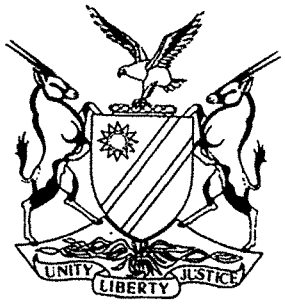

REPORTABLE

CASE NO: SA 104/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MICHAEL MUDABETI	**First Appellant**
BERNARD MBUKUSA NYAMBE	**Second Appellant**
RAPHAEL KACHELE MUNALULA	**Third Appellant**

and

RAPHAEL MBALA	**First Respondent**
GABRIEL NEPAYA N.O.	**Second Respondent**
ZAMBEZI COMMUNAL LAND BOARD	**Third Respondent**
MINISTER OF AGRICULTURE, WATER & LAND REFORM	**Fourth Respondent**
MASUBIA TRADITIONAL AUTHORITY	**Fifth Respondent**

Coram: SMUTS AJA, MAKARAU AJA and UEITELE AJA

Heard: **19 March 2026**

Delivered: **2 April 2026**

Summary: The appeal arose from a land boundary dispute in the Zambezi Region between three competing family structures representing several households. In 1997, the Bukalo Royal Khuta determined the dispute in favour of the families represented by the second and third appellants in accordance with Masubia customary law. That decision was overturned in 1998 by the Kashandi, the appellate authority under the same customary system, in favour of the first respondent's family.

In December 2014, approximately 16 years later, the appellants lodged an appeal in terms of s 39 of the Communal Land Reform Act 5 of 2002 (CLRA). The appeal tribunal upheld the appeal on 14 March 2022 and reversed the 1998 decision.

The first respondent challenged the decision of the appeal tribunal in a review application in the High Court on the several grounds, the first of which was that the appeal had been lodged out of time in contravention of s 39 of the CLRA and reg 25 of the regulations promulgated under the CLRA which requires appeals to be noted within 30 days of the decision being made known or brought to the notice of prospective appellants. In opposition to this ground, the appellants contended that they had only become aware of the 1998 decision in November 2014 and had filed the appeal within 30 days thereafter.

The High Court reviewed and set aside the impugned decision on the basis that, in the absence of deeming or transitional provisions in the CLRA, the appeal tribunal lacked authority to entertain an appeal arising from a decision made before the Act came into operation in 2003. It accordingly found that the tribunal had acted *ultra vires* in hearing and determining the appeal against the 1998 decision.

In its judgment, the High Court acknowledged that this legal point had not been expressly raised on the papers and had not been argued before it. However, as it was a point of law arising from common cause facts, the Court proceeded to consider and determine the matter on that basis.

On appeal the appellants contended that the High Court was not entitled to adjudicate the review on an issue which had not been pleaded and which did not form part of first respondent's claims or the appellants' opposition thereto. The appellants also sought condonation for the late filing of the appeal record and security for costs.

Prior to the hearing, the Supreme Court invited written submissions on the applicability of the CLRA to the dispute. In response, the appellants persisted in their submission that the High Court erred in dealing with an issue not pleaded or argued and the appeal should as a consequence succeed. On behalf of the first respondent, it was argued that the 1998 decision was not made under the CLRA and that the Bukalo Traditional Authority was not recognised under the applicable legislation. It was further submitted that the appeal tribunal lacked jurisdiction, as its powers extend only to decisions made under the CLRA, whereas the impugned decision predated the Act. On that basis, it was contended that the tribunal's decision was a nullity.

Held that, the appellants contend that the applicability of the CLRA was not pleaded at all. That is incorrect. It was stated in the founding affidavit that the CLRA was put into force on 1 March 2003. It is thus plainly pleaded that at the time of the 1998 decision, the CLRA did not apply and that there was no structure to which aggrieved persons could appeal to against a decision of a traditional authority.

