IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case No: 11907/13

In the matter between:

COASTAL LINKS LANGEBAAN	First Applicant
HENRY MAKKA	Second Applicant
MARK BURLING	Third Applicant
ALBERT MARTIN BLAKE	Fourth Applicant
HARRY BLAKE	Fifth Applicant
WILLIAM BLAKE	Sixth Applicant
FRED MAKKA	Seventh Applicant
LES MAKKA	Eighth Applicant
ALBERT OCKS	Ninth Applicant
TOMMY PREZENS	Tenth Applicant
ROBERT SMITH	Eleventh Applicant
JOHN VAN BOVEN	Twelfth Applicant
OSLEN VAN BOVEN	Thirteenth Applicant
TOM VAN BOVEN	Fourteenth Applicant
DEON WARNICK	Fifteenth Applicant

and

THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	First Respondent
DEPUTY DIRECTOR GENERAL OF THE	

FISHERIES BRANCH OF THE DEPARTMENT	
OF AGRICULTURE, FORESTRY AND FISHERIES	Second Respondent
THE MINISTER OF ENVIROMENTAL AFFAIRS	Third Respondent
DEPUTY DIRECTOR-GENERAL OF THE OCEANS	
AND COASTAL MANAGEMENT BRANCH OF	
THE DEPARTMENT OF ENVIROMENTAL AFFAIRS	Fourth Respondent
SOUTH AFRICAN NATIONAL PARKS	Fifth Respondent
WEST COAST NATIONAL PARKS	Sixth Respondent

APPLICANTS' HEADS OF ARGUMENT

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I INTRODUCTION

1. There is an imaginary line that runs across the Langebaan Lagoon. The line was drawn in 1969 to protect traditional net fishers from the encroaching pressure of recreational anglers. It is the line between Zone A and Zone B in the image below:[1]

2. Today, that same line serves the opposite purpose. It makes it a crime for the current net fishers of Langebaan – the Applicants – to practice their customary fishing right south of the line in Zone B. Instead of protecting them from recreational anglers, the line squeezes the Applicants into the overcrowded Zone A. They have to share the zone with anglers, speedboats, and other recreational activities. This limits their ability to fish, support their families, and sustain their traditions.

[1] The image appears in Dr Jackson's Report at 1: Record p 600.

3. While the Applicants – whose families have been fishing the Lagoon for generations – are forced into Zone A, three White fishers who live in Churchhaven have free, lawful access to Zone B. Moreover, despite the fact that the mostly White recreational fishers specifically target the most vulnerable species (white stumpnose), and catch 470 times more than the Applicants, there is no limit on the number of recreational fishers.

4. One would have thought that such an inequitable division of common resources would be justified by some strong scientific evidence. It is not. There was no scientific basis for excluding the Applicants from Zone B, at the time the decision was made. And the comprehensive data that has only been made available through this litigation conclusively shows that the Applicants can safely fish in Zone B without depleting the fish stocks.

5. Yet the Department of Agriculture Forestry and Fisheries (**DAFF**) continues to deny the Applicants any access to Zone B, while defending the rights of recreational fishers. Even the South African National Parks (**SANParks**)[2] – the entity responsible for managing the West Coast National Park (**WCNP**) – believes that something needs to change. Recreational fishers need to be limited, and the Applicants need to be accommodated.

6. That is what this Application seeks to achieve. It does not seek unrestricted or unreasonable access to the Lagoon. The Applicants fully endorse the need to conserve the Lagoon and the fish, fowl and flora it harbours. But the rules of access need to be rational; they need to be reasonably connected to scientific information; and they need to fairly allocate access based on the need for access, and the damage different types of activities cause.

[2] For ease of reference, I also refer to SANParks predecessors in title as SANParks.

7. The Applicants seek to set aside their exclusion from Zone B and create the space for a negotiation with DAFF and SANParks on the type of access they should have to Zone B. They hope that this litigation will lead to a better, more productive relationship with the Respondents that will improve the management of the Lagoon for generations to come.

8. This is accordingly an application to review and set aside:

   8.1. A condition ("**the Condition**") in fishing exemptions and permits granted by the First Respondent to the traditional net fishers of Langebaan; alternatively

   8.2. The decision(s) ("**the Decision**") of the First Respondent to grant the Applicants exemptions and permits subject to the Condition.

9. The Condition prevents the Applicants from fishing in a part of the Langebaan Lagoon known as "Zone B". This has serious consequences for their livelihoods, and threatens the continued existence of the custom of traditional net fishing in Langebaan. More importantly, the Condition, and/or the Decision to impose it, are irrational, unreasonable, and unfairly discriminate indirectly on the basis of race.

10. These heads of argument are structured as follows:

   10.1. **Part II** summarises the relevant factual background;

   10.2. **Part III** deals with the admittedly incomplete Rule 53 Record filed by the Respondents, and the consequences for the application;

   10.3. **Part IV** sets out the first two grounds of review: irrationality and unreasonableness;

   10.4. **Part V** contains the related grounds of review of unfair discrimination and ulterior purpose; and

10.5. **Part VI** addresses the appropriate remedy.

II FACTUAL BACKGROUND

11. In this part, we lay out the key factual background to this application in the following sections:

11.1. The history of the Langebaan net fishing community;

11.2. A brief summary of how their fishing has been regulated;

11.3. The impact of the exclusion from Zone B; and

11.4. Certain developments that occurred during the litigation.

History of Net Fishing[3]

12. The history of net fishing is described as a "*history of discrimination and marginalisation*" that "*epitomizes [a] process of exclusion*".[4]

13. Net fishing has been occurring in Langebaan since at least 1673 when early fishers provided southern mullet (**harders**) to the VOC establishment in the Cape.[5] Initially, the fishers used seine nets (**trek nets**) that were hung in the water and then pulled all the fish into one place.[6] In the late 1890s, gill nets were introduced in the Lagoon by outside fishers. Gill nets – which are used today – trap each fish in the net, normally by catching it on its gills. The size of the mesh can be altered to target specific species.[7] At the time, the traditional fishers kept using their trek nets.

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[3] See particularly Van Sittert Affidavit: Record p 133; Sunde Affidavit: Record p 440.

[4] Van Sittert Affidavit at paras 17-8: Record p 140.

[5] FA at para 39: Record p 18.

[6] FA at para 42: Record p 19.

[7] FA at para 43: Record p 19

14. The Langebaan community was close-knit and the right to fish was based on membership of the community. The fishers had an intimate knowledge of the Lagoon and they gave different fishing grounds names like Grootaas, Kleinaas, Witgat and Grootkos.[8]

15. Traditional net fishers continued to use their trek nets until the last quarter of the 20th century "*when white urban middle class recreational users and marine scientists made them the convenient scapegoats for widespread marine fish species declines driven by industrial fishing, urbanisation and pollution*".[9] Their trade and traditions were increasingly marginalised by the force of "*conservation*" and the ravages of apartheid spatial planning. Many were forced to give up their traditional methods in order to support their families.[10]

Regulation

16. Permits were first introduced in the Lagoon in 1967-8.[11] In 1969, the fishers complained about "*the negative impact of the sports fishers on their nets and on their livelihood as fishers.*"[12] The Apartheid government responded by dividing the Lagoon to protect them. He put up beacons to draw the current line between Zone A and Zone B – "*the netfishers would fish in Zone B, the sports fishers in Zone A.*"[13] It was not drawn on the basis of any conservation

[8] FA at paras 50-1: Record p 22.

[9] Van Sittert Affidavit at para 15: Record p 139.

[10] FA at paras 45-48: Record p 21.

[11] FA at para 53: Record p 23.

[12] FA at para 54: Record p 23.

[13] FA at para 54: Record p 23.

imperative, but to settle a dispute between traditional and recreational fishers.[14]

17. The Lagoon was proclaimed as a marine reserve some time in 1973. During the 1980s, the government forced the fishers to stop using their trek nets and convert to gill nets. When the Lagoon was declared a National Park in 1985, it was managed by SANParks. Fishers using gill nets were still allowed to fish in both Zone A and Zone B.[15]

18. At this time SANParks began acquiring adjacent land to be included in the newly-declared Park. Many ancestors of the current fishing community lived and worked on these farms for generations. They had enjoyed use of the waters and the marine resources for decades. However, the Park entered into agreements with some of the white landowners that allowed them to continue to access the marine resource. However, "*the coloured fishers' long-recognised property rights to the use of marine resources in the waters of the lagoon were not the subject of any contractual arrangements or compensation.*"[16]

19. Following those agreements, in 1992 SANParks introduced a set of regulations that permitted residents in the Park to fish in Zone B, while those living in Langebaan were not.[17] Those agreements are the source of the current distinction between Coloured Langebaan fishers and White Churchhaven fishers. However, the Park authorities gave into pressure from

[14] FA at para 55: Record p 24. This is admitted by the Respondents. Lamberth AA at paras 71-2: Record p 662.

