

A Handbook On **LEGAL ENTITIES** for Small-Scale Fishers in South Africa



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The views expressed in this publication do not necessarily reflect the views of the European Commission.

Introduction

The progressive Small-scale Fisheries (SSF) policy has been adopted after a decade long struggle and the process of implementation is underway. An important element of the policy relates to the establishment of Community Based Legal Entities (CBLEs). Fishing rights will be allocated to a collective of fishers through the CBLEs.

There are various models, though the Department of Agriculture Forestry and Fisheries prefer Co-operatives. In this handbook, prepared by Masifundise and supported by the European Union, information is shared on various types of entities, including co-operatives.

It is our wish that you make use of the information to empower yourself and your communities and make the objectives of the policy a reality in your daily lives.

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Community Based Legal Entities (CBLEs) key to new policy

The Small-Scale Fishing Policy (SSFP) requires fishing communities to register CBLEs to which community rights will be entrusted. This means that a right will be owned by a group of individuals rather than one individual.

That means for fishers to benefit from and gain fishing rights through the SSFP, they have to become part of a CBLE. The CBLE will make it possible for communities to collectively own, use and manage their fishing right, subject to the group rules.



To become a CBLE Rights Holder as a small-scale fisher you first have to:

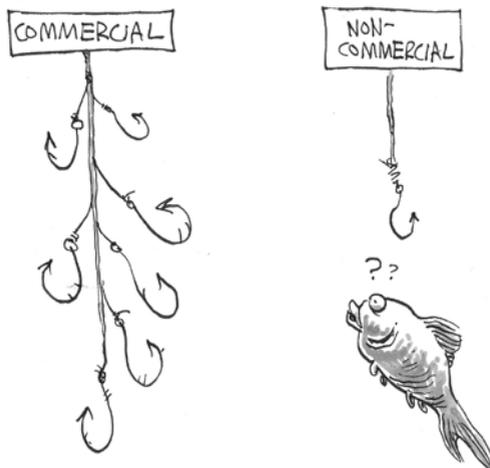
1. Be from a recognised small-scale fishing community
2. You must be on the list of identified eligible fishers
3. You must be part of a CBLE.

A CBLE is a registered entity through which small-scale fishers will be able to access rights through the small-scale fishing policy.

CBLEs can take many forms, for example DAFF proposes that communities should form co-operatives to access fishing rights, but it should be remembered that this is only the preference of the department and not what is prescribed by law.

Masifundise acknowledges this fact and in this handbook we will focus on the possible legal aspects of registering a legal based entity.

CBLEs can take many forms, depending on the fishing community where it is situated. A CBLE can be of a commercial or non-commercial nature. Commercial legal entities can be a company, a close corporation, a business trust or a cooperative. Non-commercial legal entities are those that fall under the Not-for profit organisations such as a charitable trust, a section 21 company, a communal property association or a voluntarily association.



Types of Legal Entities

The following sections describe the recognised types of commercial and non-commercial legal entities:

Commercial Entities

There are four types of legal entities, which can be established for commercial purposes, namely:

- A Company;
- A Close Corporation;
- A Co-operative;
- A Business Trust.

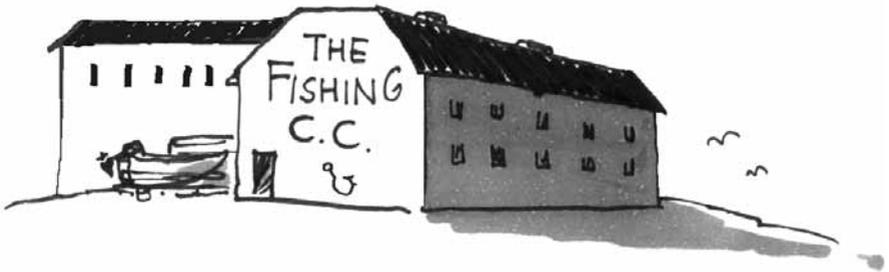


Company

This is an association of persons pursuing economic gain through a legal entity registered in terms of the Companies Act. There are two types of Companies, namely Public Companies and Private Companies. Public Companies have more than 50 shareholders and may raise capital from, and sell their shares to the public, while Private Companies generally have fewer than 50 shareholders, and are restricted in the transfer and sale of its shares.

