

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

Case no. /2021

In the matter of:

**MINISTER OF FORESTRY, FISHERIES
AND ENVIRONMENT**

Applicant

and

**VARIOUS SMALL-SCALE FISHERS
AND FISHING COMMUNITIES LISTED IN
ANNEXURE "A"**

Respondents

FOUNDING AFFIDAVIT

I, the undersigned,

BARBARA DALLAS CREECY

do hereby make oath and say:

1. I am the Minister of Forestry, Fisheries and Environment.
2. The facts described in this affidavit fall within my personal knowledge, unless I state otherwise, or the context makes it clear that they do not. The facts are to the best of my knowledge true and correct.
3. Some of the averments I make herein deal with matters of law. To the extent that I do so, I rely on the advice I have obtained from my legal representatives.

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I INTRODUCTION

4. This is a twofold application.

4.1. First, it is an ex parte application for substituted service.

4.2. Second, it is an application for orders reviewing and setting aside the process and outcomes of the recognition of small-scale fishers and fishing communities in the Western Cape.

5. Between 2016 and 2019, the Department of Environment, Forestry and Fisheries and as it was known prior to its restructuring, the Department of Agriculture, Forestry and Fisheries (“**the Department**”) considered 8646 applications for the recognition of small-scale fishers and communities in the Western Cape. Following a comprehensive audit of the process of recognition of small-scale fishers, it was revealed that the process was irregular, unfair and flawed. Its irregularities ranged from deficient data capture to errors of law. As a result, following the audit, it was found that the recognition or rejection of thousands of small-scale fishers was unfair and irregular and not in accordance with the law. There is a pressing need to correct this patent injustice. Hence this application, which I bring in two capacities: In my capacity as the member of the national executive who is responsible for fisheries, as in that capacity I have an interest in ensuring that fishing rights are awarded in a manner that is lawful and fair; and in the public interest, as it is plainly in the public interest that persons who wish to engage in small-scale fishing should be able to make that claim of access to this limited natural resource through a process which is conducted and determined lawfully and fairly.

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6. There are thousands of small-scale fishers who are impacted by the review of the recognition process. They are spread across the Western Cape. A central reason for the review application is that the data capturers failed to accurately record information of hundreds of fishers who applied for recognition. Some personal details were incorrectly captured, some location details were incorrectly captured, and there were numerous duplications of information (names, surnames, and identity numbers). Given the literally thousands of people who potentially have an interest in this matter, and given the inadequacy of the database which records who they are, it is neither practical nor effective to give notice through the ordinary process.
7. Together with officials in the Department, I have considered how best to contact those affected by the review. In my opinion, the forms of service prayed for in the notice of motion will ensure that the review is brought to the attention of those whose rights are affected.
8. This affidavit is structured as follows:
 - 8.1. **PART II:** I provide the background to this application.
 - 8.2. **PART III:** I demonstrate that the requirements for substituted service are met.
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II BACKGROUND

9. On 1 September 1998, the Marine Living Resources Act 18 of 1998 (“Act”) commenced. The Act aims to provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources, and the orderly access to exploitation, utilisation, and protection of certain marine living resources.
10. The Act regulates fishing in South Africa. Section 18(1) provides that no person shall undertake commercial fishing or small-scale fishing (both of which are defined in section 1) unless the Minister has granted them a right to fish.
11. Before 2014, the Act recognised and provided for rights only in the recreational, commercial and subsistence sectors. Many local fishing communities were marginalised by this regime. These communities were not active in any of the fishing sectors regulated by the previous regime, but nonetheless fished on a small scale. Technically, they were doing so illegally.
12. In 2007, disgruntled by the lack of recognition of the small-scale fishing sector in the 2005 medium-term fishing rights allocation, a group of small-scale fishers launched an application in the Equality Court. They sought to compel the then Minister to allow small-scale fishers to harvest certain marine resources, including lobster, mussel, and white bait. The action was pursuant to the 2005 medium term fishing rights allocation system, which did not recognise the small scale sector.

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13. In 2007, the Equality Court, by the agreement of all of the parties, made an order inter alia establishing an Interim Relief Dispensation (“IRD”). The order is attached as BC1.

The IRD would work as follows:

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17. In 2012, my predecessor gazetted the Policy for Small-Scale Fisheries Sector in South Africa (published under Government Notice No 474 on 20 June 2012) (“Policy”). I attach the Policy as **BC2**. The policy was used to guide the Department in processing applications under the IRD.

18. In 2014, section 19 of the Act was amended to recognise small-scale fishers to provide for community-based and small-scale fishing. The Act, as amended in 2014, defines a small-scale fisher as—

“a member of a small-scale fishing community engaged in fishing to meet food and basic livelihood needs, or directly involved in processing or marketing of fish, who—

- (a) traditionally operate in near-shore fishing grounds;
- (b) predominantly employ traditional low technology or passive fishing gear;
- (c) undertake single day fishing trips; and
- (d) is engaged in consumption, barter or sale of fish or otherwise involved in commercial activity, all within the small-scale fisheries sector.”

