IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

CASE NO: CA&R 26/13

REPORTABLE

In the matter between

SIYABONGA GONGQOSE	First Appellant
SEPHUMILE WINDASE	Second Appellant
NKOSIPHENDULE JUZA	Third Appellant

and

THE STATE	Respondent

CASE NO: 3001/13

In the matter between

MALIBONGWE DAVID GONGQOSE	First Applicant
SIPHUMILE WINDASE	Second Applicant
NKOSIPHELA JUZA	Third Applicant
VUYELWA SIYALEKO	Fourth Applicant
TATANA MXABANI	Fifth Applicant
BENJAMIN VON MEYER	Sixth Applicant
THE HOBENI COMMUNITY	Seventh Applicant
THE MENDWANE COMMUNITY	Eighth Applicant
THE CWEBE COMMUNITY	Ninth Applicant

and

MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES First Respondent

DEPUTY DIRECTOR: FISHERIES, DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES Second Respondent

THE MINISTER OF ENVIROMENTAL AFFAIRS Third Respondent

DEPUTY DIRECTOR: OCEANS AND COASTAL MANGEMENT, DEPARTMENT OF ENVIRONMENTAL AFFAIRS Fourth Respondent

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JUDGMENT

Mbenenge J:

Introduction

[1] This matter encompasses an appeal and a review simultaneously serving before this court by reason thereof that it was, as will become clearer hereunder, convenient to do so. Even though there are other issues raised in the appeal and the review, what straddles both proceedings is a complaint concerning the entitlement of the customary fishing community of the Hobeni,[1] Cwebe[2] and Mendwane[3] communities (hereinafter conveniently referred to as the Dwesa-Cwebe communities) to exercise their customary rights to access certain marine resources in a marine protected area.

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1 This community is situated directly adjacent to the Dwesa-Cwebe Nature Reserve.

2 Cwebe lies to the north of Hobeni adjacent to the border of the Marine Protected area and the coast line.

3 Located adjacent to the Dwesa-Cwebe Nature Reserve but without any access to the coast line at present.

[2] The Dwesa-Cwebe communities, of which the appellants and some of the applicants are a part, reside outside the borders of the Dwesa-Cwebe Nature Reserve (the Reserve). The Reserve, together with its neighbouring marine protected area, is located on either side of the Mbhashe River, and occupies a narrow coastal strip of approximately 19 km long that is between 2 km and 4 km wide on the terrestrial side extending 6 nautical miles out to sea on the marine side,[4] within the boundaries of the Amathole District Municipality and the Mbhashe Local Municipality.

[3] Over a long period of time the Dwesa-Cwebe communities enjoyed customary law rights of access to the marine resources in the Reserve. During the period 1900 to 1950 the Dwesa-Cwebe communities were relocated to land adjacent to the Reserve. This resulted in these communities being excluded from a significant portion of their ancestral land and barred from exercising their customary law rights of access to the marine resources in the marine protected area (the MPA).

[4] The MPA was first proclaimed by the then Transkeian military government in terms of the Transkei Environmental Decree 9 of 1992. With the advent of the new constitutional dispensation and the reincorporation of the Transkei into the wider South Africa in 1994 the Reserve reverted to the Republic of South Africa and the MPA then became governed by the Sea Fisheries Act 12 of 1988. In terms of the dispensation governed by the Decree and the Sea Fisheries Act there was limited access to a portion of the MPA.[5]

[5] In 1998 the Marine Living Resources Act 18 of 1998 (the MLRA) was promulgated. On 29 December 2000 the then Minister of Environmental Affairs and Tourism, acting under section 43 of the MLRA, declared the Reserve a strict "*no take*" zone. This in effect prohibited even members of the Dwesa-Cwebe communities from exercising any form of access to the marine resources. Section 43(2)(a) of the MLRA makes it an offence for anyone to fish or attempt to fish in a marine protected area without the permission of the Minister responsible for environmental affairs.

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4 Dwesa-Cwebe status final report and scientific recommendations dated April 2010 prepared by "*FieldWork*".

5 For instance, tourists spending one night in the Reserve could access a portion of the MPA

[6] Section 43(3) of the MLRA provides:

> "(3) The Minister may, after consultation with the Forum, give permission in writing that any activity prohibited in terms of [section 43] may be undertaken where such activity is required for the proper management of the marine protected area."

[7] Section 81 of the MLRA deals with exemptions, and provides, in subsection 1, that "*[i]f in the opinion of the Minister [of Agriculture, Fisheries and Forestry] 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 groups of persons or organ of state from a provision of this Act.*"

[8] Enforcement of the regulatory framework introduced in terms of the various dispensations and eventually the MLRA had not been strict until around 2005. Even when the regulatory framework was first imposed the members of the Dwesa-Cwebe communities continued exercising their customary right of acess to the MPA and the Reserve.

[9] Meanwhile, pursuant to the provisions of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act), a claim for the restitution of rights in land demarcated as "*the Dwesa-Cwebe Nature Reserves*", was lodged by the Dwesa-Cwebe communities[6] with the Eastern Cape Regional Land Claims Commission. The claim was gazetted on 19 April 1996 and eventually yielded fruit when, on 17 June 2001, a settlement agreement in terms of section 42 D of the Restitution Act[7] was signed by and between the claimant communities and the then Minister of Land Affairs in terms of which the claimed land would be restored to these claimant communities.

[10] The settlement agreement excluded the MPA proclaimed in accordance with the MLRA from its ambit, but confirmed that "*the communities should have access to sea and forest resources, based upon the principle of sustainable utilisation as permitted by law.*" In terms of the settlement agreement the

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6 Ntubeni, Mpume, Ngoma, Nhlangano, Mendwane, Hobeni and Cwebe Communites.

