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

Ensuring the socio-economic rights and decent work conditions for South Africa Small-scale fishers.
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<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>CBLE</td>
<td>Community-based legal entity</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>COFI</td>
<td>Committee on Fisheries</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CWP</td>
<td>Community Works Programme</td>
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<td>DAFF</td>
<td>Department of Agriculture, Forestry and Fisheries</td>
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<td>DBM</td>
<td>De Beers Namaqualand</td>
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<td>DEAT</td>
<td>Department of Environmental Affairs and Tourism</td>
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<td>DFFE</td>
<td>Department of Forestry, Fisheries and the Environment</td>
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<td>DMRE</td>
<td>Department of Mineral Resources and Energy</td>
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<td>DWS</td>
<td>Department of Water and Sanitation</td>
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<td>ECPTA</td>
<td>Eastern Cape Parks and Tourism Agency</td>
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<td>FAO</td>
<td>Food and Agricultural Organisation of the United Nations</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social, and Cultural Rights</td>
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<td>IDP</td>
<td>Integrated Development Plan</td>
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<td>IR</td>
<td>Interim Relief</td>
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<td>ITQ</td>
<td>Individual transferable Quota</td>
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<td>IWPA</td>
<td>iSimangaliso Wetland Park Authority</td>
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<td>KZN</td>
<td>KwaZulu Natal</td>
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<td>LED</td>
<td>Local Economic Development</td>
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<td>LRC</td>
<td>Legal Resources Centre</td>
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<td>MLRA</td>
<td>Marine Living Resources Act 18 of 1998</td>
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<td>MPA</td>
<td>Marine Protected Area</td>
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<td>MPRDA</td>
<td>Mineral and Petroleum Resources Development Act</td>
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<td>Marine Spatial Planning Act of 2018</td>
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<td>Mineral Sands Resources</td>
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<td>Olfants Estuary Management Framework</td>
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<td>South African Social Security Agency</td>
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<td>Supreme Court of Appeals</td>
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<td>SIDS</td>
<td>Small Island Development States</td>
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<td>SSFP</td>
<td>Small-scale fishing policy</td>
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<td>UCT</td>
<td>University of Cape Town</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNDROP</td>
<td>United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas</td>
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<td>UNEP</td>
<td>United Nations Environment Programme</td>
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<td>WCRL</td>
<td>West Coast Rock Lobster</td>
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<td>WFFP</td>
<td>World Forum of Fisher Peoples</td>
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Executive Summary

The Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines) adopted by the United Nations’ Committee on Fisheries (COFI) in 2014 aim to support the progressive realisation of the right to food and nutrition of small-scale fishers and fishing communities world-wide. In South Africa, small-scale fishers who live across the coastline, and throughout inland water bodies, play an important role in securing the right to food and nutrition for thousands of South Africans, from their households to their communities and beyond.

The SSF Guidelines are based on human rights. With an emphasis on the most vulnerable and marginalised, they recognise the importance of previously disadvantaged (and neglected) small-scale fishers and fishing communities. The SSF Guidelines give guidance on how states should recognize and protect tenure rights of small-scale fishers, promote measures for sustainable use and management of fisheries, and guarantee gender equality and equity. The SSF Guidelines also iterate the importance of monitoring, in order for states as the main implementers of the SSF Guidelines to assess the progress towards achieving the objectives spelled out in the SSF Guidelines.

Using seven cases, which are manifestations of the key challenges faced today by South Africa’s coastal and inland fishing communities in the realisation of their human rights, the report looks at the related State’s actions and omissions, and assesses and monitors the State’s implementation of the SSF Guidelines. Where applicable, the UN Declaration on the Rights of Peasants and People working in Rural Areas (UNDROP) as well as South African laws and policies (e.g. Constitution, Small-scale Fisheries Policy) which speak to small-scale fishers are also applied in the analysis.

The analysis of the selected cases demonstrates the failure of South Africa to duly implement the SSF Guidelines: the tenure rights, and access to fisheries and land, of small-scale fishers are continuously violated and abused, and ecosystems and healthy environments that are crucial for the sustainability of fishing resources are exploited and eroded due to the advancement of the extractive industries, thereby threatening the realisation of small-scale fishers’ human rights. The guiding principles of participation and consultation are also undermined, especially in the development of the National Freshwater (Inland) Wild Capture Fisheries Policy and granting of prospecting and mining rights to the extractive industries. Ongoing cases of criminalisation, harassment, and killing of small-scale fishers across South Africa demonstrate the State’s inaction to eliminate violence and protect small-scale fishers. It is also a blatant breach of human right to life. Small-scale fishers and fishing communities have limited access to social services and social development opportunities, undermining their right to water, and the right to social security. The analysis has also shown that women’s participation in fisheries organisations, in decision making, as well as their equal right to tenure, have been ignored.

In concluding, the report puts forward a series of recommendations, including a series of case-specific recommendations and recommendations towards secure tenure rights in small-scale fishers; creating an environment free from violence for small-scale fishers to practise their livelihoods; the implementation of bottom-up co-management; the effective implementation of the SSF policies; the recognition of customary rights; gender equity and equality in small-scale fishing communities; and the building of capacity towards the implementation of the SSF Guidelines.
1. Introduction

Historically, men, women, and children have harvested a wide range of marine resources for their basic sustenance and livelihood all along the South African Coastline.1 Today, while no official data exists, it is estimated that there are more than 80,000 people depending on small-scale fisheries who are playing a vital role in ensuring and guaranteeing the food sovereignty of their families and communities, particularly those living in rural areas.2 The realisation of an array of small-scale fisheries and their families’ human rights, such as the right to food and nutrition, the right to health, the right to work, and the right to a healthy environment, all depends on small-scale fishers’ tenure rights, equitable access and control over their natural resources—in particular, marine and ocean resources, but also adjacent land. Notwithstanding, many small-scale fishers across the country are witnessing deprivation, regression, and even outright violations of their right to food and nutrition and related human rights, contrary to the spirit of the SSF Guidelines (SSF Guidelines 1.1).

The FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (hereafter SSF Guidelines) were adopted after several years of consultation and negotiations, involving more than 4000 fishers and fish workers from the world over.3 With the endorsement of the SSF Guidelines by the UN Committee on Fisheries (COFI) in 2014, all FAO member states, including the Government of South Africa, are encouraged to implement the SSF Guidelines “in accordance with national priorities and circumstances” (SSF Guidelines 13.1). Despite being voluntary in nature, the SSF Guidelines are based on international human rights standards (SSF Guidelines 3.1) and in fact refer explicitly to several international human rights instruments to which many states, including South Africa, are state parties and thus obliged to abide by them.

This report uses the SSF Guidelines as the basis for monitoring because of its participatory development process, which involved small-scale fisher representatives, as well as its foundation on human rights. In doing so, it moves away from quantitative monitoring towards the one that uses the human rights lens to assess the progress and status of the implementation of the SSF Guidelines in South Africa, by applying several cases which are exemplary of some of the main challenges faced by small-scale fishers today. The report also envisions to aid the monitoring of the implementation by the small-scale fishers themselves, who are active agents for the promotion of their fishers’ rights as outlined in the SSF Guidelines (SSF Guidelines 13.5). As the following section will unveil, many aspects of the SSF Guidelines are already incorporated in South Africa’s legal and policy framework which speak to small-scale fishers. The report, therefore, wishes to take a closer look at the gap in SSF Guidelines implementation as experienced by communities and highlights aspects which warrant critique. Also, where applicable, because the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) adopted in December 2018 also speaks to small-scale fishers’ rights, among others their right to territories, the analysis will also refer to the UNDROP.

The report is structured as follows: first, the legal and policy framework addressing small-scale fishers in South Africa will be introduced, followed by the main challenges faced by small-scale fishers and their communities: starting with extractive industries, the report will deep-dive into the cases of Ebenhaeser in the Western Cape and Port Nolloth in the Northern Cape. Secondly, the impact of conservation and marine protected areas will be discussed, looking at the case of Dwesa-Cwebe in the Eastern Cape as an example of conflicts rising from separating humans from nature, and Kosi Bay and other areas part of iSimangaliso Wetland Park in KwaZulu-Natal as a case that expands into harassment and arrests. Finally, the issues of access and control of land and fisheries in the context of dams will be presented, looking at the cases of Gariep, Vanderkloof and Jozini dams in the Northern Cape, Free State, Eastern Cape and KwaZulu-Natal provinces. This will be followed by an analysis, thereby applying the SSF Guidelines, and where relevant also the UNDROP and South African legal and policy framework, to closely look at actions and omissions of the State of South Africa and examine whether or not and, if so, how the guidelines were implemented. The report concludes with setting out recommendations to the Government of South Africa, as well as to the international community, in particular, FAO, on how it can support the implementation of the SSF Guidelines in the future, as laid out in SSF Guidelines 13.6.

Information provided in the report was collected by Masifundise, an organisation which supports small-scale fishing communities in mobilising, lobbying and advocating for legal recognition and sustainable livelihood through social agency and self-organisation in South Africa. Masifundise is also a member of World Forum of Fisher Peoples (WFFP), a global social movement of small-scale fisher people from across the world, and thus an integral part of the International Planning Committee for Food Sovereignty.4 In the period between 2020 and 2022, Masifundise conducted participatory action research with the relevant small-scale fishing communities. Additional information was supplemented through online and desk research.

2. South Africa’s Legal and Policy Framework for Small-scale Fishers

2.1. The South African Constitution

The South African Constitution took effect in February 1997, thereby marking the end of a tumultuous history of racial segregation and violence, and marking a new era of transformation and democracy. The Constitution reflects South Africa’s unique history, and quest for freedom and democracy in stating that South Africa is a sovereign and democratic state,

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1 Sunde, ‘Social relations and dynamics shaping the implementation of the Voluntary Guidelines’
2 Masifundise, “Strengthening the voices of inland fishing communities”.
3 For the contribution of civil society organisations to the elaboration and adoption of the SSF Guidelines, see FAO and FIAN International, “Putting the Voluntary Guidelines on Tenure and the Voluntary Guidelines on Small-Scale Fisheries into practice”, 60-67.
4 Such as the Convention on the Elimination of All Forms of Discrimination Against Women (ratified by South Africa) and the UN Declaration for the Rights of Indigenous Peoples (for which South Africa voted).
5 International Planning Committee for Food Sovereignty (IPC). “The IPC”.

6
consolidation of ownership and control of fishing rights. The fishing sector characterised by a long legacy of incremental post-apartheid government faced the challenge of transforming the framework governing fisheries. With the transition in 1994, the government committed to developing a policy to recognize, regulate and develop small-scale fisheries.

All the rights recognised in the Constitution are equally guaranteed for South Africa’s small-scale fishers. South Africa is also a state party to several international human rights treaties - the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC). However, in reality, many of these rights guaranteed in the Constitution and enshrined in international law are not protected by the State, and outrightly abused and violated. Present day small-scale fisheries’ policy and legal framework consists of: The Marine Living Resources Act (MLRA) (1998, amended 2014), the Small-scale Fisheries Policy (2012), Small-scale Fisheries Regulations (2016) and the National Freshwater (Inland) Wild Capture Fisheries Policy (2022). In the following, these laws and policies will be examined and gaps in implementation highlighted.

### 2.2. The Marine Living Resources Act 18 of 1998

In post-apartheid South Africa, attempts have been made to address the historical inequalities embedded in the legal framework governing fisheries. With the transition in 1994, the post-apartheid government faced the challenge of transforming a fishing sector characterised by a long legacy of incremental consolidation of ownership and control of fishing rights. The first phase of transformation included the political, social, and economic inclusion of the previously excluded black South African citizens.

The Marine Living Resources Act 18 of 1998 (MLRA) was a central piece of legislation in this transformation agenda, with a focus on marine protection and conservation, in alignment with national and international agreements and legal frameworks. The MLRA structured the fishing industry into three sub-sectors: recreational, subsistence, and commercial fishing and allotted respective fishing rights/permits. Recreational fishing was solely for recreational or sport purposes (no sale, no barter, no earnings) and the permits could be bought at a post office.

The legal definition of subsistence fishers was limited to those who fish as a means of food and survival rather than as a means of making a living, thereby excluding small-scale fishers who also occasionally sell fish locally to sustain their livelihoods. No small-scale commercial fishing rights were allocated. For commercial fishing, fisher organisations were pressured to become entrepreneurs (privatise), as commercial fishers, with a fishing rights allocation system based on individual transferable quotas (ITQ). This resulted in restructuring of community organisations, typically led by community elites, to capture access rights, and the process effectively excluded poor and marginalised fishers from the formalised rights allocation process. The MLRA also failed to address the legacy and impact of apartheid on customary fishing rights of many coastal communities.

