



KESSL

A NEW JURISPRUDENCE FOR LAND REFORM IN NAMIBIA?

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of the
Legal Assistance Centre
and
Namibian Economic Policy Research Unit
APRIL 2008





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Printed by John Meinert Printing (Pty) Ltd, Windhoek.

ISBN 978-99945-61-27-8

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Acknowledgements

The Legal Assistance Centre (LAC) thanks the **Evangelischer Entwicklungsdienst (EED)** and **Humanistisch Instituut voor Ontwikkelingssamenwerking (HIVOS)** for their financial support for the Land, Environment and Development (LEAD) Project over the years.

The authors of this report, Sidney L. Haring, Professor of Law at the City University of the New York School of Law, and Willem Odendaal, Coordinator of the LEAD Project at the LAC in Windhoek, thank the following institutions and individuals for their contributions:

- The **Royal Embassy of Norway** in Harare, Zimbabwe, which funded this publication through financial support to the Community Technology Development Trust (CTDT) in Zimbabwe and the Namibian Economic Policy Research Unit (NEPRU) in Windhoek.
- **Dr Charity Manyeruke**, Regional Coordinator of the Land and Agrarian Reform Programme of the CTDT, and **Klaus Schade**, Acting Director of NEPRU, for helping to make funding available for this publication.
- **Perri Caplan**, for assisting with the editing and layout of this publication.
- The **City University of the New York School of Law**.
- The **Raoul Wallenberg Institute of Human Rights and Humanitarian Law**, Lund University, Sweden.

Acronyms

AALS	Affirmative Action Loan Scheme
ACLRA	Agricultural (Commercial) Land Reform Act
CBNRM	Community Based Natural Resource Management (Programme)
CFNEN	Community Forestry in North-Eastern Namibia
DED	Deutscher Entwicklungsdienst (German Development Service)
LAC	Legal Assistance Centre
LEAD	Land, Environment and Development Project
NAU	Namibia Agricultural Union
NEPRU	Namibian Economic Policy Research Unit
SWAPO	South West Africa People's Organisation
WIMSA	Working Group of Indigenous Minorities in Southern Africa
WWF	World Wildlife Fund

1. Introduction

At present, following the failure of the “willing buyer, willing seller” experiment, Namibia’s ambitious land reform programme is politically and legally anchored in a promise of widespread land expropriation to end the apartheid-era creation of two systems of land tenure: one, communal lands for blacks, and the other, large commercial farms almost exclusively for whites.¹ This policy escaped any form of judicial review from its inception in the first decade of Namibia’s Independence, celebrated in 1990, until the handing down of the judgements in the case of Gunther Kessl and the Ministry of Lands and Resettlement, and two essentially identical companion cases, in the High Court of Namibia on 6 March 2008.² The Court treats the three cases as analytically identical, referring to them throughout as “*Kessl*”, and we have followed suit in this report.

Kessl addresses many aspects of the Ministry’s land reform programme, and repeatedly upholds the legality of the principle of land expropriation, grounded in Article 16(2) of the Constitution of the Republic of Namibia, but it finds that the Ministry’s administration of the expropriation process has violated Namibian law on several grounds. While the final pages of the judgement set out very explicit requirements that the Ministry must fulfil to legalise the process, the judgement also raises difficulties with the ongoing land reform programme that will not be easy to remedy. The Court, uncharacteristic of Namibian courts, explicitly criticises the Ministry for mismanaging the expropriation process and thereby leaving the land reform programme in a state of disarray. After nearly 20 years of independence, with the former Minister of Lands and Resettlement and current President of Namibia, Hifikepunye Pohamba, directly involved in this debacle, this judgement undermines the Government’s credibility in terms of its ability to plan and manage its own land reform programme.

At the same time, the detailed and well-reasoned judgement represents a victory for the rule of law in Namibia, in that it establishes the power and maturity of the Judiciary in legally structuring a complex land reform process with full respect for the constitutional rights of all Namibian citizens. This was a “test case” in every sense of the term, acknowledged as such by the Court in the first sentence of its opinion (para 1), and argued as such by both parties. This opinion charts the way to a new Namibian jurisprudence that can break the deadlock on land reform, moving the process forward with full commitment to the rule of law. The opinion is highly significant for the future of land reform in Namibia and Southern Africa generally.

The full text of the opinion is appended to this report.³

This report first sets the context of land reform in Namibia, then analyses the significance of the *Kessl* judgement, then presents an argument as to how this case sets the path towards a new jurisprudence of land reform in Namibia.

¹ There is a voluminous body of literature on land reform in Namibia. SL Haring and W Odendaal, “*One Day We Will All Be Equal*”: A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process, LAC, 2002, cites much of this literature.

² Gunter Kessl and Ministry of Lands and Resettlement, case numbers (P) A 27/2006 and 266/2006; Heimaterde CC and Ministry of Lands and Resettlement, case number (P) A 269/2005; and Martin Joseph Riedmaier and Ministry of Lands and Resettlement, case number (P) A 267/2005.

³ The opinion is as yet unreported, thus in this article we do not refer to page numbers in a published document, but only to paragraphs as numbered in an official copy provided to us by the Clerk of the High Court via the internet, reprinted verbatim and in full herein as an appendix. (We have changed the font and line spacing to accord with the layout of this report and to reduce the number of pages from the original 83.)

2. The Legal Process of Land Reform in Namibia

Land reform was a well-defined goal of the ruling party, SWAPO, in its long struggle for liberation from colonial apartheid rule, and has been a major promise of the Government of Namibia since Independence in 1990.⁴ At Independence, about 4 000 white farmers owned about 6 000 farms which constituted just under half of the country's arable land.⁵ An apartheid-era land law had blocked black access to these commercial farms, setting out a different landholding law for blacks living in communal areas under communal landholding regimes – a form of government-structured customary law.⁶ The Namibian Constitution of 1990, in Article 16(1), recognises the right to property, but also, in 16(2), expressly permits the expropriation of land as a remedy for this apartheid-era racism and discrimination in the land law.⁷ A Land Reform Conference in 1991, by convening dozens of Namibian organisations, brought a broad-ranging input of popular will into the process.⁸

Based on that consultation, the Agricultural (Commercial) Land Reform Act (ACLRA) of 1995 set out a statutory land reform process.⁹ For the first 17 years (1990-2007), the Government, through what was then the Ministry of Lands, Resettlement and Rehabilitation (hereafter “the Ministry”),¹⁰ acquired 209 farms for land reform, abiding by the principle of “willing buyer, willing seller”.¹¹ Since the process was engaged in through free market forces, there were no legal challenges to this system of land reform, even though, in retrospect in view of *Kessl*, there were apparently violations of Article 18 of the Constitution which requires a fair and equitable administrative process in the acquisition and redistribution of these farms. Such a challenge would have to have been brought by the beneficiaries of the land reform process, and they are impoverished people who lack access to the legal system.¹² The other potential challengers,

⁴ D Pankhurst, “A Resolvable Conflict: The Politics of Land in Namibia”, *Peace Research Report No. 36*, Department of Peace Studies, University of Bradford, UK, 1996.

⁵ There is a substantial body of literature on the agricultural order in Namibia at Independence. For the basic data on these farms, see B Fuller and G Eiseb, “The Commercial Farm Market in Namibia: Evidence from the First Eleven Years”, *Briefing Paper No. 15*, Institute for Public Policy Research, Windhoek, 2002. A history of this agricultural development is presented in B Lau and P Reiner, *100 Years of Agricultural Development in Colonial Namibia*, Gamsberg Macmillan, 1993.

⁶ SL Haring, “The Constitution of Namibia and the Land Question: The inconsistency of Schedule 5 and Article 100 as applied to communal lands with the ‘Rights and Freedoms’ guaranteed communal land holders”, 12 SAJHR 467 (1996).

⁷ These two clauses are fundamentally contradictory, but this structure reflects the political compromise that gave rise to Independence. The South African Constitution contains a similar structure – see AJ van der Walt, *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996*, Juta & Co, 1997.

⁸ SL Haring and W Odendaal, 2002, op cit fn 1, pp 31-32; and Ministry of Lands, Resettlement and Rehabilitation, “National Conference on Land Reform and the Land Question: Conference Brief”, 1991.

⁹ SL Haring and W Odendaal, “No Resettlement Available”: *An Assessment of the Expropriation Principle and its Impact on Land Reform in Namibia*, LAC, 2007, pp 9-14. The ACLRA, amended numerous times (Amendment Acts 16 of 2000, 2 of 2001, 13 of 2002, 14 of 2003 and 19 of 2003), is the statutory basis for land expropriation.

¹⁰ The present Ministry of Lands and Resettlement is the same ministry; “Rehabilitation” was dropped a few years ago.

¹¹ SL Haring and W Odendaal, 2007, op cit fn 9, pp 13-14. Fuller and Eiseb (2002, op cit fn 5: 9) detail 88 government farm purchases between 1990 and 2000 – an 11-year period. The pace has obviously increased in the present decade, not least in response to political pressure.

¹² S Haring and W Odendaal, 2007, op cit fn 9, p 13. It is difficult to obtain accurate data on the acquisition of farms, but this figure, provided by the Ministry of Lands and Resettlement, is broadly consistent with the figures in a Namibia Agricultural Union (NAU) report, *Framework for Sustainable Land Use and Land Reform in Namibia*, 2003, p 82, stating that 118 farms were acquired by the Ministry in the period 1990 to August 2002 at a total cost of N\$105 127 469, thus N\$633 297 per farm.

being the 209 farmers who sold their farms to the Government through the Ministry at market prices, did so willingly and had no reason to challenge the process. During this period, 600 additional commercial farms were purchased by blacks through the Affirmative Action Loan Scheme (AALS).¹³ While this scheme forms part of the land reform programme, it is politically and economically distinct from the plan to purchase or expropriate such farms for resettlement for poverty alleviation purposes.

But the Government's announcement in 2004, through then Prime Minister Theo-Ben Gurirab, that land expropriation would begin, recognised the failure of the "willing buyer, willing seller" process: it simply did not acquire enough farm land, fast enough, to ensure a politically sustainable land reform process.¹⁴ At the rate of 209 farms in 17 years, resettling only about 9 000 poor people,¹⁵ it would take almost 100 years to acquire only a quarter of the white-owned farms, leaving the Namibian poor and landless, most of whom support the SWAPO Government, politically and economically marginalised. The AALS farmers can be expected to acquire some proportion of these farms, but this will not alleviate poverty since those who can afford to buy these farms are obviously not poor. Also, with the spectre of Zimbabwe looming over land reform in Southern Africa (an issue raised in *Kessl*, para 10), the failure of land reform represents a potential problem of political instability that goes to the core of the SWAPO majority and strong support among the poor.¹⁶

Moreover, there were other problems. The "willing buyer, willing seller" process did not allow for any parallel and systematic rural land reform and land use planning. Farms could not be acquired according to any plan, so there could be no reorganisation of the agrarian order to bring about the necessary transformation of an agricultural economy that depends on a single product (cattle) which is both destructive of the land if improperly managed, and a risky strategy in a highly competitive world market.¹⁷ Most of Namibia's remaining white farmers had built their operations under apartheid with favourable government subsidies, and it has become clear that black farmers would not be able to sustain profitable farming operations without similar levels of support under either the resettlement programme or the AALS.¹⁸ Finally, there is evidence that most of the farms offered for sale to the Government are marginal ones, and the best farms were kept off the market, often by way of complex legal manoeuvres. In fact the Government refused to buy most farms offered as they were unsuitable for farming operations – a reflection of the wasteful nature of the farming system established under the South African Administration.¹⁹ Vast tracts of farmland in parts of Namibia's

¹³ SL Haring and W Odendaal, 2007, op cit fn 9, pp 20-22. The basic Affirmative Action Loan Scheme is complex, but essentially it involves providing government subsidies to black farmers for purchasing commercial farms in the open market. There is considerable evidence that this scheme is not working, and that it is drawing financial resources from the resettlement programme as the Government spends considerable sums on subsidising the loans. A comparison of the numbers of farms acquired, however, reveals that far more have been acquired through this scheme than through the resettlement programme. But, at the same time, these farms have not been paid for and many can be expected to revert to the Agricultural Bank on foreclosure actions.

¹⁴ "Statement by the Right Honourable Theo-Ben Gurirab, Prime Minister of the Republic of Namibia, on the Acceleration of Land Reform in the Republic of Namibia", 25 February 2004, accessed on 2 April 2008 at http://www.sarpn.org.za/documents/d0000745/P826-Namibia_land_reform_Gurirab.pdf.

¹⁵ SL Haring and W Odendaal, 2007, op cit fn 9, p 17.

¹⁶ H Melber, "From Controlled Change to Changed Control: The Case of Namibia", in H Melber, *Limits to Liberation in Southern Africa: The Unfinished Business of Democratic Consolidation*, HSRC Press, 2003, pp 134-155; and H Melber, "Limits to Liberation: An Introduction to Namibia's Postcolonial Political Culture", in H Melber, *Re-examining Liberation in Namibia: Political Culture Since Independence*, Nordiska Afrikainstitutet, 2003, pp 9-24.

¹⁷ NAU, 2003, op cit fn 12, chapters 5 and 6. The NAU's analysis of Namibian agricultural productivity is rooted in the same cattle-based agricultural economy that has both limited, and arguably ruined, Namibian agricultural development. Land reform requires a new agricultural order in Namibia, as in much of the rest of Africa (Kjell Havnevik et al, *African Agriculture and the World Bank: Development or Impoverishment?*, Nordiska Afrikainstitutet, 2007.

¹⁸ S Haring and W Odendaal, 2007, op cit fn 9, pp 12-14.

¹⁹ B Fuller and G Eiseb, 2002, op cit fn 5. This underscores the fact that most farms in Namibia are only marginally suited to agriculture, a devastating critique of colonial and apartheid-era agricultural practices, but also an indication of the serious problems that Namibia's land reform programme faces. Some part of the land reform

environmentally sensitive areas have become barren as a result of ineffective and poorly supervised livestock management and land use policies.

A well-administered land expropriation process, on the other hand, would advance the land reform programme by enabling the acquisition of much more land, much faster, in the prime agricultural areas of the north, i.e. those bordering the overgrazed communal lands of the former Ovamboland, Damaraland, Kaokoland, Kavangoland and Hereroland (still the major centres of black agriculture in the country), giving the new farmers access to major population centres and markets. Another way to improve government support for new black farmers is to acquire blocks of land and concentrate support resources among groups of farms.²⁰ The commercial farm unit size in the north averages at 5 000 to 8 000 hectares, which is not a size well suited to redistribution. A concentration of support resources to groups of farms would provide for more efficiency in breaking up these farms and reorganising the country's agricultural base, which is a necessary element of any land reform process centred on poverty alleviation.²¹

The first legal expropriations, in 2005, were uncontested, which allowed the Ministry to pursue administrative processes which, again in retrospect, were clearly illegal and set the stage for the *Kessl* case. The farm Ongombo West was expropriated in the middle of a dispute with its workers that ultimately provoked the rage of former Namibian President Sam Nujoma who pronounced the following at a May Day rally: "Some whites are behaving as if they came from Holland or Germany. Steps will be taken and we can drive them out of the land. We have the capacity to do so."²² The white owners of Ongombo West purportedly mistreated their workers, degraded their land, shot off their game animals, and behaved in a racist and colonial manner reminiscent of apartheid. The owners asked N\$9 million for the farm, and the amount offered was N\$3,7 million. The owners did not challenge the expropriation order in court, perhaps for obvious reasons given their behaviour, but perhaps they also did not challenge it due to feeling intimidated by the Ministry and Nujoma.²³

In terms of legal process, it is not clear what procedures were followed in this expropriation, but it is clear that Ongombo West was not selected for expropriation through any rational process other than simple retaliation for poor treatment of workers. More importantly, no use has been made of this farm for resettlement purposes, so this expropriation was not driven by any plan to resettle poor people there.²⁴

This is not true of the second and third expropriations, of the farms Okorusu and Marburg, neighbouring farms expropriated together in order to resettle a group of five previously resettled

process must start with environmental restoration, another expensive process that will eventually result in the availability of additional lands for the resettlement of poor people, but only in the future. This is a difficult political problem in a country with thousands of poor people and limited economic resources.

²⁰ Namibia is a large country with a small population. Because farms are so large and spread out across vast areas, with long distances between them, simple issues of logistics, information and transportation present significant problems for resettled new farmers (S Haring and W Odendaal, 2002, op cit fn 1: 106-107).

²¹ There is a clear contradiction between the existing structure of commercial farming in Namibia and the resettlement of poor people. Due to Namibia's arid conditions, large farm units have been the norm, allowing for some efficiency of scale. While this may work well for commercial farms, such large units must be divided into smaller units before they are redistributed. Little planning has occurred regarding the structure of these new smaller-scale farms.

²² Christof Maletsky, "Ongombo West: Out for a Duck!", *The Namibian*, 16 November 2005, p 1.

²³ Christiaan Schmidt, "Ein Baurenopfer?", *Neue Zürcher Zeitung*, 4/5 February 2006. It might also be that the farmer groups generally believed that this was a poor subject for a test case, given the conduct of the owners, and that better farms for test cases were certain to come along soon. This would have meant that the owners of Ongombo West would have had to have financed their lawsuit themselves, a prohibitive cost.

²⁴ *Ibid*, p 4. We visited the farm to see what use was being made of it. Seven of the former workers are apparently living there along with two government employees who have been "resettled" there but commute to jobs in Windhoek. While no systematic study has been made of the disposition of the more than 200 farms acquired for resettlement, it is clear that a large number of such farms have not been used for resettlement purposes. The houses are often in the possession of government employees, apparently having no legal right of occupancy. Clearly, some accounting of these farms is in order.

farmers displaced from Cleveland, a farm acquired some years before under the “willing buyer, willing seller” scheme, now being re-sold by the Government to the owners of a private cement factory.²⁵ The Okorusu/Marburg expropriation seems to have been haphazard in its conception, given that the owners had offered the farms to the Government under the “willing buyer, willing seller” scheme, only to have been ignored, which forced them to sue the Government for a waiver so that they could sell on the open market. After this lawsuit was decided in the owners’ favour, the Ministry served them a notice of expropriation. This was completely unnecessary in view of their willingness to sell, and no explanation for this seemingly arbitrary or even incompetent action has been given. Since the owners wanted to sell anyway, the only issue remaining was compensation. The Government’s initial offer of N\$3,675 million in total for the two farms was rejected and the price was challenged in court. However, the Ministry settled the matter with an offer of N\$8 million, which was accepted, ending the litigation, again with no legal challenge to the administrative process which, in light of *Kessl*, was unlawful.²⁶

Following *Kessl*, this expropriation was illegal, at least on the basis that no consultation occurred in the Land Reform Advisory Commission regarding the farm workers and their families, about 40 people in total, living on the two farms. They contested their threatened dispossession from their homes of up to three generations (para 80). The dispossession of farm workers by the land reform process, through either expropriation or the “willing buyer, willing seller” process, had become a political issue in Namibia, raised by the Farm Workers Union.²⁷ While the professed goal of land reform was poverty alleviation, the provision of land to up to 240 000 people,²⁸ among the poorest of the Namibian population, about 30 000 black farm workers lived with their families on the white-owned farms, amounting to as many as 200 000 people. These are among the lowest-paid workers in Namibia and there is little possibility of their finding other employment in an economy with an unemployment rate of up to 40% and with white farmers employing fewer and fewer workers.²⁹

Okorusu and Marburg were expropriated in order to resettle five families of unknown size, but simple math reveals that the process was literally a waste of time and money in terms of resettling poor people: about 40 poor people were displaced to make room for about 40 other poor people, at a cost of N\$8 million,³⁰ which strongly suggests a failure of public policy relating to poverty alleviation and is also arguably in violation of natural justice in that the Ministry of

²⁵ Ibid, p 6.

