

Reaffirming Rights

The traditional net fishers of Langebaan Lagoon MPA in South Africa have proved victorious in adopting a human-rights-based approach to small-scale fisheries

A recent High Court Judgement in support of small-scale fishers' rights lays the foundation for a human-rights-based approach towards the implementation of the policy on small-scale fisheries and future Marine Protected Area (MPA) planning and governance in South Africa.

The Langebaan Lagoon MPA lies approximately 120 km northwest of Cape Town, along the western Atlantic coastline of South Africa. The lagoon is home to one of South Africa's oldest traditional net fisheries. Originally inhabited by the indigenous Cochoqua who were gradually chased out of the region, the area was settled by the Dutch during colonial times and they established farms along the shores of the lagoon. These waters gained a reputation for fine fish, particularly the large mullet (known locally as 'harders') caught in the sheltered, nutrient-rich lagoon. The small group of traditional net fishers of Langebaan Lagoon who continue to fish today are mostly descendants of the Malay slaves and other residents of mixed race who eked out an existence as labourers on these farms following the emancipation of slaves at the Cape. Most of them fished using beach-seines, gill-nets and handlines to supplement their meagre wages.

In time, the net fishers evolved a system of customary rules to manage their fishing activities and to avoid conflict amongst the different net fishing boats on the lagoon. This included a range of local customary norms and laws related to how they worked together on the water, how the catch was shared amongst the crew, who was responsible for maintenance

of the boats and how to manage conflict. Specific fishing grounds were recognized by the authorities as their customary fishing grounds and the oral histories of the Langebaan net fishing families indicate that the names of as many as 20 fishing sites in the lagoon were commonly known.

The customary fishing rules that evolved were woven into the social relations of the small, close-knit fishing community that describe themselves as a 'fishing family'. Traditional knowledge was passed on from generation to generation, and young children grew up with a strong identity attached to their

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families' interaction with the lagoon. The Langebaan fishers considered themselves the rightful users and owners of the lagoon and membership of the net fishery was limited to this group.

Apartheid

In the 1960s the fishers were impacted by the steady introduction of apartheid-based racial planning as well as the growing, predominantly white, tourism industry and recreational fishing sector in Langebaan. During this period the fishers who were classified according to the apartheid race-based classification system as 'coloured', were forced to relocate to a new area designated for coloured residence, which was some distance from

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their homes adjacent to the lagoon. In addition, growing numbers of recreational fishers on the waters disturbed their net fishing and led to increasing conflicts. In 1969 the fishers requested the local municipal board to establish a zone specifically for them, and two buoys were placed in the lagoon, effectively creating a protected zone for the traditional net fishers only.

In 1973 the lagoon was declared a marine reserve in terms of the Sea Fisheries Act and, subsequently, in 1985, it was incorporated into the West Coast National Park.

However, in the decade that followed, the Department of Sea Fisheries introduced a range of conservation measures and, drawing on the original line that had been established to protect the fishers, used this zonation to establish three zones—a sanctuary zone, a zone for non-motorized net fishing and an open, multi-use zone. In 1973 the lagoon was declared a marine reserve in terms of the Sea Fisheries Act and, subsequently, in 1985, it was incorporated into the West Coast National Park. The National Parks began acquiring farm land for inclusion in the Park and purchased a number of white-owned farms adjacent to the lagoon. The Park authorities entered into agreements with the owners of these farms and the West Coast National Park became the first contractual park in South Africa. Many of the white property owners retained certain residential rights in sections of the Park whilst the coloured fishers were forced to move to Langebaan town. The local fishing community were not consulted when the marine reserve was declared.

This simultaneous introduction of conservation and fisheries management measures in the lagoon coincided with the introduction of apartheid spatial planning measures. The forced relocation of the coloured community from their homes adjacent

to the lagoon, the eviction of fishing families from the farms that were later incorporated into the National Park, and the perceived preference given to white landowners to continue residing in the Park and fishing in restricted zones were associated with the concomitant increase in restrictive conservation measures which led to the zonation of the lagoon. The lagoon was zoned into three zones. Both line fishing and recreational fishing, as well as a range of other non-consumptive uses, were permitted in Zone A; Zone B was restricted for traditional net fishers; and Zone C was a no-take sanctuary area. When the National Parks Board took over the management of the lagoon, they confirmed this zonation, introducing a set of regulations restricting fishing and motor vessels in Zone B unless in possession of a permit from the Parks Board. In the late 1980s the trek net fishery—shore-based, drag-net fishery—was outlawed and fishers were forced to rely on their gill-nets to target *harders* only.

In 1992, following the signing of an agreement with the local landowners, the Parks Board introduced a differential set of permit regulations in which the local white landowners still resident in the Park were permitted to fish in Zone B for *harders* using their drift-nets, but the fishers resident in Langebaan were not. The net fishers resisted these permit regulations and over time the Park authorities permitted those traditional fishers with a history of fishing on the lagoon to continue net fishing in Zone B.