Company management is normally appointed, not elected, and the management does not necessarily have to be shareholders. A Company is required to have auditors and must furnish copies of its financial statements to the Registrar of Companies. A Company has perpetual succession which means that it carries on beyond the lifetime of its members.

The easiest method of registering a Company is to purchase an existing “shelf” or “off-the-shelf” Company (this refers to a company that has already been registered but is not trading.) If a new Company is formed, it needs to be registered with the Registrar of Companies.



Close Corporation

Close Corporations were introduced into South Africa in 1984 as a simple, less expensive and flexible form of small enterprise consisting of a single or a small number of participants to afford them the advantages of a separate legal personality. The Close Corporation, or “CC”, is restricted to not more than 10 natural persons pursuing economic gain through a legal entity registered in terms of the Close Corporations Act.

A CC is often, but not necessarily, run by its members. Unlike a company, a CC does not have to furnish its financial reports to the Registrar of Companies and does not require an auditor. It is therefore less costly to run.

The easiest method of forming a CC is to purchase an existing “shelf CC” (this refers to a CC that has been registered but is not trading). In the case of a newly formed CC, it must be registered with Registrar of Close Corporations.

After the implementation of the new Companies Act (Act 71 of 2008) no CC can be registered and no conversions from Companies to CCs were allowed. However, existing CCs are allowed to be maintained.



Co-operative

The Co-operative is essentially an association of persons who have formed and registered a Co-operative in terms of the Co-operatives Act.

South Africa has a long history of Co-operative organisations. These Co-operatives include:

- Buyers Co-operatives: where the Co-operative buys in bulk in order to gain economies of scale;
- Producers Co-operatives: where a product is produced jointly in order to save production costs;
- Marketing Co-operatives: where people produce individually, but sell the product jointly in order to share marketing costs.

Co-operatives are normally managed collectively, and individuals can be held liable for the debts of the Co-operative.

Registration of a Co-operative is done through the Registrar of Co-operatives.



Business Trust

A Business Trust is the arrangement whereby property or a right to property is made over to another person or persons, the trustee(s), to be administered according to the provisions of the trust instrument (trust deed) for the benefit of the person(s) or beneficiaries designated in the trust deed.

In a Business Trust the trustee(s) does not merely protect and manage the trust assets, but uses these for conducting a business for profit in order to benefit the beneficiaries or to further the aims of the Trust. In the case of Business Trusts, beneficiaries of the Trusts do not own trust property or shares, but acquire a “beneficial interest” in the Trust. In order to allow for tradability of this interest, the beneficial interest is divided into units, which are allocated to each beneficiary.

Like a Company, a Trust can also be private or public. In the case of a Private Trust, the beneficiaries of the Trust must be restricted, e.g. to members of a certain community. This limited tradability exempts the Trust from complying with the requirements of the Unit Trust Control Act.

A Trust is generally not subject to the rules, which bind Companies. Registration of a Business Trust is done with the Master of the High Court. An attorney can be employed to draw up the trust deed and lodge it with the High Court.

Non-Commercial Entities

All non-commercial organisations can apply to be registered as non-profit organisations in terms of the Non-profit Organisations Act 71 of 1997. This means that they will be exempt from income tax, and if they raise money from the public in the form of donations, will not need to pay donations tax.

If such an entity is classified as being for the public interest, it can secure the right from the Receiver of Revenue to issue section 18.a. tax certificates.

This means that people/organisations making a donation to the entity can claim the donation as a tax-deductible expense.

There are four major non-commercial legal entities, namely:

- A Section 21 Company;
- A Charitable Trust;
- A Voluntary Association;
- A Communal Property Association.





Section 21 Company

This refers to a Company registered in terms of Section 21 of the Companies Act, which carries on its business not for commercial gain, but for the promotion of cultural, religious and recreational objectives.

