THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1340/17

In the matter between:

MALIBONGWE DAVID GONGQOSE	**FIRST APPELLANT**
SIPHUMILE WINDASE	**SECOND APPELLANT**
NKOSIPHELA JUZA	**THIRD APPELLANT**
VUYELWA SIYALEKO	**FOURTH APPELLANT**
TATANA MXABANI	**FIFTH APPELLANT**
BENJAMIN VON MEYER	**SIXTH APPELLANT**
THE HOBENI COMMUNITY	**SEVENTH APPELLANT**
THE MENDWANE COMMUNITY	**EIGHTH APPELLANT**
THE CWEBE COMMUNITY	**NINTH APPELLANT**

and

MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	**FIRST RESPONDENT**
DEPUTY DIRECTOR: FISHERIES, DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES	**SECOND RESPONDENT**

MINISTER OF ENVIRONMENTAL AFFAIRS **THIRD RESPONDENT**

DEPUTY DIRECTOR: OCEANS AND COASTAL MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL AFFAIRS **FOURTH RESPONDENT**

And in the matter between: Case No: 287/17

MALIBONGWE DAVID GONGQOSE **FIRST APPELLANT**

SIPHUMILE WINDASE **SECOND APPELLANT**

NKOSIPHENDULE JUZA **THIRD APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *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)

Coram: Maya P, Majiedt and Dambuza JJA and Plasket and Schippers AJJA

Heard: 04 May 2018

Delivered: 01 June 2018

Summary: Section 211(3) of the Constitution – customary law – fishing in marine protected area in contravention of Marine Living Resources Act 18 of 1998 (MLRA) – exercise of a customary right of access to and use of marine resources – a defence to unlawfulness – MLRA not legislation dealing specifically with customary law – customary right not extinguished – appeal upheld.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Mbenenge JP and Griffiths J sitting as court of first instance):

1 The application for special leave to appeal in case number 287/17 is granted.

2 Paragraph 1 of the order of the High Court is set aside and replaced with the following order:

'The appeal is upheld and the appellants' convictions and sentences are set aside.'

JUDGMENT

Schippers AJA (Maya P, Majiedt, Dambuza JJA and Plasket AJA concurring):

[1] This appeal brings customary law, which has not occupied its rightful place in this country, directly to the fore. The central issue is whether the appellants could successfully raise the exercise of a customary right as a defence in criminal proceedings against them, more specifically, whether the exercise of a customary right of access to marine resources rendered their conduct in attempting to fish in the Dwesa-Cwebe Marine Protected Area (the MPA) in the district of Elliotdale, without a permit, lawful.

Factual background

[2] The MPA was declared by the former Minister of Environmental Affairs (the Minister) on 29 December 2000 under the now repealed s 43 of the Marine Living Resources Act 18 of 1998 (the MLRA), on a strictly 'no take' basis, ie no fishing nor harvesting of resources in the MPA was permitted.[1] It is located in the former Transkei, on the east coast of South Africa, north-east of East London. It incorporates approximately 19 km of mainly rocky shore coastline and extends 6 nautical miles (10.8 km) out to sea. The MPA is adjacent to the Dwesa-Cwebe Nature Reserve (the Reserve) which was the subject of a successful land claim by communities of the area, as appears more fully below.

[3] The appellants are members of the Hobeni community, situated directly adjacent to the Reserve. The Cwebe community is located north of Hobeni adjacent to the border of the MPA and the coastline. The Mendwane community is also located adjacent to the Reserve, but it has no access to the coastline. These communities, hereafter referred to as 'the Dwesa-Cwebe communities', have shared rules of access to land and marine resources and as such, constitute communities in terms of customary law.

[4] It is common ground that the Dwesa-Cwebe communities were dispossessed of their land and that they historically relied on forest and marine resources for their livelihood. Prior to the declaration of the MPA in 2000, their access to marine resources was restricted by various laws, referred to hereafter. The Transkei Nature Conservation Act 6 of 1971 (the Transkei Nature Conservation Act) prohibited persons from fishing, save in accordance with its provisions, and regulated the areas in which certain fish could be caught.

[1] The declaration was published under Notice No R 1429 in Government Gazette No 21848 of 29 December 2000.

[5] In terms of the Sea Fisheries Act 58 of 1973 (the Sea Fisheries Act) the Minister was entitled to take measures to protect fish, which prohibited fishing in a specified area. The Minister was also entitled to place restrictions on the quantity of fish that could be caught or processed.

[6] In 1975 the Reserve was proclaimed in terms of the Transkei Nature Conservation Act, which extended the conservation area from the forests to include the shoreline, rivers and estuaries. Measures that accompanied the 'independence' or sovereignty of Transkei,[2] brought about the end of the communities' access not only to the forests, but the grasslands and seashore as well.