Held further that, the issue was however not raised for determination in the pre-trial proceedings and argument was not directed on the issue before the High Court. Nor had that court afforded the parties an opportunity to provide further argument after reserving judgment when preparing the judgment. That could have been done by permitting further argument on the issue, either in writing or orally or both. That is the correct procedure to be followed and which should have been followed by the court below. Given the centrality of the issue to the outcome of the proceedings, further argument on the issue should have been invited. This would not in my view be one of those instances where a court would be entitled to make findings in relation to any matter flowing fairly from the record even if a party had to their peril not raised the issue during oral argument.

Held further that, as was also correctly concluded by the High Court, the 1998 appellate decision in this matter determining the boundary of the respective land allocations was not a decision taken under the Act. The High Court also correctly pointed out that decisions taken prior to commencement of the CLRA have not been brought under the purview of the CLRA in the absence of an appropriately worded deeming or transitional provision which would need to have been done in express terms.

Held further that, the carefully reasoned conclusion reached by the High Court on the question cannot be faulted and is indeed correct. It follows that the appeal against it must fail. It further follows that there is no prospect of success for an appeal against the High Court's judgment. The condonation application must accordingly fail, given the lack of any prospects of success on appeal.

APPEAL JUDGMENT

SMUTS AJA (MAKARAU AJA and UEITELE AJA concurring):

Introduction

[1] At issue in this appeal is the ambit of s 39 of the Communal Land Reform Act 5 of 2002, as amended[1] (the CLRA). That section embodies the right of a person to appeal against a decision of a Chief or a Traditional authority or any board under the CLRA to an appeal tribunal.

[2] The issue for determination arises in the following way: The Bukalo Royal Khuta in the Zambezi region, a traditional adjudicative authority under Masubia customs and traditions made a decision in 1997 in favour of two extended families (the Ndjivi and Jojo families) in a land dispute. Members of the losing protagonist Jimu family

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[1] Amended by Act 13 of 2013.

successfully appealed against that decision to the Kashandi, the appellate body under Masubia customs and traditions. That appeal was heard and decided in November 1998. The decision concerned the boundary between land allocated in accordance with Masubia customs and traditions, described by the appellants as an ongoing land dispute.

[3] The unsuccessful parties in the 1998 appellate determination sought to appeal against that outcome to the statutory appeal tribunal established under s 39 of the CLRA. Their notice of appeal to the appeal tribunal (the tribunal) was however only lodged on 1 December 2014. The tribunal ultimately heard the matter and found in their favour on 14 March 2022 and made a ruling, setting aside the 1998 decision and reinstating the earlier 1997 decision.

[4] The decision of the tribunal was taken on review to the High Court by the head of the Jimu family, the first respondent in this appeal.

Factual background

[5] It is not necessary for the purpose of this judgment to canvass the full factual setting which gave rise to the review and the preceding decision making. Shortly stated, competing family structures representing several households disputed the boundary of the land allocated to them respectively. The protracted land dispute was first decided by the Bukalo Royal adjudicative structure within that traditional community in 1997 in favour of the second and third appellants' families. This decision was reversed by the appellate structure within that traditional hierarchy in 1998 which

then made its decision, setting the boundary between the respective communities in favour of the Jimu family represented by the first respondent.

[6] The disputing parties to the 1997 decision were, according to the minutes, present during the appellate proceedings in 1998 and when the ensuing decision was given in November 1998.

[7] A representative of another family (the first appellant), who was not a party to those proceedings, sought to appeal against the 1998 decision (together with the two losing family factions represented by the second and third appellants) to the tribunal established under s 39 of the CLRA more than 16 years later in December 2014. The appeal tribunal found in their favour, setting it aside and reinstating the 1997 boundary decision.

[8] The unsuccessful party before the tribunal, the first respondent in this appeal, representing the Jimu family, then challenged the decision of the tribunal in a review application in the High Court under rule 76 of the High Court rules.