In 2002, small-scale fishers, supported by Masifundise, community-based organisations, academics, and lawyers, advocated for self-recognition as a bona fide category of ‘small-scale fishers’. In 2005, a class action lawsuit was launched against the national Department of Environmental Affairs and Tourism (DEAT). The action sought a shift from individual privatised rights to collective rights allocation, the creation of community-based legal entities (CBLE), a multi-species approach (meaning that the fishing communities would be allocated permits for a range of species, both high value species and low value for own consumption or local sale), and securing preferential access to inshore species (meaning that small-scale fishers would have access to inshore species, while commercial/industrial fishing companies would have access to offshore species).

The issue was heard at the Equality Court (2007), and as a result, the Government committed to allocating small-scale fishers interim permits under an interim relief (IR) system and committed to developing a policy to recognize, regulate and develop small-scale fisheries.

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1. An ITQ is a permit to harvest a certain amount of fish per species per year. Catch limits are based on the sustainability of the fish stocks. ITQs have promoted absentee ownership and quota leasing, as it allows ITQ holders to lease their rights to others, capturing the value of the right without doing any of the work. See Isaacs ‘Individual Transferable Quotas’.
2. Sunde, ‘Customary governance and expressions of living customary law at Dwesa-Cwebe’.
3. The class action lawsuit was based on the South African Constitution and Equality Act to argue that the existing rights allocation system excluded small-scale fishing communities and thus posed a considerable threat to their livelihoods. The case was argued on the basis of three specific rights protected by the Constitution: 1) the right to be recognized; 2) the right to a livelihood; and 3) the right to food and nutrition.
4. Masifundise, ‘Collective Rights a Big Step Forward’.
5. Sunde, ‘Marine protected areas and small-scale fisheries in South Africa’.
6. In South Africa, the Equality Court is a specialised court that specifically ensures the application of the Equality Act in matters relating to unfair discrimination, harassment etc.
7. The Interim Relief (IR) system was a means to grant fishers their fishing rights, while awaiting the development and implementation of the Small-scale Fishing Policy. It makes use of the individual transferable quota (ITQ) system, in which fishers have individual fishing rights rather than collective rights. The IR system is a basket of fishing resources given to different fishing communities, which in most cases consists of West Coast Rock Lobster and various hand-line fish species. In some communities it would also be specific to what is available in the oceans and coastal waters around the communities.
2.3. The Small-scale Fisheries Policy (2012) and the Small-scale Fisheries Regulations (2016)

Years of bureaucratic and consultative processes culminated in the promulgation of the Small-scale Fisheries Policy (SSFP) in 2012, ratified into Law through an amendment to the 1998 MLRA (amended MLRA, 2014).13 The SSFP marks a dramatic shift from the past, giving legal recognition to small-scale fishers, and moving away from individual rights towards a collective rights model (to ameliorate risks) and providing a framework for greater empowerment and equity for small-scale fishing communities. Importantly, the SSFP was developed through a bottom-up process which involved representatives of fishing communities and civil society. The process for the development of the policy constituted the basis for the development and strengthening of fisher and community-based organisations.

The aim of the SSFP is to promote socio-economic rights and the importance of economic development in rural fishing communities through allocation of fishing rights to CBLEs and job creation in the entire value chain. The SSFP represents a shift to a collective system of rights allocation, highlighting that fishers and fishing communities should directly and democratically contribute to decisions and management of the marine resources with the State at local, district, and national levels; and that the rights will be allocated to a CBLE.

However, the promulgation of the final Regulations of the SSFP (Small-scale Fisheries Regulations, 2016),14 which enabled the implementation of the policy, was top-down and fishers were not involved in the process. Although fishers submitted comments on the proposed regulations on 28 May 2015, with the support of the Legal Resources Centre (LRC)15 and Masifundise, these comments were ignored by the Department of Agriculture, Forestry and Fisheries (DAFF).16 As a result, the regulations deviated from the intent and spirit of the SSFP in most of its aspects regarding the approach to co-management and the type of CBLEs available to communities, in which the formation of a cooperative was the only option for the provision of collective rights, while the policy had envisioned the formation of a “CBLE”,

BOX 1: UNDERSTANDING COOPERATIVES IN THE IMPLEMENTATION OF THE SSFP

The Small-scale Fishing Policy introduced a new approach to the management of small-scale fisheries through the introduction of community-owned rights under CBLEs, and moving away from individual rights.

In the past, small-scale fishers were not able to establish their own organisations in managing the fisheries, and fishing conditions and regulations were set by the DAFF without any meaningful co-management by small-scale fishers, who were told what and where they were allowed to fish by giving rights and permits (as explained above). The new policy introduced a model of participation in legal entities where the small-scale fishing communities are recognised, valued, and are able to participate in the management of the fisheries. The policy envisioned democratic, equitable and sustainable fisheries in each fisher village, where local fishers care for their resources, protect them from over-exploitation and where communities can benefit by adding value and jobs along the entire value chain.

The shift to CBLEs will require careful planning and support to bring about the desired change. The process cannot be a technical one of simply establishing new rules, structure, and procedures as it ultimately relates to changes in social relations.22 However, the way in which the DFFE implemented this vision ran counter to the intended spirit: not only was the process fast-tracked, but the regulations stipulated that the legal entity should be a cooperative, thereby removing the agency of the fishing communities to decide what kind of legal entity they would like to establish.

In addition to this, the registration of cooperatives required signing of the cooperative constitutions provided by the DAFF instead of fishers being allowed to develop their own, context-specific, constitutions. Many small-scale fishers complained that they had to sign the constitution without sufficient explanation since the constitution was only available in English. The constitution did not allow fishers the autonomy to discuss the formation and it did not accommodate the customary rights of small-scale fishers with particular reference to the clauses on membership. Fishing communities with less than twenty recognised bona-fide fishers have been clustered together with fishers from other villages into one cooperative. This is a challenge for internal cooperative communication, as the villages are sometimes far apart, with limited opportunities for transport between them, as well as limited communication coverage. In addition to communication challenges, these villages can have extremely different contexts and traditions, but are expected to work together in harmony.

Also, cooperatives, made up of individuals from poor rural communities with very basic education and no knowledge of how to run them were given insufficient training (two-day basic training without long-term ongoing mentorship) and the training was exclusionary as the DAFF did not give notice to all concerned small-scale fishers. Although the communities in three provinces (Northern Cape, Eastern Cape, and KZN) have been grouped into cooperatives and received their rights and ‘quota’ allocation, there has been minimal support from the DFFE for the continuity, longevity, and success of these cooperatives. The cooperatives have been set up for failure by the State.

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13Masifundise, “Amended MLRA sets small-scale fisheries on a different path”.
14DAFF, Regulations Relating to Small-scale Fishing.
15The LRC is a public interest law organisation in South Africa, using the law as an instrument of justice for poor, vulnerable and marginalised people.
16DAFF, now Department of Forestry, Fisheries and the Environment (DFFE), is the department responsible for overseeing the fisheries sector in South Africa.
17Masifundise, “Fishers dig in their hills on the DAFF constitution for cooperatives”.

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The shift to CBLEs will require careful planning and support to bring about the desired change. The process cannot be a technical one of simply establishing new rules, structure, and procedures as it ultimately relates to changes in social relations. However, the way in which the DFFE implemented this vision ran counter to the intended spirit: not only was the process fast-tracked, but the regulations stipulated that the legal entity should be a cooperative, thereby removing the agency of the fishing communities to decide what kind of legal entity they would like to establish.

In addition to this, the registration of cooperatives required signing of the cooperative constitutions provided by the DAFF instead of fishers being allowed to develop their own, context-specific, constitutions. Many small-scale fishers complained that they had to sign the constitution without sufficient explanation since the constitution was only available in English. The constitution did not allow fishers the autonomy to discuss the formation and it did not accommodate the customary rights of small-scale fishers with particular reference to the clauses on membership. Fishing communities with less than twenty recognized bona-fide fishers have been clustered together with fishers from other villages into one cooperative. This is a challenge for internal cooperative communication, as the villages are sometimes far apart, with limited opportunities for transport between them, as well as limited communication coverage. In addition to communication challenges, these villages can have extremely different contexts and traditions, but are expected to work together in harmony.

Also, cooperatives, made up of individuals from poor rural communities with very basic education and no knowledge of how to run them were given insufficient training (two-day basic training without long-term ongoing mentorship) and the training was exclusionary as the DAFF did not give notice to all concerned small-scale fishers. Although the communities in three provinces (Northern Cape, Eastern Cape, and KZN) have been grouped into cooperatives and received their rights and ‘quota’ allocation, there has been minimal support from the DFFE for the continuity, longevity, and success of these cooperatives. The cooperatives have been set up for failure by the State.

13Masifundise, “Amended MLRA sets small-scale fisheries on a different path”.
14DAFF, Regulations Relating to Small-scale Fishing.
15The LRC is a public interest law organisation in South Africa, using the law as an instrument of justice for poor, vulnerable and marginalised people.
16DAFF, now Department of Forestry, Fisheries and the Environment (DFFE), is the department responsible for overseeing the fisheries sector in South Africa.
17Masifundise, “Fishers dig in their hills on the DAFF constitution for cooperatives”.

18Years of bureaucratic and consultative processes culminated in the promulgation of the Small-scale Fisheries Policy (SSFP) in 2012, ratified into Law through an amendment to the 1998 MLRA (amended MLRA, 2014). The SSFP marks a dramatic shift from the past, giving legal recognition to small-scale fishers, and moving away from individual rights towards a collective rights model (to ameliorate risks) and providing a framework for greater empowerment and equity for small-scale fishing communities. Importantly, the SSFP was developed through a bottom-up process which involved representatives of fishing communities and civil society. The process for the development of the policy constituted the basis for the development and strengthening of fisher and community-based organisations.

The aim of the SSFP is to promote socio-economic rights and the importance of economic development in rural fishing communities through allocation of fishing rights to CBLEs and job creation in the entire value chain. The SSFP represents a shift to a collective system of rights allocation, highlighting that fishers and fishing communities should directly and democratically contribute to decisions and management of the marine resources with the State at local, district, and national levels; and that the rights will be allocated to a CBLE.

However, the promulgation of the final Regulations of the SSFP (Small-scale Fisheries Regulations, 2016), which enabled the implementation of the policy, was top-down and fishers were not involved in the process. Although fishers submitted comments on the proposed regulations on 28 May 2015, with the support of the Legal Resources Centre (LRC) and Masifundise, these comments were ignored by the Department of Agriculture, Forestry and Fisheries (DAFF). As a result, the regulations deviated from the intent and spirit of the SSFP in most of its aspects regarding the approach to co-management and the type of CBLEs available to communities, in which the formation of a cooperative was the only option for the provision of collective rights, while the policy had envisioned the formation of a “CBLE”,
with each fishing community having the agency to decide which kind of entity would be the most appropriate to their context.\(^7\) Fishing communities with less than twenty recognized bona-fide fishers have been clustered together with fishers from other villages and forced into establishing one cooperative (see Box 1).

Overall, the regulations lacked the holistic approach to small-scale fisheries, and failed to address relevant issues such as gender equality, social security, and the development of localised supply chains, although these were all addressed in the SSFP. In addition, the first step to implement the SSFP (the identification and verification of fishers) was also criticised. The SSFP regulations stipulated the criteria by which small-scale fishers would be identified, but these criteria were decided upon without the input of the fishers themselves. These criteria include that the person applying must:

1. be a citizen of South Africa;
2. be at least 18 years of age;
3. have been involved in fishing for at least 10 years, and
4. derive the majority of their income from these small-scale fishing activities.

These criteria excluded many fishers: those who had no paperwork to prove their involvement in the small-scale fisheries, those who had been involved since childhood but could not prove this, and many more. In addition to these criteria, the DAFF also set up a community panel to verify that the applicant was in fact a ‘partisan’ fisher in their community. Each individual on the panel was given veto power. This was a challenge as it resulted in conflict within the communities, where one person on the panel could veto a fisher simply due to an existing feud or dislike. Furthermore, the verification process was extremely slow, and due to the fact that the regulations did not prioritise gender equality, as mentioned above, many women have been unsuccessful in their applications for recognition as bona-fide fishers under the SSFP. This is because many women are involved in pre- and post-harvest and value-adding activities in the fisheries value chain, rather than being directly involved in harvesting. This goes against the principles of the SSFP that has a strong focus on gender equality and advancing the role of women in the fisheries value chain.

Due to complaints over inaccuracies that were submitted by the small-scale fishers in the Western Cape in 2017-2019, the verification process in this province had to be redone.\(^8\) The Department of Forestry, Fisheries and the Environment (DFFE) Minister conducted an internal audit of the process in the Western Cape in 2019, based upon without the input of the fishers themselves. These criteria include that the person applying must:

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Additionally, the final policy makes no mention of ensuring gender equality or prioritising women in inland small-scale fishing communities, thereby undermining the role of women in the communities and in the fisheries value chain. Freshwater species are an affordable source of animal protein and essential micronutrients, making the fishery valuable to the rural poor, especially vulnerable groups such as youth, women, and elderly, who rely on fish to put food on the table and provide an income.