7 Section 42D(1) in relevant part provides:

> "(1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 30 June 2019, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:
>
> (a) The award to the claimant of land, a portion of land or any other right in land dispossessed from another claimant or the latter's ascendant".

claimant communities were granted the right to participate in the management of the nature and forest reserves and were made beneficiaries of eco-tourism.

[11] The background part of the judgment would be incomplete without mention being made of two letters that featured prior to the launch of the instant proceedings. The one letter, dated 07 August 2013, was addressed, on behalf of the Hobeni Fishing and Mussel Committee, including the appellants, to the Ministries of Environmental Affairs and of Agriculture, Forestry and Fisheries, and to the Chief Executive Officer of the Eastern Cape Parks and Tourism Agency, requesting that an undertaking be made that the declaration of the MPA would not be implemented alternatively, requesting the relevant Minister to exercise the power to grant a suitable exemption "*consented to by the Community*" in terms of section 81 of the MLRA. The other letter, which is in effect a follow-up letter, was penned on 10 October 2013. None of these letters attracted a response from the relevant government functionaries.

The criminal proceedings

[12] The decision of the Minister of Environmental Affairs to declare the Reserve an MPA was implemented when, on 22 September 2010, the first, second, third and applicants (otherwise conveniently referred to as the appellants) were arrested and arraigned on charges of-

a) attempting to fish in an MPA without perminssion in terms of section 43(2)(a) of the MRLA (count 1);

b) entering a national wild life reserve without a permit in terms of section 29(1)(a) of the Decree (count 2);

c) conveying into a national wild life reserve or being within such reserve whilst still being in possession of any weapon, explosive, trap or poison, in terms of section 29(1)(b) of the decree (count 3);

d) 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 decree, in terms of section 29(1)(c) of the decree (count 4).

[13] On 13 March 2012 the appellants pleaded not guilty to the charges. On their behalf a written explanation of plea in terms of section 115 of the Criminal Procedure Act 51 of 1977 (the CPA) was tendered. The appellants further

admitted, in terms of section 220 of the CPA, that they had been arrested within the Reserve on 22 September 2010, intending to fish using fishing rods, lines and hooks and were in possession of these items when being arrested, and without having been issued with fishing permits in terms of the MLRA or the Decree.

[14] The relevant plea-explanation statement reads:

> "We enter a plea of not guilty. Each of the three accused is a member of the Hobeni Community forming part of the broader community at Dwesa-Cwebe. Our community is governed in part according to customary law. The system of customary law in operation in our community also regulated the use of marine resources. Under the system the Hobeni community enjoyed a customary right to have access to marine resources along the coastline and stretching from the Bashe River, and the Nkonyane River. When we were arrested, we were intending to fish in accordance with our customary rights. The statutory regulation of marine resources has not extinguished our customary rights of access to marine resources. Therefore our conduct was not unlawful in terms of the MLRA and/or the Decree. In the alternative if the MLRA and/or the decree are interpreted to prevent us from exercising or customary rights, it is submitted that the MLRA and the Decree are in consistent with the constitution and invalid. The ground on which the constitutionality will be challenged will be more fully set out on appeal if necessary."

[15] The trial proceeded and the appellants eventually found guilty on count 1 (attempting to fish in an MPA without the requisite permission), and acquitted on all other counts. The first and second appellants were thereupon sentenced to pay a fine of R500 or in default of such payment to undergo 30 days imprisonment. The sentence was wholly suspended for a period of one year conditional upon the first and second appellants (jointly or individually) not being convicted of a contravention of section 43(2)(a) of the MLRA committed during the period of suspension. The third appellant (a juvenile offender), on the other hand, was cautioned and discharged.

[16] The court *a quo* made the following findings:

16.1 that the appellants were members of a community that had rights in terms of customary law in relation to the natural resources, including marine resources, within the Reserve and the MPA; and

16.2 that the community's customary law rights included the right to have access to the marine resources.

[17] Based on the evidence of the expert witness called by the prosecution, the court *a quo* concluded 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 court further held that the ban on fishing imposed by the MLRA and the resulting impugned decision on fishing "*extinguished*" the community's customary right without any consultation.

[18] Whilst expressing doubt as to the constitutionality of section 43 of the MLRA, the court remarked that it had no power to strike down the provision, this being an issue falling to be determined on appeal by a high court with the requisite jurisdiction.

[19] With the leave of the court *a quo*, the appellants noted an appeal against that part of the judgment and order of the court *a quo* finding the appellants guilty of a contravention of section 43(2)(a) of the MLRA, in May 2013.

[20] The appellants, together with other members of the Dwesa-Cwebe communities, also launched proceedings during December 2013 seeking, in the main, an order reviewing and setting-aside the decision of the Minister of Environmental Affairs dated 29 December 2000 declaring the MPA in terms of section 43 of the MLRA on a strictly "*no-take*" basis, and further and/or alternative relief about which more will be said later in this judgment.

The Appeal

[21] The appeal part of the instant proceedings is predicated on three contentions, namely:

21.1 that the court erred in failing to interpret section 43 of the MLRA to require proof of unlawfulness and in failing to hold that the proof of a customary law right to access negates unlawfulness, and should have found that the appellants' conduct was not unlawful in terms of section 43 of the MLRA;

21.2 that the MPA declared by the Minister of Environmental Affairs and Tourism pursuant to section 43 of the MLRA on 29 December 2000 and promulgated in Government Gazette No. 21948 falls to be set aside on the grounds that the decision of the Minister is reviewable in terms of the Promotion of Administrative Justice Act

3 of 2000 (the PAJA) in that it was unlawful, unreasonable and procedurally unfair; and

21.3 in the event of the MLRA being interpreted to prevent the appellants from exercising their customary rights, that section 43 and the related provisions of the MLRA are inconsistent with the Constitution and therefore invalid.