Registration is done through the lodging of the founding documents with the Registrar of Companies.





Charitable Trust

This is a special form of Trust, which is created when property is handed over to trustees to be managed for charitable purposes and not business purposes. Registration is the same as for a Business Trust.



Voluntary Association

This refers to a group which has organised itself into an entity with a constitution, but does not have a commercial aim. Typical examples are sports clubs and churches. No formalities (such as registration) are necessary to form a Voluntary Association, and it is therefore inexpensive to form and run. Voluntary Associations are normally managed by a committee elected from its members.



Communal Property Association (CPA)

This is an association of persons who wish to hold land communally and is registered in terms of the Communal Property Associations Act. A CPA must have as its main object the holding of property in common. A CPA is a legal entity with the capacity to sue and be sued and may incur rights and obligations in its own name. Like a Company, a CPA has perpetual succession.

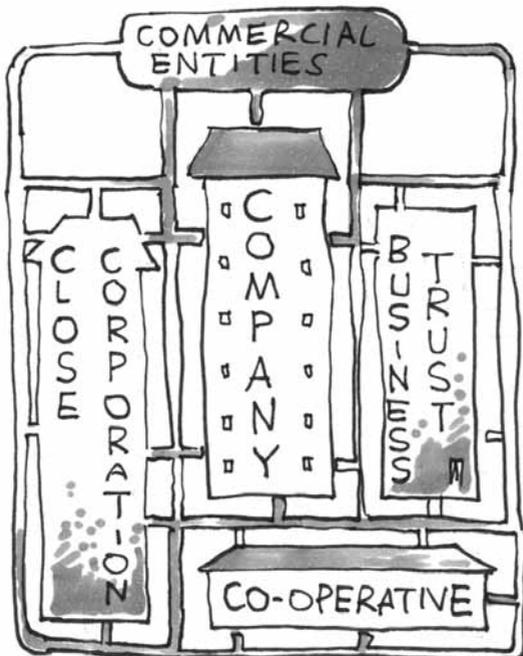
A CPA is managed by a committee elected by its members. A CPA must make certain documents, such as minutes of Annual Meetings, available to the Director-General of Land Affairs. Property of the CPA may not be disposed of or otherwise indebted without the agreement of the majority of members, and if this is not met, such a disposal can be declared void. A CPA needs to be registered with the Department of Land Affairs (DLA) and is usually arranged by DLA.



Choosing a Legal Entity

Companies, CCs and Trusts are all very flexible entities that can be constructed to fulfil the same function. Although neither the members nor management of any are liable for debts, the biggest difference between these legal entities is that a Trust is not a legal entity in its own right. A Trust may thus find it more difficult to obtain loan finance from commercial banks, since they have to serve separate notices to all the trustees in the case of a default.

Public Companies may raise capital from the general public and sell shares to the general public. As a result of this, they are not appropriate for community based forest enterprises. Private Companies, on the other hand, may be a suitable entity as long as there is a commercial purpose to the forest use and non-employee membership is less than 50. A Company can be bought “off-the-shelf” which reduces cost and time to have it registered.





In the case of a CC, the only restrictions to forming such an entity are on the number of participants (a maximum membership of 10 persons) and the nature of the members (they must be natural persons). Thus, for forestry utilisation projects involving fewer than 10 persons, Close Corporations can be utilised. This type of legal entity is particularly suitable in the case of small businesses. As with Companies, a “shelf CC” can be bought, thus reducing registration cost and time.

A Private Business Trust has restrictions regarding its beneficiaries. This is an advantage for a group or community wishing to use the forest, as the Trust is then exempt from having to meet the requirements of the Unit Trust Control Act.

This means saving on costs and administration. Also, a Trust does not pay income tax on benefits distributed to its beneficiaries, while beneficiaries are taxed on their own applicable scales. Thus members of rural communities, who are normally in very low tax brackets, can receive income from the Trust without that income first having been reduced by income tax.

Co-operatives are popular in egalitarian societies, where there is great emphasis on working together and individual incentive is regarded as a lower priority than the protection offered by the group.