19. The Act provides that small-scale fishing community—

“means a group of persons who—

- (i) are, or historically have been, small-scale fishers;
- (ii) have shared aspirations and historical interests or rights in small-scale fishing;
- (iii) have a history of shared small-scale fishing and who are, but for the impact of forced removals, tied to particular waters or geographic area, and were or still are operating where they previously enjoyed access to fish, or continue to exercise their rights in a communal manner in terms of an agreement, custom or law; and
- (iv) regard themselves as a small-scale fishing community.”

20. Small-scale fishing communities continue to be disadvantaged by discrimination, largely because of apartheid-era forced removals. Section 19 of the Act expressly provides for the regulation of small-scale fishing to “achieve the objectives contemplated in section

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9 (2) and 39 (3) of the Constitution”. Section 19(1)(d) obliges the Minister to prescribe the processes and procedures relating to the allocation and recognition of small-scale fishing rights.

21. In 2016, my predecessor promulgated Regulations relating to Small-Scale Fishing in GN 229 in GG 39790 of 8 March 2016 (“**Regulations**”) as required by section 19(1)(d) of the Act.

22. The Regulations set out how small-scale fishing rights are to be applied for and granted. The process, in summary, comprises six steps:

22.1. **Step One:** Communities register an expression of interest with the Department.

22.2. **Step Two:** The Department conducts a verification process of each person claiming to be a small-scale fisher in each of the communities that have registered an expression of interest.

22.3. **Step Three:** The Department assists the community with registering the community as a co-operative and identifying suitable species and fishing areas to be used for commercial purposes and for own consumption.

22.4. **Step Four:** The Department assists the verified fishing communities to apply for a fishing right.

22.5. **Step Five:** The Department assesses whether rights should be granted to the fishing community.

22.6. **Step Six:** The fishing communities may, if they so wish, appeal an adverse decision with respect to their application.

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23. This is a complex process of a kind which, in the nature of things, had not previously been undertaken. The Department initiated this process nationwide from 2016 to 2019. A detailed breakdown of the process is attached as **BC3**.
24. In the Western Cape, the Department finalised **Step One** (expressions of interest) by 2016.
25. The Department also commenced with **Step Two** (verification) in 2016. The Department, by way of verifying fishers, set up an application process. The process entailed that persons who considered themselves small-scale fishers applied to the Department to be verified so as to be recognised as small scale fishers.
26. The purpose and nature of **Step Two** is set out in the Regulations. Regulation 2 provides:
- “(2) The Department must conduct a verification procedure, in accordance with the time period specified in regulation 3, of each person considering themselves to be a small-scale fisher in each of the communities that have registered an expression of interest contemplated in subregulation (1).
 - (3) The verification procedure must be conducted in order to determine whether each person of the intended small-scale fishing community, meets the criteria of a small-scale fisher as set out in regulation 4(1).
 - (4) Communities may be required to assist the Department in verifying the small-scale fishers in their respective communities.
 - (5) The Department must publish, in relevant popular newspapers, a list of persons recognised as small-scale fishers per small-scale fishing community.”
27. The purpose of the verification process is thus to ensure that persons claiming to be small-scale fishers are actually small-scale fishers. The criteria for a small-scale fisher are set out in regulation 4(1):

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- “(1) The criteria to be applied in determining whether a person is a small-scale fisher are that the person must—
- (a) be a South African citizen who associates with or resides in the relevant small-scale fishing community;
 - (b) be at least 18 years of age;
 - (c) historically have been involved in traditional fishing operations, which include catching, processing or marketing of fish for a cumulative period of at least 10 years; and
 - (d) derive the major part of his or her livelihood from traditional fishing operations and be able to show historical dependence on fish, either directly or in a household context, to meet food and basic livelihoods needs.”

28. During **Step Two** (verification), which was initiated in 2016 but was ongoing for a number of years, the Department received a total of 8646 applications for small-scale fishing recognition in the Western Cape. The Department employed a third-party service provider to assist it in the facilitation of these applications. The process also involved co-opting members of the fishing communities to assist in verifying and assessing the applications for recognition. This was done in terms of regulation 2(4), which envisages communities assisting the Department in verifying fishers.

29. Subsequently, the Department announced a provisional list of small-scale fishers and opened an appeal process for those applicants who were provisionally unsuccessful. A number of appeals were received and considered, after which the final list of declared small-scale fishers in the Western Cape was announced in February 2019.

30. In response to the final list, various fishing communities made complaints to the Department about the process and its outcomes. They complained that the Department's processes were unfair, arbitrary, and inexplicable.

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31. In response to these complaints, the Department commissioned two internal audits of the verification and recognition process.
32. The initial report, in 2019, verified 1814 applications. It was submitted to me in December 2019. It revealed gross irregularities in the recognition process.
33. In the light of that report, I requested that a full, second, audit be undertaken of all the applications for recognition received and processed by the Department's Western Cape fisheries branch. This report was finalised on 19 November 2020. It is attached as **BC4**.
34. The report found that the process adopted in the Western Cape was fatally flawed. It recommended that the process be restarted afresh, with appropriate procedures for verifying the small-scale fishers and ensuring the proper application of the relevant criteria, in line with the Act and Regulations.
35. The findings in the report can be summarised as follows.
36. First, the criteria for granting the rights in the Regulations were not accurately replicated in the application process.