The DFFE has published an implementation plan for the policy, in which a user-friendly permitting system that will legalise and authorise fishers’ access to their traditional fishing grounds, is estimated to be realised by March 2027. As a pre-condition for defining access rights, DFFE has indicated that a legislative review of policy ordinances at provincial level will be required, to then either change provincial legislations that are not aligned, or draft a new legislative act at national level.

However, within this process, the State has not made specific allowance for any kind of provisional permitting system or access rights for communities. Inland small-scale fishers continue to be under the authority of provincial nature and conservation agencies or the DWS and fish on recreational fishing permits, which do not allow the sale of fish, as already explained above. This means that fishers are at constant risk of arrest and criminalisation. Being barred from accessing traditional fishing grounds due to private land ownership and the presence of nature conservation areas, reserves, and protected areas, their ability to realise their right to decent work, the right to food and nutrition, and to secure their livelihoods is greatly inhibited. The cases below exemplify this situation.

3. Challenges to the Realisation of Human Rights for Small-Scale Fishers in South Africa

Despite South Africa’s progressive laws and policies, as well as its international human rights obligations enshrined in various international legal instruments relevant to small-scale fisheries, the realisation of small-scale fishers’ human rights on the ground is riddled with challenges. An enduring challenge is that of historical and continuous ocean and land grabbing in the name of economic development and growth, often framed as being in the interest of the people, and as a means to address various socio-ecological concerns. However, more often than not, it encroaches on peoples’ natural resources and territories and results in human rights violations of local people who are dependent on their surrounding natural resources for their livelihoods. South Africa has a long history of racialised dispossession of land and resources in the name of economic development and conservation. The Blue Economy, which is marine-based economic development geared at “harnessing the full potential of the ocean”, also serves as a prime example of continuous dispossession of often rural and marginalised people in the interest of national development agendas. In South Africa, Blue Economy development finds expression in Operation Phakisa, which translates to ‘operation hurry up’ (See Box 2).

This report focuses specifically on the impacts of the mining industry, the development of protected areas, and the

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Box 2: Operation Phakisa - South Africa’s Blue Economy Model

While there is no universally agreed definition for Blue Economy, it often means the promotion of economic growth, social development and ensuring environmental sustainability in the ocean space. The idea of the Blue Economy was introduced around 2012 by the governments of Small Island Development States (SIDS), the World Bank, United Nations Environment Programme (UNEP), and conservation organisations in an effort to attract more attention to the ocean at the Rio+20 Earth Summit. Building on the UN’s three pillars of sustainability agenda, the proponents argued that blue growth, just like green growth, could bring about environmental protection, economic development and social development. This is in contrast to what small-scale fisher organisations claim: fishers, the world over, experience the destruction of nature and their territories in the name of blue economy by industrial aquaculture, mining, and oil and gas corporations and infringement upon their human rights and their land and water territories.

The Blue Economy model in South Africa took its shape as Operation Phakisa. It was introduced in 2014 to help South Africa implement its National Development Plan, with the “ultimate goal of boosting economic growth and creating jobs”. The main programs of Operation Phakisa consist of: marine transportation, offshore oil and gas, aquaculture, marine protection, harbour development, and coastal and marine tourism. Local fishers already see the impact of the Operation Phakisa on the ocean and coast, the health of their fisheries, and the natural resources they depend on for the realisation of their human rights.

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24Masifundise. “When hungry, the children look towards me”.
25For additional information, please refer to the Call for Input to the Special Rapporteur on the Right to Food submitted by Masifundise. United Nations. Call for input: Violence and the right to food.
26Masifundise. “Operation Phakisa destroys small-scale fishers’ livelihoods”.
27Co-Chairs’ Statement of The Oceans Day at Rio+20. ‘Calling for strong and immediate action’.
28World Forum of Fisher Peoples (WFFP), Statement released at the occasion of COP27
29Department of Planning, Monitoring and Evaluation. “Operation Phakisa”.
30Department of Forestry, Fisheries and Environment. “Operation Phakisa - Oceans Economy”.
construction of dams, some of which are promoted in the name of Operation Phakisa, on the realisation of small-scale fishing rights as set out in the SSF Guidelines and South African laws and policies.

3.1. Extractive Industries (Minning, Oil and Gas)

Mining has a long history in South Africa. The first mining (copper) operations started in 1852, and commercial coal mining began 12 years later, expanding until the turn of the 20th century. Diamonds were discovered by chance in the late 19th century, followed by platinum. Today, the mining industry (coal, gold, iron, copper, platinum, diamond, manganese ore, etc.) is one of the largest contributors to South Africa’s economy, with an estimated worth of R20.3 trillion (€1.47 trillion). At the global scale, it is the world’s 5th largest mining sector in terms of the country’s gross domestic product (GDP), contributing to 8% of South Africa’s GDP. Exploitation of mines is key to South Africa’s economic growth and a strategy for post-pandemic recovery - yet, mining operations have devastated large parts of the ecosystems of the country and the lives of people who depend on them. The mining industry is responsible for much of the environmental and ecological destruction seen today in South Africa.

The primary law that governs mining in South Africa is the Mineral and Petroleum Resources Development Act, 2002 (MPRDA), which lays out the process for mining to take place (e.g., for a company to get a licence or a permit to mine), and sets out the State to be the “custodian” of all mining minerals. To this effect, the Department of Mineral Resources and Energy (DMRE) is mandated with regulating and promoting the mining of minerals towards economic growth and development of the country. However, despite DMRE’s legal obligation to play a watchdog role as it pertains to the conditions under which minerals are mined, there is concern for the ad hoc manner, and the haste with which prospecting and mining rights are granted in biologically sensitive areas. Often these prospecting or mining rights are granted without due consideration or any cautionary approach to the social and environmental impacts and risks involved therein. This is contrary to the SSFP which specifies preferential access to small-scale fishing communities who have traditionally depended on marine resources for their livelihoods as one of the policy principles.

Moreover, its non-compliance means that civil society plays the oversight role, often in the form of media advocacy, legal challenges and partnerships between communities, non-governmental organisations and several other institutions, to form a united front in the attempt to hold DMRE accountable to its mandate.

The two cases below are set along the South African West Coast, where hundreds of kilometres of the coastline are being mined or have been earmarked for mining. This is despite the fact that the area is a biodiversity hotspot and is home to thousands of species of unique plants, most of which are found nowhere else in the world. The cases illustrate the effects of historical and ongoing mining operations on the local communities, especially small-scale fishers who depend on the natural resources that their surrounding environment provides. It also speaks to the continuous fight against the wave of mining, prospecting, exploration and production applications that is currently plaguing the west coast. These cases also highlight the fact that even if the SSFP were implemented in alignment with the policy principles, the fact that fishing grounds are being taken over by mining activities actively undermines the rights of small-scale fishers, and renders their fishing rights useless when they cannot access their fishing grounds due to restricted access areas, or need to fish in polluted waters.

3.1.1. Case 1: Ebenhaeser / Papendorp – Mining Threatens Access to Marine and Freshwater Resources

Ebenhaeser is an area situated at the mouth of the Olifants River in the West Coast District Municipality in the Western Cape province that encompasses small surrounding settlements which include Papendorp.

The fishers who live around the Olifants River are descendants of the indigenous people who settled in the area now known as Lutzville (around 30 km from Papendorp) in the 17th century. In 1925, as part of the national government’s plan to reduce poverty among the White settlers, fertile agricultural land was given to them, thereby dispossessing original inhabitants of their land and moving them to Papendorp at the river mouth and Ebenhaeser about 15 km upstream. For generations, they made a living through agriculture, cattle raising, and fishing. However, the poor quality of the land (less fertile) near the river mouth to which they were relocated forced them to switch primarily to fishing. Today, the fishing communities depend on the Olifants

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32Extractive industries are the businesses that take raw materials, such as oil and gas, coal, copper, gold, diamonds and other minerals, from the earth. The industrial processes that are used for extraction include drilling and pumping, quarrying, and mining.
34Chibba, “A history of mining in South Africa”
35Protect the West Coast.
36Ibid.
37Ibid.
38Christianson, “The tide turns to mining on the Olifants River”.

Figure 1: Map showing the location of Ebenhaeser and Papendorp along the West Coast of South Africa (Extracted from Samantha Williams, “Beyond rights: developing a conceptual framework for understanding access to coastal resources at Ebenhaeser and Covie”. PhD Thesis, University of Cape Town, 2013), 83.

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River and its estuary for sustaining their livelihoods. As per the 2001 national census, the population of Ebenhaeser (including surrounding settlements) was 1723 (Matzikama IDP 2007). 39

The main species caught in the river is harders (mullet), but there are also other species such as shad, snoek, katonkel (barracuda), sea bream, and white stumpnose that are found in the river. Fishers take to the river on small wooden boats that are powered by oars, and throw nets into the water to make their catch. Fishers consume the fish that is caught and sell the remainder to gain additional income. The river mouth has been identified by the community as a community-managed conservation area to be protected for future generations and for the health of the fish stocks on which they rely, and fishers have been actively engaging with various actors around the development and implementation of the Olifants Estuary Management Framework (OEMF) towards the inclusion of the protected area in this framework.

For fishers, there is never a constant stream of income due to unpredictable weather conditions, the seasonality of fishing, and the non-implementation of the SSFP, resulting in fishers fishing under the IR system. Fishers in Ebenhaeser and Papendorp fishers currently have either IR fishing permits, or exemption permits for the river, while they wait for the implementation of the SSFP in the Western Cape. Some of the fishers undertake alternative livelihood activities such as farm work, but many fishers are forced into illegal fishing in order to make ends meet. In addition to the many existing challenges, there has been an influx of prospecting and mining projects which threatens fishers’ livelihoods. Various companies have submitted applications for the mining of heavy minerals and diamonds, as well as for prospecting of oil and gas (see Figure 2). 40 There are at least 3 companies that are currently operating in the area, a further 4 companies that are currently prospecting for foreseen operations, and at least a further 3 companies with applications awaiting approval. The fishers are particularly concerned about Buchuberg Resources, TransAtlantic Diamonds, Moonstone, Belton Park, De Beers, and Transhex, amongst others.

In 2013, the prospecting right was granted to Mineral Sands Resources (MSR), an Australian mining company, by the DMRE for heavy minerals on the northern bank of the Olifants River. Local fishers have already witnessed drilling of holes near Papendorp and have reported that the waste of mining operations is being released into the ocean. They have also observed how a build-up of sand is occasionally causing blockages in the river mouth and have thus raised concern over its potential impact on the natural breeding and migratory patterns of the fish species. Fishers also worry that once mining starts, this can affect air quality and their access to newly restituted land. 42

Opponents to mining, also fishers, argue that the application procedures were flawed and there were several shortcomings, and have appealed the environmental authorisations—both on substantive and procedural grounds. 43 One local fisherman claimed that, though he had attended a public meeting on prospecting, the mining company, through its representative, had not engaged directly with the local fishing community as requested. 44 According to Merle Sowman, a professor in the environment and geographical studies department at the University of Cape Town (UCT), mining activities could have irreversible damage on the environmental and crucial resources such as critical biodiversity areas and marine habitats. 45

Local fishing communities continue to attend the consultation sessions that are hosted by the mining and fossil fuel companies to raise their concerns, and they submit comments opposing the applications or the granting of environmental authorisation, in order to stand up for their rights. However, the communities sometimes feel powerless because they know that they do not have the “right to say No” and cannot prevent mining from happening. The government continues to grant environmental authorisations to mining companies, without having conducted a Strategic Environmental Assessment of the coastline and without having considered the cumulative impact of the wide range of mining activities on marine ecosystems, and small-scale fishers’ plight falls on their deaf ears.
Due to the lack of constant or reliable income in these communities, there is sometimes support from fishing communities for extractive activities, as they are promised job opportunities and local socio-economic development. Fishers cannot focus on long-term goals when they need to focus on putting food on the table. Some of these projects are already showing impacts on the ground and affecting the livelihood of local fisher communities. One such example will be elaborated below.

3.1.2. Case 2: Port Nolloth - The Impacts of Diamond Mining on Small-scale Fishing Rights

Port Nolloth is a small coastal town with a population of 6,000 people.\(^46\) It is situated in the Northern Cape province in the Namaqua district and is approximately 100 km south of the Namibian border. Historically, the Namaqua people called this area Aukotowa (literally meaning “the place where the old man was taken away (by the sea)”) due to its great significance to the Nama people as a site for fishing and catching seals, providing them with important marine resources to be used for food and seal skins.\(^47\)

The present-day settlement of Port Nolloth developed from the need for a small harbour to serve the copper mining industry in the interior of Namaqualand in the late-1800s. By 1918, copper mining had closed down its operation, and in the years and decades that followed, the diamond mining industry flourished in the region, however, with no benefits for the local fishing communities. Today, the main obstacle for fishers in the realisation of their right to food and related rights is the denial of their essential fishing grounds due to the operations of two large diamond mining companies (Alexkor Transhex and West Coast Resources) along the Northern Cape coastline.\(^48\)

These two companies, together with De Beers Namaqualand, hold a monopoly over mining concessions along the 350 km coast, from Alexander Bay in the north to the Groenrivier in the south, blocking the access of fishers to many of their traditional fishing areas. According to fishers, they currently have access to less than 5% of this coastline. Fishers also claim that due to the small size of their boats, and the unpredictability of the sea, especially closer to the shore, they have to sail longer distances without any landing sites near-by. This is not only dangerous, but means additional transport costs and fishing time.\(^49\) Since 2017, the demands of the fishers to allow road access by the mining companies have been continuously denied.