[9] Several review grounds were raised. Only the first is relevant for present purposes. The point was taken that the 2014 appeal to the appeal tribunal was lodged out of time and in conflict with s 39 and reg 25 of the regulations promulgated under the CLRA[2] which requires that appeals are to be lodged within 30 days after the decision was made known or brought to the notice of prospective appellants. It was

[2] Regulations made in terms of the Communal Land Reform Act 5 of 2002, GN 37 of 2003, GG 2926, 1 March 2003.

pointed out that although the CLRA was put into operation on 1 March 2003, the appeal was only lodged on 1 December 2014, several years after the CLRA was put into force and 16 years after the decision was taken.

[10] In response to this review ground, the first appellant stated that he and the other appellants only came to know of the 1998 decision in November 2014 and filed his appeal within 30 days thereafter on 1 December 2014.

The approach of High Court

[11] After hearing argument in the review application where the review grounds were fully ventilated, the High Court concluded after a detailed analysis of the CLRA that the tribunal had no power to hear the appeal and had acted *ultra vires* in doing so. The court reasoned that the CLRA had no appropriately worded transitional or deeming provisions authorising the tribunal to hear an appeal which arose before the CLRA came into operation. The High Court on 9 October 2023 accordingly set aside the tribunal's decision of 14 March 2022.

[12] The High Court acknowledged that this legal point had not been expressly taken on the papers and that it was not argued before that court but, because it was a point of law which arose from common cause facts, the court proceeded to deal with it. The court did so, reasoning that, in the absence of doing so, the court would otherwise be endorsing a patently wrong or invalid decision.

This appeal and condonation

[13] The appellants lodged the appeal record out of time and also failed to file security for costs within the time frame provided for in the rules. They accordingly applied for condonation for these shortcomings and for reinstatement of the appeal. The explanation proffered for their non-compliances concerned their difficulty and time taken in raising the finances to address these steps.

[14] The condonation application is not opposed.

[15] The two-fold test for condonation is well-established. It requires firstly a reasonable and acceptable explanation for the delay and secondly that the appeal should enjoy prospects of success.[3] Given the dual nature of this test, this Court heard full argument from the parties in respect of the merits of the appeal.

Submissions on appeal

[16] The appellants contend that their appeal enjoys strong prospects of success and should succeed. They take issue with the approach of the High Court. They refer in detail to the joint case management report agreed upon, filed and made an order of court in advance of the hearing before the court below. The appellants point out that none of the issues recorded in the case management report 'related to the question as to whether the CLRA applied to the dispute'.

[17] The appellants accordingly submitted that the High Court was not entitled to adjudicate upon that issue (ie whether or not the CLRA was applicable) as it was 'not

[3] *Sun Square Hotel (Pty) Ltd v Southern Sun Africa & another* 2020 (1) NR 19 (SC) para 13.

pleaded and not forming part of the first respondent's claims or the appellants' opposition' to the review application which served before the High Court.

[18] It was contended on behalf of the appellants that the court below 'fundamentally erred when it granted the application on an issue not pleaded, not raised in the joint case management report and in respect of which the parties were never given an opportunity to be heard'.

[19] It was common cause between the parties that the court below had not requested argument on the issue at any stage, even after reserving judgment.

[20] The appellants' counsel further argued that the High Court's approach was 'plainly wrong' because the appellants stated that they only came to know of the 1998 decision in November 2014 which was long after the CLRA came into force. It was contended that the CLRA was thus applicable on this basis. It was also argued that the parties consented to the jurisdiction of the tribunal by participating in those proceedings.

[21] Brief written argument was filed on behalf of the first respondent. Even though he had succeeded with the review application in the High Court, his counsel also contended that the joint case management report delineated the issues which bound the parties. He further argued that the issue of the CLRA's applicability decided by the High Court had not been raised or agreed to by the parties and that the parties were denied the opportunity to make submissions on the question. Counsel submitted that it would be imprudent for this Court to 'decide this new issue' as a court of first

instance. It was further argued on behalf of the first respondent that the matter should be remitted to the High Court to adjudicate upon the issues as outlined in the joint case management report.

