IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF WILLOWVALE
HELD AT ELLIOTDALE

CASE NO: E382/10

IN THE MATTER BETWEEN:

THE STATE

AND

DAVID GONGQOZE PLUS 2

JUDGMENT

Introduction

In this matter David Gongqoze, a 49 year old male person, Siphumile Windase a 27 year old male person hereinafter referred to as the adult accused persons and Nkosi Juza a17 year old male person, hereinafter referred to as the child, are charged jointly with four counts summarized as follows:

The allegation in count 1 being that on the 22nd day of September 2010 and at or near the Dwesa-Cwebe Reserve the adult accused persons and the child fished or attempted to fish in a marine protected area, to wit, the Dwesa-Cwebe Marine Protected Area in contravention of Section 43(2)(a) of the Marine Living Resources Act 18 of 1998.

The allegation in count 2 being that on the same date and place the adult accused persons and the child entered a national wildlife reserve area, to wit, the Dwesa-Cwebe Nature Reserve without authorization thereto by permit in contravention of Section 29(1)(a) of the Environmental Conservation Decree No. 9 of 1992.

The allegation in count 3 being that on the same date and place the adult accused persons and the child entered a national wildlife reserve area, to wit, the Dwesa-Cwebe Nature Reserve while being in possession of any weapon, explosive, trap or poison, to wit fishing rods, lines and hooks in contravention of Section 29(1)(b) of the Environmental Conservation Decree No. 9 of 1992.

The allegation in count 4 being that on the same date and place the adult accused persons and the child entered a national wildlife reserve area, to wit, the Dwesa-Cwebe Nature Reserve and willfully killed or disturbed any wild animal other than fish caught in accordance with such regulations as may be prescribed in terms of the Decree in contravention of Section 29(1)(c) of the Environmental Conservation Decree No. 9 of 1992.

The accused were legally represented throughout the proceedings by Adv. Brickhill duly instructed by the Legal Resources Center, Cape Town.

Both adult accused as well as the child pleaded not guilty to all the charges and elected to make a detailed plea explanation in terms of Section 115 of Act 51 of 1977 (hereinafter referred to as the Statement) with specific consent that the admissions contained therein be recorded as formal admissions in terms of Section 220 of Act 51 of 1977. Subsequent to the reading of the written plea explanation into the record both adult accused as well as the child confirmed the plea and contents of the statement to be correct.

Subsequent to an enquiry by the State an amendment was effected to paragraph 5 of the Statement with the words *",lines and hooks and were in possession of these items when arrested"* being inserted after the word rods and the amended version was confirmed as correct by all three accused.

The Statement was then received by the court and marked as **Exhibit A.**

Irregularity in terms of accused 3, the child, and the Child Justice Act 75 of 2008

Subsequent to the Section 115 statement being received by the court and marked as **Exhibit A** the court raised its concern as required by Section 15 of the Child Justice Act that the court book reflected Nkosi Juza as being 18 years of age and the court requested confirmation that Nkosi Juza was in fact 18 at the time of commission of the alleged offence as the charge sheet alleged the date of offence to be approximately 18 months prior to the trial commencing.

Adv. Brickhill confirmed his instruction to be that Nkosi Juza was now 19 years old and was 18 years of age at the time of the commission of the offence. The State confirmed this accorded with the information reflected in the investigation docket as being the age provided by accused 3 at the time of his arrest. The court insisted on more certainty in this regard and the matter stood down for Adv. Brickhill to explore the issue further.

Subsequent to the adjournment it transpired that Nkosi Juza was in fact 17 years of age at the time of the alleged offence but had been processed by the police as being 18 years of age and the matter of adhering to the provisions of the Child Justice Act were never given further consideration during the subsequent appearances by Nkosi Juza. In this regard the court notes that Nkosi Juza appeared on at least 7 further occasions prior to this trial commencing. The record was then altered by this court to reflect the correct age of Nkosi Juza to be 17 years of age at the time of the commission of the offence in terms of Section 15(b) of the Child Justice Act 75 of 2008.

The court then requested both counsel to address it on the issue of the provisions of the Child Justice Act and the potential irregularity of the current proceedings in so far as Nkosi Juza was concerned in particular having regard to the provisions of Section 5 of the Act which makes the holding of a preliminary inquiry compulsory and the purpose of such inquiry as set out in Section 43. The issue being whether the court could continue with the proceedings as envisaged by Section 16(3) of the Act in that there was no prejudice to the child.

Both counsel were afforded an opportunity to address the court and were ad idem that proceedings should continue as there was no prejudice to the child and any delay in proceedings against the child would be far more prejudicial to him.

The court had to then have regard to the purpose of the provisions of the Child Justice Act and the goals it was enacted to achieve as set out in the introduction to the Act and its preamble. Clearly the Child Justice Act is designed to protect the interests of juveniles and facilitate juveniles in conflict with the law being processed with as limited exposure to the mainstream criminal justice system as possible. It was not designed nor was its primary objective to shield juveniles from such criminal justice system in every circumstance. The Act makes specific provision for the prosecution of juveniles, where appropriate, and has safeguards in place to afford them adequate protection by the courts in these circumstances.

It was abundantly clear from the address by the respective counsel that the State had no intention of diverting the matter in respect of Nkosi Juza and the prosecution would commence now or in the future. Nkosi Juza had the support of his guardian and the community leaders throughout the early appearances and was fortunate in having secured highly knowledgeable and competent legal representation from an early stage in proceedings.

This court was thus compelled to adopt a holistic approach in determining whether to allow proceedings to continue in respect of the child despite the failure to comply strictly with the provisions of the Child Justice Act.

In this regard the overriding consideration has to be the best interests of the child himself. The prosecution of the child would continue whether in the present circumstances or at a later date. The child currently enjoyed highly competent and prepared legal representation in the person of Adv. Brickhill supported by the full resources of the Legal Resources Centre. There is no guarantee that these resources would be available to him were he to be prosecuted individually in the future. Experts of considerable standing in their respective fields were present at considerable expense to testify on his behalf. Again there is no guarantee these would be available to him again in the future.

