal of Sustainability Studies* 56-72 and recently Pain N and Pepper R "Legal costs considerations in public interest climate change litigation" 2019 *King's Law Journal* 211-223.

67 Kallies and Godden 2008 *Alternative Law Journal* 194.

68 Hamman 2015 *QUT Law Review* 159.

or private entities.[69] However, as will be shown below, it is also such publicity that leads large institutions like corporations instituting defamation cases against even individuals or human rights defenders.

2.3 The legal framework supporting public interest litigation in South Africa

There is a link between the political and legal setup of a country and the incidence of public interest litigation in general.[70] For example, research has shown that public interest refugee cases rose after South Africa had ratified the 1951 *United Nations Convention on the Status of Refugees*, in 1993:

> With the apparent lack of political support for this system and the Department of Home Affairs' increasing unwillingness to engage with civil society, litigation soon became the only option open to NGOs working in the field of refugee protection.[71]

There must therefore be an enabling legal environment, complete with provisions relating to access to courts as well as the capacity to institute legal proceedings. These issues, as they pertain to South Africa, are discussed below.

2.3.1 Access to courts

With the demise of Apartheid, and the subsequent turn to the 1996 *Constitution* with its elaborate Bill of Rights, this meant that at the very least, there are litigable and justiciable rights within the *Constitution*. Where litigable and justiciable rights exist, there must be a concomitant right of access to courts to enable the vindication of those rights. Such access to courts is closely related to access to justice. The latter is described as involving "a wide range of socio-legal measures including the provision of information, legal education (for example, workshops and guidebooks) and law and policy reform."[72] Added to this is at least the opportunity to have issues vindicated by a government body that is

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69 Some scholars are even more optimistic, going as far as to suggest that even judges are noticing public trends and social media activism: "[c]ampaigns by non-governmental organisations (NGOs), media reports about the damage inflicted by corporations, and social change more generally, have made judges more responsive to those injured by corporate acts. As the public has increasingly come to accept that corporations should pay greater attention to and be responsible for the effects of their operations, judges have inevitably been affected by this shift." Frynas 2004 *The Journal of Modern African Studies* 375. The extent to which this is true is however arguable.

70 M&G 2018 https://mg.co.za/article/2018-10-12-00-public-interest-law-and-the-struggle-for-social-justice/.

71 Cote and Van Garderen 2011 *South African Journal on Human Rights* 170.

72 Hamman 2015 *QUT Law Review* 163.

independent from the other two powerful actors (executive and parliament). The courts are thus the 'vanguards' of rights and represent probably the last line of defence when contestations about rights, especially those related to the public interest, could be in issue.[73] This process of balancing competing interests between, for example environmental concerns and the pursuit of development, can only bear fruit or even be initiated if access to courts is viable:

> The court pre-eminently is a forum where the individual citizen or community group can obtain a hearing on equal terms with the highly organised and experienced interests that have learned so skilfully to manipulate legislative and administrative institutions.[74]

As a result, both the availability of litigable issues (stemming from valid legal rights) and procedural gateways of access to courts are necessary for the realisation of and fulfilment of rights.[75] Without both, rights are meaningless.

In South Africa, access to courts is guaranteed through section 34 of the *Constitution*, which provides as follows:

> Everyone 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.

This provision is believed to have sought to address the at times, archaic provisions of the past which ousted the jurisdiction of the courts in adjudicating over executive and parliamentary decisions.[76] This was a clear denial of access to justice for victims of state action. This is why, in the context of PIEL, access to courts is believed to run parallel with judicial activism. This is because it usually leads to results or redress oriented judging on the part of courts: "in the context of public interest litigation, judicial activism can be broadly characterised as judges pushing the boundaries of existing law for political purposes."[77] The SALRC further confirms the necessity of access to courts for the purposes of PIEL by noting that it indicates "the willingness of courts to listen to

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73 May and Daly *Global Environmental Constitutionalism* 88.
74 Sax *Defending the Environment: A Handbook for Citizen Action*, xviii
75 Amechi 2015 *African Journal of International and Comparative Law* 384.
76 Budlender 2004 *South African Law Journal* 339.
77 van Geel 2017 *Maastricht University Journal of Sustainability Studies* 58.

interveners" which translates to "a reflection of the value that judges attach to people."[78] The SALRC concludes by stating that:

> Our commitment to a right to a hearing and public participation in government decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.[79]

It is quite clear then that the vindication of any rights (let alone public interest litigation), is highly dependent on constitutional provisions as well as the complementary practice that is supportive of the right of access to courts.

However, once it is settled that everyone has the right of access to courts, there has to be a determination of the category of persons that can actually legitimately bring specific types of cases to courts, especially when issues of importance as 'public interest' matters are concerned. This aspect is discussed below.

2.3.2 Standing/locus standi

In the past, and in various jurisdictions, one had to clearly show that they had sufficient interest in a case before the courts could entertain such case or vindicate rights complained of.[80] For example, in the South African High Court case of *Von Moltke v Costa Areoso,*[81] an individual who had become tired of city life decided to move to a quiet place close to nature around Sandy Bay in the Cape, away from the crowds. It so happened however, that after he moved, the respondent received authorisation to develop a township around Sandy Bay. The applicant approached the courts arguing on the basis of public nuisance and disturbance to the environment. The High Court dismissed the case, finding that the applicant had to show personal injury to himself, beyond merely alleging the existence of a public nuisance.[82]

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78 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 23.

79 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 23.

80 Goldman 2006 *Vt J Envtl L* 259; Sang 2013 *Journal of African Law* 31; Chu 2018 *Ecology LQ* 488. *Ferreira v Levin NO and Others* (CCT5/95) 1996 (1) BCLR 1.

81 *Von Moltke v Costa Areoso (Pty) Ltd* 1975 1 SA 255 (C).

82 *Von Moltke v Costa Areoso (Pty) Ltd* 258. This was in keeping with the practice that *actio popularis* actions were not recognised in South Africa. See for example early judgments like *Bagnall v The Colonial Government* (1907) 24 SC 476, where the court found the *actio popularis* was not applicable as only the individual directly harmed had a cause of action.

Yet in recent times, there is an open acknowledgement that such restrictive measures inhibit environmental protection:

> Many environmental injuries are less direct or personal. For example, water pollution discharges may pollute a lake that is used but not owned by people in the community for fishing and recreation; commercial development may destroy pristine lands and lead to extinction of wildlife species. Oftentimes, individuals will be not able to demonstrate a directly affected legal interest that would have enabled them to establish standing under the common law.[83]

Clearly then, interest in a matter does not have to be '*inter partes*', as one does not need to be directly affected or adversely impacted by any activity for them to have an interest in either the proscription of or regulation of such activity.[84] In the environmental context, such restrictions would have obvious limitations because of how expansive the environment is. A clear example is climate change. It would be challenging for an individual to sue and show personal injury or direct interest on the basis climate change considerations.

For the reasons above, there are expansive constitutional provisions on *locus standi*. In terms of section 38 of the *Constitution*:

> 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) an association acting in the interest of its members.[85]

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83 Goldman 2006 *Vt J Envtl L* 259.

84 Hamman 2015 *QUT Law Review* 160. Hamman states that PIEL in itself in particular is rarely "*inter partes*".

85 Own emphasis. It is important to also note that South Africa's framework environmental law, the *National Environmental Management Act* 107 of 1998 almost similar provisions. It specifically states as follows in section 32: (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources- (a) in that person's or group of person's own interest; (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings; (c) in the interest of or on behalf of a group or class of persons whose interests are affected; (d) *in the public interest*; and (e) in the interest of protecting the environment.