[7] In 1991 the shoreline abutting the Reserve, the tidal waters and the inland waters up to 6 nautical miles were incorporated as a marine reserve in terms of special regulations made under the Sea Fisheries Act. This further exacerbated exclusion of communities from marine resources. No collection of any marine organism was permitted under the rules of the marine reserve and anyone found contravening that rule was liable for a fine of up to R50 000 or six years' imprisonment. The Sea Fisheries Act authorised the Minister to take measures to protect fish, including the prohibition of fishing in a specified area; and to place restrictions on the quantity of fish that could be caught.

[8] The Transkei Nature Conservation Act was repealed by the Transkei Environmental Conservation Decree No 9 of 1992 (the Conservation Decree),[3] which authorised the Minister, inter alia, to designate a closed season during

[2] Transkei, in the Eastern Cape, was a so-called independent homeland. As part of the implementation of apartheid, it ceased to be part of the Republic of South Africa and became an 'independent country' in 1976. However, this 'independence' was not recognised by any country apart from South Africa.'
[3] Published in Special Gazette No 51 of 24 July 1992.

which fish of any defined species could not be caught; to prohibit the catching or wilful disturbing of fish; and to authorise the catching of fish.[4]

[9] In 1996 the Dwesa-Cwebe communities lodged a claim with the Eastern Cape Regional Land Claims Commission for restitution of their land known as the Dwesa-Cwebe Nature Reserves, in terms of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). On 19 April 1996 the land claims were gazetted.

[10] The history of the dispossession of the Dwesa-Cwebe communities was described by the Regional Land Claims Commissioner: Eastern Cape (the Land Claims Commissioner) in a memorandum as follows.[5] The communities have been living within the reserves for some 300 years. In 1885 the Cape government annexed the area within which the Dwesa Reserve is situated in terms of Proclamation 140 of 26 August 1885 and annexed the area within which the Cwebe Reserve is situated under the Tembuland Annexation Act 3 of 1885. In 1890 Dwesa was declared a state forest but local people continued to use the land and its resources for residential and agricultural activities until well after 1913. Between 1900 and 1950 local villages, including Cwebe, were destroyed and residents moved out of the reserves.

[11] In the 1930s the Dwesa community was removed from the area and relocated to land adjacent to the fenced reserves of Dwesa and Cwebe. The removal was effected to give white traders and farmers priority access to prime land. Black families were not allowed to live in the reserves but the communities continued to use the land and its resources. In the 1970s further forced removal took place as part of 'betterment' planning in respect of black communities as a means of concentrating them within easily controllable areas,

[4] Section 46 of Decree No 9.
[5] The memorandum is dated 21 May 2001, with recommendations signed on 28 and 29 May 2001.

in line with government policy at the time. The Transkei Conservation Act established the Dwesa-Cwebe Nature Reserves in 1975, and fencing of the reserves commenced with the resultant denial of access to the local villagers. During that period white families were allowed to maintain residential areas within the reserves and use the forest and sea resources whilst the local black communities were denied access to the reserve and its resources.

[12] The Land Claims Commissioner recommended that the claim by the Dwesa-Cwebe communities be settled in terms of s 42D of the Restitution Act.[6] He also recommended compensation for the claimant communities pursuant to their agreement that the land remain a protected conservation area in perpetuity, and payment of restitution and settlement planning grants to a trust to be formed on behalf of the claimants. These recommendations were accepted. On 17 June 2001 the Dwesa-Cwebe Settlement Agreement was concluded. The agreement stated that 'the communities should have access to sea and forest resources, based upon the principle of sustainable utilisation as permitted by law' and that they would 'enjoy favoured status in terms of benefits from eco-tourism, employment opportunities, resource rights, input to management policies etc in accordance with the management plan'. However, the Settlement Agreement expressly excluded the MPA from its ambit.

[13] Enforcement of the prohibition on fishing in the MPA only began around 2005 and the Dwesa-Cwebe communities continued to fish according to their customary practices. From 2006 to 2008 correspondence passed and numerous meetings were held between representatives of the communities and the Department of Environmental Affairs and Tourism concerning access by the

[6] Section 42D of the Restitution Act authorised the former Minister of Land Affairs to enter into an agreement with parties interested in a land claim, inter alia, for the award of land, a portion of land or a right in land; the payment of compensation; or both an award and compensation.

communities to, and sustainable utilisation and benefit of, marine resources in the MPA, but without success.

[14] On 22 September 2010 the appellants were arrested and charged with attempting to fish in a marine protected area without permission, in contravention of s 43(2)*(a)* of the MLRA (count 1); entering a national wildlife reserve area without a permit in contravention of s 29(1)*(a)* of the Conservation Decree (count 2); entering a national wildlife reserve while being in possession of a weapon or trap, to wit, fishing rods, lines and hooks, in contravention of s 29(1)*(b)* of the Conservation Decree (count 3); and wilfully killing or injuring or disturbing any wildlife animal other than fish caught in accordance with such regulations as may be prescribed in terms of the Conservation Decree, in contravention of s 29(1)*(c)*(count 4).

