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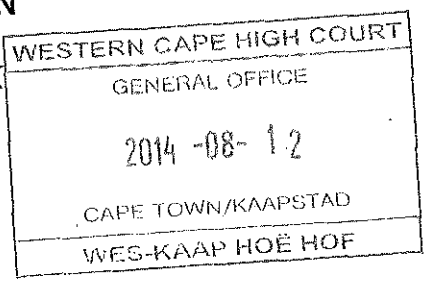
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

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 ENVIRONMENTAL AFFAIRS

Third Respondent

**DEPUTY DIRECTOR-GENERAL OF THE OCEANS
AND COASTAL MANAGEMENT BRANCH OF
THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS**

Fourth Respondent

SOUTH AFRICAN NATIONAL PARKS

Fifth Respondent

WEST COAST NATIONAL PARK

Sixth Respondent

AMENDED NOTICE OF MOTION

KINDLY TAKE NOTICE that the above Applicants intend to make an application to this Honourable Court, on a date to be determined by the Registrar, for an order in the following terms:

1. To the extent necessary, extending the period of 180 days contemplated in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000
2. Reviewing and setting aside:
 - 2.1. Condition 4.3 to the 2013 and 2014 interim relief exemptions granted to the Second, Third, Fourth, Tenth, Twelfth, Thirteenth and Fifteenth Applicants, which prohibits those applicants from fishing in Zone B of the Langebaan Lagoon;

- 2.2. The decisions of the First Respondent, taken on or about 25 January 2013, 1 January 2014 and 1 July 2014, to issue the exemptions mentioned in prayer 2.1 subject to condition 4.3;
3. Reviewing and setting aside
 - 3.1. Conditions 3.4 and 3.5 to the 2012/2013 and 2013/2014 fishing permits granted to the Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and Fourteenth Applicants, which prohibits them from fishing in Zone B of the Langebaan Lagoon;
 - 3.2. The decisions of the First Respondent during July 2012, July 2013 and June 2014 to grant the permits mentioned in prayer 3.2 subject to conditions 3.4 and 3.5;
4. Reviewing and setting aside any future decision taken before the finalisation of this matter with the same effect as the decisions identified in prayers 2 and 3;
5. Declaring that the Second to Fifteenth Applicants are entitled to fish in Zone B of Langebaan Lagoon; and
6. Directing that:
 - 6.1. If they wish to impose a condition on the Second to Fifteenth Applicants' access to Zone B the First and Second Respondents must, and any other Respondents may, engage with the Applicants about an

appropriate form of limited fishing access to Zone B of the Langebaan Lagoon;

- 6.2. Within one month of the order, the First Respondent must make a proposal on the appropriate form of limited access to Zone B, and submit that proposal to the Court;
 - 6.3. The Applicants shall have 10 days to comment on the First Respondent's proposal to the Court;
 - 6.4. The Court may accept or reject the First Respondent's proposal. If the Court rejects the First Respondent's proposal, the First Respondent must submit a new proposal;
 - 6.5. Once the Court is satisfied with the First Respondent's proposal, it will direct the First Respondent to impose that proposal as the condition on which the Second to Fifteenth Applicants will be permitted to fish in Zone B for the following year.
7. Ordering those Respondents that oppose this application to pay the costs of this application, including the costs of two counsel.
 8. Granting the Applicant further and/or alternative relief.

TAKE FURTHER NOTICE THAT –

9. The First and Second Respondents are required to:-

- 9.1. Despatch within fifteen (15) days of receipt of this Notice of Motion to the Registrar of this Honourable Court the record of the Decisions identified in para 1, including all memoranda, reports, minutes of meetings, letters, scientific reports and other 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 and to notify the Applicants that they have done so.
 - 9.2. The Applicants shall be entitled, within ten (10) days after the Registrar has made the Record available to them, to deliver a Notice and accompanying affidavit amending, adding to or varying the terms of this Notice of Motion and supplementing affidavits.
10. Should the Respondents wish to oppose the relief sought in this application they are required to:-
 - 10.1. Within fifteen (15) days after receipt of this Notice to deliver to the Applicant a Notice of Opposition and appoint in such Notice an address, within 8 kms of the offices of the registrar of this Honourable Court, at which it will accept notice and service of all processes in these proceedings.
 - 10.2. Within thirty (30) days of the expiry of the time limit referred to in Rule 53(4) of the rules of this Honourable Court, deliver any affidavits they

may desire to make in answer to the allegations made by and on behalf of the Applicant .

