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**SUBMISSION TO THE SAHRC  
POLITICS, POWER, AND THE RIGHT TO FOOD  
A NATIONAL INQUIRY INTO THE FOOD SYSTEMS OF SOUTH AFRICA**

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**PLEASE DIRECT QUERIES TO:**

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## INTRODUCTION

1. The Legal Resources Centre (LRC) make submissions based on its work with small-scale fishers and farmers on **access to land and resources** as fundamental to the realisation of food sovereignty. We will touch on the following themes:
  - 1.1. Theme 1: A crisis of historic justice, not scarcity
  - 1.2. Theme 2: Corporate capture of the food system
  - 1.3. Theme 3: The centrality of land and agrarian reform
  - 1.4. Theme 5: Indigenous knowledge and agroecology
2. We also make submissions on Theme 6: Systemic failure and fragmented governance in collaboration with and on behalf of Food Forward South Africa (FFSA) and focus on the legal framework governing **food waste and food donation**.

## LEGAL RESOURCES CENTRE

3. The LRC, founded in 1979, is a public interest law firm that uses the law as an instrument of justice. It is a registered law clinic and non-profit company established in terms of section 14 of the Companies Act 2008 (registration number NPC 2022/410419/078). The LRC operates nationally through its regional offices in Johannesburg, Cape Town, Durban, and Makhanda. It works towards the development of a fully democratic South African society grounded in substantive equality by providing free legal services to vulnerable poor, homeless, and landless communities who experience discrimination on the basis of race, class, gender, disability, and socio-economic and historical circumstances.
4. The LRC makes submissions on Themes 1, 2, 3 and 5 based on its decades-long representation of rural communities, small-scale farmers and fishers to assert their rights to access resources and determine their own development paths. In doing so, the LRC was responsible for the following cases that advanced the right to food in South Africa:

- 4.1. *Alexkor Ltd and Another v Richtersveld Community and Others*;<sup>1</sup>
- 4.2. *Kenneth George and Others v Minister of Environmental Affairs and Tourism EC*<sup>2</sup>
- 4.3. *Coastal Links Langebaan and others v Minister of Agriculture, Forestry and Fisheries and others*<sup>3</sup>
- 4.4. *Gongqose and Others v Minister of Agriculture, Forestry and Others, Gongqose and S* <sup>4</sup>
- 4.5. *Baleni and Others v Minister of Mineral Resources and Others*;<sup>5</sup>
- 4.6. *Adams and Others v Minister of Mineral Resources and Energy and Others*;<sup>6</sup>
- 4.7. *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*.<sup>7</sup>

5. The LRCs work focuses not only on securing availability of and access to food for all, but recognises the complex system that determines the realisation of these rights in any given context, including not only the political and economic realities both domestically and globally, but the intersectional barriers of inequality, unemployment, climate change, commodity speculation and ownership of productive resources.<sup>8</sup> Our work thus aims to put power in the hands of local communities to participate in their own food production and democratise food systems. We subscribe to La Via Campesina’s definition of food sovereignty as:
- The right of peoples to healthy and culturally appropriate food produced through sustainable methods and their right to define their own food and agriculture systems. It develops a model of small-scale sustainable production benefiting communities and their environment. It puts the aspirations, needs and livelihoods of those who produce, distribute and*

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<sup>1</sup> (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) 2005/01.

<sup>3</sup>; (11907/13) [2016] ZAWCHC 150; [2017] 2 All SA 46 (WCC) (31 October 2016).

<sup>4</sup> (1340/16, 287/17) [2018] ZASCA 87; [2018] 3 All SA 307 (SCA); 2018 (5) SA 104 (SCA); 2018 (2) SACR 367 (SCA) (1 June 2018).

<sup>5</sup> (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) .

<sup>6</sup> (1306/22) [2022] ZAWCHC 24.

<sup>7</sup> (3491/2021) [2022] ZAECMKHC 55; 2022 (6) SA 589.

<sup>8</sup> SPII 2015 *The Right to Food in South Africa: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to food* p5.

*consume food at the heart of food systems and policies rather than the demands of markets and corporations.*

6. In furtherance of this aim, we have established the rights of small-scale fishing communities to access the ocean (*Kenneth George*); protected their right to food through fishing against seismic exploration for oil and gas (*Adams and Others; Sustaining the Wild Coast*); confirmed the recognition of customary fishing rights (*Gongqose*); protected fishers who harvest for food security from discriminatory regulation that preferred recreational fishers; established the recognition of customary land ownership (*Richtersveld*) and the right of customary land owners to say no to mining on their land (*Baleni*).
7. We have also supported small scale farmers to access land, whether commonage land, state redistribution farms or land made available in terms of s4 of the Extension of Securities of Tenure Act.

## **FOOD FORWARD SOUTH AFRICA**

8. FFSA was established in 2009 to address widespread food and nutrition insecurity in South Africa. FFSA is the largest food redistribution organisation in Africa, recovering quality, within date, surplus food from the consumer goods supply chain and distributing it to a network of vetted Beneficiary Organisations serving local communities. FFSA is a certified member of the Global Foodbanking Network.