[15] FA at paras 58-60: Record pp 24-5.

[16] Sunde Affidavit at paras 42-3: Record pp 453-4.

[17] FA at paras 116-7: Record p 45.

the traditional net fishers and allowed them to continue to fish in Zone B.[18] The Park had adopted the line between Zone A and Zone B without any scientific research.[19]

20. During this time, the white recreational angling lobby imposed significant political influence to undermine the rights of net fishers for their benefit. This is recorded by the Respondents' own expert, Dr Lamberth, who recognised that "*complaints from recreational anglers that net fishers were targeting the line fish species that they targeted have resulted in conservation and fisheries management measures to reduce net fishing in SA as a whole.*"[20]

21. Following the promulgation of the Marine Living Resources Act (**MLRA**)[21] in 1998, the Langebaan Lagoon was gazetted as a Marine Protected Area (**MPA**). The initial regulations allowed the Langebaan net fishers to continue to fish in Zone B, while recreational fishers could only fish in Zone A.[22]

22. This remained the case until 2003 when the National Environmental Management: Park Authorities Act was introduced. SANParks then attempted to exclude the Langebaan fishers from Zone B. They resisted and it was eventually agreed that the Applicants could fish in Zone B, provided they did not use motor boats.[23]

23. In 2005, commercial long term net fishing rights were issued. Only seven permits were granted to the Langebaan community. The conditions in those

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[18] Sunde Affidavit at para 46: Record pp 454-5.

[19] Sunde Affidavit at para 44: Record p 454.

[20] Sunde Affidavit at para 47: Record p 455, summarising various articles written by Dr Lamberth. In his affidavit, Dr Lamberth does not deny this statement. Lamberth AA at para 254: Record p 711.

[21] Act 18 of 1998,

[22] Sunde Affidavit at para 48: Record p 455.

[23] FA at paras 128-33: Record pp 49-51.

permits for the first time excluded the Langebaan fishers from Zone B.[24] The White Churchhaven fishers were still allowed access to Zone B.

24. As a result of the discriminatory commercial rights allocation, in 2005 traditional fishers from the Northern, Western and Southern Cape launched the *Kenneth George* litigation in the Equality Court. They argued that the failure to provide traditional small scale fishers – including the Langebaan fishers – with access to marine resources violated their constitutional rights. The case led to two orders. First, it led to an agreement in 2007 with the Minister of Environmental Affairs to adopt a policy for traditional small scale fishers. This would eventually culminate, in 2012, in the Small Scale Fishing Policy (**SSFP**), which we discuss below. Second, in 2010, the court ordered (again by agreement) that the Department would provide "interim relief" to net fishers until the SSFP was enacted and implemented.[25]

25. At present, therefore, the Langebaan small scale fishing community is divided into two types of fishers – seven who have long term commercial rights permits; and seven who share three interim relief permits under the *George* order. Both are subject to the Condition excluding them from Zone B.

26. Meanwhile, the Langebaan Fishers attempted to convince DAFF to grant them limited access to Zone B during the holiday periods when Zone A is even more congested than usual. From 2010 to 2012, the Applicants were granted limited access to Zone B at certain times of year.[26]

27. Despite attempting to engage with the Department for reasonable access, from 2012 the Applicants have not been allowed to fish in Zone B at all. In

[24] FA at paras 134-5: Record p 51.

[25] FA at para 92: Record p 35.

[26] FA at paras 148-50: Record pp 56-7.

2013, two of the Applicants were arrested, allegedly for fishing in Zone B. Although the prosecution has since been withdrawn, it was the catalyst for this application to review and set aside the Condition.

Impact

28. For the Applicants, the effect of being excluded from Zone B is severe. Zone A is more crowded (by tourists and recreational fishers). This makes fishing more difficult and more dangerous.[27] As a result, the Applicants are often forced to fish at night (particularly during the holiday periods) when their lights scare the fish away.[28] The nearby army base also affects the number of fish in Zone A.[29]

29. In addition, the harders in Zone B are "*both larger and more plentiful*".[30] The Applicants would be more likely to sustain their livelihoods and traditions if they could fish in Zone B. As Mr Dowries summarises their position: "*If we are forced to find alternative employment, many of us would have to leave our families like our fathers did. We believe that the time has passed when poor people must be forced into migrant labour.*"[31]

Developments During Litigation

30. It is necessary to briefly mention some developments that occurred during the litigation.

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[27] FA at para 180: Record p 68.

[28] FA at para 181: Record pp 68-9.

[29] FA at para 182: Record p 69.

[30] FA at para 183: Record p 69.

[31] FA at para 190: Record p 71.

31. First, the MLRA was amended in 2014 to allow for the implementation of the SSFP.[32] The Act now defines small scale fishing and recognises them as a distinct sector, and s 19 deals specifically with the rights of small scale fishers. The amended MLRA also adds important additional objectives to s 2 of the MLRA, in particular, "*the need to recognise approaches to fisheries management which contribute to food security, socio-economic development and the alleviation of poverty*".[33] The SSFP includes a principle of preferential access for Small Scale fishers "*who are part of a Small Scale fishing community, who derive their livelihood from the sea […] to harvest marine living resources*".[34]

32. Second, there is currently a new rights allocation process underway. That process is required to comply with the SSFP and award community rights to the Langebaan fishers granting them a multi-species "basket" of marine resources.

33. Third, in the founding papers – and particularly in the Report of Dr Jackson – the Applicants referred to research by Mr Dopolo, an employee of SANParks. The full data or research were not however, available. That data was relied on by SANParks in answer and, following a request from the Applicants in terms of rule 35, provided to the Applicants' experts. The data is the fullest analysis of the state of net fishing in the Langebaan Lagoon. As we explain below, it supports the Applicants' position that their complete exclusion from Zone B is not scientifically justified.

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[32] Marine Living Resources Amendment Act 5 of 2014.

[33] MLRA s 2(l).

[34] SSFP at p 15.

III LEGAL FRAMEWORK

34. The regulation of the Langebaan Lagoon is covered by several overlapping laws and policies. We do not fully describe that framework here. Instead, we focus on the key provisions that had to inform the decision to impose the Condition. In doing so, we wish to emphasise that the law does not have a myopic focus on protecting the environment. Instead, it attempts to balance competing interests, including the rights of traditional communities to have meaningful and sustainable access to marine resources.

35. The National Environmental Management: Protected Areas Act (**NEMPAA**) governs the management of national parks, including the West Coast National Park (**WCNP**). Its objectives include:

    35.1. "*to provide for co-operative governance in the declaration and management of protected areas*";[35]

    35.2. "*promote sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of such areas*";[36] and

    35.3. "*to promote participation of local communities in the management of protected areas, where appropriate*".[37]

36. The SSFP, which is the result of the *George* litigation and commits the government to empowering small scale fishing communities, records its purpose as follows:

> *"This policy aims to provide redress and recognition to the rights of Small Scale fisher communities in South Africa previously marginalised*

[35] NEMPAA s 2(b).

[36] NEMPAA s 2(e).

[37] NEMPAA s 2(f).

and discriminated against in terms of racially exclusionary laws and policies, individualised permit-based systems of resource allocation and insensitive impositions of conservation-driven regulation. In line with the broader agenda of the transformation of the fishing sector, this policy provides the framework for the promotion of the rights of these fishers in order to fulfil the constitutional promise of substantive equality of the rights of these fishers in order to fulfil the constitutional promise of substantive equality."[38]

37. While it is sensitive to the need to protect marine resources, the government's own policy in the form of the SSFP is focused on people, on equity, and on redress.

38. Importantly, even the right to an environment in s 24 of the Constitution is not exclusively about protecting the environment at all costs – it requires environmental justice that balances conservation against legitimate human use of environmental resources.

39. Section 24 reads:

> "*Everyone has the right -*
>
> *(a) to an environment that is not harmful to their health or well-being; and*
>
> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -*
>
> *(i) prevent pollution and ecological degradation;*
>
> *(ii) promote conservation; and*
>
> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*"

[38] SSFP p 1.

40. The right is not limited to the protection of natural resources without regard for the interests of those people who rely on the resources. It requires sustainable development and environmental justice between generations. It requires a balance between protecting natural resources, and protecting people who rely on natural resources.