36.1. Administrators were following the Policy and not the Regulations, or a non-harmonious approach of combining the two, in assessing applications. The Policy is not law, whereas the Regulations are. Administrators were supposed to follow the Regulations, which contained the applicable criteria for assessing the applications. The Policy differs in some respects from the Regulations. For

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instance, the Policy allows for non-South Africans to apply for fishing rights, while the Regulations do not.

36.2. The confusion around whether to follow the Policy or the Regulations was a cause of much error. It resulted in numerous applications being improperly adjudicated because irrelevant criteria contained in the Policy, such as “no other permanent employment” or “historical involvement in traditional fishing operations”, were invoked to reject applicants.

37. Second, the application form and criteria were ambiguous in some respects. For instance, applicants were asked to what extent they depended on fishing, without properly clarifying whether the dependence related to food or income. This difference impacted on how the Department was to verify fishers but was not captured in the application form properly.

38. Third, the filing and handling of physical applications was wholly inadequate.

38.1. Applications were found that had not been processed by the Department or had, for no discernible reason, been marked as “spoilt”.

38.2. Some application forms did not have a stamp or other certification indicating whether they were successful or unsuccessful.

38.3. Some 696 applications were incorrectly filed as unsuccessful when they were in fact successful.

39. Fourth, applications were inconsistently assessed by community panel members who assisted the Department in assessing applications.

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- 39.1. Some applications were assessed by seven people, while others were assessed only by one. In some instances, there was no evidence that applications were considered by assessors at all.
40. Fifth, the criteria for verification were inconsistently and incoherently applied during the assessment and appeal process.
- 40.1. In some cases, an application was deemed unsuccessful if a single assessor of the panel found that a single criterion was not met, but in other cases fishers were verified even though multiple criteria were not met.
- 40.2. In some cases, assessors introduced new criteria, like frequency of fishing, which were not required by the Regulations.
41. Sixth, the appeals process for rejected applicants was inconsistent and unfair.
- 41.1. The process of appeal required the provision of certified copies of documents, whereas the process of applying had not required this.
- 41.2. Applicants were not allowed to submit further or new evidence on appeal. But the rule against new evidence was applied inconsistently by the Department.
- 41.3. Many appeals were incoherently decided. There were cases where all three officials who reviewed the appeals assessed an appeal as “No” but went on to recommend that the appeal succeed. There were also cases of the converse.
42. Seventh, the data used to assess applications was incomplete and inaccurate, so much so that it cannot ensure the accuracy of outcomes of applications.

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- 42.1. The report found 108 duplicated applications. It also found close to 400 duplicated applicant names and ID numbers.
- 42.2. There were 3422 applications that were not on the SMS outcomes list. It was unclear whether this was because those applicants did not have cell-phone numbers. The SMS outcomes list was a list detailing the outcomes of applicants with their cell-phone numbers.
- 42.3. There were many incorrectly captured ID numbers, names, and cell phone numbers.
43. In the end, the report found a total of 1048 outcome errors in the application process. This amounts to 18.80% of applications. Put differently, one in five applications was granted or dismissed erroneously. While the appeal process rectified a significant number of errors, the report found that 25.74% of appeals (one in four) were decided erroneously.
44. The flaws in the process were so fundamental in their nature and extent that I have reluctantly concluded that it is not possible or justifiable to hive off some applications from communities that were assessed properly.
- 44.1. All communities would have been equally affected by the absence of clear criteria, and the inconsistencies between the form and the Regulations. That would have affected what information they provided in their applications. If the forms were inconsistent with the Regulations, or misleading, that error would affect all applicants.

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44.2. All communities would have been equally affected by the inconsistent and unfair application and appeals processes. If the system itself was flawed, all applications and appeals were affected.

44.3. The inaccurate data collection means it is impossible to determine reliably which communities were impacted by irregularities and which were not.

45. It is for these reasons that I approach this Court to set aside the recognition process and any decisions arising from such process.

III SUBSTITUTED SERVICE

46. In Part A of the notice of motion I ask, on an ex parte basis, for an order for substituted service.

47. I am advised that Rule 4(2) of the Uniform Rules of Court provides:

“If it is not possible to effect service in any manner aforesaid, the court may, upon the application of the person wishing to cause service to be affected, give directions in regard thereto. Where such directions are sought in regard to service upon a person known or believed to be within the Republic, but whose whereabouts therein cannot be ascertained, the provisions of subrule (2) of rule 5 shall, *mutatis mutandis*, apply.”

48. Rule 5(2) sets out information that needs to be provided to substantiate an application for substituted service:

48.1. The nature and extent of the applicant’s claim;

48.2. The grounds upon which the claim is based;

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- 48.3. The grounds upon which the court has jurisdiction to entertain the claim;
- 48.4. The manner of service which the court is asked to authorize;
- 48.5. The last-known whereabouts of the persons to be served;
- 48.6. The inquiries made to ascertain the persons' present whereabouts; and
- 48.7. Where service by publication is ordered, the form of the publication.
49. I am advised that in an application for substituted service, the court may order any manner of service as is likely to bring the proceedings concerned to the notice of the party to be served. The Court can also order the time within which notice of intention to defend is to be given or any other step that is to be taken by the person to be served.
50. I deal with each of these matters below.
- (a) *Nature, extent, and grounds of the applicant's claim*
51. In Part B of the notice of motion, I apply for an order reviewing and setting aside the decisions which were made as a result of the recognition process detailed above, and the process itself.
52. I bring the application in my capacity as the member of the national executive responsible for fisheries, and in the public interest, given the large numbers of fishers and communities involved. I bring the application in terms of the Promotion of Administrative Justice Act 3 of 2000, alternatively the principle of legality.