Although the fishers, organised in the Aukotowa cooperative, are technically authorised to fish roughly 80 km of the coastline between Port Nolloth and the Orange River mouth to the north, in reality they are only able to fish a few kilometres of the coast. The furthest point they are able to access to the north, in reality they are only able to fish a few kilometres of the coast.

Moreover, Alexkor is indiscriminately dumping toxic quarry dust into the sea, generating large plumes of pollution.\(^44\) It is reported by the fishers that the water is so murky that one cannot see anything in the water.\(^45\) They have also noticed a reduction in the west coast rock lobster (WCRL), which is their main source of livelihood.

Due to the disturbances to the seabed caused by diamond mining pumps (situated north of Holgat in the restricted mining areas), the fishers are witnessing WCRL disappearing from the area. The fishers explain that this is due to the loss of kelp which cannot grow in this disturbed environment and because lobsters prey upon kelp-consuming species, they move to other areas in search of kelp. The fishers are denied from undertaking continuous monitoring of the environmental changes that are happening in these areas, due to prevention of access. As custodians of the ocean and its resources, the fishers are calling for collaboration with scientists in conducting an environmental impact assessment and examining the impact of mining on WCRL breeding grounds as well as their surrounding environment and natural resources. They would like to contribute through their local knowledge and experience. The Aukotowa cooperative has acted by petitioning for a moratorium on cofferdam mining, as well as an investigation into the existing mines, by writing a letter to the Minister of the DFFE. The cooperative also submitted a report that they had compiled on the experienced impacts of cofferdam mining on small-scale fishers’ livelihoods and the marine ecosystem. This letter and report were submitted to the DFFE on 29 October 2021, pending action and reaction by the Department.

Diamond mining and the use of cofferdams is resulting in the development of a dead zone for marine life, requiring years of rehabilitation: it destroys the marine ecology of the coastline and along with it, the present and future livelihoods of small-scale fishers.\(^56\) More so, a right to fish under the SSFP becomes a meaningless right as fisher’s access to traditional fishing areas is limited to a small percentage of the coastline, and the existing mining practices, including cofferdams, threaten the current and longer-term sustainability of South Africa’s marine resources, negatively impacting the surrounding environment and thereby also threaten the livelihood of small-scale fishers, jeopardising their right to food and nutrition.

3.2. Conservation and Marine Protected Areas (MPAs)

South Africa is one of the most biologically diverse countries in the world. The country is incredibly rich in species, ecosystems and landscapes, ranging from deserts, subtropical forests, to a

\(^{44}\)Human, “Meet the woman at the centre of Port Nolloth’s crayfish trade”.
\(^{45}\)Yeld, “Green Scorpions probe coastal dams”.
\(^{46}\)Masifundise, “Diamond mining threatens the livelihoods of small-scale fishers”.
\(^{47}\)Yeld, “Diamond divers warn of damage to seabed from West Coast mining dams”.
\(^{48}\)Carstens, Port Nolloth: Making of a South African seaport.
\(^{49}\)Masifundise, Coastal Mining Threats Small-scale Fishers’ Livelihoods Along the Northern Cape Coastline.
\(^{50}\)Carstens, Port Nolloth: Making of a South African seaport.
\(^{51}\)Masifundise, “Coastal Mining Threats Small-scale Fishers’ Livelihoods Along the Northern Cape Coastline”.
\(^{52}\)Masifundise, “The lack of infrastructure support for fishers in Port Nolloth”.
\(^{53}\)Christianson, “The slow squeeze on Port Nolloth’s fishers”.

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\(^{54}\)Masifundise, Coastal Mining Threats Small-scale Fishers’ Livelihoods Along the Northern Cape Coastline.
\(^{55}\)Masifundise, “Diamond mining threatens the livelihoods of small-scale fishers”.
\(^{56}\)Masifundise, “Coastal Mining Threats Small-scale Fishers’ Livelihoods Along the Northern Cape Coastline”.
great diversity of marine and coastal systems. These resources underpin the livelihoods of millions of South Africans. Efforts to conserve the country’s rich biodiversity, however, are deeply connected to colonialism and apartheid, and historically followed a protectionist approach, regarding people as separate from nature, and to be kept away from it. Conservation was also associated with protected areas that served a privileged elite, and restricted access to natural resources often involving the forced relocation of black communities.  

Today, while conservation has started to emphasise issues that relate to human rights, equity, access to natural resources and environmental sustainability, practices and the impact on the ground on local communities draw a very different picture.

The proclamation of marine protected areas (MPAs) falls under the responsibilities of DFFE, finding its mandate in the amended National Environmental Management Protected Areas Act (NEMPAA) No 21 of 2014. At present, 5% of South Africa’s oceans are protected by 41 MPAs. Re-gazetting of marine reserves and MPAs was conducted by the DEAT based on the MLRA. This process, however, largely took place with ineffectual public participation and excluded fishers from accessing their traditional fishing grounds. In the following, concrete challenges that conservation and MPAs pose on small-scale fishers’ realisation of their right to food and nutrition and related rights will be illustrated.

### 3.2.1. Case 3: Dwesa-Cwebe – Denial of Customary Rights to Traditional Fishers

Situated in the Amathole District (Eastern Cape), the Dwesa-Cwebe region is composed of Cwebe to the east and Dwesa to the southwest of the Mbhashe River. Today, the region is known for the Dwesa-Cwebe Nature Reserve, which comprises two state forest reserves (Dwesa Nature Reserve and Cwebe Nature Reserve) and a national marine reserve (Dwesa-Cwebe Marine Protected Area). There are 7 communities (Ntubeni, Mpume, Ntiangano, Ngoma, Mendwane, Hobeni, and Cwebe) living in Dwesa-Cwebe. Currently, 221 and 351 people are living in Dwesa and Cwebe, respectively, the majority of whom are traditional fishers and their families.

The region has been inhabited for several hundred years by traditional small-scale fishers and their families who, as per their customary systems of resource use, had been accessing the coast, and utilising marine resources to sustain their livelihood. Under customary practice, access to resources is given by birth or passed on through marriage, and the knowledge and skills for using coastal and marine ecosystems in a sustainable way, are transmitted from generation to generation, typically from father to son (fishing) and from mother to daughter (harvesting of intertidal resources). Knowledge was also conveyed through a range of rituals and practices within the more extensive customary system within which fishing was located. These rules make up a larger body of customary regulations governing access to local resources (e.g. residential, agricultural, and grazing land, and use of firewood and grass).

In the 1930s, when a private hotel was established close to the Mbhashe River, the main river which runs through Dwesa and Cwebe, the area became a very popular destination for tourists and recreational fishers. Local fishing communities started selling fish and other marine resources (inter-tidal resources such as mussels and oysters) at seasonal markets to local tourists, earning a meagre but much-needed income. With the

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[64] Marine Protected Areas South Africa.  
[65] Masifundise, “How will the Policy for Small-scale Fisheries be implemented in MPAs?”. See also Sunde, “Marine protected areas and small-scale fisheries”.  
[68] Sunde, “Customary governance and expressions of living customary law at Dwesa-Cwebe”.  
[70] Sunde, ‘Customary governance’.  

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declaration of the Dwesa-Nature Reserve in 1975, however, the reserve was fenced and prompted the forcible removal of several families who were living within the reserve. At the same time, restrictions on the harvesting of inter-tidal resources such as mussels, oysters, etc. were introduced, indiscriminately affecting women and young girls who were the main harvesters. The local communities were also denied access to a wide range of forest products (e.g. fuel, building materials, food, and medicines) as well as access to the reserve for grazing of their cattle. In 1992, with the promulgation of the Dwesa-Cwebe Marine Protected Area, which now included the coast adjacent to the terrestrial forest reserve, additional restrictions on marine resources were introduced.

The end of Apartheid and the birth of Democracy in South Africa introduced a wave of new laws, including the new Constitution (1996) and the Land Restitution Act (1994) which provided for the restitution of land and allowed communities to lodge claims for their land, that aimed to address the past injustices. The communities living in and adjacent to the reserve started their land claim negotiations in 1994 and filed a claim as per the Land Restitution Act in 1996 and the Land Claims Settlement Agreement was finally signed in 2001. However, on December 29, 2000, shortly before the Land Claims Settlement Agreement was signed, the DEAT, an authority responsible for fisheries and marine protected area management and a party to the Land Claims Settlement Agreement, gazetted the Dwesa-Cwebe MPA as an entirely no-take (no fishing) MPA, in line with the Marine Living Resources Act 18, 1998 (MLRA). There was no meaningful consultation with the community about the change in regulations, nor with the provincial authorities responsible for managing the reserve. In early 2000, the provincial authorities started enforcing the no-take regulations within the MPA, bringing the local communities into conflict with the authorities and many were arrested and faced high fines and imprisonment.

On 22 September 2010, three local fishers were arrested for attempting to fish in the MPA. They were then charged by the Minister of DAFF, the Minister of DEAT, the Deputy Director of Fisheries, and the Deputy Director of Oceans & Coastal Management for entering a national wildlife reserve area (Dwesa-Cwebe Nature Reserve) and fishing in a no-take area, in violation of the provisions laid out in the MLRA. In 2012, the case of the three fishers was heard in the Magistrate’s court in Elliotdale, where they pleaded not guilty to the charges, on the grounds that their conduct was not unlawful because they were exercising their customary right to fish. However, despite the Magistrate’s recognition of the fishers’ customary rights, they were nevertheless convicted for contravening section 43(2)(a) of the MLRA. To this effect, the Magistrate granted the fishers leave to appeal the matter to a higher court. This case became well-known as the Gongqose case and was ground-breaking because the small-scale fishers’ customary right to marine resources was finally acknowledged by the Supreme Court of Appeals (SCA) when it handed the judgement recognizing the community’s customary rights and legally giving them the right to access the MPA on June 1, 2018. The Judgement acknowledged the existence of customary rights for the protection of cultural and traditional practices linked to the access and use of marine resources.

While this was without a doubt a major victory, the SCA decision did not automatically allow local fishers from Dwesa-Cwebe to fish. It required fishers to join cooperatives (as per the SSFP). This procedure ran contrary to traditional fishers’ customary practice, in which members of the community themselves would identify fishers and harvesters. The idea of cooperatives was also not in alignment with customary practices. By doing so, the government continues to treat customary communities like any other community, undermining customary systems of law and customary rights.

Denial of access to and use of natural resources (forest, coastal and marine) is tremendously impacting the daily lives of small-scale fishing communities in the Dwesa-Cwebe region, in particular the Mendwane community living close by the Mbashas River and Dwesa Nature Reserve. Fishing in the Mbashas River is prohibited, and the fishers must travel to the opposite side of the river to fish in the Mpenzu estuary. This is a three-hour drive one-way. Due to its remoteness and lack of adequate infrastructure, there are not many livelihood opportunities. Aside from fishing, people also engage in small-scale farming, cattle/livestock-herding, and selling of wood and handicrafts.

Traditional small-scale fisher communities are also not able to enjoy their customary and cultural practices. Their traditional ancestral worshipping is conducted within the nature reserve, as well as certain herbs necessary for manhood initiation are only found within the reserves. This, however, has an implication for their health conditions, in particular for Mendwane community members. Since the nearest health facility is situated 40 km away, and transportation is limited or costly, many fishers avail of natural medicines (herbs) found within the reserves.

Criminalisation and harassment for securing their traditional grounds is one major challenge faced by the fishing communities surrounding the Dwesa-Cwebe MPA. On February 1, 2022, three...
young local fishers were attacked by the Eastern Cape Parks and Tourism Agency (ECPTA) rangers. The rangers who were patrolling witnessed the young fishers, fired three warning shots and asked the young fishers to hand over their bags and to be searched. When the young fishers refused, the rangers assaulted the fishers, tied them up with reeds, and suffocated them with their clothes. Another incident took place on December 11, 2022. Dwesa-Cwebe Nature Reserve rangers opened fire on three fishers from the Mpume village who were harvesting mussels in the reserve. One fisher suffered significant injury, and all three fishers were charged with trespassing. However, the fishers did not remain silent: they reported the incident at the local police station and filed harassment charges against the Dwesa-Cwebe Nature Reserve rangers. Such cases are not once-off events, but part of a broader, systematic approach by the management of the Nature Reserve, which uses violence as the first response. Often when fishers are caught by rangers, their catch is confiscated or dumped back into the sea. They are either detained at a local police station and released on bail or are formally charged for trespassing (their own territories) by the public prosecutor. Communities living adjacent to the Nature Reserve carry out their livelihood activities in constant fear of abuse and intimidation from local conservation agencies. The hostile treatment towards fishing communities threatens their ability to sustain livelihoods and ultimately diminishes their right to food. The lack of established co-management structures as well as appropriate non-militant policing methods have left small-scale fishers increasingly vulnerable. To date, not a single ranger has been charged for the violence perpetrated by them.