[22] Shortly before the hearing, this Court invited further written submissions on the applicability of the CLRA to the dispute raised before the appeal tribunal.

[23] In response to this Court's invitation to provide further argument on the correctness of the High Court's decision, the appellants' counsel submitted that *Swakop Uranium*[4] (referred to in the invitation) does not apply and that the issue raised in the notice of appeal was the complaint as to whether the High Court 'was correct to go on a frolic of its own and decide an issue not put or fully argued before it'. Counsel persisted in the submission that the High Court erred in dealing with an issue not pleaded or argued and that the appeal should as a consequence succeed. Counsel also argued that the appellants qualified as 'any person aggrieved by a decision of a chief or traditional authority' in s 39.

[24] In the course of oral argument appellants' counsel referred to a statement made in the founding affidavit concerning applications for registration of customary land rights (under the CLRA) dealt with during 2016-2018 in the context of explaining the impact of the determination of the contested boundary. That is the context of that statement. It has no bearing on whether the 1998 decision was one made under the Act for the purpose of s 39.

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[4] *Swakop Uranium v Employees of Swakop Uranium & others* 2022 (4) NR 1195 (SC).

[25] Counsel also argued that there was a High Court application to compel the line minister to appoint the tribunal. It became settled and the Minister proceeded to appoint the tribunal's members. Counsel contended that the Minister's appointment to tribunal members made pursuant to a court settlement remained extant and had legal consequences until set aside, relying upon the principle enunciated in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[5] and would first need to be set aside, referring also to *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd & another.*[6]

[26] In the course of oral submissions, counsel accepted that this Court is entitled to raise a legal point or illegality on appeal but added that this should be done sparingly. He contended that there would be prejudice to the appellant if the point were to be determined by this Court but was not able to specify discernible concrete prejudice when asked to do so.

[27] The first respondent's counsel in his further written argument contended that the 1998 decision by the Bukalo Traditional Authority was not made in terms of the CLRA as that authority was according to him not recognised under the applicable legislation. This is however a matter of evidence not forming part of the record before us and is not further considered. He also argued that the tribunal lacked jurisdiction to hear the dispute as it only enjoys jurisdiction to adjudicate upon decisions made by a chief, traditional authority or board under the CLRA. The decision appealed against was, he argued, not under the Act as it predated the CLRA and no power under the

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[5] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA).
[6] *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd & another* 2023 (1) SA 1 (CC) paras 87-88.

CLRA was exercised in doing so. Consequently counsel contended that the tribunal's decision is a nullity.

Could the High Court determine the issue of the applicability of s 39?

[28] The starting point in determining this question is an examination of the pleadings. The Deputy Chief Justice reaffirmed in *Nelumbu & others v Hikumwah & others*[7] that in motion proceedings the affidavits constitute both the pleadings and evidence and that the affidavits must contain all the averments necessary to sustain a cause of action.

[29] The appellants contend that the applicability of the CLRA was not pleaded at all. That is incorrect.

[30] In para 32 of the founding affidavit, the first respondent (as applicant *a quo*) expressly stated:

> 'In 1998, the CLRA had not come into force as yet and no structure such as the Communal Land Board or similar forum to which one could appeal the decisions of a traditional authority existed at the time.'

[31] It was further stated in the founding affidavit that the CLRA was put into force on 1 March 2003. It is thus plainly pleaded that at the time of the 1998 decision, the CLRA did not apply and that there was no structure to which aggrieved persons could appeal to against a decision of a traditional authority. But this point was not raised as a review ground.

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[7] *Nelumbu & others v Hikumwah & others* 2017 (2) NR 433 (SC) paras 40-41.

[32] The first ground of review pleaded takes the point that s 39, read with reg 25, had not been complied with – requiring parties to appeal within 30 days after the decision had become known to them or brought to their notice. That ground, although raising s 39, focused on the appeal being way out of time.