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53. I discuss in the next part the grounds of review.

54. I am advised and submit that this Court has jurisdiction in respect of the review of administrative decisions and the exercise of public power, where the decisions and the exercise of the power apply in the Western Cape.

(b) *The form and manner of service*

55. I ask the Court to authorise five manners of service.

56. First, by publication in popular newspapers that the fishers are most likely to read. The Department has consulted with fishing community leaders as to which newspapers would be best. Based on that consultation, I propose the following newspapers: Cape Argus; Cape Times; Die Burger; False Bay Echo; Hermanus Times; Son.

57. The publication will take place in English, Afrikaans, and isiXhosa. The form of the publication is annexed to the notice of motion as "B". It identifies four way ways in which fishers can access the full record of these proceedings:

57.1. They can download the papers from the Department's website via a link to be set up by the Department.

57.2. They can call a share-call number to ask for electronic delivery of the papers; and

57.3. They can visit the nearest Fishery Control Office to obtain hard copies of the papers.

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57.4. They can request an electronic copy by email to a specified address.

58. Second, by broadcasting notice of these proceedings on radio stations to which fishers are most likely to listen. The Department has consulted with communities about which radio stations are best suited for these broadcasts. In the light of those consultations, I propose the following stations, which were previously used by the Department and are therefore known to be used in communicating with these communities: KFM 94.5; Radio Tygerberg; Radio West Coast; Radio Zibonele; Voice of the Cape; uMhlobo Wenene.
59. The broadcasting will be in English, Afrikaans, and isiXhosa. The script for the broadcast is annexed to the notice of motion as "C". It also advertises the three options described above for obtaining copies of the papers.
60. Third, by making copies available at the various local Fishery Control Offices. The members of the fishing communities are familiar with these offices, where they engage officials of the Department. I attach a list as **BC5**.
61. Fourth, by sending notice of the application through Short Message Service ("SMS") to persons listed in annexure "E" to the notice of motion. These are persons whose cell-phone numbers the Department has from their recognition applications.
62. The content of the SMS is set out in annexure "D" to the notice of motion. It will contain a link to the website where fishers can download the papers. It will also identify the

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hotline to call for further details and advise fishers to visit their nearest Fishery Control Office for copies of the papers.

63. Fifth, by personal service on identified community leaders per the list annexed as **BC6**. These persons are established and recognised community leaders who are well-placed to communicate with fishers about this application.

64. On the basis of the information available to the Department and to me, these five forms of service are the best practical ways of ensuring that this application is brought to the notice of the fishers affected by it.

65. The fishers will be given 30 (thirty) days to respond to this application.

(c) *Inquiries and last known whereabouts*

66. The Department has conducted in-depth consultations with community leaders to ascertain how best to give notice to the fishers affected by this application.

67. I have myself already met with representatives of local communities and informed them of the outcome of the audit and my intention to review the recognition process.

68. In order to supplement the proposed seven methods of notification, the Department will also hold information meetings within affected communities, to inform members of the process that is taking place, and how they may assert their rights.

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69. In the experience of the Department, word spreads quickly within fishing communities about matters which affect fishing. I am confident that if these multiple methods of giving notice are used, there will be effective notice to the persons whose rights are affected.
70. I respectfully submit that a proper case has been made out for the substituted service.

IV BASIS AND GROUNDS OF REVIEW

71. As I have stated, I bring this application in terms of PAJA, alternatively under the principle of legality.
72. I am advised that a public entity can only rely on PAJA in limited circumstances for a "self-review". I am further advised that since this application is brought in the public interest, it can be brought in terms of PAJA. I am advised and respectfully submit, in the alternative, that the authorities precluding me from bringing this application under PAJA are clearly wrong.
73. In the alternative, the application is brought on the basis of the legality principle which is a founding value of our Constitution.
74. I am advised and submit that the recognition and decision process, and the decisions themselves, constituted administrative action.
75. The grounds of review for this application are as follows.

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76. First, a mandatory and material procedure or condition prescribed by an empowering provision was not complied with (section 6(2)(b)).

77. The criteria in the Regulations for verification of the applicants for recognition as small scale fishers, were not complied with by assessors. They applied the different requirements in the Policy or introduced their own criteria. The decisions were based on assessments made in accordance with this faulty process,

77.1. The process as a whole failed to make it clear to assessors that they are bound to apply the criteria in the Regulations and not the Policy.

78. Second, the action was procedurally unfair (section 6(2)(c)), alternatively procedurally irrational.

78.1. The application forms were vague, misleading, and did not afford applicants the opportunity to make proper representations to the Department.