### **A. SMALL-SCALE FISHING AS A MECHANISM FOR FOOD SECURITY**

#### **A.1 CONTEXT**

9. Small-scale fishing (SSF) communities along the coast of South Africa, as well as globally, contribute significantly to food security. Globally, it is estimated that small-scale fishers provide food and livelihood opportunities for more than 100

million people.<sup>9</sup> There are currently an estimated 147 recognised small-scale fishing communities under the South African system. While this reflects the recorded number, many individuals and communities who rely on fishing for food security and livelihoods remain unrecognised.

10. In South Africa, small-scale fisheries support thousands of fishers and their families along the coastline. Their catches are primarily consumed locally or sold within nearby communities. By contrast, the commercial fisheries sector largely focuses on exporting high-value species to international markets.
11. South African small-scale fishers target species that directly feed coastal communities, creating short supply chains that reduce carbon emissions associated with storage, transport, and distribution.
12. SSF communities employ traditional, artisanal and customary fishing methods and focus on regenerative practices. These practices support stewardship of marine ecosystems and are grounded in knowledge passed down through generations. They work with, rather than against, natural cycles, allowing fish populations to replenish and maintaining the health and balance of marine environments.
13. In the *Kenneth George* matter that led to the recognition of small-scale fishing rights in South Africa, the then UN Special Rapporteur on the Right to Food, Prof Jean Ziegler, provided an expert affidavit to the Equality Court in which she said:

*I have found that the food security of poor coastal communities is usually closely linked to fishing and therefore the right to adequate food of these communities is closely linked to their access to and control over-fishing resources as well as their capacity to catch and purchase fish for*

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<sup>9</sup> Page iii of Isaacs, M., Hara, M. M., Dennis T. L., Rouhani, Q. A., Mannarino, C., Jaffer, N. (2022). A Situational Analysis of Small-Scale Fisheries in South Africa: From Vulnerability to Viability. V2V Working Paper 2022-9. V2V Global Partnership, University of Waterloo, Canada. Available at: [https://www.masifundise.org/wp-content/uploads/2022/10/A-Situational-Analysis-of-SSF-in-South-Africa\\_V2V-Working-Paper-No.-2022-9.pdf](https://www.masifundise.org/wp-content/uploads/2022/10/A-Situational-Analysis-of-SSF-in-South-Africa_V2V-Working-Paper-No.-2022-9.pdf).

*consumption. I am therefore convinced that fisheries are an important part of the right to adequate food, in the sense that they provide livelihoods and incomes for many people [...] in the current drive to industrialise, privatise and orient fish production towards exports, fishing communities may be marginalised by losing their access to and control over fishing resources. While employment may be gained by these shifts, it has also happened that some people are arbitrarily displaced from their livelihoods and effectively denied their access to resources [...] Priority must be given to protecting livelihoods in the first instance and adequate compensation for any loss of existing access to resources must be instituted for those whose livelihoods and food security are not respected or protected in the restructuring of the fishing industry.*

## **A.2 THEME 1: A CRISIS OF HISTORIC JUSTICE, NOT SCARCITY**

14. It is trite that hunger in South Africa is not the result of food scarcity, but of structural exclusion from food-producing resources. This is particularly evident in the experiences of small-scale fishing communities who are the descendants of indigenous people who have access the ocean for hundreds of years before systematically being dispossessed of these resources.
15. When European seamen arrived on South African shores in the 1600's they encountered local indigenous communities who had been fishing for thousands of years. The indigenous people living in South African coastal areas at the time had adopted their own systems of trade and bartering. There was an indigenous tribe in the Cape in that time called the "Fishmans" because of their use of hand lines and spears for fishing.
16. Over time a new class of South African artisanal fishers developed along coastal areas. This emerging class of fishers depended heavily on local knowledge and skill handed down from generation to generation. From their fathers, mothers and ancestors they learned specialized skills that quickly became essential elements

of an artisanal fisher's skill and knowledge base. These skills included learning how to analyse the migratory habits of different fish species and observing fish reproductive and feeding patterns.

17. A key characteristic of this class of fishers along the western seaboard of South Africa was their multi-species, seasonal, basket of resources. These fishers were skilled line fishers, net fishers and harvesters of rock lobster and some harvested inter-tidal resources such as black and white mussels and limpets. They fished what was seasonally on offer with low impact gear.
18. Industrial fishing has a separate history to traditional artisanal fishing. It began in 1658 in Saldanha Bay where four freemen were allowed to settle in order to supply passing ships. These men are said to be the founders of the commercial fishing industry that exists today. This industry developed alongside traditional artisanal fishing, with one group catching fish largely for the export market and the other largely for local consumption.
19. Fish provided the principal source of protein and livelihood for most of the poor disadvantaged fisher people in South Africa. In the apartheid era traditional artisanal fishers were marginalized in favour of five major industrial fishing companies who were soon to monopolize the fishing industry. The instruments used to implement this unjust dispossession of rights were the Job Reservation Act, the Influx Control Act, the Pass Laws, the Group Areas Act and the Quota System.
20. These draconian laws were enforced upon fishing communities and were designed to promote the interests of the white minority. The quota system introduction around the 1960's forced many of the fisher people to become employees of fishing factories as harvesters. Fisheries management under the apartheid system benefited white South Africans to the exclusion of the majority of the citizens of the country. Whites owned the companies, skippered or owned

most of the boats, received the fishing rights for the most lucrative species, and on top of this, were able to fish recreationally. Racial segregation under the National Party government, embodied in legislation such as the Group Areas Act of 1950, forcibly moved many non-white traditional fishing communities away from the coast, in order for whites to build vacation homes.