It is clear from this provision that the removal of inhibiting criteria like personal, sufficient and direct interest have meant that there are now expanded horizons for instituting actions. For example, it is now possible for one to institute action in the public's interest in preventing animal abuse.[86] However, Currie and de Waal argue that of all the above provisions detailing *locus standi* under section 38, the provision on public interest [section 38(d)] is the one that presents challenges.[87] The problematic nature is detailing exactly what could count as falling within the public's 'interest'. Thus, in her minority judgment in *Ferreira vs Levin*,[88] justice O'Regan set out a number of factors which could be used to determine if an issue was really brought to the court for an actual 'public interest' cause:

> Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be considered in the light of the facts and circumstances of each case.[89]

There is therefore not a closed list of requirements, but rather factors that are characteristic of a public interest case. This was also confirmed in the 2004 case of *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*.[90] The matter was an immigration related case, involving an Ann Francis Eveleth who had been detained under the *Immigration Act*[91] for over 7 days without being presented for trial. As applicants, both Lawyers for Human Rights and Ann Francis Eveleth relied on the provisions of section 38(d) to argue that the matter deserved the Constitutional Court's (hereafter CC) attention because it was one implicating public interest matters. The constitutionality of some provisions of the *Immigration Act*[92] which were used to detain and eventually deport illegal foreigners were being challenged as being contrary to the

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86 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 6.
87 Currie and De Waal *The bill of rights handbook* 83.
88 *Ferreira v Levin NO; Vryenhoek v Powell NO*.
89 *Ferreira v Levin NO; Vryenhoek v Powell NO*, para 234.
90 *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*.
91 *Immigration Act* 13 of 2002.
92 Some of the provisions included, among other provisions, sections 34(2) and 34(8). The provisions respectively curtailed or limited freedom and security of the person as well as the right to be released or to appear before a court or tribunal within 48 hours of arrent.

spirit and purport of the *Constitution*. Thus, in addition to the factors established by justice O'regan in *Ferreira vs Levin*, justice Jacoob added that:

> The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. *I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis*.[93]

Based on these courts' findings, it suffices to say that unlike in the past where parliamentary sovereignty ruled, and where an individual was constrained in their capacity to enforce rights, section 38 has considerably expanded the borders of *locus standi*. Thus, while in normal actions a direct interest is still required,[94] public interest actions and specifically the broadened horizons of section 38 could be considered exceptions to such general rule.

2.4 Potential associated "costs" of PIEL

In a discussion of this nature, one should be cautioned against naivety. There is indeed a cost associated with PIEL which could be borne by states and corporations. These are briefly referred to below.

2.4.1 Risk to states

Whilst speaking specifically on litigation against transnational corporations, Frynas argued that "litigation creates a legal liability risk, i.e. the risk of becoming liable for social and environment damage" and that "in extreme cases, this risk can prevent a potential investor from committing funds …"[95] This can possibly happen in Africa. This is because research has shown that public interest litigation generally happens around natural resource extraction issues in Africa, simply because many African countries have these in

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93 *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*, para 18. Own emphasis.

94 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 12.

95 Frynas 2004 *The Journal of Modern African Studies* 377.

abundance.[96] As such, if countries are heavily reliant on natural resources, and if there is a litigious community around such natural resources, that might scare off potential investors. It is for reasons as these that Australia, for example, is mulling the idea of enacting laws limiting NGOs from challenging large-scale developments which end up being costly.[97]

Also, it should be certain that when government authorities are taken to courts under PIEL, they are likely using tax payers' money.[98] While the expenditure could be seen as processes of perhaps enforcing accountability, they still come off as costs that could have been redirected for other priorities, which are many for a developing country like South Africa.

2.4.2 Risks to corporations

Financial risks could be experienced by corporations as a result of PIEL. While this is not unique to PIEL, the latter is usually well publicized, which ultimately makes commercial activity become costly beyond initially projected costs. Specifically, from an investment perspective: "[a]t a minimum, litigation could render commercial operations costly, for instance, through higher cost of capital for infrastructure development projects such as hydroelectric dams or other projects which are considered risky from a legal or 'ethical' perspective"[99] Arguably, at times corporations do suffer considerable loses from delayed activities caused by litigation since companies make investments which are normally executed under specific timelines.[100]

More so, even if a PIEL case does not result in guilt or damages apportioned to a corporation, such victory rarely compensates on aspects like lost time or lost investments and potential revenue streams.[101] This is why PIEL also potentially carries a reputational

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96 Frynas 2004 *The Journal of Modern African Studies* 378.

97 Konkes 2018 *Environmental Communication* 191.

98 See for example discussions in Onselen 2017 https://www.businesslive.co.za/fm/features/2017-02-16-counting-the-costs-of-governments-legal-fees/. Also see News 2021 https://www.sabcnews.com/sabcnews/north-west-government-records-litigation-bill-of-over-r6-6-billion/.

99 Frynas 2004 *The Journal of Modern African Studies* 379.

100 Frynas 2004 *The Journal of Modern African Studies* 377.

101 Frynas 2004 *The Journal of Modern African Studies* 378. The scholar also observes that "[a] legal victory by a company several years down the line may not compensate for the adverse publicity generated by a lawsuit."

risk for corporations.[102] This is because branding has become a significant part of an entity's overall perceptions. Thus, once such reputational damage has set in, it could be difficult to correct and to restore the clean brand, such that even if an entity engages in other corporate social responsibility activities, they might still be associated with a bad reputation. For example, Shell is forever associated with the Ogoni land human rights violations and for the circumstances around the murder of Nigerian environmental defender Ken Saro Wiwa.[103] It stands to reason then that companies do have legitimate justifications to fight back when their interests are under threat.

2.5 Conclusion

What is particularly significant about PIEL is that it puts environmental interests at the centre stage. PIEL lays emphasis on the fact that the public should, and has a say in environmental matters that affect them. Emphasis is on, for example, environmental deprivations or the environmental injustices, in so far as they implicate the lives and experiences of communities, or in this specific case, the 'public'. It is for this very reason that the discussion concluded that PIEL must be fostered and any challenges to PIEL seriously considered.

In view of this, the next Chapter considers cost orders as potential challenges to PIEL and how courts have spoken on the issue.

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102 Frynas 2004 *The Journal of Modern African Studies* 378.

103 Shell is being fingered and considered to have been complicit indirectly in the environmental defender's murder. See for example the case against Shell initially in the United states of America and then in the Netherlands, EarthRights https://earthrights.org/case/wiwa-v-royal-dutch-shell/.

3 COST ORDERS IN ENVIRONMENTAL LITIGATION

3.1 Introduction

The previous chapter established the nature of and possible benefits of PIEL, including the potential problems associated with a litigious society. This chapter continues the discussion by analysing the issue of cost orders as challenges to PIEL and how the courts have adjudicated on matters involving such. In view of this, the chapter seeks to answer this question: *What are cost orders and how have the courts pronounced on matters relating to cost orders in PIEL?* The equally important and related sub-question is determining the extent to which the judicial pronouncements have contributed to cost orders not becoming a hindrance to PIEL. The chapter addresses these issues by evaluating the following:

- The nature of and necessity for cost orders;[104]
- The *Biowatch* guidelines on costs;[105] and
- Recent case law.[106]

These issues are in turn addressed below.

3.2 The nature of and necessity for cost orders

Cost orders are best described as the costs of taking or engaging in legal action. In South African context, the general rule is that costs follow the results of a matter.[107] This rule is also described as the "loser pays" rule.[108] This general rule is closely associated with the practice that a presiding officer in a court of first instance has a discretion on how costs are awarded.[109] It is for this reasons that even though some scholars believe that a discretion lies with the court in awarding costs to a losing side in some circumstances,

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104 Section 3.2.
105 Section 3.3.
106 Section 3.4.
107 Budlender, Marcus and Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* 134; Humby 2009 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 98. This is a rule that is followed in most common law-based countries including the UK, Australia etc. Pain and Pepper 2019 *King's Law Journal* 212.
108 Ncube *The personal liability of public officials for constitutional litigation costs* 19.
109 Pain and Pepper 2019 *King's Law Journal* 212; Dugard 2008 *South African Journal on Human Rights* 227; Humby 2009 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 98.

this is not always a guaranteed outcome.[110] This is why it is important to note that where discretion is used to deviate from the general rule, such discretion must be used judiciously and might actually not offset a precedence: "the fact that a judge follows a particular approach to the award of costs creates no precedent binding on judges called upon to exercise such a discretion in exactly the same set of circumstances in future."[111]

The critical problematic aspect of cost orders is not the actual awarding of costs by a court, but the prospect of the costs being awarded and how such prospects can potentially tip the scale on whether a case reaches the courts or not: "the prospects of an adverse costs award would ordinarily constitute a significant disincentive to public interest litigation."[112] Dugard puts it more starkly, stating that:

> If, as a result of judicial uncertainty on the principle, there is even a possibility of receiving an adverse costs order in the event of losing a case, many potential litigants will be discouraged from raising matters at all. For many public interest organisations, even one adverse costs order could easily bankrupt them – an unacceptable price for pursuing litigation aimed at developing South African constitutionalism in the public interest.[113]

This view is certainly true if one considers climate change related PIEL which often comes at a significant cost owing to the need for scientific data and consultations, if any meaningful litigation is to ensue.[114] Added to this is the fact that cases are generally unpredictable and no result can be guaranteed. Thus, even a well-meaning litigant might end up faltering, depending on the nature of and the direction which any case might be headed.

