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'Massive blow' dealt to Eastern Cape over customary law - UCT researcher

Appeal Court decision may have national implications

The Cala Reserve Community have had their right to appoint their own headman affirmed, after a Full Bench of the Eastern Cape High Court unanimously dismissed an appeal by the Premier of the Eastern Cape to overturn a judgment by a lower court on 18 August 2015.

The decision will have far-reaching implications for the role of traditional authorities in the Eastern Cape and possibly even nationally, in the post-1994 democratic dispensation in South Africa, says Professor Lungisile Ntsebeza, AC Jordan Chair in African Studies and holder of the National Research Foundation (NRF) Chair in Land Reform and Democracy at the University of Cape Town. He says: "Unless this judgment is challenged, the Eastern Cape will have to review the whole system by which they appoint their headmen."

Professor Ntsebeza presented expert evidence on behalf of the Cala Reserve Community. He says: "The arguments presented in the judgment have dealt a massive blow to the manner in which the Eastern Cape government interpreted customary law rules relating to the appointment of chiefs and paramount chiefs in the Eastern Cape."

Here is a summary of the events leading up to the court case.

- In 2013, the headman of Cala Reserve, JH Fani, who had served since 1979, tendered his resignation.

- As had been their custom, the residents of the Cala Reserve called a community meeting and elected Mr Gideon Sitwayi – a sub-headman and Fani's de facto deputy – as their new headman.

- The amaGcina Traditional Council rejected their choice because he was not a member of the royal family.

- Chief Gecelo, head of the council, imposed his own choice on the community: Mr NJ

Yolelo, his clansman. He cited the Eastern Cape Act which, he said, instructs the royal family to elect the headman, and telling them: "*Nokuba niyathanda okanye anithandi na, yiroyal family ethata izigqibo ngokubekwa kwenkosana* (Whether you like it nor not, it is the royal family that decides on the headman)".

- The community made various complaints of the Chief's appointment to the Premier of the Eastern Cape (Mr Phumulo Masualle), the MEC for Local Government and Traditional Affairs (Mr Fikile Xasa) and the Qamata Regional Traditional Council.

- When they were unsuccessful, they approached the Legal Resources Centre (LRC), which launched an application in their behalf in the Eastern Cape High Court against the decision of the Premier.

- The Court of first instance found in favour of the Cala Reserve community on 9 October 2014, but the Premier of the Eastern Cape appealed against this decision.

- The appeal was subsequently dismissed by a full bench of the Eastern Cape High Court.

Professor Ntsebeza, who had conducted extensive research into the history of traditional authority in the Xhalanga district where Cala Reserve stands, wrote an opinion for the LRC at the community's request. He gave a detailed account of the history of electing headmen in this district, including Cala Reserve, going back to the 19th century. Ntsebeza also drew attention to a provision in the Traditional Leadership Governance Framework Act, which states that the royal family can only appoint a headman after taking into account the practice of the community. The practice in Cala was to elect their leaders.

UCT's evidence was deemed crucial by the Appeal Court.

"The only evidence as to the customary law in the Cala Reserve concerning the identification of the headman is that tendered on behalf of the respondents by Professor Ntsebeza," Judge J Plasket wrote in his judgment. "His evidence stands unchallenged. It is the only admissible evidence on the issue. No reason was advanced as to why it ought not to be accepted."

Judge Plasket suggested in his judgment that the case of the Cala Reserve should act as a model on how to democratise traditional authority. It turns a traditional practice into one that conforms to democracy, by having its leader elected, and thus abides by the intention of the Governance Act, which stipulates that traditional authority must align with democracy.

UCT's Faculty of Law was involved in another critical case that threatened the democratic rights of South Africans who live under customary law.

On 20 August 2015, the Constitutional Court issued a resounding and unanimous judgment in support of democratic control of land in traditional areas. Finding in favour of the Bakgatla-Ba-Kgafela Communal Property Association (CPS), the court set aside a 2014 decision of the Supreme Court of Appeal and ordered immediate implementation of an earlier ruling in the Land Claims Court that the CPA existed and should own and administer

land won in a restitution claim.

The order will allow the permanent registration of the Bakgatla-Ba-Kgafela Communal Property Association and for the CPA to take ownership of land around Moruleng in North West Province, which was returned to the community in 2006 in terms of the Restitution of Land Rights Act. The land was taken from the community under apartheid and part of it was used in the creation of the Pilanesberg National Park. The ruling (CCT 231/14) undercuts the Department of Rural Development and Land Affairs recent position that communal property associations should be discouraged in areas under the control of traditional leaders.

Dr Aninka Claassens, acting director of UCT's Centre for Law and Society, said: "The judgment comes down firmly on the side of people having the right to choose the form of land-holding they prefer, instead of government dictating 'tribal ownership' as the only option in former Bantustan areas. The judgment sends a clear message that current policy, which proposes to transfer title deeds of land in the former homelands to traditional councils cannot fly constitutionally."

Read the Centre for Law and Society's full press release here.

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