Having regard to the purpose of a preliminary inquiry the court held that to allow the proceedings to adjourn briefly for the state and defense to consult would in essence fulfill all the requirements of an informal preliminary inquiry. Subsequent to such consultation and all affected parties requesting that the matter proceed the court ruled that the best interests of the child would be served by continuing with the current proceedings with the court now constituted as a Child Justice Court as envisaged in terms of Section 63 of the Child justice Act.

In so far as the proceedings are required to be held in camera the court requested Adv. Brickhill to address it in this regard. On application by the defense and having regard to the history of the matter and the nature of the offence the court ruled in terms of Section 63(5) of the Child Justice Act that the proceedings not be held in camera as the gallery constituted residents of the child's community and family who were specifically there to render him their support.

History of the Dwesa-Cweba area and this matter

The history set out below is gleaned from a culmination of that contained in the various exhibits before the court.

This matter is the culmination of a long and unfortunate history relating to the plight of the people of Hobeni who previously inhabited the area now described as the Dwesa-Cwebe Reserve. These communities have lived within the Reserve from time in memorial.[1] According to the history placed before this court, the Xhosa royal lineage was established in the Dwesa-Cwebe area as early as 1600 and settlement by indigenous people has been ongoing ever since.[2]

In 1903 Dwesa and Cweba were declared state forests and the land and its resources continued to be used by the resident communities subject to minor controls.

During the period 1891 to 1894 the Dwesa and Cwebe communities were forcibly removed and relocated to land adjacent to the actual forest areas and coastal strip. The people, however, continued to use the land and its resources as before.

In 1971 the Transkei Nature Conservation Act came into force and the Nature Conservation Division was established and restrictions were placed on fishing except in tidal waters, bait restrictions, selling without a permit was prohibited and provision was made for reserves and headmen were declared ex-officio status, as conservation officers.

During 1970 to 1989 a second forced removal was effected and these removals constituted the dispossession of rights in land based on past racially discriminatory laws and practices. These removals were based exclusively on the race of the inhabitants and were carried out with neither consultation or due process nor compensation.

In 1975 the Dwesa-Cwebe Nature Reserve was established which in 1981 was proclaimed a state protected Nature Reserve with authorities halting all access by local communities.

In 1991 the Marine Reserve was declared but restrictions were apparently not very tightly enforced all along the coast of the Reserve.

In 1995 a meeting was held with its purpose being the negotiation of an interim solution to problems experienced around access to natural resources at the Dwesa-Cwebe Nature Reserve by local communities. Already at this point the local communities demanded the unconditional return of their custodianship of this land and its resources.

At this meeting the Eastern Cape Department of Nature Conservation agreed that:

- *the communities should have access to sea and forest resources, based upon the principles of sustainable utilization as permitted by law,*
- *the communities should participate in the management of the nature and forest reserves, and,*

[1] Exhibit L drawn largely from Palmer, Timmerman and Fray, 2002
[2] Exhibit C Dwesa Cwebe Settlement Agreement page 6

- *the communities should benefit from the proceeds of eco-tourism.*

Between 1996 and 1999 a series of meetings were held between the Eastern Cape Department of Nature Conservation and the communities to discuss future co-management arrangements.

In 1998 the Marine Living Resources Act of 1998 was promulgated and comes into force.

In 2000 the Marine Reserve was declared a Marine Protected Area (MPA) in terms of the Marine Living Resources Act of 1998 and "no-take" regulations are imposed. The community in effect is no longer able to harvest marine resources at all and there is a complete ban on fishing. However, there was not strict compliance enforcement of these restrictions until around mid-2005.

The affected communities lodged a claim for restitution of their land rights in accordance with the Restitution of Land Rights Act 22 of 1994.

In 1996 the final Constitution of the Republic is adopted.

In 2000 the communities of Dwesa and Cwebe engage in meetings and negotiations with the State culminating in them committing themselves to the retention of the Reserve in perpetuity as a conservation area in the national interest, in partnership with the State subject to the terms of the Dwesa Cwebe Settlement Agreement and the following vision endorsed by the Department of Economic Affairs, Environment and Tourism, Eastern Cape, and the claimant communities was adopted worded as follows:

"The Community and a Nature Conservation Agency shall jointly manage the area in a manner that conserves the biodiversity, while seeking to optimize the benefits to the Dwesa and Cwebe community, based on the principles of sustainable utilization."

This agreement culminated in the signature of the Dwesa Cwebe Settlement Agreement (the Agreement) on the 17th day of June 2001 by the duly elected and mandated representatives of the seven Community Associations representing the local communities, The Department of Agriculture and Land Affairs, The Department of Water Affairs and Forestry, The Department of Environmental Affairs and Tourism, The MEC of the Executive Council for the Department of Economic Affairs, Environment and Tourism, Eastern Cape Province, Transdev (Propriety Limited), Occupiers of Cottages represented by Mr. G. Bell and the Trustees of the Dwesa Cwebe Land Trust.

In terms of paragraph 3 to 5 of the Agreement the State agreed in partial settlement of the claim, to restore the land to the Dwesa and Cwebe community to be held in Trust on behalf of the said community subject to the terms of the Agreement.

In terms of paragraph 8 of the Agreement the parties thereto further agreed to enter into a "Community Agreement" in terms of which the manner of management, control and utilization of the Reserve would be governed.

It is here that the goodwill toward the ordinary resident of these communities appears to terminate. It is common cause between the parties that no effect has been given to the Community Management Agreement and the frustrations of the community have not been addressed in particular their demands to access to the sea and marine resources and their anticipation of preferential treatment in respect of the Reserve.

Paragraph12.1 of the Agreement provides as follows;

"The community shall enjoy favoured status in terms of the benefits from eco-tourism employment opportunities, resource rights, input to management policies etc in accordance with the management plan."

In 2009 Mr. Alan Boyd as representative of the DEAT, at a workshop with fishermen, promises to re-open a section of the coast for fishing and he commissions an evaluation of opening of the MPA by Dr. Peter Fielding who subsequently recommends against such opening. The government departments involved in the discussions subsequently are split up and everything has been on hold since then.[3]

Evidence

In opening its case the state indicated that since the Section 115 Act 51 of 1977 written plea explanation by the adult accused and the child contained admissions to all the elements of the various charges they faced and these had been recorded as formal admissions in terms of Section 220 of Act 51 of 1977 the state did not intend leading further evidence save for reserving its right to call rebuttal evidence if it deemed it necessary.