[22] It is convenient to first deal with the issues raised in the appeal before considering those canvassed in the review application, the focus, being on whether the court *a quo* erred in not holding that the appellants' conduct was not unlawful in terms of section 43 of the MLRA and the constitutionality or otherwise of the section.

Nature and content of customary rights

[23] The record establishes that when the appellants were arraigned and eventually convicted they, and the rest of the members of the Dwesa-Cwebe communities, had been accessing the MPA and fishing not only to sustain their families, but as an expression of the communities' culture and for economic reasons; they regarded the sea, rocks and coastline at and around the Reserve as sacred to them and the home of their ancestors; they claim to have known and used a range of fish and other *inter-tidal* resources since the time of their ancestors; they 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,[8] or through official state regulation. It is this customary right existing parallel to section 43 of the MLRA, recognised and preserved by the Constitution, that the appellants seek to assert and which they contend negates the existence of unlawfulness on a criminal charge brought pursuant to section 43.

[24] Mr Brickhill who, together with Mr Bishop appeared for the applicants, dispelled any notion that the appellants were asserting an unqualified customary right of access to marine resources, stating that the right being asserted was one in principle subject to appropriate regulation.

Does proof of the existence of the customary right negate unlawfulness on a charge under the MLRA?

[25] Unlawfulness is one of the general requirements for criminal liability. Even though the National Wildlife Reserve Regulations 1992 promulgated under the Decree makes it an offence for one to "*unlawfully*" fish without a permit, section 43 of the MLRA is, however, silent on lawfulness as an element of the offence created by the section. The parties hereto are in agreement that the requirement of unlawfulness must be read into the section. Indeed, the legislature is presumed, unless there are clear and convincing indications to the contrary, not to have intended innocent violations of statutory prohibitions to be punishable.[9]

[26] Therefore, although a statute may not specifically refer to the element of unlawfulness, there is a general presumption that the general defences excluding unlawfulness would be available to a person charged with contravening a

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[8] The sanctions available to the community are to discipline members who are not compliant with the rules of the community's governance system including the imposition of fines by traditional authorities, damage to reputation and, significantly, social exclusion.

[9] Per James JP in *Ismail v Durban Corporation* 1971 (3) All SA 222, at 224; *S v Mnisi* 1997 (1) All SA 248 (T); 1996 (1) SACR 469 (T) at 251

criminal prohibition in a statute.[10] To that end, section 250(1) of the CPA casts an onus on a person charged with offences based on the lack of necessary authority in the form of a licence, permit, permission or other authority or qualification to adduce evidence that she/he has the necessary authority.

[27] The appellants are not on record as contending that prior to being arraigned they had obtained the requisite permit in terms of the MLRA or that they had been exempted from the provisions of the MLRA by the Minister of Agriculture, Fisheries and Forestry by virtue of section 81 of the MLRA.[11] The upshot of their contention is that the existence of a customary right of access to the conduct in respect of which they were prosecuted renders the conduct lawful.

[28] What is considered *"unlawful"* has also been looked at from the perspective of a community's perception of justice or the legal convictions of the community, thus affording one a defence were the conduct complained of not to be contrary to the community's perception of justice or the legal convictions of the society. This consideration brings to the fore the question of whether lawfulness in this instance ought to be determined on the basis of the perceptions of the Dwesa-Cwebe communities or the entire South African Community.

[29] In our constitutional dispensation the Bill of Rights enshrined in Chapter 2 of the Constitution is pivotal in a determination of whether conduct is in

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10 Burchell, *South African Criminal Law and Procedure Volume 1*; General Principles of Criminal Law (4 ed), JUTA Cape Town at 116.

11 On the contrary, the decision of the Minister of Agriculture, Fisheries and Forestry not to grant the exemption in terms of section 81 is under attack in the review section of these proceedings.

conflict with public policy or the community's perception of justice and therefore unlawful.[12]

[30] It is so that customary law is indubitably recognised by the Constitution as an independent and original source of law.[13] Gone are the days when custom was considered, as in *Van Breda v Jacobs*[14], a useful accessory, filling in normative gaps in the common law.[15]

[31] The appellants' contention for the negation of unlawfulness rests primarily on sections 30, 31, 39 and 211 of the Constitution. Sections 30[16] and 31[17] of the Constitution entrench respect for cultural diversity, whilst section 39(2) enjoins a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. At the same time, section 39(3) provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as being consistent with the

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12 CR Snyman, *Criminal Law* (5 ed) LexisNexis Durban at 98; *S v Engelbrecht* 2005 (2) SACR 41 (W) at 54b and 106a; *S v I* 1976 (1) SA 781 (RA) at 788; *S v Robson* 1991 (3) SA 322 (W) at 333E; *Clarke v Hurst* 1992 (4) SA 630 (D) at 653B-659B-C; and *S v Fourie* 2001 (2) SACR 674 (C) at 681a-b.

13 *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as* Amicus Curiae*)* 2005 (1) SA 580 (CC).

14 1921 AD 330.

15 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 55.

16 Section 30 provides:

> "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."

17 Section 31 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.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

Bill of Rights. Section 211[18]of the Constitution accords institutional protection of customary law.

[32] In *Alexkor Ltd v Richtersveld Community* [19] the Constitutional Court held:

> "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 courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution:
>
> > ". . . 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 [of Rights]."
>
> It is clear, therefore that 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. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law."[20]

[33] Against this background the appellants contend that the MLRA, which does not recognise the appellants' customary fishing rights, has not extinguished those rights. Such extinguishment would have had to be done expressly and satisfy the requirements of section 36 of the Constitution. As they had been fishing in terms of their rights derived from their customary law

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[18] The section provides:

> "(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
> (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[19] 2004 (5) SA 460 (CC).

