REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2022/00352

In the matter between:

RAPHAEL MBALA	**APPLICANT**

and

MICHAEL MUDABETI	**FIRST RESPONDENT**
BERNARD MBUKUSA NYAMBE	**SECOND RESPONDENT**
RAPHAEL KACHELE MUNALULA	**THIRD RESPONDENT**
GABRIEL NEPAYA N.O.	**FOURTH RESPONDENT**
ZAMBEZI COMMUNAL LAND BOARD	**FIFTH RESPONDENT**
MINISTER OF AGRICULTURE, WATER & LAND REFORM	**SIXTH RESPONDENT**
MASUBIA TRADITIONAL AUTHORITY	**SEVENTH RESPONDENT**

Neutral citation: *Mbala v Mudabeti* (HC-MD-CIV-MOT-REV-2022/00352) [2023] NAHCMD 488 (9 August 2023)

Coram: PARKER AJ
Heard: **29 June 2023**
Delivered: **9 August 2023**

Flynote: Administrative law – Administrative action – Review of decision of an inferior statutory tribunal – In terms of the Communal Land Reform Act 5 of 2002 –

Applicant challenging validity of an appeal tribunal's decision setting aside a decision taken in 1998 by a traditional appellate body – Court finding that the Act did not apply retrospectively to an act carried out before the commencement date of the Act in the absence of saving or transitional provisions in the Act – Appeal tribunal's decision reviewed and set aside with costs.

Summary: This is an application to review of decision of an inferior statutory tribunal, namely, the appeal tribunal for the Zambezi Communal Land Board. The establishment, powers and functions of an appeal tribunal are provided in the Communal Land Reform Act 5 of 2002. The Act came into operation on 1 March 2003 and the Regulations made thereunder were published in the Government Gazette on 15 June 2023. In 1997 the Bukalo Royal Khuta was seized with a land boundary dispute between two families. This first-instance traditional body's decision was overturned in 1998 by a traditional appeal body called Kashindi. On an appeal before an appeal tribunal established under Act 5 of 2002, the statutory appeal tribunal overturned the 1998 decision. Aggrieved by the appeal tribunal's decision, the applicant brought the instant application to review and set aside the appeal tribunal's decision. The court determined the application on a legal point that was not raised on the papers but which arose from the common cause facts and did not raise any new factual issue. The court found that there would not be any prejudice because the legal point did not raise any new factual issue. The legal point was that the Act was presumed not to be retrospective, unless such was clearly the intention of the Legislature. The Act did not contain saving or transitional provisions that could save the 1988 decision and bring it under the purview of the Act, which was an amending legislation in substance and in effect. More important, the primary purpose of the Act is the allocation of portions of land to individuals in communal land arears and matters. The Act is not concerned with land boundaries between families which was the dispute before the traditional bodies in 1997 and 1998. Consequently, the court found that the appeal tribunal's decision stood to be reviewed and set aside on the basis of ultra vires and legality.

Held, an act cannot be regulated retrospectively by a new statute that came into operation *ex post facto* in the absence of deeming or transitional provisions saving such act and bringing it under the purview of the new statute.

Held, further, a law is presumed not to be retrospective, unless such was clearly the intention of the Legislature.

ORDER

1. The appeal tribunal's decision made on 14 March 2022 is reviewed and set aside, with costs.

2. The matter is finalised and removed from the roll.

JUDGMENT

PARKER AJ:

[1] This is an application to review a decision of a statutory appeal tribunal for the Zambezi Communal Land Board ('the appeal tribunal') made on 14 March 2022. The appeal tribunal sat on an appeal from a decision on a land boundary dispute between two families, namely, the Ndjivi and Jojo families on the one hand and the Jimu family on the other hand in the Zambezi Region.

[2] The Bukalo Royal Khuta had made a decision in 1997 in favour of the Ndjivi and Jojo families. In 1998, the 1997 decision was overturned by the Kashandi, the appellate body under Masubia customs and traditions. It is abundantly clear that those decisions were taken by traditional bodies, applying the customary law of the community involved. It is the 1998 decision that was appealed from before the appeal tribunal. The instant application is to review the decision of the appeal tribunal made on 14 March 2022.

[3] In the notice of motion, the applicant seeks an order in the following terms verbatim:

'1. Reviewing and/or setting aside and/or correcting the decisions and/or order of the Fourth Respondent, the Appeal Tribunal for the Zambezi Communal Land Board, made in a judgment delivered on 14 March 2022, namely:

1.1 "the appeal against the decision of the second respondent [7th Respondent herein] made in 1998 in favour of the 3rd respondent [Applicant herein] succeeds;

1.2 that the 1998 decision of the second respondent [7th Respondent herein] is set aside;

1.3 the 1997 decision is accordingly reinstated."

2. Re-instating the decision of the 7th Respondent, made on 9 November 1998;

3. Such further and/or alternative relief which the above Honourable Court may deem appropriate; and

4. Costs of disbursements of the Applicant's Legal Practitioners of Record.'

[4] The appeal was brought under the Communal Land Reform Act 5 of 2002 (as amended by the Communal Land Reform Act 13 of 2013) ('the CLRA'). It is to the CLRA that I now direct the enquiry.