TAKE FURTHER NOTICE that if no such intention to oppose is given, the application will be made on a date to be determined by the Registrar.

TAKE FURTHER NOTICE that the Supplementary Affidavit of **WILHELMINA CATHARINA WICOMB** and Affidavits of **JACQUELINE SUNDE, SUE JACKSON** and **NORTON DOWRIES** will be used in support of this application.

TAKE FURTHER NOTICE that the Applicants have appointed the Legal Resources Centre, at the address set out hereunder, as the address at which they will accept notice and service of all process in these proceedings.

KINDLY place the matter on the roll accordingly.

DATED AT CAPE TOWN THIS 11th DAY OF AUGUST 2014

W Kerfoot

far **MS W WICOMB**

Applicants Attorney

Legal Resources Centre

3rd Flr Greenmarket Place

54 Shortmarket Street

CAPE TOWN

Tel: 021 4813000

Fax: 021 4230935

TO : The Registrar
High Court
Western Cape Division
CAPE TOWN

AND TO: The State Attorney

First to Fourth Respondents Attorneys

22 Long Street
CAPE TOWN

Ref: Mr L Manuel

STAATSPROKUREUR: KAAPSTAD
2014 -08- 11
@14:18
STATE ATTORNEY: CAPE TOWN



AND TO: Webber Wentzel Attorneys

Fifth to Sixth Respondents Attorneys

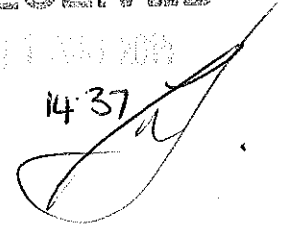
15th Floor Convention Tower
Heerengracht
CAPE TOWN

Ref: Mr M Diemont

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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: 11907/13

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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
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First Respondent

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SOUTH AFRICAN NATIONAL PARKS

Fifth Respondent

WEST COAST NATIONAL PARKS

Sixth Respondent

SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

WILHELMINA CATHARINA WICOMB

do hereby make oath and state:

1. I am an adult female attorney practising as such at the Legal Resources Centre, 3rd Floor, Greenmarket Place, 54 Shortmarket Street, Cape Town. I am the attorney for the Applicants in this matter.
2. The facts as stated herein are true and correct and, save where it appears to the contrary, within my own personal knowledge and belief.
3. This affidavit is filed in response to the Rule 53 Record ("the Record") filed by the state attorney on 2 and 3 June 2014. In terms of rule 53 of this Court's rules, the Applicants are entitled to supplement their grounds of review and amend their Notice of Motion.
4. Along with this affidavit, the affidavits of Dr Sue Jackson, Ms Jacqueline Sunde and Mr Norton Dowries will also be filed. I will refer to their affidavits in brief in this affidavit where the contents are relevant.
5. This affidavit is structured as follows:
 - 5.1. Part I briefly describes the development since the Rule 53 Record was filed;
 - 5.2. Part II summarises and comments on the contents of the Rule 53 Record;
 - 5.3. Part III indicates the amendments to the Notice of Motion that have become necessary given the delays in the finalisation of this matter; and
 - 5.4. Part IV deals with the ground of relief.

