



REPORTABLE

CASE NO: SA 28/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

DANIEL SIBOLEKA MUSWEU

Appellant

and

CHAIRPERSON OF THE APPEAL TRIBUNAL

First Respondent

HENRY MUHONGO

Second Respondent

ZAMBEZI COMMUNAL LAND BOARD

Third Respondent

MASUBIA TRADITIONAL AUTHORITY

Fourth Respondent

Coram: SHIVUTE CJ, HOFF JA and FRANK AJA

Heard: 17 June 2024

Delivered: 29 January 2025

Summary: This appeal stemmed from a long-standing land dispute between the Munitongo and Muhongo families, represented by the appellant and second respondent, respectively, over land located in Nansefu, in the Nsundwa Area of the Zambezi Region in Namibia. In 2011, both families sought recognition of their

customary land rights under the Communal Land Reform Act 5 of 2002 (the Act). After investigations, the Zambezi Communal Land Board (Land Board) resolved in 2013 to register the land in the names of both families. Dissatisfied, the Muhongo family appealed to the Appeal Tribunal established in terms of s 39 of the Act.

The Tribunal's first ruling of 16 August 2014 set aside the Land Board's decision, directing further investigations and hearings by the Land Board. The Land Board complied, reaffirming its earlier decision in 2013, which led to another appeal by the second respondent. The Tribunal's subsequent decision on 3 June 2017, referred to as the 'final judgment' ordered the land to be registered in the name of the second respondent. The appellant challenged this ruling in the High Court, arguing that the Tribunal's second decision was *ultra vires* and that it acted beyond its authority after becoming *functus officio* following the first ruling.

The High Court dismissed the challenge, holding that the Tribunal's first ruling was interim, as it merely directed further investigations without resolving the substantive issue. The court found that the Tribunal acted within its powers under the Act, concluding that its second decision was a valid final determination. Consequently, the High Court upheld the Tribunal's actions and dismissed the appellant's application with costs.

On appeal, the Supreme Court considered whether s 39(6)(b) of the Act (which allows the Appeal Tribunal to 'make any order in connection [with the subject of the appeal] as it may deem fit') gave the Appeal Tribunal a discretion in granting interim or interlocutory orders.

The appellant sought condonation for the late filing of the record and the first, third and fourth respondents sought condonation for the late filing of their heads of argument.

Held that; Section 39(6)(b) gives the Tribunal wider discretion to ‘make any order in connection therewith as it may think fit’. It is correct that the Tribunal had the power to refer the matter to the Land Board with directions as to the further conduct of the matter, but such referral does not convert the proceedings into interim or interlocutory proceedings. There is no provision for such a procedure, neither in the Act nor in the Regulations governing the Tribunal.

Held that; a decision of the Tribunal is, in terms of s 39(6), conclusive and binding on the parties. The word ‘conclusive’ is defined as meaning, amongst others, ‘final’. The appeal was not ‘pending’ before the Tribunal. The Tribunal rendered a written ruling, which was published to the parties. In terms of regulation 25(6)(b) such ruling was final. The Tribunal was therefore *functus officio*. The decision it rendered on 16 August 2014 was determinative of the rights of the parties and was final in effect.

The Court granted the respective condonation applications of the parties and the appeal was upheld.

APPEAL JUDGMENT

SHIVUTE CJ (HOFF JA and FRANK AJA concurring):

Introduction

[1] The doctrine of *functus officio* establishes that once a decision-making body has issued a final determination within its jurisdiction, it loses the authority to revisit or alter that decision, ensuring finality and certainty in legal proceedings. In this appeal, involving a communal land dispute, this Court must decide whether a prior decision by a quasi-judicial body rendered it *functus officio*, precluding further action on the matter by meeting the doctrine's requirements for finality.

Parties

[2] The appellant, who was the applicant in the court a quo, is Mr Daniel Siboleka Musweu, the headman of Munitongo Village in the Nansefu, Nsundwa Area in the Zambezi Region. The first respondent is the Chairperson of the Appeal Tribunal, appointed in terms of s 39 of the Communal Land Reform Act 5 of 2002. The second respondent is Mr Henry Muhongo, the headman of Muhongo Village, also located in Nansefu, in the Nsundwa Area in the Zambezi Region, Namibia. The third respondent is the Zambezi Communal Land Board, established in terms of the Communal Land Reform Act 5 of 2002. And lastly, the fourth respondent is the Masubia Traditional Authority, a traditional authority established in terms of s 2(1) of the Traditional Authorities Act 25 of 2000. When referred to collectively, the first, third and fourth respondents will be referred to as the Government respondents.