A particularly significant aspect to note is that how a matter is brought to court and how the case unfolds invariably has an impact on whether there will be a cost order against a

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110 Kallies and Godden 2008 *Alternative Law Journal* 197.

111 Humby 2009 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 101; Dugard 2008 *South African Journal on Human Rights* 231. See also a quote from an Australian judgement which gives an indication of when a deviation would be warranted: "[A] discrete approach has been taken to costs in circumstances where courts have concluded that a litigant has properly brought proceedings to advance a legitimate public interest, has contributed to the proper understanding of the law in question and has involved no private gain." *Oshlack v Richmond City Council* (1998) 193 CLR 72, para 124.

112 Budlender, Marcus and Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* 134; Pain and Pepper 2019 *King's Law Journal* 211; Maloka 2020 *Obiter* 186.

113 Dugard 2008 *South African Journal on Human Rights* 227; Budlender, Marcus and Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* 134.

114 Pain and Pepper 2019 *King's Law Journal* 214.

public interest litigant.[115] For example, the CC has frowned upon those who are prone to litigation even where there are no prospects of success, in the hope that the courts might be lenient when it comes to costs if they lose:

> This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this court, no matter how spurious the grounds for doing so may be or how remote the possibility that this court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks."[116]

Adverse costs in such instances are a necessity. The High Court has also added its voice by noting that such practices of bringing court actions on spurious grounds amount to an abuse of court processes. For example, in a case where former president of South Africa, Jacob Zuma, had sort to block the release of a report by the Public Protector into matters relating to state capture, the High Court found that:[117]

> An abuse of the judicial process is evinced when a party conducts litigation in an unreasonable manner to the prejudice of those who are naturally forced to defend their interests. It is such conduct that has been viewed by courts as a justifiable basis to mulct the culpable litigant with a punitive costs order.[118]

Ultimately, costs are part of the litigation process and cannot simply be wished away. Yet judges have a wide discretion anchored on the nature of the proceedings.[119] But how could this play out in practice in relation to PIEL. There are two broad ways. The first could be through *National Environmental Management Act*[120] (NEMA) provisions and the second could be through some guidelines established through the case *Biowatch Trust v Registrar Genetic Resources and Others* case[121] (hereafter *Biowatch*).

Concerning NEMA, Section 32 states as follows:

> A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the

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115 Maloka 2020 *Obiter* 187.
116 *Motsepe v Commissioner for Inland Affairs* 1997 (2) SA 898 (CC), para 30.
117 *President of the RSA v Office of the Public Protector* [2018] 1 All SA 576 (GP).
118 *President of the RSA v Office of the Public Protector*, para 46.
119 *Oshlack v Richmond City Council*, para 124.
120 *National Environmental Management Act* 107 of 1998.
121 *Biowatch Trust v Registrar Genetic Resources and Others*

> opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.[122]

It is a significant fact that the framework environmental law in South Africa, NEMA, was partly crafted with the full acknowledgment of the necessity for the relaxation of cost orders when it comes specifically to PIEL. This is monumental and signals the all-important role PIEL plays in the whole range of environmental governance in South Africa. Thus, at this point in the discussion, although one could say that a generalized conclusion on costs in South African public interest litigation is variable, one could state that based on section 32(2) of NEMA, PIEL occupies a peculiar space because NEMA specifically calls for courts to be proactive. In other words, courts are called to engage in what Sang calls principled judicial activism:

> This implies a proactive judicial role, including finding innovative ways to remedy particular environmental wrongs, the redress for which would ordinarily be obscure, inarticulate- late, inadequate or altogether absent. In this manner, judicial activism transforms the court from being a merely disinterested umpire into a proactive means for providing realistic access to the legislature's objective intent, so that the theoretical process of democracy applies more meaningfully and effectively in practice.[123]

Yet, even in pursuit of a genuinely noble environmental cause, NGOs and litigants need to be aware that section 32 of NEMA cannot completely shield them. A good reference point would be *Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others.*[124] In this case, the applicant had challenged the granting of a license for an incinerator, noting its environmental concerns. The applicant however realised that the matter would be costly, and that it had also delayed in filing requisite papers. The applicant then withdrew the matter and sought to plead with the court not award it an adverse costs order in line with section 32 of NEMA. In a lengthy deliberation that warrants reproduction here, the court found that:

> In all the circumstances I am of the view that, objectively viewed, applicant's conduct in launching the application was, regrettably, not reasonable. I use the word regrettably advisedly because it is quite clear that in bringing the application applicant acted out of the best of motives arising out of its very real concern for the environment. It wished, in the

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122 Section 32(2) of the *National Environmental Management Act*.

123 Sang 2013 *Journal of African Law* 42.

124 *Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others* [2005] 3 All SA 389 (E) (28 April 2005).

> public interest, to prevent the installation of a waste disposal system which it considered would be gravely harmful to the environment and to human life. However, in the light of all the circumstances pertaining at the time the proceedings were instituted and of which circumstances applicant, had it exercised due care, should have been aware, its concerns had already been met and the application was therefore unnecessary. I am acutely aware of the above-mentioned authorities as to the chilling effect of adverse costs orders in matters of this nature as well as of the pertinent remarks of Davis J in the Silvermine case, supra. In my view, however, it would neither be fair nor in the interests of justice for first and second respondents to be deprived of the costs incurred by them in opposing an application which was doomed to failure from its inception.[125]

In view of this, circumstances and the facts of each case do matter when it comes to whether section 32 of NEMA could be applied by the courts or not.

In addition to the obvious benefits of section 32 of NEMA, the CC has also laid down general principles in relation to how costs should be administered. The discussion now turns to these principles.

3.3 Biowatch and other general principles on costs

As noted earlier, it is now an established fact that costs generally hinder litigation.[126] This is even more so when it comes to PIEL because for the most part, there are competing developmental and environmental interests at odds. This is perhaps why the SALRC voiced its concern at costs in its report, noting that:

> [W]e still believe the court should have a discretion to deviate from the normal cost rules, but we are in principle against the court making costs orders against the representative or requiring the representative to provide security for costs as this will have an inhibiting factor on the bringing of public interest actions. We have accordingly provided for security to be furnished only where there is good reason to do so.[127]

Clearly, the costs issue is a serious concern, because what value would there be in having expanded/wide standing provisions if there is still the fear of costs to be awarded against a party for trying to enforce environmental laws? An Australian judge once stated that "there is little point opening the doors to the Court if litigants cannot afford to come in".[128] As such, the South African CC's judgment in *Biowatch* is instructive.

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125 *Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others*, page 35.

126 Hamman 2015 *QUT Law Review* 159.

127 SALRC *The Recognition of Class Actions and Public Interest Actions in South African Law* 31.

128 Judge John Toohey as cited in Hamman 2015 *QUT Law Review* 160.

In *Biowatch*, an environmental watchdog had not been awarded costs in the High Court in a case in which it had partially succeeded in requesting information (from the Registrar for Genetic Resources) that would allow the watchdog to enforce their environmental rights in the public's interest. The High Court had found that *Biowatch* was inept in its request for information, having required too much information without proper clarity in which information was relevant.[129] *Biowatch* appealed this costs order to the CC. Interestingly, and to show just how concerning this was for those who litigate on public interest matters, three NGOs joined Biowatch's appeal as *amicus curiae*: the Centre for Applied Legal Studies, Lawyers for Human Rights and the Centre for Child Law.[130]

While confirming and approving section 32 of NEMA, Sachs J found that "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."[131] The court went on to establish some broad principles:

i. First, the CC found that "[t]he primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice."[132] Environmental rights being a constitutional issue, the acknowledgement of the pre-imminence of environmental issues and the need for protecting the pursuit of their enforcement becomes indispensable.
ii. Second, the CC found that where a litigant is enforcing constitutional issues/rights against the state, such litigant "ought not to be ordered to pay costs".[133]
iii. Third, the CC noted it is the responsibility of the state to regulate, such that if it fails in its task, and if a litigant institutes proceedings to enforce their rights and

