

Living Off the Land

A case regarding the customary rights of fishermen in the Dwesa-Cwebe Marine Protected Area of South Africa could be a landmark

David Gongqose is a fisherman from a remote coastal community on the eastern seaboard of South Africa. On 22 September 2010, David and two other fishers from his community were arrested in the Dwesa-Cwebe Marine Protected Area (MPA) and charged with attempting to fish in the MPA. David and his companions argued that they had a customary right to fish in this reserve as it comprised their ancestral lands. David's father had taught him to fish according to the customary system that he himself

the material basis of their culture and upon which they depended for food security.

Due to successive waves of colonial—and, later, apartheid—conservation planning, many households have been forced to vacate their ancestral homesteads and relocate to surrounding lands. Under apartheid, this section of the country was declared a *'bantustan'* (the term used to refer to the area reserved for residence for African persons during the apartheid regime) and, subsequently, the community lived on communal land administered by traditional authority, but within the restrictive constraints of apartheid planning.

In 1991, the Dwesa-Cwebe Marine Reserve was established. Inter-tidal harvesting was prohibited but shore-based angling was permitted under strict regulations. In 1996, after the election of the first democratic government and the introduction of land restitution legislation to provide redress to communities who had suffered under apartheid, the communities' claim to the land comprising the reserve was recognized and negotiations on how they would access their land and natural resources commenced.

Land claim

In 2001, they signed a land claim agreement. Government policy required that the MPA remain under conservation status; however, access to resources was a key principle underlying the Settlement Agreement. Despite the fact that negotiations leading up to the signing of the Settlement Agreement confirmed recognition of the communities' right

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had inherited from his father. David further noted that on the night in question, he had been fishing in order to put food on the table and to purchase mourning clothes for his mother as his father had recently died and David was now the sole provider for his family. Harvesting of marine resources is his primary livelihood.

The seven communities comprising Dwesa-Cwebe have historically depended on the coastline of the MPA and the adjacent coastal forest for their livelihoods, and have a well-established customary system of natural resource use. Over the past century, these communities, comprising approximately 2,300 households, were systematically deprived of access to both the coastal and forest resources, which formed

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to sustainable use of resources and to participate in the co-management of natural resources in the reserve, the marine reserve component was removed from the final Settlement Agreement.

Instead, Dwesa-Cwebe MPA was promulgated as a complete 'no-take' MPA in 2000, just six months prior to the signing of the Settlement Agreement. This was authorized by the Department of Environmental Affairs and Tourism, the department responsible for MPAs at the time, and also a party to the negotiations and signatory to the Settlement Agreement. There was no consultation with the affected communities about the declaration of the MPA; however, the community understood that their right to access marine resources would continue to be negotiated. To date, the fisheries and the conservation authorities have neither recognized the communities' claim to their customary fishing rights along this coastline nor taken steps to establish appropriate co-management arrangements.

In a Statistics South Africa survey published the same year (2000), it was noted that the district in which David resides was the poorest district in the country. There are very few alternative livelihood options, and hence the seven local communities comprising the greater Dwesa-Cwebe community have continued to harvest both marine and forest resources, despite running the risk of prosecution. They cite both their customary system and their lack of alternatives as reasons for continuing to fish. Many fishermen and women inter-tidal harvesters have had to pay huge fines or face imprisonment when they cannot afford to pay the fines. Two persons have been killed by conservation rangers while harvesting resources in the reserve during the past year. The community has embarked on protest action in the past and have made repeated requests to the authorities to re-consider the no-take zonation of the MPA, and make provisions for sustainable use but, to date, the no-take status of the reserve is maintained.

At the time that David was arrested, the Committee on World Food Security had commenced an international consultative process in order to develop Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests. In the context of National Food Security, in May 2012 at a Special Session held in Rome, the Committee on World Food Security adopted the Guidelines. These Guidelines are intended to contribute to global and national efforts towards the eradication of hunger and poverty, based on the principles of sustainable development. They recognize the centrality of secure tenure rights and equitable access to land, fisheries and forests in this regard.

Most significantly, the Tenure Guidelines recognize that in many countries, communities have pre-existing systems of rights and entitlements that guide access to, and use and management of both land and marine resources. These local systems of tenure might not be recorded or formally recognized in statutory law but are nonetheless legitimate tenure rights that require recognition.

The Guidelines state that:

9.5 Where indigenous peoples and other communities with customary tenure systems have legitimate tenure rights to the ancestral lands on which they live, States should recognize



David Gongqose with his legal representative, Jason Brickhill. David was arrested for attempting to fish in the Dwesa-Cwebe MPA, South Africa

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David Gonggose and co-accused with members of their community and their legal team. The community hopes that their freedom to enjoy their basic human rights will be upheld

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and protect these rights. Indigenous peoples and other communities with customary tenure systems should not be forcibly evicted from such ancestral lands.

In addition, the Guidelines note that:

9.6 States should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems. Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should co-operate to accommodate such changes in the customary tenure systems.

While many countries, such as those in the Pacific and elsewhere, have long recognized both the existence and importance of customary systems of marine tenure, these Guidelines will have far-reaching implications for countries that to date have tended to develop

statutory regulations with little or no recognition of communities' customary rights to coastal lands and adjacent waters or their right to practise their culture and traditional livelihoods in these spaces.

Although some governments have argued that such statutory legislation in effect extinguishes any pre-existing customary rights, in this South African matter the court heard arguments that drew on precedents established in the Supreme Court of Canada in *Ronald Edward Sparrow vs Her Majesty The Queen* (1990), which found that the fact that an aboriginal fishing right was controlled by regulation did not mean that the right was thereby extinguished.

Clear intention

According to the court, the burden of proving that the Sovereign intended to extinguish an existing right was on the Crown and that intention had to be "clear and plain", now commonly referred to as

the “test of extinguishment”. The defence team also drew on principles established in the highest court in Australia when, in *Yanner vs Eaton* (1999) the court held that:

“It is sufficient to say that regulating 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. [...] Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the aboriginal peoples concerned with the land [...]. 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 recognizes them as possessing.”

In their defence, the South African fishermen acknowledged the need for their use of marine resources to be sustainable and to accommodate the rights of future generations. They also did not deny the need for their use of the resource to be regulated or for the reserve to be an MPA; however, they argued that they have a customary system that can form the basis of any future management arrangements and that their local knowledge of the resource should be included in any such arrangements.

The Magistrate in this case expressed strong criticism of the conservation authorities for their failure to recognize the livelihood needs of this community. He drew extensively on the South African Constitution, noting “the court cannot ignore that the purpose of this legislation was to protect and enforce the constitutional freedom and rights to land and unrestricted practice of their customs by ordinary citizens of which the inhabitants of the Dwesa-Cwebe area, are certainly part”.

As it was not within his powers as a Magistrate to pass judgement on the constitutional validity of the Marine Living Resources Act, the Magistrate

was required to find the provisions of the Act in force and, therefore, to find the fishermen guilty in terms of this act; however, he noted that the constitutional validity of the Act in this regard was highly debatable. This matter will now be taken on appeal to the High Court to confirm the fishermen’s claim to their customary rights. For the first time since 1994, the community of Dwesa-Cwebe have hope that their freedom to enjoy their basic human rights will finally be realized. **3**

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For more



www.fao.org/nr/tenure/voluntary-guidelines/en/

Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

www.lrc.org.za/press-releases/1944-2012-05-22-press-release-transkei-fishermen-to-challenge-guilty-verdict-in-high-court-

Transkei fishermen to challenge guilty verdict in High Court