Background

[3] This appeal stems from a decades-old land dispute between the Munitongo family, represented by the appellant, and the Muhongo family, represented by the second respondent. Both families reside in Nansefu, in the Nsundwa Area of the Zambezi Region. The dispute specifically concerns a piece of land occupied by the Munitongo family since approximately 1979, which the Muhongo family claims as their own.

[4] The dispute intensified in 2011 when representatives of the third respondent, the Zambezi Communal Land Board (the Land Board) visited the second respondent's homestead to register his residential land rights under s 28 of the Communal Land Reform Act 5 of 2002 (the Act). Around the same time, the appellant also approached the Land Board seeking recognition and registration of customary land rights over the same piece of land. The dispute regarding the conflicting claims between the families was ultimately escalated to the first respondent – hereafter referred to as the Tribunal – for determination. The relevant events leading to the Tribunal's involvement, as well as its rulings delivered on 16 August 2014 and 3 June 2017, are outlined below.

[5] To address the land dispute between the appellant and the second respondent, the Land Board established a committee to investigate the parties' respective claims to the land in question.

[6] In its letter dated 12 July 2013, addressed to the second respondent, the Land Board reported that it had considered the committee's investigation report at its ordinary meeting of 12-13 June 2013. Based on the report's findings and recommendations, the Land Board resolved that: the families of the appellant and the second respondent should be advised to register their respective land rights in accordance with their claims to the land; they should coexist harmoniously without interfering with each other's land rights or properties; and that neither family should

register commonage, such as cattle grazing areas and rivers, as those areas served not only the parties involved but also other neighbouring communities in the area.

[7] The letter concluded by informing the second respondent of his right to appeal the Land Board's decision in terms of s 39 of the Act, if dissatisfied with the outcome. Aggrieved by the Land Board's decision, the second respondent exercised this right by noting an appeal to the Tribunal. The relief sought in the appeal was for the appellant to be evicted from the contested land for lack of right, and for the second respondent's customary law land right to be permitted and accepted for registration.

[8] After reviewing the Land Board's investigation report and decision, the Tribunal delivered its appeal ruling on 16 August 2014. It found that the second respondent had failed to submit the necessary copies of his application to the Land Board for the Tribunal's consideration. As a result, the Tribunal determined that it could not grant the relief sought in the appeal. The ruling concluded with the following orders:

'[21] The Tribunal makes the following order(s):

- (a) set aside the decision of the Masubiya Traditional Authority and the Zambezi Communal Land Board awarding or allocating the disputed land to the [appellant];
- (b) the [Land Board] must consider the application made by the [second respondent] and the [appellant] in accordance with the relevant and applicable provisions of the Act,

- (c) the [Land Board] must carry out a comprehensive investigation and conduct a hearing in accordance with section 28(6) and (9) or section 37 of the Act; and
- (d) the order set out in paragraphs (a), (b) and (c) above, shall be implemented within a period of thirty (30) working days calculated from the date of receipt of this order by the [Land Board].'

[9] The Minister, by letter dated 4 September 2014, informed the second respondent of the Tribunal's ruling, and further advised the second respondent to comply with the ruling which was made in terms of s 39(6) of the Act and regulation 25 of the Regulations made under the Act.

[10] Following the ruling delivered on 16 August 2014, the Land Board had hearings conducted by its investigation committee which were attended by the appellant and second respondent, as well as members of their respective families. Thereafter, the Land Board resolved – as it previously had done – that the families of the appellant and second respondent should live together on the disputed land and that their respective customary land rights should be registered separately. This decision was communicated to the second respondent by letter dated 31 March 2016.

[11] Dissatisfied with the Land Board's decision, the second respondent lodged an appeal against it on 11 April 2016 (the second appeal). However, the second respondent alleged that two months later, on 20 June 2016, he received a phone call from one Mr Milinga, an employee of the Ministry, who indicated that it had been unnecessary for the second respondent to lodge another appeal against the Land

Board's decision as the Appeal Tribunal was still seized with the initial appeal (dated 30 September 2013).