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129 *Biowatch Trust v Registrar Genetic Resources and Others*, para 2-3.
130 *Biowatch Trust v Registrar Genetic Resources and Others*, para 5.
131 *Biowatch Trust v Registrar Genetic Resources and Others*, para 19.
132 *Biowatch Trust v Registrar Genetic Resources and Others*, para 16.
133 *Biowatch Trust v Registrar Genetic Resources and Others*, para 21. Interestingly, in 2015 case, the CC ordered costs against a litigant: "In pursuit of an otherwise legitimate constitutional cause of ensuring that there is an adequately independent corruption-fighting agency in this country, Mr Glenister chose to be careless and to overburden the record with an ocean of irrelevancies. The worthiness of his cause should not be allowed to immunise him against an otherwise well-deserved adverse costs order. This Court has not made an order for costs against anyone litigating against the state for a long time and for good reason. If there would ever be a fitting case for a costs order, this is it. In the exercise of this Court's discretion on costs for the application to strike out the huge volumes of unnecessary evidential material, Mr Glenister must bear ordinary costs in the High Court and in this Court." See *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 (1) BCLR 1 (CC), para 38

to force the state to abide by its obligations, then the state should pay the costs of that litigant if the litigant succeeds. But more so, even if the litigant does not succeed, the litigant can be shieled from having to pay the costs of the state: "[i]f 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."[134]

Having established these general rules, the CC reversed the High Court order, requesting the state to pay the costs for *Biowatch* because the watchdog had been successful in requesting environmental information for enforcing their constitutional environmental right in the public's interest.

The court however did not deal with aspects related to where costs are between private parties, with the exclusion of the state. In this regard, there are no hard and fast rules, yet the differences between the parties might be huge. For example, while commenting on public interest actions between companies and NGOs, Chamberlain noted that:

> Companies have ready access to a team of lawyers, a dedicated public relations office to manage public image and the resources to build and maintain relationships with government decision-makers. Communities often cannot afford legal representation and will certainly not have a dedicated communications office. Members of rural communities may have to travel far to reach government officials. Further, the culture of secrecy in the mining sector means that it is very difficult for the public to access information about planned developments and their environmental impacts.[135]

Costs in such instances could be inhibiting. However, there have been instances where the courts have refused to make cost orders and required each party to bear their own costs. For example, the CC has opined in *Barkhuizen v Napier*,[136] that where private parties are involved in a dispute, and one of the parties raises a constitutional issue which is not as a result of the need for profit, then the courts could be lenient:

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134 *Biowatch Trust v Registrar Genetic Resources and Others*, para 23.

135 Chamberlain 2017 *Law Env't & Dev J* 9. Other scholars consider the issue of the unfairness between the parties in this way: "[t]he clear import of such a strenuous seeking of costs by the 'Goliaths' against an unsuccessful 'David' signals another means by which the civic space of public participation in decision-making on major environmentally-sensitive proposals can be narrowed down yet again." Kallies and Godden 2008 *Alternative Law Journal* 198.

136 *Barkhuizen v Napier* 2007 5 SA 323 (CC).

> The applicant has raised important constitutional challenges to contractual terms. The determination of these issues is beneficial not only to the parties ... but to all those who are involved in contractual relationships. In these circumstances, justice and fairness require that the applicant should not be burdened with an order of costs. To order costs ... may have a chilling effect on litigants who might wish to raise constitutional issues. I consider therefore that the parties should bear their own costs, both in this Court and in the Courts below.[137]

Thus, it should be clear at this point of the discussion that cost orders are indirectly an affront to the right of access to courts. For the avoidance of doubt, the *Biowatch* principles stand as the overarching guidelines within which courts must operate when faced with an issue that involves the potential imposition of costs against those litigating in the public's interest.

3.4 Cases after Biowatch

In view of the discussion thus far, the question as to whether costs are potentially a challenge to public interest litigation turns on whether there have been cases, especially after *Biowatch*, that potentially muddy the waters. Two recent cases are thus discussed below.

3.4.1 Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others[138]

This case had novel aspects involving mining in protected areas and whether the ministers for the environment and mining had exercised their discretion diligently. Concerning the facts, the case involved a litany of NGOs who were described as representing "primarily the public interest" in the enforcement and protection of the environmental rights in section 24 of the *Constitution*.[139] There were also many respondents, including the Minister of Environmental Affairs, the Minster of Mineral Resources as well as a prospective coal miner, Atha-Africa Ventures (Pty) Ltd.

Apart from the *Constitution* and NEMA, the other relevant legal frameworks pertaining to the case involved the *National Environmental Management: Biodiversity Act* (hereafter

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137 *Barkhuizen v Napier*, para 90.

138 *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* [2019] 1 All SA 491 (GP) (8 November 2018).

139 *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others*, para 2.

NEMBA),[140] the National Environmental Management: Protected Areas Act (hereafter NEMPAA)[141] and the *Mineral and Petroleum Resources Development* (hereafter MPRDA).[142] In view of these legal frameworks, the applicants sought to protect protected areas and wetlands against a decision to allow Atha-Africa to mine coal in the Mabola protected area.

Section 12 of NEMBA allows the Minister of Environmental Affairs to designate some areas as threatened ecosystems which would require protection, while section 2 of NEMPAA deals with how protected areas are to be managed and conserved, including how sustainable use of such protected areas could be fostered. Of importance however, is that section 28 of the NEMPAA requires the written permissions of both the Ministers of Environmental Affairs and Mineral Resources before any mining activity could commence.[143] In addition, NEMPAA however also retains some hierarchical superiority in relation to other laws. NEMPAA states that:

> (1) In the event of any conflict between a section of this Act and –
> (a) Other national legislation, the section of this Act prevails if the conflict specifically concerns the management or development of protected areas[144]

While the case dealt with a number of issues, the aspect of costs ultimately turned on the proper interpretation of section 48 of NEMPAA, which until that time, had never been before the courts.[145] Specifically, the applicants argued that there was no transparency in the process leading to the written permissions of the Ministers in terms of section 48, as there had been no public participation. The Ministers on the other hand, were of a view that public participation was not required and they could depart from the normal processes of administrative action which would require such participation.[146] The court did not agree, finding that:

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140 *National Environmental Management: Biodiversity Act* 10 of 2004.
141 *National Environmental Management: Protected Areas Act* 57 of 2003.
142 *Mineral and Petroleum Resources Development Act* 28 of 2002.
143 Section 48(1) states as follows: "Despite other legislation, no person may conduct commercial prospecting or mining activities- (a) in a special nature reserve or nature reserve; (b) in a protected environment without the written permission of the Minister and the Cabinet member responsible for minerals and energy affairs".
144 Section 7 of the *National Environmental Management: Protected Areas Act*.
145 *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others*, para 10.
146 *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others*, para 11.

> there is a disturbing feature in the conduct of the Ministers or their departments which gave rise to one of the complaints of a lack of transparency and it is this: the primary beneficiaries of the mining activity sought to be permitted are based off-shore and their local BEE component is, to an extent, "politically connected". There was therefore, apart from the statutory requirements, a compelling need for environmental decision-making to take place openly. As the advocates who appeared for the Applicants put it: "ethical environmental governance and behaviour is enhanced simply by exposing it to the glare of public scrutiny".[147]

For these reasons, while accepting that this was a novel case, and even though the respondents sought to have the court not to make an adverse cost award to them, again, the court did not agree, finding as follows:

> The matter does not fall in the class of constitutional litigation envisaged in Biowatch Trust v Registrar, Genetic Resources and others 2009 (6) SA 232 CC where costs should not be awarded against the state, even if unsuccessful. Ms Pillay SC further argued that, were the Applicants to be successful and entitled to costs, it should not be on a punitive scale. She argued that the Ministers' "handling" of the Section 48 application was based on a "genuine interpretation of a statutory provision which has thus far not been interpreted by a court". Their interpretation of Section 48 aside, there was no justification for the lack of transparency or the departure from sections 3 and 4 of PAJA, both of which could have gone a long way in possibly even preventing litigation. Compliance therewith would certainly have removed a large portion of the grounds of review which featured in this matter. A punitive costs order is therefore justified.[148]

Clearly then, although *Biowatch* was not applied, the court was still able to find the value and necessity of not burdening the applicant by at the very least, not making an adverse costs order or requiring the parties to pay their own costs. This, in view of the discussion in this Chapter, is at least indicative of the fact that when based on a well-founded and properly argued case, PIEL can achieve its purposes and costs might not stand as a daunting challenge.