The states' case was then closed.

The defense opened its case by calling accused 1, David Gongqose under oath.

His evidence is summarized as follows..

He testified that he was a 49 year old male residing in the Hobeni locality within the magisterial district of Willowvale and that he had resided at such location since his birth. His father and grandfather had similarly resided at such locality since their births.

He confirmed that both accused 2 and the child were known to him and that they had also resided at Hobeni since their births and are fellow fishermen, registered as such by the Hobeni leadership structures as reflected in **Exhibit N**.

He was raised as a fisherman from around the age of 10 years old and been taught the skills and traditions of fishing by his father who in turn had been taught these by his father.

[3] Exhibit L drawn largely from Palmer, Timmerman and Fray, 2002

He testified that part of the legacy passed from generation to generation was an appreciation for the natural environment. He spoke of learning to release smaller fish he caught and to cut only certain larger trees allowing the fish to mature and the saplings to grow.

He testified that he is illiterate but schooled in the customs and culture of his community.

He testified that he and his fellow fishermen were uniquely dependent on the sea as the fish caught provided food for their families and surplus was sold to maintain and educate their children. He spoke of customs and traditions relating to the allocation of fishing spots over the generations and the reliance on the sea for many traditional customs practiced by the men and woman of his community.[4]

He testified of the hardship experienced by the entire community brought about by the enforcement of the ban on fishing in the Dwesa-Cwebe Reserve. He confirmed that the fishing community of his village now no longer had any practical access to the sea where fishing was permissible. This was as a consequence of them having limited resources in respect of transport and the considerable distances they would have to walk to fish lawfully.

He testified as to the leadership structures within his community and the mechanisms for dispute resolution. His specific community falls within the jurisdiction of the Hobeni Communal Property Association which looks after the land and regulates its usage by the community.[5]

As a member of the Hobeni Fishing Committee he was a signatory to the Memorandum of Grievances/Petition dated the 25th of April 2011 submitted to the various state departments tasked with environmental issues.[6] This document listed a number of pertinent grievances relating to the delays in negotiating a settlement in respect of the fishing rights dispute and expressed the frustrations of the local communities. He further testified to being a signatory to the grievance letter directed to Mr. Allan Boyd of the Parks Board in which the fishermen again expressed their grievances at having their pleas ignored and contained threats to take the law into their own hands.[7] This letter emanated subsequent to a meeting between all affected parties at the Haven Hotel on 28 June 2011.

This court notes the minutes of this meeting of 28 June 2011prepared by the Eastern Cape Parks and Tourism Agency, reflect in paragraph 8 thereof under Conclusion and Way Forward, the following:

"The following points capture the broadly suggested steps going forward:

- ***Need for DAFF/DEA/DEDEA/ECPTA/Community to work on a plan that can balance both priorities: need to conserve as well as need to facilitate access for subsistence***

[4] See Exhibit M for specific terms and phrases
[5] See Exhibit B
[6] See Exhibit D
[7] Undated but sent subsequent to the 28/6/2011 meeting at Haven Hotel

- ***Participants agreed on an urgent need for the meeting to be held wherein a plan can be worked amongst all affected parties and approved by the relevant Authorities simultaneously"***[8]

Mr. Gongqose reiterated throughout his evidence, the frustration of his community at not being consulted at all regarding decisions made that had a direct negative impact on their community and the continuous empty promises and lack of results emanating from numerous meetings between the affected communities and state authorities. It was his evidence that nothing further has transpired subsequent to the above meeting. This lack of movement in continuing negotiations was confirmed by Dr. Fielding in his rebuttal evidence as well as his report dated March 2012.[9]

This court notes that having regard to the attendance list annexed to the minutes[10] quoted above, it is clear that all affected state environmental agencies were represented and that Dr. Peter Fielding himself was a key speaker.

Under cross-examination Mr. Gongqose conceded that he was aware of the law prohibiting fishing but that such law was made without consulting them.

On questioning by the state he indicates that in respect of the meeting held at the Haven Hotel on 28 June 2011, the expectations of the community was that the state departments would come back to them with a way forward in respect of opening the sea.

In respect of the interpretation to be placed on the contents of the Dwesa Cwebe Settlement Agreement[11] he refuted the state's suggestion that this was a surrender of his customary right to fish. He affirmed that the communities expectation was that in signing the Settlement their access to the sea would be restored.

The second witness for the defense was Ms. Vuyelwa Siyakelo. She testified that she was born and raised in Hobeni and was a trainee medicinal healer. She is a member of the muscle committee and the woman's' committee. She had begun going to the sea from around 10 years of age and was taught the ways of the marine harvesters by her mother.

Ms. Siyakelo gave an insight into the customary rituals relating to the sea and the intrinsic value of that specific piece of the coast to her ancestral rituals.

The state then called the expert evidence of Dr. Derick Fay whose report and curriculum vitae forms part of the record.[12]

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[8] Page 4 of Exhibit E
[9] At page 12 of Exhibit G
[10] See pages 5 and 6 of Exhibit E
[11] Exhibit C
[12] Exhibit D

Dr. Derick Fray is an Assistant Professor at the University of California, USA. His field of expertise was in the land usage, customs and impact of proclaimed areas on the residents of coastal areas and the Hobeni area in particular.

Dr. Fay is fluent in Xhosa and resided within the Dwesa and Cwebe community at Hobeni for a period of approximately 2 years between 1996 to 1998 during which time he did extensive research into these communities and their reliance on natural resources. His doctorate degree was awarded to him for his research over this period. He resided in the area again for brief periods in 2009, 2010 and 2011.

His evidence is summarized as follows.

A system of customary regulation exists governing the use of natural resources in the communities around Dwesa and Cwebe. He described the authoritative structures including sanctions and remedies as developed and respected by those subject to them.

