

## Fisheries management

## Fishing rights vs human rights?

An ongoing class action litigation in South Africa brings to focus the challenge to the rights-based management system in the country's fisheries

A group of South African artisanal fishers has launched class action litigation against the Minister responsible for fishing rights allocation on the grounds that the policies pursued by the South African government are inequitable and discriminatory, and violate the human rights of artisanal fishers in the country. Is it possible that the introduction of a rights-based management system might violate the human rights of certain fishers?

South Africa began introducing a rights-based fisheries management system as early as the 1960s, when quotas were introduced by the Department of Sea Fisheries for a limited number of commercially exploited species. From 1988 onwards, the Department allocated rights in terms of the Sea Fisheries Act 12 of 1988. These quotas were allocated within a racially defined fisheries structure and were largely held by white rights holders, while the artisanal fishery was being marginalized. Highly capitalized commercial companies predominated in the industry during this period.

Following the election of the first democratic government in 1994, the government began a process of restructuring the fishing industry and developing new legislation and policies to guide the allocation of fishing rights and the management of these rights. Towards this end, the Marine Living Resources Act (MLRA) was introduced in 1998.

This Act empowered the Minister of Environmental Affairs and Tourism to allocate fishing rights in three defined fishing categories: subsistence, commercial and recreational. No

provisions for artisanal fishers were included in this Act and the legislation states clearly:

*“no person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister” (MLRA, 1998,18 (1)).*

In terms of the MLRA, a fishing right is granted to a specific person or entity and, “in terms of Section 21 of the MLRA, the right may not be transferred without the approval of the Minister or his delegate. Upon the death, sequestration, or liquidation of the right holder, the right vests, respectively, in the executor, trustee or liquidator and the right may continue to be exploited for the period of time permitted by the applicable legal provisions. However, any transfer of the fishing right to a third party requires approval” (General Fishing Policy, 2005).

Following the introduction of this Act, the government established a Subsistence Fisheries Task Group (SFTG) to investigate the nature and extent of subsistence fishing and to advise on the management of this sector. This task group undertook research along the coast in South Africa and identified approximately 30,000 subsistence fishers. Most significantly, the SFTG recognized that three categories of fishing practices could be discerned amongst these fishers, based on the empirical survey data that was gathered for this purpose.

### Three categories

According to a 2005 affidavit by Ken Salo presented in support of the court case of Kenneth George and others vs the

Minister of Environmental Affairs and Tourism, these three categories “were classified as subsistence, artisanal and commercial according to a comprehensive combination of social, economic, technical, spatial, ecological and historical criteria that did not weigh any one criterion more than the other”.

**I**n South Africa, the artisanal fishery has specific characteristics. Artisanal fishers historically live in communities near the shoreline, use low-technology fishing gear, and harvest a variety of marine species found near the shoreline. Over generations, they have developed an understanding of the main biological lifecycle and migration patterns of certain marine species. Their catch is either consumed, shared, bartered or marketed through a complex set of relations and traditions developed between men and women, families, neighbours and local retailers. In this manner, fishing communities have developed a culture and caring for one another’s livelihood.

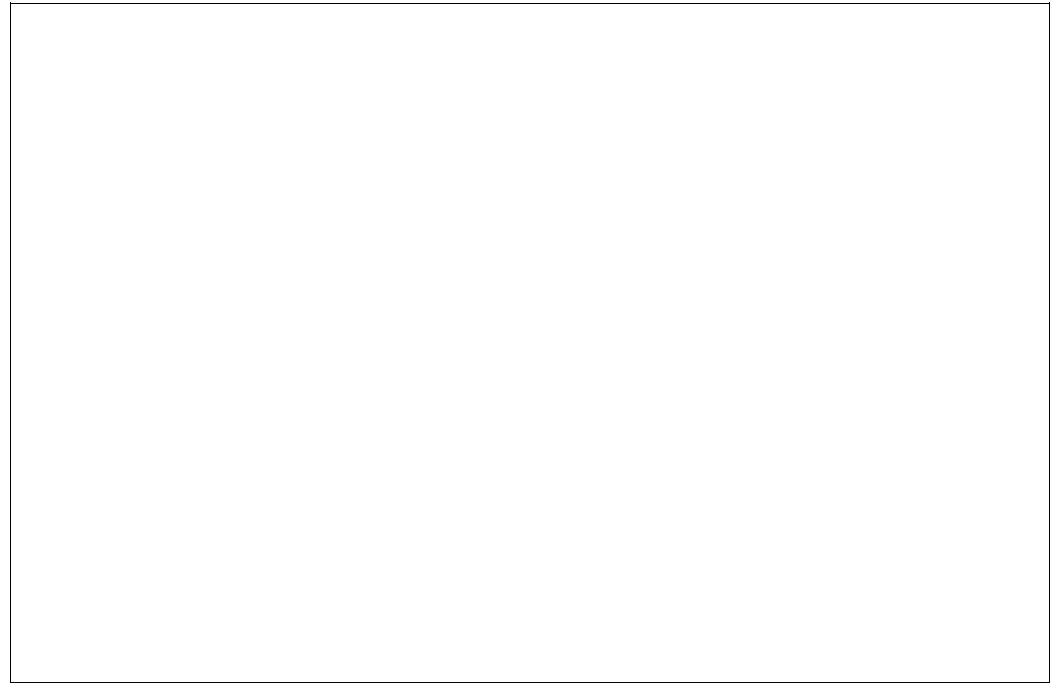
There was considerable debate regarding the definition of artisanal fishers, and, although it was acknowledged by the Task Group that their needs should be accommodated, no formal recognition of this group legally ensued. Business and the large-scale commercial companies actively lobbied the authorities to maintain the status quo regarding the