[15] The appellants were tried in the Magistrate's Court, Elliotdale. They pleaded not guilty to the charges. Their defence was that their conduct was not unlawful because they were exercising their customary right to fish. Despite finding that the appellants indeed exercised that right at the material times, the Magistrate convicted them of contravening s 43(2)*(a)* of the MLRA (count 1) and acquitted them on the remaining charges. The first and second appellants were sentenced to a fine of R500 or 30 days' imprisonment, wholly suspended for one year on condition that they were not convicted of contravening s 43(2)*(a)* of the MLRA, during the period of suspension. The third appellant (a minor) was cautioned and discharged.

[16] The appellants were granted leave to appeal against their convictions. One of the grounds of appeal was that the declaration of the MPA by the Minister on 29 December 2000 (the impugned decision) was reviewable and fell to be set aside, inter alia, on the ground that in declaring the MPA, the Minister

failed to recognise the appellants' customary rights. Consequently, on 12 December 2013 the appellants and the Dwesa-Cwebe communities launched an application to review and set aside the impugned decision on that and other grounds. The appeal and review were heard together by the High Court.

[17] Before the appeal and review were heard, there were two important developments. First, on 16 May 2014 the Marine Living Resources Amendment Act 5 of 2014, which repealed s 43 of the MLRA with effect from 2 June 2014, was signed into law. That amendment established a new structure in the MLRA for the recognition of small-scale customary fishing rights, in accordance with the Small-Scale Fishing Policy published by the Minister on 20 June 2012. Second, on 6 November 2015 the Minister published new regulations for the management of the MPA which introduced limited access to the MPA for community members.

[18] On 18 February 2016 the high court upheld the convictions. It held that when the MLRA was passed, the lawgiver contemplated that there were persons such as the appellants exercising customary rights in respect of marine resources. The court however held that their conduct was unlawful because they had not applied for an exemption as contemplated in the MLRA, granting them a permit to fish.[7] It dismissed the review application on the grounds that the review was not properly raised as a collateral challenge as it had been brought after the appellants' conviction; and that they had delayed unreasonably in launching the review proceedings.

[19] The high court granted the appellants leave to appeal only against its order dismissing the review. An application for special leave to appeal to this

[7] Section 81(1) of the MLRA reads:
'If in the opinion of the Minister there are sound reasons for doing so, he or she may, subject to the conditions that he or she may determine, in writing exempt any person or group of persons or organ of state from a provision of this Act.'

Court against the appellants' convictions was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the application for special leave to appeal). Counsel for the appellants informed the Court that in the event of special leave being granted and the criminal appeal succeeding, they do not persist with the appeal against the dismissal of their application to review and set aside the impugned decision. It is therefore unnecessary to consider the appeal against the dismissal of the review if the appellants' convictions are set aside. In any event, s 43 of the MLRA, in terms of which the Minister made the impugned decision, has been repealed. And there can be no prejudice to the third and fourth respondents in the appeal against the dismissal of the review application because they did not seek costs on appeal, or in the court below.

[20] Before dealing with the application for leave to appeal, I should say something about the approach of the National Director of Public Prosecutions (the NDPP) in this case. The parties were notified as early as 22 May 2017 that the application for special leave to appeal had been referred for oral argument. When the matter was heard on 4 May 2018, counsel for the NDPP simply informed the Court that the NDPP elected to abide by the decision of the Court. That was most unhelpful. The appeal raises novel and complex issues of law that require careful consideration. The NDPP's failure to file written submissions and present oral argument deprived this Court of the benefit of being able to canvass issues relating to unlawfulness and customary rights in criminal law, with the authority constitutionally responsible for the institution of criminal proceedings on behalf of the State.[8] The approach of the NDPP is regrettable.

[8] In terms of section 179(2) of the Constitution, the National Prosecuting Authority has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.

[21] The application for special leave to appeal raises four issues: (1) the status of customary law; (2) whether the appellants proved that they were exercising customary rights of access to and use of marine resources when the offence was committed; (3) whether the MLRA extinguished those rights; and (4) whether the appellants' conduct was unlawful.

The status of customary law

[22] The Constitution recognises customary law as an independent and original source of law. In terms of s 211(1) of the Constitution, the status and role of traditional leadership according to customary law are recognised, subject to the Constitution. Section 211(2) provides that a traditional authority observing a system of customary law may function subject to any applicable legislation and customs. Section 211(3) reads:

'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

[23] These provisions make three things clear. First, customary law 'is protected by and subject to the Constitution in its own right.'[9] Thus, the adjustment and development of customary law may be necessary to align its provisions with the Constitution, or to promote the 'spirit, purport and objects of the Bill of Rights', as required by s 39(2). Second, the legislative authority of Parliament to pass laws dealing with customary law has not been ousted.[10] And third, the injunction to apply customary law is not rendered subject to any legislation generally, but only to 'legislation that specifically deals with customary law'.