[33] The first respondent understandably disputed the first to third appellants' claims that they only became aware of the 1998 decision 16 years later in November 2014. In this context, it was pointed out that the third appellant, heading the Ndivi family, would have been aware of the 1998 decision as the allegation is made and supported by the record of the 1998 decision that the 'Ndivi family were part and parcel of the 1998 hearing and the decision was made in their presence'. This allegation is not expressly dealt with in the answering affidavits. Despite this, all three appellants persisted with their denials of any knowledge of the 1998 decision until November 2014. This in the context of what is termed 'an ongoing land dispute between the appellants' families and that of the first respondent concerning the border between the families' land', in the affidavit in support of the condonation application.

[34] The first respondent did not apply to have this factual dispute referred to oral evidence and was content to argue that the denials were so untenable that they could be rejected on the papers.

[35] It is not necessary for present purposes to consider whether a factual finding on the papers on this issue can be made.

[36] Although compliance with the time limit posited by s 39 and reg 25 was raised in the joint case management report, the issue as to whether s 39 applied to the dispute is not referred to in that report and subsequent order. The founding affidavit did however in fact state that the 1998 decision was taken before the CLRA had come into force and that there was at that time no appellate structure under that Act to which an aggrieved person could appeal to against decisions of a traditional authority.

[37] The issue was however not raised for determination in the pre-trial proceedings and argument was not directed on the issue before the High Court. Nor had that court afforded the parties an opportunity to provide further argument after reserving judgment when preparing the judgment. That could have been done by permitting further argument on the issue, either in writing or orally or both. That is the correct procedure to be followed and which should have been followed by the court below. Given the centrality of the issue to the outcome of the proceedings, further argument on the issue should have been invited. This would not in my view be one of those instances where a court would be entitled to make findings in relation to any matter flowing fairly from the record even if a party had to their peril not raised the issue during oral argument.[8]

[38] The appellants contended that the failure to do so was a vitiating error because the court had on its own raised and disposed of an issue not placed before it without hearing the parties. The order sought on appeal in the notice of appeal is that the order of the High Court is to be set aside and the tribunal's decision of 14 March 2022 is to be upheld and the review application dismissed. In oral argument, counsel argued that

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[8] *Thompson v South African Broadcasting Corporation* 2001 (3) 746 (SCA) para 7; *De Villiers & another NNO v BOE Bank Ltd* 2004 (3) SA 459 (SCA) para 12.

the relief sought was an order upholding the appeal and replacing the High Court order with one dismissing the review application.

[39] It is well settled that judicial officers are required to confine an enquiry to the facts placed before them.[9] This principle was reaffirmed by the Chief Justice in *Namib Plains Farming and Tourism CC v Valencia Uranium Ltd & others.*[10]

> '[39] It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. If a point which a judge considers material to the outcome of the case was not argued before the judge, it is the judge's duty to inform counsel on both sides and to invite them to submit arguments.'[11]
> (Emphasis supplied)

[40] In this instance the issue in question did arise on the facts placed before the High Court. The point was not however raised as one of the issues in dispute between the parties. Given its importance, it was certainly the presiding judge's duty to inform the parties and invite argument on the point before deciding it. But does the presiding judge's failure to invite further submissions vitiate that decision on that legal point which arose on the papers and was based on common cause facts?

[41] On appeal, the correctness of the High Court's decision is in issue and the parties should plainly have addressed the correctness or otherwise of that decision.

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[9] *Arangies v Neves & others* 2019 (3) NR 671 (SC) para 45 (*Arangies*).
[10] *Namib Plains Farming and Tourism CC v Valencia Uranium Pty Ltd & others* 2011 (2) NR 469 (SC).
[11] *Id* para 39. See also *Merit Investments Eleven (Pty) Ltd v Namsov Fishing Enterprises (Pty) Ltd* 2017 (2) NR 393 (SC) paras 34-36.