21. Many traditional artisanal fishers were forced to work for white boat owners while others disregarded the unjust laws and circumvented them.
22. With the demise of the oppressive apartheid regime many of the fishers experienced political freedom for the first time. Unfortunately, within the industry no true equitable transformation was implemented following the end of apartheid. Instead, traditional artisanal fishers saw their livelihoods, their access to food, and their culture deteriorate even further with the implementation of the 1998 Marine Living Resources Act.
23. In 2005, following a national inquiry by the South African Human Rights Commission, Kenneth George and other traditional, artisanal fishers took the Minister of Environmental Affairs and Tourism to the Equality Court to challenge their exclusion from the allocation of fishing rights through the Marine Living Resources Act that effectively only recognised commercial and recreational fishing.
24. The Minister at the time acknowledged the injustice and through a series of court orders agreed to by the parties, the Court's inquiry into the allegations of discrimination by small scale fishers was postponed pending the implementation of a framework that "must accommodate the socio-economic rights of traditional/subsistence fishers and ensure equitable access to marine resources for those fishers".

25. The implementation of the small-scale sector has been painfully slow and hampered significantly by the continued bias of the Department to export-orientated commercial fishing and the protection of the recreational lobby. Although the Small-Scale Fisheries Policy (2012) was adopted to address historical injustices the introduction of the Small-Scale Fisheries Regulations in 2016 has, in practice, been exclusionary. The regulations impose enormous red tape on fishing communities, including forcing them to form cooperatives and operate as a business.
26. As a result, fishers may have been granted rights but cannot use them because of endless system glitches with the CIPC, ever-changing departmental requirements and unworkable permit conditions. We submit that part of the State's duty to respect the right to food of fishing communities includes the right not to interfere with the existing ability of fishing communities to feed themselves and their communities without reasonable justification. In the Christian Adams matter, Judge Thulare held:
- [32] Snoek was a source of food for the impoverished communities of the West Coast and also provided an income to sustain the small-scale communities. It was a solution for food security and malnutrition. It had macro and micronutrients and was a source of protein. It was vital for growth and underdeveloped digestive systems of children who often could not process staple food with more starch. It was essential for human health needs, including essential vitamins. The survey's impact on food security for the small-scale fishers was a regressive measure in that it would diminish the existing enjoyment of the right to food as envisaged in section 27(1)(c) of the Constitution.*
27. We submit that the management of the small-scale fisheries has served to place unnecessary barriers in the way of the realisation of these communities' right to food.

28. An illustrative example of this exclusion concerns resource allocation. Under the Small-Scale Fisheries Policy, small-scale fishers were to be allocated a basket of species before the Minister apportions resources to the industrial sector, in line with the “preferential access” objective.<sup>10</sup> In practice, however, small-scale fishing communities are often allocated only what remains after the majority share has been granted to the commercial sector.
29. Co-management of resources was a central objective of the Policy. Communities have advanced several initiatives in support of this goal, including:
- 29.1. Locally managed co-management committees: Communities have sought to establish governance structures that provide meaningful control over marine resources and territories. These arrangements would enable communities to reject developments that threaten their livelihoods and food security, and to implement sustainable management practices grounded in local knowledge.
- 29.2. Localised food systems: Fishing communities in South Africa are strengthening local food networks by sharing catches within community networks and selling locally, thereby reducing reliance on distant supply chains and associated emissions.
- 29.3. Livelihood diversification: Coastal communities are pursuing complementary economic activities to reduce vulnerability during periods of climate disruption, while maintaining cultural connections to fishing.

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<sup>10</sup> “3.2 Objectives” in Policy for the Small Scale Fisheries Sector in South Africa GG 35455 GN 474 (20-06-2012):

“The primary object of this policy is to introduce certain fundamental shifts in Government’s approach to the Small Scale fisheries sector. This entails adopting a developmental approach and an integrated and rights-based allocation system which recognizes the need to ensure the ecological sustainability of the resource; identifies Small Scale fishers as a category of fishers for the purposes of the MLRA in law; and provides for community orientation in the management of the marine living resources harvested by these fishers. With this object in mind the following strategic policy objectives are proposed:

...

- (c) to improve access to marine living resources through mechanisms that allow preferential access for Small Scale fishers, including the designation of strips of land 13 where appropriate as coastal access land to secure access.”

30. These proposals have not been meaningfully considered and remain unimplemented by the Department of Forestry, Fisheries and the Environment. The result is a profound contradiction: communities living adjacent to rich marine ecosystems experience hunger and food insecurity because they are denied secure access to the very resources that have historically sustained them.
31. It is our submission that the Department of Fisheries, Forestry and the Environment should recognise the significance of small-scale fisheries to realising food security, through the localisation of the food system, and its obligations, as the State, to protect, promote and fulfil the right to food.