[20] *Id* at para [51]. (Footnotes omitted.).

system, the appellants argue that their conduct was lawful; customary law confers on them the necessary authority to fish in the MPA without a permit.

[34] It is the cultural diversity of the people of this country, its fascinating history, and the uniqueness and preciousness of the country's wild life[21] that give rise to the question at hand.

[35] We should, at this juncture, also remind ourselves of the following remarks by Navsa JA in *Oudekraal Estates (Pty) Ltd v City of Cape Town*:[22]

> "Regrettably, humankind has not always been aware of the importance of treading softly on this planet. Environment concerns have only recently begun to receive the necessary attention and, even then, humankind is not always sufficiently aware of the environmental perils consequent upon deeds or inaction. In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC); 2007 (10) BCLR 1059 at para 54 the Constitutional Court referred with approval to the following dictum of the International Court of Justice in *Gabcikovo-Nagymaros Project (Hungry/Slovakia)* 37 ILM 162 (1988) 200 in para 140:
>
> > 'Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind-for present and future generations-of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.'"

[36] In its wisdom the legislature enacted the MLRA so as to "*provide for the conservation of the marine ecosystem, the long term sustainable utilisation of marine living resources and the orderly access to exploitation utilisation and protection of certain marine living resources and the orderly access to exploitation utilisation and protection of certain marine living resources and for these purposes to provide for the exercise of control over marine living*

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[21] Introductory remarks by Van der Westhuisen in *Khohliso v The State and Another* 2015 (2) BCLR 164 (CC); 2015 (1) SACR 319 (CC) at para [1].

[22] 2010 (1) SA 333 (SCA) at 353 E-I.

resources in a fair and equitable manner to the benefit of all citizens of South Africa".[23]

[37] The customary rights contended for which are of limited territorial application operate in parallel with the MLRA which is of national application. I do not believe that the introduction of a law of general application aimed at preserving and protecting marine living resources for the benefit of all, including the Dwesa-Cwebe communities, has had the effect of jettisoning (and not preserving) the customary rights that have been exercised by these communities as contended for in these proceedings. It must have been within the contemplation of the legislature when enacting the MLRA that there were persons such as the appellants exercising customary rights in respect of marine resources, hence provision is made for persons or a group of persons to lodge an application to be exempted from the requirement of obtaining a permit for fishing. Upon a proper reading of the relevant provisions of the MLRA nothing prevents any person or group of persons, including the appellants, from seeking exemption even on the basis that in terms of customary law such permit is not required. The appellants had not sought the exemption before setting out to fish. Their conduct was unlawful in terms of the MLRA. Therefore, the rights accorded to them by customary law did not negate the existence of unlawfulness.

[38] The Dwesa-Cwebe communities agreed to the restoration of the Dwesa-Cwebe Nature Reserves and to have access to sea and forest resources "*based upon the principle of sustainable utilisation as permitted by law*". The contention that exercising their customary rights negated the existence of unlawfulness on a charge under the MLRA is not consistent with their acceptance that they would access the sea in accordance with the dictates of the law giving expression to the concept of sustainable development. On their own

[23] MLRA Long Title.

showing, the appellants' exercise of customary rights had always been subject to regulation, and had never been unqualified. The enactment of the MLRA was in fact part of such regulation.

[39] Moreover and in any event, the rights accorded by sections 30 and 31 of the Constitution are not to be exercised in a manner that is inconsistent with any provision of the Bill of Rights. One of such provisions is section 24, which, *inter alia*, gives everyone the right to have the environment protected for the benefit of present and future generations through legislative and other measures that prevent ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. To contend that the mere existence of a customary right negates unlawfulness on a charge under the MLRA would serve not only to elevate the sections 30 and 31 rights at the expense of the right to the environment, but would make nonsense of the objects of the MLRA.

Constitutionality of section 43 of the MLRA

[40] Having found that the appellants' attempt to fish without the requisite permit in terms of the MLRA was unlawful, I cross to deal with the appellants' alternative submission namely, that section 43(2)(a) of the MLRA is inconsistent with the Constitution and invalid to the extent that it does not recognise existing customary law rights of access to marine resources and criminalises the exercise of customary law rights that have never been extinguished in circumstances that would satisfy the Constitution.

[41] It is timely to mention that section 43 of the MLRA has since been repealed by section 90(3) of National Environmental Management: Protected

Areas Act 57 of 2003.[24] The declaration of the Dwesa-Cwebe MPA as contained in stipulation 2(7) of the declaration Notice named Declaration of Areas as Marine Protected Areas in Government Gazette 2948, Notice No. 1429 of 29 December 2000 has similarly been withdrawn and repealed by the Dwesa-Cwebe Marine Protected Area Regulations published in Government Gazette 39379 under Notice No. 1074 dated 06 November 2015 which came into operation on 01 December 2015. The repeal affords no solace to the appellants who have already been convicted on the strength of section 43, hence this Court has residual jurisdiction to inquire into the constitutionality of the section.

[42] It has greatly exercised my mind whether it is felicitous to inquire into the constitutionality of the replacement provisions (sections 22A and 48A of the NEMPAA) given that these provisions had no bearing on the appellants' conviction which is the subject of the appeal.