They initially failed to do so. Hence the invitation by this Court to file further submissions.

[42] It is not correct, as asserted on behalf of the first respondent, that this Court is sitting as a court of first instance on the issue. The High Court gave a reasoned judgment on the issue and its correctness is in issue on appeal, initially overlooked by both sides in this appeal. The parties on appeal have been afforded the full opportunity to address the court on the correctness of the confined legal point raised and determined by the High Court.

[43] Certain of the appellants' counsel's submissions would appear to be based on an incorrect premise that the factual matter upon which the High Court based its decision was not pleaded or placed before it. That premise is faulty. As shown, it was expressly pleaded that the CLRA did not apply when the 1998 decision was made. That factual basis in any event emerges from the CLRA itself and the subsequent date it was put into operation.

[44] As was made clear by this Court in *Arangies*:

> '[46] This court has permitted parties to raise issues of statutory non-compliance or illegalities for the first time on appeal.[12] The dictum by Innes J in *Cole v Government of the Union of SA*[13] is instructive in this regard:
>
> > "(I)t has been suggested that the appellant should not be allowed to take advantage of the point on appeal. But there seems no reason, either on principle or on authority, to prevent him. The duty of an appellate tribunal is to

[12] *Ferrari v Ruch* 1994 NR 287 (SC).
[13] *Cole v Government of the Union of SA* 1910 AD 263 at 272-3.

ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong."'[14]

[45] After citing this authority, this Court in *Arangies* added:

'[47] The corollary to this is that it would create an intolerable position if a court of appeal is precluded from giving the right decision on accepted facts merely because one of the parties had failed to raise a legal point.[15]

[48] It is also open to a court of appeal to raise questions of law of its own motion for the first time on appeal. It is indeed the court's duty to do so if the Constitution or a statutory provision or the common law would preclude reliance upon an illegal contract or a principle of common law in conflict with the Constitution. This court has done so and will continue to do so when circumstances require it to do so.'[16]

[46] At issue in *Arangies* was a claim of acquisition by prescription of a servitude of right of way over immovable property which had been municipal property. This Court of its own motion raised the issue for the first time on appeal as to the applicability of

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[14] See also *Greathead v SA Commercial Catering & Allied Workers Union* 2001 (3) SA 464 (SCA) paras 14-15.
[15] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 2.C-G; See also *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 510A.
[16] *TransNamib Ltd v Poolman & others* 1999 NR 399 (SC). *Moolman & another v Jeandre Development CC* 2016 (2) NR 322 (SC); *JS v LC and another* 2016 (4) NR 939 (SC) para 21; *RH v DE* 2014 (6) SA 436 (SCA) para 4.

s 65 of the Local Authorities Act 23 of 1992 which precluded in peremptory terms acquisition by prescription of any immovable property of a local authority or of any right in such property.

[47] The facts pertinent to that question – as is the case concerning the issue in this matter – were common cause.

[48] The court in *Arangies* found that there was no inherent unfairness or prejudice for the issue to be raised on appeal for the first time as the facts were common cause.[17]

[49] The appellants have in this matter not identified any discernible prejudice for the legal question in this matter being raised and argued on appeal and understandably so, given its basis in common cause facts.

[50] In *Swakop Uranium* this Court[18] for the first time raised the question of the High Court's jurisdiction at all to hear the dispute in that matter.[19] This Court in *Swakop Uranium* made it clear that the question of jurisdiction can be raised for the first time on appeal. So too can this Court for the first time consider whether the tribunal had jurisdiction to hear the appeal against the 1998 decision on a reading of s 39 of the CLRA.

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[17] Para 50.

[18] Para 23. *Swakop Uranium* was followed by this Court in *Namibia Water Corporation Limited v Tjipangandjara* 2025 (3) NR 716 (SC) para 25.