### **A.3 THEME 2: CORPORATE CAPTURE OF THE FOOD SYSTEM**

32. Internationally, a move from a human rights-based approach to a mere rights-based approach to marine resource conservation over the last two decades have been driven by the increasing involvement of ‘stakeholders’ such as corporates, conservation NGOs and the financial sector being treated as partners of states in solving global issues. The rights-based approach is shorthand for property rights. As a result, both financiers and international environmental NGOs, for example, talk about the so-called “blue economy” to boost both conservation and the economy. It is fundamentally an ideological approach, or something Seth Macinko has called the “*privatize or perish*” dogma.<sup>11</sup>
33. The South African coastline, from the Mozambican to the Namibian border, is also increasingly shaped by “blue economy” initiatives, raising significant concerns among small-scale fishing communities. While framed as sustainable ocean development, these projects prioritise export-oriented growth and

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<sup>11</sup> <https://theecologist.org/2016/nov/21/ocean-grabs-fighting-rights-based-corporate-take-over-fisheries-governance#:~:text=Fishers%20refuse%20to%20become%20mere%20'stakeholders'&text=The%20increasing%20corporate%20capture%20of,the%20human%20rights%20based%20approach.>

corporate profit — including industrial fishing, aquaculture, mining, and oil and gas — over local food security and community livelihoods. This has resulted in the displacement of fishing communities, loss of access to traditional fishing grounds, and escalating conflicts over marine resources.<sup>12</sup>

34. Industrial fishing is highly fossil-fuel dependent and largely oriented toward export markets. By contrast, small-scale fisheries support local food systems through short value chains that enhance the affordability and accessibility of nutritious food.
35. The increasing pressure to integrate small-scale fishers into export-driven value chains risks undermining their role in local food systems by shifting fishing effort toward high-value export species, increasing dependence on fossil-fuel-intensive cold chains and transport, and displacing the food security function of small-scale fisheries. Oil and gas exploration and seismic surveying further threaten marine ecosystems and fish stocks. Fishing communities along the West Coast and Wild Coast have mobilised to resist these developments due to their impacts on livelihoods, culture, and food security.

#### **A.4 THEME 5: INDIGENOUS KNOWLEDGE AND AGROECOLOGY**

36. Small-scale fishing communities possess generations of traditional ecological knowledge relating to marine ecosystems, seasonal patterns and species behaviour and environmental changes. This knowledge is valuable for climate adaptation as communities observe and respond to shifting fish distributions, changing weather patterns, and ocean conditions.

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<sup>12</sup> Masifundise Development Trust “Turning the tide towards the realisation of small scale fishing rights: Monitoring the implementation of the Voluntary Guidelines on Small-scale Fisheries in South Africa” (2023), available at: <https://www.masifundise.org/wp-content/uploads/2023/03/Monitoring-Report-Feb-2023-Online-002.pdf>

37. This knowledge supports sustainable resource use and climate adaptation through practices such as seasonal diversification of target species; adaptive fishing practices; and community-based stewardship of marine ecosystems.
38. Women mussel harvesters are particularly affected by climate change impacts, including warming waters, shifting mussel beds and increased storm intensity, and pollution which directly threaten household food security.
39. The effectiveness of these adaptation strategies is increasingly constrained by external factors including loss of access to fishing grounds, marine spatial planning that excludes SSF considerations, and inadequate legal recognition of customary rights and territories.
40. Despite its importance, traditional ecological knowledge remains marginalised in governance and decision-making processes.

## **B. SMALL-SCALE FARMING**

41. The LRC works with land organisations across South Africa and on all three legs of land reform to support current and potential land reform beneficiaries. Our partners in the LandNNes network have made submissions on many of the issues relevant to that work and we endorse those submissions. To avoid duplication, we limit our input here to the appropriateness of utilising municipal commonage land for food sovereignty.

### **B.1 THEME 3: THE CENTRALITY OF LAND AND AGRARIAN REFORM**

42. The democratisation of food systems and the dismantling of the corporate-industrial food system that has captured South Africa, is only possible if local communities have access to land and resources. In this section, we make the argument for the release of municipal commonage land to small scale producers as an effective mechanism to make land such land available.

43. The original objective of land reform, as formulated in the initial redistributive land reform programme, was to uplift and benefit poor and marginalised people by improving livelihoods. This occurred through the Settlement or Land Acquisition Grant (SLAG). People or families were awarded limited funds with which to purchase land, which created a scenario in which a number of families purchased land together. However, perhaps because of the failure of production on awarded land, the government changed the redistribution policy to benefit previously disadvantaged individuals with some capital to kick-start production. In practice, this has meant that poor and marginalised people are no longer the primary beneficiaries of land reform. Instead, those who already have capital have benefitted, while production has only been marginally successful.