²⁶ Ibid, pp 4-9.

²⁷ Ibid, pp 5-8.

²⁸ The exact number of poor Namibians to be the beneficiaries of land reform is not clear, and different figures are given, reflecting the lack of any clear plan. In the *Kessl* opinion (para 20), the Ministry is said to have provided the figure 240 000 to its Land Reform Advisory Board in their “consultation” with the Minister. (This consultation is at issue in the case and the High Court found that it was not a legal one in terms of the Act of 1995.) We have used this figure throughout this article. Estimates are that about 40% of Namibia’s population is outside the labour force, thus about 800 000 people (Jan Kees van Donge, “Land Reform in Namibia: Issues of Equity and Poverty,” Institute of Social Studies, The Hague, Netherlands, 2005). Most of these, however, live on communal lands, often in extended family groupings, and may not actually be willing to be resettled in spite of their poverty. Most of these, however, live on communal lands, often in extended family groupings, and may not actually be willing to be resettled in spite of their poverty.

Simple math reveals that there are not enough farms in the country to meet this demand – if 6 000 farms divided among 240 000 people equals 40 persons per farm. While this figure might be reasonable in the more productive agricultural areas of the north, it is an impossible figure for the south, or at least in half of the country.

²⁹ SL Harring and W Odendaal, 2007, op cit fn 9, pp 27-28; and C Karamata, *Farm Workers in Namibia: Living and Working Conditions*, Labour Research and Resource Institute, Windhoek, 2006.

³⁰ The *Kessl* opinion reports that the Land Reform Advisory Commission, in considering these three expropriations, was told that it had an annual budget of N\$50 million. At N\$8 million per farm, this would pay for only six farms. For any reasonable programme of land reform, this rate serves too few people and the pace is too slow. There is clearly an argument that the mismanagement of the Ministry drove up land prices, but in fairness, the “willing buyer, willing seller” process also may have done so. Still, the Government buys only about one-sixth of the farms sold in Namibia. Fuller and Eiseb’s data (2002, op cit fn 5) reveals an average farm price of N\$500 000, rising in the range of this figure from 1990 to 2000. But the Ministry was only buying “farms suitable for resettlement”, which means that it should not have been buying farms with the least agricultural potential.

Lands and Resettlement is creating as much poverty as it eliminates by displacing poor farm workers by resettling other landless poor people.

No statutory rights exist for these farm workers after displacement, and no provision was made for them in the land reform process. Their only right is to apply to be placed on the same imaginary list of applicants for resettlement on which up to 240 000 other people are already listed. Moreover, one of the five selected was a well-paid government official who had been a police administrator and at the time was the Deputy Dean of the Law Faculty at the University of Namibia. This official never occupied his farm but rented it out, visiting about once a month from his substantial home in Windhoek, a four-hour drive away.³¹ Obviously, providing this person with a free farm while displacing existing farm workers did not help to resettle any poor people, but it did achieve the opposite result in that it created poor people so that this official could have a farm at a substantial cost to the Government.³²

But, and here the rationality becomes more perverse and circular, there never has been any actual “list” of the 240 000 landless and poor in Namibia who need to be resettled, as there is neither transparency nor clear administrative rationality in the land reform process. As each resettlement scheme is opened, advertisements are placed in official newspapers, or posted in the Ministry’s various offices. In response to these open advertisements, people apply to the local offices for resettlement. Provisional beneficiaries are selected at regional level and their names are forwarded to the Ministry’s head office in Windhoek for final approval.³³ So, the

³¹ SL Haring and W Odendaal, 2007, op cit fn 9, pp 7-8. It is impossible to determine how many SWAPO government officials have been “resettled” in this way. We asked about this specific resettlement decision in the local Ministry office and were told that the person involved had a right to apply for resettlement just as any other Namibian citizen. We acknowledged that he might have that right, but questioned the selection process that gave him priority over poor people. The functionary had no answer. It is important to note that this official has not violated any law; he was entitled to this land under Ministry procedures.

³² There is some violation of “natural justice” in that poor people are dispossessed of land for the resettlement of wealthier people, among other purposes, and one group of poor people is substituting another. Evolving concepts of international human rights law argue that when a government displaces people for some public purpose, they must be provided with adequate support, substitute housing and at least an equivalent livelihood. In Namibia, the constitutional rights to housing, culture and a livelihood may be implicated. These rights stem from Article 25 of the Universal Declaration of Human Rights and are embodied in a number of international agreements. For example, as spelled out in the World Bank’s *Displacement and Resettlement Sourcebook* of 2005, the standards on displacement of poor people require that equivalent or better housing be provided if people are displaced by public projects funded by the World Bank. The International Labor Organisation (ILO) Convention on Indigenous and Tribal Peoples, 1989 (No. 169), in Article 16(1) provides that “the peoples concerned shall not be removed from lands which they occupy”. Article 16(2) provides:

“Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations”

While Namibia is not a party to this convention, this principle has become part of international customary law, protecting indigenous and tribal peoples. The Namibian Constitution, in Article 144 on International Law, states that “the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia”.

³³ We have tried to study the application process, but the endeavour has not proved easy. The basic elements of the process are described in our work (SL Haring and W Odendaal, 2002, op cit fn 1, pp 38-52; and 2007, op cit fn 9, pp 24-26). It is difficult to describe the level of disarray in the Ministry of Lands and Resettlement. We once asked the local Ministry director of a gazetted resettlement scheme what the plan was for resettling people there. He told us that the resettlement scheme of which he was in charge was not a resettlement scheme and that everyone there would eventually be resettled elsewhere. When asked about the disposition of thousands of hectares of government-owned agricultural lands at this location, he stated that he did not know. Thus, apparently, even people “resettled” at a gazetted resettlement location were to be moved on to some unknown place at some unknown time, while the plan for thousands of acres of good land nearby was unknown. All the people resettled at Okorusu/Marburg had previously been resettled at Cleveland, so the meaning of “resettlement” is not clear. Most resettlement projects, as documented above, consist of little more than rural slums, providing basic shelter for unemployed poor people who remain poor.

displaced farm workers do not find any list on which to place their names. They are simply outcasts, moving in with whatever relatives might accept them, further impoverishing these relatives.

This is the land resettlement situation 13 years after the enactment of the Agricultural (Commercial) Land Reform Act of 1995 as faced by the High Court hearing argument in *Kessl*. The range and scope of the failures of the Ministry are a matter of public discussion: nothing contained in the two reports cited by the High Court in *Kessl* is not widely discussed in Namibia.

3. The Framing of the *Kessl* Case

It was a forgone conclusion that the commercial agricultural interests in Namibia would mount a legal challenge to the Ministry's land expropriation programme, and all parties in *Kessl* referred to this as a "test case." The High Court treats it as such; in fact the Court refers to it as a "test case" on the first page of its opinion (para 1). A "test case" is a key analytical tool in any study of the relationship between the law and social change. Substantial legal resources are spent on such challenges, focusing precisely on legal issues. A number of published reports on various aspects of land reform issue were circulating at the time, including two published by the Namibia Agricultural Union (NAU) whose members include the commercial farmers who set out their position on land expropriation.³⁴

The High Court judgement, authored by Justices Muller and Silungwe, took judicial notice of all this activity by citing and discussing at length two of these reports at the beginning of their opinion (para 7). The first, "The Commercial Farm Market in Namibia: Evidence from the First Eleven Years", is a 16-page report by Dr Ben Fuller and George Eiseb prepared for the Institute for Public Policy Research in 2002.³⁵ The report, an empirical analysis of commercial land sales, revealed that the failure of the "willing buyer, willing seller" scheme for blacks to acquire white farms was proceeding at a slow pace, that white farmers were avoiding offering their land to the Government by creating close corporations, and that any progress in land redistribution under this scheme was being offset by a continuing gap between white and black agriculture.

The second report, "*One Day We Will All Be Equal*": A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process, is a 115-page report by Sidney Haring and Willem Odendaal, published by the Legal Assistance Centre in 2002. This study, in common with that of Fuller and Eiseb, is very detailed and empirical, and focused on the resettlement process itself, showing that many farms taken for resettlement under the "willing buyer, willing seller scheme" had not actually been resettled. Furthermore, the existing resettlement projects were a failure because the Ministry had failed to adequately support the poor people moved to those projects. At the same time, the report, based on field visits to the major resettlement projects, detailed the complexity of the land reform process as a mechanism for poverty alleviation.³⁶ In all, early in the opinion, the Court devoted three pages to discussing these reports (paras 7-11). This is a classic incorporation of sociology into the law, using research reports on the actual situation of poor people on the land as a basis for a legal judgement.³⁷ The Court was well aware that it was doing this, as somewhat contradictorily the judgement then states (para 11):

As mentioned before, the previous description of the history of land in Namibia and the steps taken since Independence for Land Reform, as dealt with by different authors in

³⁴ NAU, 2003, op cit fn 12; and NAU, 2004, "Proposals Towards Establishing Principles and Procedures for Agricultural Land Expropriation for Resettlement Purposes in Namibia".

³⁵ B Fuller and G Eiseb, 2002, op cit fn 5.

³⁶ SL Haring and W Odendaal, 2002, op cit fn 1. From the record it is impossible to say why these two studies, out of dozens on the land reform process, were specifically cited in this case, but apparently they were appended to the Ministry's response, and brought by the Government to the Court's attention. The LAC had provided copies of the report to the Ministry upon its completion. As the authors of that report, who have spent many years closely observing the land reform process in Namibia, we are pleased that both the Ministry of Lands and Resettlement and the Court found it helpful.

³⁷ The roots of the sociology of law go back well into the 19th Century, but legal realism emerged in the 1930s as a form of jurisprudence holding that legal reasoning should be grounded in close observation of the impact of law on society. (Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd ed), Oxford University Press, 1992; and Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, Cambridge University Press, 2008.)

different research projects on this issue, is referred to for the sole purpose of facilitating a better understanding of the matter and the applications that this Court has to deal with. It is by no means a confirmation of the correctness of these reports or the relevance that the first respondent wishes to place thereon by attaching them to its answering affidavit.

This disclaimer was apparently due to the fact that the Ministry was the party that had attached these reports to its answer, potentially winning an argument against the appellants through untested introduction of facts into evidence (para 7). But the Court's own statement earlier in the same paragraph is in fact inconsistent with this conclusion because, if, as is stated, this history "is referred to for the sole purpose of facilitating a better understanding of the matter and the applications that this Court has to deal with", such facilitation by definition would be impossible unless these reports are taken to be accurate. That both reports were (a) the best available, (b) published by the most reputable social and legal research organisations in the country, (c) based on detailed data analysis, and (d) unchallenged during the lengthy court proceedings, underscores that these facts impacted significantly on the judgement. The appellants, in fact, had no reason to challenge the accuracy of either report because the data they contain is legally neutral. Indeed these facts were as helpful to the appellants as they were to the Government, depending on how they were argued.³⁸

It is also interesting that the Ministry, and not the appellants, introduced both reports into the proceedings. Both are implicitly critical of the Ministry, and "*One Day We Will All be Equal*": *A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process*, is strongly critical, describing many instances of mismanagement by the Ministry. The Court, in effect, took judicial notice of this mismanagement in a document introduced by the Ministry itself. The probable reason for the Ministry nonetheless introducing both documents is that both provided extensive empirical evidence of the failure of the "willing buyer, willing seller" approach, thereby promoting the more direct approach of land expropriation as absolutely necessary to achieve the political goal of land reform (para 7). These reports, then, provided some empirical basis for the Minister's exercise of discretionary judgement, a central issue in the case.

The Ministry needed to introduce these reports to the latter effect because the strategy of the appellants' legal team was a brilliant and multi-layered attack on the land reform process itself, through the constitutional requirement that land expropriation be done "in the public interest". If the entire land reform process was a failure, then it could not possibly, by this logic, be in the public interest.³⁹ The Ministry must have felt vulnerable to this broadside attack on its entire record of land reform. Both reports take the land reform process seriously, support it and spell out the complexity of the situation that the Ministry faces. The Ministry clearly felt that it needed this evidence.

This legal attack on the entire land reform process had been developing for some time, and can be seen evolving in two reports of the NAU. The commercial farmers of Namibia, mindful of the attack on commercial farmers in Zimbabwe 20 years after Independence, had developed a strategy of cooperating with the Ministry of Lands and Resettlement, and with the Government generally, on land reform. Their key provision was that the Ministry needed to proceed strictly according to the rule of law, and not damage the agricultural economy in the process.⁴⁰ While supporting the "willing buyer, willing seller" scheme, the NAU was aware that land expropriation was specifically legal under Article 16(2) of the Namibian Constitution as well as politically popular among the black population. Accordingly, it adopted a strategy of

³⁸ The report documents in some detail the difficulties and failures of the land reform and resettlement process, including ministerial mismanagement of the process. Therefore, while the Ministry could introduce the document in an effort to demonstrate the difficulty of land resettlement as a public interest objective, the farmers could also have introduced the report to demonstrate the failure of the resettlement process, arguing that it did not serve the public interest.

³⁹ This argument is fully developed in NAU, "Proposals Towards Establishing Principles and Procedures for Agricultural Land Expropriation for Resettlement Purposes in Namibia", 2004.

⁴⁰ Ibid. See also NAU, 2003, op cit fn 12.

advocating that any land expropriation process proceed only in accordance with the law. At the same time it developed a number of legal arguments against the land expropriation process, preparing for a test case that was sure to come. While some of these arguments were narrow and technical, one was a complete challenge to the entire process: that the “public interest” requirement of Article 16(2) was violated if the Ministry took functioning farms and turned them over to black farmers who could not make a living on the same lands, rendering the farms literally “unsuitable” for agricultural purposes⁴¹ (paras 55-56). Thus there is a careful duplicity at the core of the NAU strategy: while continuously stating its support for a land reform process, at the same time it insists that this process is entirely consistent with a rigorous set of legal requirements which in fact is extremely difficult for the Ministry to meet.

When the Ministry prepared its response to the hearing on *Kessl*, it was fully aware that it faced a challenge on every aspect of the land reform process, and not just a few technical arguments as to the procedure or process followed against *Kessl* and his co-applicants. Both reports, but particularly “One Day We Will All be Equal”, described the complexity of the land reform process that the Ministry faced, and also emphasised that poverty alleviation as a legitimate goal of land reform was at odds with another important goal, being a profitable commercial farming system.⁴² Of course, poverty alleviation is a legitimate public interest fully independent of the public interest in maintaining efficient farms, and in racial equality in farm ownership.⁴³ All this was at stake in this case, and all was carefully introduced into the opinion on the basis of these reports at this stage.

By definition, appellants Gunther Kessl, Adolf Herburger (sole owner of Heimaterde, a close corporation) and Martin Joseph Riedmaier did not choose themselves to be in this position in this test case: the Ministry selected them by choosing their farms for the first contested land expropriation cases under both Article 16(2) of the Constitution and the ACLRA of 1995.

All three are German citizens and residents of Germany, but have owned their farms in Namibia for many years, visiting them two or three times annually (para 32). *Kessl* had 400 cattle and 12 workers with 42 dependants living on his farm; *Riedmaier* had 200 cattle and 3 farm workers with their dependants on his farm; and *Herberger* had 500-600 cattle, 4 workers and 14 dependants on his farm. All three employed full-time farm managers (para 32). It was commonly speculated in Namibia that these farms were expropriated because their owners were absentee Germans, and this fact was cited by the appellants as one of the grounds for the expropriations being unlawful (paras 101-106). Surely, as a test case, the logic underlying the Ministry’s selection of three German citizens as the first farmers subject to land expropriation is suspicious, and not likely based on policy considerations relative to the acquisition of suitable farms for the purpose of land reform and resettlement of poor people. German citizens, in fact, own a very small percentage of all the farms in Namibia.⁴⁴

⁴¹ *Ibid*, chapter 3.3. A main thrust of this detailed policy paper is to challenge the entire conception of land reform as a means of poverty alleviation. The NAU argues that no “public interest” is served by taking land for poverty alleviation because land reform is an ineffective means of achieving that goal.

⁴² SL Harring and W Odendaal, 2002, op cit fn 1, pp 96-109.

⁴³ Here it must be noted that the link between poverty alleviation and land reform is at the heart of a debate on development and poverty in Africa and the world. The World Bank, for example, for many years supported a policy of economic rationalisation of agriculture, favouring large commercial farms and aimed at small-scale subsistence agriculture. This literature, still extensive, plays into the hands of this NAU argument, supporting the existing commercial farming system as a better way to fight rural black poverty than supporting land reform. The difficulty with this view is that, firstly, the World Bank was arguably wrong in not supporting small-scale black agriculture, which in fact is a viable development option in Namibia, and secondly, poverty alleviation is a social and political issue and not merely an economic one (K Havnevik, D Bryceson, L-E Birgegard, P Matondi and A Beyene, *African Agriculture and the World Bank: Development or Impoverishment*, Nordiska Afrikainstitutet, 2007).

⁴⁴ Most “foreign” land owners in Namibia are in fact South African citizens. German citizens own fewer than 100 farms, i.e. perhaps 2-3% of all commercial farms. The actual extent of foreign land ownership is impossible to determine due to the use of several different legal devices to conceal ownership, including close corporations, partnerships and extended family arrangements. In all, non-Namibian citizens own 4 700 km² or 0.7% of the agricultural land and 0.6% of Namibia’s surface area. These owners include foreigners with temporary or permanent residence permits who live on the farms, and absentee owners who either have managers running the

We are not in a position to know how their common case was financed, but any reading of the opinion, or of the various NAU documents,⁴⁵ reveals that what was put forward on these appellants' behalf was the same basic though well-developed challenge to the legality of the land expropriation process that could have been expected of any appellant in their situation. Any lawyer in Namibia instructed in this case may have made similar arguments, but this statement should not detract from the fact that their lawyers presented a highly competent case – a presentation complimented by the Court itself – and an argument that doubtlessly facilitated the clear judgement that followed.