[5] The CLRA came into operation on 1 March 2003, and the Regulations made thereunder were published in the Government Gazette on 15 June 2015.[1]

[6] In our statute law, an act cannot be regulated retrospectively by a new statute that came into operation *ex post facto* in the absence of deeming or transitional provisions in the new statute, saving such act and bringing it under the purview of the new statute. There are no deeming or transitional provisions in the CLRA, saving the 1998 decision of the Kashandi and bringing it under the purview of the CLRA.

[7] This legal point was not raised on the papers. It arises from the common cause facts. That being the case, this court is competent to decide the application on the point of law because it arises from the facts, even if the parties have not relied

[1] Regulations in terms of Communal Land Reform Act 5 of 2002 (GN 100 in GG 5760 of 15 June 2015).

on it.[2] It seems to me that there would not be any prejudice because the legal point does not raise any factual issue.[3] Indeed, on the facts, the court has a duty to raise and consider the legal point, otherwise the court would be endorsing a decision that is patently wrong and perverse and thereby perpetuate an illegality. That in itself offends the rule of law.[4]

[8] The written law, the common law and customary law in force at a particular time are considered as a coherent whole. Therefore, every new law is essentially amending in nature and effect. That is the case even though the new law may not expressly say that it is an amending law: The law may break new ground, as is the case of the CLRA, by regulating some activity for the first time. In such a situation, the new law is an amending law in substance and in the practical sense, as CLRA is.[5] Indeed, the short title and the long title of the Act vindicate this conclusion.

[9] The CLRA is, in virtue of what I have said previously, an amending law through and through. It amends by reforming the various customary laws on the allocation of land in communal land areas of the country. The long title of the CLRA which contains the object of the Act says so. The Act is: 'To provide for the allocation of rights in respect of communal land; to establish Communal Land Boards; to provide for the powers of Chiefs and Traditional Authorities and boards in relation to communal land; and to make provision for incidental matters.'

[10] To take the enquiry to the next level, I should say the following. There is a presumption against retrospectivity of legislation. The legal and constitutional importance of this presumption is said to be this: Observance of the presumption 'is a fundamental principle of the law-state and disregard of it reduces the law to an instrument of governmental anarchy'[6]

[11] The theoretical underlay of the presumption is to ensure that justice is done to the individual. The practical consideration for the presumption is that since the operation of statutes are limited by time (hence the need for commencement dates

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[2] L De Villiers van Winsen Herbstein and Van Winsen: *The Civil Practice of the Supreme Court of South Africa* 4ed (1997) at 368.
[3] *Bruni NO v Minister of Finance* [2021] NASC (11 June 2021) para 53.
[4] Ibid para 54.
[5] See GC Thorton *Legislative Drafting* 3ed (1987) at 116-117.
[6] G E Devenish *Interpretation of Statutes* (1996) at 186 fn 293.

of statutes), it would therefore, as a rule, make no sense to prohibit or to permit what has been done in the past.[7] In *Von Weiligh v The Land and Agricultural Bank of South Africa* the court held that 'the rule of both English and Roman-Dutch law is that a law is presumed not to be retrospective, unless such was dearly the intention of the Legislature'.[8] There is no intention of the Legislature that can be gathered from the words of the CLRA[9] indicating that the CLRA is to operate retrospectively.

[12] As I have found previously, there are no deeming or transitional provisions in the CLRA to that effect. The result is that it would occasion injustice to the beneficiary of the 1998 decision, if the CLRA was implemented retrospectively. It will make no sense to consider the CLRA as prohibiting or setting at naught the 1998 decision.[10] Doubtless, the beneficiary of 1998 decision acquired rights.[11] Therefore, the appeal tribunal's unlawful and invalid assumption of power to overturn the 1998 decision interferes adversely and prejudicially with those rights of the beneficiary.

[13] I have found previously that the primary object of the CLRA is to provide for the allocation of rights in respect of communal land, that is, customary land rights. In terms of s 19 of the CLRA, the rights that may be allocated are (a) customary land rights and (b) rights of leasehold. In terms of s 20 of the CLRA, the power to allocate or cancel any customary land rights vests in the Chief of the traditional community or, where the Chief so determines, in the Traditional Authority of the community in question.