44. In 1997, the Department of Land Affairs (as it then was) adopted the Municipal Commonage Programme as part of its redistribution programme. According to the White Paper on Land Policy (DLA, 1997):

*In large parts of the country, in small rural towns and settlements, poor people need to gain access to grazing land and small arable / garden areas in order to supplement their income and to enhance household food security. The Department of Land Affairs will encourage local authorities to develop the conditions that will enable poor residents to access existing commonage, currently used for other purposes. Further, the Department will provide funds to enable resource-poor municipalities to acquire additional land for this purpose.*

45. Municipal Commonage is land that is owned by a Municipality and set aside for public use and benefit.<sup>13</sup> Because this land is especially set aside for public use and benefit,

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<sup>13</sup> Historically, municipal commonage refers to land found adjacent to small towns that was granted by the state or church for the use and benefit of the town's poorer residents. This land was given to municipalities for free when the towns were formally established in the 1800s. Thus, commonage was granted for the exclusive purpose of community development and to meet community needs. At this time, land was mostly needed for cattle grazing. Other uses of commonage could not infringe on this public benefit. This land is

it is a relatively easy to use it for land reform purposes. The size of commonage land varies from province to province and from municipality to municipality. In the Northern Cape many municipalities have between 30 000 - 40 000 hectares of municipal commonage as opposed to much smaller numbers in the Southern Cape, totalling only 1645.6 hectares in the Hessequa district, for example. A survey conducted in 2003<sup>14</sup> found that there are at least 112 795 ha of municipal commonage in the Free State. Figures are not available for the other provinces, but commonage is a typical feature of Western Cape and Eastern Cape towns. A 1996 survey established that there is 8 643 ha commonage in the West Coast district of the Western Cape, for example.<sup>15</sup>

46. We submit that there are many important reasons why municipal commonage is well placed to perform a land reform role. Three key reasons are:

- 46.1. Commonage is already state land and does not need to be acquired.
- 46.2. Commonage is situated in towns, which is useful for easy access and access to markets. People can travel to the land and transport their goods to market easily.
- 46.3. The municipality owns commonage land and can manage it – the institution already exists to manage.

47. These three reasons are especially important because much of the failure of land reform thus far can be attributed to:

- 47.1. Lack of sufficient funds to buy land, while commonage is already state-owned;

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now referred to as “traditional” or “old” commonage as opposed to “new” commonage, which has been acquired after 1994 through the DLA’s Commonage Programme.

<sup>14</sup> D Atkinson and B Buscher, ‘Municipal commonage and implications for land reform: A profile of commonage users in Philippolis, Free State, South Africa’ in *Agrekon: Agricultural Economics Research, Policy and practice in Southern Africa*, 45 (4), 2006, p.439

<sup>15</sup> Anderson, M and Pienaar, K 2003 ‘Municipal Commonage’ in *Evaluating Land and Agrarian Reform in South Africa* available at <https://uwcscholar.uwc.ac.za:8443/server/api/core/bitstreams/fb7f5434-07a7-45e7-9988-bb342231832e/content>.

- 47.2. The inability of the state to secure strategically useful land in terms of the proximity of land to people and markets. Commonage is well-placed near residential areas and is close to markets and people;
- 47.3. The difficulty of beneficiaries to manage conflicts on land awarded in common. With commonage, the municipality is an already existing institution that has the potential to manage conflicts and set down rules.
48. While the Commonage Policy is still applicable, commonage has been made available to small-scale producers only on a limited basis. The biggest obstacle has been the reluctance of municipalities to make the land available, opting to rather lease it out at market-related rentals to commercial farmers or for other uses like golf courses.
49. Municipalities do this citing two reasons:
- 49.1. They are responsible for the socio-economic development of their community, and they need to raise revenue in order to do that;
- 49.2. Land Reform is not a local government competency in terms of the Constitution.
50. However, municipalities, as a sphere of government, are required to contribute to national priorities, *including* land reform. Even if land reform is not a local government competency, they can also not obstruct a national priority. Anything that municipalities do at local government level needs to be guided by the Constitution. All governmental powers stem from the Constitution and need to comply with it. Local government's autonomy must be exercised "subject to national and provincial legislation, as provided in the Constitution".
51. Local government has the following developmental objectives as set out in Chapter Seven of the Constitution:

51.1. Local government must “promote social and economic development” [152 (1)]. It must “strive, within its financial and administrative capacity, to achieve” this objective [152 (2)].

51.2. Local government must “structure and manage its administration, and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community”. [153 (a)]

51.3. This means, we submit, that local government is required to assist in achieving national aims of development and of land reform, as a means to equity, redress and food security, using the administrative and financial means available to it.

52. The Municipal Systems Act (No.32 of 2000) makes these duties possible. It obliges municipalities to be developmental organisations that “move progressively towards the social and economic upliftment of communities and the provision of basic services to...the poor and disadvantaged”.

53. The Municipal Finance Management Act 65 of 2003 also allows for and supports the leasing of commonage land at lower than market prices. It states that: “immovable property is let at market related rates except when the public interest or the plight of the poor demands otherwise” [40 (2) (c) (i)].

54. In order to properly fulfil its development tasks, municipalities should include commonage management plans in their Integrated Development Plans (IDPs). This is important because commonage can contribute to development in municipalities. Commonage also needs to be managed in a way that is not separate from other development goals of municipalities. The use of commonage for land reform purposes needs to be part of an integrated plan for development.

