

The intersection of customary law and environmental protection

November 2018

It shouldn't be possible for the state to criminally prosecute a person for exercising their legal rights. This was, however, exactly what happened to Mr Gongqose and other members of the Dwesa-Cwebe community after they were arrested for fishing in the Dwesa-Cwebe Marine Protected Area without a fishing permit.

They argued that they were not acting unlawfully because they were fishing according to their generations old customs and traditions. They were, however, convicted and given a suspended sentence on condition that they didn't enter the marine protected area again without a permit. After appealing unsuccessfully to the High Court, the matter came before the South African Supreme Court of Appeal.

The Supreme Court set aside the criminal convictions. The court found that the Dwesa-Cwebe community had a constitutionally protected customary right to fish in the marine protected area. At the time the laws governing the marine protected area didn't extinguish the community's customary rights, and they were accordingly acting lawfully when they entered the marine protected area to fish.

This judgement has been wrongly criticised using the argument that environmental protection laws can now be circumvented by communities. This argument was, however, considered and rejected by the court. The court recognised that there may be a conflict between the right to a protected environment and cultural rights, but found that these can coexist. The Dwesa-Cwebe community has a direct interest in ensuring the protection of their resources. Their customary laws ensured the continued protection of the environment, and were not inconsistent with the right to a protected environment.

It should, however, be kept in mind that this case dealt with the provisions of the relevant law before it was amended to specifically deal with customary rights.

Questions that the court considered

If the community members were exercising customary rights when they entered the marine protected area, then their actions of fishing without a permit would be lawful, and their criminal convictions would have to be set aside.

The legal questions the court considered were, (i) did the Dwesa-Cwebe community have a customary right to access the marine protected area and use the marine resources; and (ii) if so, then did the Marine Living Resources Act ("**MLRA**") extinguish these customary rights?

Did the Dwesa-Cwebe community have customary rights?

Members of the community, anthropologists and researchers gave evidence on the Dwesa-Cwebe community's customs and traditions.

The Dwesa-Cwebe community had lived in the area of the marine protected reserve for more than 300 years before the areas were annexed by the Cape government in 1885. In the 1930's the community was physically removed from the area to give white farmers access to the land. Further removals of community members occurred during the 1970's, and the reserves were fenced in 1975. White families were allowed to stay in the fenced reserve areas, but the black community was denied access.

The community relied heavily on marine resources for healing, ancestral ceremonies, and to feed their families. Families sold surplus fish to afford to maintain and educate their children.

The community passes down an appreciation of the natural environment from generation to generation. From a young age children are taught the skills and traditions of fishing. There was a long standing and well developed system of customary law that regulated access to the marine resources. These traditions included rules for the allocation of fishing spots and settling disputes, and rules prohibiting catching spawning fish and fish under a certain size.

The court accordingly held that "since time immemorial" Dwesa-Cwebe community had a tradition of utilising the marine and terrestrial natural resources, and thus had a right to continue to exploit these natural resources under customary law.

Did the Marine Living Resources Act extinguish the community's customary rights?

After finding that the Dwesa-Cwebe community had a customary right to access and use the natural resources in the marine protected area, the court had to decide if the MLRA extinguished these customary rights. This was the first time a South African court had to consider the extinguishment of indigenous or customary rights.

South Africa's Constitution protects customary law. Customary law is only subject to the Constitution and to "legislation that specifically deals with customary law". It isn't subject to general legislation.

The MLRA, at the time, didn't specifically deal with customary law, and it therefore couldn't extinguish the Dwesa-Cwebe community members' right to access the marine protected area and use its resources.

The court accordingly held that when community members exercising their customary law rights and entered the marine protected area, their actions were lawful. The court set aside their criminal convictions.

Gongqose and others v Minister of Agriculture, Forestry and Fisheries and others (1340/16 &287/17) [2018] ZASCA 87 (01 June 2018))

Marine Living Resources Act, No 18 of 1998 ("**MLRA**")

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