[43] It is convenient to quote in full the now repealed section 43 of the MLRA on the basis of which the appellants were convicted. The section reads:

> "(1) The Minister may, by notice published in the Gazette, declare an area to be a marine protected area—
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> (a) for the protection of fauna and flora or a particular species of fauna or flora and the physical features on which they depend;
> (b) to facilitate fishery management by protecting spawning stock, allowing stock recovery, enhancing stock abundance in adjacent areas, and providing pristine communities for research; or
> (c) to diminish any conflict that may arise from competing uses in that area.
>
> (2) No person shall in any marine protected area, without permission in terms of subsection (3)—
>
> (a) fish or attempt to fish;
> (b) take or destroy any fauna and flora other than fish;
> (c) dredge, extract sand or gravel, discharge or deposit waste or any other polluting matter, or in any way disturb, alter or destroy the natural environment;
> (d) construct or erect any building or other structure on or over any land or water within such a marine protected area; or

[24] As amended by the National Environmental Management: Protected Areas Amendment Act 21 of 2014 (NEMPAA), which came into operation on 2 June 2014.

(e) carry on any activity which may adversely impact on the ecosystems of that area.

(3) The Minister may, after consultation with the Forum, give permission in writing 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"

[44] As a starting point the appellants have urged this Court to interpret section 43 so as to permit the recognition of customary law rights of access to marine resources. The appellants' constitutional attack is premised purely upon the Court adopting a construction of the section that precludes the recognition and exercise of customary rights of access to marine resources. In as far as the provisions of section 43 "*purport to disregard or extinguish these rights*", so the argument goes, the impugned provisions are inconsistent with the Constitution and invalid to that extent.

[45] It is trite law that the validity of customary law cannot be tested with reference to common law or statutory law. In *Bhe*[25] the Constitutional Court held that:

> "an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation, such as the Intestate Succession Act, would be incorrect. At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution."[26]

[46] There is indeed no scope for arguing that the Dwesa-Cwebe communities have no customary rights because the MLRA does not recognise those rights. Ms Pillay, who appeared for the third and fourth respondents, did not contend so.

[47] In terms of section 211(3) of the Constitution customary law is subject to legislation that deals specifically with customary law. Even though customary

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25 *Supra*.

26 *Ibid* at para [42] see also para [32] *supra*.

law may be regulated in terms of other legislation,[27] such regulation will only amount to extinguishment of the customary law rights if done explicitly,[28] otherwise the rights derived from customary law prevail.

[48] There is thus merit to the appellants' contention that because the MLRA was promulgated after the coming into force of the Constitution such promulgation could not only amount to an extinguishment of customary law rights if the MLRA expressly provided for it and the extinguishment could only be valid if it satisfied the requirements of section 36 of the Constitution.

[49] Upon a plain reading of section 43 nothing in the section offends the Constitution. Nor is there scope for an interpretation that disregards or extinguishes the appellants' customary rights of access to marine resources. If one has regard to the purpose of the declaration of an MPA (conservation and protection), it is not clear as to what bearing customary law has on such a declaration.

[50] I accordingly conclude that section 43 is not unconstitutional for not permitting the recognition of customary law rights of access to marine resources.

[51] In as far as the appellants may be said to be entitled to challenge the constitutionality of sections 22A[29] and 48A[30] of the NEMPAA, my conclusion

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[27] See *supra Bhe*, at para [44], where it was held:

> "It should however not be inferred from the above that customary law can never change and that it cannot be amended or adjusted by legislation. In the first place, customary law is subject to the Constitution. Adjustments and development to bring its provisions in line with the Constitution or to accord with the "spirit, purport and objects of the Bill of Rights" are mandated. Secondly, the legislative authority of the Republic vests in Parliament. Thirdly, the Constitution envisages a role for national legislation in the operation, implementation and/or changes effected to customary law."

[28] *Supra Alexkor Ltd* at para [81].

[29] The section reads:

"Declaration of marine protected areas.—(1) The Minister may, by notice in the Gazette—

(a) declare an area specified in the notice—

(i) as a marine protected area; or

would not differ. Section 22A(2) of the NEMPAA also refers to conservation and protection as being the purpose of the declaration of an MPA. Section 48A merely restricts activities in MPAs.

The Review Application

(ii) as part of an existing marine protected area; and

(b) assign a name to the marine protected area.

(2) A declaration under subsection (1) (a) may only be issued—

(a) to conserve and protect marine and coastal ecosystems;

(b) to conserve and protect marine and coastal biodiversity;

(c) to conserve and protect a particular marine or coastal species, or specific population and its habitat;

(d) if the area contains scenic areas or to protect cultural heritage;

(e) to facilitate marine and coastal species management by protecting migratory routes and breeding, nursery or feeding areas, thus allowing species recovery and to enhance species abundance in adjacent areas;

(f) to protect and provide an appropriate environment for research and monitoring in order to achieve the objectives of this Act; or

(g) to restrict or prohibit activities which is likely to have an adverse effect on the environment.

(3) A notice under subsection (1) (a) may only be issued after consultation with the Cabinet member responsible for fisheries."

[30] Section 48A reads:

"Restriction of activities in marine protected areas.—(1) Despite any other legislation, no person may in a marine protected area—

(a) fish or attempt to fish;

(b) take or destroy any fauna or flora;

(c) undertake any dredging or extraction of sand, rock, gravel or minerals unrelated to any activities referred to in section 48 (1);

(d) discharge or deposit waste or any other polluting matter;

(e) in any manner which results in an adverse effect on the marine environment, disturb, alter or destroy the natural environment or disturb or alter the water quality or abstract sea water;

(f) carry on any activity which may have an adverse effect on the ecosystem of the area;

(g) construct or erect any building or other structure on or over any land or water within such a marine protected area;

(h) carry on marine aquaculture activities;

(i) engage in bio-prospecting activities;

(j) sink or scuttle any platform, vessel or other structure; or

(k) undertake mineral exploration, and production of petroleum and other fossil fuels.

(2) Notwithstanding subsection (1) but subject to section 48 (1), the Minister may, in relation to a marine protected area, prescribe—

(a) different zones to regulate different activities within that marine protected area; and

(b) activities which require a permit.