The communities are statistically some of the very poorest in the Republic and that the socio-economic and substantive quality of life of these residents is supported by access to natural resources. [13] He described in detail the reliance on and direct use of fish resources for net income of the resident communities and effect of the decline in the formal employment sector and increased reliance on child care grants.[14] He stressed that the loss of access to marine resources had led to substantial hardship for the communities concerned. He highlighted the economic plight of the resident communities and refuted any suggestion that alternate means of economic subsistence was readily available to the resident communities.

When invited to comment on the findings of Dr. Fielding that allowing partial access to controlled areas leads to significant depletion of marine resources, he indicated that he disagreed and stated in his opinion that such partial access had very limited impact on resources and was a means of suppressing illegal harvesting.

Having resided within the Hobeni community he could state that the walking distance to the nearest accessible section of coast where fishing was lawful is around 3 and a half to four hours through difficult terrain. On the other hand, the closest fishing spots within the Reserve were around 45 minutes walk and readily accessible.

He confirmed having attended numerous meetings and being present during the negotiations culminating in the signing of the Dwesa-Cwebe Settlement Agreement.[15] He testified that the subsequent closure of the marine resources brought about by the proclamation of the Reserve as a MPA took place with no consultation with the local communities and outside the co-management process.

[13] Measuring poverty in South Africa, Statistics South Africa 2000 compiled by Dr. R. Hirschowitz (Acting Head)
[14] Migrants, Forests and Houses: The Political Ecology of Architectural Change in Hobeni and Cwebe, South Africa printed in Human Organization Vol. 70, No. 3, 2011
[15] Exhibit C

Dr. Fay's evidence is that the community leaders and the general membership of the communities expected that the resolution of their land claim would allow for restored access to the marine resources they were previously accustomed too.

Under cross-examination he conceded that he was not qualified in the field of marine biology but was an expert in the human sciences. His research had focused primarily on the humanitarian crises brought about by the closure of the Reserve and had not focused on the marine resources themselves.

The defense then called its second expert witness, Ms. Jacqueline Sunde, whose report and curriculum vitae forms part of the record.[16]Ms. Sunde is a social researcher and PhD student in the Department of Environmental and Geographical Science, University of Cape Town.

Ms. Sunde has conducted research in Dwesa-Cwebe and in other areas of South Africa relating specifically to customary law systems governing marine resources. Her research includes an assessment of the impact of apartheid fisheries and conservation legislation and policy on customary communities, in particular the impact of statutory systems of regulation on customary systems of marine resource use. She is currently involved in the Food and Agricultural Organisation consultation process for development of international guidelines for the governance of the small-scale fisheries.

Ms. Sunde's evidence was that historically, many coastal communities have relied heavily upon marine resources for their survival and that this use was not merely a matter of subsistence or material need, but also constituted part of the culture and custom of many communities.

Ms. Sunde detailed the long-standing and well-developed system of customary law in the Dwesa-Cwebe community and Hobeni in particular, which system comprised a system of rules relating to, and use of, marine resources. At the heart of this system is a customary norm entitling members of the community to have access to, and to use, marine resources for subsistence, ritual and other purposes.

Ms Sunde's findings are that new statutory systems of regulation of marine resources and marine conservation have impacted negatively on the capacity of the Dwesa-Cwebe community and other such communities to practice their system of customary law rules in respect of marine resources.

Under cross-examination Ms. Sunde also conceded that she was not qualified as an expert in the field of marine biology but had done extensive research into small-scale fisheries and the resultant usage of marine resources. Ms. Sunde was an expert in the social sciences and governance of small-scale fisheries. Her research had focused primarily on the humanitarian crises brought about by the closure of the Reserve and had not focused primarily on the marine resources themselves.

Accused 2 and the child elected not to testify and by implication rely on the evidence of accused 1, Ms. Siyakelo and the expert witnesses called by the defense.

[16] Exhibit K at page 19

That was the case for the defense.

The state applied to re-open its case to lead the rebuttal evidence of Dr. Peter Fielding. This application was granted.

Dr. Peter Fielding is a marine biologist and environmental expert and practices as such under the business name of FieldWork.

Dr. Fielding has been involved in the study of small-scale fishing and its impact on the sustainability of marine resources throughout Africa for in excess of 20 years.

Dr. Fielding stressed the importance of the retention of marine protected areas and that his research has shown a need to significantly increase the geographical extent of these protected areas. Its Dr. Fielding's finding that the impact of human development on the environment is predominantly negative.

Dr. Fielding testified that there are currently 21 marine protected areas along the South African coast of which only a miniscule portion (3) are complete no-take zones and that the Dwesa-Cwebe protected area was of considerable importance to the protection of South Africa's marine biodiversity.[17]

Dr. Fielding testified that the result of opening protected areas has historically proved disastrous as the large breeding fish get taken first leading to an inevitable decline in spawning and hatching of new stock. He states that the Mbashe Estuary within the Dwesa-Cwebe Marine Reserve is the only known spawning area for the white Steenbras. He gives the further example that within the protected area the coverage of coastal rocks by muscles is around 40 to 50% while it is less than 1% outside the Reserve.

Dr. Fielding disputes the defense expert's submission that the resident communities are primarily reliant on harvesting of marine resources. He indicates that fishing is but one of a wide range of lifestyle opportunities available to the residents. Dr. fielding goes so far as to question the submission that the residents of Dwesa and Cwebe have a tradition of fishing. He relies on a taboo by local people to the eating of fish. This belief of Dr. Fielding was challenged as incorrect by Ms. Sunde when she was recalled by the defense to rebut his statement.

Dr. Fielding strongly advocates against the opening of the marine protected area whether in total or partially. He disputes that local restraint and customary rules and traditional authoritative structures will suffice to ensure sustainable use. He describes the limited lifting of restrictions in Kossie Bay as a prime example of the ecological disaster of such a compromise and that self-regulation does not work.

Dr. Fielding disagrees that customary rights have the same value as legislation.

[17] Exhibit G at pages 7 to 10

Under cross-examination Dr. Fielding denied that he believed fish are more important than people; it was all a question of sustainability.