I DEVELOPMENTS SINCE FILING

6. This application was launched on 26 July 2013 in the Western Cape High Court. It is an application to review and set aside:
 - 6.1. a condition in fishing exemptions and permits granted by the First Respondent to the traditional net fishers of Langebaan; alternatively
 - 6.2. the decision(s) of the First Respondent to grant us exemptions and permits subject to the Condition.
7. The papers were served on both the First and Second Respondents on 26 July 2013. As detailed in my earlier supplementary affidavit filed on 19 March 2013, there was a long series of correspondence between myself and the state attorney in order to get the Rule 53 Record filed. I do not repeat that series of communication here, but relate the subsequent events.
8. Having filed a supplementary affidavit, the Respondents were, in terms of rule 53(3) required to file their answering affidavits within 30 days of receipt of the supplementary affidavit. However, by the expiry of the time period we received no answering affidavit, nor any correspondence explaining the non-compliance with the court rules.
9. Unable to proceed with the matter in the circumstances, we thus filed a chamber book application on 6 May 2014 for an order to compel the Respondents to file papers. The order was handed down on 22 May 2014 and made available to us on 26 May 2014. It ordered that:

the Third and Fourth Respondents are to file their answering papers within 5 (five) business days of this order being granted, failing which the matter may be enrolled by the Applicants on the unopposed roll for an order in terms of the Notice of Motion.

10. It was immediately served on all the Respondents.
11. On 27 May 2014, the State Attorney informed me telephonically that he will file the record within 5 days as per the order.
12. On the same day, I received an email from the attorney of the Fifth and Sixth Respondents indicating that they had belatedly decided to oppose the application.
13. The Rule 53 Record was eventually filed on 3 June 2014.

II THE RULE 53 RECORD

14. As Mr Dowries explained in the Founding Affidavit, the Applicants comprise both commercial net fish rights holders (the Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and Fourteenth Applicants) and interim relief permit holders (the Second, Third, Fourth, Tenth, Twelfth, Thirteenth and Fifteenth Applicants).
15. As described in more detail in the Founding Affidavit, the Applicants as a group and under the auspices of the First Applicant, Coastal Links, have fought for many years to be recognised as a small scale fishing community and to have their right to access the marine resources recognised on this basis.

16. With the long-awaited amendment to the Marine Living Resources Act 18 of 1998 ("MLRA") enacted on 19 May this year, the Applicants now also constitute, in law, a small scale fishing community for the purposes of that Act.
17. Against this background, the contents of the Rule 53 record may be divided into four categories:
 - 17.1. The granting of commercial net fishing rights to certain Langebaan fishers in 2006;
 - 17.2. The granting of interim relief to the other Langebaan net fishers on a yearly basis from 2010 onwards;
 - 17.3. Correspondence between the Applicants and the Respondents on the possibility of allowing the Applicants to fish in Zone B; and
 - 17.4. The rationale for and management of the Langebaan Marine Protected Area.
18. I will discuss these four categories in turn. The first three relate to the chronology of events before and after the challenged conditions were imposed. The fourth category presumably relates to information taken into account by the decision maker in applying the said conditions.

The granting of commercial net fishing rights to certain Langebaan fishers in 2006

19. The first document contained in the record is the "*Policy for the Allocation and Management of Commercial Fishing Rights in the Beach-Seine (Treknet) and Gillnet (Drift-Net, Set-Net) Commercial Fishery 2005*". The policy was issued

by the Third Respondent who was the responsible authority at the time, and who delegated his authority to allocate these commercial rights in terms of section 79 of the MLRA to an official who would, in turn, be guided by the policy document (p 3).

20. This application concerns the specific conditions that are issued to both the commercial and interim relief permit holders on an annual basis, and more particularly the regulations that were issued in 2013, and again in 2014. The policy document is actually concerned with the issuing of the permit itself, with the only reference to the conditions found on the final page in a single sentence (p 10). The relevance of the policy is thus not immediately apparent, but it may be assumed that the information contained in the policy that was to inform the granting of permits should also have been used in the formulation of the conditions.

21. It should also be noted at the outset that this net fish policy was created in a now defunct system where net fishers could only operate as individuals in terms of the MLRA and as either commercial, recreational or subsistence fishers. The Langebaan net fishers, who are more properly described as small scale fishers, had to fit the category of commercial fisher in order to access the sea. With the amendment of the MLRA to recognise small scale fishing communities as rights holders earlier this year, the radical overhaul of this system has been initiated.