(3) Before exercising the power referred to in subsection (2), the Minister must—

(a) consult with the Minister responsible for fisheries and the management authority that is responsible for managing the relevant marine protected area; and

(b) ensure that the zoning achieves the objectives referred to in section 2.

(4) Any zone declared in terms of section 43 of the Marine Living Resources Act, 1998 (Act No. 18 of 1998), or created by regulation in terms of section 77 of that Act which exists when the National Environmental Management: Protected Areas Amendment Act, 2014, takes effect, must be regarded as a zone prescribed in terms of subsection (2)."

[52] There are two decisions at the heart of the review application. The review grounds also constitute a further ground of the appeal in the alternative. The one decision is that of the Minister of Environmental Affairs taken on 29 December 2000 declaring the Dwesa-Cwebe Nature Reserve an MPA on a strictly "*no take*" basis (the MPA decision), and the other decision that of the Minister of Agriculture, Forestry and Fisheries not to grant the Hobeni, Cwebe, and Mendwane Communities an exemption in terms of section 81 of the MLRA.

[53] In addition to seeking a review of the decisions referred above, the applicants seek an order directing the parties to engage one another meaningfully regarding the manner in which the Communities may exercise their rights of access and property or other associated rights under customary law and, subject to reasonable regulation, to maintain the resources in the MPA.

[54] The applicants' principal complaint in relation to the MPA decision is that they were not consulted at all when the impugned declaration was made. They claim that they were never informed that such decision would be made; they were not asked to make comments when it was being proposed to issue the declaration. They had no knowledge that the decision had been taken at all until 2005 when steps were being taken to implement the decision. They contend that the MPA decision is reviewable on the grounds that it was procedurally unfair; unreasonable and irrational; inconsistent with sections 30, 31, 39(3) and 211 of the Constitution; and inconsistent with the right to environmental justice and equitable access to natural resources.

[55] Because the letter seeking an exemption in terms of section 81 of the MLRA was not responded to by the relevant government functionaries, upon whom it was incumbent to decide on the matter, the non-response consists of a failure to take a decision and is, according to the applicants, reviewable on the

grounds that it is unreasonable and irrational, infringes the applicants' customary law rights of access to marine resources and the right to the environment.

[56] The third and fourth respondents (the respondents) contend that the applicants are time-barred from launching the review of the MPA decision as it was brought more than 180 days after the decision was taken.[31] The applicants have, on the other hand, adopted the stance that the delay rule, and thus section 7 of the PAJA, finds no application in *hoc casu* because the application constitutes a collateral challenge to the implementation of the MPA decision in prosecuting and convicting the appellants and that the applicants have, in any event, made out a case for condonation. It is proposed to deal with these preliminary issues seriatim.

Collateral Challenge

[57] It is trite law that whilst the validity of the administrative act is generally challenged by way of judicial review, such challenge may arise not by the initiation of the proceedings, but by way of a defence, as a collateral issue, in a claim for the enforcement of a private law right, as the case may be.[32]

[58] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[33] dealt with the nature and ambit of a collateral challenge in the following terms:

> "But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or

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[31] This contention is predicated on section 7(1)(b) of the PAJA which makes it a requirement that judicial review proceedings be "*instituted … not later than 180 days after the date … on which the person concerned … might reasonably have been expected to have become aware of the action and the reasons*" for it.

[32] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) at para [13].

[33] 2004 (6) SA 222 (SCA) (*Oudekraal*).

refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act. Such a challenge was allowed, for example, in Boddington v British Transport Police, in which the defendant was charged with smoking a cigarette in a railway carriage in contravention of a prohibitory notice posted in the carriage pursuant to a byelaw. The House of Lords held that the defendant was entitled to seek to raise the defence that the decision to post the notice (which activated the prohibition in the byelaw) was invalid because the validity of the decision was essential to the existence of the offence. (It happened that the decision to post the notice was held to be valid but that is not material for present purposes). At 153H-154A Lord Irvine LC said the following:

> 'It would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a court as unlawful. Suppose an individual is charged before one court with breach of a byelaw and the next day another court quashes that byelaw – for example, because it was promulgated by a public body which did not take account of a relevant consideration. Any system of law under which the individual was convicted and made subject to a criminal penalty for breach of an unlawful byelaw would be inconsistent with the rule of law.'

And at 160 and 161 he went on to say the following:

> '[160C-G] However, in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely ... [161C-D] However, in approaching the issue of statutory construction the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings.'

As Lord Steyn pointed out at 173A-B:

> 'Provided that the invalidity of the byelaw is or may be a defence to the charge a criminal case must be the paradigm of collateral or defensive challenge.'

Dealing with an earlier decision of the Divisional Court that precluded a collateral challenge to the procedural validity of subordinate legislation in criminal proceedings he went on to say the following at 173E-G:

> 'My Lords, with the utmost deference to eminent judges sitting in the Divisional Court I have to say the consequences of Bugg's case are too austere and indeed too authoritarian to be compatible with the traditions of the common law. In Eshugbayi Eleko v Government of Nigeria [1931] A.C. 662, a habeas corpus case, Lord Atkin observed, at p 670, that "no member of the executive can interfere with the liberty or

> property of a British subject except on condition that he can support the legality of his action before a court of justice." There is no reason why a defendant in a criminal trial should be in a worse position. And that seems to me to reflect the spirit of the common law.'[34]
>
> It is important to bear in mind (and in this regard we respectfully differ from the court *a quo*) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: the right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and *ex hypothesi* the subject may not then be precluded from challenging its validity. On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid."[35]

[59] The applicants seek to gain mileage from a statement made in the *Oudekraal* case[36] to the effect that a person is entitled to bring a collateral challenge at any point and that a court confronted with it has no discretion but to consider it.[37] The matter does not end there because "*[a] collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings'*".[38] This statement should be understood as meaning that the remedy must be sought by the person entitled thereto in the right forum at the opportune stage.[39]

[60] An examination of the facts and circumstances surrounding this case, with a view to testing whether it is opportune stage for the applicants to launch the review (the collateral challenge), is necessary. One issue needs to be

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34 *Ibid* at para [32]. (Footnotes omitted.)