3.4.2 Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others (Tendele I)[149]

The Tendele case is perhaps the most recent case which brings into reality the idea of a 'chilling effect' so far as costs in PIEL are concerned. The case concerned open-pit mining of anthracite in the Somkhele Mine which is adjacent to Hluhluwe-Imfolozi Park in

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147 *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others*, para 11.1.3.

148 *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others*, para 13.

149 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* [2019] 1 All SA 176 (KZP) (20 November 2018).

KwaZulu-Natal.[150] The main applicant, Global Environmental Trust was described as an environmental trust which brought the matter on the basis of protecting environmental rights in the public's interest.[151] The relief sought by the applicants was the total shut down of the mine as, according to the applicants, the mine was operating illegally, contrary to relevant laws. Among many submissions, the applicants were arguing that the respondent was mining without NEMA authorisations, waste management licenses and even authorisations in terms of heritage laws in relation to the removal of graves.[152] Among other arguments, the respondent was arguing that the changes to the licensing laws (in line with the introduction of the One Environment System) did not alter its already existing licenses, with the result that there was no need to re-apply for new licenses. The court agreed with this line of argument.

In coming to its decision, the court found the applicants to have put the cart before the horse, arguing that if their concerns were real, they should have at least waited for the authorities to do their investigations before approaching the courts. This meant that the applicants' case had allegations that were "vague, generalised and unsubstantiated."[153] Overall, the court was of the view that the applicants adopted what was termed a "scatter gun approach" in which they hoped to "hit one target or another."[154] It is for this reason that the applicants' case was dismissed and an adverse costs order made against the applicants. In other words, the court was of the view that the actions of the applicant were deserving of a costs order against them, regardless of whether they were engaged in frivolous proceedings or not. Surprisingly, the CC in *Biowatch*, although acknowledging that Biowatch had gone on a fishing expedition, i.e., taking a "scatter gun approach", the CC still deemed it fit not to punish Biowatch with a cost order.

As could be expected, there was a subsequent appeal to the Supreme Court of Appeal by Global Environmental Trust.[155] To indicate how potentially chilling the cost order had been, the Centre for Environmental Rights joined the case as amicus curiae and submitted

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150 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*, para 3.
151 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*, para 5.
152 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*, para 17.
153 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*, para 107.
154 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*, para 109.
155 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* [2021] 2 All SA 1 (SCA).

arguments against the costs order of the High Court.[156] In this appeal however, Tendele abandoned the costs order awarded in the High Court, but the fact of the matter is, as Schippers J observed in the minority judgment, that "a notice of abandonment does not overturn the judgment of the court a quo, which remains on the public record and is available to persons researching or seeking a direction on costs in an environmental law dispute. There is no public record that the costs order was abandoned."[157]

Thus, in his minority judgment, Schippers J was clear in the view that the *Biowatch* guidelines had to apply in the case. The justice went as far as referring to section 32 of NEMA, noting the potential "chilling effect" of the High Court cost orders,[158]

> It is clear from the founding papers that the appellants were seeking to enforce the right to have the environment protected, contained in s 24 of the Constitution, as well as the provisions of NEMA and various other environmental management statutes. The application for the interdict was brought in the public interest, the interests of the people residing in the vicinity of the mine affected by mining operations and in the interests of the appellants' members, as envisaged in s 38 of the Constitution…..In the light of the facts and principles outlined above, the order directing the appellants to pay Tendele's costs is not one that could reasonably have been made. The high court failed to exercise its discretion judicially and the costs order must be set aside.[159]

Despite this finding, the majority judgment, penned by Ponnan J (and three other justices concurring) did not at all speak on the issue of costs and how such cost could potentially inhibit PIEL. There is thus, an obvious disjuncture in the practice in relation to how cost orders have been significant matters in court. If the Tendele case is anything to go by, then it stands to reason that there is a level of inconsistency, and that ideally, cost matters are for the most part determined on a case by case basis. There was however no indication of whether the applicants in the Tendele cases were reckless or whether they brought a frivolous case that would warrant a cost award. That the majority judgment did not at all speak on this is concerning.

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156 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*, para 3.
157 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*, para 87.
158 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*, para 90.
159 *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*, para 91-92.

3.5 Conclusion

Costs in general and adverse cost orders will forever be challenges to PIEL. What will be required is for courts to be pragmatic when deciding whether particular cases implicating public interest matters are deserving of a punitive costs order. It is encouraging that the *Biowatch* guidelines stand as guidance, yet *Tendele* is potentially worrisome for its lack of engagement on the matter.

The penultimate Chapter considers whether SLAPP suits, a new phenomenon in South Africa, are a potential challenge to PIEL and how courts have spoken on the matter.

4 SLAPP SUITS IN SOUTH AFRICA

4.1 Introduction

The previous chapter considered the aspect of adverse costs and how recent jurisprudence addressed the issue. This chapter now turns to the issue of SLAPP suits. For context purposes, it should be noted that literature on SLAPP suits in South Africa is extremely scanty. As a result, there is not much literature to work with when it comes to this issue. However, as will be shown below, SLAPP suits have now entered the South African legal foray. To that end, in view of the fact that there are no laws on SLAPP suits in South Africa, the chapter interrogates the following question: *What are SLAPP suits and how have the courts pronounced on matters relating to SLAPP suits in PIEL?* As a sub-objective, and as with the previous chapter, this chapter also seeks to investigate how the entry of SLAPPs into the South African space has been handled by the courts. As such, the chapter considers the following aspects:

- What a SLAPP suit is;[160] and
- SLAPP suits in the South African courts.[161]

4.2 What is a SLAPP suit?

As will be recalled, the term SLAPP suit stands for 'Strategic Lawsuit/Litigation Against Public Participation' and has its origin in the United States of America. A SLAPP suit can be defined as a "meritless case mounted to discourage a party from pursuing or vindicating their rights, often with the intention not necessarily to win the case, but simply to waste the resources and time of the other party until they bow out."[162] Elsewhere, SLAPP suits are described as claims that arise:

> …from a defendant's public participation on matters of public interest and which lacks legal merits, is manifestly unfounded, or is characterised by elements indicative of abuse of rights or of process laws, and therefore uses the judicial process for purposes other than genuinely asserting, vindicating or exercising a right.[163]

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160 Section 4.2.
161 Section 4.3.
162 Murombo and Valentine 2011 *South African Journal on Human Rights* 84.
163 Borg-Barthet, Lobina and Zabrocka *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* 19.

These meritless cases unfortunately arise in a multitude of instances. For example, Pring observes that individuals and NGOs have been sued for:

> reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations.[164]

It is clear from this description that SLAPP suits are not unique to PIEL, but they stand as formidable threats to PIEL. What is certain though, is that "SLAPP suits are frequently identified with development projects in which citizens petition local government to curtail certain development activity and the developers sue the citizens to discourage their complaints."[165] This is particularly true, as Murombo and Valentine clearly noted that the developmental and emergent economic state of South Africa has the consequence that there will invariably be clashes between those promoting environmental protection and those promoting development.[166] In such instances, petitions, lobbying, campaigns, boycotts etc., as noted above, are likely to happen.

As with adverse cost orders in PIEL, SLAPP suits are also known to have a 'chilling effect' on public interest activists.[167] This is because they are meant to intimidate and can happen to anyone who speaks out on issues that implicate public interest.[168] To be sure, if indeed "litigation is the most important thing the environmental movement has done",[169] then SLAPP suits are a direct affront to interests PIEL seeks to protect. Put differently, SLAPPs are an affront to works of civil society and activists championing public interest issues, including in the context of this study, environmental interests. This is because "a vibrant civil society contributes to the scrutiny which is necessary to ensure the safeguarding of

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164 Pring 1989 *Pace Envtl L Rev* 5.

165 Hartzler 2006 *Val UL Rev* 1236.

166 Murombo and Valentine 2011 *South African Journal on Human Rights* 84. The authors go on to state the following: "[u]ltimately SLAPP suits, in the context of public interest environmental litigation, evince a deeper conflict in society. This conflict is the struggle between the competing interests of developers pursing their property rights, and government or environmentalists pursing conservation objectives. Also, SLAPP suits broadly show the need for a balance between competing individual rights such as freedom of expression, right to privacy, and the right to property."

167 Borg-Barthet, Lobina and Zabrocka *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* 19.

168 Pring 1989 *Pace Envtl L Rev* 4. For further and elaborate comments, see the extended version of this work in the 1996 book Pring and Canan *SLAPPs: Getting sued for speaking out*.