[24] The recognition of customary law as an independent source of law is further entrenched by ss 30, 31 and 39 of the Constitution. In terms of s 30,

[9] *Bhe & others v Khayelitsha Magistrate & others* 2005 (1) SA 580 (CC); [2004] ZACC 17 para 41.
[10] *Bhe* fn 8 para 44.

everyone has the right to use the language and participate in the cultural life of their choice.[11] Section 31 provides that persons belonging to a cultural community may not be denied the right to enjoy their culture and form cultural associations.[12] Section 39(2) enjoins courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation and developing customary law. Section 39(3) provides that the Bill of Rights does not deny the existence of any other rights or freedoms recognised or conferred by, inter alia, customary law, to the extent that they are consistent with the Bill.

[25] As an independent source of norms within the legal system, customary law may give rise to rights, such as access and use rights to resources. Thus, in *Alexkor*,[13] the Constitutional Court found that the Richtersveld Community possessed a right of communal ownership under customary law in the relevant land, which included use and occupation of the land; and the rights to use its water and exploit its natural resources above and beneath the surface. The question is whether the appellants proved customary rights of that kind.

Did the appellants prove customary rights?

[26] In a written plea explanation the appellants admitted that they had been arrested within the Reserve; that they intended to fish using fishing rods; and that they did not have fishing permits to do so in terms of the MLRA or the Conservation Decree. Those admissions were recorded as formal admissions in

---

[11] Section 30 of the Constitution reads:
'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.'

[12] Section 31 of the Constitution provides:
'(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
(a) to enjoy their culture, practise their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'

[13] *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (6) SA 460 (CC); [2003] ZACC 18 para 62.

terms of s 220 of the Criminal Procedure Act 51 of 1977.[14] The appellants however denied that their conduct was unlawful. Their defence, in summary, was this. They are members of the Hobeni community, governed according to a system of customary law which regulated their access to marine resources. The statutory regulation of marine resources did not extinguish their customary rights of access to these resources; consequently their conduct was lawful. Alternatively, if the MLRA or the Conservation Decree were interpreted so as to prevent them from exercising their customary rights, then those laws are inconsistent with the Constitution and invalid.

[27] The first appellant, Mr Gongqose, a fisherman, testified in his defence. He stated that his co-accused were members of the Hobeni community, and that he is illiterate but schooled in the customs and culture of his community. From the age of 10 he had been taught the skills and traditions of fishing by his father, who in turn had been taught those by his father. Part of the legacy that passed from generation to generation was an appreciation of the natural environment. Mr Gongqose spoke of customs and traditions relating to the allocation of fishing spots and reliance on the sea for many traditional customs practised by the men and women of his community. There were rules that small fish and fish with eggs should not be caught but left in the sea so that there could be more fish in later years. Disputes about fishing spots were settled by headmen or subheadmen in the community. He said that he had a right to fish on the coastline at Hobeni, because he grew up there and his great grandfathers used to fish there. He went into the reserve to fish because his culture allowed him to do so. He said that he and his fellow fishermen were dependent on the sea as the fish caught provided food for their families and any surplus was sold to maintain and educate their children.

[14] Section 220 of the Criminal Procedure Act provides that an accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.

[28] Mr Gongqose described the hardship experienced by the community brought about by the enforcement of the ban on fishing in the Reserve. They had to walk long distances (up to 6 km) to fish lawfully and had limited or no funds for transport. Mr Gongqose said that traditional healers were also suffering because they were denied access to marine resources required to practise healing. The healers would go to the sea and sleep there for days to get the herbs they needed from their ancestors. Their rights to fish and their traditional rights were being infringed. State authorities had made empty promises concerning access to marine resources and numerous meetings with the authorities produced no results.

[29] Ms Vuyelwa Siyaleko, a trainee medicinal healer born and raised in Hobeni, testified for the defence. She said that she was taught the ways of marine harvesters by her mother and started going to the sea when she was about 10 years old. Ms Siyaleko described customary rituals relating to the sea and the intrinsic value of that part of the coast to her ancestral ceremonies.

[30] The appellants presented expert evidence by Dr Derick Fay, an Associate Professor at the University of California. His field of expertise is the land usage, customs and impact of proclaimed areas on the residents of coastal areas and the Hobeni community in particular. Dr Fay speaks IsiXhosa and lived in the Dwesa-Cwebe communities between 1996 and 1998, during which time he did extensive research on the communities and their reliance on natural resources. He lived in the area again for brief periods in 2009, 2010 and 2011.