35 *Ibid* at para [36]. (Footnotes omitted.)

36 *Ibid.*

37 *Ibid* at para [36].

38 *Ibid* at para [35]. See also *Metal and Electrical Workers Union of SA v National Panasonic CC (Parow Factory)* 1991 (2) SA 527 (C) at 530C.

39 *Ibid.*

disposed of without ado. Whilst the relief sought in this application may have a bearing on the criminal appeal, no stretch of imagination is required for one to conclude that it is not a collateral challenge to the criminal prosecution.

[61] The founding affidavit makes it abundantly clear that the launch of the review was a sequel to a decision about which the applicants were never informed and which took some time before being given effect to, and was prompted by their inability to access the marine resources and sustain their livelihoods.

[62] As a further bow to their arrow, the applicants placed reliance on *Kouga Municipality v Bellingan and Others.*[40] In this case the respondents brought a review of a by-law concerning the trading hours for liquor stores more than 2 years after the by-law had been enacted. The court, having been of the view that the application was in the form of a direct challenge, but in substance a defensive or collateral challenge to the validity of the by-law,[41] held:

> "I can conceive of no reason why a collateral challenge to the validity of a piece of legislation cannot be brought in civil proceedings for a declaratory order by a person who has been charged with contravening such legislation."[42]

[63] The cases are distinguishable in a vast manner. In the *Kouga* matter the criminal proceedings were postponed, and after the applicants had sought and obtained advice regarding the conduct of their case, they instituted an application to challenge the validity of the bylaw. In the instant matter, however, the criminal trial ran to a finish without any application for review having been instituted. The instant review application has been instituted at appeal stage against the conviction in the criminal proceedings.

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40 2012 (2) SA 95 (SCA).

41 *Ibid* at para [12].

42 *Ibid* at para [19].

[64] I am not persuaded that the applicants brought the review in the right proceedings at the opportune stage. The relief sought in the review application therefore does not constitute a collateral challenge.

Was there an unreasonable delay?

[65] Section 7(1)(b) of the PAJA makes it incumbent on a person bent on challenging an administrative action on review under the PAJA to resort to such proceedings without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons. The instant review application is founded on the PAJA and the Constitution. Section 7(1) is thus of application. In any event, it is a long standing rule that a legality review must be initiated without undue delay and that courts have, as part of their inherent jurisdiction to regulate their own proceedings,[43] to refuse a review application in the face of an undue delay in initiating proceedings[44] or to overlook the delay in the exercise of the discretion informed by the values of the Constitution.[45]

[66] The reasonableness or unreasonableness of a delay is entirely dependent on the facts of any particular case, and have nothing to do with the exercise of the court's discretion.[46] The *raison d'etre* of the rule is said, in *Wolgroeiers Afstlaer (Edms) Bpk*[47], to be twofold: first, the failure to bring a review within a

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43 *South African Broadcasting Cooperation v National Director of Public Prosecution and Others* 2007 (1) SA 523 (CC) at paras [36] – [37].

44 *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at para [46].

45 *Khumalo v MEC for Education* 2014 (5) SA 579 (CC) at para [44].

46 *Setsokasane Busdiens (Edms) Bpk v Voorsetel, Nasionale Verwoer Kommissisie en 'n Ander* 1986 (2) SA 57 (A) at 86.

47 *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) (*Wolgreiers*).

reasonable time may cause prejudice to the respondent; secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.[48] *"It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after a unreasonably long period of time has elapsed* – interest *reipublicae ut sit finis litium. . . Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule."*[49] It should, on the other hand, be mentioned that, as adverted to in *National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry v Photo Circuit SA (Pty) Ltd and Others*,[50] according to the majority decision in *Wolgroeiers*,[51] although prejudice to other parties is a relevant factor, the demonstration of such prejudice is not a prerequisite for a court to non-suit an applicant on the grounds of delay.

[67] From the background facts presented above, it will be observed that the decision subject to these proceedings was taken on 09 December 2000, approximately 13 years before the launch of the review application. The MPA decision was only given effect to around 2005, 8 years before the application was launched. More than 3 years after the arrest of the appellants, on 22 September 2010, the application was resorted to. The trial before the court *a quo* commenced in March 2012, resulting in the appellants being convicted on 22 May 2012, more than 18 months before the application was launched.

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48 *Ibid* at 41.

49 Nugent JA's translation of paragraph 41E-F of *Wolgroeiers Afslaers (Edms) Bpk* in *Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 (SCA)* at para [22].

50 1993 (2) SA 245 (C) at 251J.

51 *Supra.*

[68] It is clear that it took an inordinately and unreasonably lengthy period before the MPA decision was brought on review. What remains to be considered, and involves the exercise of a discretion, is whether the delay should be condoned.[52]

Should the delay be condoned?

[69] In their quest for the extension of the 180 day period in terms of section 9(1)(b)[53] of the PAJA the applicants have pointed to various factors that demonstrate that it is in the interests of justice to extend the period: the MPA declaration is causing on-going prejudice to the constitutional rights of the applicants; the declaration has been relied upon to secure the conviction of the appellants; the affected communities, being among the poorest in the country, had access to legal advice and representation when the prosecution of the appellants commenced, after they had consistently engaged with the relevant government departments in an attempt to assert their rights, to no avail.