78.2. The criteria by which applicants were being assessed were not made clear to the applicants.

78.3. The data of applicants, including the outcomes of applications, were incorrectly recorded.

78.4. Assessors were not consistent, either in their composition or assessment of applications.

78.5. The appeals process was flawed and poorly implemented.

79. Third, the action was materially influenced by an error of law (section 6(2)(d)).

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 - (iii) have a history of shared small-scale fishing and who are, but for the impact of forced removals, tied to particular waters or geographic area, and were or still are operating where they previously enjoyed access to fish, or continue to exercise their rights in a communal manner in terms of an agreement, custom or law; and
 - (iv) regard themselves as a small-scale fishing community.”
20. Small-scale fishing communities continue to be disadvantaged by discrimination, largely because of apartheid-era forced removals. Section 19 of the Act expressly provides for the regulation of small-scale fishing to “achieve the objectives contemplated in section

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9 (2) and 39 (3) of the Constitution”. Section 19(1)(d) obliges the Minister to prescribe the processes and procedures relating to the allocation and recognition of small-scale fishing rights.

21. In 2016, my predecessor promulgated Regulations relating to Small-Scale Fishing in GN 229 in GG 39790 of 8 March 2016 (“**Regulations**”) as required by section 19(1)(d) of the Act.
22. The Regulations set out how small-scale fishing rights are to be applied for and granted. The process, in summary, comprises six steps:
 - 22.1. **Step One:** Communities register an expression of interest with the Department.
 - 22.2. **Step Two:** The Department conducts a verification process of each person claiming to be a small-scale fisher in each of the communities that have registered an expression of interest.
 - 22.3. **Step Three:** The Department assists the community with registering the community as a co-operative and identifying suitable species and fishing areas to be used for commercial purposes and for own consumption.
 - 22.4. **Step Four:** The Department assists the verified fishing communities to apply for a fishing right.
 - 22.5. **Step Five:** The Department assesses whether rights should be granted to the fishing community.
 - 22.6. **Step Six:** The fishing communities may, if they so wish, appeal an adverse decision with respect to their application.

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23. This is a complex process of a kind which, in the nature of things, had not previously been undertaken. The Department initiated this process nationwide from 2016 to 2019. A detailed breakdown of the process is attached as **BC3**.
24. In the Western Cape, the Department finalised **Step One** (expressions of interest) by 2016.
25. The Department also commenced with **Step Two** (verification) in 2016. The Department, by way of verifying fishers, set up an application process. The process entailed that persons who considered themselves small-scale fishers applied to the Department to be verified so as to be recognised as small scale fishers.
26. The purpose and nature of **Step Two** is set out in the Regulations. Regulation 2 provides:
- “(2) The Department must conduct a verification procedure, in accordance with the time period specified in regulation 3, of each person considering themselves to be a small-scale fisher in each of the communities that have registered an expression of interest contemplated in subregulation (1).
 - (3) The verification procedure must be conducted in order to determine whether each person of the intended small-scale fishing community, meets the criteria of a small-scale fisher as set out in regulation 4(1).
 - (4) Communities may be required to assist the Department in verifying the small-scale fishers in their respective communities.
 - (5) The Department must publish, in relevant popular newspapers, a list of persons recognised as small-scale fishers per small-scale fishing community.”
27. The purpose of the verification process is thus to ensure that persons claiming to be small-scale fishers are actually small-scale fishers. The criteria for a small-scale fisher are set out in regulation 4(1):

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- “(1) The criteria to be applied in determining whether a person is a small-scale fisher are that the person must—
- (a) be a South African citizen who associates with or resides in the relevant small-scale fishing community;
 - (b) be at least 18 years of age;
 - (c) historically have been involved in traditional fishing operations, which include catching, processing or marketing of fish for a cumulative period of at least 10 years; and
 - (d) derive the major part of his or her livelihood from traditional fishing operations and be able to show historical dependence on fish, either directly or in a household context, to meet food and basic livelihoods needs.”

28. During **Step Two** (verification), which was initiated in 2016 but was ongoing for a number of years, the Department received a total of 8646 applications for small-scale fishing recognition in the Western Cape. The Department employed a third-party service provider to assist it in the facilitation of these applications. The process also involved co-opting members of the fishing communities to assist in verifying and assessing the applications for recognition. This was done in terms of regulation 2(4), which envisages communities assisting the Department in verifying fishers.
29. Subsequently, the Department announced a provisional list of small-scale fishers and opened an appeal process for those applicants who were provisionally unsuccessful. A number of appeals were received and considered, after which the final list of declared small-scale fishers in the Western Cape was announced in February 2019.
30. In response to the final list, various fishing communities made complaints to the Department about the process and its outcomes. They complained that the Department’s processes were unfair, arbitrary, and inexplicable.

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31. In response to these complaints, the Department commissioned two internal audits of the verification and recognition process.
32. The initial report, in 2019, verified 1814 applications. It was submitted to me in December 2019. It revealed gross irregularities in the recognition process.
33. In the light of that report, I requested that a full, second, audit be undertaken of all the applications for recognition received and processed by the Department's Western Cape fisheries branch. This report was finalised on 19 November 2020. It is attached as **BC4**.
34. The report found that the process adopted in the Western Cape was fatally flawed. It recommended that the process be restarted afresh, with appropriate procedures for verifying the small-scale fishers and ensuring the proper application of the relevant criteria, in line with the Act and Regulations.
35. The findings in the report can be summarised as follows.
36. First, the criteria for granting the rights in the Regulations were not accurately replicated in the application process.