41. This was recognised by the Constitutional Court in *Fuel Retailers*:

> "*The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. … Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.*"[39]

42. According to Gonzales, the idea of environmental justice captures four ideas: distributive justice, procedural justice, corrective justice and social justice.[40] Three of those elements of environmental justice were violated by the decisions under review in the present matter:

    42.1. Distributive justice calls for a "*fair allocation of the benefits and burdens of natural resource exploitation*".[41] It is not fair to completely deny the

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[39] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) at para 45.

[40] C Gonzales 'Environmental Justice and International Environmental Law' in S Alam et al *Routledge Handbook of International Environmental Law* (2013) at 78-79

[41] Ibid at 78.

Applicants their customary right to fish without a scientific basis, and while failing to regulate rapacious recreational fishers.

42.2. Procedural justice "*requires open, informed, and inclusive decision-making processes.*"[42] As noted throughout the affidavits, while there have been interactions between the Applicants and the Respondents, those have not constituted "*inclusive decision-making*".[43]

42.3. Social justice, according to Gonzales, "*recognises that environmental struggles are inextricable intertwined with struggles for social and economic justice.*"[44] This recognises that the right to a healthy environment is not limited to protecting natural resources. The right is meaningless if those who are prejudiced to protect natural resources have no food, no employment and are forced to abandon their traditional ways of life.

43. In short, the absolutist approach of completely excluding the Applicants from Zone B is not supported, let alone required, by the right to a healthy environment. Far from upholding the right, it undermines it by failing to promote the fair balance between people and resources, and between different generations that environmental justice demands.

IV THE REASONS AND THE RECORD

44. Administrative decisions must be justifiable when they are made. What s 33 of the Constitution and PAJA require is that decision makers must act lawfully, reasonably and fairly <u>when they take decisions</u>. An administrator cannot

[42] Ibid at 78-79.

[43] See generally, RA at paras 33-40: Record pp 1486-8.

[44] Ibid at 79.

defend an administrative decision based on reasons that she did not consider when she took the decision. Rule 53 of this Court's rules and the entire edifice of administrative law is designed to prevent *ex post facto* justifications for bad administrative decisions.

45. That is precisely what the respondents attempt to do in this case. The Rule 53 Record filed by the Respondents is scant and patently inadequate. DAFF itself admits that "*the Rule 53 Record is indeed incomplete*".[45] In the face of the inadequate Record, the respondents seek to build an ex post facto justification for the impugned decisions in the affidavits.

46. This is not permissible. Precedent of this Court, other High Courts, the SCA and the Constitutional Court either hold, or strongly suggest that the only reasons on which the Respondents are entitled to rely to justify their decisions are those contained in the Rule 53 Record.

47. In this Part, we first explain why the Respondents cannot be permitted to raise new reasons, or put up new documents in answer. We then describe which reasons are new reasons, and why there is no basis to depart from the ordinary rule.

The Rule 53 Record

48. There are two basic reasons why the decision maker cannot advance new reasons in his affidavit that are not contained in the rule 53 record: (a) those reasons are *ex post facto* justifications, not the true reasons for the decision; and (b) it is unfair to the applicant for judicial review.

[45] Lamberth AA at para 230: Record p 703.

49. First, our courts have followed the following approach endorsed by the English Court of Appeal in *R v Westminster City Council, Ex parte Ermakov*:

> "*[T]he purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. … [I]n many cases it might be … suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to application to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.*"[46]

50. In *National Lotteries Board v South African Education and Environment Project*, the Supreme Court of Appeal endorsed these sentiments in the following terms:

> "*The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision.*"[47]

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[46] [1996] 2 All ER 302 (CA) at 315h - 316d. Quoted with approval in *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) at 121F-122C and *National Lotteries Board and Others v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA). See also *R (s) v Brent LBC* [2002] EWCA Civ 693 at para 26.

[47] *National Lotteries Board* (n 46) at para 27.

51. Second, rule 53 rule exists to facilitate applications for judicial review. The rule is "*an important tool in determining, on equal footing … the lawfulness and fairness of any administrative action which is mostly taken, so to speak, behind closed doors.*"[48] It recognises that those seeking to review public decisions often have "*no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision.*"[49] Without the protection afforded by Rule 53, the applicant "*would be obliged to launch review proceedings in the dark*".[50]

52. To overcome this almost inevitable information deficit, Rule 53 compels the public authority to provide the record of proceedings and then entitles the applicant to amend its notice of motion and supplement its founding affidavit. Importantly, this entitlement to amend and supplement is granted "*as of right and without the expense and delay of an interlocutory application*".[51] In essence, the applicant is given a fresh chance to state its case after having sight of all relevant documents. As the Appellate Division put it in *SA Jockey Club*: "*The Rule thus confers the benefit that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court.*"[52]

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[48] *Lawyers for Human Rights v Rules Board for Courts of Law and Another* [2012] ZAGPPHC 54; [2012] 3 All SA 153 (GNP); 2012 (7) BCLR 754 (GNP) at para 23.

[49] *Jockey Club of SA v Forbes* 1993 (1) SA 649 (A) at 660D.

[50] Ibid.

[51] Ibid.

[52] Ibid.

53. That is why, in *Jicama 17 (Pty) Ltd v West Coast District Municipality*, Cleaver J held that "*it is not open to the first respondent to raise the other defences raised for the first time in its answering papers. The applicant has come to court in order to deal with the reason which was conveyed to it as being the basis on which the decision to cancel the tender had been made.*"[53]

54. This Court has subsequently endorsed and applied the above holding.[54] The Johannesburg High Court,[55] the Pretoria High Court,[56] and the Land Claims Court[57] have also endorsed and applied the reasoning in *Jicama*.

55. As noted earlier, the SCA in *National Lotteries Board* also supported this approach, although it did not "*strictly decide*" the question.[58] However, the SCA refused to consider additional reasons given by the respondent in its answering affidavit. The effect of its reasoning is clear: decision-makers are bound by the reasons they provide and cannot think up new reasons to meet an applicant's complaints.

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[53] *Jicama* (n 46) at para 11.

[54] See *South African Education and Environment Project and Another v National Lotteries Board and Others* [2010] ZAWCHC 220 at para 74; and *Beach Clean Services South Africa CC v City of Cape Town* [2014] ZAWCHC 41 at paras 64-6.

[55] *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others, In Re: Vodacom (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others* [2014] ZAGPJHC 51; [2014] 3 All SA 171 (GJ) at paras 95-7.

[56] *CFIT (Pty) Ltd v Minister of Defence and Others* [2015] ZAGPPHC 2 at para 43.

[57] *Florence (Dodgen) v Government of the Republic of South Africa and Another* [2013] ZALCC 11 at paras 20-1.

[58] *National Lotteries Board* (n 46 above) at para 27 (following the passage quoted above, the court stated: "*Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.*")

56. The Constitutional Court endorsed the SCA's reasoning in *Minister of Defence and Military Veterans v Motau*.[59] Having found that the Minister had offered sufficient reasons for her decision, Khampepe J stated in a footnote:

> "*I do not consider it necessary to deal with the further reasons cited by the Minister for her decision in her papers in this Court and the High Court. In any event, I have reservations about whether it would be permissible for her to rely on these reasons as they were not relied on or disclosed when she took her decision (see in this regard Cachalia JA's judgment in* National Lotteries Board and Others v South African Education and Environment Project *[2011] ZASCA 154; 2012 (4) SA 504 (SCA) at paras 27-8).*"[60]

57. The legal position, therefore, is clear. The default rule is that a decision maker can only defend its decisions based on the reasons and documents that she provides either when reasons are requested, or in the rule 53 record.

58. This rule is not absolute. There are cases where courts have allowed a decision maker to advance new reasons.[61] The most important is the decision of the SCA in *Van Zyl v Government of the Republic of South Africa*.[62] The case concerned a challenge to the government's decision not to provide the appellants with diplomatic protection. Importantly, the appellants did not bring their application in terms of rule 53. Harms ADP rejected their

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[59] [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC).

[60] Ibid at fn 85 (our emphasis).

[61] See, in this division, *Bizstorm 51 CC T/A Global Force Security Services v Witzenberg Municipality and Another* [2014] ZAWCHC 83 (evidence demonstrated that the reasons advanced were not in fact *ex post facto* rationalisations) and *CAE Construction CC v Petroleum Oil & Gas Corporation of SA (Pty) Ltd and Others* [2006] ZAWCHC 57 at para 39 (distinguished on the basis that the reasons were not in fact *ex post facto*).