While these appellants implicitly challenged the entire legality of the land expropriation process, this issue was also lost: the Court handed the Ministry and the Government of Namibia a near instant victory in the second sentence of its judgement (para 1), stating that “the applicants conceded that the Government of Namibia has the right to expropriate farms under certain conditions”, an admission made by the appellants' own lawyers, to which they had no choice but to concede, both legally, given the express terms of Article 16(2) providing that land expropriation is lawful, but also politically because, for white commercial farming interests, to have insisted otherwise would have been politically self-destructive.

This decision of a two-judge panel of the High Court can be appealed in the Supreme Court of Namibia, and of course, this being a test case, the respective parties have anticipated such an appeal. The Supreme Court has taken a consistently moderate stand in its relationship to the Government, but has stood its ground as an independent judiciary, prepared to defend the rule of law in an environment that can be difficult and politically charged.⁴⁶ Once there were jokes about the imposing Supreme Court building, constructed even before full-time judges were appointed, but today the Court is highly respected. It has demonstrated that it is confident and capable of bold decision-making backed by well-reasoned opinions. Also it has consistently defended fundamental rights as defined in the Namibian Constitution.

The Government is regularly handed sound defeats, though the Courts are sometimes felt to be overly deferential to the State. For example, the Government's insistence on trying nearly 200 Caprivians on treason charges without providing them with defence lawyers at the expense of the public drew a strong statement from the Supreme Court about the necessity of defence lawyers in a state committed to the rule of law.⁴⁷ While it is impossible to speculate on any appeal, it might be noted that the Ministry has a lot to lose here: the High Court opinion is so well reasoned that the final result could be even worse for the Ministry, by drawing more attention to the disarray of its operations. The land reform programme is a high priority of the Government, and the Minister of Lands is a high-profile post, always held by a leading member of SWAPO as the ruling party. Therefore, the Ministry takes some risk by appealing and prolonging a legal process that exposes itself to this level of detailed scrutiny of its administrative operations.

farms or keep the land completely unoccupied and agriculturally unproductive. This information was compiled by the Ministry of Agriculture, Water and Forestry in March 2005 from “Farm Registers” of the Deeds Office (Ministry of Lands and Resettlement) who is the custodian of cadastral information in Namibia. These registers, being summaries of the individual deeds, are updated from time to time by Deeds Office staff. The database had also been updated from information received from agricultural extension staff in the regions. The database is the best available source of information at present and is used extensively by the Ministry of Agriculture, Water and Forestry, but it cannot be considered a legally valid document.

⁴⁵ NAU, 2003, op cit fn 12. The latter document is particularly clear on the NAU's legal strategies, so we do not need to speculate about them. These documents were published for the NAU to promote a dialogue with the Ministry on land reform based on open information.

⁴⁶ The Supreme Court Act 15 of 1990 makes provision for the jurisdiction of the Supreme Court of Namibia in pursuance of the provisions of Article 79 of the Namibian Constitution.

⁴⁷ *Government of the Republic of Namibia and Others v Mwilima and all other accused in the Caprivi treason trial*, 2002 NR 235 (SC).

4. Article 16 and Land Expropriation

Paragraph 1 of Article 16 of the Namibian Constitution protects property rights, while the next paragraph, somewhat contradictorily, sets out the constitutional requirements for land expropriation: it must be compensated and in the public interest. While the Supreme Court has occasionally reviewed Article 16, there has been no discussion of Article 16(2) specifically. It might be noted here that all governments have the power to expropriate land in the public interest; this is inherent to state sovereignty.⁴⁸ In the difficult period at the end of apartheid, the protection of property was a compromise placed in the Constitution to calm white fears and stabilise a potentially fragile economic and political order. It should be no surprise that there is a great deal of contradiction in a black government protecting white property rights that are based solidly in colonialism, racism and exploitation. This tension is embodied in the constitutional law of Namibia, and that of South Africa and other countries, as noted by the Court in its opinion (paras 36-37). The argument that these lands are “stolen lands” that should be repatriated to the Namibian people is an obvious argument, freely put forward in Namibian politics. Thus Article 16 is a politically difficult provision in the Constitution and the two paragraphs have to be read together in this context, as the High Court agreed (para 36).

The legal argument here, advanced by the Ministry in arguing that the procedural violations that occurred are not constitutionally relevant, is that Article 16(2) is self-contained; it is the whole constitutional law of expropriation and the highest law in the land (para 44). This position is simply not tenable in any analysis of constitutional law, particularly within the context of fundamental rights.⁴⁹ Not only does each statement of rights modify and reinforce every other right, but the whole cannot be limited by any other law. In retrospect, the Ministry cannot have expected to prevail in this argument, considering the short shrift given it by the Court, but in view of what must be its own analysis of the administrative problems with the expropriation process, it was a necessary attempt at a quick disposition of the case by arguing that the procedural requirements of the ACLRA were irrelevant to an expropriation under Article 16(2). In any case the Court held that not only must Article 16(2) be read in the context of all of the law governing the Constitution, but all provisions of the Constitution must be so read (para 45). The right to property is a fundamental right, and accordingly there should be “strict adherence” to any provisions limiting such rights. Accordingly, the “provisions of the Agricultural (Commercial) Land Reform Act of 1995 should be strictly adhered to” (para 43). This is a powerful statement of the law of land reform in Namibia, with profound implications for the Ministry’s operations, as will be discussed in Section V of the ACLRA of 1995.

The more serious legal argument under Article 16(2) is the constitutional requirement that land expropriation be in the “public interest”. While this doctrine generally has been tested around the world and held to be some version of a valid public interest, the NAU has put forth a far more restrictive argument, inquiring into the substance of the public interest and testing its effectiveness (paras 55-56). This is almost never done, but rather, the courts defer to the Legislature’s determination of public policy, a determination more appropriate for the political arena. The NAU argument that no public interest can be served by taking profitable farms and making them unprofitable leaves us with another question: aren’t there interests other than farming interests involved?

⁴⁸ AJ van der Walt, 1997, op cit fn 7, pp 17-20.

⁴⁹ This is an especially dubious argument considering that it is clear that the whole of Article 16 itself must be read in the context of both other fundamental rights and the rest of the Constitution, especially Article 22 which states that any law providing for a limitation on fundamental rights shall not work against the essential content thereof and shall not be aimed at a particular individual (SL Harring, 1996, op cit fn 6).

The Court was apparently not impressed by this constitutional argument, recognising, as stated in its introduction, that land reform for poverty alleviation purposes is a legitimate public interest. Thus, no matter how difficult it is to accomplish, the land reform process still necessitates a complex land reform law to give it legitimacy (para 9). Under this objective, poor people moved onto substantial farmlands might make far less income than existing white farmers, but still achieve the objective of a better life for themselves, and contribute more to Namibian society as working citizens.⁵⁰ Indeed, taking this logic further, degraded agricultural lands might be acquired under Article 16(2) and cleared of farming altogether to serve the public interest in restoring a degraded environment for future generations. But, as will be seen in the next section, the Court found that the procedural violations under Article 18, specifically in respect of the Ministry's duty to investigate each farm to determine whether it is suitable for land reform purposes, made it impossible to determine whether or not there was a public interest under Article 16(2) (para 118). The Court also found that one Article 18 violation was that the Minister had not determined whether the farm was "suitable for the purpose of expropriation" (para 56), making it clear that if the farm is not in fact suitable for this purpose, then the public interest requirement of Article 16(2) is not being met.

Finally, with regard to the Article 16 right to property, the Court held that the fundamental rights afforded by the Namibian Constitution are entitled to the highest level of protection, and any infringement thereof must be justified under Article 22 (paras 39-41). Even more important then, since the audi principle does not feature per se in the Act, but rather is imposed in the Act through the principle of natural justice being incorporated into Article 18 by requiring that administrative officials act fairly and reasonably (i.e. "to hear the other side") according to natural justice as well as other legal principles, any principle of natural justice and Roman Dutch common law may be incorporated. Thus, the natural justice principle is built on two principles: no one should be the judge in his or her own case, and each party in a dispute should have the right to heard. This is consistent with the cited line of cases protecting fundamental rights, but as applied to land reform, and in the context of the poor-quality work of the Ministry, this had profound implications, also to be developed in Section V of the ACLRA. In sum, *Kessl* does not turn on any new interpretation of Article 16. If anything, the Ministry won on the major Article 16 issue: the legality of land expropriation was upheld, although only in dicta, not in the direct holding.

⁵⁰ The ideal of the self-reliant small farmer is at the core of the land reform and resettlement process (SL Haring and W Odendaal, 2002, op cit fn 1, pp 38-60).

5. Article 18 on Administrative Justice

The majority of the opinion is spent applying Article 18 of the Namibian Constitution to the actual administration and implementation of land expropriation in these cases. While this is a narrow exercise applying only to these facts, this part of the judgement is in fact bold and far-reaching. Looking at the research cited by the Court in “One Day We Will All be Equal” and the Court’s own detailed scrutiny of the administrative work of the Ministry in these cases, it is apparent that there are deep administrative problems within the Ministry. These problems are so serious that it is unclear that the Ministry can meet the constitutional requirements of Article 18, not only in future expropriation cases, but also in other aspects of the land reform process generally, including overall planning, selection of farms, selection of beneficiaries, transparency and resettlement project administration. In short, these elements amount to the entire process, and this conclusion requires very detailed analysis of the Court’s work in this section.

Article 18 on Administrative Justice reads (in pertinent part) as follows:

“Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation ...”

Constitutional provisions relating to human rights are deeply rooted in human experience. It is an elementary principle, taught in every administrative law class, that the administrative procedures exist to protect substantive rights. Such procedures are not mere technicalities, but necessary to make constitutionally guaranteed rights accessible in day-to-day relations between citizens and their government.⁵¹ The procedures governing land expropriation exist to protect other fundamental rights in the Namibian Constitution, not just the Article 16 right to property, but also general rights to equality and human dignity.

In analysing whether Article 18 was violated, the Court undertook a detailed analysis of the land expropriation process, beginning with a “Chronology” (para 16) and then setting out the minutes of an “extra-ordinary meeting on expropriation held by the Hon. Minister with the Land Reform Advisory Commission, 10th March, 2004” (para 20).

Suffice it to say here that the process as described in these documents was highly irregular, approaching chaotic. The “extra-ordinary meeting” was called by the then Minister of Lands, Hifekepunye Pohamba, now President of Namibia. As is noted in the minutes, he spoke briefly to the Advisory Commission and then left the meeting (para 21). The discussion generated no conclusions, and clearly the Commissioners were both confused and in disagreement (para 21). Minister Pohamba returned four hours later, at 14h00, thanked the Commissioners for their input and advice, noted various disagreements and adjourned the meeting at 14h30 (para 21). As revealed in the Ministry’s own transcript, this “consultation”, required under the ACLRA, had not dealt with any substantive issues regarding the selection of farms for expropriation.

On the same day, 10 May, a letter headed “Intended Acquisition of Farm Gross Ozombitu, No 124” was served on Appellant Gunter Kessl at his farm near Otjiwarongo, about a four-hour drive north of the venue for the meeting, being Ministry offices in Windhoek (para 23). This service was accomplished by a Ministry official “accompanied by several heavily armed

⁵¹ L Baxter, *Administrative Law*, , Juta & Co, 1984, pp 570-572; L Boule, B Harris and C Hoexter, *Constitutional and Administrative Law – Basic Principles*, Juta & Co, 1989, pp 327-340; and DP Jones and A de Villas, *Principles of Administrative Law* (2nd ed), Juta & Co, 1994, pp 177-183.

members of the Namibian police force and the special field force”. Besides this demonstration of force against peaceful farmers, the process of writing and serving this legal notice quite evidently started well before the meeting, legally required to be a “consultation”, was held (para 28). The meeting of the Advisory Commission, and the “consultation”, was facially a sham, called to cover a land expropriation process already decided upon, for which the legal machinery had already been put into motion. This calls into question the entire credibility of the Ministry’s case, an issue not helped by the discovery of pages missing from one of the exhibits.⁵² Within a few weeks, identical letters were served on the two remaining appellants.

An exchange of letters occurred with the farmers, first asking for more time, and then, through their attorneys, asking for detailed information about the expropriation process (paras 26-30). Finally, a “Notice of Expropriation of Agricultural Land” was served on the three farms, but not “personally” as clearly required by the statute (para 30). These exchanges set the stage for the expropriation letter, and for the legal challenge to the expropriation process in the High Court.

Due to the lackadaisical administrative work of the Ministry and its clumsy efforts to either defend or cover it up (the Court at paragraph 95 noted that some pages were missing from the minutes of the Cabinet meeting in which these expropriations were discussed), the Court engaged in detailed discussions here on several matters, from basic to complex, pertaining to natural justice in administrative law. At the basic level, the Ministry had failed to serve the expropriation order personally as required by the statute. Any law student knows that the rules of service must be strictly followed, and this point was well argued by appellants’ counsel (para 82). Not only did the Ministry not serve the document legally, but also it defended its actions by arguing that it had “substantially complied” by serving others at the respective farms (para 79). The Court would have nothing to do with this argument and specified that such notice must be personally served on the landowner as required by the statute (para 118).

Another issue, widely reported in connection with the case and discussed in the press, was the argument that these farms were expropriated because the owners were either foreign or German, in violation of both the Constitution which does not permit such discrimination, and the Encouragement and Reciprocal Protection of Investments Treaty between Germany and Namibia (para 24). Because Article 16 protects the right of “all persons” to own property without regard to nationality, it is clear that the property rights of foreigners are also protected by the Constitution, independent of any treaty rights (para 112). The Ministry emphasised in its argument the “absentee” character of these farm owners, not their foreign nationality, a fact noted by the Court, which chided their lawyer for “probably” changing his argument when he realised that nothing in the Act provided for expropriation based on land ownership by foreign citizens (para 102).

Ultimately this issue merged into the issue of the Minister’s failure to do his administrative duty under Article 18 by fully considering the issue of absentee ownership in taking decisions on expropriation (paras 101-107). Therefore, the question of whether the Minister could consider foreign or absentee ownership as one or two factors in deciding on an expropriation was not directly decided, though an implication exists that absentee or foreign ownership could be considered as one or two factors to be considered in a complex discretionary administrative decision-making process. The Court did hold directly that the Treaty with Germany forbade any discrimination against German citizens in land expropriation decisions. German citizens must be treated on the same basis as farmers who are Namibian citizens, but considering the absentee status of any farm owner as one factor in an expropriation decision would be lawful under this ruling (para 106-107).

These were simpler parts of the decision, reached as part of the process of moving on to the major issue, being the failure of administrative justice. A critical bridge toward this holding

⁵² The “missing pages” issue was not seriously pursued by the appellants in Court, leading to an inference that this was a mistake and these pages were irrelevant, but this is an inference of administrative incompetence on the part of the Government, not one of dishonesty.

was the appellants' emphasis on the requirement of *audi alterem partem*,⁵³ a rule of natural justice requiring the administrative decision-maker to hear from the parties involved before making any ruling against them. This was not directly required by the ACLRA's procedural requirements. These procedures were independently violated, but some, if followed, would at least have given these farmers more access to the administrative process.

To provide a simple example of the interrelationship between these provisions, the Act requires that before the decision is taken to expropriate a farm, a team of valuers visits the farm to evaluate its suitability for land reform purposes.⁵⁴ In the *Kessl* case this did not happen until the final stages of expropriation, when the price was being set. Therefore, at the time of the expropriation decision and mailing of the notice, the Ministry in fact had no knowledge whatsoever of the condition of any of these farms. Had the visits to these farms taken place, each farmer would have had an opportunity for input into the process by virtue of being able to show his farm to the evaluators, but there was not even this minimal exchange of information; the process was completely blind, based, as far as one could determine, on nothing.

However, the *audi alterem partem* argument would require far more, directly changing the process required by the Act by adding one additional step: the Minister must give each owner of a farm facing expropriation an opportunity to be heard as part of the decision-making process. By definition this must happen while the decision-making process is actually underway so that the Minister might "put his mind" to the arguments of the farm owner just as he puts his mind to all other relevant factors before him (paras 47-54). As a principle of natural justice, *audi alterem partem* brings more into the administrative decision-making process than simply more information – although, in itself, any rule requiring administrators to take into account more information is a good one. Rather, this principle requires some measure of transparency, or a literal "hearing", not in the bureaucratic sense but in an actual hearing of the views of one class of interested persons (para 49).

Transparency goes beyond this simple process of hearing landowners. It would also require the Ministry to notify those whose lands are being considered for expropriation long before the actual expropriation, to afford time for a "hearing" and subsequent decision-making process, giving landowners, as a class, more information about the Ministry's expropriation process, and more time to address it, either through the Ministry's decision-making process or in any public venue. This changes the entire process of land expropriation in Namibia from this case forward, by requiring a much longer and much more detailed consideration by the Ministry, and enabling a full public discussion as specific groups of farms are targeted and their owners notified.

Even more important then, since the *audi* principle does not feature in the Act but rather is imposed on the Act through the principle of natural justice, any principle of natural justice and Roman Dutch common law⁵⁵ may be incorporated into the expropriation procedures and substantive standards (para 47). This opens up Article 16(2) of the Constitution and the ACLRA of 1995 to any argument based on natural justice. In the context of fundamental rights and freedoms, and in the socially difficult context of land reform through expropriation, we can pose some issues of natural justice here. For example, can a land expropriation scheme be defended on principles of natural justice when one group of poor people is expelled and made homeless so that a group of the same size, of equally poor people, can be settled on the same land? Can communal landholders who have lived on ancestral lands for generations

⁵³ A literal translation of the Latin term *audi alteram partem* is "hear the other side".

⁵⁴ ACLRA of 1995, section 15(1)(a)(i-iii).

⁵⁵ Article 66 of the Namibian Constitution provides:

- (1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.
- (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.

be displaced so that others can be resettled on those lands? Should the “just compensation” requirement for land expropriation be considered in the context of racism, colonialism, imperialism and land theft?

Each of these questions can be addressed through some analysis of natural justice – analyses that are extremely difficult. The High Court has directly deemed natural justice a factor to be considered in land reform and land expropriation, giving the courts a role in this complex process – if not equal to the roles of Parliament and the Ministry: that of protecting a broadened requirement that these actions be taken according to the rule of law, with the rule of law now being read to include the broadest recognition of rights, including rights that flow from natural justice and rights that flow from statutes. While the application of the *audi* principle was a proverbial ‘nail in the coffin’ of the Ministry’s argument, it was not necessary for the final decision-making in this case. Thus it is a judicial statement about the meaning of the rule of law in land expropriation cases, and more broadly, in the interpretation of the Constitution generally.