[31] Dr Fay's evidence can be summarised as follows. A system of customary regulation governs the use of natural resources in the communities around Dwesa and Cwebe. There is historical evidence of fishing and collection of shellfish since at least the 18th century. Members of the communities gained

access to these resources by birth, marriage or affiliation to a headman. Access was dependent upon knowledge and skills transmitted from generation to generation as young people accompanied elders on fishing trips. These rules were part of a larger body of customary regulation governing access to local resources including residential, agricultural and grazing land, firewood and building wood, thatching grass and mud for brickmaking. Access to natural resources promotes socio-economic rights and substantive equality. The Dwesa-Cwebe communities are among the poorest in South Africa and the loss of access to marine resources has caused them substantial hardship. The closure of marine resources took place without consulting the communities.

[32] The appellants also called Ms Jacqueline Sunde, a social researcher and Ph.D student, as an expert witness. Ms Sunde conducted research in Dwesa-Cwebe relating to customary law systems governing marine resources. She stated that the community in Dwesa-Cwebe has a long-standing and well-developed system of customary law that includes a system of rules regarding access to and use of marine resources for subsistence, ritual and other purposes. Archaeological and historical evidence indicated that these communities practised shore-based harvesting and fishing for a range of marine resources along the South African coast since time immemorial. The statutory regulation of marine resources has impacted on the customary law and practices of the communities.

[33] The State adduced evidence by Dr PJ Fielding, a marine and coastal environmental consultant, who said that he was commissioned to present the features of a marine protected environment. He testified concerning the benefits of marine protected areas in sustaining resources and managing and rebuilding fish stocks. He said that many of the marine protected areas in the country were

gazetted and implemented on an ad hoc basis. The MPA was proclaimed in 2000, but the first studies of line fish in the MPA were only conducted in 2009.

[34] In the evaluation of the evidence, it is necessary to reiterate that the validity of a custom is no longer determined according to the common law.[15] As the Constitutional Court explained in *Alexkor*:[16]

'While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. . . . The Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values.'

[35] So, the nature and content of the appellants' rights of access to and use of marine resources in the MPA must be determined by reference to customary law. That is the law which governed access by the Dwesa-Cwebe communities to natural and marine resources.[17] As was said in *Shilubana*:[18]

'It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly.'

[36] And the caveat sounded in *Alexkor*[19] bears repetition:

'In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.'

---

[15] See in this regard *Van Breda & others v Jacobs & others* 1921 AD 330.
[16] *Alexkor* fn 12 para 51.
[17] *Alexkor* fn 12 para 50.
[18] *Shilubana & others v Nwamitwa* 2009 (2) SA 66 (CC); [2008] ZACC 9 para 43.
[19] *Alexkor* fn 12 para 53.

[37] In this case there is extensive evidence concerning the nature of a customary system governing all aspects of life in the Dwesa-Cwebe communities, having regard to the study of the history of those communities and their usages.[20] These aspects range from relations between parents and children, husbands and wives, household heads and neighbours, headmen and sub-headmen. They include ceremonial events (weddings, payment of bridal wealth and circumcision); access to and use of natural resources, more particularly land, forest and marine resources; and the resolution of disputes. There is historical evidence of fishing and collection of shellfish since at least the 18th century.

[38] Knowledge of the customary system was transmitted from generation to generation, typically from father to son as regards fishing and from mother to daughter with regard to the harvesting of intertidal resources. Knowledge was also conveyed through a range of rituals and practices within the larger customary system within which fishing was located. All of this evidence was not disputed by the State. Indeed, the prosecutor put it to Ms Sunde that the State did not deny that the Dwesa-Cwebe communities had a right in terms of customary law (of access to marine resources), and that customary law had to be given equal recognition as legislation.

[39] The appellants accordingly proved that since time immemorial, the Dwesa-Cwebe communities, of which they are part, have a tradition of utilising marine and terrestrial natural resources. It is thus not surprising that the Magistrate found that the evidence established the existence of a customary right to fish within the relevant coastal waters by the Dwesa-Cwebe communities. The high court described that right and its regulation as follows:

---

[20] *Alexkor* fn 12 paras 56 and 60.

'[T] hey understood that nature had a way of protecting itself and this is what regulated their harvesting; the tides and the weather did not allow them to go fishing every day; they also had their own way of making sure that there would be enough fish for the generations to come, having been taught by their fathers and elders not to take juveniles and to put the small fish back. These rights were never unregulated, and were always subject to some form of regulation either under customary and traditional practices.'

Did the MLRA extinguish the appellants' customary rights?

[40] In *Alexkor*,[21] the Constitutional Court explained that the Richtersveld Community's indigenous law ownership of land could have been extinguished (in a pre-constitutional era) by the British Crown if: the laws of the Crown expressly extinguished indigenous law ownership of the land; the laws of the Crown applicable to the Richtersveld rendered the exercise of material incidents of indigenous law ownership unlawful; the Crown granted the community limited rights in respect of the land where the only reasonable inference to be drawn was that the rights of indigenous law ownership were extinguished; or the land was taken by force.