[12] The Land Board also communicated its findings to the Tribunal, which received an unsigned investigation report dated 28 January 2015 and a letter dated 8 July 2016 detailing how it complied with and implemented the orders of 16 August 2014.

[13] On the basis of the Land Board's findings, the Tribunal delivered a subsequent decision on 3 June 2017. This second decision, titled 'FINAL JUDGMENT', references the earlier decision of 16 August 2014 as the 'INTERIM JUDGMENT OF TRIBUNAL'. In this subsequent judgment the Tribunal ordered that the land at Nansefu be registered by way of customary land right in the name of the second respondent. Dissatisfied with the Tribunal's ruling of 3 June 2017, the appellant approached the High Court seeking an order reviewing and setting aside the said ruling.

Statutory provisions

[14] Before considering the decision of the High Court in the review application, I consider it apt to set out the statutory provisions of relevance to this appeal.

[15] Section 39 of the Communal Land Reform Act 5 of 2002 outlines the provisions governing the establishment, composition, and functions of an appeal tribunal, as well as the procedures and powers related to appeals against decisions made by a Chief, a Traditional Authority, or any board under the Act. It reads in

relevant parts as follows:

‘39. (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.

(2) an appeal tribunal consists of such person or number of persons as the Minister may appoint, who must be a person or persons with adequate skills and expertise to determine the appeal concerned.

(3) If two or more persons are appointed under subsection (2) the Minister must designate one of them to act as chairperson of the appeal tribunal.

(4) All the members of an appeal tribunal constitute a quorum for a meeting of that tribunal.

(5) If the tribunal consists of more than one member -

(a) the decision of the majority of the members thereof shall be the decision of the appeal tribunal; and

(b) the chairperson of the appeal tribunal has a casting vote in addition to a deliberative vote in the case of an equality of votes.

(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.

...’

[16] Regulation 25 of the regulations¹ made under the Act sets out the appeal procedure to an appeal tribunal under the Act, and reads as follows:

- '25. (1) Any person who wishes to appeal against a decision of a Chief, a Traditional Authority or a board, as the case may be, must lodge the appeal with the Permanent Secretary within 30 days after the decision has been made known or otherwise brought to his or her notice.
- (2) The Permanent Secretary must as soon as is practicable -
- (a) after he or she has received an appeal in terms of subregulation (1), notify the Minister thereof for the purposes of the appointment of an appeal tribunal by the Minister as contemplated in section 39(1) of the Act;
 - (b) after the Minister has appointed an appeal tribunal, submit the appeal to the appeal tribunal.
- (3) An appeal referred to in subregulation (1) must be in writing and must set out-
- (a) particulars of the decision appealed against;
 - (b) the grounds for the appeal; and
 - (c) any representations the appellant wishes to be taken into account in the hearing of the appeal.
- (4) The fee set out in Annexure 2 in respect of an appeal must accompany the appeal.

¹ Regulations in terms of the Communal Land Reform Act 5 of 2000 (GN 100 in GG 5760 of 15 June 2015).

(5) An appeal tribunal must hear an appeal within 30 days after the date from which it has received the appeal.

(6) Any decision of an appeal tribunal in terms of section 39(6) of the Act is conclusive and binding on the parties.'

[17] I now turn to consider the decision of the High Court in the review application launched by the appellant.

Judgment of the court a quo

[18] For convenience, the Tribunal's decision of 16 August 2014 will hereinafter be referred to as the 'first ruling' and its decision of 3 June 2017 will be referred to as the 'second ruling'.

[19] The court a quo summarised the appellant's grounds of review in three main categories, namely: (a) the second ruling was *ultra vires* the provisions of s 39(1), (3) and (6) of the Act; (b) the failure by the Tribunal to accord the applicant a right to be heard before taking the impugned decision; and (3) the Tribunal's misapplication of the law to the facts.

[20] As will become apparent in this judgment, the first ground of review (which is also the first ground of appeal) alone is dispositive of the appeal.

[21] It was contended on behalf of the appellant (applicant a quo) that once the Tribunal had exercised its discretion by setting aside the decision that was the subject of the appeal to it, it became *functus officio*, and that the Tribunal's first ruling was final, not interim. It was further contended that when the Tribunal delivered its so-called 'final judgment' on 3 June 2017, it was not properly constituted and appointed under s 39(2) and (3). As such, it was asserted that the Tribunal acted outside the provisions of s 39, or alternatively, without statutory authority, rendering its decision a nullity and invalid in law.