Ultimately the case turned on narrower violations of Article 18 of the Constitution. It was not just that the Ministry failed to meet even the most basic requirements of the ACLRA, such as personally serving the landowner, but also, there was a documented failure, detailed in Ministry minutes, in the rational decision-making process. This has profound implications for land reform in that it revealed the Ministry’s basic dysfunctionality: the expropriation process is poorly managed on every level, and to protect itself the Ministry must constantly cover up its administrative incompetence. The Court repeatedly details this issue, sometimes with brief commentary but most often letting it speak for itself, and this issue is at the core of this case.

A sound administrative judgement must be based on sound administrative practice. The twin statutory requirements that (1) a team of valuers visits each farm proposed for expropriation prior to any administrative action being taken, and (2) that the Land Reform Advisory Commission actually meets to consider the information gathered by the valuers before “advising” the Minister, is key to the rest of the case.⁵⁶ These administrative requirements are at the centre of the ACLRA, for good reason. Land reform is an extremely complex process and there are great variations in the situation of each parcel of land in relationship to each group of prospective resettled farmers. Expropriation is expensive and clearly has the potential to be socially disruptive in that productive farms are taken out of production, farmers’ lives are changed by the loss of their family farms, and farm workers are unemployed and displaced.

By 1995, Parliament had gathered extensive information on the land reform process and, mindful of its complexity, it devised a very detailed plan for expropriation that attempted to account for all these difficulties. With all this background and experience, the ACLRA set out a very detailed process with many provisions.⁵⁷ The twin requirements discussed above are important here not only because they are such key elements of a fair process, but because the Ministry breached these procedural requirements and then tried to cover up the breaches. The Court was concerned not only about these violations of the law, but also about the careless and autocratic quality of these actions. This is all detailed in the Court’s judgement.

In the first place, the requirement that a team of valuers visits and evaluates each farm proposed for expropriation *before* expropriation proceedings begin goes to the heart of land reform as a complex *substantive* process. At its core, this process is about farms, farming and the hard work of making a living off the land. Everyone who knows agriculture will know that each farm is different, and each farmer succeeds by virtue of his/her intimate ability to work with a particular piece of land. Namibian farming conditions are especially difficult due to the dry climate, varying weather conditions, unique problems of access to water, and increasing land degradation.⁵⁸ Thus, any land reform scheme must specifically take account

⁵⁶ ACLRA of 1995, Part II, sections 14-15.

⁵⁷ See the lengthy and detailed regulations in the Agricultural (Commercial) Land Reform Act 6 of 1995. See also SL Harring and W Odendaal, 2007, op cit fn 9, pp 10-16; and 2002, op cit fn 1, pp 9-16.

⁵⁸ NAU, 2003, op cit fn 12, chapter 5, p 35.

of these factors, farm by farm, one farm at a time. Indeed, most farms offered by their owners for sale to the Government under the “willing buyer, willing seller” scheme were declined as “unsuitable” for land reform, so the danger of the Government expropriating unsuitable farms is a real one, and it is easily avoided by the valuation required before consideration of the expropriation.⁵⁹ This valuation puts each farmer on notice of the Ministry’s intentions, and gives each farmer a chance to demonstrate either the particular strengths of his/her farming operation in an effort to increase the valuation, or the unsuitability of the farm for resettlement purposes, which may enable them to avoid expropriation altogether.

Not only did this not occur at the beginning of the expropriation process as prescribed by the ACLRA, but the Ministry hastily sent out valuation teams at the end of the process, as if this was just in time to justify the amount of money offered, but also to cover up the fact that no valuation had been conducted in accordance with the Act. Even worse, if the valuation team was available all along, and if only four farms were being expropriated, or only 26 were being considered for expropriation at the time (para 21), what was the team doing to earn its pay? One may infer that it was doing “nothing”, which constitutes a huge waste of public funds and clear evidence of mismanagement on the Ministry’s part. The Minister in charge of this meeting is now the President, so this issue is politically loaded. In any event these four farms, “coincidentally” all owned by German citizens, were identified for expropriation without any valuation, and without the Government having any direct knowledge of their condition or suitability for resettlement.

What then were the criteria for the decision to expropriate these farms? The Court is very clear that from a detailed examination of the record, no investigation took place, meaning that this important administrative decision was based on no information (para 59). The best that the Ministry could argue was that the Government had information about every farm in Namibia, thus this investigation was unnecessary, and the Court found this statement to be beyond belief (paras 60-61). The Court further noted that all the specific information that the Ministry claimed it had was dated *after* the decision to expropriate (paras 60-61).

But, moving on to the second issue, because the required information on the farms, even if gathered properly, is complex and difficult to interpret, a statutory body, namely the Land Reform Advisory Commission, with a statutorily defined range of practical experience, is needed to evaluate the data and the Minister is required to consult the Commission on each expropriation. We have already seen that this process was a sham in the *Kessl* case, with the Commission expressly called into session at the very moment that appellant Kessl’s notice of expropriation was being delivered by armed police officers in order to meet the letter of the statute, but none of the substance was met. There was no “consultation” per se, as the Minister walked in and addressed the Commission at about 10h00, then left and returned at 14h00, only to be told that the Commissioners were confused and deadlocked, whereupon he addressed them again and then adjourned the meeting. The Commission’s own minutes clearly reflect that this was not a “consultation” as per any dictionary definition of this term (para 21).

But the above is not the full extent of the problem. The Commission had a list of 26 farms before it (para 21), but no actual data on *any* of them. Their discussion, then, was based on their life experience, but not on any specific information about any farm under consideration. So, the entire “consultation” was doubly defective.

And it becomes triply defective due to the same lack of information. In a process of land reform and resettlement for poverty alleviation purposes, a key question, which was never raised, is “What about the farm workers?” Based on the above, the Ministry had no information at all about them. The *Kessl* applicants included such data in their pleadings (para 32). Their workers with their families brought the figure to nearly 100 Namibian citizens (para 32). We know that farm workers are among the poorest-paid workers in Namibia, and that housing

⁵⁹ SL Haring and W Odendaal, 2007, op cit fn 9, p 13.

was provided to them on these farms. While we do not know exactly what will happen to them when the Ministry expropriates the farms, it is common practice that the farm workers are forced to move, which in this case would leave up to 100 poor Namibians both unemployed and homeless.

Section 20(6) of the ACLRA provides that the Land Reform Advisory Commission “shall consider the interest of any persons employed and lawfully residing on the land and the families of such persons residing with them”. As the Court pointed out, “this is a peremptory provision ... Once the Commission has considered the interest of such persons, it may recommend to the Minister what he may do in that regard. The Minister’s conduct must be fair and equitable ...” – as provided in Article 18 of the Constitution. It is clear from its own minutes that the Commission had “disregarded” that obligation (para 63).

Based on all of this, the Court concluded that the ACLRA of 1995 had been violated by the Ministry in terms of not gathering information as required under the Act, nor having it considered by the Land Reform Advisory Commission at the appropriate stage, meaning in a timely way before commencing with the expropriation process (para 64).

This is a narrow conclusion, as the Court ordinarily proceeds, but pausing for a moment here to think about what this represents substantively is critical, because these procedures are in place to protect substantive rights. Perhaps, in reverse order, the most glaring issue is that in a modern democracy with a well-functioning state apparatus, no thought was given at all to the dispossession of up to 100 poor farm workers and their families, even though express consideration of their status is required by statute through section 20(6) of the Act, for an obvious reason, intimately connected to democracy, poverty alleviation and human rights. What was the Ministry thinking? What was their level of engagement with this land reform process which they themselves had initiated? How many officials of the Ministry worked on these cases? Who supervised them? Were they familiar with the provisions of the Act of 1995? How were they trained? Who trained them? Given the magnitude of the violations cited above, other important questions arise, though they may pale in the shadow of these violations.

In any case, one can say that the Ministry was proceeding with a fundamentally important land expropriation process, not only in violation of many of its own procedures, but based on no direct information whatever. The Minister, we are told, has some general knowledge of every farm in Namibia (para 59), but this is nothing less than uncontaminated gobbledygook in terms of the level of detail needed for land reform, and evidently it is also not true because he had no information about any farm worker on these farms.

These violations of the ACLRA are independent of violations of Article 18 of the Constitution requiring that administrative actions, even when in accord with some statute, must be fair and reasonable. The distinction here is that even if the Minister had precisely followed all terms of the statute, he would still be responsible, under Article 18, to make a fair and reasonable decision, upon an actual investigation of the facts. Even having broad discretionary power, as the Act provides, the Minister must “put his mind” to all the relevant details of each case. What exactly this entails must be decided on a case by case basis (paras 66-67). In *Kessl*, the Court is clear in concluding that “our law knows the concept of ‘consultation’ as an essential part of the process of decision making. Not only should it not be treated as a mere formality, but it should constitute a meaningful exchange of views to achieve the object of the legislature.” The Court continues with a quotation: “... the essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice”⁶⁰ (para 89). The Ministry of Lands and Resettlement does not operate in this way, and this admonition requires a new administrative culture in the Ministry.

The Court had apparently seen enough by this point. In two pages it deals with affidavits of Minister Pohamba and his successor Jerry Ekandjo, attesting to nothing substantive, but only to

⁶⁰ Citing *J Donaldson in Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 AER 289 (QB) at 284 E-F. The Court cited several other tests for sound administrative judgement, all to this same effect, i.e. an actual mental consideration of the issues.

what their Permanent Secretaries had stated in their evasive affidavits.⁶¹ The language of the Court is blunt: “The Minister is the functionary and decision-maker in terms of several provisions of this Act, but *not* the Permanent Secretary (Court’s emphasis, para 69). Then, in unambiguous language: “Not only did the respective Ministers fail to deal with the requirements and duties they were empowered to perform at the time that they were authorised to do so, but there is no indication who did what and when” (para 69).

Not only is this a direct criticism of the two individual Ministers themselves, one of whom is now President of Namibia, but also it is a direct criticism of the administrative disorder in the Ministry of Lands and Resettlement: “there is no indication who did what and when” in this major process at the core of the Government’s land reform programme. This is a powerful judicial criticism of the Ministers and the Ministry. Article 18 of the Constitution was violated by this lack of a “fair and reasonable” administrative procedure.

⁶¹ For example, Mr Tsheehama, deposed Permanent Secretary of the Ministry of Lands and Resettlement, stated in an affidavit that “**the decision** of the first respondent to expropriate ... the farms **was not arrived at haphazardly**, but was done **after a long process of consultations, research**, and informed by the **recommendations** made by the LRAC” (original emphasis, para 69). Both Ministers entered only confirmatory affidavits, confirming that Tsheehama was deposed in his official capacity, but not stating that they, as Ministers, had made these decisions based on this or any other information. It should also be pointed out that Mr Tsheehama’s affidavit is not supported by the facts as the Court presented, particularly in recording the minutes of the meetings of the Land Reform Commission (paras 20-21).

6. A New Jurisprudence of Land Reform in Namibia?

There are several parts to this concluding section. Obviously, the Court's conclusion matters, and that will be addressed immediately, but it should be clear, based on the structure and substance of the analysis above, that there is too much going on in this case for a simple conclusion to be drawn.

A. The Test Case

Because *Kessl* is a “test case” (para 1), leaving the analysis here would leave the land reform process in complete disarray and subject to having to be completely reconstituted. So, the Court details (as from para 70) exactly what the Ministry must do to comply with the Agricultural (Commercial) Land Reform Act of 1995. The process that the Court sets out is thoughtful, detailed and based on both a deep commitment to the rule of law and a deep faith in the possibility of a fair and equitable land reform process, carried out according to the rule of law.

This is a model of judicial process, a reserved but open and fair judicial intervention into a government process gone wrong. We will not spell out the procedures here because they are detailed and based on the Act, but a clear roadmap is set out for the Ministry to follow in all succeeding cases. The Court makes clear that Article 16 of the Constitution, on protection of property, confers a fundamental right under the Constitution, and all procedures set out in any land reform Act must be strictly followed (para 72). And, although it was not argued, the Court repeatedly stated that land expropriation under Article 16(2) is legal in Namibia.

By definition, a “test case” tests the legal basis of a governmental or private action, so that all concerned can get a clear sense of what law governs. This has been achieved in the High Court's judgement in *Kessl* as lawyers for both sides put forward their best arguments, resulting in a clear and unambiguous judgement of a highly competent Court.

B. A New Jurisprudence of Land Reform

Our argument in this section is that the Court's caution to the Ministry is to follow the law, but the Court went beyond this caution in an effort to address a lack of respect for legality at the heart of the Ministry of Lands and Resettlement. The land reform process is in chaos. Millions of dollars are being wasted, while the legitimate aspirations of poor Namibians for land reform, and for a place in their own society, denied them for decades by colonialism, are being ignored, just like those of the 100 poor farm workers and their families who would have been displaced, apparently unknowingly and unthinkingly, by the same Ministry.

The Court has directly interposed powerful language from Article 18 of the Constitution into the middle of the law on land reform. This can be viewed in several ways. The first is the direct rebuke of two Ministers for failing to perform their legal duties: these are quasi-judicial functionaries, empowered with great discretionary power to purchase and redistribute land to up to 240 000 Namibians (para 21), and their conduct has been unlawful. The Court makes it clear that the Minister of Lands and Resettlement must follow the law. But it goes beyond this in its holding on Article 18. Let us return to the following quotation: “the essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice” (para 89). This admonition requires the creation of a new administrative culture in the Ministry

of Lands and Resettlement.⁶² This cautions the Minister, and those under his supervision at the Ministry, to be transparent about the land reform process; to open it up to the advice of a democratic Namibia, just as, in another context, the Government opened up the issue at the first conference on land reform in 1991.

This new model of legality is critical in a land reform process that is, for all the statutory detail of the Act of 1995, primarily discretionary. Neither Parliament nor the Courts are going to decide on a plan for land reform, acquire thousands more farms through expropriation or on a “willing buyer, willing seller” basis, at a cost of billions of dollars to the Namibian state, and redistribute this land to up to 240 000 poor Namibians, together with adequate financial and infrastructural support. It is the Ministry of Lands and Resettlement that must have the legal capacity to carry out land reform. But all the evidence before us now suggests that the Ministry simply does not have this capacity, which flows from a legal culture that has not been instilled in the Ministry since its founding in 1990. Instead, the Ministry has produced a culture of secrecy, conspiracy, insiders and outsiders, and bureaucrats who think that their job is to shuffle papers; a culture of “getting by”. All this became apparent as the Ministry proceeded to defend the expropriations in the *Kessl* case.

Honestly, what would be the cost of a transparent land reform process, carried out under the rule of law, with a national resettlement plan tabled by the Ministry and widely reported on and discussed around the country, an open and honest system for selecting beneficiaries, an open valuation and selection process, specific provisions for farm workers who might be displaced, honest protections under Article 18 to ensure that the Minister makes the best discretionary decisions possible, and the widest possible information base? The Court is saying both that this is required by the Constitution of Namibia and that it is not only desirable and achievable under the law, but in a democracy it must be achieved under the rule of law. The rule of law does not mean that bureaucrats juggle procedures to make it appear that rules were followed; it means that this culture pervades the entire process – from start to finish. Every Namibian knows that something has gone deeply wrong with the land reform process. The Court has gone a great distance in both revealing what exactly has failed, and pointing out that there is a solution and land reform can go forward under the rule of law.

Finally, now that the concept of natural justice has been introduced into a land reform case, it should be obvious that the principle of natural justice underlies the entire land reform process. In a predominantly agrarian society such as Namibia’s, poor people must have access to land, and land rights which must be respected. Under colonial law in racist societies these rights were denied, as happened in this country. The rationale for Namibia’s land reform programme is to redress this historical injustice, so it is always appropriate to analyse land reform issues within a framework of natural justice. Even the most basic legal instrument of property law, the deed, was not available to poor and black people in Namibia before 1990. In 2008, sadly, the situation for the beneficiaries resettled since Independence hasn’t changed much; to date no resettlement farm leaseholds have been registered at the Deeds Office. Consequently, resettlement beneficiaries cannot obtain loans if they have insufficient collateral. Resettlement beneficiaries cannot offer the land on which they are resettled as collateral, as the land belongs to the State. Natural justice must afford legal recognition of those whose property rights were denied in the past. Poor people’s land rights have to have the same protection in law as wealthy people’s land rights.

⁶² On 7 April 2008, a month after *Kessl* was decided, Ministry of Lands and Resettlement Minister Jerry Ekandjo was transferred to another Ministry and replaced by a new Minister. This transfer was part of a broader Cabinet reorganisation and it is not clear that this was in reaction to the judgement, but it does provide an opportunity for a new Minister to change the administrative culture of the Ministry.

C. The Next Land Reform Cases in View of *Kessl*

Every day, the Ministry of Lands and Resettlement is involved in taking dozens of decisions that affect the lives of thousands of Namibians. At the time of writing, more land expropriation cases are at various stages of the decision-making process, just as the “willing buyer, willing seller” scheme continues. Resettlement projects are being created, and beneficiaries are being selected. Everyone who works with the Ministry knows how difficult it is to do so: officials do not follow rules and do not cooperate with the public, decisions are veiled in secrecy, and poor decisions, often based on poor evidence, are made and then concealed.

The *Kessl* case sets out a framework for change in the Ministry, but making these changes will require a great deal of hard work. Law is not self-actualising: it does not enforce itself, nor does it impose itself on those responsible for applying it. The basic recommendations of the Court (and this report) will be difficult to implement. We have seen at the most basic level that the overturning of the result in *Kessl*, the vacating of the land expropriation orders, turned first on overt Ministry violations of the law. There were easy-to-read statutory regulations in place that the Ministry could not or would not follow, and then attempted to cover its own wrongful conduct. These regulations are not simple: it will take money and training to build a Ministry staff body that can legally carry out the provisions of the ACLRA.

But applying Article 18 to discretionary ministerial actions will be even more difficult, requiring many more lawyers, many more court cases and much more training within the Ministry. The Ministry does not even have a legal department – it takes legal advice from the Office of the Attorney-General – much less the capacity to train non-lawyer staff in the legal requirements of their duties. If the Court is serious, and we presume it is, about applying the Article 18 standard that it sets out, requiring adequate information, openly presented to the Minister in a context where he can give it his full attention, then a large staff will be needed to administer the whole process.

As researchers on land reform issues, we know how factually complex these issues are out in the Namibian countryside. We know that the Court knows this too, because it read and cited our report of 2002, “One Day We Will All Be Equal”. While different experts might disagree on some points, there is no question that the land reform programme is in bad shape and mismanaged on just about every level. We might simply list some of the larger issues here, that all will require substantial legal input in order for decisions to be made lawfully, either under existing statutes or under the requirements of Article 18 as articulated in *Kessl*. The reader might think about the legal processes required for these actions to occur, given the discussion above.