[62] 2008 (3) SA 294 (SCA).

attempt to prevent the government from raising new reasons in its answering affidavit. He provided four reasons:

58.1. The applicants there had not followed rule 53;

58.2. *Jicama* concerned reasons that were in fact *ex post facto* reasons;

58.3. The English cases are based on the statutory duty to give reasons which did not exist; and

58.4. The government had reasons not to disclose their justifications earlier.[63]

59. As we explain below, these distinctions do not aid the Respondents in this matter.

The Record in this Case

60. For the following reasons, the Respondents should not be allowed to rely on any information or reasons not contained in their Rule 53 Record.

61. First, the Applicants did rely on Rule 53. The notice of motion asks the Respondents to file a record that includes all documents "*which relate to its decision or were before the First or Second Respondents when the decisions were made, together with such reasons as they may desire to give*".[64] The Respondents ignored this request. It is also worth noting that the Respondents took far longer than they were entitled to file the Record – nearly 10 months. This is not a case where mistakes were made because of compliance with time limits. The Respondents had more than sufficient time to file a proper record.

[63] Ibid at para 55.

[64] NOM at para 9.1: Record p 5.

62. Second, the Record did not include a variety of patently relevant documents. Indeed, it did not include documents that the Applicants attached to their Founding papers. That could not be a mere oversight. Rather, it was an honest representation of what was considered.

63. Third, Dr Lamberth provides a long list of documents that should have been in the Record,[65] but he was not the decision-maker. The single decision-maker who deposed to an affidavit states that he only considered a single document the *Recommendation of the Linefish Scientific Working Group* (2012).[66] The Rule 53 Record does not consist of all information a Respondent may later think could justify his decision, but the information he in fact considered.

64. Fourth, Mr Tanci states that the Respondents attorneys will file an affidavit explaining why these supposedly relevant documents were not included in the Record.[67] No such affidavit was filed.[68] There is, therefore, no explanation for why the supposedly relevant documents were not included in the Record.

65. There are, therefore, good reasons to hold that the justifications advanced in answer by the Respondents are not the true reasons, but *ex post facto* justifications. However, even if they could be relied on, they do not justify the Condition, for the reasons we set out in the next Part.

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[65] Lamberth AA at para 240: Record pp 707-8

[66] Tanci AA at para 9: Record p 1067. The document appears as **SA2**: Record p 1096.

[67] Tanci AA at para 17: Record p 1074.

[68] RA at para 82: Record p 1502.

V IRRATIONAL AND UNREASONABLE

66. The Applicants' primary ground of review is that the decision to impose the Condition is irrational and unreasonable because it is not supported by any relevant research.

67. We expand on that argument as follows:

67.1. We set out the law concerning rationality and reasonableness review;

67.2. We show that there is no evidential basis for the Condition;

67.3. We indicate how the decision-makers failure to consider relevant information and considered irrelevant information; and

67.4. We explain why the new justifications advanced for the first time in the Answering Affidavits cannot rationally justify the Condition.

The Law

68. The Applicants rely on a number of provisions of PAJA to support the claim that the decision to impose the Condition was irrational and unreasonable. These include:

68.1. Because irrelevant considerations were taken into account or relevant considerations were not considered (s 6(2)(e)(iii));

68.2. It was not rationally connected to:

68.2.1. The purpose for which it was taken (s 6(2)(f)(ii)(aa));

68.2.2. The information before the administrator (s 6(2)(f)(ii)(cc)); or

68.2.3. The reasons given for it by the administrator (s 6(2)(f)(ii)(dd)); and

68.3. It was so unreasonable that no reasonable person could have taken it (s 6(2)(h)).

69. We do not intend to address each ground separately. In the context of this case they are closely interrelated and overlapping. The Condition is so unreasonable precisely because relevant information was not considered, there was no information before the Respondents to justify it and the reasons are so patently flawed and inadequate. Instead, we consider the problems with the Decision thematically and cumulatively to show that it was both irrational and unreasonable.

70. It is necessary, however, to explain what standard of decision-making PAJA requires. What is a reasonable decision naturally depends on the facts of each case. The relevant factors include:

> "*whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.*"[69]

71. While courts must treat "*the decisions of administrative agencies with the appropriate respect*", that is not a licence for unrestrained deference. As O'Regan J explained in *Bato Star*:

> "*where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.*"[70]

72. The above statements were made in the context of a similar situation – the allocation of long term fishing rights. Although O'Regan J ultimately

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[69] *Bato Star Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) at para 45.

[70] *Bato Star* at para 48 (emphasis added).

concluded that those decisions were reasonable, *Bato Star* makes it clear that complex, multifaceted decisions are not immune from review. This Court has a duty to examine the evidence before it and decide whether or not DAFF has put up sufficient facts and reasons to justify its decision.

73. Importantly, the Applicants are not specifying what decision DAFF should take; they argue only that the decision that has been taken is irrational and unreasonable.

No Evidential Basis for Exclusion from Zone B

74. The most important reason that the Condition is irrational and unreasonable is that there is no basis in science to support it. SANParks' West Coast National Park Management Plan accurately summarises the lack of information supporting the Condition:

> "*One of the questions raised is how appropriate the current Langebaan MPA Ramsar Site zoning in terms of the management of gillnet fisheries? The zoning was drawn up with minimal stakeholder (affected parties) effective participation and with limited ecological justification. Underway study is looking to provide guidance on this issue in the next two years. The contested zoning on the ground would stand the risk of the Ramsar Site being a paper conservation area.*"[71]

75. We expand on the lack of any factual basis for the Condition under three headings:

75.1. The line is arbitrary;

75.2. The harder stock is strong and the level of fishing optimal; and

75.3. The Applicants have a negligible impact on threatened fish species.

[71] PMP at para 1.3.2: Record p 1276.

The line is arbitrary

76. It is common cause that the line between Zone A and Zone B was not drawn for conservation reasons. It was drawn in 1969 in order to protect the netfishers from the sports fishers.[72] As Dr Lamberth puts it: "*the zoning preceded any attempts to manage the fisheries in the Lagoon and arose from attempts to separate users*".[73] Or as Dr Jackson explains: "*The zonation was … not informed by research on spatial patterns of fish use of Lagoon habitats*",[74] and "*has not been derived from a management plan based on analysis of stock assessments of fishery catch data.*"[75] She notes that the line was drawn four years before the Lagoon was declared a Marine Reserve, and seven years before any study on harder exploitation was conducted.[76]

77. In short, the line was not based on science at all. It was certainly not designed with any desire to conserve the Lagoon, or protect vulnerable species of any type.

78. It is important to note that – unlike the line between Zone A and Zone B – the line between Zone B and Zone C was not arbitrary. It was, as the Respondents' scientists put it, "*designed so as to accommodate fishers within Langebaan without compromising the MPA.*"[77] The Applicants accept that Zone C should remain free from fishing, and that the line between Zone B and Zone C was rationally drawn.

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[72] FA at para 54: Record p 23.

[73] Lamberth AA at para 264: Record p 713. Dr Lamberth goes on to claim that the zoning was also motivated by "*avian and other biodiversity concerns*". Ibid. As we explain below, that claim is false.

[74] Jackson Report at 2: Record p 601.

[75] Ibid at 3: Record p 602.

[76] Ibid at 2: Record p 601.

[77] Tanci AA at para 10.5: Record p 1070, quoting SWG.

79. The Applicants do not dispute that some form of zonation is necessary to protect the Lagoon and regulate the different activities that occur on the Lagoon. They contend that it is irrational to use a line that was designed to allow them to fish in Zone B, to exclude them from Zone B.

80. Importantly, since 1969, the placement of the line has never been reconsidered. The Respondents have never conducted a study to determine whether this arbitrary line drawn to protect netfishers is a rational and reasonable way to regulate the fishery. Nor have they considered whether a different line could better protect vulnerable species, or better regulate the Lagoon's marine resources.

81. Because they cannot rationally explain the position of the line, the Respondents resort to the strange position: "*Although the current demarcations are consistent with the historical boundaries that emanated from separating the sports fishers from the netfishers, that configuration accords with the objectives of a protected area.*"[78] This is an argument that reduces reason to coincidence. It also seeks to employ a justification for some protection of the Lagoon in principle to justify a specific measure without its own scientific backing.

82. There are any number of lines that could have been drawn on the Lagoon that would have protected the MPA. But the use of this particular line – which was designed for a contradictory purpose – without any reasoned basis is not rational.[79] If the Respondents wish to exclude the Applicants from their historical fishing grounds, PAJA and the Constitution require them to base

[78] Tanci AA at para 12.2: Record p 1072. The same statement is repeated verbatim in Mkefe AA at para 6.3: Record p 1135; and Lamberth AA at para 36: Record p 651.