However, should a Co-operative fail, the individuals may be held personally responsible. In the forestry context Co-operatives are suited for commercial ventures among smaller user groups or business enterprises that have high levels of inter-personal trust and, since it is generally difficult for a Co-operative to attract financial loans, where there is no need for external funding.

Choosing a Non-Commercial Legal Entity

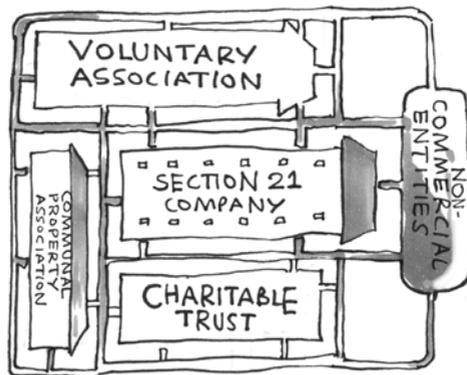
The choice of a legal entity for the non-commercial use would depend on whether the group intends to apply for funding from an external source. Often groups wish to apply for funding from funding/donor organisations and these donors may have their own requirements for the type of legal entity they wish to engage with.

Or, alternatively, groups may not wish for any funding or grant, only to protect their resource and to have security of rights and tenure. In such a case there would not be external pressure on the nature of the legal entity.

The Voluntary Association is the simplest form of legal entity. A Voluntary Association may be the most appropriate legal entity in cases such as a hiking club or a botany association, which will not extract any forest products, nor have commercial purposes.

Where the benefits of the activity is aimed at society in general, a Section 21 Company is more appropriate, while a Charitable Trust is best suited when the beneficiaries are easily identifiable and can exercise internal control over the activities and proceeds. Section 21 Companies are registered with the Registrar of Companies, while Trusts have to be registered with the Master of the High Court.

A Communal Property Association (CPA) may be a suitable entity for land reform and agricultural projects, particularly where land rights are to be acquired for groups rather than individuals, and have been designed for this purpose. Its decision-making processes demand participation by all members of the CPA but, although democratic, this can be too cumbersome to deal effectively with pressing business decisions.



Registering a Community Based Legal Entity

According to the [Doing Business Project](#), those trying to incorporate and register a new legal entity in South Africa face many bureaucratic and legal hurdles.

They have identified the procedures, time and cost involved in launching a commercial or industrial firm with between 10 and 50 employees in South Africa.

Below is a 6 step legal and bureaucratic procedures of registering a legal entities in South Africa according to the Doing Business Project.

1. Register at the Companies and Intellectual Property Commission (CIPC)

An entrepreneur has 4 different ways to register a company with CIPC. The most common form of registration, which is counted by the Starting a Business indicator, is through the CIPC website (www.cipc.co.za). Registration can also be done at the self-service terminals located in Pretoria, Johannesburg and Cape Town; at some bank branches (FNB so far); and by email.

To register the company online, the entrepreneur needs to register as a customer on the CIPC website (www.cipc.co.za).



2. Open a bank account

In order to open a bank account, the applicant must submit proof of the directors' identity, and the original company documents. This procedure may take longer in practice if the required documents as per the Know your customer ("KYC") requirements in The Financial Intelligence Centre Act No. 38 of 2001 are not in order.



3. Register for income tax and withholding taxes (PAYE, UIF and SDL) at the South African Revenue Service (SARS)

The CIPC and SARS are linked electronically. When the entrepreneur visits a SARS branch to register for income tax, SARS retrieves the information previously provided by the entrepreneur to the CIPC during procedure 1. The entrepreneur still needs to visit the SARS office for:

- a) Income tax registration.
- b) Employees tax (PAYE), Unemployment Insurance Fund (UIF) and Skills Development Levy (SDL) registration:

The entrepreneur must submit the EMP 101e form which is available online or at the local SARS office. Registration is immediate and can be done online or at the branch.

4. Register for VAT at the South African Revenue Service (SARS)

Businesses with annual taxable turnover of more than ZAR 1,000,000 must register for VAT. The application for the registration of VAT is done on a VAT 101 form. VAT registration can take from 1 to 21 working days depending on the risk level assigned to the company by SARS. The risk level is assessed based on different variables such as company activity, turnover and consistency of the information provided.