1. In August 2003, the Minister of Lands, Resettlement and Rehabilitation (as it was known then) decided to take stock of and evaluate experiences within the land reform programme to date, and to prepare strategic options based on the results of this programme. In this regard, a team of Namibian consultants, referred to as the Permanent Technical Team (PTT), has been appointed. The PTT was expected to take stock of and evaluate land policies and actions to date, in order to assist the Namibian Government in the formulation of strategic options towards land reform.⁶³ These included communal land, commercial land (resettlement farms and AALS) as well as current state lands. The PTT made its findings available in August 2006. Among the most important of its findings are that the Government will have to spend a total land reform amount of N\$1 950 000 000 over a proposed 15 years (2006-2020), based on a projected level of investment of N\$130 million per year during which a total of 13 987 500 ha would be required to resettle 16 105 families.⁶⁴

⁶³ The Permanent Technical Team (PTT) on Land Reform, “Strategic Options and Action Plan for Land Reform in Namibia”, November 2005, p 1.

⁶⁴ *Ibid*, p 45.

The PTT also found that the directorates within the Ministry experience a variety of obstacles such as limited qualified staff and inadequate resources to carry out their tasks effectively, “as expropriation of farms will place greater pressure on MLR services”.⁶⁵ In view of the latter finding, the PTT recommended as a matter of urgency that each directorate evaluates the qualifications of its staff and determines their long-term training requirements.⁶⁶ But, despite these ambitious targets set by the PTT, there still appears to be no urgency in implementing a complete plan for land reform. Over the next period of, say, 13 years, hundreds of farms must be purchased, and thousands of people must be resettled on farms that would be required through either the “willing buyer willing seller” or expropriation principles. Scholars have convincingly written that this will require rebuilding the agrarian social order in many or all parts of the country. What will this new agrarian order look like? How will it be carried out?

2. Which farms will be expropriated and on what basis will they be selected? Will expropriation be the preferred method of acquisition or will the “willing buyer, willing seller” model also be used? If so, what is the relationship between the two methods? Is one preferred over the other? Will lists of farms under consideration be published?
3. Will there be a process of land reform in the communal areas? If so, what are the legal rights under Article 16, statutory law (i.e. the Communal Land Reform Act 5 of 2002), the common law and customary law, or natural justice for the people now living on those lands?
4. Once land is available for land reform purposes, how will it be redistributed? Who will receive land? How will beneficiaries be selected? What priorities exist for making such lists? Will these lists be transparent?
5. Once individual settlers are chosen, as above, what will each land resettlement scheme look like? Will there be one model used all over the country? Will there be a different agricultural plan for each resettled farm or region? What resources will the Ministry commit to supporting these new farmers? How will these resources be allocated? Will this be transparent?
6. What legal rights will these new beneficiaries have to their lands? Will they have some legal tenure status? Will they have rights against the Ministry if some dispute arises (as some surely will)? Will there be legal processes available to protect the rights of new beneficiaries within these resettled areas?
7. Does land reform and resettlement serve the public interest of alleviating poverty? If so, how can this best be achieved with the most efficient use of public resources?

We are aware that the list above is limited to just some of the factors involved, but we think our point is obvious. The above is an enormously complex legal agenda given the requirements of Article 18 regarding discretionary decision-making by the Minister of Lands and Resettlement. Based on existing practice and experience, the Ministry is not remotely up to this task. And this task is not merely a good idea: following *Kessl*, it is required by law.

While these issues are real and will certainly materialise, they are abstract. In another land reform matter before us now, the facts differ completely to those in *Kessl*. From a legal perspective, the question of how *Kessl* might apply in this matter is not easy to answer. To demonstrate this point, we refer to N=ǀa Jaqna Conservancy in north-eastern Namibia,⁶⁷ this being a legally gazetted communal land conservancy,⁶⁸ with a population of about 5 000, almost

⁶⁵ Ibid, 41.

⁶⁶ Ibid.

⁶⁷ Situated in the Kalahari Desert, a semi-arid and sandy area without any permanent surface water. The Kalahari spans a huge area of approximately 900 000 km², and partly covers three southern African countries, i.e. South Africa, Botswana and Namibia.

⁶⁸ National Association of CBNRM Support Organisations (NACSO), *Namibia's Communal Conservancies: A Review of Progress and Challenges in 2005*, 2006. A conservancy in a communal area is an area in which rural

all of whom are San of several groups including !Kung and Ju|'hoansi. The Conservancy has a management plan, approved by the Ministry of the Environment, which was gazetted as required in the Conservancy Act. The plan allows for some small farming operations run by residents, but leaves most of the area open for the planned reintroduction of game, which, in view of the conservancy's proximity to game areas in the adjoining Nyae Nyae Conservancy and Kaudom Game Reserve, is intended to restore the natural Kalahari environment for the benefit of its mostly San residents, including giving them income from game management.⁶⁹

The Ministry of Lands and Resettlement recently announced a plan to take about a third of the northern half of the conservancy (north of the main gravel road that connects the area with the rest of Namibia) to accommodate a number of medium-sized commercial-type farms (purportedly about 1 500 hectares each) to be created for resettlement purposes. Thousands of cattle will be grazed on these farms, entirely new infrastructure such as roads, boreholes, fences and agricultural support services will have to be constructed, and thousands of people – probably almost all non-San – will be resettled there. The San are the poorest people in Namibia, long exploited by both whites and black peoples. These several thousand newly resettled people will travel up and down the only road in the region. They will fill the few stores and shops in the region, and take over most government services. Their children will go to the government schools, and San children will be forced out. The area's game management plan will be destroyed because game animals do not compete with cattle and other livestock. The boreholes will reduce the water table. The cattle will break down fences and graze in conservancy lands, a problem that will increase in drought periods.⁷⁰ *Veldkos* (foods gathered from the desert) will disappear. Crime and violence will increase.

The future not only of Nǀa Jaqna Conservancy but also of Namibia's Community Based Natural Resource Management (CBNRM) Programme could be negatively impacted upon if small-scale commercial farms are developed in the conservancy as this would create a precedent for similar developments in other conservancies. Conservancies and community forests have become well established in Namibia as two complementary components of a broader CBNRM movement. Both institutions offer local communities commercial use rights to a variety of natural resources and are based on integrated management plans, improved resource protection from fire and illegal use, generation of direct benefits to local people, and provision of incentives to communities who introduce and apply sustainable resource management practices and systems.

Poorly conceived resettlement efforts within Nǀa Jaqna Conservancy may result in large portions of the conservancy and community forests being fenced off and no longer being accessible to the local communities and wildlife. This would seriously affect the sustainable management of natural resources within the conservancy boundaries and reduce the longer-term potentials of the conservancy and the several proclaimed community forests in the area to provide an income and benefits to their members.

Unless the Minister visits the area, or sends out highly competent, open-minded and honest people with legal training, he is not going to know what is happening there.

No one in Nǀa Jaqna has been consulted about this resettlement plan and no one has been "heard" in terms of the meaning of Article 18 of the Constitution. No one in the Ministry of Environment and Tourism has been consulted about it. No valuers, estimators or surveyors have evaluated the land earmarked. No Ministry official has made any statement as to whether or not the local San have a legal right to that land. Compensation of the communal land, in case the land is to be expropriated from those who currently live on it, has never been discussed. This in itself is discriminatory against those who live on communal land, as clear

communities gain rights to use, manage and benefit from the consumptive and non-consumptive use of natural resources (i.e. wildlife and plants) of such gazetted conservancy area.

⁶⁹ SL Haring and W Odendaal, *"Our Land They Took": San Rights Under Threat in Namibia*, LAC, 2006, pp 22-33.

⁷⁰ DED/CFNEN Programme Coordinator, LAC, WIMSA, WWF and LIFE Plus Project, "Potential Impacts of Leasehold Allocations in Northeast Namibia", 22 November 2006.

guidelines exist in the Agricultural Commercial Land Reform Act as to how freehold land-owners should be compensated when land is expropriated, but no such provisions exist under the Communal Land Reform Act for those who live on communal land. This is obviously also against the constitutional provision of Article 16(2) that the State may expropriate property in the public interest subject to just compensation. In the *N!a Jaqna* case, however, neither the public interest nor what constitutes just compensation have been established. There have been no local hearings regarding social and environmental damages, and no one has any knowledge of who is to be resettled in the area or how they will be selected.

This situation involves a number of legal issues. In the first place, the Nature Conservation Amendment Act 5 of 1996, which governs conservancies, is legally enforceable in any court in Namibia.⁷¹ Secondly, under Article 16 of the Constitution, which recognises the right to own “all forms of property”, the property rights of Namibians living in communal areas (i.e. half of the national population) must be protected, but this has never been directly decided by a court. There are also use rights and rights under aboriginal or native title which have been recognised internationally, including in Botswana and South Africa, and probably Namibia too. Finally, the issue of the applicability of the African Charter on Human and Peoples’ Rights to the San in this case has never been addressed in Namibia. Other United Nations standards and international laws on indigenous and minority rights may apply as well.

Furthermore, this plan must violate Article 18 of the Constitution. The requirement of a fair and equitable administrative process, which was not upheld in the *Kessl* case, is again not being upheld in this case. This is a poor plan in that it is being forced on a minority group with few resources and will displace them, ruin their conservancy and replace it with up to 200 resettlement farms created through an unknown process to be occupied by persons selected through an unknown process. No San have been consulted and it is not clear what the Minister has “heard” about this resettlement scheme. Bearing these facts in mind, it is not difficult to imagine the attack that the *Kessl* appellants’ attorneys could make on the Ministry, and this is precisely our point: there are dozens of cases like this emerging in Namibia every month,⁷² all of which involve a similar pattern of no plan, no transparency, no clarity as to what will happen and who the beneficiaries will be, and no one in the Ministry discussing these issues.

⁷¹ The Amendment Act does not give communities ownership of the conservancy land since these lands are all communal, but it does give the members of such conservancies the legal right to use the natural resources found on the land, such as wildlife and plants.

⁷² In a recent case, the owners of Namib Plains cc approached the High Court to stop Valencia Uranium (Pty) Ltd, a Canadian company, from extracting water from boreholes in the Khan River or in an ancient underground water reservoir in the area, referred to as the Khan palaeo channel, and to review and set aside four water permits that the Permanent Secretary of the Ministry of Agriculture, Water and Forestry granted to Valencia Uranium in February 2008. These permits allow the company to drill boreholes in the Khan River and Khan palaeo channel, and to extract up to 1 000 cubic metres (a million litres) of water a day from underground sources in an area described by the mine in one of its scoping reports as “one of the driest regions in the world” and “one of the driest regions on the planet”.

The farm owners protested the awarding of the permits, charging that as affected parties they were not consulted by the Ministry before the permits were granted, while the permits were issued without proper scientific information being available on the size and sustainability of the water resources to be exploited. The Judge dismissed the applicants’ case and concluded that “the legal reality is that the Permits do not exist: it is as if they had not been issued at all” – this, despite the fact that the Ministry had erred in the first place by issuing abstraction water permits that it (negligently?) assumed was declared as a subterranean water control area, but in the end no proclamation in terms of the Water Act of 1956 could be produced to declare its existence.

D. Conclusion

These cases have more to do with legal process than with the substantive law on land reform. How can lawyers hold the Ministry to account in cases of such complexity on a day to day basis, one after another? One land reform expert with experience in Namibia suggested, somewhat in jest, that the donor nations funding land reform projects here should also be required to provide funds to ensure that each project proceeds according to law, which would explicitly require that donors fund legal challenges to each resettlement project that they fund. This would ensure that each project proceeds according to the rule of law, which presumably would at least foster a higher level of confidence in the legitimacy of the land reform process.

But it is not only poor people in Namibia who lack the legal resources to challenge the land reform process. *Kessl* makes clear that the Ministry also lacks effective legal capacity. The land reform programme is a complex legal undertaking that also requires the Ministry to employ a competent legal staff.

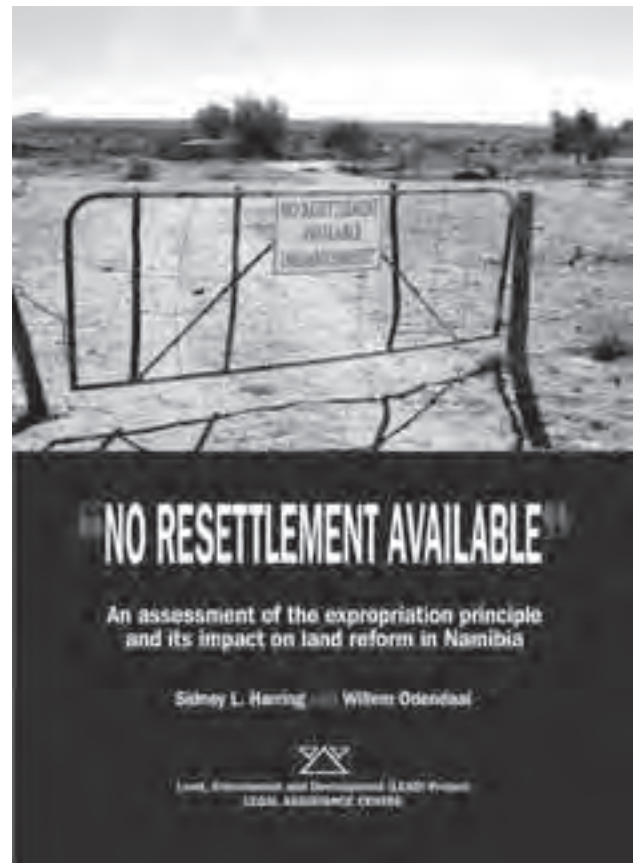
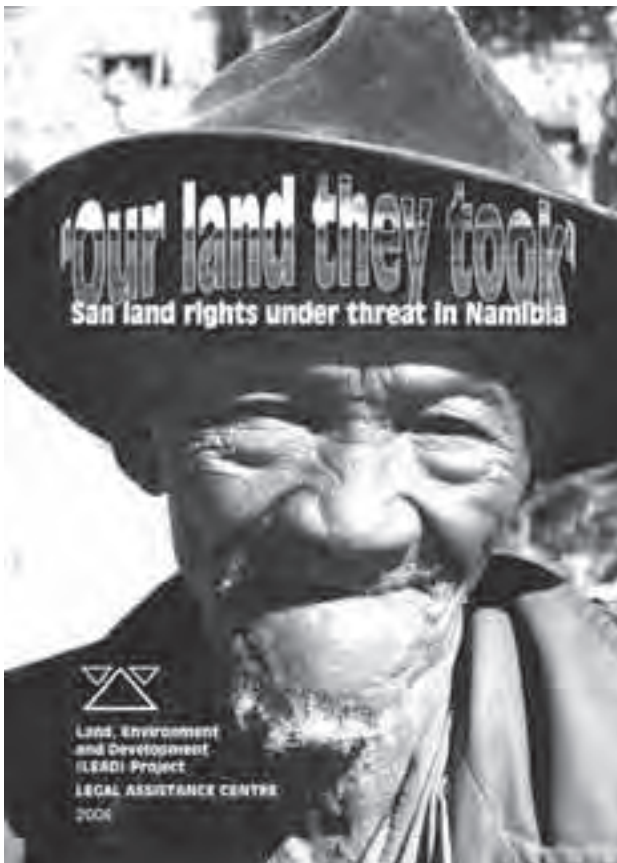
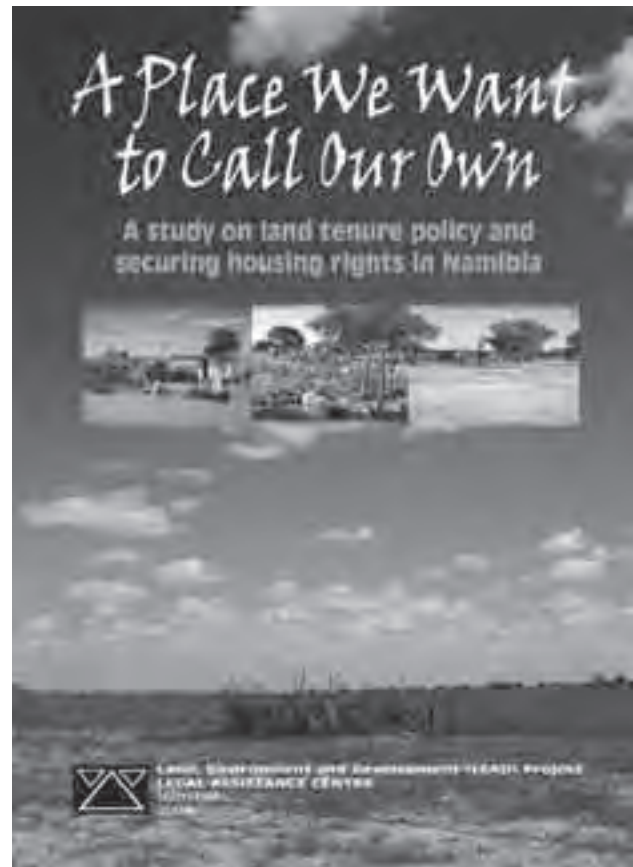
Presently there is a lack of legal resources in Namibia to meet the *Kessl* standards. This surely would represent a lost opportunity: the window through which a meaningful, peaceful and legally structured land reform programme can be achieved is surely going to close at some point. The spectre of Zimbabwe always looms over any discussion of failed land reform, and the Court took note of this fact in the *Kessl* judgement (para 10). The Ministry is now 18 years into its land reform programme, with the programme in disarray and perhaps even stalled, and public confidence in the programme is low. The Court in *Kessl* points to a way forward, but meeting the Court's standards requires a substantial effort to put in place the necessary legal mechanisms.

There is some danger here of a political backlash against the Court or against the rule of law. The claim that 'legal technicalities' are impeding the popular will and blocking land reform is easy for popular politicians to make in the political arena, and such claim is very difficult to respond to. A failed land reform policy is transparent but difficult to remedy. Judges do not defend their decisions in newspapers or Parliament, but they do sometimes hesitate under public pressure in succeeding cases, and strong decisions can set weak precedents if successive judges are unwilling to interpret them boldly. The rule of law is not easy to uphold, but in the long course of legally structuring an undertaking as fundamental as transforming a racially biased agrarian order into a modern multi-racial one serving previously disadvantaged black farmers is surely worth the effort. Failure might be less expensive, but it cannot be an option. The rule of law, like land reform, is not cheap, but the result of an improved legal process will be a more legitimate and enduring land reform and resettlement process.