22. The policy document records that:

22.1. net fishing is the oldest 'commercial' fisheries in South Africa;

- 22.2. A survey indicated that only 8% of 'permit holders' country-wide were *bona fide*, full-time netfishers;
- 22.3. Permit holders in most areas operated at a loss, "*the exceptions being the gillnet fishery in Saldanha-Langebaan, where 50 percent of operators were full time*" and False Bay.
23. The policy indicates (without reference to any authority) that the main target species, the harder, "*is currently over-exploited. There is a direct negative correlation between the degree of effort and stock status*" (p4). This information is not applicable to Langebaan Lagoon. What the policy does not indicate – and which was thus not brought to the attention of the relevant official guided by it – is that the state of harder fishery nationally is not a good indicator of the health of the population in Langebaan, which, as Dr Jackson's report points out, "*is a unique and relatively isolated area*".
24. It may also be noted that the most recent data as to the levels of harder stock in the Langebaan Lagoon, recorded by Dr Mbulelo Dopolo in 2012 and 2013, is held by the Fifth and Sixth Respondents, but has not been released (see Dr Jackson's report attached).
25. However, in a letter from the Fifth Respondent to The First Applicant, dated 3 November 2012 and attached to the Founding Affidavit of Mr Dowries marked **ND34**, the Park Manager indicates that "*a healthy resource*" of harders is available in the Langebaan/Saldanha Bay area.
26. In addition, the *State of the Bay Report 2012: Saldanha Bay and Langebaan Lagoon* ("SOB Report) published by Anchor Environmental Consultants in

August 2013, and of which relevant extracts attached marked "WW?", makes the following assessments:

- 26.1. The fish communities from the two Saldanha areas and the Langebaan Lagoon differ significantly (p246);
 - 26.2. The data suggest a fairly closed harder stock with little influence of broader demographic factors via immigration and emigration of fish to and from the bay (p250);
 - 26.3. No notable change in the fish fauna in the Lagoon evident in samples data distributed over the period of 1994-2012 (p249);
 - 26.4. The current status of fish and fisheries within Saldanha-Bay Langebaan is satisfactory (p252);
 - 26.5. A consistent long-term negative trend since 1986 has not been detected (p252);
 - 26.6. The annual effort expended in the Saldanha/Langebaan commercial harder gill net fishery has remained fairly consistent at around 1500 boat days/year over the period 2006-2012 despite the introduction of Interim Relief in 2010 (p250).
27. In any, event, there are no other documents in the Rule 53 record that relate to harder stocks in Langebaan Lagoon. There would thus be no justification for the barring of the net fishers from Zone B on the basis of the state of the harder stock.

28. The policy also indicates that *"there is a substantial linefish by-catch comprising mostly over-exploited or collapsed species. Consequently, the management of the netfishery cannot be considered separately from the traditional linefish sector"*. The impact of net fishery on line fish stocks (if not on the traditional linefish sector) is further elaborated upon in the record in the four scientific papers considered by the decision makers. These papers are all discussed by Dr Jackson in the attached report and her conclusions summarised below. But it is necessary to point out at this time that the by-catch of the Langebaan net fishers is not 'substantial'. Dr Jackson's research indicates that it comprises less than 1% of netfishers' total take. This information was apparently not taken into account by the decision maker.

29. I note that the objectives of the allocation of long-term rights in the sector was to (p 5):

- Improve the transformation profile of the sector;
- Allocate rights to traditional fishers in traditional fishing areas;
- Facilitate the management of the main target species *"in [a] manner which will ensure their recovery from current levels of over-exploitation"*;
- Support the economic viability of the fishery; and
- Ensure the environmental sustainability of the fishery.

30. I respectfully submit that the allocations of the Langebaan net fishing permits in 2006 and the conditions attached to these in all subsequent years fail in every one of the objectives listed here.