36.1. Administrators were following the Policy and not the Regulations, or a non-harmonious approach of combining the two, in assessing applications. The Policy is not law, whereas the Regulations are. Administrators were supposed to follow the Regulations, which contained the applicable criteria for assessing the applications. The Policy differs in some respects from the Regulations. For

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instance, the Policy allows for non-South Africans to apply for fishing rights, while the Regulations do not.

- 36.2. The confusion around whether to follow the Policy or the Regulations was a cause of much error. It resulted in numerous applications being improperly adjudicated because irrelevant criteria contained in the Policy, such as “no other permanent employment” or “historical involvement in traditional fishing operations”, were invoked to reject applicants.
37. Second, the application form and criteria were ambiguous in some respects. For instance, applicants were asked to what extent they depended on fishing, without properly clarifying whether the dependence related to food or income. This difference impacted on how the Department was to verify fishers but was not captured in the application form properly.
38. Third, the filing and handling of physical applications was wholly inadequate.
- 38.1. Applications were found that had not been processed by the Department or had, for no discernible reason, been marked as “spoilt”.
- 38.2. Some application forms did not have a stamp or other certification indicating whether they were successful or unsuccessful.
- 38.3. Some 696 applications were incorrectly filed as unsuccessful when they were in fact successful.
39. Fourth, applications were inconsistently assessed by community panel members who assisted the Department in assessing applications.

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- 39.1. Some applications were assessed by seven people, while others were assessed only by one. In some instances, there was no evidence that applications were considered by assessors at all.
40. Fifth, the criteria for verification were inconsistently and incoherently applied during the assessment and appeal process.
- 40.1. In some cases, an application was deemed unsuccessful if a single assessor of the panel found that a single criterion was not met, but in other cases fishers were verified even though multiple criteria were not met.
- 40.2. In some cases, assessors introduced new criteria, like frequency of fishing, which were not required by the Regulations.
41. Sixth, the appeals process for rejected applicants was inconsistent and unfair.
- 41.1. The process of appeal required the provision of certified copies of documents, whereas the process of applying had not required this.
- 41.2. Applicants were not allowed to submit further or new evidence on appeal. But the rule against new evidence was applied inconsistently by the Department.
- 41.3. Many appeals were incoherently decided. There were cases where all three officials who reviewed the appeals assessed an appeal as “No” but went on to recommend that the appeal succeed. There were also cases of the converse.
42. Seventh, the data used to assess applications was incomplete and inaccurate, so much so that it cannot ensure the accuracy of outcomes of applications.

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- 42.1. The report found 108 duplicated applications. It also found close to 400 duplicated applicant names and ID numbers.
- 42.2. There were 3422 applications that were not on the SMS outcomes list. It was unclear whether this was because those applicants did not have cell-phone numbers. The SMS outcomes list was a list detailing the outcomes of applicants with their cell-phone numbers.
- 42.3. There were many incorrectly captured ID numbers, names, and cell phone numbers.
43. In the end, the report found a total of 1048 outcome errors in the application process. This amounts to 18.80% of applications. Put differently, one in five applications was granted or dismissed erroneously. While the appeal process rectified a significant number of errors, the report found that 25.74% of appeals (one in four) were decided erroneously.
44. The flaws in the process were so fundamental in their nature and extent that I have reluctantly concluded that it is not possible or justifiable to hive off some applications from communities that were assessed properly.
- 44.1. All communities would have been equally affected by the absence of clear criteria, and the inconsistencies between the form and the Regulations. That would have affected what information they provided in their applications. If the forms were inconsistent with the Regulations, or misleading, that error would affect all applicants.

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- 44.2. All communities would have been equally affected by the inconsistent and unfair application and appeals processes. If the system itself was flawed, all applications and appeals were affected.
- 44.3. The inaccurate data collection means it is impossible to determine reliably which communities were impacted by irregularities and which were not.
45. It is for these reasons that I approach this Court to set aside the recognition process and any decisions arising from such process.

III SUBSTITUTED SERVICE

46. In Part A of the notice of motion I ask, on an ex parte basis, for an order for substituted service.
47. I am advised that Rule 4(2) of the Uniform Rules of Court provides:
- “If it is not possible to effect service in any manner aforesaid, the court may, upon the application of the person wishing to cause service to be affected, give directions in regard thereto. Where such directions are sought in regard to service upon a person known or believed to be within the Republic, but whose whereabouts therein cannot be ascertained, the provisions of subrule (2) of rule 5 shall, *mutatis mutandis*, apply.”
48. Rule 5(2) sets out information that needs to be provided to substantiate an application for substituted service:
- 48.1. The nature and extent of the applicant’s claim;
- 48.2. The grounds upon which the claim is based;

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- 48.3. The grounds upon which the court has jurisdiction to entertain the claim;
 - 48.4. The manner of service which the court is asked to authorize;
 - 48.5. The last-known whereabouts of the persons to be served;
 - 48.6. The inquiries made to ascertain the persons' present whereabouts; and
 - 48.7. Where service by publication is ordered, the form of the publication.
49. I am advised that in an application for substituted service, the court may order any manner of service as is likely to bring the proceedings concerned to the notice of the party to be served. The Court can also order the time within which notice of intention to defend is to be given or any other step that is to be taken by the person to be served.
50. I deal with each of these matters below.
- (a) *Nature, extent, and grounds of the applicant's claim*
51. In Part B of the notice of motion, I apply for an order reviewing and setting aside the decisions which were made as a result of the recognition process detailed above, and the process itself.
52. I bring the application in my capacity as the member of the national executive responsible for fisheries, and in the public interest, given the large numbers of fishers and communities involved. I bring the application in terms of the Promotion of Administrative Justice Act 3 of 2000, alternatively the principle of legality.