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Some recent publications of the LEAD Project





Appendix: The Kessi Judgement



SUMMARY

CASE NO.: (P) A 27/2006
CASE NO.: (P) A 266/2006

In the matter between:

GÜNTHER KESSL

APPLICANT

and

**MINISTRY OF LANDS AND RESETTLEMENT
THE CHAIRPERSON OF THE LANDS
REFORM ADVISORY COMMISSION
THE REGISTRAR OF DEEDS**

1ST RESPONDENT

**2ND RESPONDENT
3RD RESPONDENT**

In the matter between:

CASE NO.: [P] A 269/2005

HEIMATERDE CC

APPLICANT

and

**MINISTRY OF LANDS AND RESETTLEMENT
THE CHAIRPERSON OF THE LANDS
REFORM ADVISORY COMMISSION
THE REGISTRAR OF DEEDS**

1ST RESPONDENT

**2ND RESPONDENT
3RD RESPONDENT**

In the matter between:

CASE NO.: [P] A 267/2005

MARTIN JOSEPH RIEDMAIER

APPLICANT

and

**MINISTRY OF LANDS AND RESETTLEMENT
THE CHAIRPERSON OF THE LANDS
REFORM ADVISORY COMMISSION
THE REGISTRAR OF DEEDS**

1ST RESPONDENT

**2ND RESPONDENT
3RD RESPONDENT**

MULLER, J et SILUNGWE, AJ

2008 March 06

- Three applications were launched to review certain decisions taken by the Minister of Lands & Resettlement to expropriate four farms belonging to three land owners.
- The Respondents opposed each application.
- For the sake of convenience all three applications were consolidated and arguments were heard in respect of these applications together.
- A previous application by the First Applicant was withdrawn and only the costs thereof played a further role. The Respondents conceded liability for the costs of that application.
- The history of pre-independence in Namibia discussed for the purpose of background to the three applications.

Relevant Statutory provisions

- Article 16(1) of the Namibian Constitution contains specific provisions regarding the right to acquire, own and dispose of property. Article 16(2) provides for the expropriation of property against compensation, if it is in the public interest. The Agricultural (Commercial) Land Reform Act, No. 16 of 1995 (the Act) regulates the purchase and redistribution of privately owned farms. The relevant sections of the Act in respect of acquiring agricultural land and expropriation of such land are s 14, providing for the purchasing of agricultural land by the State on a willing buyer/ willing seller basis and s 20, providing for expropriation of such land and requirements therefore.
- The Act also provides for the appointment, composition, powers and duties of the Land Reform Advisory Commission (the Commission), which is the Second Respondent in all the applications. The technical omission on commercial farm land mandated to investigate the entire land tenure situation in Namibia and its recommendations as far as “*absentee foreigners*” are concerned, discussed.

Constitutional position in terms of Act 16 (1) and (2)

- The constitutional position in respect of the fundamental right to acquire, own and dispose of property and to expropriate agricultural property discussed against the two appropriate works of the author van der Walt AJ, namely *Constitutional Property Clauses* and the *Constitutional Property Clause*, as well as the discussions in *Cultura 2000 and Another v Government of the Republic of Namibia* 1993 (2) SA 12 (NHC) and 1994 (1) SA 407 (NSC). Caution expressed in blindly following decisions of the South African Constitutional Court by Namibian Courts before ascertaining whether the constitutional dispensation provided for by the constitutions of the two countries are the same in respect of the relevant issue.
- The approach to be followed in interpreting provisions of the Namibian Constitution providing for the infringement of fundamental property rights embodied in Article 16 (1) by the State according to its right of *eminent domain* to expropriate property. Cases referred to in this regard: *Minister of Home Affairs (Bermuda) v Fisher and Another* 1980 AC 319; *Minister of Defence, Namibia v Mwandighi* 1993 NR 63 (SC), *Cultura 2000 case supra*, *S v Zuma and Others* 1995 (2) SA 642 (CC).
- **Held:** An Act or Statute that provides for actions that may infringe fundamental rights should be interpreted restrictively in such a manner as to place the least possible burden on subjects or to restrict their rights as little as possible. There should be a proper balancing of the rights of the public against those of individuals by adhering to the requirement of “*public interest*” in Article 16 (2), as well as the provisions of s 14 of the Act.

Whether Act 16 (2) excludes any other statutory provision and the *audi* principle

- **Held:** that Article 16 (2) is not a self-contained or “walled-in” provision, excluding the right to *audi alteram partem*. The Respondents’ reliance on the Namibian Supreme Court case *Namibia Grape Growers and Exporters Grape Growers Association and Others v The Ministry of Mines & Energy and Others* 2004 NR 194 (SC) misplaced. The decision in *West Air Aviation and Others v Airports Company Limited and Another* 2001 NR 256 (HC) in respect of applicability of the *audi* principle confirmed.
- **Held:** that the principle of *audi alteram partem* is applicable. The history of reliance on the *audi* principle discussed at the hand of an article by Ranyit J Purshotan in 1994 SA Law Journal Vol 111.
- **Held:** that the Respondents’ alternative argument, namely, that if the *audi* principle is found to be applicable, the First Respondent did comply with it by inviting the Applicants to make representations, is rejected on the evidence of the contents of the letters and the background of such invitation.

Public Interest

- The requirement of “*public interest*”, as a prerequisite to expropriation in Article 16 (2) discussed at hand of international authorities and the case of *Aonin Fishing (Pty) v Ministry of Fisheries and Marine Resources* 1998 NR 47.

Provisions of Act should be complied with *before* the Minister decides

- **Held:** that the Minister can only act within the limits of his statutory discretion and should apply his mind to the requirements of the enabling Act. In order to expropriate land, it must be done within the provisions of the Act and involves a double-barrel process, namely, firstly in terms of s 14 and then in terms of s 2. This must be done *before* the Minister takes a decision.

Section 20 (6) requirement

- S 20 (6) of the Act provides that the Commission is obliged to consider the interests of the persons employed and lawfully residing on the land and the families of such persons residing with them.
- **Held:** this peremptory provision was not complied with.

Suitability

- The conduct of the Minister and the Commission analysed to determine whether the farms were suitable for the purpose that the Act provides, *before* the Minister takes a decision.
- **Held:** that it was not determined that the farms were suitable for such purpose and that the existence of data in respect of these farms was not enough.

Confirmatory affidavits

- There were two different persons who were the responsible “Minister” and who made the decision that led to the review.
- The appropriate Minister at the time when respective decisions in terms of s 14 and 20 were taken did not depose to affidavits as functionaries in terms of the Act, in order that it could be ascertained what they did, when and what grounds. They merely made confirmatory affidavits confirming allegations made by the Permanent Secretary of the First Respondent, who was the not the functionary in terms of the Act.
- **Held:** that the functionary who is empowered by a statute to take decision(s) should depose to an affidavit indicating what he did, what he took into account and how he applied his mind and not merely make a confirmatory affidavit to an affidavit of somebody else who is not authorised to exercise such function.

Points in limine

- Service of the expropriation notice implies that such important notice of the Minister’s decision must come to the attention of the landowner. However, as there seemed to be no prejudice to the Applicants because the notices did come to their attention and they acted thereon, the issue of service of the notices were left open.
- The time provided for response by the land owner, namely 90 days in s 23 (4) of the Act needs to be complied with even if the issue of compensation is not in dispute.

Consultation

- Consultation by the Minister with the Commission is a prerequisite for involving the s 20 expropriation process. Such consultation should be done already at the s 14 stage of willing buyer / willing seller and *before* the Minister decides to purchase a particular farm.
- Such consultation must be a *genuine* consultation. Several cases discussed and approved: *Articultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 AER 280(QB); *Robebtrson and Another v City of Cape Town* 2004 (5) SA 412 CPD; *Maqoma v Sebe NO and Another* 1987 (1) SA 483 CkGD; *Stellenbosch Municipality v Director of Valuations and Others* 1993 (1) SA 1 CPD.
- **Held:** that there was *no proper consultation* as required by the Act.

Discrimination against foreign nationals

- Provisions in the Act in this regard discussed.
- **Held:** *before* the Minister decides to acquire agricultural land he is obliged to act in terms of the provisions of ss 14 and 15 of the Act.

Decision must be that of the decision maker

- The law in respect of the requirement is that where a person is authorised by legislation to take decisions, he, and he alone, should take those decisions. Cases considered and confirmed in this regard:
- *Kaura Riruako and 46 Others v The Minister of Regional, Local Government and Housing and Others*, unreported judgment, Case No (P) A 366/2001 delivered on 13 December 2001;
- *Disposable Medical Products v Tender Board of Namibia* 1997 NR129; and
- *Leech v Secretary for Justice Transteion Government* 1965 (3) SA EC.

Compliance with Statutory provisions

- The Minister's conduct analysed to determine whether he complied with the requirements of the Act in the first process by strict compliance with ss 14 and 15 of the Act and thereafter with the provisions of s 20 of the Act.
- **Held:** that the Minister failed to comply with the Act when he decided to expropriate the farms of the Applicants.

Article 18 of the Constitution

- The requirements of Article 18 in respect of fairness and reasonableness in respect of the applications considered. Cases considered and approved of in respect of public powers: *Pharmaceutical Manufacturers of SA and Another: In Re: Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC), *Sikunda v Government of the Republic of Namibia* 2001 NR 181 (HC), *Bato Star Fishing Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC).
- Although the adoption of Article 18 governs the reviewability of administrative decisions by the Court, the common law grounds for review did not disappear and should be interpreted in terms of the constitutional grounds for review. *Immigration Selection Board v Frank* 2001 NR 107 (SC) considered and applied.

Guidelines

- Certain guidelines were provided in respect of steps to be taken by the Minister when he considers the expropriation of agricultural land.

Order

- Orders made in respect of each Applicant to the effect that the decision by the Minister to expropriate their respective farms are set aside. The First and Second Respondents ordered to pay the costs of the three Applicants, which costs include that of one instructing and two instructed counsel. The First and Second Respondent also ordered to pay the costs of the applicant in the first application (P) A 266/2006.

JUDGMENT

CASE NO.: (P) A 27/2006
CASE NO.: (P) A 266/2006

In the matter between:

GÜNTHER KESSL

APPLICANT

and

**MINISTRY OF LANDS AND RESETTLEMENT
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1ST RESPONDENT

**2ND RESPONDENT
3RD RESPONDENT**

CORAM: MULLER, J. et SILUNGWE, A.J.

Heard on: 2007 July, 24 & 25

Delivered on: 2008 March 06

MULLER, J.: [1] This matter received a lot of publicity as it is considered to be a test case. That is only partly true, because the applicants conceded that the Government of Namibia has the right to expropriate farms under certain conditions. Consequently, a very large part of what is contained in the annexures to the first respondent's answering affidavit is not relevant for the decisions that are sought. However, there are two main issues that the parties agreed need consideration and adjudication by this Court and could, therefore, be seen as a test case. These issues are, firstly, whether the *audi alterem partem* principle is relevant in expropriation cases of this nature; and, secondly, whether the procedure that was followed in all these three cases is in conformity with the law.

[2] The applicants applied for similar relief against the same respondents in all these applications. Except for the third respondent, the other two respondents opposed the applications. Both parties have consequently submitted consolidated heads of argument and although reference has mainly been made during argument before this Court to the first applicant's application, the *Kessl* – matter, the issues that this Court has to consider are the same in all three applications. We shall therefore hereafter refer to the applicants by name (e.g. *Kessl*) and not to first, second or third applicant. The Court is grateful for the comprehensive heads of argument submitted on behalf of the applicants and the respondents. These submissions contained in these consolidated heads of argument were further amplified during oral argument in Court, which lasted for a day and a half. The applicants were represented by Advocate Adrian Bourbon SC, assisted by Advocate Rudie Cohrssen, while the respondents were represented by Advocate Semenye SC, assisted by Advocate G Hinda.

[3] The applicants originally requested certain interim relief in the first part of their Notices of Motion, marked (A) and furthermore for certain reviews of the decisions of the first respondent in respect of the expropriation of the particular four farms, which were the subject-matter of these applications, in part B thereof. The farms that form the subject-matter of these applications and which were expropriated are as follows:

Farms Gross Osumbutu No. 124 and Okozomdudu West, No. 100 in the Otjozondjupa Region, both belonging to Mr Günther Kessl; farm Welgelegen No. 303, also in the Otjozondjupa Region, belonging to Martin Joseph Riedmaier; and farm Heimarterde No. 391, also in the Otjozondjupa Region, belonging to Heimarterde CC.

[4] Because the Notices of Motion in respect of all three applications regarding these four farms belonging to the three owners (applicants) are the same, we shall only refer to the first Notice of Motion in respect of Mr Günther Kessl's two farms, except where there may be a difference, which will be dealt with by reference to that specific farm or applicant. It is clear from the Notices of Motion that the reliefs requested in respect of all four farms are similar. The Notice of Motion in respect of the farms of Mr Günther Kessl reads as follows:

“BE PLEASED TO TAKE NOTICE that application will be made in terms of Rule 53 on behalf of the abovementioned applicant on a date to be arranged with the Registrar for an order in the following terms:

- 1. Reviewing and setting aside the decision of the first respondent to expropriate the farm and all rights attaching to it, described as the farm Gross Ozombutu No. 124, Otjozondjupa Region.”***
- 2. Reviewing and setting aside the notice of expropriation dated 5 September 2005 in respect of the abovementioned farm.***

3. *Reviewing and setting aside the decision of the first respondent to expropriate the farm and all rights attaching to it, described as the farm Okozongutu West No. 100, Otjozondjupa Region.*
4. *Reviewing and setting aside the notice of expropriation dated 5 September 2005 in respect of the abovementioned farm.*
5. *Reviewing and setting aside the decision of the second respondent recommending to the first respondent that the farms Gross Ozonbutu NO. 124, and Okozongutu West No. 100 Otjozondjupa Region are suitable for expropriation in terms of the provisions of the Act.*
6. *That the decisions referred to in paragraph 1, 2, 3, 4 and 5 above be declared in conflict with Articles 10, 12 and 18 of the Constitution and set aside.*
7. *That the first respondent, alternatively first and second respondents and such further respondents as may oppose this application be ordered to pay the costs of this application jointly and severally.*
8. *Granting further and/or alternative relief to the applicant.”*

[5] As a result of an agreement between the applicants and the first respondent in respect of the interdicts – part A of the Notice of Motion – the first respondent is not going to proceed with the expropriation of the farms until a decision is made by this Court. It is not necessary to deal with that aspect any longer and it is, therefore, ignored for the purpose of this judgment. Before us the parties were *ad idem* that only the second part, namely B, in respect of the reviews, should be argued and were in fact so argued.

[6] The applicant in respect of the first two farms, Mr Günther Kessl, originally instituted action by way of a Notice of Motion against the same respondents. As a result of new litigation instituted by Mr Kessl against the same respondents by way of this present Notice of Motion, as well as the other Notices of Motion instituted by the other two applicants, the issue of costs of the original application remained alive. Although this issue of costs of the first application by Mr Kessl was originally opposed by all the respondents, it was during argument conceded by Mr Semenyé that the respondents were indeed liable to pay the costs of that application. Consequently, an order will be made by this Court that the respondents should pay the wasted costs of the applicant, Mr Günther Kessl, in respect of the first application, No. 266/05, dated 5 September 2005.

[7] Despite the concession by the applicants that the issue of land reform and resettlement was not disputed, as well as the fact that this concession rendered most of the voluminous annexures to the first respondent’s answering affidavit unnecessary, in order to understand the complexity of this issue, we consider it necessary to refer briefly to the history of the ownership of land in Namibia prior to Independence. Several writers and researchers referred to the post-colonial situation, as well as to the situation regarding ownership of land during the colonial period prior to the Independence of Namibia. In a paper to the Institute for Public Policy Research under the heading: **The Commercial Farm Market in Namibia: Evidence from the First Eleven Years**, dated November 2002, writers Ben Fuller and George Eiseb referred to this issue when they discussed the commercial farm market in Namibia. They also mentioned that, according to many Namibians, the war for National Liberation was fought because of land. The process of colonial dispossession by removing indigenous people from their lands to create farms for successive waves of firstly, German and secondly, South African settlers, also led to this perception. The first respondent also attached as an annexure to the answering affidavit

a paper prepared by the Legal Assistance Centre called “**A Socio/Legal Perspective on the Namibian Land Reform and Resettlement Process**” by Professor S L Haring and Mr Willem Odendaal. In that paper, land ownership in Namibia was also discussed. They refer to these parallel agricultural systems comprising communal and commercial land in Namibia which divided Namibia in terms of land utilisation and also reflected the racial division of the country with most whites as freeholders of land and blacks as communal land holders. The former were usually well off, but the latter were generally poor. There was usually ownership of land in the freehold system in commercial farming areas, while communal land holders did not have any title to their land. Of the 82.4 million hectares of surface area in Namibia, 41% percent is described as communal land, while commercial farms and proclaimed towns make up the remainder of the surface area, namely, 44%. Save for the mining sector, the authors said that agriculture plays a major roll in the economy of Namibia and the largest part of the Namibian labour force is employed in the agricultural sector. The authors made the further comment in their study, dated 2002, that Namibia needs a clear agricultural development policy that includes restructuring of the existing commercial agricultural sector, improving agriculture on the communal lands, as well as a bold and creative policy of Land Reform and Land Resettlement.

[8] The Namibian Constitution contains specific provisions regarding the right of Namibians in respect of the acquisition and ownership of property. The Constitution also provides for the expropriation of property subject to the payment of just compensation, if it is in the public interest. The Agricultural (Commercial) Land Reform Act, No. 6 of 1995 (hereinafter referred to as the Act) regulates the purchase and redistribution of privately owned farms on the basis of “willing buyer/willing seller”. Section 14 of that Act provides for the purchase of land by the Government and prescribes the appropriate notice to be given. It is common cause that this is not a part of the expropriation process, but in the event of expropriation of property, a section 14 notice is a prerequisite. Section 20 of the Act deals with the expropriation of property and the giving of the required notice. The Act has been amended on a few occasions.

[9] The Act also makes provision for the appointment, composition, powers and duties of the Land Reform Advisory Commission, (hereinafter called “the Commission”), i.e. the second respondent in these three applications. In 1991, Cabinet established a technical committee on commercial farm land which was mandated to investigate the entire land tenure situation in Namibia and to make recommendations. This technical committee’s recommendations included, *inter alia*, targetted land, abandoned land, under-utilised land, over-utilised land, as well as ownership of multiple farms and excessive ownership of land. Some of these recommendations were included in the Act. What was not included in the recommendations of the technical committee is that land owned by “*absentee foreigners*” can be expropriated and reallocated to the Land Reform Programme. It is clear from the documents attached by the first respondent to its answering affidavit that the Act is the product of an intensive effort by the Namibian Government to address the need for land reform. In its aforementioned research study, the Legal Assistance Centre referred to the fact that an impressive effort to address the land reform issue in Namibia was made, but stated that it was a difficult subject and that some of the problems that contributed thereto were policies which underlie land reform. Such policies include poverty alleviation, affirmative action, the redress of historical inequities, which do not always have the same aim, namely to provide for efficient redistribution of productive commercial agricultural land.