169 Sive 2001 *Pace Envtl L Rev* 3.

other features of a broader conception of the rule of law, including the prevention of corruption and the upholding of access to justice."[170]

Ultimately, the rise of SLAPPs has led to some states in federal countries adopting anti-SLAPP laws.[171] Furthermore, other regions are in the process of developing laws on anti-SLAPPs. For example, the European Union Parliament recently commissioned a report which showed that SLAPPs are rapidly rising.[172] The report titled "The Use of SLAPPs to Silence Journalists, NGOs and Civil Society", observes that these legal actions are usually instituted by wealthy individuals, corporations and surprisingly at times, by government institutions.[173] The report goes as far as even suggesting an expanded understanding of SLAPPs, describing them as 'abusive lawsuits against public participation'.[174] The report notes that 'abusive lawsuit' would replace 'strategic lawsuit' because such legal actions are not always strategic, as they merely have to be abusive of court processes.[175]

With this broad understanding of SLAPP suits, it is necessary to explicate how SLAPP suits could be identified and what their characteristics could be.

4.2.1 Characteristics of a SLAPP suits

SLAPP suits are at times difficult to detect as they could be disguised as malicious prosecutions, defamation claims or even delicate liability claims against those who have engaged in or spoken on matters of public interest.[176] However, considering that they are

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170 Borg-Barthet, Lobina and Zabrocka *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* 10.

171 *Quebec Code of Civil Procedure* C-25.01. Article 51 of this statute states as follows: "The courts may, at any time, on an application and even on their own initiative, declare that a judicial application or a pleading is abusive. Regardless of intent, the abuse of procedure may consist in a judicial application or pleading that is clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome. It may also consist in a use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice, particularly if it operates to restrict another person's freedom of expression in public debate."

172 Borg-Barthet, Lobina and Zabrocka *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*. Available at https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf.

173 Borg-Barthet, Lobina and Zabrocka *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* 8.

174 Borg-Barthet, Lobina and Zabrocka *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* 18.

175 Borg-Barthet, Lobina and Zabrocka *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* 18.

176 Murombo and Valentine 2011 *South African Journal on Human Rights* 84.

generally meritless, SLAPP suits are usually launched with the intention of financially crippling critics as a way of limiting their free speech and also as a way of limiting robust debate about matters that concern public interest.[177] This is so because research shows that SLAPP suits can last years on end, with huge financial implications for the litigants.[178] Consequently, this is why some note that in addition to financially crippling critics, SLAPP suits are also a way of emotionally frustrating these critics or even activists.[179] Pring puts it more starkly: "SLAPPs send a clear message: that there is a 'price' for speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings."[180]

Some scholars rightly note that those who initiate SLAPP are usually not looking to get the actual amount they claim:

> The use of SLAPPs by powerful corporations and individuals is not aimed at obtaining a legal victory, which seldomly materialises, but to deploy procedural costs and the threat of disproportionate damages to silence the respondent in a specific claim, and to have a broader "chilling effect" on the work of journalists, NGOs and civil society.[181]

Accordingly, while not always the case, the nature of SLAPPs is such that in addition to the huge monetary amount being claimed for, they almost always come with the alternative of a public apology, a correction of a public statement or even a promise from the defendant not to speak out again.[182] For this reason, SLAPP suits are also described as an abuse of court processes.[183] This is because SLAPPs are known to transfer public interest matters to the legal space, where finances dictate the order and longevity of the issues.[184] Consequently, in determining whether a case qualifies as a SLAPP suit or not, the court must be mindful of legitimate interests involved. For example, everyone (including corporations as juristic persons for example) has a right not to be defamed, while everyone also has a right to freedom of expression. Assuming that words spoken (or any other act done by an activist for example) have the potential to be defamatory,

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177 Pring 1989 *Pace Envtl L Rev* 6; Anti-slapp.org Date Unknown https://anti-slapp.org/what-is-a-slapp.
178 Anti-slapp.org Date Unknown https://anti-slapp.org/what-is-a-slapp.
179 Schindlers 2021 https://www.schindlers.co.za/news/a-south-african-perspective-on-slapp-suits/.
180 Pring 1989 *Pace Envtl L Rev* 6
181 Borg-Barthet, Lobina and Zabrocka *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* 13.
182 Anti-slapp.org Date Unknown https://anti-slapp.org/what-is-a-slapp.
183 Schindlers 2021 https://www.schindlers.co.za/news/a-south-african-perspective-on-slapp-suits/.
184 Borg-Barthet, Lobina and Zabrocka *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* 8.

courts in a SLAPP case would have to weigh this potential defamation against the right of persons to speak on matters that are of public interest without the fear of being sued.

Overall, if SLAPP suits are indeed meant to curtail public debate over environmental interests for example, then it stands to reason that SLAPP suits are an affront to various constitutional and legislative provisions. Among many such provisions, SLAPPs would be a violation of the constitutional right to freedom of expression.[185] Furthermore, SLAPPs would be a violation of section 2 of NEMA which promote, amongst various other requirements, public participation.[186]

4.3 SLAPP suits in the South African Courts

Cases resembling SLAPPs, let alone being found to be SLAPP suits explicitly are few in South Africa. As the discussion below will show, the cases discussed have aspects that correlate with the discussion immediately above concerning what SLAPP suits are and what their characteristics could be.

4.3.1 Petro Props (Pty) Ltd v Barlow and Another (Petro Props)[187]

One of the first cases to have resembled a SLAPP suit is *Petro Props*. In this case, Petro Props sought to construct a service station, having obtained the requisite authorisations. The respondent, Ms Barlow who was a Chairperson of a Wetland Association, was against this construction, arguing that the construction would happen in an ecologically sensitive wetland (which also happened to be located close to where Ms Barlow resided).[188] In voicing the opposition to the service station, Ms Barlow engaged the use of "media, public meetings, submissions directed to various governmental levels" and even to Sasol, the company which would finance Petro Props.[189] The applicant was arguing that these

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185 See section 16 of the *Constitution*.

186 See section 2(4)(f) of the *National Environmental Management Act*. Murombo and Valentine conclude as follows: "[u]ltimately SLAPP suits, in the context of public interest environmental litigation, evince a deeper conflict in society. This conflict is the struggle between the competing interests of developers pursing their property rights, and government or environmentalists pursing conservation objectives. Also, SLAPP suits broadly show the need for a balance between competing individual rights such as freedom of expression, right to privacy, and the right to property." Murombo and Valentine 2011 *South African Journal on Human Rights* 84.

187 *Petro Props (Pty) Limited v Barlow and Another* (29663/05, 29663/05) [2006] ZAGPHC 46 (12 May 2006).

188 *Petro Props (Pty) Limited v Barlow and Another*, para 2.

189 *Petro Props (Pty) Limited v Barlow and Another*, para 3.

campaigns had damaged Petro Props and resulted in Sasol withdrawing from its contract with Petro Props, which, according to the applicant, had immense financial consequences. Petro Props thus sought an interdict:

> …against [Ms Barlow] in her personal capacity and in her capacity representing Libradene Wetland Association in terms whereof [Ms Barlow] is interdicted and restrained from either directly or indirectly unlawfully harassing and/or interfering with the applicant's rights of enjoyment of its property, being Erf 342, Libradene Extension 2

The court accepted that if the final interdict was to be granted, a burden rested on the applicant to show that the campaign was unlawful, and this also had to be balanced against Ms Barlow's freedom of expression.[190] The court carefully detailed the elaborate campaign by Ms Barlow on behalf of herself and her community, including frequent communication with government. These communications where such that the Gauteng Department of Agriculture Conservation and Environment launched investigations into how the authorisations had been given for the construction of the service station.[191]

In the meanwhile, Sasol was not comfortable with the publicity the issue was bringing and it sought to distance itself from Petro Props, claiming in an email to Petro Props that:

> The fact that Petro Props is suing Mrs Barlow for a reported R6 million because she is trying to protect a wetland (for whatever reasons) is putting the spotlight on Sasol. The public are under the impression that this is done with the blessing of Sasol and that Sasol is supporting attempts to silence responsible individuals in pursuit of profits.[192]

Clearly, Sasol's stance here is indicative of Petro Props being involved in a SLAPP suit in the most basic sense of it. In making its decision, the court noted that if the interdict were to be given, then it had to be proven that Ms Barlow and the association's actions were illegal. The court found otherwise on the point, observing that:

> Ms Barlow and the members of the Association have in my view conducted their campaign in an entirely candid manner. They have not cloaked their activities or hidden behind fictitious entities. Their concerns and objectives have been a matter of public engagement from the very start at a variety of levels in civil society – ranging from local community meetings to parliament. This is also not a case where the respondents have manufactured falsehoods calculated to harm the applicant. At worst for them, they have put up the belief that there may be defects in the process of environment-related approvals obtained by Petro Props.[193]

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190 *Petro Props (Pty) Limited v Barlow and Another*, para 10.
191 *Petro Props (Pty) Limited v Barlow and Another*, para 34.
192 *Petro Props (Pty) Limited v Barlow and Another*, para 39.
193 *Petro Props (Pty) Limited v Barlow and Another*, para 47.