Dr. Fielding further conceded that no specific research had been done on line-fish prior to the proclamation of the Dwesa-Cwebe marine protected area.

Dr. Fielding confirmed that he stood by his reports of April 2010 and March 2012 that he believed it imperative that the Dwesa-Cwebe marine protected area remain a no-take zone. He did concede that in forming such opinion he had not consulted the resident communities of Dwesa and Cwebe and the Hobeni fishermen in particular.

Dr. Fielding stated that to the best of his knowledge, the discussions regarding resource use in the Reserve were still alive with a meeting having taken place in East London 2 weeks prior to him giving his evidence on 14 April 2012 but he had not attended that meeting.

Evaluation of evidence

During the course of the trial a number of exhibits were handed in to the court and received into evidence. For ease of reference these were marked and are listed as;

A. Statement in terms of Section 115 and 220 of act 51 of 1977,
B. Constitution establishing the Hobeni Communal Property Association,
C. Dwesa Cweba Settlement Agreement,
D. Memorandum of Grievances by the community dated 25 April 201,
E. Minutes of meeting held at Haven Hotel on 28 June 2011,
F. Undated letter by Dwesa-Cwebe fisherman to Mr. Alan Boyd of DEAT,
G. Report titled Management of Marine and Coastal Resources by Dr. Fielding dated March 2012,
H. Map of Reserve and Dwesa-Cwebe Coastal topography,
I. List of forest products/species required by communities from Dwesa-Cwebe reserves,
J. Expert report of Dr. Derick Fay with curriculum vitae,
K. Expert report of Ms. Jacqueline Sunde with curriculum vitae,
L. Dwesa-Cwebe historical time line,
M. Glossary of traditional terms,
N. List of fishermen and harvesters,
O. ***Ruled inadmissible***
P. National Economic Development and Labour Council report on small-scale fisheries policy 2012 (Gazetted), and
Q. Final report by Dr. Fielding dated April 2010 prepared for Marine and Coastal Management.

In respect of the oral evidence of the various witnesses is concerned, this court was not asked in argument on the merits to make any adverse credibility findings in respect of any of the witnesses.

All the witnesses were honest and reliable and this court finds it can accept their evidence whether they testified for the state or defence.

Naturally there will be points of departure between the various expert witnesses but all readily conceded aspects or opinions that fell outside their respective fields of expertise.

It is common cause that the Marine Living Resources Act, No 18 of 1998, in particular the proclamation in terms of this Act of the Dwesa-Cwebe Marine Reserve as a Marine Protected Area (hereinafter referred to as the MPA) in December 2000 with the resultant ban on the removal of any marine species from the Reserve prohibits the indigenous inhabitants from practicing their custom of fishing in the Reserve.

The court is reminded by the State and the evidence of Dr. Peter Fielding that the prohibition on fishing is not absolute but is exclusively applicable to the coastline encompassing the proclaimed Reserve itself. This fact was not disputed by either Dr. Derick Frey or Ms. Jacqueline Sunde for the defense. Their counter argument being the significant cultural value placed by the indigenous inhabitants on the specific area of coast itself and to a lesser extent the substantial distances and terrain the resident fishermen will have to traverse to reach the accessible coast where fishing is permitted.

Dr. Fielding disputes the submissions by the experts for the defense that traditional authoritative structures or the practice of sustainable harvesting by the fishermen themselves can adequately regulate over-fishing in the Reserve. He relies in this regard on specific examples of degradation of species numbers in other reserves once the blanket ban on harvesting was lifted or partially lifted.[18]

In support for the retention of the MPA Dr. Fielding gives his insight into the benefits to fishermen of retaining such MPAs as there is higher catch rates in surrounding waters.[19] Dr. Fielding remains steadfast that to even partially suspend the prohibition on harvesting marine resources in the MPA would have disastrous consequences. He goes to the extent of saying the current MPAs in the Republic are hopelessly insufficient.[20]

Dr. Fielding during the course of his evidence concedes that the decision to proclaim the Marine Reserve an MPA was taken with little or no consultation with local communities and certainly did not engage them in any formal discussions. The decision can thus be accepted to have been made on purely scientific grounds having regard to the marine biodiversity of the area without much thought being spared for the impact of the decision on the indigenous communities. He confirms that to date little or no effect has been given to the implementation of the Community Management Agreement entered into and forming part of the Dwesa Cwebe Settlement Agreement signed on 17 June 2001. In his report of March 2012 he acknowledges that'

"The current state of conflict over fishing activities in the Dwesa-Cweba MPA is ultimately the result of a lack of delivery and co-ordination on the part of a range of institutions in relation

[18] Report by Dr. P.J. Fielding dated March 2012 at page 11 paragraph 3, and page 5 to 6
[19] Report by Dr. P.J. Fielding dated March 2012 at page 4 paragraphs 2 and 3
[20] Report by Dr. P.J. Fielding dated March 2012 at pages 7 and 8

to managing the environment, the natural resources base and the human elements in the area. Management authorities have not addressed co-management arrangement properly."[21]

Dr. Fielding during the course of his oral evidence in rebuttal disputed the existence of an established custom of fishing in the Reserve as described by Dr. Derick Frey and expanded on by Ms. Jacqueline Sunde and suggested that it was in fact completely the opposite in that the men of the area traditionally did not eat fish at all. However, he states in his report that,

"No-one denies that communities along the Wild coast have a tradition of marine and terrestrial natural resource use and no-one denies that these communities should benefit from the assets that form part of the environment and heritage."

Dr. Fielding goes on to say that these extractions of resources provide very limited short-term benefits and that alternative livelihoods options for displaced fishers should have been a very high priority of conservation management agencies as well as local, regional and national government institutions.

This court cannot be blind to the reality that the plain and simple truth is that while these marine resource extractions may not include long term benefits for communities or the environment itself they in reality only need to benefit the community from day to day to have an enormous immediate benefit to those utilizing them to survive. What in essence is the undeniable truth is that this impoverished community is starving today and the children of the area require education now and for them the future is of little consequence.