3.2.2. Case 4: Kosi Bay and iSimangaliso Wetland Park– Mismatch between Traditional Fishing Practices and Access Rights vs. Policy Implementation on the Ground

Kosi Bay is situated in the Umkhanyakude District and lies at the top north-eastern corner of the KwaZulu Natal province. It is south of the Mozambique border and approximately 400 km north of Durban. The Kosi Bay system consists of four lakes and forms part of the iSimangaliso Wetland Park World Heritage Site. In response to intentions to mine the area, and in order to save the coast, in 1999, iSimangaliso was listed as South Africa's first World Heritage site. It was proclaimed in 2000 as per World Heritage Convention Act, 1999, an Act which incorporated the World Heritage Convention into South African legislation. To this effect, the iSimangaliso Wetland Park Authority was established to manage the park on behalf of the State and under the authority of DFFE. The iSimangaliso Wetland Park Authority also has partnerships with various other entities in the management of the park. One such partnership is with Ezemvelo KZN Wildlife, a public entity mandated to manage nature conservation within the province. Although the iSimangaliso Wetland Park Authority regulates conservation at the park, Ezemvelo KZN Wildlife is contracted to take care of the day-to-day conservation management of the park.

The park covers more than 330 000 hectares, stretching for 220 km along the Indian Ocean and encompasses one third of the KwaZulu-Natal coastline and nine per cent of the entire coastline of South Africa. It seeks to protect three major lake systems, eight interlinking ecosystems, most of South Africa's remaining swamp forests, Africa's largest estuarine system, 530 bird species and 25,000-year-old coastal dunes (among the highest in the world). Since 1 August 2019, the park has expanded significantly, with the result that the World Heritage Site is now 1,328,901 hectares (marine and terrestrial combined), making it South Africa's second largest protected area after the Kruger National Park, incorporating the country's largest MPA.

The Kosi Bay area, however, has historically been, and continues to be, home to the Tsonga people who are under the control of the Tembe Traditional Authority. Before 1895, the Tsonga people lived across the whole of St Lucia Bay, which is now the geographical area proclaimed as iSimangaliso. When Britain colonised South Africa, the Tsonga people lost large tracts of land in St Lucia Bay in 1895 and were restricted to Kosi Bay.

The lake system has been a very significant source of food and livelihood for the communities that settled in this region. Many women from these coastal communities harvest a range of inter-tidal resources such as mussels, chitons, sea cucumbers, seaweed and octopus as well as sandy shore organisms such as ghost and mole crabs, whilst men fish for various species of line fish. They also harvest marine resources for medicinal use, as well as using them in a range of cultural rituals. They have a very extensive knowledge of the local resources and marine ecosystems of this coastline as they have interacted with them for centuries. For example, each of the rocky outcrops along the coastline is owned by a different community and they know exactly who has the right to fish and harvest on which sections of the coastline. In their customary system, fishing rights are held by individuals but are nested within a community system of common property ownership. Since time immemorial, they have developed customary systems that govern their lives and their interaction with the lakes and surrounding environment.

However, the establishment and expansion of the protected area is marked by alienation of the local people from their surrounding environment through forced removals and heavy policing of their movements and access to harvest important resources, such as fish and culturally important

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plant materials, in total disrespect of their customary rights. This has significantly impacted on the livelihoods that people have practised for generations. Still today, the communities surrounding iSimangaliso remain deeply affected by the history of dispossession, and feel their cultures and traditions, especially those related to the coast, were deliberately erased.

Most of the communities that were forcibly removed in the creation of the park, now live along its borders but continue to fish and depend on the coast and estuaries for marine resources. They refer to these resources as ‘nelifa lethu’ (our heritage). Therefore, local fishers over the years persisted in asserting their rights by continuing to fish at their customary fishing grounds despite being criminalised, perceived as trespassers on their own land, and suffering from various forms of violent repressive measures perpetrated against them.80

With the adoption of the SSFP in 2012, local communities hoped that there would be a shift in their relationship with iSimangaliso authorities. However, to the contrary, the implementation of the SSFP presented several challenges. Central to these challenges is the notion amongst conservation authorities, despite the evidence of the long history of humans living in the area, that fishing communities who are the owners of much of the land in the reserve are “destroying the pristine nature of the area”.81 To this effect, iSimangaliso has a policy of ‘rewilding’ the area and as a result has been reluctant over the years to permit small-scale fishing within its borders.82

This has resulted in the small-scale fishers receiving permits that are not in line with the SSFP, making it impossible for them to practise their rights on the ground. Their permits, for example, do not allow them to fish in MPA areas, nor are they allowed to use gears to which they have become accustomed over the years, such as small boats and gillnets. The fishers were not consulted about these restrictions and there remains a lack of clarity with regard to the regulations pertaining to small-scale fishers at iSimangaliso. This has caused great confusion and contributed to conflicts between Ezemvelo rangers and local fishers that have led to incidences of violence, resulting in the death and disappearance of fishing community members (see Box 3).

The relationship between iSimangaliso and the local fishers has for the longest time been defined by insufficient communication and throughout the years, small-scale fishers have been continuously excluded from any meaningful participation in decision-making and management plans (e.g. management of the park). iSimangaliso claims to be implementing Community-Based Natural Resource Management (CBRN) through the People and Parks programme, with a vision of “Economically viable and bio-diverse protected areas with infrastructure that supports community beneficiation”.83 However, and despite being provided for in the SSFP, no effective co-management has taken place, nor has there been any recognition of the local communities’ customary law as it pertains to fisheries governance.

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**BOX 3: CRIMINALIZATION OF LOCAL FISHERS AND LACK OF ACCESS TO JUSTICE**

On 16 September 2020, Celimpilo Mdluli (30) and two other fishermen from the Nibela fishing co-operative went fishing, and were approached by Ezemvelo rangers.84 During the encounter, Celimpilo Mdluli was shot. The rangers claim that they shot at the fishers in response to being shot at first. This statement by the rangers is contested by Celimpilo’s family who had never seen Celimpilo with a gun. To date, the investigation report on Celimpilo’s death commissioned by the Minister of DFFE has not been made available to the family or the community. The investigation into his death by the police has suffered several inexplicable delays and the police have claimed that evidence is missing.

On 12 November 2021, another disturbing encounter with Ezemvelo rangers took place. This time, Celimpilo’s brother, Thulani Mdluli (24) and three other fishers went out fishing at St Lucia lake, when they heard gunshots fired, which caused them to scatter in different directions and run home. Thulani never returned home, and his family went back to the scene of the shooting, finding only Thulani’s shoes. When they reported him missing at the police station at Mtubatuba, they were told by the station commander that rangers phoned to report a shooting at iSimangaliso but they claimed that they did not investigate whether the person was wounded fatally, nor did they retrieve the body.85 The three fishers that accompanied Thulani have strongly denied that he was armed or fired shots, and no gun has been found.86 Thulani’s body was never found. He left behind his partner, a three-month-old baby, and a family that relied on him to bring fish home for food. These incidents left the communities living around the park in fear of their lives. They fear that just as there was no justice for Celimpilo, there will be no justice for Thulani.

In the statements released by iSimangaliso on both incidences, they acknowledged the shooting but assumed the fishers were poachers87 and claimed that they shot as a reaction to fishers opening fire first. In the second incident, the rangers appear to not have cared for finding the wounded fisherman or the gun he allegedly used to fire at them. Following these incidents, a number of protests were held by communities in the area, and the LRC is supporting the Mdluli family with legal representation. Following the protests, the community met with DFFE, but to date there has been no meaningful actions taken by DFFE to put an end to harassment. It is reported by local fishers that they continue to face harassment by rangers to this day.

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80 Masifundise, “Fishers in KZN face on-going harassment from conservation authorities”.
81 Masifundise, “iSimangaliso World Heritage Site: Whose heritage? The hidden truth”.
82 Ibid.
83 DFFE, “People and Parks Programme”.
84 Masifundise. ‘Stop the violence and let us fish, plead Nibela fishers’, Fishersnet, February 2021
85 Masifundise, “Shooting and disappearance of Nibela fisherman at St Lucia”.
86 Ibid.
87 The statement calls Thulani Mdluli a ‘poacher’ without any evidence.
3.3. Dams and Freshwater Resources

South Africa is largely dependent on rivers, dams, and underground water for its water supply. Due to the fact that South Africa receives an average of less than 500 mm of rainfall per year, dams have been necessary to ensure sufficient water for drinking, growing food, and for industry. There are over 500 official state dams in South Africa, the oldest of which was built in 1880. The dams are also important for recreational purposes, as well as in the provision of food and nutrition for local communities who rely on small-scale fishing activities.

According to the National Water Act of 1998 (NWA), all water in South Africa is a national asset that is legally held under the stewardship and custodianship of the State, on behalf of all its citizens. However, the issue of access by inland small-scale fishers to freshwater resources becomes a land issue, as access to riparian areas is often inhibited by private land ownership, farms and lodges, or conservation areas, as the cases below show.

3.3.1. Case 5: Vanderkloof Dam - Conservation and private land ownership restrain communities’ control over access to natural resources

Vanderkloof Dam, situated on the border of two provinces (the Northern Cape and Free State), is the second-largest dam in South Africa, with the highest dam wall in the country, and a capacity of 3,187,557 million cubic metres. It was commissioned in 1977 and is fed by the Orange River. A hydroelectric power plant within the dam wall converts the energy of flowing water into electric power for the Eskom (South Africa’s energy producer) network. Water from the dam’s reservoir irrigates more than 100,000 hectares of surrounding farmland.

The communities of Keurtjieskloof, Petrusville (Northern Cape) and Luckhoff (Free State) are situated close to the Vanderkloof Dam. The total population is at 10,138 (2011 census). Fishing is the main source of livelihood for the communities. Keurtjieskloof is a township linked to Vanderkloof town, which was established to house the labour force constructing the dam. Both Luckhoff and Petrusville were established on farms owned by white British settlers in the late 1800s.

Aside from fishing, there are extremely few income opportunities within these communities that bring a consistent source of income. The majority of the population is either unemployed or benefiting from the Community Work Programme (CWP). Without any adequate and meaningful opportunities for income generation, natural freshwater resources have become the most important source of food security and income for households. Small-scale fishers living close to the Vanderkloof Dam are predominantly kraal fishers. Kraal fishers are those who catch fish by hand from rock enclosures (called kraals) that trap the fish in the low water levels caused by the opening and closing of the sluices below the dam wall. The area below the dam wall is a security zone due to the presence of the Eskom hydroelectric power plant at the dam wall. Through extensive engagement with the DWS, the authority responsible for the management of the dam and the security zone, small-scale fishers have been granted access to the security zone, provided they are able to present a kraal fisher identity card issued by the DWS. This concession requires ongoing engagements and meetings between the fishers and the DWS, and the maintenance of a relationship.

The Luckhoff fishers must travel 36 km to access the kraals, while Petrusville and Keurtjieskloof fishers must travel 20 km and 5 km, respectively. Transport is a major challenge for many in these communities, as there is no public transport operating in these areas, and many fishers therefore find themselves walking extremely long distances in order to catch a few fish. Although there are points of access to both the Orange River and the Vanderkloof dam that are closer and more easily accessible to Luckhoff than the kraals below the dam wall, these small-scale fishers are forced to make the long journey to the kraals as private land ownership and fenced-off zones prevent them from accessing any of the more suitable fishing sites. Despite water resources being a national asset, citizens are unable to access and benefit from it. When fishers are caught on private land or farms as a means of accessing the riparian areas, they are often arrested or fined for trespassing, and their gear is confiscated.

The fish are most productive between September and February, at which time the small-scale fishers go to the kraals daily in order to collect fish from the rock traps and feed their families. Sometimes they sell along the way for a small income, though this is considered “illegal” according to the recreational fishing permits they have. From March until August, the fish are less productive, and although the fishers still access the kraals, they undertake other activities. In these months, fishers use the ‘jigging’ method, in which they throw a piece of fishing line with a hook and some corn into the river or dam, and wait for a bite. Many do not own fishing rods, and use makeshift ‘Y’-shaped pieces of stick stuck into the mud to hold their lines up. Some of the fishers also practise ‘jigging’ at the Rolfontein Nature Reserve (accessible from both Petrusville and Keurtjieskloof). Previously, fishers were granted free access to the reserve at the Petrusville entrance, but in 2022, this privilege was removed and fishers now need to pay a R30 (approximately € 1,58) entrance fee. This is not an insignificant amount of money for someone who is unemployed, and the ability to catch and sell fish to make the money back is not guaranteed. Small-scale fishers have begun to engage with the Rolfontein Nature Reserve to negotiate for free access for those who are either unemployed or pensioned. Also in Vanderkloof, while small-scale fishers were previously accessing the dam for fishing activities at a boat launch site called Croilia Bay, this area has now become a private boat club, demanding an annual membership fee of R750 (around € 40).