[79] RA at para 143: Record p 1516.

that decision on research and science, not regulatory roulette. The Respondents are required to assess whether or not there are alternative zonations that could better accommodate the Applicants, while still protecting the MPA. That the Respondents have irrationally refused to do.

83. Dr Jackson summarises the point as follows: DAFF's failure to consider alternative strategies for regulating fishing in the Lagoon and its "*insistence on maintaining zones developed before scientific data were collected, is indefensible.*"[80] We return below to why the failure to consider alternatives itself renders the decision reviewable. But that failure also explains why the continued use of the line for the opposite purpose for which it was designed is irrational.

Harder population

84. The Respondents appear to claim that excluding the Applicants from Zone B is necessary to protect harder stocks. This claim has no basis in fact.

85. In 2001, when more net fishers were allowed to operate in both Zones A and B, Dr Lamberth – DAFF's own expert – described the harder stock in the Lagoon as "*optimal*".[81]

86. Dr Jackson states emphatically that:

> *"the exclusion of netfishers from Zone B is not based on research on harder stocks in the Langebaan Lagoon – Saldanha Bay system, because there is no research to suggest that harder stocks in Langebaan Lagoon are threatened by fishing, or otherwise.*"[82]

[80] Jackson Report at 10: Record p 609.

[81] Lamberth AA at para 21.4: Record p 641.

[82] Jackson Affidavit at para 12: Record p 581.

87. That was the case at the time the Conditions were first imposed – there was no research to support a concern about harder stocks. This is confirmed by the State of the Bay Report, which concluded in 2013 that:

87.1. The current status of fish and fisheries in the Lagoon is satisfactory;

87.2. There is no consistent long term negative trend since 1986; and

87.3. The annual effort expended in the harder net fishery has remained constant between 2006-2012, despite the introduction of the interim permits.[83]

88. The same is true today based on the most recent and complete data. After studying Mr Dopolo's data, Dr Jackson confirms her view that the harder stock is sustainable despite the fact that net fishers are currently fishing largely in Zone B. She concludes:

88.1. The size of harders in the Lagoon has not decreased since 1998;[84] and

88.2. Catch-per-unit-effort (the number of harders caught with each throw of the net) has not declined since 1994.[85]

89. While she expresses concern about unmonitored fishing in Zone B, she persists with the recommendation of a "*fishery management plan to regulate both small scale (or commercial) and recreational fishing in the Lagoon is key to equitable utilization of the Langebaan harder resource.*"[86]

90. Indeed, the mere fact that both Langebaan and Churchhaven fishers are currently fishing in Zone B contradicts Dr Lamberth's claim that "*the inevitable and automatic consequence of fishers being allowed to exploit in Zone B is*

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[83] **WW2** State of the Bay Report at 250-2: Record pp 434-6.

[84] Jackson RA at para 7a: Record p 1600.

[85] Jackson RA at para 7c: Record p 1601.

[86] Jackson RA at para 8: Record p 1601.

that the size and quantity of fish will be reduced".[87] The Langebaan and Churchhaven fishers are exploiting Zone B (as they had for decades previously) and stocks are stable.

Protected species

91. The primary reason advanced for excluding the Applicants from Zone B is the need to protect protected species, particularly the white stumpnose. We point out below[88] that recreational fishers directly target white stumpnose and are a far greater threat to that and other species than netfishers. This undisputed fact demonstrates that DAFF's true motivation for excluding the Applicants from Zone B is to promote the interests of recreational fishers.

92. But even taken alone, the Applicants do not pose a significant threat to white stumpnose or other threatened species. Dr Jackson pointed out in her first report that the available data showed that for the Langebaan harder fishery, "*bycatch is an estimated <1% of the global total catch of the most frequently-caught species over three years*".[89] This is because the Applicants target the "*shallow areas where harder are more plentiful*", rather than the deep, central channels preferred by other species.[90]

93. Based on her analysis of the Respondents' own data Dr Jackson confirmed this opinion in her second report. The net fishers caught a total of 170kg of white stumpnose in a year. That is "*insignificant relative to the 80 000kg per*

[87] Lamberth AA at para 97: Record p 668.

[88] See paras 105-110.

[89] Jackson Report at 5: Record p 604.

[90] Ibid.

year caught by the recreational fishery".[91] In addition, the extent of bycatch was identical no matter what zone the net fishers were fishing in.[92]

94. One of the main reasons for the low bycatch is the specific parts of Zone B that the Applicants use. They target the shallow areas on either side of the Lagoon where the harders are more plentiful. The white stumpnose and other linefish prefer the deep central channels.[93]

95. This uncontested expert evidence shows that excluding the Applicants from Zone B has no connection to protecting white stumpnose or other threatened species.

Consideration of Irrelevant Information

96. According to Mr Tanci, the only document he considered was the *Recommendation of the Linefish Scientific Working Group* (2012).[94] This document does not support imposing the Condition:

96.1. The document is not about the Langebaan fishers, but about the net fishery in general.

96.2. The primary discussion of Langebaan concerns the determination of the TAE (which we address below), not the exclusion of the Applicants from Zone B. The SWG Report contains no actual data on the impact of net fishing on harder stocks or linefish.

96.3. The document records that:

> *"It needs to be stressed that the maintenance of the effort status quo is not due to the fishery operating at sustainable levels, but due to the*

[91] Jackson Reply Report at 3: Record p 1640.

[92] Jackson Reply Report at 2: Record p 1639.

[93] FA at paras 73 and 165: Record p 29 and 63; Jackson Report at 5: Record p 604.

[94] Tanci AA at para 9: Record p 1067. The document appears as **SA2**: Record p 1096.

fact that <u>insufficient new data are available for any adequate up-to-date assessment of the fishery to be made</u>".[95]

97. The question that the Applicants have raised is <u>not</u> why there is some limit on fishing in the Lagoon – the need for that is common cause. The question is why they cannot fish in Zone B. The SWG merely records past decisions about the allocation of the TAE; it does not explain why the Applicants cannot fish in Zone B.

<u>Failure to Consider Relevant Information</u>

98. The Rule 53 Record is, on the Respondents' own version, incomplete. In particular, it does not include:

98.1. A consideration of the viability of alternative zones or regulations;[96]

98.2. The SSFP;[97]

98.3. The West Coast National Park Management Plan;[98]

98.4. The long history of customary net fishing in the Lagoon;[99]

98.5. The research of Mr Dopolo;[100]

98.6. Research by Dr Lamberth himself; or

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[95] **SA2** at 1: Record p 1098.

[96] SA at para 82: Record p 418. SANParks has previously suggested that the Applicants could be accommodated by making special zones within Zone A. But as SANParks' Ms Bopape noted, these alternatives "*were not practical*". FA at para 157: Record p 60. What has not been considered is alternatives that offer the Applicants limited access to Zone B and limit recreational fishing.

[97] SA at para 85: Record p 419. Even in Answer, Mr Tanci makes no claim to have considered this information.

[98] SA at para 86: Record p 419.

[99] SA at para 87: Record p 419.

[100] SA at para 88: Record p 420. We know this was not considered both because it was not included in the Record of decision, and because its conclusions directly contradict the exclusion of the Applicants from Zone B.

98.7. The 2005 General Policy and 2005 Netfishing Policy.[101]

99. As noted earlier, this is not a purely technical complaint. The only decision-maker to depose to an affidavit – Mr Tanci – states that the only document he considered was the SWG Report. Dr Lamberth's attempts to claim that other documents should have been included in the record ring hollow in light of Mr Tanci's admission, and the absence of the promised explanation for why key documents were not included in the Record.

100. More importantly, the Respondents appear not to have considered two vital concerns:

100.1. All the reasons given and documents supposedly relied on do not contain an attempt to balance the rights of net fishers, recreational fishers and conservation. Conservation is the only and ultimate justification relied upon for the restriction no matter how unnecessary, or how seriously it impacts on the Applicants. The legislative framework set out above requires the Respondents to consider the culture, history and socio-economic circumstances of the Applicants and attempt to find a sustainable solution that balances their rights to access to the need to preserve the Lagoon. That has not been done.

100.2. Related to that, DAFF has not considered the appalling impact that recreational fishers have on the Lagoon. As we note below, DAFF has never considered limiting recreational fishers, despite the fact that they are primarily responsible for damage to threatened species. If recreational fishing could be limited, it would make it far easier to increase access for the Applicants.