31. Firstly, while the decision makers may wish to claim success in the internal transformation of the net fishing sector, the attached report by Dr Jackson indicates the inexplicable deference to recreational line fishing in the Langebaan Lagoon. These fishers are allowed to catch an abundance of the apparently 'threatened' line fish species, the white stumpnose, and seem to go virtually unregulated.
32. Secondly, the only fishers who continue to be allowed access to Zone B are three white fishermen from Churchhaven (as Mr Dowries explains in his affidavit).
33. Thirdly, the allocation of commercial permits in Langebaan in 2006 recognised only 7 of the at least 14 traditional fishers (the latter 7 were eventually catered for under Interim Relief). However, the real objection with regards to the conditions imposed on the traditional fishers in this area is that it continues to bar them from operating in their traditional fishing area. In his Founding Affidavit, Mr Dowries described the traditional use of the Langebaan fishing community of fishing spots in Zone B – to the extent that these spots were named and 'allocated' to different families. This attachment to their traditional fishing ground has been denied with the prohibition on fishing in Zone B.
34. Fourthly, as Mr Dowries explained in his Founding Affidavit, the prohibition on fishing in Zone B is making it increasingly hard for the traditional fishers to catch enough harders to support their operations. This, he explains, is due largely to the amount of other activity in Zone A – recreational fishers and other recreational activity. These conditions do not, therefore, support the economic viability of this community, recognised as the only one in South

Africa that relies almost solely on net fishing for its survival. Indeed, the condition banning access to Zone B has quite the contrary effect.

35. Fifth, as noted in some detail by Dr Jackson, the barring of the net fishers from Zone B as a single strategy of ensuring the environmental sustainability of the fishery is simply not justifiable on the available evidence.
36. The policy indicates that the fishery "*will be managed in accordance with the ecosystem approach to fisheries [...] a holistic and integrated policy which recognises that fishing and associated land-based activities impact on the broader marine environment*" (p 9). The 'ecosystem approach to fisheries' is a principle now recognised in all key international agreements relating to fisheries management adopted over the last two decades. The Food and Agriculture Organization of the United Nations defines it as follows:

"An ecosystem approach to fisheries strives to balance diverse societal objectives, by taking into account the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries. A primary implication is the need to cater both for human as well as ecosystem well-being. This implies conservation of ecosystem structures, processes and interactions through sustainable use. Inevitably this will require considering a range of frequently conflicting objectives where the needed consensus may not be readily attained without equitable distribution of benefits. In general, the tools and techniques of EAF will remain the same as those used in traditional fisheries management, but they will need to be applied in a manner that addresses the wider interactions between fisheries and the whole ecosystem. For example, catch and effort quotas, or gear design and restrictions, will be based not just on

sustainable use of the target resources, but on their impacts on and implications for the whole ecosystem."

37. I attach a copy of the relevant extract from the FAO's website as annexure "WW1".

38. The record indicates that the needs of and impact upon the traditional fishing community was not considered at all and therefore no attempt was made at balancing "*diverse societal objectives*". As is apparent from the affidavit of Ms Sunde, an invitation was not even extended to these fishers to attend the discussions around the development of a management plan for the WCNP. Finally, the massive discrepancy between the allowance made to recreational fishers who are, according to the State of the Bay Report (p231), pulling out 92 tons of white stumnose per year and the traditional fishers who are punished for the negligible by-catch of the same species cannot be said to represent 'equitable distribution of benefits'. The relevant extract from the SOB Report is attached marked "WW2".

39. The only reference to permit conditions in the policy is the following:

"Permit conditions for this fishery will be issued annually. The permit conditions will be determined after consultation with rights holders in this fishery and will be subject to revision as and when it may be necessary."

40. There is no evidence on the record that the Respondents consulted the Applicants about these conditions prior to 2006 or any time thereafter. In fact, the Applicants tried repeatedly to initiate consultations on the topic. Mr Dowries relates in the Founding Affidavit (paragraphs 139-145) how the fishers requested repeatedly for an explanation as to why the condition has

been imposed and for a co-management and co-decision making structure to be set up whereby they could meaningfully engage around the imposition of conditions. These requests went unanswered.

41. The record then contains the seven letters granting commercial net fishing rights to the relevant Applicants in 2006. The granting of those permits is not the subject of this application; the conditions attached to the permits is.