5. Register the company with the Unemployment Insurance Fund (UIF)

According to the Unemployment Insurance Act and the Unemployment Insurance Contributions Act, all employees working more than 24 hours per month must be registered with the UIF. The employer is liable for the registration of the employees.

6. Register with the Commissioner in deference to the Compensation for Occupational Injuries and Diseases Act

According to the Compensation for Occupational Injuries & Diseases Act 130/1993 amended in 1997, the employer is responsible for registering employees with the Compensation Fund.

Registration forms can be obtained from the Department of Labour's website (www.labour.gov.za). However, online registration does not exist and must be done in person.

A Co-operative as a Community Based Legal Entity

A large number of people in South Africa are part of the informal economy or are otherwise socially, economically and politically excluded from the benefits of development. Cooperatives play an increasing significant role in helping these people to find solutions on how to cooperate out of poverty by tapping their own resources, knowledge and strengths. Cooperatives contribute to develop the local economies where the poor live through their unique and strong linkages with the community.

They enable poor people to have their voices heard in addition to improving their daily working and living conditions. Because co-operatives are democratic organisations and owned by those who use their services cooperatives are an ideal instrument to empower the poor. They are participatory, responsive to local needs and able to mobilise communities and help particularly vulnerable groups of people.

What isn't possible for the individual is possible for many persons acting together!

National and provincial government promote cooperatives as a type of business entity and a means to get informal economic actors involved in and benefitting from the formal economy. In Local Economic Development (LED) the focus is to develop cooperatives that aggregate buying power and generate opportunities for collective marketing.



1. What is a co-operative?

Definition: 1

The International Co-operative Alliance (2007) defines a cooperative as an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically controlled enterprise. Co-operatives are usually understood to be either an agricultural form of business or a state-driven welfare intervention.

Definition: 2

A co-operative is an independent association of persons who join forces to meet their economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise, organised and operated on co-operative principles.

The co-operative provides services and products to its members. Profits, known as surpluses in a co-operative, are divided among members in relation to the amount of the business each member did with the co-operative.



2. What are the characteristics of a co-operative?

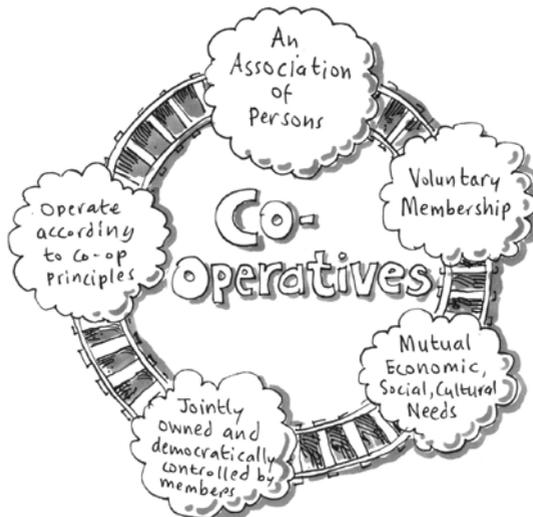
It is an association of persons

Membership is voluntary

Mutual or common economic, social and cultural needs

Jointly owned and democratically controlled by the member

Operate according to Co-operative principles



3. What are the principles of the co-operatives?

Democratic member control

Voluntary and open membership

Autonomy and independence

Educational training and information

Co-operation among co-operatives

Concern for community

Member economic participation

4. What are the benefits?

Achieve what one cannot achieve on one's own

Provides easy access to needed services

By pooling resources, each member pays less for inputs, marketing, distribution and selling of produce

Process products if necessary



5. How to start a co-operative?

FORMATION: HOLD A MEETING TO ESTABLISH IF THERE IS ENOUGH INTEREST IN THE PROPOSED PROJECT

The Chairperson reads part of the business plan which outlines the aims and objectives, as well as the business prospects to all present in the formation meeting

Answer all the questions arising

Invite everybody to join

Those interested should be given an Application Form or Membership to complete

Those that completed the Application Forms for Membership will then choose the Board of Directors

The co-operative is now legally formed



FORMATION: HAVE A FORMATION MEETING

Identify the objectives (Exactly what the co-operative wants to do)

Equipment, buildings, and other materials needed in the enterprise

Financial requirements (How are you going to obtain this?)