55. National government also has the mandate to provide financial assistance towards land reform, including to municipalities. The DLRRD has legislative authority to assist

specifically with the “planning, acquisition and provision of infrastructure on municipal-owned land”. The Provision of Land and Assistance Act (1993) Section 10 (amended by Act 58 of 2008) determines that the Minister of Rural Development and Land Reform may “acquire property”; “maintain, plan, develop or improve property or cause such maintenance, planning, development or improvement”; and “provide financial assistance...for the acquisition, maintenance, planning, development or improvement of property and for the capacity building, skills development, training and empowerment” out of money “appropriated from parliament” for these purposes. This means the Minister can fund municipalities to provide and improve infrastructure on ‘existing’ commonage, fund the capacity building of those using the commonage, and assist municipalities to acquire ‘new’ commonage (private farms bought for this purpose by government).

56. It is our submission that municipalities, with the assistance of the national government, should:
- 56.1. Include commonage land in municipal Integrated Development Plans (IDPs), enabling municipalities to plan for its use to uplift communities, particularly women and other marginalised groups.
  - 56.2. Lease commonage lands, within the ambit of the IDP, at nominal rates to qualifying beneficiaries.
  - 56.3. Prioritise community-driven small-scale farming initiatives on commonage land to enable women and other vulnerable persons to produce food for their households and generate income.
  - 56.4. Apply for grants and other forms of social benefits from the national government to strengthen and sustain such programmes.
57. In the context of the central role of land and agrarian reform in advancing food security, municipal commonage represents an immediately available and constitutionally grounded mechanism to advance meaningful access to productive land. Food insecurity in South Africa is closely linked to unequal land distribution and limited access to natural resources for poor and marginalised

communities. Because commonage land is already publicly owned, it can be mobilised without the delays associated with acquisition and transfer, and strategically utilised to support small-scale production, household food security, and local agrarian development. Properly planned and aligned with community needs, commonage can operate not merely as municipal property, but as a practical instrument of agrarian reform — enabling sustainable livelihoods, enhancing local food systems, and giving effect to the State’s constitutional obligation to foster equitable access to land and natural resources.

## **C. FOOD WASTE AND FOOD DONATION**

**Legal Resources Centre; Food Forward South Africa**

### **C.1 THEME 6: SYSTEMIC FAILURE AND FRAGMENTED GOVERNANCE**

#### **C.1.1 INTRODUCTION AND SCOPE**

58. The submissions under this theme consider the extent to which South Africa’s legal framework governing food waste and food donation undermines the realisation of the constitutional right of access to sufficient food, as guaranteed in section 27(1)(b) of the Constitution.
59. Food insecurity and malnutrition in South Africa have reached crisis levels. The challenge is not a lack of food, but a failure of access driven by systemic inefficiencies, misaligned incentives, and fragmented coordination that exclude vulnerable communities and intensify the climate crisis. While food donation is not a substitute for a comprehensive human rights-based food system, it forms a realisable, low-cost intervention that prevents edible food from being destroyed and wasted.
60. The submission shows that existing legislative and institutional arrangements actively discourage the redirection of safe, edible surplus food to people who need it, thereby entrenching avoidable hunger. The failure to remove these barriers reflects a broader pattern of fragmented governance and policy

incoherence operates as a systematic barrier that frustrates the State's constitutional obligations around food security.

### **C.1.2 THE RIGHT TO FOOD AND THE STATE'S OBLIGATIONS**

61. Section 27(1)(b) of the Constitution guarantees everyone the right of access to sufficient food, while section 27(2) obliges the State to take reasonable legislative and other measures within available resources to progressively realise this right. These obligations extend beyond the adoption of high-level policies and strategies. They require the State to ensure that its legislative framework, taken as a whole, does not impede access to food or incentivise conduct that undermines food availability.
  
62. International and regional human rights law reinforces this understanding. States are required to respect, protect, promote, and fulfil the right to food.<sup>16</sup> This includes an obligation to prevent third parties from interfering with access to food and to ensure that regulatory frameworks governing food systems support, rather than undermine, food security. Where legislation creates disincentives for food donation or facilitates unnecessary food waste, it reflects a failure of governance that is incompatible with these obligations.

### **C.1.3 FOOD LOSS AND WASTE AS A STRUCTURAL BARRIER TO THE RIGHT TO FOOD**

63. South Africa experiences persistently high levels of food loss and waste across the food supply chain, with approximately one-third of all food produced for human consumption exiting the system before it can be consumed. The majority of food loss occurs during processing, packaging, and manufacturing, while significant quantities of edible food are also wasted during distribution and consumption. At the same time, millions of South Africans experience food insecurity and hunger on a daily basis.

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<sup>16</sup> Article 25 of the Universal Declaration of Human Rights (UDHR); Article 11 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR); and Article 28 of the Convention on the Rights of the Child, and Article 28 of the Convention on the Rights of Persons with Disabilities.

64. This coexistence of widespread hunger and large-scale food waste is not a logistical or market failure. It reflects systemic governance shortcomings, including the absence of a coherent legal framework to prevent food waste and facilitate food recovery and donation. The result is a food system in which edible food is routinely wasted, in some cases not due to safety concerns, but due to legal uncertainty, financial disincentives and administrative complexities, resulting in the state's failure to ensure that available food resources are used to advance the right to food.