The granting of Interim Relief to seven Langebaan net fishers in 2010

42. The record includes the Court Order of 1 July 2010 that granted three additional exemptions to net fishers in the Langebaan Lagoon and which are shared on a rotational basis by seven of the Applicants. It also includes an internal recommendation to the Acting Deputy Director-General of Fisheries Management of the First Respondent, dated 12 September 2011, for the exemption to be extended.
43. Mr Dowries sets out the circumstances leading up to that Order in some detail in his Founding Affidavit and I will not repeat it here. He also relates the failure of its implementation in particular relating to the required co-management of the resource.
44. As far as the subject of this application goes, these documents are only relevant in as far as the Order provides that the exemptions "*shall include a composite of permit conditions*" including that the fishers shall "*engage in fishing in designated near shore zones only*".
45. The Order further provides that "*should the respondent at any time provide evidence that the stock of any species identified for catch and sale by the*

qualified fishers in terms of this order may be endangered or under undue pressure, or that the interim relief is not sustainable taking into account other claims on the resource" then the Minister may suspend or restrict the exemptions (my emphasis). There is no evidence in the Rule 53 Record to justify restricting the exemptions to Zone A of the Langebaan Lagoon. The Applicants have never been provided with that evidence. And as the report of Dr Jackson demonstrates, that evidence does not exist.

Correspondence between the Applicant and Respondents on fishing in Zone B

46. The correspondence included in the Rule 53 record show the following chronology of events (supplemented, where relevant with events related in Mr Dowries' Founding Affidavit).
47. On 20 July 2009, Mr Xola Mkefe, at the time Parks Manager of the WCNP, wrote to Mr Andre Share, Chief Director of Resource Management at DEAT, as it was at the time. The correspondence could be summarised thus:
 - 47.1. WCNP must be consulted regarding the allocation of any rights in the MPA in the form of formal correspondence;
 - 47.2. SANParks reiterates (what it had clearly stated previously) that *"the allocation of 10 permits for Langebaan Lagoon are adequate to see the continuation of the tradition of net-fishing"*;
 - 47.3. *"SANParks remains strongly opposed to any additional net-fishing rights issued for Langebaan Lagoon MPA"*. WCNP believed that the "subsistence rights holders" in Langebaan were trying to convert their

rights to commercial rights and SANParks insisted that this is highly undesirable. *"By simply converting these permits it would be nothing more than a guise to allow these fishermen to use the MPA"*.

47.4. It has come to the attention of SANParks that the 10 net fishers were as of recently being allowed to fish in Zone B. SANParks had not been consulted and objects strongly. *"Research has clearly shown the impacts of disturbance to the sand-flat fauna through trampling and we must prevent the use of motors in this restricted zone"*.

47.5. Any further allocations (on the basis of the passing away of rights holders) must be discussed with SANParks.

48. Before I proceed, I wish to point out the following with regards to this letter:

48.1. The statement that 10 permits are sufficient to *"see the continuation of traditional net fishing"* completely misses the point: the tradition of net fishing is not to be preserved like a cultural artefact. The tradition and custom rather gives rise to rights of the traditional fishers – the right to culture and to custom – and any rights to the resources that may arise from their custom. This point is expanded on in Ms Sunde's affidavit.

48.2. SANParks provides no reason why more net-fishers cannot be allowed apart from vague references to 'problems' with the 'subsistence sector'. The net fishers are not now and were not at the time subsistence fishers. Regardless, Mr Mkefe must at least provide sound reasons why he thinks the livelihoods of these fishers should be cut-off completely.

48.3. In this letter, completely novel reasons are presented for keeping the net fishers out of Zone B. These reasons are not cited elsewhere in the record and are not substantiated.

