



LRC

Legal Resources Centre

WHAT IS CUSTOMARY LAW?

It is a system of law that is practised by a community, in this case, a community of fishers. It has existed and evolved over time. It is part of a bigger customary system that regulates who holds land in the community and how, the leadership, cultural rituals etc.

FACTS:

- The community system recognises the rights of certain community members to fish or harvest, enforces rules for example when a community member who is not recognised as a fisher, attempts to fish or when there is overfishing.
- So instead of the government deciding who can fish and who can't, the community's customary system regulates that.
- That does not mean that anyone in the community can fish or harvest. It means that the community exercises its power to identify fishers and harvesters and ensure that it happens sustainably.
- These customary systems have existed for tens and even hundreds of years.
- Before the Constitution, customary law and customary systems were ignored and not seen as real law.
- The Constitution changed that and tells the government they must recognise customary law.



WHAT DID THE GONGQOSE JUDGMENT SAY?



The Court said that the Hobeni community had proven that it has a customary system and that as part of that customary system, members of the community, like David Gongqose, had a customary right to fish.



The Court said that the Minister had still ignored the community's customary law by not recognising that some community members had customary rights to fish and harvest. For that reason, the government could not find David and others guilty.



The government then changed the law (the MLRA) and recognised small scale fishing communities, including customary communities. That means that we can no longer say the government is ignoring customary law. They have now created a mechanism for the government to recognise customary rights, and one can no longer say that the MLRA does not apply to customary communities. It does.



This does not mean that anyone from Hobeni or Dwesa-Cwebe could go and fish: it means that the members of the community who are recognised as fishers and harvesters by their communities in terms of customary law, may do so.



BUT the problem now is that the government does not allow the customary communities to identify the fishers and harvesters that they know and recognise as customary users. The government treats customary communities like any other community without a customary system. This means that often the fishers and harvesters with customary rights are left off the list recognised by the government's permits and other people added.

WHAT SHOULD WE DO?



As communities, we must strengthen our customary systems and be able to articulate who we recognise as a community as fishers and harvesters and why. We must challenge the government – the Minister, ECPTA, the police – to recognise those fishers and harvesters as lawful users of the sea.



When we fight the government, we must be able to show what our system looks like and how and why we identify fishers and harvesters and how we make sure that people use the ocean sustainably.