[22] For the second respondent it was argued that the Tribunal's first ruling was interim in nature, with the final decision delivered on 3 June 2017. It was further argued that s 39 empowered the Tribunal to make any order it deemed fit. Consequently, it was submitted that both the 'interim' and 'final' orders were within the Tribunal's authority under s 39.

[23] The Government respondents aligned with the second respondent's stance, arguing that the Tribunal's ruling of 16 August 2014 was interim, as it did not resolve the matter conclusively.

[24] Returning to the consideration of the High Court's judgment, the court concluded that the Tribunal's first ruling was not final but interim in nature. It noted that the Tribunal had labelled its ruling as an 'interim judgment', and the accompanying orders were directed not to the parties involved but to the Land Board.

The Tribunal had ordered the Land Board to conduct statutory investigations and hearings under ss 28(6), 28(9), and 37 of the Act, which had not been complied with before the matter was brought before the Tribunal. The court found that the Tribunal's ruling regulated the further conduct of the appeal rather than resolving the dispute or granting any substantive relief sought by the appellant.

[25] The court found that the Tribunal's powers under s 39 of the Act were broad enough to issue the interim order and that the Tribunal's actions were not *ultra vires*. It stated that the interim ruling did not dispose of the substantive relief sought but instead set aside the Land Board's decision without allocating the disputed land to any party. The reason for this was the necessity of awaiting the Land Board's investigation report. After receiving the report, the Tribunal subsequently made a final determination regarding the allocation of the disputed land, reinforcing the interim nature of the first ruling.

[26] Ultimately, the High Court ordered the dismissal of the review application with costs, concluding that 'the decision by the Tribunal of 3 June 2017 was not *ultra vires* the provisions of s 39 read with regulation 25' and further that 'the Tribunal did not become *functus officio* after it had delivered its interim ruling on 16 August 2014'.

Appeal

[27] The appellant relied on four grounds of appeal, namely that the High Court misdirected itself, alternatively erred in law and/or in fact by:

- (a) finding that the Tribunal's first ruling was interim in nature or interlocutory;
- (b) finding that in the absence of regulation 25 imposing an obligation on the Tribunal to invite the appellant to present his case, there was no obligation on the Tribunal to do so, and that in the absence of a constitutional challenge against the provisions of regulation 25 no case was made out by the appellant;
- (c) dismissing the appellant's application notwithstanding the fact that the Tribunal had not set aside the decision of the third respondent delivered on 31 March 2016;
- (d) ordering the appellant to pay costs of the review application when the appellant was a legally aided litigant and contrary to the provisions of s 18(1) of the Legal Aid Act 29 of 1990, which precludes a cost order award against a legally aided person.

[28] As noted earlier in this judgment, only the first ground of appeal will be addressed, as its resolution is decisive for the outcome of the appeal. Accordingly, only the submissions of the parties concerning this ground will be dealt with below.

Submissions made on behalf of the appellant

[29] The appellant's legal practitioner contended that by considering the matter and delivering its second ruling, the Tribunal revived a matter it had already completed three years prior. This was irregular, it was submitted, because the first ruling was final and not interim. The orders made in the first ruling were final and dispositive in nature. With reference to regulation 25(6) of the Act, he argued that the first order was binding and conclusive.

[30] It was further contended that by granting the order in paragraph (a) of the first ruling, which set aside the Land Board's decision to allocate the disputed land to the appellant, the Tribunal had complied with s 39(6)(a) of the Act, rendering its decision final. Counsel emphasised that the first ruling did not direct the Land Board to report back to the Tribunal. While the first order of the Tribunal did not conclusively resolve the dispute between the parties, the appeal before the Tribunal was addressed. With the delivery of the first ruling, the Tribunal had discharged its duties in the matter.

[31] To reinforce the contention regarding the finality of the appeal after the first ruling, counsel argued that when the Land Board communicated its resolution on the matter following hearings conducted after the first ruling, it informed the parties of their right to appeal the decision under s 39 of the Act.

Submissions made on behalf of the Government respondents

[32] On behalf of the Government respondents, it was argued that the appeal rested on this Court's interpretation of s 39(6)(b) of the Act – specifically, the meaning of the provision stating that the Tribunal 'may make any order in connection [with the subject of the appeal] as it may deem fit'.