[41] The post-constitutional extinguishment of indigenous or customary rights has not been considered in the South African context. But there is persuasive foreign authority that only clear and justified extinguishment of customary rights is permissible. Mindful of the warning that it should not be assumed that the approach in a foreign court can readily be transplanted to South African soil,[22] the foreign cases are nonetheless instructive.

[42] Canada has a developed jurisprudence of aboriginal fishing rights. The source of those rights is s 35(1) of the Constitution Act, 1982. It provides:

---

[21] *Alexkor* fn 12 para 70.
[22] *Minister of Justice & others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA); [2016] ZASCA 197 para 58.

'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed'.

Lamer CJ explained in *R Van der Peet*[23] why aboriginal rights are recognised:

'In my view, the doctrine of aboriginal rights exists, and is recognised and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.'

[43] This dictum strikes remarkably close to home – the people of Dwesa-Cwebe have been exploiting marine and natural resources in what is now the Reserve for hundreds of years, according to a distinctive customary system. That is why the Constitution affords their rights special protection.

[44] In *R v Sparrow*,[24] the appellant, a member of the Masqueam Indian Band, was charged and convicted under the Canadian Fisheries Act with possession of a drift net longer than that permitted by the terms of his Band's Indian food fishing licence. He admitted that the facts alleged constituted the offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction was inconsistent with s 35(1) of the Constitution Act. The Crown submitted that that the Masqueam Band's aboriginal right to fish had been extinguished by regulations under the Fisheries Act.

[45] The Crown failed to discharge the burden of proving extinguishment. The court held that the test of extinguishment was that the 'Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right'. Dickson CJ and La Forest J went on to say that mere regulation did not meet that threshold:

[23] [1996] 2 SCR 507 para 30.
[24] [1990] 1 SCR 1075.

'There is nothing in the Fisheries Act or its detailed regulations that demonstrate a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.'[25]

[46] The protection of customary rights in Australia is not constitutional, but statutory. Under s 211 of the Native Title Act of 1993, if a law required a licence or permit in order to exercise a native right, then:

'the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

(a) for the purpose of satisfying their personal, domestic or non-commercial communal need; and

(b) in exercise or enjoyment of their native title rights and interests.'

[47] In *Yanner v Eaton*,[26] the accused was charged with taking fauna contrary to the Australian Fauna Conservation Act 1974, in that he used a harpoon to catch two juvenile estuarine crocodiles without a permit. The relevant provision provided:

'A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act'. The Magistrate found that it was a traditional custom of the appellant's clan to hunt juvenile crocodiles which had tribal totemic significance based on spiritual belief; and that the Fauna Conservation Act did not prohibit native title holders from carrying on activities in the exercise of their native title rights and interests. The Magistrate dismissed the complaint. A majority of the Court of Appeal of Queensland set aside the Magistrate's order and remitted the

[25] *Sparrow* fn 22 at 1099.
[26] [1999] HCA 53; 201 CLR 351; 166 ALR 258.

proceedings to the Magistrate's Court for the matter to proceed according to law. On appeal to the High Court of Australia the respondent contended that any native title right or interest to hunt crocodiles had been extinguished by the enactment of the Fauna Act.

[48] The court held that the appellant's native title had not been extinguished:

'[R]egulating the way in which rights and interests may be exercised is not inconsistent with their continued existence. Indeed, regulating the way in which a right may be exercised presupposes that the right exists. . . . But in deciding whether an alleged inconsistency is made out, it will usually be necessary to keep well in mind that native title rights and interests not only find the origin in Aboriginal law and custom, they reflect connection with the land. . . . And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, 'You may not hunt or fish without a permit' does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.'[27]

[49] Thus, the approach in Australia is that regulation of fauna or fishing in terms of a licensing or permitting scheme does not extinguish or deny the continued existence of native title rights and interests under the traditional laws acknowledged and customs observed by Aboriginal peoples.[28]

[50] Counsel for the appellants submitted that the Canadian test – a clear and plain intention to extinguish a customary right – fits perfectly with the text and purpose of s 211(3) of the Constitution. It seems to me unnecessary to adopt that approach or the Australian one that the regulation of a fishing right through

[27] *Yanner* fn 25 para 64 (per Gummow J concurring).
[28] *Akiba on behalf of the Torres Strait Regional Sea Claim Group v Commonwealth of Australia* [2013] HCA 33 para 75.

a permit does not sever the connection of Aboriginal peoples with their land, or deny the continued exercise of their rights and interests under Aboriginal law. Ultimately, the validity of customary law, and the rights under it in South Africa, are protected by s 211 of the Constitution and are rendered subject only to the Constitution and legislation that specifically deals with that law. It follows first, that a customary right can only be extinguished by legislation specifically dealing with customary law; and secondly, that such legislation must do so either expressly or by necessary implication.