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[101] Lamberth AA at para 240: Record pp 708-9.

101. The failure to consider these documents and issues renders the decision irrational and unreasonable.

The New Reasons

102. As noted earlier, in the Answering Affidavits the Respondents advance new reasons to justify the Condition that are not contained in the Rule 53 Record. That is impermissible and those reasons should not be considered. But even if they are, they fail to justify the Condition. In this section, we consider the following new reasons advanced in answer:

102.1. The Condition is justified by the TAE;

102.2. Excluding the Applicants from Zone B is good for them; and

102.3. The protection of birds and seagrass.

The TAE

103. The primary substantive defence put up by the Respondents relates to the TAE. The Respondents' argument is as follows:

103.1. In 2001, it was determined that – unlike in other netfisheries in the country – the number of nets being used in the Lagoon "*was at an optimal level*".[102]

103.2. In order "*to sustain these optimal catches in Langebaan*" the TAE (**Total Allowable Effort**) was set at five rights holders who could use two gillnets each.[103]

[102] Lamberth AA at para 21.4: Record p 641. Mr Nel recounts a similar rationalisation for excluding the fishers from Zone B. See Nel AA para 33: Record p 1150.

[103] Ibid at para 21.5.

103.3. Following representations by fisher groups that "*bona fide fishers [were] being left out of the fishery*", the TAE was increased from 5 to 10. This was accomplished "*by reducing the TAE in the Saldanha netfish area, overlapping the Langebaan and Saldanha netfish areas and dividing the Langebaan effort between the **existing** A and B zones.*"[104]

103.4. Five rightsholders from Church Haven and Stofbergsforntein were allowed to fish in Zone B, while five rights holders from Langebaan could only fish in Zone A.[105] This kept the "*nets per kilometre*" of coast optimal.[106]

103.5. DAFF added two further rightsholders from Langebaan because they met all the criteria.[107] Following the *George* order, a further three interim relief permits were granted.[108]

103.6. This took the total to 15 rightsholders, 5 more than the 10 that was "*optimal*".[109]

103.7. Because there has been no challenge to the determination of the TAE, and because it is based on a division between Zone A and Zone B, this determination undermines the Applicants' attack on their exclusion from Zone B.[110]

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[104] Ibid at para 21.6.

[105] Ibid at para 21.7.

[106] Ibid at para 21.8: Record p 642.

[107] Ibid at para 21.9.

[108] Ibid at para 21.10.

[109] Ibid.

[110] Ibid at para 22: Record p 643.

104. This argument fails for two simple reasons: it is wrong in fact, and it is irrelevant in law.

105. In fact, the reliance on a TAE of 5 or even 10 is imaginary. Until 1997, there were 27 netfishers in the Lagoon. In 1997, 21 netfishers were recognised and fished in both Zone A and Zone B.[111] That was the case until 2003, when netfishers were first excluded from Zone B. Therefore, when the TAE was assessed in 2001, it was based on data from 1998 to 2000 when 21 fishers had been fishing in Zone A and B. As Dr Lamberth admits, the level of exploitation at that stage was "*optimal*". As Mr Dowries succinctly puts it: "*the Respondents are relying on a fiction when they state that the TAE of 5 is the optimal sustainable option for Langebaan Lagoon. The optimal TAE is 21.*"[112] And that effort is spread across both Zones A and B.[113] What in fact happened in 2001 is that the optimal TAE was reduced by more than 50%. That unexplained and unnecessary reduction is now being relied on to justify allowing some fishers in Zone B, while excluding others.

106. In law, even if there was factual support for a TAE of 10, the TAE is irrelevant to the case brought by the Applicants. That case is based on: (a) how the lagoon is divided; and (b) their exclusion from Zone B while white fishers are allowed access to Zone B and recreational fishing in Zone A remains unregulated. Dr Lamberth himself acknowledges that the "*optimal*" TAE

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[111] RA at para 28: Record pp 1484-5. See also RA at para 127: Record p 1512.

[112] Ibid at para 31: Record p 1485.

[113] Given that their reliance should have been included in the Rule 53 Record (so the Applicants could address it in their Supplementary Affidavit), the Respondents cannot rely on the *Plascon Evans* rule to rebut the evidence in the Replying Affidavit. Moreover, if the Respondents disputed the facts set out in the RA – which directly contradict the version they put up in their Answering Affidavits – they could and should have sought leave to file an additional affidavit. *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at para 51.

allowed fishing in both Zone A and Zone B. It is therefore possible to allow the Applicants some reasonable, limited access to Zone B. It is the Respondents' persistent refusal to consider that possibility that is under challenge.

Birds and Seagrass

107. The claim that the Applicants are excluded from Zone B to protect paleo-arctic migrant waders and seagrass is raised for the first time in answer. It is a classic *ex post facto* justification that the Respondents cannot permissibly advance. In any event, there is no basis for the assertion that net fishers threaten the birds or the seagrass.

108. Seagrass: Dr Lanmberth claims that "*the exclusion of human activities from Zones C and B was motivated primarily on the need to protect these birds during their feeding season.*"[114] This is naturally an important goal. But it is not rationally connected to the Condition:

108.1. There is no historical evidence that it was in fact the basis for the protection. It certainly was not the basis for drawing the line between Zones A and B.

108.2. It is only recreational fishers that pose a danger to these birds. As Dr Jackson points out, recreational fishers conduct bait collecting on the sand- and mud-flats. That kills invertebrates on which the local and migratory wading birds depend. Bait collecting "*is practised by recreational fishers only, to an extent that is currently not*

[114] Lamberth AA at para 35: Record p 650.

documented."[115] The same link is drawn in the scientific articles about seagrass that we discuss below.

109. Seagrass: The Applicants accept that seagrass should be protected.[116] However, there is no factual basis to connect netfishing with seagrass loss. This appears from the Respondents' own documents. The Park Management Plan says the following about seagrass:

> "*A decline in seagrass coverage in the lagoon from 1960-2007 has been noted (Pillay et al. 2010), mirrored by a loss in invertebrate diversity and a decline in numbers of waders. The causes of these changes are unclear, but are consistent with global trends (Waycott et al. 2009).*"[117]

110. The article by Pillay et al. is part of the papers.[118] While it concludes that the causes are unclear, it never links the worrying decrease in seagrass coverage with netfishing. The study does, however, link the decline in seagrass directly to recreational fishing:

> *"Smaller scale losses of [seagrass] may have been caused by human disturbance associated with trampling and bait collecting. [Seagrass] was virtually eliminated by 2007 at Klein Oesterwal, a site where recreational harvesting of mud- and sandprawns is common. At the adjacent Oesterwal, where no such harvesting is permitted, [seagrass] is still present".*[119]

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[115] Jackson Report at 4: Record p 603.

[116] RA at para 354: Record p 1565.

[117] **PLN2** Park Management Plan at para 2.9.5: Record p 1183. See also **PLN2** at para 1.3.3: Record p 1276.

[118] **CGA6** D Pillay et al 'Ecosystem change in South African Marine Reserve (1960-2009): Role of Seagrass Loss and Anthropogenic Disturbance" (2010) 415 *Marine Ecology Progress Series* 35: Record p 1425.

[119] Ibid at 42: Record p 1432. The cause of a large loss in 1976 is linked to dredging operations in Saldanha Bay. Ibid.

111. They estimate that recreational fishers turn over roughly 4840 tons of sediment per year. Seagrass is extremely susceptible to increased sedimentation and burial.[120]

112. Again, it is the recreational fishers, not the Applicants who threaten the Lagoon. Yet it is the Applicants who are targeted and excluded, while no steps are taken to limit the number of recreational fishers.

Conclusion

113. There is undoubtedly reason to protect the Lagoon, and to impose reasonable regulations on net fishing. But there is no rational basis to completely ban the Applicants from Zone B. It is not supported by science, or principle. Indeed, all the evidence demonstrates that the Applicants can fish sustainably in Zone B. The real threat is not the Applicants, but recreational fishers.

VI UNFAIR DISCRIMINATION AND ULTERIOR PURPOSE

114. Not only is the Applicants' exclusion from Zone B irrational and unreasonable – it unfairly discriminates against them to the benefit of white fishers in Churchaven and white recreational fishers. Indeed, the restrictions DAFF has imposed on the Applicants seem designed in large part to avoid limiting recreational fishing.

115. DAFF has taken this position despite the fact that it is recreational fishers who target white stumpnose; recreational fishers who are a threat to the birds; and recreational fishers who damage the seagrass. Yet instead of seeking to limit that clearly destructive behaviour of people who use the Lagoon for pleasure,

[120] Ibid at 43: Record p 1433.