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94 Le Maître et al., Strategic Water Source Areas.
95 South African National Committee on Large Dams (SANCOLD), “South African Register of Large Dams”.
96 InfoSA, “Vanderkloof Dam”.
97 CWP is a government initiative that provides a safety net for unemployed people of working age in South Africa. Presently, regular CWP participants work two days a week/eight days a month and receive R81/day in stipends. The work entails odd-jobs such as cleaning streets and picking up litter. The income generated from the CWP work is minimal (R 648 per month, which at current exchange rate is € 34.6) and does not cover the costs for basic needs such as food, energy, and sanitation.
Since small-scale fishers are unable to afford this, they have to find other fishing areas.

There was a recent win in 2022 for the small-scale fishers in this area: After years of the fishers’ engagement, consultations, and maintenance of a relationship with the DWS in Vanderkloof, a fishing site on the banks of the dam (known to fishers as the “Free State Side”) which was previously accessible only for the occasional recreational fishing competition during the tourist season, has been declared open for free access to all fishers during day time hours. The access to this site will expand the fishing capabilities of these communities and contribute to sustained realisation of their right to food and nutrition and related human rights.

3.3.2. Case 6: Gariep Dam - Issues of Access and Control, Private Land Ownership and Conservation

The Gariep Dam, bordering the Eastern Cape, Northern Cape, and Free State provinces, is the largest dam in South Africa. It was commissioned in 1971, with the primary purposes of irrigation, domestic and industrial use as well as for power generation. Within the 88 m high dam wall is a hydroelectric power station that contributes electricity to the Eskom network. The dam also serves recreational purposes and tourism, as well as fishing opportunities for the local communities.

The communities of Venterstad (Eastern Cape), Norvalspont (Northern Cape) and Gariep Dam (Free State), lie on the banks of the Dam and the Orange River. The total population of the three communities is at 7755. For these communities, fishing is first and foremost a way of life rather than a consistent source of income and their primary means of putting food on the table on a daily basis.

Similar to the Vanderkloof fishing communities (case 5), there are very limited employment opportunities in the area and many fishing community members therefore rely on the monthly South African Social Security Agency (SASSA) grants in order to survive. The amount of grants vary depending on the age of the recipient, but they make up the primary source of income for 24.4% of all households in the country.102 The lack of economic or developmental opportunities in the area thus makes the access to freshwater natural resources sine qua non for the realisation of the right to food and nutrition as well as other human rights for the small-scale fishing communities.

However, small-scale fishers on the Gariep Dam cannot always access their traditional fishing grounds due to several reasons. One of them is conservation and protected areas. The Oviston Nature Reserve (part of the Eastern Cape Parks and Tourism Agency - ECPTA, a regional state tourism authority), is a reserve that stretches from along the Southwestern border of the Gariep Dam in the Eastern Cape and lies between the Venterstad community and the dam. Small-scale fishers in Venterstad are engaged in an ongoing battle with the ECPTA authority in a request for recognition, inclusion in decision-making processes, and free-access to various fishing sites within the reserve. Until very recently, fishers were only allowed free access to one fishing site. Historically, they have been prevented from accessing this area due to hunting, as paying hunters received preference. However, as a result of continuous efforts and engagement with ECPTA, including a fisher-organised protest in April 2022, ECPTA has finally allowed fishers access to the area throughout the year, including the hunting season.

Another challenge is the establishment of a private resort for tourism and charging of entrance fees. Gariep A Forever Resort103 is a private resort situated within the Gariep dam community. It has privatised the most easily accessible stretch of prime fishing grounds, with the owners charging an R80 (€4.15) daily entrance fee in order to access these fishing grounds. The fishers have engaged with the owners, in attempts to build a relationship of trust and a plea for free access. Thus far, only a handful of fishers have been granted this concession. To the North of the community lies the Gariep Dam Nature Reserve (charging R30 (€1.56) entrance fees), and to the South of the community lies the Ruigtevlei Substation (an old Eskom power plant) where fishers are no longer allowed to access. Impoverished and unemployed community members cannot afford to pay these fees, and are thereby forced to risk fishing illegally or jumping over the fences of the Substation.

While the Norvalspont community faces similar challenges in accessing the Orange River due to private farms, a lodge (the Waschbank River Lodge), and the Gariep Dam Nature Reserve, fishers are increasingly being criminalised. On 14 November 2021, the body of a small-scale fisher was found hanging from a fence bordering the Orange River. His community members suspect he has become a victim of criminalisation for fishing, the only means of subsistence. While the fishers’ family did file a case with the South African Police Service (SAPS), it is still under investigation and has not yet been resolved.

In another case, three fishers from Norvalspont were charged with “unlawfully entering or remaining in a special nature reserve or world heritage site” in the Eastern Cape, and each fined R1000 (€51.60). The fishers did not remain silent and are demanding their human rights: they wrote a letter to the Venterstad Municipality, explaining their case, and highlighting the importance of fishing to be able to put food on the table. Their fines were later dropped.

3.3.3. Case 7: Jozini Dam- Traditional Practices and Access Rights

Jozini Dam (formally known as the Pongolapoort dam) is located on the Pongola river. It is situated in the uMkhanyakude District in Northern KwaZulu Natal and is approximately 280 km north-east of Durban and south of the border with Eswatini. The Pongola floodplain is one of the most biologically diverse ecosystems in South Africa, comprising lagoons, lakes, forests, levees and floodplains, with grasslands providing for a wide

102The SASSA grant amounts are as follows: Older Age (60-74 years old)- R1990 (€105), Older Age (75+ years)- R2010 (€106), War Veteran’s- R1990, Disability- R1990, and Care Dependency-R1990. (Careers Portal, 2022). 103Gariep, A Forever Resort is a private resort that used to be called Aventura and was a public private partnership. The Forever Resort group took over this space in 1992 and soon after implemented a daily entrance fee. 104Van Vuuren, “Development steeped in controversy”.
variety of birds, fish and animals.\textsuperscript{104} Construction of the Jozini dam commenced in 1969 and was completed in 1973. At the time of its construction, it was the largest dam in South Africa. It was built with the capacity to provide irrigation for 45 000 hectares of land, specifically aimed at benefiting commercial farms in an effort to promote economic growth.\textsuperscript{105} Its construction, however, prompted the forcible removal and relocation of the amaThonga people who had lived adjacent to the Pongola river for many generations, leaving behind their ancestral graves and altering their traditional ways of life. Without access to the river, people no longer had fish to eat and no water for household use, crops and livestock.\textsuperscript{106}

The construction of the dam also affected the natural flow patterns of the Pongola river, and the communities’ ability to fish. Historically, local people were able to catch fish with makeshift fishing rods or used pieces of cloth to catch fish (so-called Umfhonya system), while women, in addition to fishing, also contributed to household income through selling of weaved baskets with natural plant material. This was at a time when the water was much shallower and the river was still flowing naturally. An elderly woman from the area recall:

\begin{quote}
WE NEVER HAD TO BUY FISH, WE WOULD SIMPLY CATCH IT OURSELVES. WE WOULD USE THE BLANKET METHOD TO CATCH FISH IN PONGOLO WHEN THE WATER WAS LOW. EVERYONE WAS PART OF FISHING WHEN WE GREW UP...UNCLES, BROTHERS AND FRIENDS.\textsuperscript{107}
\end{quote}

With altered flow of the river water, these traditional fishing methods can no longer be used and many women who were previously able to fish for themselves are now unable to do so. This is largely due to the steep cliffs that surround the dam, making it difficult to fish from the edge of the dam and requires one to enter the water with a boat.\textsuperscript{108} For the local community, this is perceived as a dangerous endeavour, especially because the boats that some of the small-scale fishers use are self-made and do not necessarily meet safety standards. Many times, fishers take a risk using these self-made boats as they cannot afford to buy certified boats. Due to the danger posed in accessing the dam, women are reluctant to fish, and are becoming dependent on male family members or acquaintances. They now buy fish from others and resell it, or keep it for their own household consumption. Women’s active agency has diminished due to this increased dependency, in particular, for women-led households.\textsuperscript{109}

While men are engaged in fishing, they are currently fishing without legal access rights to the dam and thus often become victims of harassment and are criminalised for their fishing practices. Fishers in this area have become accustomed to the use of gillnets which is illegal, thus threatened to be criminalised and harassed by law enforcement authorities such as the South African Police Service (SAPS).

According to the traditional leaders of the area, they were never informed about the nature of the dam that was to be constructed, and the extent to which it would change their lives and livelihoods.\textsuperscript{110} Due to lack of information and consultation, they were under the impression that there would merely be some adjustments made to control the flow of the water and feel deceived by the State. Today, Jozini dam area is characterised by underdevelopment, unemployment, and poor service provision.\textsuperscript{111} It also has the worst child malnutrition rate in the country.\textsuperscript{112} Despite having the dam within their vicinity, the residents in Jozini and the surrounding areas are living in absolute poverty with little to no income in order to sufficiently sustain their livelihoods. They have also suffered many years from insufficient and erratic water supply.\textsuperscript{113} This stands in contrast to the tourism industry that has developed along the banks of the Pongola river in the form of lodges and game reserves, where recreational fishers are allowed to fish. The vast difference in the economic activities of the local people and the surrounding tourism industry, that caters for those seeking leisure and recreational activities, is evident. It is said that although the tourism industry is large, it is not big enough to be a source of widespread job creation in the area.\textsuperscript{114} It has also been pointed out that the Jozini Municipality’s Local Economic Development (LED) office has thus far failed to secure inclusion for local people in the agriculture and tourism sectors that are being served by the dam.

However, in anticipation of the implementation of the freshwater fisheries policy, local fishers, together with members of the community, including women, are in the process of engaging with the Municipality’s LED office, as well as the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs, through roundtable discussions organised by Masifundise. To this effect, they are in the process of forming an organisation in order to be in a better position to advocate for their fishing rights.

4. Analysis using the SSF Guidelines and South African Legal/Policy Frameworks

In the following section, the status of the SSF Guidelines implementation by South Africa (including state actors) will
be assessed, by applying the SSF Guidelines, South African Constitution and relevant national policies, as well as the UNDROP, thereby focusing on the following areas: i) tenure and the right to fisheries and land, ii) consultation and participation, iii) criminalisation, violence and access to justice, iv) social development and access to social services, v) ecosystem destruction and the right to a safe, clean and sustainable environment, and vi) gender equality and equity.

4.1. Tenure and Right to Fisheries and Land

For small-scale fishers world-wide, water and land are inseparable and indispensable resources for the realisation of their human rights, and thus fisheries tenure must encompass this broad livelihood context, ensuring not only the right to access and control over water resources and fishing grounds, but also the rights of small-scale fishers to coastal, inland and riparian lands for residential (housing), cultural (sites of workshop, areas where traditional medicines are collected), and occupational purposes (e.g. landing, pressing, storing gears and boats), and that small-scale fishers simply be allowed to pass through to access water resources. Because many small-scale fishers also are engaged in non-fishing activities as part of their coping strategies to make ends meet, their access to resources relevant for these activities as well as any other natural resources that produce additional sources of livelihood must be ensured.115

All the cases presented above depict how different actors, both state and non-state, continue to abuse and violate the tenure rights and human rights of small-scale fishers in South Africa, through actions and omissions. The Government of South Africa has failed to recognize the tenure rights of small-scale fishers, in contrary to SSF Guideline 5.3, which states that “States, in accordance with their legislation, should ensure that small-scale fishers, fish workers and their communities have secure, equitable, and socially and culturally appropriate tenure rights to fishery resources (marine and inland) and small-scale fishing areas and adjacent land (…)”.116

It is also to be highlighted that, while the SSFP designates the relevant Minister to establish fishing areas for small-scale fishing communities, as well as process and procedures in relation to allocation, recognition, and management of access and use rights, the identification of small-scale fishers was problematic (as detailed in Section 2.3. of the report) and the implementation of the SSFP - and thus ensuring tenure rights for small-scale fishers - is yet to be seen. The cases show how denial of access is taking place (or threatened, in the case of Ebenhaeser / Papendorp) due to the advancement of the Blue Economy through mining, conservation and marine protected areas, dams, private landholding (tourism, lodges, farming) and in several cases such as Port Nolloth, Dwesa Cwebe, Vanderkloof, and Gariep Dam, adjacent territories to water resources are closed off for small-scale fishers, or require payment which makes access extremely difficult and almost impossible.