[70] The applicants urge the court not to bar them, and to consider the merits of the application.

[71] The respondents, on the other hand, contend that they have been prejudiced in opposing the review proceedings because of the passage of time in various ways; several new ministers of the Department of Environmental Affairs (DEA) have, in the interim, succeeded the Minister responsible for the Declaration in 2000; some relevant officials are no longer in the employ of the DEA; key documentation that could point to consultative processes preceding

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[52] *Supra Wolgroeirs Afslaers (Edms) Bpk* at 41; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A); *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321B; *Supra Gqwetha* at paras 4 - 5; *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC) at paras 49 – 50.

[53] In terms of section 9(1)(b) of the PAJA the period of 180 days referred to in section 7 may be extended for a fixed period by a court on application by the person concerned.

the Declaration decision are no longer to hand; the legal framework has changed from what it was at the time of the Declaration.

[72] There is much to be said regarding the contentions that the relevant officials are no longer available and key documentation no longer possible to locate.[54]

[73] Here is what is dispositive of this aspect of the review application. The applicants have proffered no acceptable explanation for their neglect to seek a postponement of the criminal case whilst seeking to review the impugned decision. Most importantly and in any event, this Court is being asked to grant condonation in relation to a decision that was taken 15 years ago and implemented 10 years ago in circumstances where that underlying decision is no longer operational and has been set aside by a new regime. In my view, the interests of justice do not favour the grant of the condonation sought, hence the plea of undue delay is upheld.

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[54] In considering the issue of what a reasonable time is in any given case in *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) at 799B-F Booysen J (in a passage, the first two paragraphs of which were referred to with approval in *Liberty Life Association of Africa v Kachelhoffer NO and Others* 2001 (3) SA 1094 at 1112G-I) held:

> "[w]hen considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order initiate those review proceedings. Such steps include steps taken to ascertain the terms and effect of the decision sought to be reviewed; to ascertain the reasons for the decision; to consider and take advice from lawyers and other experts where it is reasonable to do so; to make representations where it is reasonable to do so; to attempt to negotiate an acceptable compromise before resorting to litigation; to obtain copies of relevant documents; to consult with possible deponents and to obtain affidavits from them; to obtain real evidence where applicable; to obtain and place the attorney in funds; to prepare the necessary papers and to lodge and serve those papers.
> When considering whether the time taken to prepare the necessary papers was reasonable or unreasonable, allowances have to be made for the differences in skill and ability between various attorneys and advocates.
> It must furthermore be borne in mind that no time has in fact been laid down for the institution of such proceedings and it cannot be expected of a litigant or his legal representatives that they should act in an overhasty manner, particularly where the opposing party or parties have been notified timeously of the fact that review proceedings were in the offing."
> (Case citations omitted.)

The Exemption Decision

[74] In the background part of this judgment I made mention of two letters that featured prior to the launch of the review application. One of the letters forms the basis of the alternative relief being sought in the review application, founded on section 81 of the MLRA, which grants the Minister of Agriculture, Fisheries and Forestry (Minister of Agriculture) the power to exempt any persons or group of persons from a provision of the MLRA.

[75] As already pointed out, the letter of 7 August 2013 is directed primarily at the Minister of Agriculture for and on behalf of "*the Hobeni Fishing and Mussel Committee, include three individuals members who were recently found guilty by the Elliotdale Magistrate's Court for intention to fish in Dwesa-Cwebe Reserve*". The letters also purport to have been written on behalf of "*other individual member of Hobeni, Mendwane and Ntubeni Communities situated around the Dwesa-Cwebe Reserve*". Apart from mapping out the history relative to the matter, the letter requests that the Legal Resources Centre, Cape Town be furnished with an undertaking that the decision of 29 December 2000 declaring the Dwesa-Cwebe Marine Protected Area a "*no-take*" zone be withdrawn within 10 days of receipt of the letter. Alternative to that request, the Minister of Agriculture was required to exempt the Hobeni Fishing and Mussel Committee (including the appellants) and certain faceless and unidentified individual members of the affected committees from the provisions of the MLRA prohibiting access to the marine resources in the MPA "*in terms negotiated with the community*".

[76] The letter attracted no response from the relevant Ministry. At the very least, conduct of this nature constitutes a failure to take a decision and is reviewable in terms of section 6(2)(g) of the PAJA.

[77] The exemption was sought at a time when the appellants had already been convicted, on behalf of the Fishing and Mussel Committee of which the appellants are members, and not on behalf of all the applicants in the review application. Were the relief sought to be granted the court would, at the very least, be entitled to direct the Minister of Agriculture to decide whether the persons on whose behalf the subject letter was written are entitled to be exempted from the provisions of the MLRA prohibiting access to the marine resources in the MPA, in terms of section 8(2) of the PAJA. A provision of the MLRA effectively prohibiting access to the marine resources in the MPA is section 43. That section has since been repealed. Any order the court were to grant, even if it were to take the decision itself, would be without a lawful basis, as the enabling section has been repealed. This part of the review application must also fail.

Costs

[78] The criminal appeal, by its nature, attracts no cost order. Even though the applicants have not been successful in the review application, in keeping with the *Biowatch*[55] principle, they are not liable to pay the costs of the application. Ms Pillay, quite correctly so, did not press for a cost order.

Conclusion

[79] In all these circumstances, the order that I grant is the following:

1. The appeal is dismissed.

2. The review application is dismissed with no order of costs.

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[55] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

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S M MBENENGE

JUDGE OF THE HIGH COURT

I agree

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R GRIFFITHS

JUDGE OF THE HIGH COURT

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Date heard:	13 November 2015
Date delivered:	18 February 2016