allocation of quotas and not to re-allocate to the artisanal or small-scale sector to any extent. They argued that government could best achieve its transformation and redistribution goals by supporting established industry to provide employment and to increase its black empowerment component. They were also successful in wooing organized labour in these companies to support them by promising them job security and, in some instances, a share in the profits through worker share schemes.

Following the introduction of the new legislative framework, the government department responsible for allocating and managing fishing rights, Marine and Coastal Management, developed a medium-term fishing rights allocation policy with a view to allocating rights for the period 2002 -2005. It was intended that a long-term rights allocation policy would be implemented following this initial period. The medium-term rights period did not recognize artisanal fishers as a category of fishers on their own and instead forced them to apply for ‘commercial’ or ‘limited commercial’ rights.

**Limited rights**

Only a small number of artisanal fishers were successful in obtaining these limited commercial rights and those who did get rights were allocated totally unsustainable quotas. Many bona fide



fishers were left out of the system completely and hence no longer had access to the sea. Others were able to eke out an existence by working for rights holders in one or other sector at certain times of the season but often had no income during other times of the year.

**D**uring 2005, Marine and Coastal Management released the Draft Long-term Fishing Rights Policy, which would effectively allocate long-term rights for up to 15 years in 19 of the commercial species. Artisanal fishers up and down the coast held high hopes that this policy would recognize and accommodate them; however, this new policy further entrenched their exclusion. The application process was extremely costly and complicated, and the application forms were only provided in English, which is not the home language of the fishers. The fishers were forced to either form companies or other legal entities with others and compete with the large commercial companies for the high-value species or apply as individuals for meagre quantum in a few limited nearshore species. The majority of the artisanal fishers have been completely excluded from obtaining long-term fishing rights. For example, in the nearshore West Coast Rock Lobster sector, of the 4,070 fishers who applied, only 813 have been allocated rights. Those who have been allocated rights have only received between 250 and 750 kg per annum. Once their catching and marketing costs have been deducted, these fishers will barely be living above the poverty line and those allocated only 250 kg will be way below the poverty line. Those who did get long-term rights have to operate in the narrow confines laid down in the policy. They are not skilled operators within this system and thereby remain totally vulnerable to exploitation.

The past 18 months have seen unprecedented action by the artisanal sector in South Africa as the fishers fight for their rights to their traditional livelihoods and those of the coastal communities in which they live, which depend on the artisanal fishing economies. They have embarked on a range of advocacy and lobbying activities, including numerous letters and memorandums to the Ministry and

Presidency, meetings with officials, marches on Parliament, the chaining of leaders to the gates of Parliament, a hunger strike and vigil by veteran artisanal fisher activist Andrew Johnston, and building strong alliances with other stakeholders in civil society.

Currently, the fishers' hopes are pinned on the outcome of litigation, which they have launched with the support of Masifundise Development Trust, members of the Artisanal Fishers Association of South Africa and the Legal Resources Centre. The Legal Resources Centre, an NGO, is funding this class action against the Minister, and has launched papers on behalf of the artisanal fishers in this regard. The court cases have been launched in both the High Court and the Equality Court. The Equality Court is a new court introduced in South Africa, following the introduction of the first democratic Constitution in the country in 1996. The Equality Court aims specifically to give effect to the Equality Clause in the Constitution, which states that "everyone is equal before the law and has the right to equal protection and benefit of the law" (Section 1).

In order to provide the legal framework for this protection, the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 was promulgated. This Act states: "Neither the State nor any person may unfairly discriminate against any person" (Section 6). The argument presented by legal counsel for the artisanal fishers centres on the belief that the Minister's failure to define and provide for the artisanal fishers in the Marine Living Resources Act of 1998, and the consequences of this failure on the lives and livelihoods of this fishing community, constitute a violation of a number of human rights contained in the South African Constitution. Matters of 'non-equality' nature in this case will be argued in the ordinary High Court.