[14] Section 21 of the CLRA stipulates that the customary land rights which may be allocated in respect of communal land are (a) a right to a farming unit, (b) a right to a residential unit and (c) a right to any other form of customary tenure to customary land. Section 22 provides that the allocation of customary land rights is *in respect of a specific portion of land*, and s 23 provides for limitation on size of land that may be allocated. (Italicised for emphasis) Furthermore, s 26 provides that unless the right allocated is relinquished by the holder thereof, the right endures for

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[7] Ibid at 186 – 187.
[8] *Von Weiligh v The Land and Agricultural Bank of South Africa* 1924 TPD 62 at 66.
[9] See *Wildlife Ranching Namibia v Minister of Environment and Tourism* [2016] NAHCMD 110 (13 April 2016) para 7.
[10] See GE Devenish Interpretation of Statutes fn 5 loc cit.
[11] *Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 where Corbett J relied on CE Odgers *Craies on Statute Law* (1952).

the natural life of the holder of the right. Additionally, a Chief or Traditional Authority may, in accordance with customary law, cancel a customary land right. Upon the death of the holder of customary land rights, such rights revert to the Chief or Traditional Authority concerned for reallocation forthwith.

[15] In terms of s 30 (1), read with s 34, of the CLRA, a communal land board may grant to a person a right of leasehold for a period of 99 years in respect of a portion of communal land. The board has the power to cancel a leasehold in terms of s 36 of the Act.

[16] Furthermore, in terms of s 28, subject to prescribed exemptions and conditions, a customary land right may be transferred only with the written consent of the Chief or Traditional Authority concerned, and a leasehold with the consent of the communal land board in question.

[17] I have undertaken in paras 13-16 above an examination of ss 19, 21, 22, 23, 26, 28, 30, 34 and 36 of the CLRA to make these crucial points: Section 39 (1) provides: 'Any person aggrieved by a decision of a Chief or Traditional Authority or any board under this Act' may appeal against that decision to an appeal tribunal'. It means a decision taken by such Chief or such Traditional Authority under this Act, that is, the CLRA. It is not every decision imaginable that may be appealed against by an aggrieved person in terms of s 39 of the CLRA: It should be a decision taken under the CLRA in respect of primarily the allocation of customary land rights and incidental matters, eg the size of a portion of land that may be allocated.

[18] It is abundantly clear from the short title and the aforementioned provisions of the CLRA that customary land rights are allocated to an individual and in respect of a specific portion of land. Moreover, the customary land rights which are allocated are a right to a farming unit, a right to a residential unit and any form of customary tenure to customary land. The rights are, therefore, *ad hominem* and endure for the life of the holder thereof. Upon his or her death, the rights revert forthwith to the Chief or Traditional Authority in question.

[19] Doubtless, the 1998 decision did not concern the allocation of customary land rights within the meaning of the CLRA, as indicated by the short tile and the

provisions of the CLRA which I have examined above. The 1998 decision concerned a land boundary between families. What is more, the 1998 decision was not a decision 'taken under this Act' (ie the CLRA). Furthermore, that decision has not been saved and brought under the purview of the CLRA by deeming or transitional provisions of the CLRA.[12]

[20] In that regard, it is significant to note the following: In 1999 the Bukalo Traditional Authority reconsidered its earlier decision of 1997 referred to previously. The appeal tribunal held that any party aggrieved by that decision, which was taken before the coming into operation of CLRA, has the right to seek relief from the High Court. It is inexplicable then why the appeal tribunal did not apply that holding to the 1998 decision that was also taken before the coming into force of the CLRA.

[21] In my view, any challenge of the 1998 decision, which was about a dispute respecting a land boundary between two families and taken before the CLRA came into force is doomed to fail. The appeal tribunal's power to hear appeals in terms of s 39 of CLRA are, as I have said before, appeals regarding decisions on allocation of customary land rights and incidental matters and where such decisions were made under the CLRA. The 1998 decision is not such decision. The examination of the provisions of the CLRA undertaken in paras 13–16 and the short title thereof compels me to this conclusion.

[22] Both counsel referred the court to *Mbala v Kazavanga NO*.[13] The preponderance of the analysis of the law and facts undertaken above and the conclusions thereanent are unaffected by the judgment and order of the court (per Angula J) in *Mbala v Kazavanga NO*. That case is distinguishable inasmuch as the Angula J decision was that an appeal tribunal in question had been appointed in contravention of the peremptory provisions of s 39 of the CLRA and regulation 25 of its Regulations.

[23] Based on these reasons, I hold that the appeal tribunal had no power to determine the appeal under the CLRA that challenged the validity of the 1998 decision. The appeal tribunal acted ultra vires. Consequently, the appeal tribunal's

[12] See para 6 above.
[13] *Mbala v Kazavanga NO* [2016] NAHCMD 393 (15 December 2016).

decision made on 14 March 2022 stands to be reviewed and set aside on the basis of ultra vires and legality.[14]

[24] Consequently, in my judgment, the review application succeeds. In the result, I order as follows:

1. The appeal tribunal's decision made on 14 March 2022 is reviewed and set aside, with costs.

2. The matter is finalised and removed from the roll.

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C PARKER

Acting Judge

[14] *Nolte v The Minister of Environment, Forestry and Tourism* [2023] NAHCMD 361 (28 June 2023) para 6, and the cases there cited.

APPEARANCES

APPLICANT:	R Xamseb Of Legal Assistance Centre, Windhoek
1ST – 3RD RESPONDENTS:	NN Alexander Of Sisa Namandje & Co. Inc., Windhoek