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LRC

Legal Resources Centre

Your Ref: EC1/05

Our Ref: WW/tw

19 February 2016

Ms Siphokazi Ndudane
The Deputy Director-General (acting)
Fisheries Management
Department of Agriculture, Forestry and Fisheries
Per email: SiphokaziN@daff.gov.za

Copy to:

Mr L Manual
The State Attorney
22 Long Street
CAPE TOWN
Per Fax: 021 421 9364

Dear Ms Ndudane

Confirmation of TAC/TAE apportionment between sectors relating to small-scale fishers

1. We write for Norton Dowries and the Masifundise Development Trust (MDT), the fifth and eighth applicants in the matter of *Kenneth George and Others v Minister of Environmental Affairs and Tourism EC1/05*. MDT represents in this matter the interest of small scale fishing communities who are members of the structure known as Coastal Links.
2. As you are aware, a series Court Orders were granted in the *Kenneth George* matter (all reached by agreement between the parties) on 2 May 2007, 19 November 2008, 5 July 2010 and 6 July 2010 ("the KG orders"). These orders did not bring the matter to finalization, but rather provided for the postponement of the Court's inquiry into the allegations of discrimination by small scale fishers **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"**.¹ The Court invited all the parties to the proceedings to report to it on progress made by the Department in fulfilling this obligation.
3. While progress towards the development of the policy and its implementation has been painfully slow, the applicants continued to trust that the Department was in good faith working towards the proper implementation of the Small Scale

¹ Para 2.1 of the Order 19 November 2008.

Fisheries Policy (the "SSFP" signed in 2012) which constituted the 'framework' required to comply with the KG orders.

4. Given the fact that the recognition of small scale fishers entails the creation of a new sector, and given that the resources available for allocation are finite, the Department is legally bound by the KG orders to re-apportion splits between existing sectors in order to accommodate the new small scale fisheries sector. What is more, the SSFP provides access to a *basket* of species for small-scale fishers and guarantees them preferential access in line with the KG orders.
5. The implementation of this framework thus required careful coordination between the different sectors. Indeed, the SSFP provides that "When the Department reviews the General Fisheries Policies it will take the principles, objectives and management approach to the Small Scale fisheries sector as spelt out in this policy into consideration *to ensure alignment between the policies*".²
6. Our clients continued to insist on such alignment in successive comments on departmental processes.³
7. Regrettably, as we pointed out in submissions to the Minister of 13 July 2015 on the Draft Policy on the Allocation and Management of Fishing Rights in the Netfish Fishery, such alignment was entirely absent and the 2015 fisheries policies all ignored the coming into force and obligation to implement the SSFP.
8. In mid-November 2015, the West Coast Rock Lobster allocations were announced with increases to the offshore resource but no increase for small scale fishers from their allocation under the Interim Relief regime ("IR") – which means that there cannot possibly be enough to go around for the baskets of small scale fishing communities which far outnumber the IR fishers. In addition, the appeals in the White Mussel and Oyster sectors were finalized with nothing left over for the small scale basket. (In the circumstances, our clients reserve their rights to challenge all three sector allocations.)
9. However, on 25 November 2015, your Department⁴ hosted a meeting with small scale fishers and industry representatives to present a 'Proposed TAC/TAE Apportionment between Sectors Relating to Small Scale Fisheries' and requested comments on the apportionment by 18 December 2015. Our clients were in attendance. At the meeting, Ms Sue Middleton as chair confirmed that "people need to know what the apportionment will be" and committed to make a final statement on the resource apportionment once comments had been received and before the closing of FRAP applications by the end of February 2016.

² P 49 of the SSFP.

³ See for example LRC submission on the amendment to the Marine Living Resources Act 18 of 1998 dated 25 July 2012; Submissions on behalf of MDT to the Minister of Agriculture, Forestry and Fisheries on the Proposed Regulations Relating to Small-Scale Fishing dated 28 May 2015.

⁴ The meeting was attended by Sue Middleton, Craig Smith and Seeha Peeha on behalf of DAFF. You tendered apologies.

10. On 18 December 2015, we wrote on behalf of Mr Dowries and the Langebaan net fishers in particular to indicate that in the absence of clarity on the apportionment between the commercial and small scale fishers in the net fishing sector, the Langebaan small scale fishers are at a loss as to how to protect their rights as small scale fishers in light of the call to apply for rights under FRAP. The letter was sent to Mr Peeha in your Department on 22 December 2015, 20 January 2016 and 4 February 2016 before Mr Peeha finally responded on 8 February 2016 indicating that his office "will, with immediate effect attend to the matter and revert back to you as soon as possible". We never received a further response.
11. However, the FRAP process has steamed ahead despite protests from small scale fishers and with no announcement whatsoever on the apportionment.
12. Then, on 9 February 2016 and in response to a question from a member of the Portfolio Committee on Agriculture, Forestry and Fisheries as to when the apportionment would be announced, you stated that there is no obligation to announce the splits between the sectors and stated that it is entirely within the discretion of the Minister to do so.⁵ This, despite the clear commitments made in November by your Department that the apportionment would be announced before the FRAP process runs its course.
13. Based on these recent developments, our instructions are to point out that:
 - a. The KG orders binding on your Department require the implementation of the SSFP in a way that would realise the socio-economic rights of their sector and ensure equitable access to the marine resource;
 - b. In order to do so, the Department must have sufficient effort available across all relevant sectors to fill the basket of the small scale fishing communities required in the SSFP;
 - c. The Department has likely already contravened this obligation by not providing for the small scale sector in the allocation of White Mussel, Oyster and West Coast Rock Lobster thereby precluding the inclusion or sufficient inclusion of these species in the small scale baskets at least until the current long term rights expire. Our clients reserve their rights to challenge these allocations;
 - d. The Department apparently intends to further renege on its obligation to implement the KG orders in the line fish sector following litigation instituted by the South African Commercial Line Fish Association. It bears noting that MDT intervened in that Court Case precisely to defend your Department's allocations, but your Department chose not to defend its own position and simply settled the matter without reference to the rights of small scale fishers. The Court Order reached (dated 10 November 2015) entitled our clients to make representations to the Minister as to the impact of allocations in the commercial line fish sector on the small scale fishing sector. MDT made such submissions on 15 January 2016 but received no indication that the Minister applied his mind to it;


⁵ PMG minutes of the meeting on Fishing Rights Allocation Process; Small Scale Fisheries Policy Implementation available at www.pmg.co.za.

- e. If the Department goes ahead in allocating the long term rights in the remaining sectors without apportioning sufficient stock to be included in the small scale communities' baskets in order to realise their rights and ensure equitable access, it will render its own compliance with the KG orders impossible (if it has not already done so with the previous allocations).
14. In the circumstances, our instructions are to demand, as a matter of urgency, that the splits between the small scale, commercial and recreational sectors of the species yet to be allocated be announced **within 5 days** of receipt of this letter and before the closing of the FRAP applications. Our clients' reserve their rights to challenge the apportionment should it not be in compliance with the Court Order.
15. Failure to comply with this demand will force our clients to report to the Equality Court that the Department is failing to comply with the Orders reached by agreement. They will ask the Court to re-open the matter that was postponed solely for the purposes of giving the Department the time to comply with the Order.
16. We look forward to your urgent response.

Yours sincerely

LEGAL RESOURCES CENTRE

Per:



WILMIEN WICOMB