DAFF elected to undermine the culture, traditions and livelihood of the Applicants.

116. In this Part, we first explain why the history and geography of the WCNP has resulted in unfair discrimination against the Applicants. Second, we expand on the submission that the Applicants exclusion from Zone B can only be explained as an attempt to protect recreational fishers.

Unfair discrimination

117. The third ground of review is that the Decision is "*otherwise unconstitutional or unlawful*" in terms of s 6(2)(i) of PAJA, because it indirectly and unfairly discriminates against the Applicants on the basis of race. Unfair discrimination is prohibited both by section 9 of the Constitution and section 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("**Equality Act**"). Where administrative action constitutes unfair discrimination, it falls to be reviewed and set aside under s 6(2)(i) of PAJA.

118. We first explain why there is discrimination, and then why the Respondents cannot justify it as unfair.

Discrimination

119. The basis of the discrimination is simple:

119.1. The Langebaan fishers are all coloured and are not allowed to fish in Zone B.

119.2. Fishers who live in Churchhaven and Stofbergsfontein are all white and permitted to fish in Zone B.

120. This is no coincidence, but a result of the apartheid legacy of segregation and forced removals. It is submitted that the practice of differentiating between fishers on the basis of residential address in these circumstances constitutes indirect discrimination on the ground of race.

121. The leading case on *indirect* discrimination remains *City Council of Pretoria v Walker*.[121] *Walker* concerned a similar instance of indirect discrimination in which the overt differentiation was based on residential address but the impact of the differentiation constituted discrimination on the ground of race.

122. Although declining to provide a definition of indirect discrimination, Langa DP identified the indirect discrimination in issue as follows:

> *"[T]his conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race. It would be artificial to make a comparison between an area known to be overwhelmingly a "black area" and another known to be overwhelmingly a "white area", on the grounds of geography alone. The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one which differentiated in substance between black residents and white residents. The fact that there may have been a few black residents in old Pretoria does not detract from this."*[122]

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[121] *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC).

[122] *Walker* para 32.

123. The present matter is on all fours with *Walker* in this regard. Although on the face of it a distinction was drawn between categories of fishers based on residential address, the fishers who are allowed to fish in Zone B by virtue of their residence are all white; the Langebaan fishers who are barred from doing so are all coloured.

124. It is no answer to a charge of indirect discrimination to argue that the discrimination was not intended or is not directly on the ground of race.[123] The question is solely about the impact of the decision, not its motivation. The Equality Act defines "*discrimination*" as any act or omission which "*directly or indirectly – (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds*". Race is a prohibited ground and the Condition clearly withholds benefits, opportunities and advantages from the coloured Langebaan fishers while granting them to the white Churchhaven fishers.

125. It is important to the massive advantage that the white fishers enjoy over the Applicants:

125.1. The harders in Zone B are "*larger and more plentiful*";[124]

125.2. There are no speedboats and no recreational fishers in Zone B; and

125.3. Zone B is not affected by the nearby military base.

126. In short, it is better to fish in Zone B than Zone A. That is why Mr Dopolo's data show that fishers brave the risk of arrest and prosecution in order to fish in Zone B. That fact, as noted earlier, also puts paid to SANParks'

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[123] *Walker* para 43.

[124] FA at para 183: Record p 69. See also Jackson Report at 5: Record p 604.

paternalistic argument that the fishers are actually better off fishing in Zone A – they manifestly are not.

127. In any event, the Decision is not free from racist baggage. The underlying basis for the continued differentiation between white and coloured fishers is based on an agreement concluded between the Apartheid government and white landowners.[125] That economic and racial advantage is being perpetuated by the ongoing imposition of the Condition.

128. It is not an answer to that claim to note that there may have been some exceptions to the general pattern of racially disparate impact.[126] The Applicants noted in their founding affidavit that the Langebaan fishers managed to object to their exclusion from Zone B and some of the older fishers were allowed continued access to that part of the Lagoon. Even at the time the racially discriminatory impact was plain. Today, it is absolute: white fishers fish in Zone B, Coloured fishers fish in Zone A.

129. Nor is it an answer to claim that the discrimination is not intentional. The Applicants have never argued that the Respondents are purposefully discriminating against Coloured fishers. But the effect of the Condition is discriminatory.[127]

130. Lastly, I should note that both SANParks and DAFF state that in 2015 they intended to make Zone B a complete no-take zone. That would exclude the white fishers as well as the Applicants. By the time the Replying Affidavit was filed in July 2015, that had not been done. At the end of May 2016, it still had

[125] FA at paras 117-20: Record pp 45-6.

[126] Nel AA at paras 58-63: Record pp 1160-1161.

[127] RA at para 211: Record p 1532.

not occurred. The claimed desire to cease discrimination in the future does not answer the claim of actual, current discrimination.

Unfair

131. Once the Applicants establish that racial discrimination exists, the onus is on the Respondents – particularly DAFF – to justify that discrimination as fair.[128] Sections 14(2) and 14(3) of the Equality Act deal with the fairness of discrimination. They read:

> *"(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:*
>
> *(a) The context;*
>
> *(b) the factors referred to in subsection (3);*
>
> *(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.*
>
> *(3) The factors referred to in subsection (2)(b) include the following:*
>
> *(a) Whether the discrimination impairs or is likely to impair human dignity;*
>
> *(b) the impact or likely impact of the discrimination on the complainant;*
>
> *(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;*
>
> *(d) the nature and extent of the discrimination;*
>
> *(e) whether the discrimination is systemic in nature;*
>
> *(f) whether the discrimination has a legitimate purpose;*
>
> *(g) whether and to what extent the discrimination achieves its purpose;*
>
> *(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;*

[128] Equality Act s 13(2).

> *(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-*
>
> *(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or*
>
> *(ii) accommodate diversity."*

132. The Constitutional Court has noted that s 14(3) includes issues usually adjudicated under s 36(1) of the Constitution and may, therefore, "*involve a wider range of factors than are relevant to the test of fairness in terms of section 9 of the Constitution*".[129]

133. We do not consider each of the factors listed in s 14(3). Instead, we identify eight factors that are particularly relevant to the determination of fairness.

134. First, it must be considered in the correct historical context. The Applicants have been historically discriminated against. The current discrimination flows from patterns of forced removals and spatial apartheid. The Constitution commits the state to undoing those structural forms of disadvantage. It is also recognised in the SSFP which defines a small scale fishing community to include communities that "*have a history of shared Small Scale fishing activity but, because of forced removals, are not necessarily tied to particular waters or geographic area*".[130]

135. Second, the continued exclusion impairs the Applicants' dignity. It undermines their traditional way of being and treats them as less deserving of access to public resources as a result of their race.[131]

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[129] *MEC for Education: KwaZulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC) at para 70.

[130] SSFP Glossary of Terms: Record p 812.

[131] FA at para 223.1: Record p 85.

136. Third, it has a serious impact on the Applicants. It limits their economic opportunities, threatens their ability to provide for their families. It may force some or all fishers to give up their traditional way of life.[132]

137. Fourth, the discrimination does not achieve any legitimate purpose. While conserving the Lagoon is a valid goal that the Applicants support, there is no link between allowing only white fishers from Churchhaven to fish in Zone B, and research about protecting the Langebaan Lagoon. Indeed, there is no rational basis for the line at all. The discrimination is particularly inexplicable in light of the fact (addressed in more detail below) that it is white, recreational fishers who pose the most serious threat to the Lagoon.

138. Fifth, even if there were a conservation purpose to be served by restricting access to Zone B, there is no justification for granting access to one category of white fishers and denying access to poor, coloured fishers who are forced to bear the burden of conservation alone. A fair system would give a preference to the Applicants as the group who rely on the resource for their culture and livelihood and who have borne the brunt of historical discrimination.

139. Sixth, there are certainly less restrictive steps to achieve the purpose. The Lagoon can be zoned differently to both protect the fish in the Lagoon and provide reasonable access to Zone B. As we have noted above, SANParks has endorsed the need to rethink the zonation of the Lagoon, both in the Management Plan, and in its affidavits.

140. Seventh, the Respondents have begun to take steps to address past discrimination by enacting the SSFP. However, they enacted the Policy only

[132] FA at para 223.2: Record p 85.

after being compelled to do so by the Equality Court. The Policy has not yet been fully implemented. Unless it is – and unless it comes with reasonable restrictions on recreational fishers and reasonable access to Zone B – it does not in fact reduce the impact of historical discrimination on the Applicants.