This court cannot shy away from the conclusion that little but lip service has been paid to the terms of the Dwesa Cwebe Settlement Agreement and even less to the Community Management Agreement of the Reserve by government agencies. While loath to say so it would appear to this court that subsequent to the signatures being placed thereon and before the ink could dry, the doors were firmly slammed shut in respect of the expectations of the community to regain access to the sea and its resources. Whether this was premeditated or not is debatable to say the least.

In evaluating the conflicting opinions of the experts in this matter the court cannot lose sight of the fact that Dr. Derick Frey and Ms. Jacqueline Sunde are experts in the social sciences and have as their point of departure the impact on humanity and in particular disadvantaged communities while Dr. Fielding is a marine biologist who has as his point of departure the impact of human habitation and exploitation on the environment more particularly the sea and its resources.

The court is thus tasked with balancing these two interests; having regard to the undeniable hardships total closure of harvesting the coastal reserve has to resident communities and the scientifically supported necessity to ensure long term sustainability of marine resources.

In so far as accused 2 and the child elected not to testify, it is this court's opinion that no adverse inference should be placed on such election. As will be more apparent from this judgement this court specifically finds that the alleged custom of fishing by the residents of Hobeni has been

[21] Exhibit G, Report by Dr. P.J. Fielding dated March 2012 at page 12

proved by the defence. A custom is not practiced by an individual in isolation but by a particular community or group of people in association. If this court finds that the defence of reliance on a custom is to be upheld in respect of accused 1; the same defence will automatically be applicable to accused 2 and the child as residents of the same community while practicing that custom.

Legal considerations

In light of the defense raised this court saw fit to pose certain questions to both counsel which the court wished addressed on argument of the merits of the matter. The letter dispatched to the state and Adv. Brickhill is annexed to the record marked **Annexure F.** This court expresses its sincere appreciation to both counsel for their diligent response thereto and thorough address on the issues raised by the court.

There can be no doubt that South Africa with its undeniably divers biodiversity has been a Continental leader in enacting legislation with a strong responsibility in respect of environmental protection and responsible utilization of natural resources. Critics of environmental policies and legislation will come and go; some justified and others not.

At the outset this court must be guided by the Constitution of the Republic being mindful of the provision of Section 2 thereof which provides as follows,

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

In this regard the court is guided by Section 9 of the Constitution which reads as follows,

9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The importance and value of custom and culture was also not lost to the legislature and Section 31 provides that,

31(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, practice their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

In enacting the Constitution the legislature was further mindful of the importance of and issues relating to the environment and provided in Section 24(b) as follows,

24(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
1) prevent pollution and ecological degradation;
2) promote conservation; and
3) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

In so far as customary law in particular is concerned, its existence and importance was entrenched in the Constitution and all courts of the Republic are compelled to have regard too and apply customary law as a legitimate legal system with equal stature. Section 39 reads as follows,

39(1) When interpreting the Bill of Rights, a court, tribunal or forum
- ***(a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;***
- ***(b) Must consider international law; and***
- ***(c) May consider foreign law.***

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The legislature was further mindful of the unavoidable reality that circumstances will exist where legitimate grounds exist for the limitation or curtailing of certain rights afforded by the Bill of Rights and enacted in Section 36 as follows,

36 (1) the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including
- ***(a) The nature of the right;***
- ***(b) The importance of the purpose of the limitation;***
- ***(c) The nature and extent of the limitation;***
- ***(d) The relation between the limitation and its purpose; and***
- ***(e) Less restrictive means to achieve the purpose.***

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The question before this court was to what extent a lower court may apply customary law and in particular to what extent is such lower court bound by existing legislation where same is in conflict with or prohibits the practice of a custom or provision of customary law.

It was on this point precisely that this court requested comments from counsel for the defence in particular. The court being open to the strict interpretation of and limitations upon its powers provided for in Section 170 of the Constitution that reads,

170. Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

This court further had regard to the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, No 4 of 2000. Which was specifically enacted to give effect to and promote the implementation of the Bill of Rights entrenched in the Constitution.

The introduction and preamble to this Act give a detailed synopsis of its importance in our jurisprudence and reads as follows,

To give effect to section 9 read with item 23 (1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.

<u>Preamble</u>

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;
Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;
The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish;
South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination;
Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality;
This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences;

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom,

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.

The exercise of these practices of custom is to be encouraged and protected and should be limited only by the provisions contained in Section 36(1) of the Constitution.

The Marine Living Resources Act, No 18 of 1998 came into effect on the 27th of May 1998 and provides as its purpose in its preamble;

"To provide for the conservation of the marine ecosystem, the long-term sustainable utilization of marine living resources and the orderly access to exploitation, utilization and protection of certain marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all citizens of South Africa;"

This piece of legislation is of national application and supersedes all other marine environmental legislation unless expressly excluded.

In terms of Chapter 4 Section 43 the power is granted to the Minister to declare an area to be a marine protected area. Section 43(2)(a) provides for an absolute prohibition on fishing in such marine protected area.

However, a rider clause is provided for in Section 43(3) that the Minister may, after consultation with the Forum, give permission that any activity prohibited in terms of this section may be undertaken, where such activity is required for the proper management of the marine protected area.

Thus there is no doubt the Minister may, after consultation, grant indemnity for persons performing acts otherwise prohibited in terms of Section 43(2). Thus there is no lawful reason prohibiting the Minister from allowing subsistence fishing by local communities of the Dwesa-Cwebe area in the Reserve. This indemnity from prosecution and recognition of their customary rights is exactly what these communities have been pleading for over the last decade.

The Environmental Conservation Decree No. 9 of 1992 on the other hand is a piece of legislation of questionable significance and importance in the jurisprudence of modern day South Africa. It has limited territorial jurisdiction and in essence adds more to the concept of legal uncertainty than it does in environmental enhancement of our biodiversity legislation. It has limited territorial jurisdiction in so far as it is applicable to the territory described as the erstwhile Republic of the Transkei. There is no question that there is offences enacted in terms of this legislation which do not exist in the broader spectrum of provinces in the Republic let alone magisterial districts within the same province. It is this court's humble submission that this piece of legislation is from a bygone era and should be relegated to the shelves of antiquity and laid to

rest alongside the other legislation which existed prior to reaching our constitutional democracy. However, this court accepts that no matter how it feels about the necessity for retaining this piece of legislation, the constitutionality or otherwise of same, and value of its continued existence will fall to be determined by a higher court. For the purpose of this decision the Decree exists and full force and effect must be given thereto albeit under duress.