Premises (Where will the co-operative be located)

Choose a steering committee for the purpose of driving the formation process further

Draw-up an initial plan of operation

Obtain a constitution (statute) which will lay down the procedures to be followed by the co-operative in executing its aims and objectives.

FORMATION: The Process Further

First meeting of the board

Registration process

Completion of registration forms & constitution

Filing documents with the Registrar of Co-operatives for consideration

Certificate of Registration

Registered constitution

Start operating!



6. Who can be a member?

Anyone who has completed a membership application form

Anyone who shares the same interests in the group (co-operative)

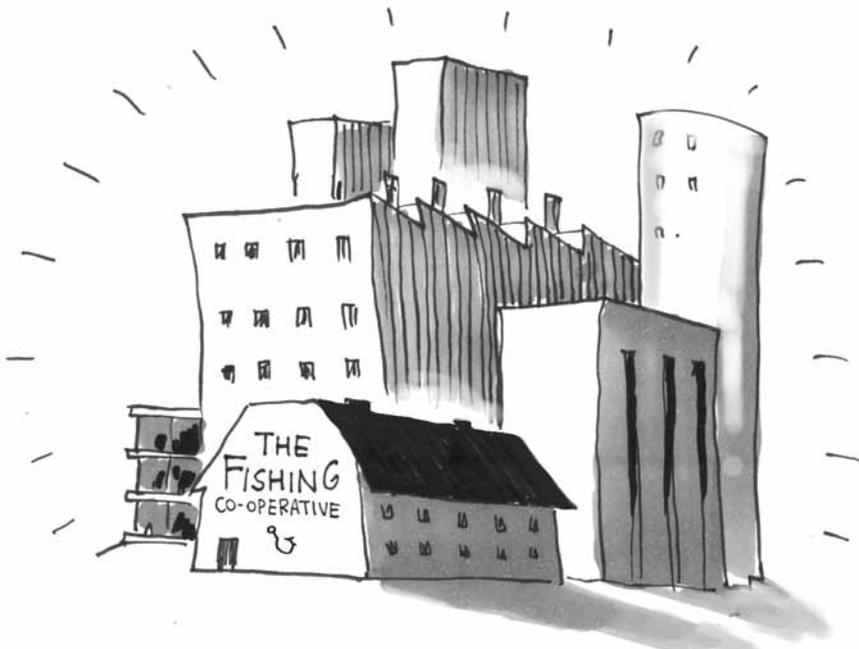
Any person above the age of eighteen

There are various forms that have to be lodged with the Companies and Intellectual Property Commission (CIPC) to register your Co-operative. For this information you can visit the Co-operatives category on the CIPC website.