[51] So, in determining whether legislation such as the MLRA extinguished the appellants' customary right to fish, the rules of interpretation of statutes apply, together with the injunction in s 39(2) of the Constitution that courts must interpret statutes to 'promote the spirit, purport and objects of the Bill of Rights'. It is trite that that words in a statute must be given their ordinary grammatical meaning and be construed in the light of their context. That context is not limited to the language, but includes the subject matter of the statute, its apparent scope and purpose and within limits, its background.[29] Stated differently, when interpreting legislation what must be considered is the language used, the context in which the relevant provision appears, and the apparent purpose to which it is directed.[30] And s 39(2) of the Constitution requires courts to 'prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their

[29] *Jaga v Dönges, NO & another*; *Bhana v Donges NO & another* 1950 (4) SA 653 (A) at 664E-H, affirmed in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA 490 (CC); [2004] ZACC 15 para 89.
[30] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); 2012] ZASCA 13 para 18.

constitutional guarantees',[31] but does not authorise an interpretation that unduly strains the text.[32]

[52] Applying these principles, there is nothing in the language of the MLRA that specifically deals with customary rights. At most, it provided a right of access to marine resources by 'subsistence fishers', defined as;

'a natural person who regularly catches fish for personal consumption or for the consumption of his or her dependants, including one who engages from time to time in the local sale or barter of excess catch, but does not include a person who engages on a substantial scale in the sale of fish on a commercial basis .'

[53] The recognition of the right of a subsistence fisher who catches fish for personal or family consumption is *not* the recognition of a customary law right to fish. While the activities of some customary fishers may include subsistence fishing, subsistence fishers are not necessarily persons who fish in terms of customary law. Further, the appellants established in evidence that their customary rights of access to and use of marine resources were not confined to consumption, but were exercised for purposes of customary rituals, ancestral ceremonies and adornment.

[54] By contrast, the amendment in terms of Act 5 of 2014, introduced 'small-scale fishing communities', defined in the MLRA as a group of persons who:

'have a history of shared small-scale fishing and who are, but for the impact of forced removals, tied to particular waters or geographic area, and were or still are operating where they previously enjoyed access to fish, *or continue to exercise their rights* in a communal manner in terms of an agreement, *custom* or law'.[33]

---

[31] *Department of Land affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); [2007] ZACC 12 para 53.
[32] *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others In re: Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & Others*; 2001 (1) SA 545 (CC); [2000] ZACC 12 para 53.
[33] Emphasis added.

The amended MLRA constitutes legislation that does – consistently with s 211(3) of the Constitution – alter customary rights. The unamended MLRA did not.

[55] The purposes of the MLRA, as is evident from its long title, include:

'the conservation of the marine ecosystem . . . the long-term sustainable utilisation of marine living resources . . . and the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa . . .'.

[56] These purposes are consistent with the continued existence of customary rights of access to and use of marine resources, and their conservation, by the Dwesa-Cwebe communities since time immemorial. These rights and practices were extant long before the MLRA came into force in September 1998 and are subject to significant regulation by customary law. Customary rights and conservation can co-exist. And it is important to remember that as regards conservation and long-term sustainable utilisation of marine resources in the MPA, the Dwesa-Cwebe communities have a greater interest in marine resources associated with their traditions and customs, than any other people. These customs recognise the need to sustain the resources that the sea provides. For these reasons, and more particularly, that the customary law of the Dwesa-Cwebe communities provides for sustainable conservation and utilisation of resources, the high court's finding that by concluding the restoration agreement, the communities had accepted 'that they would access the sea in accordance with the dictates of the law giving expression to the concept of sustainable development', is insupportable.

[57] An interpretation that the appellants' customary rights survived the enactment of the MLRA not only grants them the fullest protection of their customary system guaranteed by s 211 of the Constitution, but also accords with the position in international law – which a court is enjoined to consider when

interpreting the Bill of Rights[34] – that indigenous peoples have the right to their lands and resources traditionally owned.

[58] Thus, the African Charter on Human and People's Rights, to which South Africa is a party, recognises the rights of all peoples to 'freely dispose of their wealth and natural resources' and to 'economic, social and cultural development with due regard to the freedom and identity in the equal enjoyment of the common heritage of mankind'. The Charter must be interpreted in light of the United Nations Declaration on Indigenous People's Rights (UNDRIP). Article 26 of UNDRIP reads:

'1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to customs, traditions and land tenure systems of the indigenous peoples concerned.'

[59] On a proper construction of the MLRA, it did not extinguish the appellants' customary right of access to and use of marine resources. These rights continued to exist subject to the limitations already imposed by customary law. Indeed, the high court found that the MLRA did not have 'the effect of jettisoning (or not preserving) the customary rights' of the Dwesa-Cwebe communities; and that there was no scope for arguing that they had no customary rights because the MLRA did not recognise those rights. These findings undoubtedly are correct.

[34] Section 39(1) of the Constitution.

Was the appellants' conduct unlawful?