On whether Ms Barlow and the association had exceeded the limits of their rights to freedom of expression, the court found that they were in fact exemplary:

> All things being equal, Ms Barlow and the Association bear a standard that any vibrant democratic society would be glad to have raised in its midst. Their interest and motivation is selfless, being to contribute to environmental protection in the common good. None of them stands to gain material personal profit. Their modus operandi is entirely peaceful. It is mobilised within a self-funding voluntary Association. It is geared towards public participation, information gathering and exchange, discussion and the production of community-based mandates. Its accompanying public discourse and media coverage have been fair, with participants and readers alike being presented in a balanced way with the viewpoints of all sides. In my view, conduct of that sort earns the support of our Constitution. In this context, it should be borne in mind that the Constitution does not only afford a shield, to be resorted to passively and defensively. It also provides a sword, which groups like the Association can and should draw to empower their initiatives and interests.[194]

Thus, the court concluded that the campaign by the respondents was neither vexatious, *contra bonos mores* or even actionable enough to warrant an interdict.[195] While the case did not at all make mention of the term SLAPP suit, it had all the indicators and markings of one. The court was thus pro-active in dismissing the case.

4.3.2 Wraypex (Pty) Ltd v Barnes (Wraypex)[196]

In Wraypex, the plaintiff instituted four claims for what the court termed as "prodigious" amounts" against the four defendants, arguing that they had published a matter that was defamatory to the plaintiff.[197] Summarised, the published material alleged by the plaintiff to have been defamatory related to the development of a golfing estate and the associated legal requirements and authorisations related thereto. The plaintiff argued that the defamation resulted in financial loss and was worthy of a punitive costs order. As a result, from all the defendants, the plaintiff was claiming a total amount Forty Million Rands (R40 000 000).[198] Part of the argument was that one of the defendants had

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194 *Petro Props (Pty) Limited v Barlow and Another*, para 55.
195 *Petro Props (Pty) Limited v Barlow and Another*, para 65.
196 *Wraypex (Pty) Ltd v Barnes and Others* (25173/05, 30729/05, 32648/05, 32649/05) 2011 (3) SA 205 (GNP) (11 February 2011).
197 *Wraypex (Pty) Ltd v Barnes and Others* (25173/05, 30729/05, 32648/05, 32649/05) 2011 (3) SA 205 (GNP) (11 February 2011, page 2
198 *Wraypex (Pty) Ltd v Barnes and Others,* page 10.

suggested to authorities that the plaintiff was engaged in "illegal" activities, which according to the plaintiff, amounted to "criminal" activities.[199]

In their defence, the defendants argued that they had rights to freedom of expression in terms of section 16 of the *Constitution* and that the action, as brought by the plaintiff, was meant "to intimidate and/or silence the defendant during the currency of the action, and not to vindicate its reputation."[200] Interestingly, without mentioning the term SLAPP suit, the defendant argued that the plaintiff had no realistic expectation that the amount claimed could be granted.

In coming to its decision, the court observed that the alleged defamatory statements did not in any way hamper the legal processes related to approvals or authorisations: "defendants were entitled to place before the authorities their fears and concerns and to oppose the applications made by the Plaintiff as strenuously as they did. In so doing, no rights of the Plaintiff were violated."[201] The court found all four claims to have been similar and the plaintiff was unsuccessful in any of them. Importantly, however, in a separate judgment in which the parties had argued for costs, this is where the issue of SLAPPs first came into the fray. In a lengthy quote, the court stated as follows:

> Plaintiff's (sic) counsel likened the case to what is known in other jurisdictions as "SLAPP". The acronym stands for Strategic Litigation Aimed against Public Participation. No instances of cases so described are to be found in local law reports but the concept of vexatiousness corresponds very closely with the features of a "SLAPP" suit. The Defendants should not have been called upon to contest the Plaintiffs claims especially not in the High Court. The litigation was purposeless from an economic point of view and if anything was more harmful to the Plaintiff than the words complained of. At the same time the four Defendants were unnecessarily involved in heavy expenditure in defending the cases brought against them. This is a case where the Court should exercise its discretion to make an order as prayed for by the Defendants.[202]

This was a clear affirmation of the case as a form of a SLAPP suit and the court is commended for dismissing the case.

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199 *Wraypex (Pty) Ltd v Barnes and Others,* page 24.
200 *Wraypex (Pty) Ltd v Barnes and Others,* page 10.
201 *Wraypex (Pty) Ltd v Barnes and Others,* page 34.
202 *Wraypex (Pty) Ltd v Barnes* 2011 JDR 0084 (GNP) 5.

4.3.3 *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 (Mineral Sands Resources)*[203]

This case might perhaps turn out to be a *locus classicus* when it comes to SLAPP suits in the South African legal space and context. Three Environmental Lawyers and three community activists had been sued for defamation to the tune of R14,25 million by two mining companies and their Directors.[204] One of the activists was accused of defaming the plaintiffs through books he had published, interviews and social media posts etc.[205] This activist was being sued for R10 million. One attorney and another activist were accused of having defamed the company and its CEO over a radio interview, and these were sued for R3 million.[206] Two other defendants were sued for defaming the plaintiffs in a Public Lecture they presented at the University of Cape Town titled "Mining the Wild and West Coast: 'Development' at what cost?".[207] These were sued for a combined R1,250 million. Importantly, the plaintiffs sought damages, and in the alternative, "*the publication of apologies*."[208]

In their defence and response, the defendants raised a special plea, which was based on arguments alleging that the plaintiff's actions constituted an abuse of court processes for the purposes of achieving an improper end while using "litigation to cause the defendants' financial and/or other prejudice order to silence them" and while also potentially serving as a violation of the right to freedom of expression under section 16 of the *Constitution*.

If the court accepted that the action by the plaintiffs was indeed an abuse of process, that would have meant that the case is not decided on the merits. Thus, the aspect of

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203 *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* 2021 (4) SA 268 (WCC) (9 February 2021).

204 *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*, para 1.

205 *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*, para 2.

206 *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*, para 3.

207 *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*, para 4.

208 *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*, para 5. Own emphasis.

motive/purpose, so far as it related to the initiation of the action came into question, and became the basis upon which the defendants raised their special plea.[209] Therefore, the plaintiffs contention that "it would be permissible to sue activists for defamation even if '*the only purpose is to silence the activists',* was found to be clearly unsustainable.[210] The court went on to elaborately describe SLAPPs, noting that there were notorious, are meant to intimidate and that:

> A SLAPP does not need to be successful in court to have its intended effect. Proceedings can be continued until the desired effect and impact is achieved. Prolonging and dragging out proceedings and shifting the debate out of the public domain to the courts can fulfil the intended objective. The mere threat of being sued is sometimes sufficient to engender fear and intimidate the target.[211]

As such, the court then traced SLAPPs to the United States of America, noting that three elements had to be present for a SLAPP defence: that a defendant must have engaged in a public participation in relation to a public matter; the defendant is then sued by a plaintiff who is pursuing an improper purpose and that the lawsuit is meritless. According to the court, an objective test had to be used and a 'reasonable person' must be able to determine that the lawsuit is meant:

> (i) To discourage the defendant or anyone else from engaging in public participation;
> (ii) To divert the defendant's resources away from engagement in public participation; or
> (iii) To punish or disadvantage the defendant for engaging in public participation.[212]

The court then clarified that the burden of proof shifts to the plaintiff for them to show that their case, the lawsuit, has 'substantial merit'.[213] Having noted that the plaintiffs

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209 *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*, para 17.

210 *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*, para 20. In defence of academic freedom, the University of Cape Town, which had hosted the event at which the lawyers and activists had made the lectures complained of as being defamatory, submitted arguments to the effect that academic freedom deserved a form of qualified privilege. The University submitted that: "SLAPP suits will deter academics from investigating and challenging harmful conduct, more particularly relating to deep questions on environmental issues", para 27.