49. On 28 October 2010, the First Applicant wrote to the First Respondent to request a special exemption for the Applicants to be allowed to fish in Zone B from 1 December until 31 January and during the Easter period. This letter followed a series of letters and meetings going back as far as June 2007 concerning the same issue as outlined by Mr Dowries in his Founding Affidavit.
50. The record includes a further letter from the Applicants, dated 24 November 2010, this time addressed to the Fifth Respondents. This letter indicates that the Applicants had had no response to their letter of October 2010.
51. On 14 December 2010, the First Respondent, in the person of the Acting Director of Inshore Fisheries Management writes to the Applicants to confirm that the exemption has been granted (albeit late).
52. The following undated letter is another request from the First Applicant for an exemption to fish in Zone B during the holidays. The letter was sent in March 2011 and referred to the upcoming Easter Holiday. As is evident from the further correspondence dated 18 April 2011, the fishers had by then not received a response to their March letter.
53. On 19 April 2011, the Deputy Director of Line and Net Fisheries Management in the Department of Agriculture, Forestry and Fisheries ("DAFF") recommends that permission be granted to the Langebaan net fishers from 21

April to 4 May 2011. The recommendation is supported by the following 'strategic intent':

"To ensure the viability of the netfish commercial fishing rights granted to Langebaan Netfishers. To promote food security and secure socio-economic profile of the commercial fishers in the lagoon whilst consideration is given to sustainable utilisation of the marine living resources."

54. The exemption was not granted to the commercial rights holders only, but to the Langebaan net fishing community.
55. The recommendation was approved by the Acting Director of Inshore Fisheries Management on 20 April 2011 and the decision communicated to the Applicants.
56. The record shows that the same pattern was followed in December 2011 with the Applicants requesting an exemption for the December holidays and it being granted, this time for the period of 15 December 2011 until 15 January 2012.
57. On 14 December 2011, WCNP wrote to Mr Mkefe, now no longer Park Director at WCNP but a Director at DEA, indicating that it opposed DAFF's decision to allow fishing in Zone B over the holiday period because:
 - 57.1. SANParks was not consulted on the issue;
 - 57.2. The exemption should have ended on 10 rather than 15 January as the school holidays end on that date; and

57.3. The new net fishers that were allowed means that the Total Allowable Effort has been exceeded for the Lagoon.

58. On 29 March 2012, DAFF writes to the First Applicant to say that the issue of fishing in Zone B would henceforth be dealt with by DEA. No basis for this apparent 'delegation' is provided.

59. On 3 April 2012, Mr Xola Mkefe, wrote to Masifundise to inform them that the application on behalf of the traditional fishers to fish in Zone B was declined.

The reasons he gave this time were:

"This is a highly contested area for fishing, as it is the heart of the Langebaan Lagoon MPA. Studies by Colin Atwood also show the increase in the fish population in the B zone. This is an important nursery for the white stumponose specifically which has been heavily exploited in the West Coast. The MPA is a unique and sensitive environment and one of the only lagoons of its kind in the country. Net-fishing by its nature is particularly destructive and should only be allowed in very limited circumstances."

60. I am unsure why Mr Mkefe thinks Zone B is "*highly contested for fishing*" as, to the best of my knowledge, no other fishing sectors are applying for access to it – or would have any right to do so.

61. Mr Mkefe is also not able to show that the "*increase in the fish population in the B Zone*" (an assertion which he doesn't substantiate and which is contrary to the cited figures from the State of the Bay Report of 2012) is as a result of the ban on net-fishing.

62. Zone B is indeed an important nursery for white stumponose; this is confirmed in the report of Dr Jackson. But the impact of net-fishers on this species has

been shown to be negligible. More interesting is the reference to the 'heavy' exploitation of white sturgeon on the West Coast – that is by recreational fishers who, according to the State of the Bay Report of 2012 not included in the record, takes out 92 tons of white sturgeon a year (p 249, attachment **WW2**).

63. It should be noted that the period of 2010 until 2012 saw various meetings held and correspondence exchanged between these parties not captured in the record but outlined in the Founding Affidavit. It is difficult to understand why this communication was excluded from the Rule 53 Record.