Critical Success Factors

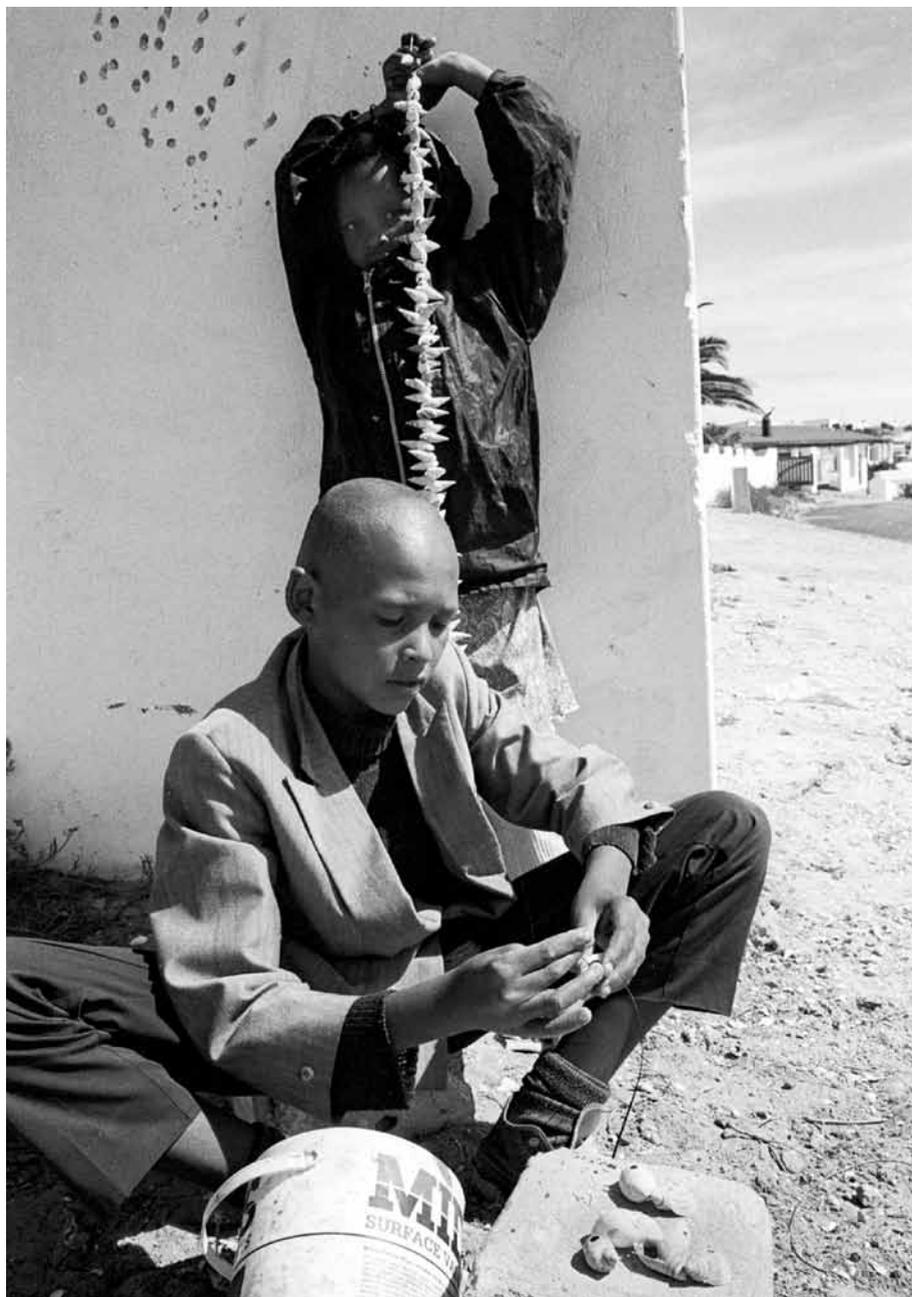
In order to be successful co-operatives need the following internal fundamental conditions:

1. A group of people must have the desire to solve a common problem
2. There must be at least one person with leadership abilities in the group
3. The co-operative should produce tangible benefits for the members
4. The co-operative should have dynamic managers who can implement business policies. A management structure that reflects the capabilities of the members should be in place
5. The advantages of membership must outweigh the duties and cost of membership



In order for successful co-operatives to work one needs the following external fundamental conditions:

1. There must be a favourable climate for co-operative work
2. Enabling legislation must be in place granting autonomy to adjust the by-laws of each co-operative society to the wishes and needs of its members
3. A tax regime for co-operatives should be provided which takes their particularities into account
4. Patience is essential. Trying to speed up the development process artificially by injecting external funds usually leads to short lived growth followed by collapse after external aid comes to an end.



Conclusion

The SSF policy lays the foundation for a break with the past and a new beginning of empowered fishing communities. Its proper implementation is going to be vital and depends on united, visionary and informed communities.

Discuss and debate the content of this publication and share it with others. As we know, knowledge is power.

Let us work together to ensure that the policy becomes a lived reality in our daily lives.

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