#### **Right to choose**

The artisanal sector argues that the Minister has deprived them of their right to choose their trade or occupation. Section 22 of the South African Constitution provides that "every citizen has the right to choose their trade or occupation freely" (Constitution of South

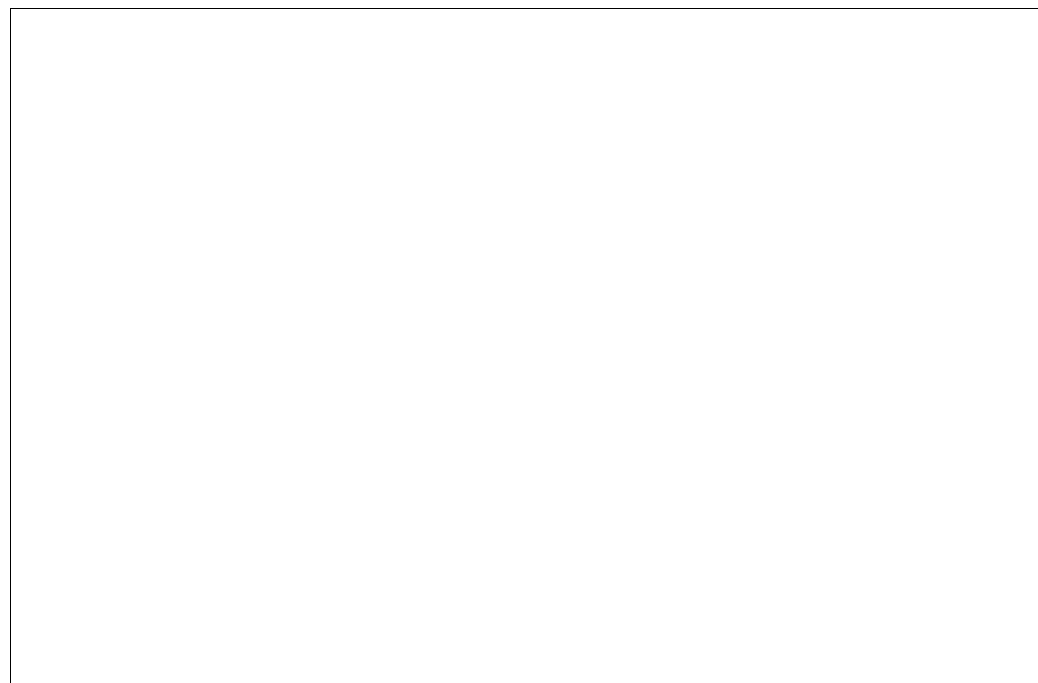
Africa, 1996, Section 22). According to a 2004 affidavit filed by Naseegh Jaffer on behalf of Masifundise in the matter between Kenneth George and others vs the Minister of Environmental Affairs and Tourism: “These fishers are faced with the untenable options of either forsaking their traditions and the skills passed between generations of fishers, and entering a commercial fishing industry for which they are not skilled, or resigning themselves to a life of poverty outside the framework of legal fishing operations, risking prosecution and criminal sanction. It is thus believed that these options do not constitute a proper ‘choice’ of trade or occupation as contemplated by the Constitution and are, accordingly, unlawful and unconstitutional”.

It is also argued that the current legislative framework violates a number of other basic socioeconomic rights, most notably, the right of access to sufficient food, and hence the internationally recognized right to food security is threatened. The impact of this violation is felt by not only the fishers but by all members of their households and the extended community that depend on these livelihoods within the local marine and coastal economy. The right to healthcare, housing and education, and the rights of the child to basic nutrition are threatened by this violation, and hence are also cited in the arguments to be presented to the Courts. The right to have the environment

protected through reasonable legislative and other measures is central to the case as the Minister has a duty to develop legislation that fulfills this right whilst promoting the sustainable use of the country’s natural resources. In addition to the abovementioned socioeconomic rights, the fishers argue that the way in which the policy and application process has been administered violated several key constitutional provisions, namely, the right of everyone to use the language of their choice. Enshrined in this is the duty imposed on the State to “use at least two official languages and to ensure that all official languages are treated equitably”. The failure of the Department to provide application forms in the home languages of the fishers greatly exacerbated the difficulties experienced by the artisanal sector in understanding what was required of them when applying for rights. This aspect is directly linked to the right to reasonable administrative action, which is also a right protected by the Constitution.

#### **Inequitable**

This case argues that all of the above-alleged violations of the rights of artisanal fishers arise because the State, through the Minister, has failed to treat the fishers equitably in comparison to the other fishing sectors. In failing to do so, the law is inequitable and discriminatory and hence violates the central tenet of the Constitution, that of the Equality Clause.



The Minister of Environmental Affairs and Tourism has, to date, fought the legal proceedings by appealing against the decision to hear the matter in the Equality Court. The fishers were heartened by the judgment of the Appeal Court that insisted that the fishers had the right to have the matter heard in this Court and noted that the Minister should not deny the fisher's prayer to have their say in court. The advantage of the matter being heard in the Equality Court as well as the High Court is that the Equality Court is empowered to order a variety of forms of redress, if it is deemed necessary. This raises the hope that it may yet be possible to envisage a real, rights-based fisheries management policy in South Africa, one based on the principles of social justice and the rights enshrined in the country's Constitution, and upon which the future of South Africa's new democracy rests. ♣

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