Our legal system has for decades been blessed with a wealth of literature by experts in every field of law. Sadly customary law to a large extent appears to be the forgotten child. This court however, was guided by the excellent publication by TW Bennett titled Customary Law in South Africa initially published by Juta in 2004 and reprinted in 2007.

Culture is closely linked to tradition. In a general sense, tradition means no more than the transmission of culture from one generation to the next.[22]

Tradition operates to give people a sense of continuity in their lives, especially when they are experiencing the stress of change. Hence, tradition is used, on the one hand, by people caught up in the process of change to make sense of new situations, and, on the other hand, by colonial, and indeed many post-colonial African governments to give legitimacy to state policies. Tradition may also be asserted to resist these policies.[23]

Courts working in the western legal tradition will inevitably find custom a problematic source of law. For a start, the presumption that all courts know the law works well only in systems where judges are familiar with their sources. Customary law however, derives from the practices of particular communities; these practices differ considerably from place to place, and they change constantly over time. In such circumstances, a court that is not part of the community it serves cannot possibly know the law.[24]

South Africa's new constitutional dispensation began not only a political but also a legal revolution. With the inclusion of a justiciable Bill of Rights in the Constitution, the validity of a wide range of laws, whether public or private, could now be tested against the standards of fundamental human rights. For the first time in South African legal history, customary law became an issue of constitutional importance. This development was due in part to the possibility of constitutional review and in part to the association of customary law with a right to culture.[25] Roman-Dutch and customary law are now treated as equal partners. The recognition and application of customary law, however, rests on a right to culture, for which special provision is made in Sections 30 and 31 of the Final Constitution.[26]

Legislation considered

[22] TW Bennett, Customary Law in South Africa at page 22 paragraph 4
[23] TW Bennett, Customary Law in South Africa at page 22 paragraph 5 and page 23

[24] TW Bennett, Customary Law in South Africa at page 44 paragraph 2

[25] TW Bennett, Customary Law in South Africa at page 76 paragraph 1
[26] TW Bennett, Customary Law in South Africa at page 78 paragraph 3

During the course of preparing this judgment this court had regard to the following legislation;

South African legislation:

- The Constitution of the Republic of South Africa Act, No of 1996
- The Child Justice Act, No 75 of 2008,
- The Children's Act, No 38 of 2005,
- The Promotion of Equality and Prevention of Unfair Discrimination Act, No 4 of 2000,
- The Marine Living Resources Act, No 18 of 1998
- Protected Areas Act 2003
- Biodiversity Act 2004
- National Environmental Management Act, No. 57 of 2003
- Proclamation declaring Marine Protected Areas and regulations 29 December 2000
- Transkei Nature Conservation Act, No. 6 of 1971
- Environmental Conservation Decree, No 9 of 1992
- Amendment of Transkei Fisheries Regulations 23 July 1993

Foreign and international legislation:

- Article 35 of the Canada Act of 1982
- African Charter on Human and Peoples' rights
- The Convention on Biological Diversity (CBD 1992)
- United Nations Conference on Environment and Development (UNCED Ch. 17 Agenda 21

Decided cases considered

During the course of preparing this judgment this court had regard to the following decided cases of the various High Courts of South Africa and internationally;

South African cases:

- Van Breda and Others v Jacobs and Others 1921 AD 330
- Alexkor Ltd v The Richtersveld Community 2004 (5) SA 460 (CC)
- *New Foodcorp Holdings (Pty)Ltd v Minister of Agriculture, Forestry and Fisheries* (82/11) [2012] ZASCA 30 (28 March 2012)
- Shilubana and Others v Nwamitwa (CCT 03/07) 2008 ZACC 9; 2008 (9) BCLR 914 (CC)

Foreign cases:

- R v Sparrow (1990) 1 SCR 1075
- R v Adams (1996) 3 SCR 101
- Yanner v Eaton (1999) HCA 53

- Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endoris Welfare Council v Kenya African Commission on Human and Peoples' Rights (2010) 276/2003
- Apirana Mahuika et al v New Zealand 547/1993

Finding

At the outset this court wishes to express its gratitude to counsel for the defense in particular for his invaluable help in making all the applicable legislation, case law and extracts from publications available to this court and the state and his efforts in preparing the trial bundle which made the handling of the considerable volume of documentary evidence far easier.

In its closing address the state argued that it had proved its case beyond reasonable doubt in respect of all four counts and asked for a finding of guilty in respect of both adult accused as well as the child on counts 1 to 4 based entirely on their own formal admissions.

The defense on the other hand argued that in light of the evidence it had presented that the customary rights relied upon existed the court was entitled to acquit the accused persons on all counts despite the formal admissions made and that the reliance on customary rights to fish and enter the Reserve without permits by the accused persons had to be sustained with a ruling that the conduct of the accused persons was thus consequentially, not unlawful.

For the sake of convenience this court elects to give its ruling on counts 2 to 4 first thus disposing of the matters in terms of the Environmental Conservation Decree No. 9 of 1992 and then dealing with count 1 regarding the contravention of Section 43(2)(a) of the Marine Living Resources Act 18 of 1998.

As would be abundantly clear this court sees little value in the retention of the Environmental Conservation Decree No. 9 of 1992 in our post-constitutional legislation. Be that as it may its not for this court to determine the fate of this legislation. The provisions of Section 170 of the Constitution compel this court to have regard to and enforce the provisions of the Environmental Conservation Decree No. 9 of 1992.

Having regard to the evidence presented in the case and the State's election to call no witnesses but rely on the formal admissions by the defense, the court has scant information of the exact circumstances which lead to the apprehension of the 2 adult accused and the child on the 22nd day of September 2010.

The only undisputable fact is that the 2 adult accused and the child entered the marine protected area of the Reserve with the intention to fish without the requisite permits. The only conclusion this court can draw is that no effect had been given to that intention yet at the time of their arrest.