Conditions and restrictions

In 2003 the National Environmental Management: Protected Areas Act, 2003 (NEMPAA), was promulgated, granting the National Parks the authority to introduce specific permit conditions and restrictions on use in certain zones. The conservation authorities used this legislation to prohibit the Langebaan net fishers from fishing in Zone B, which was their traditional fishing grounds, although the white landowners were

able to continue. This policy dovetailed with the fisheries authority's policy of restricting the net fishing effort on the lagoon.

The Langebaan net fishers have argued that these restrictions are discriminatory. Firstly, three white landowners who have a contract linked to their continued residence in the Park with the conservation authorities have retained the right to continue fishing in Zone B, and the traditional net fishers, who depend on the net fishery for their livelihoods but were forced away from the Park, have to compete with the growing recreational sector in Zone A. The conservation authority and the department responsible for fisheries management have argued strongly that the zonation is needed to protect key line fish and shark species that use the shallow waters of the lagoon as a nursery ground. Zone B acts an important buffer zone within the MPA. However, the scientific evidence used to motivate these restrictions on the harder fishery draw largely on national-level data for *harders* and is also outdated. As the fishers were not consulted about the restrictions and the zonation, they question the legitimacy of the MPA zonation and the accuracy

of the scientific data upon which decisions have been made.

The Langebaan net fishing community has been one of the leading communities participating in the small-scale fisheries campaign in South Africa since 2004 that has demanded recognition that their 'fisher rights are human rights'. They have advocated strongly for their right to preferential access to their traditional waters and to participate in management in line with the FAO Code of Conduct for Responsible Fisheries. They cite the customary system of local fisheries management developed by their forefathers as the basis for their claims in addition to their human right to food security and to practice their occupation. In the absence of any real consultation that took their histories and needs seriously, and faced with their continued exclusion from their traditional fishing grounds, and increasing conflict with the recreational fishers, the Langebaan fishers launched legal action in 2013 against the Minister of Environmental Affairs, as the governance authority of the lagoon, the Minister of Fisheries as the authority responsible for allocating fishing rights and the SANPARKS as the contracted

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Langebaan fishers listen to the legal advisers from Legal Resource Centre outside the Cape Town High Court, South Africa, June 2016. The Langebaan fishers considered themselves the rightful users and owners of the lagoon

management agency for the Langebaan Lagoon MPA (Coastal Links Langebaan and others versus the Minister of the Department of Agriculture, Fisheries and Forestry (DAFF) and others, 2013). Represented by the Legal Resources Centre, a human rights public litigation NGO, the fishers argued that the permit condition that “prevents us from fishing in a part of the Langebaan Lagoon known as ‘Zone B’... has serious consequences for our livelihoods, and threatens the continued existence of the custom of traditional net fishing in Langebaan. Drawing on the Bill of Rights in the South African Constitution, they argued that the fisheries regulations imposed on them are irrational, unreasonable, and unfairly discriminate indirectly on the basis of race” (Coastal Links Langebaan versus the Minister of DAFF and others, 2013).

Further, the fishers argued that it is ironic that the line that was originally drawn to protect them, is the same line “now used to keep us from our traditional fishing grounds and threatens our ability to survive. It is significant that the line was not drawn on the basis of any conservation imperative; it was drawn to solve a dispute between

- any alternatives to a complete limitation of the right to access Zone B; and
- the applicable legal framework, including domestic and international law and policy, and, in particular, the new SSF Policy.

They argued that the zonation underpinning the MPA was not based on scientific evidence and hence it is arbitrary and irrational to continue to employ this same line in the name of ‘conservation’ and restrict their rights. As such, the decision by the Minister and the harsh restrictions on the *harders* net fishers are unreasonable in terms of the Constitutional obligation of the Minister to seek the least restrictive limitations on their rights (Section 36 of the Constitution). They allege that the scientific evidence available does not indicate that net fishing in Zone B will have an unacceptable ecological impact. They also argue that the current restriction unfairly discriminates against them on the grounds of race and perpetuates past patterns of discrimination. The fishers cite the Policy on Small-scale Fisheries (DAFF 2012) in their argument, citing again the principle that small-scale fishers who depend on fisheries for their livelihood should be given preferential access to resources. They challenge the conservation authorities for seemingly turning a blind eye to the thousands of recreational fishers who are catching the same threatened line fish species that the MPA zonation allegedly seeks to protect. They also document the impact of the conflict with the recreational sector on their livelihoods.