[10] Reference is also made to the way that land was redistributed in Zimbabwe and the outcry in certain sectors in Namibia to follow a similar process here and not the process as envisaged by the Constitution and the Act. This outcry was also strengthened by the factual situation that farmers in the commercial sector, in certain productive areas, did not offer their

farms for sale to the Government, or when offers were made, the prices were excessive or unrealistic. This led to extensive criticism, namely that the resettlement process was too expensive and took too long. The National Union of Namibian Workers also criticised the principle of “willing buyer/willing seller” in respect of acquisition of land for resettlement. A general impatience was expressed with the slow pace of land redistribution.

[11] As mentioned before, the previous description of the history of land in Namibia and the steps taken since Independence for Land Reform, as dealt with by different authors in different research projects on this issue, is referred to for the sole purpose of facilitating a better understanding of the matter and the applications that this Court has to deal with. It is by no means a confirmation of the correctness of these reports or the relevance that the first respondent wishes to place thereon by attaching them to its answering affidavit.

[12] We also consider it of importance to refer at this juncture to certain relevant articles of the Namibian Constitution and to certain sections of the Agricultural (Commercial) Land Reform Act. We shall first refer to relevant articles of the Constitution and thereafter to relevant sections of the Act.

[13] Chapter 3 of the Constitution of the Republic of Namibia (hereinafter referred to as the Constitution) deals with the “**Fundamental Human Rights and Freedoms**”. Article 5 is the first article in this chapter and deals with the “**Protection of Fundamental Rights and Freedoms**”; it reads as follows:

“The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.”

Article 12 deals with **Fair Trial** and Article 12(1)(a) was referred to in argument by the applicants. Article 12 (1)(a) states:

“In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.”

With regard to **Property**, Article 16 provides as follows:

(1) All persons shall have the right in any part of Namibia to acquire, own or dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.”

Subarticle 2 of Article 16 also deals with property and in particular, the **expropriation** thereof:

“(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.”

Article 18 deals with **Administrative Justice** and reads as follows:

“Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.”

The **Limitation of Fundamental Rights and Freedoms** are also dealt with in the Constitution and, in particular, in Article 22 thereof:

“Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

- (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;***
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.”***

[14] The Act referred to is divided into parts and sections. Part I, for instance, makes provision for the Land Reform Advisory Commission and comprises sections 2 to 13. Part II deals with the acquisition of agricultural land by the State for purposes of Land Reform and comprises section 14 to 15, while Part IV deals with Compulsory Acquisition of Agricultural Land, which is commonly known as expropriation of land, and comprises sections 19 to 35. Certain of these sections are relevant and are quoted in full.

[15] Section 14, (as amended by Act 14 of 2003) which falls under Part II of the Act, reads as follows:

“14. (1) Subject to subsection (2), the Minister may, out of moneys available in the Fund, acquire in the public interest in accordance with the provisions of this Act, agricultural land in order to make such land available for agricultural purposes to Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.

(2) The Minister may under subsection (1) acquire –

- (a) any agricultural land offered for sale to the Minister in terms of section 17(4), whether or not the offer is subsequently withdrawn;***
- (b) any agricultural land which has been acquired by a foreign national, or by a nominee owner on behalf or in the interest of a foreign national, in contravention of section 58 or 59, or***
- (c) any agricultural land which the Minister considers to be appropriate for the purposes contemplated in that subsection.”***

Section 15 deals with the **inspection of Agricultural Land** to be acquired by the State and reads as follows:

“15. (1) Where the Commission considers it necessary or expedient for the performance of its functions under this Act, the Commission may in writing authorise any person to enter upon and inspect any agricultural land, and may specifically –

- (a) in order to ascertain whether such land is suitable for acquisition for the purposes contemplated in section 14(1), or in order to determine the value thereof, authorise that person to -**
 - (i) enter upon such land with assistants and vehicles and equipment;**
 - (ii) survey and determine the area and levels of that land;**
 - (iii) dig or bore under the sub-soil;**
 - (b) authorize that person to demarcate the boundaries of the land required for the said purposes.**
- (2) A person authorised by the Commission under subsection (1) –**
- (a) may, in so far as it may be necessary to gain access to the land in question, enter upon and go across any other land;**
 - (b) shall not, without the consent of the owner or occupier concerned, enter upon or cross any land, unless he or she has given the owner or occupier at least 7 days’ notice of his or her intention to do so.**
 - (c) shall not, in the exercise only of the powers conferred by this section, enter into any dwelling-house without the consent of the owner or occupier.**

The relevant parts of Section 20, (as amended by Act 13 of 2002 and Act 14 of 2003) which fall under Part IV of the Act, provide as follows:

“20. (1) Where the Minister, after consultation with the Commission, decides to acquire any property for the purposes of section 14(1) and

- (a) the Minister and the owner of such property are unable to negotiate the sale of such property by mutual agreement, or**
- (b) the whereabouts of the owner of such property cannot be ascertained after diligent inquiry, the Minister may, subject to the payment of compensation in accordance with the provisions of this Act, expropriate such property for such purpose.**

(2) Where the Minister decides to expropriate any property, the Minister shall cause to be served on the owner concerned an expropriation notice which shall –

- (a) ...**
- (b) ...**
- (c) ...**
- (d) ...**
- (e) ...**
- (3) ...**

(4) Where the property expropriated is land, the Minister shall cause a copy of the expropriation notice, or a notice to the effect that the land is being expropriated giving the particulars of the expropriation, to be served –

(a) upon every person who, according to the title deed of the land has any interest in that land...”

(b) ...

(5) ...

(6) Notwithstanding anything to the contrary contained this Act, the Commission shall, where the Minister decides in terms of subsection (1) to expropriate any agricultural land, consider the interests of any persons employed and lawfully residing on such land, and the families of such persons residing with them, and may make such recommendation to the Minister in relation to such employees and their families as it may consider fair and equitable in the circumstances.

[16] At the commencement of the oral submissions before us, the applicant handed up a document called a “Chronology” in respect of certain events and letters with the relevant dates thereof. We found this “Chronology” useful in respect of the particular dates of which certain letters were written or certain events took place and we find it necessary to quote from that “Chronology” hereunder in *extenso*. The respondents did not object to this chronology or dispute the correctness thereof:

<i>Date</i>	<i>Event</i>
6 December 1995	<i>The Agricultural (Commercial) Land Reform Act 1995 comes into force</i>
1997	<i>The Investment Treaty between Namibia and Germany ratified by Namibia</i>
27 November 2003	<i>Meeting of the Land Reform Advisory Commission</i>
17 February 2004	<i>Meeting of the Namibian Cabinet held which decided on course of expropriation of farms</i>
10 March 2004	<i>Meeting of the Land Reform Advisory Commission addressed by the Minister</i>
17 and 18 March 2004	<i>Meeting of the Land Reform Advisory Commission</i>
10 May 2004	<i>Meeting of the Land Reform Advisory Commission attended by the Minister</i>
10 May 2004	<i>Two notices of identification of the farms belonging to Kessl as appropriate for acquisition issued and served</i>
24 May 2004	<i>Kessl writes to Minister in response to the notices</i>
2 June 2004	<i>Minister acknowledges receipt of the letter of 24 May 2004</i>
15 June 2004	<i>Minister writes to grant extension to 30 June for making offer</i>
29 June 2004	<i>Diekmann Associates write to Minister on behalf of Kessl to seek a further extension</i>
23 September 2004	<i>Minister grants extension to 29 September 2004</i>
29 September 2004	<i>Diekmann Associates state on behalf of Kessl that he is not interested in selling the farms</i>
1 October 2004	<i>Ministry send expropriation notices to the Attorney-General for scrutiny and verification before they are sent out to the owners</i>
11 October 2004	<i>Minister gives Kessl an opportunity in terms of Article 18 of the Constitution for representations to be made</i>
21 October 2004	<i>Diekmann Associates respond seeking documents and information to make such representations</i>
27 October 2004	<i>Ministry requests legal advice from the Attorney-General with regard to the response from Diekmann Associates</i>
1 November 2004	<i>Ministry receive a letter from the Attorney-General that the notices are in line with the legal requirements, save for some typographical errors</i>
1 and 2 December 2004	<i>Meeting of the Land Reform Advisory Commission</i>
30 June 2005	<i>Kessl advised that his farms are to be inspected</i>
12 July 2005	<i>Inspection of farms</i>
19 August 2005	<i>First set of expropriation notices signed by the Minister</i>

22 August 2005	<i>First set of expropriation notices served</i>
31 August 2005	<i>Amended front pages of expropriation notices issued</i>
5 September 2005	<i>Second set of expropriation notices signed by the Minister</i>
5 September 2005	<i>Kessl signs his founding affidavit in review application Case P (A) 266/05</i>
6 September 2005	<i>First review application Case P (A) 266/05 instituted</i>
6 September 2005	<i>Second set of expropriation notices served</i>

[17] In respect of the chronological sequence of events, including letters written by the applicants or the first respondent, it is necessary to quote some of these letters or the relevant letters, minutes or other documents *in extenso* or in some instances, only relevant parts of such documents. We shall first refer to minutes of meetings of the Cabinet or the Commission, or relevant parts thereof, and thereafter to relevant letters written on behalf of the applicants or their legal representatives and by the Minister, or relevant parts thereof.

[18] On 17 February 2004, the Namibian Cabinet decided to approve the expropriation of certain farms, none of which included the relevant farms of the three applicants. Those farms are included in Minutes of the Cabinet dated 17 February 2004.

[19] Minutes of these meetings of the Commission were attached by the first respondent to his answering affidavit and were referred to during argument in Court by both parties, namely:

- (a) *Minutes of a special meeting on Expropriation held by the Honourable Minister with the Land Reform Advisory Commission on 10 March 2004;*
- (b) *Minutes of an Extraordinary meeting of the Land Reform Advisory Commission of 10 May 2004; and*
- (c) *Minutes of a Meeting of the Land Reform Advisory Commission of 1 and 2 December 2004.*

These minutes are quoted *in extenso* hereunder. Only 2 pages of the minutes of the meeting of 1 and 2 December 2004 (“C” above) were attached of which only paragraphs 7 and 8 are relevant. The minutes that we quote hereunder have not been edited and no spelling mistakes, et cetera, have been corrected.

[20] ***SPECIAL MEETING ON EXPROPRIATION HELD BY THE HON. MINISTER WITH THE COMMISSION – 10TH MARCH 2004***

1. **Present**

<i>Mr H M Tjipueja</i>	<i>MLRR (Chairman)</i>
<i>Mr M Shanyengana</i>	<i>MLRR</i>
<i>Mr J D Brand</i>	<i>NAU</i>
<i>Mr M Kukuri</i>	<i>Private</i>
<i>Mrs J van der Merwe</i>	<i>NAU</i>
<i>Ms E Iipumbu</i>	<i>NNFU</i>
<i>Mr D S Shimwino</i>	<i>Private</i>
<i>Rev S M Simaniso</i>	<i>NFU</i>
<i>Mr T Ipumbu</i>	<i>Ministry of Justice</i>
<i>Mr S Steenkamp</i>	<i>MAWRD</i>
<i>Ms S Nangula</i>	<i>Private</i>
<i>Mr V K Likoro</i>	<i>Private</i>
<i>Mr G Katjiuongua</i>	<i>Agri-Bank</i>
<i>Dr N K Shivute</i>	<i>Secretary</i>

1.2 Apologies

Mr F M Tsheehama MLRR

1.3 Absent

None

1.4 Staff Members

Mr M Rigava	Deputy Valuer General Rating and Taxation
Mr D Beukes	Registrar of Deeds
Mrs Mutota	Acting Deputy Director - LUPA
Mr Nchindo	Land Use Planner
Ms J Imbili	Valuer Technician
Mr S Fredericks	Clerk

Questions Asked and Responses:

Q: 1 When will the expropriation process start?

A: According to Cabinet the process will start as soon as possible, meaning:

- Referring to arrangements on informing targeted owners by sending expropriation notices.
- Guidance on way forward from line Ministries, Office of the Attorney General and the Ministry of Justice.

Q: 2 What will be the role of the Commission be with regard to the expropriation process?

A: To advise the Hon. Minister on:

- Allocation of expropriated farms,
- Selection of ideal candidates, and
- Advise on deficiencies and possible land use.

Commissioners should consult their Acts.

Q: 3 What is the expropriation criteria for excessive agricultural commercial land?

A: The Commission should give advise to the Hon. Minister in this regard.

Q: 4 Is there funds available for this exercise?

A: The emphasis was that the government cannot look for funds to acquire land beyond the borders of Namibia, as the international community will only make funds available for the development of already acquired land.

Q: 5 What is the estimated timeframe for the completion of the expropriation process?

A: About twenty (20) years however it depends on a few factors which include among others, the long list of landless citizens of the country, market prices, current fund allocation for land reform (N\$50 million) and the number of farms offered to the State.

Q: 6 Does the Ministry and Government at large, have a strategic plan towards the implementation of the expropriation exercise?

A: A strategic plan, subject to amendments, is been revised and will be put on paper to avoid the process having a negative impact on the agricultural sector.

Q: 7 Do commissioners have the mandate to request for a individual appointment with the Minister to discuss matters relating to the Commission?

A: Yes.

Q: 8 Is the budget allocation of N\$50 million which is earmarked for willing-seller-willing-buyer land reform purposes also to cover costs of expropriation?

A: Yes.

Q: 9 Will there be pricing differences other than those been used for the current land reform program?

A: No. The same pricing principles will apply as with the willing-buyer-willing-seller principle.

In actual fact, payments may be a bit higher than those paid for at present as the expropriation exercise displaces people and will have to compensate them for the inconvenience caused.

There is however room for negotiating prices if it appears that prices are unreasonable with regard to market prices.

Q: 10 Are there penalties for absentee landlords not utilizing farmland they own?

A: No. The Commission may however advise the Hon. Minister in this regard as this will be determined by information on the ground, which can only be brought to the attention of the Hon. Minister by the Commissioners.

This will however be dealt with, with the implementation of the land tax as foreign absentee landlords will be charged a different rate of tax.

Q: 11 Are the farms published in the Namibia Today newspaper, indeed those earmarked for the kick-start of the expropriation exercise?

A: No. The truth of the matter is that the origin of that list, as published, is not from the Ministry.”

[21] **“EXTRA-ORDINARY MEETING OF THE LAND REFORM ADVISORY COMMISSION**

DATE : 10th May 2004

VENUE : Block A, Brendan Simbwaye Square,
MLRR HQ

TIME : 10h00

PURPOSE : HON MINISTER CALLED THE MEETING TO CONSULT THE LRAC ON THE EXPROPRIATION OF FARMS AS PROVIDED IN SECTION 20 (1) OF THE AGRICULTURAL (COMMERCIAL) LAND REFORM ACT, ACT 6 OF 1995

PRESENT

- | | | |
|-----|-------------------|-----------------|
| 1. | Mr FMK Tsheehama | Chairman |
| 2. | Mr HM Tjipueja | Deputy Chairman |
| 3. | Mrs J vd Merwe | Commissioner |
| 4. | Mr J Brand | Commissioner |
| 5. | Mrs NM Kukuri | Commissioner |
| 6. | Mr DS Shimwino | Commissioner |
| 7. | Mr MN Shanyengana | Commissioner |
| 8. | Ms S Nangulah | Commissioner |
| 9. | Mr C Kwala | Commissioner |
| 10. | Mrs L Muttotta | Commissioner |
| 11. | Mrs NK Shivute | Secretary |

APOLOGIES

- | | |
|----------------------------|---------------------|
| 1. Mr G Katjiuongua | Commissioner |
| 2. Mr V Likoro | Commissioner |
| 3. Mr T Ipumbu | Commissioner |
| 4. Mrs E Ipumbu | Commissioner |

ABSENT

None

1. Opening

The chairperson welcomed all present and invited the Hon Minister to address the Commission. The Chairperson informed the meeting that the Hon Minister has requested to address the Commission as part of the requirement of the Act, that, before any expropriation is done, he should consult the Land Reform Advisory Commission (LRAC)

2. Address of the Hon Minister

The Hon Minister submitted a memorandum to the Commission in which he outlined the following items:

- The memorandum was presented to the Commission in accordance with the provision of Section 20 (1) of the Act, which requires the Minister to consult the Commission prior to the decision to expropriate.***

3. Statement: Main Points

3.1 Following on the address of the 10th March 2004, in which the Commission was informed of Government intention to expropriate some commercial farmland, the Minister in consultation with LRAC has to make a decision to expropriate.

3.2 A list of farms (in files) handed to the Chairman for consideration by the LRAC.

3.3 Specified 8 criteria points for expropriation.

3.4 Stated need to resettle 240,000.

3.5 Location of lands where offers are not forthcoming – dire need and demand to resettle people.

3.6 Call on commissioners to exercise its mandate to advice the Hon Minister on how to implement his desire to acquire the properties on the list.

3.7 Request in put and comments. Inviting commissioners to revert back to the Hon Minister should they need additional information.

3.8 Minister expresses urgency on the matter.

Chairman: Thanked the Hon Minister and the Minister left the meeting.

4. LRAC MEETING

4.1 The chairman seized with the files of farms, which the Hon Minister wishes to acquire compulsorily, thanked the commissioners for responding to the emergency call to attend the extra ordinary meeting on a short notice.

4.2 He reiterated the need to respond expeditiously to the request.

- **Therefore, give comments on properties identified – today to enable the Hon Minister to respond to the dire demand for land by**
- **Technical Input is required**
- **The meeting is consulted by the Hon Minister.**

5. The chairman outlined as provided in the Act:

5.1 The chairman outlined the process as provided in the Act:

- **Negotiate sale**
- **See letter of intend to acquire farm**
- **If agree buy**
- **If no agreement, serve notice to expropriate, after the land owner has been invited to make representations.**
- **This above process is to satisfy the provision of Article 18 in the Namibian Constitution. After the notice has been issued, the owner will submit a claim, the farm will be valued, a counter offer will be issued and if agreed, the farm will be purchased, otherwise proceed to the Lands Tribunal.**

5.2 Capacity/Readiness

- **The Ministry is ready to begin the process:**
- **Valuers have been received from the Zimbabwean Government**
- **Funds are available**
- **Transport is made available and more will be made available later.**

The total farms identified by the Hon Minister are 25 and a total of sixteen (16) owners. The LRAC was to deliberate on the matter (to serve notice of intention to acquire).