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53. I discuss in the next part the grounds of review.

54. I am advised and submit that this Court has jurisdiction in respect of the review of administrative decisions and the exercise of public power, where the decisions and the exercise of the power apply in the Western Cape.

(b) *The form and manner of service*

55. I ask the Court to authorise five manners of service.

56. First, by publication in popular newspapers that the fishers are most likely to read. The Department has consulted with fishing community leaders as to which newspapers would be best. Based on that consultation, I propose the following newspapers: Cape Argus; Cape Times; Die Burger; False Bay Echo; Hermanus Times; Son.

57. The publication will take place in English, Afrikaans, and isiXhosa. The form of the publication is annexed to the notice of motion as "B". It identifies four way ways in which fishers can access the full record of these proceedings:

57.1. They can download the papers from the Department's website via a link to be set up by the Department.

57.2. They can call a share-call number to ask for electronic delivery of the papers;
and

57.3. They can visit the nearest Fishery Control Office to obtain hard copies of the papers.

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- 57.4. They can request an electronic copy by email to a specified address.
58. Second, by broadcasting notice of these proceedings on radio stations to which fishers are most likely to listen. The Department has consulted with communities about which radio stations are best suited for these broadcasts. In the light of those consultations, I propose the following stations, which were previously used by the Department and are therefore known to be used in communicating with these communities: KFM 94.5; Radio Tygerberg; Radio West Coast; Radio Zibonele; Voice of the Cape; uMhlobo Wenene.
59. The broadcasting will be in English, Afrikaans, and isiXhosa. The script for the broadcast is annexed to the notice of motion as "C". It also advertises the three options described above for obtaining copies of the papers.
60. Third, by making copies available at the various local Fishery Control Offices. The members of the fishing communities are familiar with these offices, where they engage officials of the Department. I attach a list as **BC5**.
61. Fourth, by sending notice of the application through Short Message Service ("SMS") to persons listed in annexure "E" to the notice of motion. These are persons whose cell-phone numbers the Department has from their recognition applications.
62. The content of the SMS is set out in annexure "D" to the notice of motion. It will contain a link to the website where fishers can download the papers. It will also identify the

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hotline to call for further details and advise fishers to visit their nearest Fishery Control Office for copies of the papers.

63. Fifth, by personal service on identified community leaders per the list annexed as **BC6**. These persons are established and recognised community leaders who are well-placed to communicate with fishers about this application.

64. On the basis of the information available to the Department and to me, these five forms of service are the best practical ways of ensuring that this application is brought to the notice of the fishers affected by it.

65. The fishers will be given 30 (thirty) days to respond to this application.

(c) *Inquiries and last known whereabouts*

66. The Department has conducted in-depth consultations with community leaders to ascertain how best to give notice to the fishers affected by this application.

67. I have myself already met with representatives of local communities and informed them of the outcome of the audit and my intention to review the recognition process.

68. In order to supplement the proposed seven methods of notification, the Department will also hold information meetings within affected communities, to inform members of the process that is taking place, and how they may assert their rights.

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69. In the experience of the Department, word spreads quickly within fishing communities about matters which affect fishing. I am confident that if these multiple methods of giving notice are used, there will be effective notice to the persons whose rights are affected.

70. I respectfully submit that a proper case has been made out for the substituted service.

IV BASIS AND GROUNDS OF REVIEW

71. As I have stated, I bring this application in terms of PAJA, alternatively under the principle of legality.

72. I am advised that a public entity can only rely on PAJA in limited circumstances for a "self-review". I am further advised that since this application is brought in the public interest, it can be brought in terms of PAJA. I am advised and respectfully submit, in the alternative, that the authorities precluding me from bringing this application under PAJA are clearly wrong.

73. In the alternative, the application is brought on the basis of the legality principle which is a founding value of our Constitution.

74. I am advised and submit that the recognition and decision process, and the decisions themselves, constituted administrative action.

75. The grounds of review for this application are as follows.

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76. First, a mandatory and material procedure or condition prescribed by an empowering provision was not complied with (section 6(2)(b)).

77. The criteria in the Regulations for verification of the applicants for recognition as small scale fishers, were not complied with by assessors. They applied the different requirements in the Policy or introduced their own criteria. The decisions were based on assessments made in accordance with this faulty process,

77.1. The process as a whole failed to make it clear to assessors that they are bound to apply the criteria in the Regulations and not the Policy.

78. Second, the action was procedurally unfair (section 6(2)(c)), alternatively procedurally irrational.

78.1. The application forms were vague, misleading, and did not afford applicants the opportunity to make proper representations to the Department.