[33] Counsel conceded that the first ruling was not labelled 'interim ruling', but as the orders did not finally determine the dispute between the appellant and second respondent, it was interim in nature. The Tribunal required additional information to finally decide the appeal, hence the directive in paragraph (c) of the first ruling, instructing the Land Board to conduct an investigation and hold hearings. Counsel argued that the Tribunal was allowed to make such an interim order in terms of s 39(6)(b) of the Act.

Submissions by the second respondent

[34] The second respondent, who was unrepresented in the appeal argued in response to the appellant's first ground of appeal that the Tribunal's first ruling was lawful as the Tribunal had been properly constituted to hear the appeal. He further argued that in terms of s 39(6)(b) the Tribunal was empowered to make any order it deemed fit. Accordingly, in making the orders in its first ruling, the Tribunal had complied with this section.

[35] It was the second respondent's contention that regardless of whether this Court found that the first ruling was interim or final, the appellant did not have any prospects of success as he had not appealed the first ruling of the Tribunal, which set aside the decision to allocate the disputed land to the appellant. Thus, it was argued, the appellant had no *locus standi* to have launched the review application before the court a quo.

[36] In the event that this Court were to find that the Tribunal was *functus officio* when it made its second ruling, such a decision would not aid the appellant as the appellant had not appealed against the first ruling which it argued was a final decision. Thus, it was argued in conclusion that the appellant had no *locus standi* or land rights to contest before any court.

Disposal

[37] In a relatively recent judgment² of this Court, Damaseb DCJ dealt with the doctrine of *functus officio* within the context of administrative decisions. The learned Deputy-Chief Justice stated the following at paras 27-29 of that judgment:

[27] An administrative decision is deemed to be final and binding once it is made. Once made, such a decision cannot be re-opened or revoked by the decision maker unless authorised by law, expressly or by necessary implication. The animating principle for the rule is that both the decision maker and the subject know where they stand. At its core, therefore, are fairness and certainty.

[28] As Pretorius aptly observes:

² *Hashagen v Public Accounts' and Auditors' Board* 2021 (3) NR 711 (SC).

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person’s legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

[29] What that means then is that once an administrative body has exercised an administrative discretion in a specific way in a particular case, it loses further jurisdiction in the matter. It cannot go back on it or assume power again in respect of the same matter between the same parties.’ (Reference to other authorities omitted)

[38] Against this backdrop, it is necessary to consider the scope of the discretion granted to the Tribunal under section 39(6)(b). Section 39(6)(b) gives the Tribunal wider discretion to ‘make any order in connection therewith as it may think fit’. It is correct that the Tribunal had the power to refer the matter to the Land Board with directions as to the further conduct of the matter, but such referral does not convert the proceedings into interim or interlocutory proceedings. There is no provision for such a procedure, neither in the Act nor in the Regulations governing the Tribunal.

[39] A decision of the Tribunal is, in terms of s 39(6), conclusive and binding on the parties.³ The word 'conclusive' is defined as meaning, amongst others, 'final'.⁴ The appeal was not 'pending' before the Tribunal. The Tribunal rendered a written ruling, which was published to the parties. In terms of regulation 25(6)(b) such ruling was final. The Tribunal was therefore *functus officio*. The decision it rendered on 16 August 2014 was determinative of the rights of the parties and was final in effect.

[40] The final nature of the Tribunal's ruling of 16 August 2014 was reiterated in the Minister's letter dated 4 September 2014 where he stated the following:

'In light of the above decision, you are kindly advised to comply with the decision of the Appeal Tribunal and note that this decision was made in terms of Section 39(6) of the Communal Land Reform Act, 2022 and Regulation 25 of the said Act and is thus conclusive and binding on both parties thereof.'

[41] The fact that the Tribunal directed the matter to be investigated by the Land Board did not make such decision interim. There was no direction for the Land Board to report back its findings to the Tribunal. The parties to the dispute were informed of their right to appeal if dissatisfied with the Land Board's decision. The Land Board's decision does not suggest in its terms that it was subject to a confirmation by the Tribunal. There is no basis either in logic or law to refer the Land Board's decision to the Tribunal.