[60] The appellants were charged with a contravention of s 43(2)*(a)* of the MLRA which provided:

'No person shall in any marine protected area, without permission in terms of subsection (3)–

(a) fish or attempt to fish . . .'

[61] Section 43 was silent as to whether unlawfulness is an element of the offence. When a statute is silent on the elements of an offence, courts must interpret the legislation. The general approach is that the lawgiver does not intend innocent violations of statutory prohibitions to be punishable, unless there are clear and convincing indications to the contrary.[35] Likewise, if a statute does not specifically refer to the element of unlawfulness, there is a general presumption that the defences excluding unlawfulness would be available to a person charged with contravening a criminal prohibition in a statute.[36] In other words, it is generally presumed that unlawfulness is an element of a statutory offence.

[62] A defence excluding unlawfulness in a statutory offence, is possession of the 'necessary authority' by the accused person. This is recognised in terms of s 250(1) of the Criminal Procedure Act, which creates the procedural mechanism to deal with the defence. It provides:

'If a person would commit an offence if he performed an act without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the 'necessary authority'), an accused shall, at criminal proceedings upon a charge that he committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved.'

---

[35] *S v Arenstein* 1964 (1) SA 361 (A) at 365C.

[36] J Burchell South African Criminal Law and Procedure volume 1: *General Principles of Criminal Law* (4 ed 2011) 116.

[63] In this case the requirement of necessary authority is satisfied either by adducing evidence that the requisite permit or licence has been granted in terms of the MLRA, or by proving the existence of a customary right of access to and use of marine resources that renders the conduct lawful, in light of the special status of customary law in the Constitution.

[64] The appellants have proved that at the time of the commission of the offence, they were exercising a customary right to fish. That right was not extinguished by legislation specifically dealing with customary law. Therefore, the appellants' conduct was not unlawful.

[65] Consequently, the finding by the high court that the appellants' conduct was unlawful because they had not sought an exemption (under s 81 of the MLRA) before setting out to fish, cannot be sustained, for the following reasons. First, if the MLRA did not extinguish the appellants' customary rights, then logically their conduct was not unlawful. Second, the court's finding that the MLRA did not have the effect of jettisoning (and not preserving) the customary rights exercised by the Dwesa-Cwebe communities, is directly at odds with its finding that those rights may only be lawfully exercised in terms of an exemption granted under the MLRA. The court could not at the same time hold that customary rights were not extinguished by the MLRA, but that those rights were nonetheless subject to the discretion of the Minister, created in terms of s 81 of the MLRA. Therefore, the finding that nothing 'prevented the appellants from seeking exemption even on the basis that in terms of customary law such permit is not required', is a *non sequitur*.

[66] The high court's finding that to contend that a customary right negates unlawfulness on a charge under the MLRA would elevate the rights to culture in ss 30 and 31 at the expense of the right to a healthy environment and to have the

environment protected as envisaged in s 24 of the Constitution is likewise unsustainable.[37] It is true that the right to culture cannot be exercised in a manner inconsistent with other rights, and that environmental protection and conservation mandated by s 24, self-evidently is a valid legislative concern. But that is not the end of the Constitution's protection of customary rights. It also protects them from interference, other than through specific legislation contemplated in s 211(3). The MLRA, prior to its amendment by Act 5 of 2014, was not such legislation. And the facts show that the exercise of the appellants' customary rights was not inconsistent with s 24 of the Constitution.

[67] Finally, the requisites for special leave to appeal have been met. Apart from reasonable prospects of success, there are special circumstances that merit a further appeal to this Court. The appeal raises a substantial point of law; the matter is of great importance to the parties, the public and in particular to the Dwesa-Cwebe communities; and the prospects of success are so strong that the refusal of leave would result in a manifest denial of justice.[38]

[68] By reason of the conclusion to which I have come it is unnecessary to deal with the appellant's contention that if the MLRA or the Conservation Decree were interpreted so as to prevent them from exercising their customary rights, then these laws are unconstitutional.

[69] In the result, the following order is made:

---

[37] Section 24 of the Constitution reads:
'Everyone has the right –
(a) to an environment that is not harmful to the health and well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecological a sustainable development and use of natural resources while promoting justifiable economic and social development.'

[38] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering* [1986] ZASCA 10; 1986 (2) SA 555 (A) at 564H-565D; *Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85 para 21.

1 The application for special leave to appeal in case number 287/17 is granted.

2 Paragraph 1 of the order of the High Court is set aside and replaced with the following order:

‘The appeal is upheld and the appellants’ convictions and sentences are set aside.’

_____

A Schippers
Acting Judge of Appeal

APPEARANCES

For Appellant:	T Ngcukaitobi and M Bishop
	Instructed by:
	Legal Resource Centre, Cape Town
	Webbers Attorneys, Bloemfontein
For Third and Fourth Respondents:	K Pillay
	Instructed by:
	State Attorney, Cape Town
	State Attorney, Bloemfontein