211 *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*, para 43.

212 *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*, para 45.

213 *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*, para 46.

would be content with an apology, the court observed that the case was clearly a SLAPP and noted the following:

> Individuals or NGO's must have the freedom to respond to issues affecting society, such as those related to the environment and sustainable development. In instances where corporates could be the main cause of damaging and destructive behaviour of the environment and biodiversity, civil society should be allowed to confront and restrain such behaviour. Litigation of this nature pose a serious threat to the defendants' participation in matters of public importance, particularly environmental issues…. Public dialogue and debate with broad participation on matters of public interests, such as the environment must be protected and encouraged. Any legal action aimed at stifling public discourse and impairing public debates should be discouraged.[214]

As a result, although recognising the absence of anti-SLAPP laws in South Africa, the court was of the view that this could not be a bar to the use of the special plea by the defendants. In further protecting public interest, the court referred to the *Biowatch* principles, and dismissed the case with costs.

4.4 Conclusion

While they were not identified as such, it seems that SLAPP suits have long been part of the South African legal fabric. It is quite evident that SLAPPs could stand as incredible threats to PIEL and courts should always be on the lookout for the elements of a SLAPP suit. In *Mineral Sands Resources,* a unique aspect of the case is that for the first time, the court had to decide whether a SLAPP could indeed count as a legally sound exception/defence to a charge of defamation. To its credit, while accepting that there is no law on SLAPPs in South Africa, the court however held as valid the defence, owing to the potential of SLAPPs being used as a weapon to silence those who stimulate debate on public interest environmental matters and those who act to defend the environment.

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214 *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*, para 64.

5 SUMMARY AND CONCLUSION

5.1 Summary

5.1.1 Public interest environmental litigation

The discussion in Chapter 2 was guided by the question below:

Why is PIEL important and what is the legal framework supporting PIEL in South Africa?

The discussion found that South Africa's history provided the ideal context for public interest litigation in general. As such, given this background, public interest litigation has a number of advantages, including the fact that it partially levels the playfield in relation to the various players in the regulatory space. It also facilitates accountability and public participation and it ultimately enriches environmental jurisprudence.[215] In addition, the Chapter concluded that there is an elaborate constitutional framework supporting public interest litigation in general. This is through provisions on standing (section 38 of the *Constitution*) and provisions on access to courts (section 34 of the *Constitution*).[216] Overall, the Chapter concluded that for all its benefit, public interest litigation can also result in unintended consequences for the state and corporations, with the result that they both have legitimate reasons to act and protect themselves when PIEL comes into play.[217]

5.1.2 Cost orders in South Africa

Against the contextual setting of what constitutes PIEL and why it is necessary, the study then sought to analyze the extent to which cost orders constitute a challenge to PIEL in South Africa. This Chapter was guided by the following question:

What are cost orders and how have the courts pronounced on matters relating to cost orders in PIEL?

The discussion found that adverse cost orders, which are determined at the end of a PIEL case, have the potential to have a 'chilling effect' on PIEL in that they could prevent those

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215 Section 2.2 above.
216 Section 2.3 above.
217 Section 2.4 above.

acting in the public interest from vindicating their rights.[218] It seems however, that the South African CC realized this and established what are known as the *Biowatch* guidelines.[219] These guidelines have the effect that when public interest litigation is against the state, costs do not have to follow the suit/result, unless the courts are of the view that a litigant was reckless or the case is vexatious. In a further analysis of cases, including the 2021 *Tendele* case, the discussion concluded that although there is a consistent line of reasoning in relation to cost orders, lower courts routinely fail to apply the *Biowatch* guidelines.[220] For example, the court in *Tendele* was of the view that the public interest litigant had adopted a scatter gun approach in its case, and saw fit to make a cost order against it, this was precisely the same context within which *Biowatch* was not burdened with a costs order.

Ultimately, cost orders are perhaps the more perverse when it comes to PIEL. On 6 August 2021, the University of the Witwatersrand's Centre for Applied Legal Studies (which also happens to regularly participate in public interest litigation and was *amicus curiae* in *Mineral Sands Resources*) hosted a workshop on cost orders titled "Public Interest Litigation Threats: Cost Orders".[221] Interestingly, this workshop had three objectives:

- Courts are increasingly disregarding the Biowatch principle and imposing adverse costs orders on Civil Society Organisations or individuals litigating in the public interest, even when the litigation is against the state and not frivolous or vexatious;

- Courts are narrowly defining what constitutes a "constitutional issue", resulting in Civil Society Organisations litigating in the public interest at times being precluded from the Biowatch guidelines; and

218 Section 3.2 above.
219 Section 3.3 above.
220 Section 3.4 above.
221 CALS 2021 https://www.wits.ac.za/news/sources/cals-news/2021/public-interest-litigation-threats-cost-orders.html.

- Civil Society Organisations litigating in the public interest and/or on a constitutional principle or provision, against a private individual or company are not protected against adverse costs orders.[222]

Suffice to say that the *Tendele* majority decision did not do much to allay these fears. Going forward, it should be clear that to safeguard and cushion themselves, NGOs and whoever else is pursuing public interest litigation must be strategic in the cases they take on and they must be precise in what they allege. Proper preparation of cases on the part of public interest groups is key to obtaining relief. For specifically PIEL, where Science is required, it should be brought forth. This might, for example, shield them from cost orders that are severe. Courts however must be consistent. For it seems that lower courts might not follow *Biowatch*, with the result that most cases are reversed on appeal. Arguably, the result is indeed chilling, such that if a party does not have funds for an appeal, such adverse costs will stand.

In addition, and away from the courts, more efforts should be put at alternative methods of dispute settlements and effort should be made to make these public. That way, there is evidence of effort by parties and this could help streamline funding for well-meaning public interest causes.

5.1.3 SLAPP suits in South Africa

As with the previous Chapter, the discussion in Chapter Four sought to answer the following question:

What are SLAPP suits and how have the courts pronounced on matters relating to SLAPP suits in PIEL?

The discussion found that SLAPP suits are a new phenomenon the world over. At the most basic level, SLAPP suits are deliberately meant to intimidate public interest litigants. The study found that the hallmark of a SLAPPs suit is that it is meritless, and that those instituting such are content with an apology, in lieu of the exorbitant monetary

[222] CALS 2021 https://www.wits.ac.za/news/sources/cals-news/2021/public-interest-litigation-threats-cost-orders.html.

compensation sought.[223] The case discussion that followed revealed that SLAPP suits have come before the South African courts, without necessarily being identified as such, but that the 2021 *Mineral Sands Resources* judgment became the first case to name and shame SLAPPs.[224] SLAPP suits are likely to stay in the fray for a while. They are such that in 2020, the Centre for Environmental Rights set up the "Asina Loyiko Campaign" which is a direct response to the growing number of SLAPP suits.[225] Literally translated, the campaign means "we have no fear" and its objectives are to "raise awareness about SLAPP suits; discourage the use of this tool to silence and intimidate activists; and unite civil society against corporate bullying."[226]

Ultimately, although SLAPP are legitimate threats to PIEL, courts must be proactive in seeking to identify them. It is hoped that *Mineral Sands Resources* might turn out to be a *locus classicus* that established 'guidelines' much in the same way as *Biowatch* established 'guidelines' for dealing with adverse cost orders. For now, the jury is out on whether SLAPP will, in practice and in future, constitute a proven challenge to PIEL in South Africa.

5.2 Concluding remarks

The overall question guiding the whole discussion was as follows:

What do recent jurisprudential developments reveal about cost orders and SLAPP suits as challenges to public interest environmental litigation in South Africa?

In answering the question, it became clear that cost orders and SLAPP suits are indeed significant threats to PIEL. The recent jurisprudential developments do however show that courts stand as the ultimate vanguard of rights. These developments are such that at times the decisions are inconsistent (as the case with *Tendele* regarding costs) and at other times they are being activist (as was the case in *Mineral Sands Resources).* Suffice to say that it is encouraging that the courts ultimately acknowledge that cost orders and

223 Section 4.2 above.
224 Section 4.3 above.
225 CER 2020 https://cer.org.za/programmes/corporate-accountability/asina-loyiko.
226 CER 2020 https://cer.org.za/programmes/corporate-accountability/asina-loyiko.

SLAPP suits can have a 'chilling' effect and that activism in defence of public interest matters like environmental protection, is worthy of protection.

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