[42] The second respondent evidently understood the decision to be final because he exercised his right and appealed against the Land Board's decision. The second

³ Regulation 25(6).

⁴ *Miriam- Webster Dictionary of English* <https://www.merriam-webster.com/>.

appeal launched by the second respondent on 11 April 2016 is therefore still pending before the Tribunal and should obviously be dealt with. It follows that the appeal before this Court stands to be upheld.

Condonation

[43] The appellant and Government respondents brought respective condonation applications for non-compliances with the rules of this Court. The appellant, who is legally aided, sought condonation for his failure to timeously lodge the record of appeal in terms of the rules of this Court. Due to this non-compliance the appeal is deemed withdrawn, and thus, the appellant also seeks the reinstatement of the appeal.

[44] The judgment of the court a quo was delivered on 5 April 2022. In accordance with the three-month time limit prescribed in rule 8(2)(b) of the Rules, the record was to be filed by no later than 5 July 2022. However, the record was not filed until 17 August 2022, approximately a month and a half past the due date.

[45] To explain the delay in filing the record, the appellant detailed the reasons for the non-compliance in his affidavit accompanying the application as follows: The appeal was lodged on 27 April 2022. On 13 June 2022, a transcription company was instructed by the appellant's legal practitioner to attend to the transcription and preparation of the record. On the same date, the appellant's legal practitioner was

required to pay a deposit of N\$1000 per the transcription company's quotation addressed to the appellant's practitioners of record, which deposit was duly paid.

[46] On 4 July 2022 – one day prior to the deadline for lodging the appeal record – the appellant's legal practitioner received an email from the transcription company to which an invoice was attached for its services. As with the quotation, the invoice too was addressed to the appellant's legal practitioners. The appellant avers that the email from the transcribers did not indicate that the invoiced amount had to be settled before the record could be collected. His legal practitioner only became aware of this requirement when attempting to collect the record. According to the appellant, this requirement deviated from the usual practice which allowed legally aided litigants, such as the appellant, to obtain the record without payment, with the transcription company invoicing the Directorate of Legal Aid (Legal Aid) directly.

[47] Due to the short notice, the appellant was unable to immediately secure the funds to settle the invoice and sought assistance from relatives to raise the necessary amount. In the meantime, his legal practitioner on 13 July 2022 addressed a letter to Legal Aid informing of the appellant's dilemma and requesting payment of the amount due for the transcription.

[48] While awaiting feedback from Legal Aid, the appellant's legal practitioner received a letter from the registrar of this Court dated 19 July 2022 (and delivered on

the same date) informing him that due to the appellant's failure to comply with the Rules of Court, the appeal was deemed to have been withdrawn.

[49] The appellant managed to raise the funds to settle the invoice by 8 August 2022 and on 9 August 2022 his legal practitioner collected the transcribed record. His legal practitioner then attended to drafting the condonation application which he settled on 12 August 2022. The application was sent to the appellant for signature on 14 August 2022, whereafter it was filed together with the appeal record on 17 August 2022.

[50] The Government respondents also brought an application for condonation for the late filing of their heads of argument.

[51] The Government respondents seek condonation for their failure to file their heads of argument with the registrar of this Court despite having served them on the other parties to the appeal on 16 May 2024. The respondents' non-compliance with rule 17(3) was blamed on the messenger, who allegedly failed to serve the heads of argument with the registrar. The Government respondents' legal practitioner of record only became aware of the non-compliance upon receipt of a letter from the registrar dated 11 June 2024, which stated that although the bundle of authorities referenced in the heads of argument had been filed, the heads of argument had not. The messenger did not depose to a confirmatory affidavit as he had allegedly taken leave of absence and was not reachable on his mobile phone.

[52] It is burdensome for this Court to continuously have to deal with applications for condonation for avoidable delays and non-compliances, which rob it of valuable time and resources that could be better spent addressing the substantive issues raised in appeals.

[53] The principles governing condonation applications are trite and will not be repeated here, save to state that the first leg of the two-pronged test is whether the explanation rendered for the non-compliance is reasonable and acceptable; and the second leg is whether the party seeking condonation has demonstrated good prospects of success on the merits.