78.2. The criteria by which applicants were being assessed were not made clear to the applicants.

78.3. The data of applicants, including the outcomes of applications, were incorrectly recorded.

78.4. Assessors were not consistent, either in their composition or assessment of applications.

78.5. The appeals process was flawed and poorly implemented.

79. Third, the action was materially influenced by an error of law (section 6(2)(d)).

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- 79.1. The Department believed that the Policy regulated the criteria for verification when it was the Regulations that contained the prescribed requirements.
80. Fourth, the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered.
- 80.1. Assessors under the process considered criteria from the Policy and omitted to consider criteria from the Regulations.
- 80.2. Assessors introduced their own criteria when assessing applications.
81. Fifth, the action was arbitrary (section 6(2)(e)(vi)) or irrational (section 6(2)(f)).
- 81.1. The verification process resulted in fishers being verified based on incorrectly captured data or by sheer mistake.
- 81.2. A substantial percentage of recognition decisions were made for no discernible reason.
82. Sixth, the action was unreasonable.
- 82.1. No reasonable person would have undertaken the verification process in the way the Department ultimately did. While the process was undertaken in good faith, it was in practice wholly flawed and inadequate, to such an extent that thousands of fishers were incorrectly recognised or rejected as small scale fishers.
83. Each of these six grounds of review, I am advised, is sufficient for setting aside the recognition order.

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V DELAY

84. I am advised and submit that I have not unreasonably delayed in bringing this application.
85. I only became aware, and reasonably only could have become aware, of the reasons for the outcomes of the recognition process when I read the final audit report on 19 November 2020. That is, 101 days before today.
86. I then consulted within the Department, and took legal advice from counsel, as to how this intolerable situation could and should be remedied. Various options were explored to see if there was any way of salvaging any part of the recognition process, or, the outcome in certain of the communities. However, despite best efforts, it was evident that the process was too flawed for this to be viable. I also consulted with the Fisheries branch and the Department's general communication's team on the best methods of communicating with all concerned persons in this matter so as to ensure that we could reach the applicants.
87. It was also important to create an interim position so as to alleviate the burden this review may otherwise place on those who may have expected a positive outcome, having been informed that they were positively verified.
88. As explained above, as soon as communities began complaining about the recognition process, I ordered an internal audit of several hundred applications.

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89. Once that first audit showed gross irregularities, I mandated a full audit of the entire recognition process. It was only once that audit was completed that I was aware, and could have been aware, of the irregularities in the recognition process, their extent and their consequences. Accordingly, I submit that I did not delay unreasonably before bringing this application.
90. In the alternative, I am advised and respectfully submit that it is in the interests of justice to condone or overlook any unreasonable delay on my part.
91. This application relates to thousands of fishers who rely on fishing for their livelihood. They are part of communities that have been historically discriminated against. There is a constitutional imperative to establish, lawfully, a regime whereby their rights are protected and recognised. Whatever prejudice has been caused by the delay of this application is far outweighed by the need to set aside the irregular recognition process run by the Department. The prejudice to fishers and fishing communities caused by *not* setting aside this recognition process will be untold and severe and long-lasting, as rights can be held for up to 15 years.
92. I submit that there are strong prospects of success in the review application. The report established beyond doubt that the recognition process was fundamentally flawed on numerous fronts. The extent and nature of this illegality is a crucial factor in determining whether the delay should be condoned.
93. Furthermore, I am advised that the conduct of a state official in self-reviews is an important factor in deciding to overlook delays. In this case, the Department and I have

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acted in good faith, reacted expeditiously, and approached this Court to set aside poor decision-making.

94. In any event, even if my delay is unreasonable and should not be condoned, I am advised and respectfully that the recognition process is so patently flawed that this Court is compelled to declare it as inconsistent with the Constitution.

VI REMEDY AND CONCLUSION

95. I am advised that the default remedy in review applications is remittal. I seek this default remedy.

96. I also seek a declaration that pending the finalisation of the new recognition process, the status quo will remain in place. Re-doing the verification and recognition process will take approximately one and a half years. The best interim measure will be to maintain the status quo.

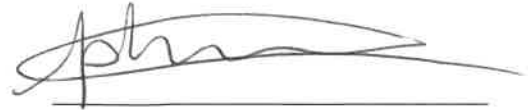
97. As explained above, the status quo is that 2856 fishers operate under the IRD. A few of these fishers may also have access indirectly to operate under commercial licenses held by commercial fishing businesses or processing plants. The purpose of the declaratory relief is to make it clear that the current regime continues to be of force and effect while the Department re-processes the applications for recognition.

98. For these reasons, I respectfully ask that the Court grant the orders set out in the notice of motion.

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**BARBARA CREECY**

SIGNED AND SWORN TO BEFORE ME AT *Preboriq* ON THIS *03* DAY OF
MARCH 2021, THE DEPONENT HAVING STATED THAT SHE KNOWS AND
UNDERSTANDS THE CONTENT OF THIS AFFIDAVIT AND HAVING TAKEN THE
OATH IN THE PRESCRIBED MANNER.

**COMMISSIONER OF OATHS**

APIWE MPIKWA
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
CORPORATE PLACE • BLOCK A
39 SELATI STREET • ASHLEA GARDENS
TEL: (012) 460-8704 • FAX: (012) 460-5358