In the cases of Vanderkloof and Gariep, respective state authorities (DWS and ECPTA) have granted access to fishing grounds after several years of constant engagement. This is a positive development and shows the Government’s willingness and intention to implement SSF Guideline 5.6, however, as these institutions are not fisheries departments, they do not feel responsible for the concerns of small-scale fishers. Here, the government should strive for better cross-sectoral collaboration and promote institutional structures and linkages toward achieving, in line with SSF Guideline 10.5, the core objectives of the SSF Guidelines.

In Dwesa Cwebe, the customary fishing rights are acknowledged and spelled out in the Supreme Court of Appeals (SCA) decision. Yet, no action has been taken by the responsible authority to duly implement the decision of the SCA. In this sense, the Government of South Africa has failed to respect SSF Guidelines 5.4, which explicitly calls for the recognition, respect and protection of “all forms of legitimate tenure rights, take and protect all forms of legitimate tenure rights, taking into account, where appropriate, customary rights to aquatic resources and land and small-scale fishing areas enjoyed by small-scale fishing communities.” In the case of Jozini Dam, fishers were forcibly removed and relocated, leaving behind their ancestral graves (which were eventually lost as they were submerged in water) and driven away from the source of water, which not only provided them livelihood, but water essential for living. This is against SSF Guidelines 6.2 and Guiding Principle 2 (Respect of Cultures). The actions and omissions of the Government of South Africa are also in breach of UNDROP’s Article 17 (the right to land of peasants other people living in rural areas and the right to have access to, sustainably use and manage land and the water bodies, coastal seas, fisheries), in particular Article 17.3 which requires the State to “provide legal recognition for land tenure rights, including customary land tenures, and to protect legitimate tenure and ensure that fishers’s rights are not infringed” and Article 5 which underlines “the right to have access to and use in a sustainable manner the natural resources present in their communities that are required to enjoy adequate living conditions (...).”

4.2. Consultation and Participation

Consultation and participation is one of the guiding principles of the SSF Guidelines and calls for active, free, effective, meaningful and informed participation of small-scale fishers and their communities in decision-making processes. It reinforces the idea that small-scale fishers who will be affected by changes need to be involved. For example, when a government is developing new policies or services (such as Operation Phakisa, or the SSFP), it needs to consult with small-scale fishers who will be impacted and create open channels of communications.116

In the elaboration of the National Freshwater (Inland) Wild Capture Fisheries Policy, while small-scale fishers actively took part in various consultations and submitted their proposals, these were not included in the actual policy. This is also the case in Ebenhaeser and Port Nolloth: despite fishers’ participation and consultation in the EIA process, none of their comments and submissions were considered. In order to achieve the objectives outlined in SSF Guidelines, consultation and participation with small-scale fishers as laid out in SSF Guideline 5.10, which calls states to “consider the social, economic and environmental impacts through impact studies, and hold effective and meaningful

consultations with these communities, in accordance with national legislation” cannot merely be formal or tokenistic, but must have actual impact on decisions taken by the State.

In Dwesa Cwebe and Kosi Bay, fishers and fisher communities were left out of participation in decision-making and management of the marine spatial areas. In Jozini, fishers were not thoroughly informed about the impact of dam construction. Thus, in these cases, the government disrespected not only SSF Guidelines 5,10, but also SSF Guidelines 5.15 which calls for participation in the design, planning and, as appropriate, implementation of management measures, including protected areas affecting livelihood options. This also contradicts SSF Guidelines’ Guiding Principle 6 (Consultation and Participation), which highlights, aside from ensuring “active, free, effective, meaningful and informed participation and decision-making process in fishery resources and all areas where small-scale fishers operate (including adjacent land areas) to take consideration of power imbalance between parties. Thus, calls for the inclusion of “feedback and support from those who could be affected by decisions prior to these being taken, and responding to their contributions”. The right to participation of fishers in matters that affect their lives, land, and livelihoods is also recognized in UNDROP Article 10 and 11. There are also several South African legal provisions, such as the National Environment Management (NEM); Protected Areas Act 2003, NEM: Biodiversity Act of 2004, and specific to marine protected areas, and the NEM: Integrated Coastal Management Act of 2008, and the MLRA (1998, revised 2004) that highlight the need for communities to participate in management and decision-making, gain equitable access to resources and to share in the benefits of protected areas.

By making the formation of cooperative the only means for granting fishing rights to small-scale fishers, and registering and verifying bona-fide small-scale fishers and communities using the criteria set out by DAFF (who did not consider the comments submitted by the fishers on the proposed regulations), South Africa failed to implement SSF Guidelines 5.3 which calls for states to “take appropriate measures to identify, record and respect legitimate tenure right holders and their rights”, and that when considering which activities and operators are considered small-scale, that States are to identify vulnerable and marginalised groups needing greater attention, and to ensure that “such identification and application are guided by meaningful and substantive participatory, consultative, multilevel and objective-oriented processes so that the voices of both men and women are heard”. The actions of the government have also disregarded UNDROP Article 9.1 “the right to form cooperatives (...) for the protection of protection of their interests (emphasis added), and to bargain collectively” and UNDROP Article 9.3 “States shall take appropriate measures to encourage the establishment of (...) cooperatives (...) particularly with a view to eliminating obstacles to their establishment and “provide them with support to strengthen their position (...).”

4.3. Criminalisation, Violence, Access to Justice

Often, as shown in several cases, when fishers whose primary means of subsistence is fishing are denied access to prime fishing grounds and marine resources, they are forced to fish illegally or enter “off-limit” areas because no alternatives are given, and fall prey to violence, criminalisation and killings by private rangers who patrol conservation and marine protected areas. In Dwesa Cwebe, Kosi Bay, Jozini Dam, and Gariep Dam, incidences of criminalisation and shootings of small-scale fishers should have been avoided by the Government by creating conditions for small-scale fishers and their communities to be able to “carry out fisheries-related activities in an environment free from crime, (...) violence, corruption and abuse of authority” (SSF Guidelines 6.9). Also, as no one ranger has been brought to justice till date, the Government has failed to ensure access to justice for small-scale fishers in Dwesa Cwebe, Kosi Bay, Jozini Dam and Vanderkloof as it should have “institute(d) measures that aim to eliminate violence and (...) ensure(d) access to justice for victims of inter alia violence and abuse (...).” according to SSF Guidelines 6.9. UNDROP Article 8.4 also addresses the action to be taken by the State to ensure “protection by the competent authorities of everyone, individually and in association with others, against any violence, threat, retaliation, de jure or de facto discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise and defence of the rights described in the present Declaration.”

The killings and shootings of small-scale fishers is also a breach of the right to life (Chapter 2 Section 11) recognised in the South African Constitution. The criminalisation of fishers in Dwesa Cwebe and Kosi Bay, in particular, occurs due to fishers practising their customary fishing activities, and as long as these activities are not in contravention of the Constitution, then the Constitution recognises the exercising of cultural life (Chapter 2 Section 30 - Language and Culture). All people in South Africa have the right not to have their possessions seized (Chapter 2 Section 14), which is violated when rangers confiscate fishing gear from fishers in Gariep Dam and Kosi Bay as examples.

It is also to be highlighted that the permits currently available to inland fishers consider the selling of fish an offence, thus inland fishers in the cases of Vanderkloof, Gariep Dam, and Jozini, face the risk of being criminalised when they sell fish to make additional income to ensure livelihood. Also, in the cases of Kosi Bay and Jozini, use of traditional fishing gears such as gillnets is banned. This contravenes also with SSF Guidelines 6.9. In cases of Kosi Bay and Jozini, the State, instead of criminalising the use of traditional fishing gears, should support the practice of small-scale fishing communities as per SSF Guideline 11.6.

4.4. Social Development and Access to Social Services

SSF Guidelines place social development and access to social services in the context of human rights and emphasise the need for empowerment of small-scale fishers to enjoy their human rights (SSF Guidelines 6.1). Recognizing that small-scale fishing communities often reside in remote areas, lack alternative livelihoods, and have limited access to social services, SSF Guidelines 6.2 calls for affordable access to health, education, and skills (to generate added value to the fisheries resources) as well as essential services, including housing, basic sanitation, drinking water for personal and domestic use, and sources of energy.

SSF Guidelines 6.7 also requires states to take steps toward progressive realisation of an adequate standard of living and work in accordance with international human rights standards and SSF Guidelines 6.8 clammers for the development of complementary and alternative income generating opportunities in addition to earning from fisheries related activities. The right to social security, including maintenance of social protection floors (also
basic income security) is acknowledged in Article 22 of UNDROP. Likewise, the right to water for personal and domestic use is guaranteed in Article 21 of UNDROP. These rights as well as several guidelines (6.1, 6.2, 6.7, 6.8) are violated and disrespected in the cases of Vanderkloof, Gariep, and Jozini, as fishers and their communities do not have sufficient and adequate access to essential services (lack of sufficient water in Jozini and health facility out of reach in Dwesa Cwebe) as well as lack of social and economic development and no alternative means of livelihood (insufficient monthly social security grant (Gariep) and employment program (Vanderkloof)). The Bill of Rights in the Constitution of South Africa also recognises the right to access to “health care services, (...) sufficient food and water; and social security, including, if they are unable to support themselves and their dependents, appropriate social assistance”. The experience of these communities illustrates that these rights are being undermined.

4.5. Ecosystem Destruction - Right to a Healthy Environment

Realisation of small-scale fishers’ rights also depends on the rich ecosystem, biodiversity, and healthy environment of natural resources, in particular inland and marine resources. Therefore, the objective of SSF Guidelines is to promote the contribution of small-scale fisheries to “environmentally sustainable future for the planet and its people.”

In cases of Ebenhaeser and Port Nolloth, mining and the advancement of the Blue Economy is not only denying them access to their traditional fishing grounds, mining activities of various minerals - copper, sand, gold ore, diamonds, rare earth, etc. - will negatively impact the environment, marine and coastal ecosystem, and destroy fishing grounds, and affect fishers' catch as already seen in Port Nolloth. In Port Nolloth, the construction of cofferdams was done illegally. This is in direct contravention of the SSF Guidelines which speak to the need for “responsible and sustainable use of aquatic biodiversity and natural resources to meet the developmental and environmental requirements of present and future generations”, SSF Guideline 5.6 which requires the State (when it is the owner of land and water resources) to “determine the use and tenure rights taking into consideration, inter alia social, economic and environmental objectives” and safeguard publicly owned resources which are collectively used and managed by small-scale fishers, SSF Guideline 5.10 which ensures prior to the implementation of projects that might impact small-scale fishing communities to consider social, economic, and environmental impacts through impact studies and hold effective and meaningful consultation with these communities in accordance with legislation, and SSF Guideline 5.14 which demand sustainable use of resources and maintenance of ecological foundation for food production.

For environmental impact assessment, in particular, the State should recognize small-scale fishers as “holders and providers of knowledge” in line with SSF Guideline 11.4 so they can be actively involved in decision-making and inform sustainable fisheries processes (for example in the case of Port Nolloth). Also, in both cases, small-scale fishers are already practising fishing in line with SSF Guideline 5.14 which “minimise harm to the aquatic environment and associated species and support the sustainability of the resource.” It is also contrary to the South African Constitution Chapter 2 Section 24 which states that everyone has the right to “an environment that is not harmful to their health or wellbeing, and to have the environment protected for the benefit of past, present and future generations.” The Government must also ensure that it respects SSF Guidelines’ Guiding Principle 10 (Economic, social and environmental sustainability) which underlines the application of “precautionary approach and risk management to guard against undesirable outcomes, including overexploitation of fishery resources and negative environmental, social and economic impacts.” Here, the Government has also failed to respect the right to a safe, clean and sustainable environment recognized in UNDROP Article 18, in particular 18.4 which states that “States shall take effective measures to ensure that no hazardous material, substance or waste is stored or disposed of on the land of peasants and other people working in rural areas”.

4.6. Gender Equality and Equity

Gender equality and equity is one of the main guiding principles of the SSF Guidelines (Guiding Principle 4), recognising that it is fundamental to any development, and thus the vital role of women in small-scale fisheries, equal rights and opportunities should be promoted (SSF Guidelines paragraph 3.1.1).

In the implementation of the SSFP, although the policy recognises and prioritises women, the regulations for its implementation do not. This implies that thousands of fisherwomen were excluded in the verification of small-scale fishers across the country. The inland fisheries policy, on the other hand, does not even mention women as important actors in small-scale fishing communities although they contribute to harvesting and are engaged in the value chain of small-scale fisheries’ activities. It is evident that the DFFE did not use nor obtain gender disaggregated information in the development of the policy, despite the fact that it was developed after the adoption of the SSF Guidelines. This leaves a critical gap in the understanding of the inland small-scale fisheries sector, and therefore fundamental omissions in the regulatory framework.

