



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

GONGQOSE & OTHERS v MINISTER OF AGRICULTURE, FORESTRY & FISHERIES AND OTHERS; GONGQOSE & OTHERS v STATE & OTHERS (1340/16 & 287/17) [2018] ZASCA 87 (01 JUNE 2018)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today, in a landmark judgment, the Supreme Court of Appeal (SCA) held that the exercise of a customary right of access to and use of marine resources can constitute a defence negating unlawfulness in criminal law.

The appellants are members of the Hobeni community who live adjacent to the Dwesa-Cwebe Nature Reserve in the Eastern Cape. In 2010 they were convicted in the Magistrate's Court, Elliotdale, of attempting to fish in the Dwesi-Cwebe Marine Protected Area (MPA) without a permit, in contravention of s 43(2)(a) of the Marine Living Resources Act 18 of 1998 (MLRA). They were sentenced to a fine of R500 or 30 days' imprisonment, wholly suspended for one year. Despite finding that the appellants were exercising a customary right to fish, the Mthatha High Court dismissed their appeal against conviction on the basis that they should have applied for an exemption from the provisions of the MLRA.

A further appeal to the SCA was upheld on the grounds that the appellants proved that they were exercising customary rights of fishing in the tradition of their forebears, when the offence was committed. In the criminal trial they presented evidence that a system of customary regulation governs the use of natural resources in the communities around Dwesa and Cwebe, who have been engaged in fishing and the collection of shellfish since time

immemorial. These customary rights were protected by s 211(3) of the Constitution which provides that ‘courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’.

The SCA held that the MLRA was not legislation that specifically dealt with customary law; that it did not extinguish the appellants’ customary rights of access to and use of marine resources; and that its purposes of conservation and sustainable utilisation of marine resources were not inconsistent with the customary rights of the Dwesa-Cwebe communities. Consequently, the appellants’ conduct in attempting to fish in the MPA was not unlawful. The appeal against their convictions was upheld and the convictions and sentences were set aside.