#### **C.1.4 THE LEGISLATIVE FRAMEWORK GOVERNING FOOD DONATION IS FRAGMENTED**

65. South Africa's legal framework governing food donation is fragmented across several statutes that regulate different aspects of the food system, including food safety, consumer protection, and taxation. This fragmentation is not, in itself, unusual or inherently problematic. Each of these statutes pursues legitimate objectives in its own regulatory domain, and none was originally designed with food donation as a central concern.
66. The difficulty arises because food donation has now been clearly identified as a relevant intervention within the broader constitutional and policy framework for realising the right to food, yet the existing legislative framework has not been adapted to respond to this need. Tax and consumer protection laws operate in ways that inadvertently discourage food donation or create uncertainty and risk for donors and food recovery organisations.
67. The problem is not the absence of a single, comprehensive food donation law, nor the need to rewrite the existing legislative framework in its entirety. Rather, it lies in the lack of alignment, coordination, and purposive interpretation across existing laws in light of food security challenges and constitutional obligations. In the absence of such alignment, the combined effect of otherwise rational legal

provisions is to incentivise the destruction of edible food and to shift legal and financial risk onto those who seek to contribute to food security.

68. Addressing this form of fragmentation requires targeted legislative attention to specific provisions within existing laws that create barriers to food donation, as well as clearer guidance on how those laws should operate in relation to donated food. Without focused intervention, the current framework will continue to undermine the state's obligation to take reasonable measures to facilitate access to sufficient food, despite policy recognition of food donation as a valuable and appropriate response to food loss and waste.

**(a) The Consumer Protection Act creates liability uncertainty**

- 68.1. The Consumer Protection Act does not explicitly regulate or exempt food donations. Its strict liability regime, which applies to harm caused by unsafe or defective goods, creates uncertainty as to whether food donors and food recovery organisations may be held liable for harm arising from donated food, even where food is donated in good faith and is safe for consumption. This uncertainty has been identified by food businesses and food recovery organisations as a significant deterrent to food donation.
- 68.2. The absence of donation-specific liability protections or clear statutory guidance reflects a failure to align consumer protection objectives with constitutional obligations relating to the right to food. Given the uncertainty of whether food donations fall within the scope of the CPA donors and intermediaries are discouraged by the threat of strict liability claims. Donors are thereby discouraged from donating food which, in itself can contribute to food security within South Africa.

**(b) Income tax law disincentivises surplus food donation**

- 68.3. The Income Tax Act permits businesses to claim deductions for surplus food that is destroyed/wasted and written off as a business loss. By contrast, donating surplus food is often administratively complex and may not yield equivalent or predictable tax benefits. Food donors must, upon donating food to another party, receive from that party a certificate/receipt. Which the donor can submit to SARS to receive a tax deduction. In South Africa at the moment most organisations or communities that would receive would do not have the capacity to produce this certificate as required by the legislation.
- 68.4. This creates a perverse incentive structure in which it is more financially rational for businesses to dispose of edible food than to donate it. Such incentives are incompatible with the state's obligation to take reasonable legislative measures to advance access to food. A tax incentive therefore becomes an important tool to support food donation efforts. This illustrates how fiscal policy, when developed in isolation from social and human rights objectives, can actively undermine the realisation of socio-economic rights.

**(c) Value-added tax places administrative barriers to donation**

- 68.5. The VAT regime further complicates food donation by limiting the circumstances in which donors may claim input tax deductions for food that is donated rather than sold. Current provisions restrict such deductions to donations made in the course of a vendor's ordinary business activities and impose administrative burdens that create uncertainty and risk for donors. These limitations disproportionately affect smaller producers, manufacturers, and retailers, and contribute to a regulatory environment in which donation is discouraged. Once again, the absence of coordination between tax policy and food security objectives reflects fragmented governance rather than resource constraints.

### **C.1.5 POLICY RECOGNITION WITHOUT LEGISLATIVE FOLLOW-THROUGH: THE FOOD LOSS AND WASTE STRATEGY (2020-2025)**

69. The National Food Loss and Waste Strategy (2020-2025)<sup>17</sup> acknowledges the scale of food loss and waste in South Africa and recognises food donation as a preferred intervention for surplus edible food. It identifies liability concerns and the need for an enabling environment to support donation and redistribution. However, the Strategy does not meaningfully address the legislative barriers created by the Consumer Protection Act, the Income Tax Act, and the VAT Act. Nor does it establish binding obligations, timelines, or accountability mechanisms to ensure that these barriers are removed. As a result, the Strategy remains largely aspirational and fails to translate policy recognition into enforceable legal reform.

### **C.1.6 INSTITUTIONAL COORDINATION FAILURES ACROSS THE FOOD SYSTEM**

70. Responsibilities for regulating different aspects of the food system in South Africa is spread across multiple government departments and regulatory authorities, including those responsible for food safety, consumer protection, taxation, agriculture, and social development. This distribution of functions is not inherently deficient but reflects the complexity of modern food systems and the range of public interests they engage.