The rationale for and management of the Langebaan Marine Protected Area

64. This section includes the Guidelines for the Development of a Management Plan for a Protected Area in terms of the National Environmental Management Protected Areas Act (“**NEMPAA**”) released by the Department of Environmental Affairs in 2010 (“**the Guidelines**”) and four scientific papers. It is to be assumed that these are the documents contained in the record that directly informed the decision to restrict the Applicants from Zone B (as the other documents in the record rather speak to a chronology of events).
65. I will show, in this section, that in as far as these documents are relevant to the decision under review, they support the Applicants' argument that the decision did not take into account relevant information, while indeed taking irrelevant information into account. I will also show that the provided information is wholly insufficient to justify a decision that affects the rights of the Applicants to the extent that it does.

The Guidelines

66. It is not immediately apparent how the Guidelines informed the decision to impose the particular conditions on the Langebaan net fishers.
67. The Guidelines provide a pro forma for the development of management plans of protected areas in South Africa and in this regard reflect the requirements of NEMPAA.
68. I will discuss specific requirements of the Guidelines as I believe they are relevant to the relationship of the Fifth and Sixth Respondents with the Applicants in developing the West Coast National Park Management Plan of 2013 (which, oddly, is not included in the record).
69. The Guidelines require that the objectives of the NEMPAA should be borne in mind throughout the development of a management plan (p3). These objectives include:
- 69.1. to provide for co-operative governance in the declaration and management of protected areas (s2(b));
 - 69.2. to promote sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of such areas (s2(e)); and
 - 69.3. to promote participation of local communities in the management of protected areas, where appropriate (s2(f)).
70. As is apparent from some of the correspondence included in the Rule 53 Record and discussed further below, and the Founding Affidavit of Mr

Dowries, the confusion in who is responsible for the management of the marine resource inside the West Coast National Park has for some time caused confusion and difficulties, at least for the Applicants. In this regard, co-operative governance seems to be lacking.

71. At present, the utilisation of the Langebaan Lagoon as a protected area is skewed in favour of the tourists that frequent it. In particular, the management of the area is giving preferential treatment to tourism above the needs of the local community. Given the specific reference to the promotion of local communities in section 2(f), this state of affairs seems incompatible with the objectives of the Act. Any decision maker faced with these objectives and the prejudice of the local fishers vis-a-vis the tourists and, in particular, the recreational fishers, should have sought to rectify this.
72. The Guidelines also require that a management plan sets out the relevant international obligations (p4-5) applicable to the protected area. Ms Sunde's supporting affidavit, attached, deals with this aspect in greater detail.
73. Furthermore, the Guidelines require that the management authorities consider "*the policies in place*" for the sustainable utilisation of resources (p 6). By the time the West Coast National Park Management Plan was developed in 2013, these policies included the Small Scale Fisheries Policy ("**SSFP**") of 2012.
74. In its policy framework, a management authority is also required to set out how it "*aims to solve cultural issues around the protected area*". The supporting affidavit of Ms Sunde sets out the mapping of cultural spots that the Fifth Respondent undertook with the Applicants, thereby acknowledging the cultural significance of the lagoon – and in particular Zone B - to these

fishers. As Ms Sunde's affidavit attests, however, this exercise was the end of any attempt to "*solve cultural issues*" despite repeated requests for further engagement on this very issue from the Applicants.

75. Section four of the Guidelines deals with consultation and requires, in terms of NEMPAA, that in the preparation of a plan, the "*management authority concerned must consult ... local communities*" (s 39(3)) and the plan itself "*must contain at least procedures for public participation, including participation by ... any local community*" (s 41(2)(e)). Ms Sunde's attached affidavit also deals with the process of consultation – or rather the lack thereof – in the development of the West Coast Management Plan.

76. Section six of the Guidelines may be the most relevant for our purposes. This section deals with the 'Zoning Plan'. The following principles are relevant:

76.1. "A zoning plan should play an important role in minimising user conflicts by separating potentially conflicting activities while ensuring that legitimate land use can continue";

76.2. "A rationale should be made to explain the basis for establishing and delineating zones";

76.3. "Conservation objectives and restrictions applied within each zone must be recorded as part of the management plan. NB [sic] limits of acceptable development must relate to the conservation objectives."

77. The first quoted principle is significant as it echoes the explanation provided by the Applicants in their Founding Papers as to how the existence of Zone B first came about. It was created to protect the local net fishers from