[19] The appellant had taken a special plea, pleading that the High Court and the Labour Court had concurrent jurisdiction but pleaded that it did not have jurisdiction to hear the dispute if the one year period in s 86(2)*(b)* of the Labour Act 11 of 2007 had lapsed.

[51] It follows that it is open to this Court to raise that issue itself for the first time on appeal. In this instance, the High Court already unilaterally addressed the issue albeit without inviting and receiving submissions of the parties on the issue which should have occurred.

[52] As was lucidly stated by Innes J, it is the duty of this Court as an appellate court to ascertain whether the court of first instance came to a correct conclusion on the case submitted to it.[20] The point of law determined by the High Court was on the basis of and arose from the factual matter placed before it.

[53] If s 39 did not afford jurisdiction to the appeal tribunal to hear the appeal, its act in doing so is beyond its powers and renders the proceedings a nullity. The fact that the Minister's decision to appoint the tribunal on an *ad hoc* basis to hear the appeal was not challenged or set aside is of no moment in determining whether the tribunal had jurisdiction at all to hear the dispute. The Minister's appointment of tribunal members to hear the appeal could not clothe that tribunal with jurisdiction where none existed upon the proper interpretation of the CLRA. Reliance upon *Oudekraal*[21] does not avail the appellants. Nor does their reliance upon the *Sembcorp* which reaffirms the principle in sequential administrative decision making that each decision is subject to scrutiny to determine its validity and if the first decision was properly taken, it would not be vitiated by irregularities impairing the second.[22] That principle does not arise because the Minister's appointment does not provide the tribunal with its jurisdiction. It derives it from s 39. If it lacks jurisdiction, that is the end of the matter.

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[20] See also *Paddock Motors* at 23D-G.
[21] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).
[22] Para 88.

[54] It is plainly intolerable if this Court were to be precluded from giving the right decision on the accepted facts merely because the first respondent had not listed the issue in the joint case management report and failed to raise it in argument.

[55] The question arises as to whether s 39 authorised the tribunal to hear the appeal in respect of a decision taken nearly four years before the CLRA was passed and more than four years before it was put into operation. (This is quite apart from the further 11 and a half years which elapsed before the 'appeal' was eventually noted).

[56] Whether the tribunal had jurisdiction is to be determined upon the interpretation to be given to s 39 in the context of the CLRA to be construed as a whole.

Section 39

[57] The relevant portions of s 39 provide:

> '(1) Any person aggrieved by a decision of a Chief or a Traditional Authority or any board under this Act, may appeal in the prescribed manner against that decision to an appeal tribunal appointed by the Minister for the purpose of the appeal concerned.
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> (2) . . . .
>
> (3) . . . .
>
> (4) . . . .
>
> (5) . . . .
>
> (6) An appeal tribunal may –
>
> (a) confirm, set aside or amend the decision which is the subject of the appeal;
>
> (b) make any order in connection therewith as it may think fit.

(7) . . . .'

[58] An appeal under s 39(1) can only arise where a person is aggrieved by a decision of a chief or a traditional authority or any board under the Act. The phrase 'under the Act' qualifies the decision of the person or bodies appealed against. Chiefs, traditional authorities and boards are empowered under the CLRA to take a range of decisions.

[59] A 'decision' for the purposes of s 39 is one taken after the CLRA is put into force as it means a decision taken in terms of an enabling provision contained in that Act. That is the clear meaning of that phrase in the context of s 39 and the Act construed as a whole.

[60] As the High Court correctly found, there are no deeming or transitional provisions contained in the CLRA to clothe the tribunal with the power to hear and determine appeals prior to the CLRA coming into operation. As stated by the High Court, this interpretation accords with the common law presumption against retrospectivity of statutes.

[61] The purpose of the CLRA is contained in its long title and is 'to provide for the allocation of rights in respect of communal land; to establish (land) boards and for the powers of chiefs and traditional authorities and boards in relation to communal land' as well as incidental matters. An incidental matter is to provide remedies for persons aggrieved by decisions taken under the powers in the CLRA to allocate or cancel rights over communal land under the Act. In terms of s 19, those rights are divided into customary land rights and rights of leasehold.