The High Court judgement delivered on 31 October 2016 has far-reaching implications for the future management of small-scale fisheries in South Africa. In particular, it sets an important precedent for how the rights of small-scale fishers should be considered when planning, managing or evaluating existing MPAs. In his judgement, the Honourable Judge Sher highlighted the fact that the national statute legislating the management of marine living

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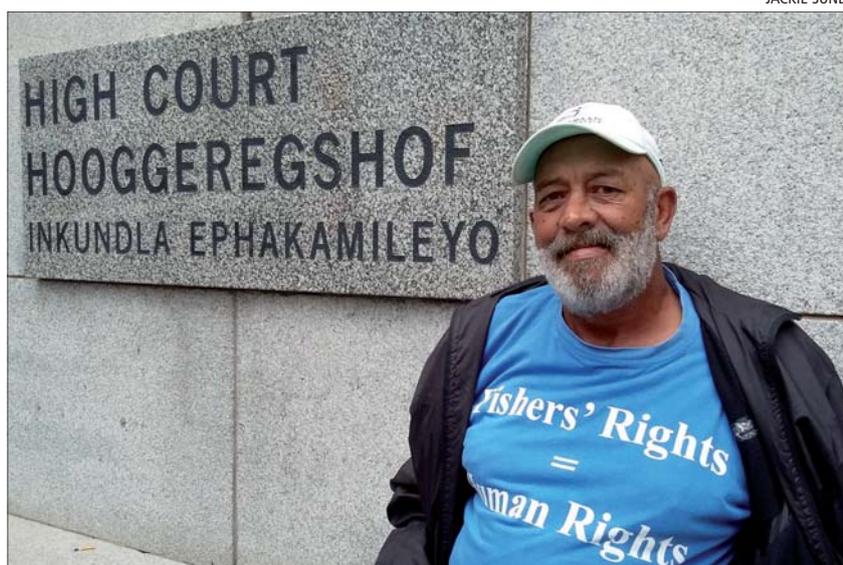
traditional and recreational fishers over 40 years ago” (Coastal Links and others versus the Minister and others 2013, CASE NO: 11907/13). The founding legal papers argued that the Minister of DAFF and other respondents acted unconstitutionally in that they should, at minimum, have considered:

- the available science pertaining to the Langebaan Lagoon relevant to the specific species and net fishery;
- the socioeconomic status of the fishers impacted by the decision;

resources in South Africa, the Marine Living Resources Act of 1998, provides guidance in section two of the Act to the Minister to have regard for a number of principles and objectives when developing management mechanisms, not just objectives narrowly restricted to protection of the marine ecosystem. This includes the need to achieve “the ‘optimum utilisation’ and ecologically sustainable development of such resources, and the re-structuring of the fishing industry in order to address historical imbalances, and to promote ‘equitable access to, and involvement in,’ all aspects of the fishing industry (with particular reference to the need to rectify past prejudice against women, youth and disabled persons) and to achieve equity within all branches of the industry.” (Langebaan Coastal Links versus the Minister and others 2016, 11907/13).

The judgement gave visibility to the Small-scale Fisheries Policy which, like the SSF Guidelines adopted by the FAO Committee on Fisheries (COFI), stresses the centrality of the principles of equity and equality. The Policy on SSF has, as one of its principal objectives, the promotion of “equitable access to, and benefits from, marine living resources, taking the historical background of the fishers into account”. The vision outlined in the SSF Policy is of a sustainable, equitable, small-scale fishing sector in which the “wellbeing and livelihood of fishing and coastal communities is secured and the health of the marine ecosystem is maintained”. It also recognizes that in order to achieve effective transformation, small-scale fishers need to regain their lost access to their traditional areas.

The judgement draws on Section (9 (3) of the Bill of Rights in the Constitution, noting that the State may not unfairly discriminate, either directly or indirectly, against anyone on a number of grounds, including race. In this instance, the Judge found that the permit conditions imposed on the Langebaan traditional net fishers were discriminatory



Langebaan leader Norton Dowries outside the Cape Town High Court, South Africa. The Langebaan community members have advocated for their right to preferential access

and irrational. He argued that the decisionmakers did not take important factors into consideration such as the fishers’ “historical claim to traditional fishing rights, the imperatives of transformation and the need for ecological conservation whilst also allowing for sustainable utilisation and development of the resources concerned” (Langebaan Coastal Links versus the Minister and others, 2016).

Importantly, the Judge found that the Court cannot determine the new regulations and permit conditions, but the parties to the action must sit and negotiate new terms, by taking into consideration these important social imperatives. In reaffirming these socioeconomic rights as integral to the governance and management of fisheries and conservation, this judgement confirms a core principle at the heart of the SSF Guidelines, that of the indivisibility of human rights, sustainable development and responsible governance of fisheries. 3

For more



irc.org.za/ircarchive/press-releases/3704-press-release-court-finds-fishing-restrictions-at-langebaan-irrational-calls-for-transformation

Court Finds Fishing Restrictions at Langebaan Irrational—Calls for Transformation

saflii.org/za/cases/ZAWCHC/2016/150.html

Coastal Links Langebaan and Others v Minister of Agriculture, Forestry and Fisheries and Others (11907/13) [2016] ZAWCHC 150 (31 October 2016)s