Count 2 requires that the accused persons should enter the Reserve other than under authority of a lawfully obtained permit. In this respect the undisputed evidence is that the land comprising the

Dwesa-Cwebe Reserve was previously dispossessed from the resident communities and ownership subsequently restored under the Dwesa-Cwebe Settlement Agreement.[27]

The inhabitants of Hobeni of which the 2 adult accused and child are part, thus collectively "own" the land comprising the Reserve albeit held in Trust. The question to be asked is thus whether it is conceivable that the owners of land may be required to obtain permits to enter upon such land. One of the questions posed to the respective counsel for the parties was whether in negotiating the Settlement the resident communities had abandoned their rights to enter upon or enjoy privileges in respect of such land? It is this court's finding that this was never the intention of the parties to the Settlement. Simply entering upon the Reserve was not included in the prohibited activities prescribed in paragraph 7 to the Settlement. Specific arrangements were negotiated in respect of a Community Agreement for the co-management of the Reserve by the resident communities.[28] Effect to such co-management could never be achieved by excluding the community from unrestricted access to their own land. Finally the Settlement provides for a favoured status for the community in respect of the Reserve. The community is thus entitled to the reasonable expectation of unrestricted access to the Reserve. The contract can only be interpreted as indemnifying the resident communities from requiring permits to enter the Reserve.

Both adult accused as well as the child are found not guilty in respect of count 2.

Count 3 requires that the accused persons should be found in possession of any weapon, explosive, trap or poison. The only evidence before this court is drawn from the formal admission that the accused persons were in possession of fishing rods, line and hooks. Having regard to the definitions prescribed in Chapter 1 of the Environmental Conservation Decree No. 9 of 1992 this court notes that "weapon" is defined as,
"***any firearm and includes ammunition; and any other instrument which is capable of propelling a projectile or which can itself be propelled or used in such a way that a wild animal may be killed, injured or immobilized thereby."***
"Explosive" is not defined at all.
"Poison" is defined as,
"any poison, preparation or chemical used to catch, immobilize, sterilize, kill or physically harm any animal".

This court will not have any further regard to explosives or poison as these are clearly not of relevance.

It is argued by the state that fishing rods, line and hooks constitute weapons as envisaged in the definition. This court can find no substance in this argument. The Decree makes specific provision for lawful fishing and could never have conceivably intended to prohibit the essential tools required to fish being fishing rods, line and hooks.

Both adult accused and the child are found not guilty in respect of count 3.

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[27] Exhibit C paragraph 4 page 8
[28] Paragraph 8 to the Settlement Agreement

Count 4 requires that the accused person willfully kill or injure or disturb any wild animal other than fish caught in accordance with such regulations as may be prescribed in terms of section 29(1)(c) of the Decree. As set out above this court has scant evidence of the events of 22nd day of September 2010. There is certainly no evidence that the accused persons or the child killed any wild animals other than fish or had even attempted to do so. It is this court's interpretation that this provision expressly intended to exclude fish from the prohibited species. It is the state's submission that the clause only excludes fish caught lawfully in terms of the regulations. It is common cause that no fish may be lawfully caught within the Reserve due to its marine protected area status.

What should not be ignored is the fact that the Environmental Conservation Decree No. 9 of 1992 was enacted prior to the Marine Living Resources Act 18 of 1998 being promulgated. Its core function was to regulate fishing in reserves in an era when such fishing was lawful albeit restricted. It is this court's interpretation that Section 29(1)(c) was enacted to prohibit the killing or disturbing of wild animals other than fish. The fact that decades later the Reserve has been declared a MPA with an absolute prohibition on fishing does not empower this court to give Section 29(1)(c) a broader interpretation than that which what was originally intended. There is no evidence that the accused persons had any intention to kill or disturb any wild animals other than fish.

The 2 adult accused and the child are found not guilty in respect of count 4.

Finally in respect of count 1 the sole issue that falls to be determined is whether the fact that the accused persons reliance on a customary right to fish in the area promulgated as a MPA negates the unlawfulness of their conduct required for a convition in respect of a contravention of Section 43(2)(a) of the Marine Living Resources Act 18 of 1998.

The formal admissions by the accused persons in terms of Section 220 of Act 51 of 1977 are that they all intended to fish in the Reserve on the 22nd day of September 2010. The accused persons have established through the evidence of accused 1 and the expert evidence of Dr. Derick Fay and Ms. Jacqueline Sunde that such a custom of fishing within the coastal waters by the fishermen of the communities of Dwesa and Cwebe exists. This custom of fishing has subsequent to the enactment of the Marine Living Resources Act 18 of 1998, found itself in conflict with national legislation.

This court in its letter dated 16 March 2012 posed the question to both counsel as which law is to take preference in situations such as the current impasse? It is argued by Adv. Brickhill that customary law and custom is expressly recognized by the Constitution and is of equal value to common and statutory law. Adv. Brickhill argues further that while the Constitution provides for the regulation of customary law by statute, such regulation cannot amount to the complete extinguishment of customary rights unless it is done explicitly and if such extinguishment is not done in a manner consistent with section 36 of the Constitution. There can be no other conclusion that the absolute ban on fishing and/or harvesting of marine resources in the Reserve amounts to a complete extinguishment of the customary rights of the communities of Dwesa and Cwebe to practice these customs in that specific geographical area. The fact that such extinguishment occurred without consultation is also irrefutable. Whether the provisions of the

Marine Living Resources Act 18 of 1998 in so far Section 43 are concerned would survive a test of constitutional validity is debatable to say the least.

Whether fortunate or otherwise, such determination of constitutional validity does not fall to be determined by this court; such authority being expressly excluded by section 170 of the Constitution.

This court must find that the provisions of the Marine Living Resources Act 18 of 1998 and in particular Section 43 thereof to be valid and of force.

On the accused persons' own version they intended to fish in the marine protected area and since the prohibition includes any attempt to fish, they are guilty of the offence.

The 2 adult accused and the child are found guilty in respect of count 1.

_____ _____

Mr. G.S. Nel Date
Additional Magistrate
Mthatha