The case of Jozini dam illustrates how women are adversely affected in situations of tenure loss, and what this means for families’ livelihood. Due to the dam construction and subsequent change of water flow, women no longer can practise their traditional fishing system and have become dependent on men in sustaining their livelihood and feeding their families. The State failed to act upon ensuring women’s tenure rights against the SSF Guiding Principle 4 and SSF Guidelines 5.3, which requires states to “ensure appropriate tenure rights to fishery resources (marine and inland) (...) with a special attention paid to women with respect to tenure rights”. While some women were identified as bona-fide fishers, often women have not been recognised as fishers (as they are not engaged in fishing but in the value chain), and were denied participation in cooperatives. This is in contrast to the SSFP as well as SSF Guidelines 8.2 which encourages women’s participation in fisheries organisations and the support needed for women toward organisational development.

117Masifundise. Coastal Threats Small-scale Fishers’ Livelihoods along the Northern Cape Coastline. 2018

118Masifundise, “When hungry, the children look towards me”. 23
5. Recommendations

Based on the seven cases and analysis of the implementation of the SSF Guidelines by South Africa, Masifundise would like to make the following recommendations to the Government of South Africa on the specific cases addressed in this report as well as a series of general recommendations towards the implementation of the SSF Guidelines and the realisation of small-scale fishers’ right to food and nutrition and related human rights. Although the recommendations are case-based, they represent nonetheless the challenges and human rights violations that are experienced across South African small-scale fishing communities, both coastal and inland. These recommendations are also indicative of a way forward for the implementation of the SSF Guidelines in South Africa and beyond.

5.1. Case Recommendations:

For each of the cases covered in this report, the following is recommended:

Case 1: Ebenhaeser/ Papendorp
1. The State, and specifically the DFFE, must protect small-scale fishers’ access to aquatic resources over and above the exploration and surveying rights for minerals that are being granted to international oil and other mining companies in the advancement of the Blue Economy, adjacent to fishing grounds, in line with SSF Guidelines 5.3 and 5.7, focused on securing access rights to fishery resources and ensuring that small-scale fishers are considered before third party resource users.
2. The DEAT should conduct a Strategic Environmental Assessment of the coastline in order to understand the cumulative impacts of the various prospecting, mining, and drilling activities, in order to ensure the above recommendation can be met, and access to natural resources by small-scale fishers can be ensured.
3. Necessary actions must be taken by the State, in collaboration with small-scale fishers, their communities and other relevant actors, to declare the Olifants River Mouth a community-managed protected area, in order to prevent the expansion of mining activities, in line with SSF Guideline 5.5 which recognises the role of small-scale fishers in conserving and protecting natural resources.

Case 2: Port Nolloth
1. The State must ensure that fishers have access to traditional fishing grounds by allowing entry to private access roads to the North and South of Port Nolloth, to assist fishers in achieving “secure, equitable, and socially and culturally appropriate tenure rights to fishery resources”, as stated in SSF Guideline 5.3.
2. The State must act upon the above-mentioned report submitted by the Aukotowa cooperative in Port Nolloth on the impacts of cofferdam mining on their livelihoods, and take action against the illegal cofferdam mining activities that cause long-lasting destruction of the coastline and ecosystem, in alignment with SSF Guidelines 5.3, 5.5, 5.13, and 9.3, ensuring the tenure rights to fisheries resources, recognising the role of small-scale fishers in conserving their ecosystems, ensuring sustainable fisheries, and to “take steps to address (…) destruction of coastal habitats due to human induced non-fisheries-related factors”.
3. The DFFE should commission collaborative research on the WCRL species abundance and distribution in the Northern Cape, as well as the impacts of mining on this species, in line with the strive for sustainable fisheries in SSF Guidelines 5.13. The local knowledge of traditional fishing communities must be incorporated in this exercise.

Case 3: Dwesa Cwebe
1. Steps must be taken by the State to implement the SCA decision of recognition of the customary rights of small-scale fishers on the ground, in line with SSF Guideline 5.4.
2. The State needs to take steps to stop the criminalisation, harassment, and human rights violations of fishers, and the inherent use of violence by rangers in the Nature Reserve must be investigated, allowing fishers to carry out their livelihood activities in an environment free from violence, in alignment with SSF Guideline 6.9, and ensuring that law enforcement authorities have a full understanding of the rights of small-scale fishers.
3. The DFFE must implement co-management, in alignment with the SSFP, and ensure that fishers are included in decision-making processes around the management of the MPA and the protection of their rights, towards meeting SSF Guidelines 5.15.

Case 4: Kosi Bay and iSimangaliso
1. The State must take immediate actions to investigate the killings of fishers and to put an end to the harassment and criminalisation of fishers, in line with SSF Guideline 6.9 focusing on the creation of a violence-free work environment for SSF.
2. The report on the investigation into the death and disappearance of the Nibela fishers must be made publicly available, and similarly, the reports of all investigations into claims of shooting or harassment must be made publicly available. There must also be a responsibility on DFFE to put pressure on the SAPS to conclude these investigations.
3. Small-scale fishing cooperatives must be involved in the development of any restrictions that apply to their permit conditions with regard to accessing fishing grounds within MPAs, as well as the use of their fishing gear such as small boats and gillnets, aligning with the involvement of small-scale fishers in the planning, implementation and management of protected areas in SSF Guideline 5.15.
4. The DFFE needs to conduct research on the impacts of gillnets on the ecosystem based on traditional and indigenous knowledge systems, towards the inclusion of the knowledge, culture, traditions and practices of small-scale fishers in research, as outlined in the SSF Guideline 11.6.

Case 5: Vanderkloof Dam
1. The State must take steps to ensure that pensioned and unemployed small-scale fishers have free access to the Rolfontein Nature Reserve, and that small-scale fishers have appropriate and equitable access to the Orange River and Vanderkloof dam, while they await the implementation of the Inland Fisheries Policy, ensuring equitable access to resources, aligning with SSF Guidelines 5.8.
2. An enabling environment must be created by the State for economic development and essential services in these communities, in line with SSF Guideline 6.1.
5.2. General Recommendations

Further to the case-specific recommendations, the following general recommendations are made towards the implementation of the SSF Guidelines in South Africa:

5.2.1. Secure tenure and land access rights of small-scale fishers
The State must ensure that small scale fishers’ tenure rights and access to natural resources are respected and protected and their fishing rights guaranteed. This means that the Government must ensure that fishers have secure access to land for residential, cultural, and occupational needs, including allowing fishers to pass through in order to access fishing sites. Denial of access to natural water resources (both marine and riparian) by small-scale fishers must come to an end, for the realisation of the human rights of small-scale fishers (SSF Guidelines 5.3, 5.4, 5.5). The Government must also ensure that the ecosystem health is protected, and that extractive activities and the advancement of the Blue Economy through Operation Phakisa do not undermine and impact on the ability of small-scale fishers to access natural resources now and in the future.

5.2.2. Stop the violence and criminalisation of small-scale fishers
Linked to secure tenure rights to access fishing grounds, the criminalisation of fishers in practising these rights must come to an end. The Government of South Africa must ensure that those responsible for the harassment and shootings of small-scale fishers practising their livelihood activities are held to account. An enabling policy environment must also be supported, to ensure that fishers who have been forced to fish illegally can perform fisheries-related activities in an environment that is free from criminalisation, violence, corruption and abuse of authority (SSF Guideline 6.9). Officials (including conservation agencies) and private rangers must be trained to be sensitive to this and stop misconduct and the use of excessive force against small-scale fishers.

5.2.3. Build small-scale fishers’ capacity to implement bottom-up co-management
The Government of South Africa must ensure that small-scale fishing communities can actively be involved in the management/co-management across the coastline and inland, and development of natural resources and protected areas across the country (SSF Guidelines 5.5 and 5.15). To this effect, the Government must provide the necessary support for the development of small-scale fishers’ capacity, with the inclusion and representation of women (SSF Guideline 5.18). In particular, the DFFE should extend the co-management from its singular pilot in the Eastern Cape,115 to the rest of the small-scale fishing cooperatives, and enable the fishers to have agency in their livelihoods. To this effect, small-scale fishers must be allowed to participate in decision-making processes and be consulted on decisions that will impact on their livelihoods (SSF Guideline 12.4).

5.2.4. Develop strong small-scale fishing cooperatives and implement policy effectively
The implementation of both the SSFP and the Inland Fisheries policy must consider the context-specific variances across culture, traditional fishing practices, ecosystems, and socio-economic situations in order to meet different needs and provide the most benefit for communities and cooperatives. Those cooperatives that are established under the SSFP need to be supported, trained, and receive ongoing mentorship, in order to build the capacity of these communities to be able to effectively use the tools at their disposal to advance their sustainable development and realise their right to food and nutrition. The Government of South Africa must also learn from its failure in implementing the SSFP on the coast, pursue the Inland Fisheries Policy in an inclusive and holistic manner, adopt a bottom-up approach and focus on the inclusion of women (SSF Guideline 10 - Policy coherence, institutional coordination and collaboration).

5.2.5. Recognise the customary rights of small-scale fishers
Customary law in South Africa is equal to statutory law, provided it is not in contravention of the Constitution of South Africa. Customary rights and customary systems of law need to be recognised, respected and promoted in all areas of the planning, management and evaluation of small-scale fisheries. MPAs should respect, protect, and contribute towards the livelihoods, customary and other human rights of small-scale fishers. MPA regulations in South Africa need to be brought in line with the amended MLRA and the SSFP, to ensure that fishers are prioritised in decision-making processes and that they are not denied access to traditional fishing grounds, especially tenure to which they have been granted fishing rights (SSF Guideline 5.4).

5.2.6. Ensure gender equity and equality in small-scale fishing communities
Gender mainstreaming should be integral to all small-scale fisheries development strategies, and in the implementation of the SSFP and the Inland Fisheries Policy in South Africa, women need to be empowered to exercise their rights to participate in decision-making processes and the management of the natural resources. Women must be trained to participate in and benefit from the marketing, value-adding, and processing of fish and natural resources, and should be equally represented within institutional structures (SSF Guidelines 8.1 and 8.3).

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115The DFFE has implemented a 6 month long co-management pilot project in Port St. Johns, Eastern Cape, to create baseline information on the implementation process for monitoring and evaluation. However, the next steps in expanding this project have not yet been outlined publicly.
5.2.7. Build capacity towards the implementation of the SSF Guidelines
The SSF Guidelines still remain unknown to many authorities who are duty-bears and thus play a key role in the promotion of small-scale fishers’ realisation of human rights. Raising awareness about the SSF Guidelines is key to implementing them, and capacity needs to be built within the DFFE and other implementing bodies and actors that have an impact on the lives of small-scale fishers, through awareness raising campaigns, and targeted information sharing workshops.

The government of South Africa should ensure and support people and small-scale fisher centred monitoring of the implementation of the SSF Guidelines as a continuous process in South Africa, and where possible, also globally. (SSF Guideline 13- implementation support and monitoring). FAO should remain committed to supporting the implementation of the SSF Guidelines by South Africa and collaborate with small-scale fishers and fishing communities on the path toward the progressive realisation of the right to food and nutrition.

6. Conclusion
The analysis of SSF Guidelines implementation on seven selected cases illustrates the extent to which South Africa, despite its progressive Constitution and small-scale fisheries legal and policy framework, and international human rights law and standard to which South Africa has committed to guarantee and act upon, has failed to use and apply the SSF Guidelines toward supporting the progressive realisation of the right to adequate food, the main objective of the SSF Guidelines. Small-scale fishers across South Africa continue to face abuses and violations of their human rights, in particular, the right to food and nutrition and related rights due to denial of their tenure rights, access and control over natural resources and fishing grounds, as well as persistent violence and criminalisation against small-scale fishers, in breach of their human right to life.

Small-scale fishers are also denied adequate social security schemes and no efforts have been made by the Government of South Africa to promote women fishers’ participation and decision-making. In the face of increased issuance of prospecting and mining licences by the Government, fisheries resources continue to be eroded and exploited.

Notwithstanding, the cases also manifest how small-scale fishers do not remain silent; as active agents for change, they continue demanding their human rights to be respected, protected and fulfilled. Here, the SSF Guidelines (and also this report) can serve as one additional tool in their struggles, thereby holding the Government accountable vis-a-vis its human rights obligations, while also contributing to the efforts of South Africa in implementing and monitoring the SSF Guidelines as prescribed in SSF Guideline 13.4. Monitoring the implementation of SSF Guidelines is thus an ongoing endeavour.

In line with the envisaged spirit and global scope of the SSF Guidelines, Masifundise invites all fisher communities and movements worldwide, and all members of the IPC to apply bottom-up people’s monitoring of the SSF Guidelines, and call on governments as well as FAO’s commitment towards the implementation of the SSF Guidelines and support such efforts on the ground.

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SA Register of Large Dams

Customary governance and expressions of living Customary Law


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A small-scale fishers meeting in Kosi Bay (photo by Masifundise)

The neglected jetty in Port Nolloth (photo by Masifundise)

The Gariep Dam wall (photo by Masifundise)

The Venterstad and Norvalspont fishers protest at ECPTA, April 2022 (photo by Masifundise)