71. However, in the context of a clear constitutional obligation to facilitate access to sufficient food, the absence of effective coordination between these institutions has resulted in regulatory misalignment. Departments and regulators continue to exercise their mandates largely in isolation without a shared framework for assessing how their respective laws and practices affect food donation as a means of reducing food loss and alleviating hunger.

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<sup>17</sup> Strategy for Reducing Food Losses and Waste GG 53243 GN 6556 (29-08-2025).

72. As a result, food donation falls between institutional mandates. No single department bears responsibility for ensuring that laws governing food safety, consumer liability, and taxation operate coherently in relation to donated food. In practice, this shifts risk and compliance burdens onto food donors and food recovery organisations, while the state retains high-level policy commitments to reducing food waste and promoting food security. This institutional fragmentation undermines the state’s obligation to take reasonable and coordinated measures to realise the right to food. It also weakens accountability as barriers to food donation persist not because of deliberate policy choices, but because of the cumulative effects of uncoordinated decision-making across departments.

### **C.1.7 RECOMMENDATIONS**

#### **(a) Positioning food recovery as a scalable, cost-effective solution to food insecurity and reducing food waste**

73. Food recovery should be formally recognised and positioned as a scalable and cost-effective intervention within South Africa’s broader food security framework. While not a substitute for a comprehensive rights-based food system, food recovery provides an immediate and practical mechanism to prevent the destruction of edible food and to improve access for vulnerable communities. As such, it warrants deliberate policy support and institutional recognition.

#### **(b) Policy rationale: why food recovery is a public interest intervention**

74. South Africa faces a structural paradox: significant volumes of edible food are lost or wasted each year, while millions of households experience chronic food insecurity and levels of child stunting continue to rise. This is not primarily a production failure, but a systems failure driven by misaligned incentives, fragmented logistics, regulatory uncertainty, and the absence of a coordinated national food recovery mechanism.
75. Food recovery directly addresses this systems failure by reducing food waste at source, lowering the relative cost of food security interventions when compared

to procurement-based models, and delivering immediate social returns while advancing environmental and fiscal objectives.

76. From a public policy perspective, food recovery functions as a public interest intervention. It generates positive externalities through reduced landfill use, lower greenhouse gas emissions, and improved nutritional access. It corrects a market inefficiency by creating pathways for surplus food to reach people. It also reduces pressure on public social protection systems by supplementing existing food security measures.

77.

**(c) Public financing pathways**

78. Government involvement in food recovery systems can be catalytic. The State need not assume operational control but can enable, support, and scale models that are already functioning effectively within civil society and the private sector.

79. Potential public financing mechanisms include hybrid funding models in which the State supports logistics and operational costs while the private sector supplies surplus food; conditional grants to support provincial or municipal food recovery infrastructure; formal inclusion of food recovery within national and provincial food loss and waste strategies as a preferred intervention; performance-based contracting linked to verified volumes recovered and distributed; and the development of carbon credit mechanisms, including the use of accredited standards such as Gold Standard, to enable participation in voluntary carbon markets.

80. Such measures would not require the State to operate food recovery programmes directly, but to create enabling financial and regulatory conditions that allow existing systems to scale sustainably.

**(d) Targeted policy engagement and public advocacy**

81. The removal of structural barriers to food donation requires deliberate engagement with policymakers, regulators, and industry stakeholders. Civil society organisations are well placed to contribute to this process through formal submissions, technical input, and public advocacy aimed at shifting the current regulatory constraints.
82. This includes advocating for an enabling food donation policy environment that reduces legal risk for donors; making formal submissions on food loss and waste regulation that call for clarity in date labelling and explicit recognition of food donation as a preferred waste-reduction measure; and promoting alignment between food safety standards and the operational realities of redistribution.
83. It also includes calls for strengthened national governance, including the finalisation and implementation of the Food and Nutrition Security Plan for South Africa, the adoption of clear South African Bureau of Standards (SABS) food donation standards that reduce operational uncertainty, and the establishment of a Food and Nutrition Security Council to improve coordination across departments and strengthen accountability.

**C.1.8 CONCLUSION**

84. In light of the governance and coordination failures outlined above, this submission invites the Commission to consider how existing laws and institutions can be better aligned to support the realisation of the right to food. The barriers to food donation identified in this submission do not arise from a lack of regulation, but from the way in which existing laws interact, often without specific regard to food donation or food security.
85. The Commission is invited to recommend targeted legislative and regulatory changes that clarify how existing statutes apply to food donation, remove legal and financial disincentives to donating safe, edible food, and ensure that food

safety, consumer protection, and tax rules are applied in a manner consistent with constitutional obligations under the Constitution.

86. These changes would not require a complete overhaul of South Africa's food law framework. Rather, it would require focused interventions to address specific provisions and practices that currently discourage food donation or create unnecessary uncertainty for donors and food recovery organisations. By taking these steps, the state would remove avoidable barriers to food donation and take a practical and achievable step towards improving access to food for people who are currently experiencing hunger.
87. The Legal Resources Centre will welcome any opportunity to engage the SAHRC further on the issues that we have raised in these submissions.