[54] In the appellant's case, it appears that he has not acknowledged responsibility for the delay in filing the record. Instead, blame for the delay is placed squarely at the door of the transcribers for the 'unannounced change of established practice by [the transcription company] from invoicing Legal Aid directly to invoicing the litigant's legal representatives, and [requiring] full payment before collection'. However, if regard is had to the service requisition sheet completed on behalf of the appellant, it was clearly indicated that the appellant's legal practitioners were to be invoiced for the transcription. Nowhere on the form is it indicated that the appellant was legally aided or that Legal Aid should be invoiced. The appellant also does not allege that the transcribers were informed that Legal Aid should be invoiced. Thus, one must ask how the appellant and his legal practitioner expected the transcription company to

know to invoice Legal Aid. Rightly so, both the quotation and the invoice were addressed to the appellant's legal practitioners, as per the service requisition sheet.

[55] If, as the appellant states, there had indeed been a change in the customary practice regarding legally aided litigants and the transcription company failed to inform the appellant's legal practitioner of this change resulting in the appellant's delay in obtaining the record, one would expect there to be a confirmatory affidavit on behalf of the transcription company supporting this averment. There is none.

[56] The appellant states that had his legal practitioner been made aware sooner or on the day the request for the transcription was made, and not the day before it was due for filing, then payment for the record would have been timeously attended to. The appellant does not state whether earlier inquiries were made with the transcribers as to the status of the record. This would be expected of a diligent legal practitioner, to allow for time to properly peruse the record and ensure that it is correct and complete before filing. To wait until the day before the record is due for filing exhibits a lack of diligence and foresight, risking procedural complications and potentially prejudicing the appellant's case.

[57] Our law requires that a party seeking condonation for non-compliance must bring such application as soon as he or she becomes aware of the infraction. To the first, third and fourth respondents' credit, condonation was sought a day after the non-compliance was brought to their attention. The appellant, on the other hand, must

have certainly been aware that he would not be in a position to comply with rule 8(2) (b) by 5 July 2022, when on 4 July 2022 his legal practitioner was informed by the transcription company that the record could not be released until payment was made. The appellant was then reminded of his non-compliance by the registrar's letter on 19 July 2022. And yet the appellant took a month and a half to file his application. Not a shred of explanation is tendered for this delay in bringing the condonation application.

[58] In the appellant's heads of argument it is submitted that the appellant's legal practitioners 'did not sit idly' but that they 'took rigorous and all reasonable steps to ensure the release of the record immediately, after [the transcription company] demanded payment before release of the record. They physically attended to [the transcription company] to ensure that the record is available'. The 'rigorous and reasonable steps' taken are not set out in the affidavit, save for stating that the legal practitioners physically attended to ensure that the record is available, a step which in any event was expected of them.

[59] I find that the Government respondents' explanation for their delay in filing their heads of argument is reasonable and acceptable. The explanation proffered by the appellant, on the other hand, leaves much to be desired. However, the good prospects of success which have been shown to exist may save the appeal.

[60] It is trite that there is interplay between the obligation to provide an acceptable explanation for the non-compliance and reasonable prospects of success. Good

prospects of success on appeal may result in a condonation and reinstatement application being granted, even if the explanation for the non-compliance is weak or not entirely satisfactory. Despite the poor explanation for his non-compliance, for all the reasons stated, the appeal has strong prospects of success. As such, it is to be reinstated and upheld.

Costs

[61] During the hearing of this appeal appellant's counsel prayed for costs in the High Court should the appeal succeed, but submitted that the appellant, who is legally aided, would not seek costs in this Court.

Order

[62] For the reasons stated above, the following order is made:

- (a) The appellant's condonation application is granted and the appeal is reinstated.
- (b) The first, third and fourth respondents' condonation application is granted.
- (c) The appeal succeeds and the judgment and order of the High Court are set aside and the following order is substituted therefor:

- '(i) The application for review succeeds.
 - (ii) No order as to costs is made.
 - (iii) The matter is remitted to an appeal tribunal appointed in terms of s 39 of the Communal Land Reform Act 5 of 2002 to consider and decide the appeal noted by the second respondent on 11 April 2016.'
- (d) No order as to costs in this Court is made.

SHIVUTE CJ

HOFF JA

FRANK AJA

APPEARANCES

APPELLANT:

P S Muluti

Of Muluti & Partners

FIRST, THIRD AND FOURTH

RESPONDENTS:

J Ncube

Of the Office of the Government Attorney

SECOND RESPONDENT:

H Muhongo