Ulterior purpose: Recreational Fishers

141. The most striking element of the reasons advanced by the Respondents to support the Condition is that it is recreational fishers that are the real threat to the Lagoon. Recreational fishers:

141.1. Target the most threatened species, including white stumpnose and elf;

141.2. Threaten the birds by collecting bait so that they can target threatened species; and

141.3. Destroy seagrass through the same activities.

142. Yet there is no limit on the number of recreational fishers. If DAFF was genuinely acting to protect the Lagoon while recognising the constitutional rights and interests of traditional fishers, they would start by restricting recreational fishing.

143. Disturbingly, DAFF does the precise opposite. Instead of explaining how they intend to control recreational fishing, in their affidavits DAFF repeatedly seeks to promote the interests of recreational fishers in order to justify threatening the Applicants' culture, health and livelihood by excluding them from Zone B.

144. Dr Lamberth justifies the concern over netfishers' insignificant bycatch of white stumpnose by arguing that those fish "*form the basis of the largest recreational fishing concentration on the entire South African Atlantic*

coast."[133] He puts the point even more brazenly later: "*The populations of white stumpnose, the mainstay of the biggest recreational fishery along the west coast which is the main attraction for 100s of tourists in the area will be compromised*" if the Applicants are allowed limited, reasonable access to Zone B.[134]

145. As we have shown, this fear has no basis in fact or science. But even if it did, it is clear that DAFF is not concerned only with conserving the MPA. On its own version, one of DAFF's primary purposes is to protect the interests of white recreational fishers and tourists.

146. DAFF is alone in wishing to protect tourists by denying reasonable access for traditional, small scale fishermen. For SANParks, Dr Attwood points out the anomaly of unrestricted recreational fishing: "*In no other National Park does one find a situation where ordinary citizens can enter the park and remove large quantities of wildlife, including red listed species, at any time of day or night, without having to report such harvests.*"[135] He recommends that:

> *"SANParks and DAFF should consider restraining the extent of recreational fishing in the West Coast National Park. Because the lagoon and its resources are finite, a limit to the amount of recreational fishing must be imposed if the resources are to be protected."*[136]

147. This accords with the opinion of the Applicants' expert, Dr Jackson. She points out that recreational fishers directly target the most vulnerable species – white stumpnose. Indeed, 88% of the catch by boat-based recreational fishers comprised white stumpnose. In a year, recreational fishers land

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[133] Lamberth AA at para 38.3: Record p 652.

[134] Ibid at para 45.2: Record p 655.

[135] Attwood AA at para 23: Record p 1353.

[136] Ibid at para 21: Record p 1352.

"*between 80 and 100 metric tons of white stumpnose*".[137] That is "*nearly three times the total national annual trawl catch of 30 tons pa on the entire south and east coasts.*"[138] It is also 470 times as much white stumpnose as the Applicants catch (as bycatch) in a year.[139]

148. Dr Jackson finds it "*difficult to understand why, even [during the white stumpnose breeding season] recreational fishers are permitted to fish 10 white stumpnose per day.*"[140] Presumably, that is because white stumpnose breed between September and February, which is also the peak season for tourists (and therefore recreational fishers) to visit the Lagoon.[141]

149. Yet despite the fact that recreational fishers are primarily responsible for the risks to white stumpnose and birds, their numbers are unlimited, and "*policing of the line-fishery is poor.*"[142] Instead of addressing the real problem – unrestricted recreational fishing – DAFF chose to exclude net fishers from their traditional fishing grounds, threatening their culture, and making their livelihoods unsustainable.

150. In sum, the real purpose behind excluding the Applicants from Zone B is to accommodate as many white recreational fishers (and the accompanying tourists) as possible. The Applicants – and the MPA – must simply bear the consequences. Or, in Dr Jackson's words: "*the stated need to protect*

[137] Jackson Report at 2: Record p 601.

[138] Ibid at 6: Record p 605 (our emphasis).

[139] Jackson Replying report at 3: Record p 1640.

[140] Jackson Report at 6: Record p 605.

[141] Ibid.

[142] Ibid.

bycatch species is inconsistent with the complete failure to regulate or meaningfully limit the effort of recreational fishers."[143]

151. That is not the purpose set out in the rule 53 record. Nor is it a purpose permitted by NEMPAA, the SSFP or any other legislation that regulates DAFF's conduct. It an impermissible, ulterior purpose. It is also a discriminatory purpose. It cannot justify the imposition of the Condition.

152. Accordingly the Condition (alternatively the Decision) falls to be reviewed and set aside in terms of section 6(2)(e)(i) to (iii), in that it was taken:

    (i) *"for a reason not authorised by the empowering provision;*

    (ii) *for an ulterior purpose or motive; [and/or]*

    (iii) *because irrelevant considerations were taken into account or relevant considerations were not considered.*"

153. We stress that the preference afforded to recreational fishers is not only contrary to the existing regulatory framework, it is also discriminatory.[144] Strict and arbitrary regulations are imposed on coloured fishers who fish to support and feed themselves and their families. White fishers who fish for fun are unregulated, and unlimited.

VI REMEDY

154. In terms of s 8 of PAJA, this Court has the power to grant any order that is "*just and equitable*".

155. The Applicants have always accepted that there needs to be reasonable regulation governing their access to the Lagoon, including their access to

[143] Jackson Report at 7: Record p 606.

[144] See RA at para 194: Record p 1528.

Zone B. They do not seek an order that would simply set the Condition aside and allow them untrammelled access to their former fishing grounds. Instead, they seek an order that creates the space for meaningful engagement between them, DAFF and SANParks about how their access should be regulated.

156. The relief they seek has three parts.

157. First, they seek an order reviewing and setting aside the Condition (alternatively the Decision). This is the standard order that flows from a finding that the decision to impose the Condition was contrary to PAJA.

158. The slight wrinkle is that the Applicants seek to review not only the conditions that were in place at the time the application was launched, but "*any future decision taken before the finalisation of this matter with the same effect*" as the Conditions that were in place in 2013.[145] This was necessary because of the delay in finalising the matter, combined with the fact that new permits are issued each year. The Respondents have not raised any objection to this form of relief.

159. Second, the Applicants seek a declaration that they are entitled to fish in Zone B. This declaration is important because, while the Applicants wish to negotiate the terms of that access, some access is a requirement. This too flows from the grounds of review. If it is accepted that there is no rational or reasonable basis to exclude the Applicants from Zone B, then they should be allowed to fish there.

160. Third, the Applicants seek to establish a process of court-supervised engagement between them and the Respondents to design reasonable

[145] This prayer was added through an amendment to the Notice of Motion delivered in terms of Rule 53.

conditions of access to Zone B. This is vital because they Applicants wish to preserve the Lagoon. They accept that there may be a reasonable basis for some restrictions.

161. These restrictions could take a variety of forms:

161.1. The Applicants could fish in Zone B only at certain times or on certain days;

161.2. The zonation of the Lagoon could be redrawn to, for example, make Zone A smaller, Zone C bigger, and move Zone B further northwards. That would offer the Applicants access to part of what is now Zone B, while still excluding recreational fishers and tourists.

162. The access to Zone B could also be accompanied by other measures, particularly limiting the number of recreational fishers and tourists to make the use of Zone A easier, and therefore reduce the need for the Applicants to fish in Zone B.

163. Ultimately, the Applicants desire a respectful co-management relationship with the Respondents. Under the rubric created by the SSFP they are all jointly responsible for managing the fishery. The intention is that the engagement order will force the Respondents to take the Applicants' concerns seriously and ultimately lead to the type of partnership that will benefit all parties, as well as ensuring the conservation of the Lagoon.

164. The remedy is just and equitable because it recognises the Applicants' rights, is founded in the scientific research, and strikes a fair balance between the environment and the Applicants' socio-economic rights.

VII CONCLUSION

165. The Applicants are a community with a strong cultural and historical connection to Langebaan Lagoon. Their fathers and mothers, grandfathers and grandmothers relied on the Lagoon for their livelihood and their sense of identity.

166. Those lives are being threatened by attempting to exclude the Applicants from Zone B of the Lagoon. That exclusion has no rational basis. It evinces an unjustifiable preference for recreational fishers. And it perpetuates patterns of racial discrimination. It cannot stand.

167. This Court should grant the relief sought which will allow a reasonable, scientifically-justified regime to be put into place that fairly balances all the interests at stake.

168. If they are successful, the Applicants are entitled to their costs, including the costs of two counsel. If they are unsuccessful, there should be no order as to costs.[146]

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30 May 2016

[146] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC).

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