[62] In terms of s 20, the primary power to allocate and cancel customary land rights in respect of land in a communal area of a traditional community under the CLRA vests in the chief of that traditional community or where the chief so determines, in the traditional authority of that traditional community.

[63] The CLRA in s 21 specifies the categories of land rights which may be allocated. A procedure is set out in s 22 for applications for customary land rights to be allocated under the Act. Section 24 requires that any allocation made by chief or traditional authority under s 22 has no legal effect unless ratified by the relevant land board.

[64] The CLRA in s 28 provides for the power and the procedure in cancelling land rights under the Act. That power is also subject to ratification by the relevant board for effectiveness.

[65] Existing customary land rights immediately before the commencement of the CLRA are recognised in s 28 unless the claim is rejected upon an application under s 28(2) or the land has reverted to the State under s 28(13). The procedure for recognition of rights in existence immediately prior to the CLRA is provided for in s 28(2).

[66] The CLRA further authorises the line minister, in consultation with a land board, to establish an investigating committee to report to the board.

[67] There are also provisions in the CLRA for a land board to grant a leasehold to a person for a period of 99 years and for the power of a board to cancel such leasehold.[23]

[68] As the High Court correctly concluded, there are several powers vested in chiefs, traditional authorities or boards to make decisions in respect of the allocation and cancellation of rights in relation to communal land under the Act. And, as the High Court correctly concluded, those are the decisions under the Act in respect of which an appeal under s 39 is intended to provide a remedy to a person aggrieved by those decisions under the Act.

[69] As was also correctly concluded by the High Court, the 1998 appellate decision in this matter determining the boundary of the respective land allocations was not a decision taken under the Act. The High Court also correctly pointed out that decisions taken prior to commencement of the CLRA have not been brought under the purview of the CLRA in the absence of an appropriately worded deeming or transitional provision which would need to have been done in express terms.

[70] There can also be no question of the participation by a party in the proceedings before the appeal tribunal amounting to a consent to jurisdiction if that statutory body was not vested with the power to adjudicate upon that appeal if it does not fall within the issues assigned to it under its empowering provision, namely s 39.

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[23] Sections 30-34.

[71] Although the procedure followed by the High Court in not inviting submissions on this issue did not accord with what would be expected, the parties were accorded the full opportunity to address the same question of law on appeal in this Court. The lapse in procedure has not resulted in incurable prejudice or fairness because the point is based on common cause facts and the parties were expressly invited by this Court to address the issue on appeal and did so.

[72] The carefully reasoned conclusion reached by the High Court on the question cannot be faulted and is indeed correct. It follows that the appeal against it must fail. It further follows that there is no prospect of success for an appeal against the High Court's judgment. The condonation application must accordingly fail, given the lack of any prospects of success on appeal.

Costs

[73] The first respondent only sought the costs of appeal against the appellants to be limited to disbursements. Given that the legal point in question was not raised as a review ground and that the parties did not have the opportunity to address it before the High Court, it would be apposite if its order setting aside the tribunal's decision should not be accompanied by a cost order. The High Court order is altered to that extent in accordance with this Court's powers under s 19 of the Supreme Court Act 15 of 1990.

[74] It follows that no order as to costs is made.

Order

[75] The following order is made:

1. The appellants' condonation application is dismissed.

2. The order of the High Court is amended and is replaced with the following order:

   'The appeal tribunal's decision made on 14 March 2022 is reviewed and set aside with no order made as to costs.'

3. The matter is struck from the roll, with costs limited to disbursements incurred.

SMUTS AJA

MAKARAU AJA

UEITELE AJA

APPEARANCES

APPELLANTS:	S Namandje (with him N Alexander) Of Sisa Namandje & Co. Inc.
FIRST RESPONDENT:	T Kasita Instructed by Legal Assistance Centre