Farms

Ongombo Kalkpan Omitara West Omitara Oos

No.	Farm Name	No.	Size	Region	Nationality	Reg Div	Resolution
1	Wyoming		5038	Omaheke	German (based)	L	Serve notice (absentee foreign national)
2	Kansas		5964	Omaheke	German (based)	L	Serve Notice
3	Gross Ozombutu	124	5145	Otjozondjupa	German	D	Foreign National, more than one farm
4	Okozongutu	100	5060	Otjozondjupa	German	D	Serve Notice
5	Hohenstein	39	3767	Kunene	German	A	Foreign
6	Kuramakatiti	749	5320	Kunene	German	A	Landlord
7	Welgelethen	303	5638	Otjozondjupa	German	D	Serve Notice
8	Heimaterde (PTY)	391	6807	Otjozondjupa	German	D	More info required Foreign/absent
9	Endeka	392	7627	Otjozondjupa	German	D	Serve notice
10	Paxton	44	4857.7	Kunene	German	A	More than one farm ownership of shares
11	Saratoga	42	5337.29	Kunene	German	A	Not clear- pending on information
12	Etiromund	51	4748	Erongo	Austria	H	More information
13	Onguati	52	6177	Erongo	Austria	H	Required
14	Rem Extent of Omitara	109	4087	Omaheke	Namibian	L	No consensus criteria/consideration by the Hon Minister
15	Omitara West	203	4280	Khomas	Namibian	K	No consensus on criteria/consideration by the Hon Minister
16	Vlakplaats	325	2529	Otjozondjupa	French/Namibian	D	Ozondjahe farming
17	Ozondjahe Nord	316	5072	Otjozondjupa	French/Namibian	D	Company with
18	Ozondjahe Peak	315	2529	Otjozondjupa	French/Namibian	D	50% Namibian
19	New Market	156	3134	Otjozondjupa	French/Namibian	D	Ownership
20	Epsom	155	4982	Otjozondjupa	French/Namibian	D	Resolved
21	Ozondjahe	152	5616	Otjozondjupa	French/Namibian	D	Serve letter
22	Kalkpan	314	5323	Omaheke	Namibian	L	Deferred for the consideration of the Hon Minister
23	La Paloma	438	5225	Otjozondjupa	German	D	Verify Nationality
24	Otjikondo	37	8288	Otjozondjupa	German	A	Verify Nationality
25	Pamela	37	4842	Kunene	German	A	Verify Nationality
26	Groot Ruijter	992	5918	Omaheke	South Africa	L	Serve Notice of intent

Discussion

Commission is divided to arrive at a decision.

Concerns raised involved i.e.

- ***Why the Hon Minister picked this farm, if the Hon Minister has a prerogative to pick any farm that meets the criteria.***
- ***That the Hon Minister has made public his criteria, before and his current address to the Commission, i.e. no farms have been forthcoming in the area and that the farms were suitable for resettlement purposes.***

Resolution

- *No specific resolution was taken in this regard, as the meeting was divided into two obvious directions.*
- *The matter was referred to the Hon Minister to decide.*

Conclusion

The Hon Minister then returned to the meeting at about 14h00.

The Chairperson briefed the Hon Minister of the outcome of the meeting.

The Hon Minister thanked the Commissioners for their input and advice and made the following comments, that:

- *To differ is normal, and that what is important is to reach a consensus/ compromise/ agreement such as in the case of Ongombo, Kalkpan and Omitara (2*
- *With regard to what people say and their perceptions is not a criteria for expropriation by the Hon Minister.*
- *Not mentioned in statement that labour dispute is a criteria.*
- *No consideration of what has happened, but rather on the criteria.*
- *Taken note of position that when information is not clear, more other views can be solicited including from the Hon Minister.*
- *Noted the various views and questions that vary but accept that persons can work to a consensus.*
- *Taken note of information that farms with a total of 68,834 ha have been recommended to be served with the letter of intend.*

Hon Minister expressed the need for chairman to ensure that the resources are available.

Chairman assured the Hon Minister that there is enough funds to cover the initial phase, that:

- *N\$35 million is currently in the fund as balance from last year.*
- *N\$50 million appropriated for the land purchase for this year which would make a total of N\$85 000.00*
- *Minister at an appropriate time will publish the list of farms to be acquired i.e. when he has finally taken a decision to compulsorily take the farms in accordance with part IV of the Agricultural (Commercial) Land Reform Act, Act 6 of 1995 and its relevant amendments.*
- *Gazetting will only happen to farms to be expropriated, and this will only be when owner and the Hon Minister do not agree to sale.*
- *The LRAC was advised to still keep information confidential, as this is only an intention to purchase – no report of specific details to the organizations the commissioners represent.*

Hon Minister thanked the Commissioners and adjourned the meeting at 14h30.”

[22] Relevant parts of the Minutes of the Land Reform Advisory Commission held on 1 and 2 December 2004, are as follows:

“7. Farm Welgelegen No. 303 Reg. Division D

The owner was also served with a letter of intention to acquire the farm on 5 June 2004, but declined the offer on 29 September 2004. Preparation for Notice of Expropriation in progress.

Resolution

Ministry to proceed with expropriation notices in liaison with the Attorney General’s office.

8. Farms Okozonguty West No. 100 and Gross Ozombutu No. 124 Registration Division D

Owners were served with letters of intention to acquire the farms on 10 May 2004, but declined the offers on 29 September 2004. Preparation for Notices of Expropriation in progress.

Resolution

Ministry to proceed with expropriation notices in liaison with the Attorney General’s office.

9. Farms Hoheinstein No. 39 and Kurumakatiti No. 749 Registration Division D

Owners were served with letters of intention to acquire the farms on 16 June 2004, but declined the offers on 29 September 2004. Preparation for Notice of Expropriation in progress.

Resolution

Ministry to proceed with expropriation notices in liaison with the Attorney General’s office.”

[23] The following letters are also relevant. They were written by the respective applicants or by their legal representatives on their behalf to the first respondent and replied to by its legal representative who was in every case - Mr Diekmann of Diekmann and Associates. As regards the letters written in terms of section 14 (1) of the Act, these letters were apparently served on the foremen of the respective applicants on the following dates; 10 May 2004, in respect of the applicant -Günther Kessl; and at the end of June in respect of the applicants - Riedmaier and Heimaterde CC. It is not disputed that when these letters were served by an official of the first respondent, he was accompanied by several heavily armed members of the Namibian police force and the special field force. Since the contents of the three letters, served on the foremen of the three applicants, are similar, except for the names of the owners and the farms, only the letter addressed to Günther Kessl is quoted as an example hereunder:

***“Günter Kessl
PO Box 102
Otjiwarongo***

INTENDED ACQUISITION OF FARM GROSS OZOMBUTU NO 124

1. In terms of subsection 14(1) of the Agricultural (Commercial) Land Reform Act, 1995 (Act 6 of 1995) as amended (“the Act”), the Minister of Lands, Resettlement and Rehabilitation (“the Minister”) is entitled to acquire in the public interest and in accordance with the provisions of the Act, agricultural land which the Minister considers to be appropriate in order to make such land available for agricultural purposes to Namibian citizens who do not own or otherwise have the use of

agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.

2. *The Property, more fully described below, has been identified by the Minister as being appropriate for the aforementioned purposes:*

*Farm Name: FARM GROSS OZOMBUTU
Extent of property: 5145,7711 Hectares
Number: 124
Registration Division: D
Region: Otjozondjupa*

3. *After consultation with the Land Reform Advisory Commission and on behalf of the State, I hereby express an interest in acquiring the Property in the public interest and for the aforementioned purposes. You are accordingly invited to make an offer to sell the Property to the State and to enter into further negotiations in that regard.*
4. *Due regard being paid to the urgency of the matter, I would appreciate a response to this communication not later than 14 (fourteen) days from the date of receipt hereof.*
5. *Any further inquiries and all further correspondence in regards to this notice must be addressed BY REGISTERED MAIL or PERSONAL DELIVERY to:*

*Honourable Hifekepunye Pohamba
Minister of Lands, Resettlement and Rehabilitation
Private Bag 13343
Brendan Simbwaye Square, Block A
Goethe Street
Windhoek
Namibia*

[24] In response, each applicant addressed a letter to the Honourable Minister of the first respondent indicating their shock on receipt of these letters and requesting an extension of time to respond thereto after they had had time to consult and consider all the consequences of the intended acquisition of their farms. They also referred to the treaty between the Federal Republic of Germany and the Republic of Namibia called the **Encouragement and Reciprocal Protection of Investments Treaty** (the "Treaty"). The first applicant attached to this letter a list of the names of his employees on his two farms together with their dependants.

[25] On 2 June 2004, the Minister acknowledged receipt of this letter. On 15 June, the Minister again addressed a letter to Mr Kessl confirming the grant of an extension of time and concluded:

"I trust that by the extended deadline, you will be in a position, at the very least, to indicate whether you are prepared to enter into negotiations regarding the sale of the above-indicated property, or not. Should we have not received reply by the extended deadline we will have no option but to assume that you do not want to enter into negotiations regarding the sale of the above property."

Other letters, which are not very relevant, followed thereafter.

[26] On 29 September 2004, the legal representatives of Mr Kessl (and similarly the other two applicants) wrote to the Minister and informed him, *inter alia*, in paragraph 4 thereof as follows:

“4. Our client is not interested to sell the farms Okozongutu West no. 100 and Gross Ozonbudu no. 124, registration division: “D” or to enter into any negotiations regarding the sale of the aforementioned farms.”

Similar letters were written to the Minister by Diekmann and Associates, conveying the same information regarding the other applicants’ decision not to sell their farms.

[27] On 11 October 2004 the Minister addressed similar letters to all the applicants and the letter to the applicant Kessl is quoted hereunder:

“11 October 2004

**G Kessl
P O Box 102
Otjiwarongo**

Dear Sir

SUBJECT: OPPORTUNITY TO MAKE REPRESENTATIONS TO THE MINISTRY IN RELATION TO POSSIBLE EXPROPRIATION OF THE FARM OKOZONGUTU WEST NO 100 AND GROSS OZOMBUTU NO 124.

I hereby acknowledge receipt of your letter dated 29 September 2004 and at the same time, take note of your refusal to offer your farm to the state.

Having been unable to negotiate the sale of the below described property by mutual agreement, the said property has been provisionally identified for future expropriation in terms of Subsection 14 (1) and 20 (1) of the Agricultural (Commercial) Land Reform Act no. 6 of 1996, and Article 16 (2) of the Namibian Constitution.

In line with the requirements of Article 18 of the Namibian Constitution, you are hereby afforded an opportunity to make written representations in respect of the intended expropriation of the property and the representations should reach my office before the 22nd October 2004.

In the event that I, after having taken into account all relevant considerations, decide to expropriate your property, a Notice of Expropriation in terms of subsection 20 (2) of the Act will be served upon you. In this respect, your attention is drawn to the provisions of part IV of the abovementioned Act dealing with the Compulsory Acquisition of Agricultural Land.

Any further inquiries and all correspondence in regard to this letter must be addressed to the Permanent Secretary, F M Tsheehama.

The description of the property:

Farm Name:	OKOZONGUTU WEST
Number:	100
Registration division:	‘D’
Region:	Otjiwarongo
Extent of portion:	5060,5580

AND

Farm Name: OKOZOMBUTU
Number: 124
Registration division: 'D'
Extent of portion: 5145,7711

Counting on your usual cooperation and understanding.

Yours sincerely

Hifekepunye Pohamba, MP
Minister”

[28] On 21 October 2004 the legal representative of all three applicants addressed similar letters to the Minister of the first respondent in reply to the letter of 11 October 2004. The following letter serves as an example:

“The Honourable Minister
Minister Hifekepunye Pohamba
Ministry of Lands, Resettlement & Rehabilitation
Private Bag 13343
WINDHOEK

Honourable Minister Pohamba

RE.: FARM OKOZONGUTU WEST No 100 and FARM GROSS OZOMBUTU No 124
(REGISTRATION DIVISION “D”)

- 1. We act on behalf of Mr G Kessl who instructed us to reply to your letter dated 11 October 2004.**
- 2. My client has been advised that to give proper effect to Article 18 of the Constitution the following are inter alia required:-**
 - 2.1 a request for reasons for the two decisions taken, time to consider such reasons, and time to properly respond to such reasons;**
 - 2.2 full disclosure of documentation on which the decisions are based or should have been based, time to consider such documentation, and time to properly respond to such documentation;**
 - 2.3 the right by the landowner to test the decision-making by way of questioning of the decision-maker with regard to compliance with pre-requisites for and considerations which motivated the decisions;**
 - 2.4 comprehensive representations by the landowner which includes the right to an oral hearing;**
 - 2.5 Impartial decision-making – prescribed by Articles 12 and 18 of the Constitution – which in this case is impossible because the Minister is judge in his own cause.**
- 3. In the circumstances it seems that no purpose would be served by a response within the stipulated time frame and in the absence of the pre-requisites referred to above.**

4. *What the above indicates is a process already tainted by illegality and irregularity.*
5. *All my client's rights are reserved.*

Yours faithfully

DIEKMANN ASSOCIATES

Per: H DIEKMANN"

It is common cause that this letter has not been replied to by the Minister in respect of each of the applicants.

[29] The next letter by the Minister to Kessl (and the other two applicants) is dated 30 June 2005, eight months after the last letter of Diekmann and Associates dated 21 October 2004. In that letter, the Minister informed Kessl (and the other two applicants) that a team of land use planners and valuers, as duly authorised by the first respondent, were going to inspect the farms, in terms of the Act, on a specified date, which, as it transpired, was 13 July 2005, in the case of Kessl.

[30] On 19 August 2005, (similar) letters purporting to be Notices of Expropriation in respect of the particular four farms were written to the three applicants: The Notice of Expropriation to Kessl is quoted in full:

"NOTICE OF EXPROPRIATION OF AGRICULTURAL LAND IN TERMS OF SECTION 20 (1) OF THE AGRICULTURAL (COMMERCIAL) LAND REFORM ACT, (ACT NO. 6 OF 1995)

**To: Mr Günter Kessl
P O Box 225
Otjiwarongo**

1. ***KINDLY TAKE NOTICE that I, the Minister of Lands and Resettlement, for purposes of section 14 (1), after consultation with the Land Reform Advisory Commission, and the Minister and the owner of such property are unable to negotiate the sale of such property, have decided to expropriate on behalf of Republic of Namibia and hereby in terms of the power vested in me expropriates as provided under section 20 (1) of Agricultural (Commercial) Land Reform Act, 1995 (Act No. 6 of 1995) ("the Act"), the following immovable property, being an agricultural land and all rights (to minerals or otherwise), (not already registered in favour of a third party) attaching thereto in respect of which you are the owner.***

**CERTAIN: FARM GROSS OZOMBUTU NO 124
SITUATE: IN REGISTRATION DIVISION "D"
REGION: OTJOZONDJUPA REGION
MEASURING: 5145, 7711
(FIVE ONE FOUR FIVE COMMA SEVEN SEVEN ONE ONE) HECTARES
HELD BY: RIEDMAIER MARTIN
T73/1986**

as fully appear from sub-divisional diagram No. A 635.1921, a copy of which is attached hereto.

2. ***TAKE FURTHER NOTICE that the expropriation shall take effect on 5th September 2005, from which date the ownership of the expropriation land shall vest in the State, released, but subject to provisions of the law and to all rights, other than***

mortgage bonds, registered over or in relation to that land in favour of third parties, unless such rights are expropriated in accordance with the provision of the law.

- 3. TAKE FURTHER NOTICE that the State shall take possession of the expropriated property on 5th December 2005, or such other date as may be agreed upon between the owner and the Minister but within six (6) months after the date of expropriation so stated.**
- 4. BE INFORMED that, I hereby and upon the recommendation of the Commission, offer to you an amount of N\$2 253 847.74 (Two million Two Hundred and Fifty Three Thousand Eight hundred and fourty Seven Namibian Dollars and Seventy Four Cents) as compensation for the property which is being expropriated. If the amount of compensation offered herein is not accepted by you, you may not later than 24 October 2005, a date being not sooner than 90 days from the date of this notice, make an application to the Lands Tribunal for the determination of the compensation and if, upon expiry of the date so determined and specified by the Minister, you have not made an application to the Lands Tribunal for the determination of the compensation so offered. You shall be deemed to have accepted an offer made by the Minister in accordance with this notice.**
- 5. TAKE FURTHER NOTICE that I may withdraw the offer made under paragraph 4 herein, if a lessee has a right by virtue of an unregistered lease in respect of the portion of the property expropriated of which the Minister had no knowledge on the date of this notice.**
- 6. FURTHER your attention is drawn to sections 22 (1) and 25 (3)(b) of the Act, the provisions of which are set out in Annexure "A" and forms part of this notice.**
- 7. YOU ARE HEREBY FURTHER requested to indicate the address in Namibia to which you desire further documents, in connection with this expropriation, to be posted, delivered or tendered to you, and to deliver or cause to be delivered to me, within 6 from the abovementioned date of notice, the title deed of the expropriated property this is not in your possession or under your control, written particulars of the name address of the person in whose possession or under whose control it is."**

It is common cause that this letter was not served personally on any of the applicants.

[31] Final letters, dated 5 September 2005, were addressed by the Minister to the applicants with regard to the effect of the expropriation of their farms. It is not necessary to quote the contents thereof.

[32] The following is a background summary in respect of the four different farms owned by the three applicants as set out in the respective founding affidavits, which has not been disputed:

- (a) Applicant Günther Kessl he is the owner of two farms namely Gross Ozombutu No. 124 and Okozongutu West No. 100 both of Otjiwarongo in the Ozondjudupa Region. According to his affidavit he has 400 cattle on the farm and has invested approximately DM60.000 in the building of infrastructure and the electrification. He employs a farm manager, Mr Rainer Kersten. There are twelve workers with 42 dependants on the farms. The workers have houses with electricity. There are farm implements on the farm and Mr Kessl visits the farm two to three times a year. His children and family visit the farm regularly. He acquired the farms since 1973;**

- (b) **Martin Josef Reidmaier owns the farm Welgelegen No. 303, Ozontjodjupa Region. He has approximately 200 cattle on the farm and invested in buildings and fencing on the farm. He employs a full time farm manager, namely Mr Wolfgang Weber. He has three farm workers with their dependants on the farm and the workers have houses. He has farm implements on the farm and visits that farm two to three times per year. His three sisters and family also visit the farm; and**
- (c) **The farm Heinmarterde No. 391, Ozondjudupa Region, belongs to a close corporation. There are about five to six hundred cattle on that farm and the close corporation has since 1981 invested approximately 750 Euros in buildings and fencing, including game fencing. The close corporation employs a full time farm manager, namely Mr Hendrick Jacobus Winterbach. There are four workers with fourteen dependants on the farm. The workers have houses with electricity and all amenities. There are farm implements on the farm. Mr Adolf Herburger is the sole member, of the close corporation and visits the farm two to three times per year, often with friends or family from Europe.**

[33] We have already alluded to the two main submissions by the applicants, namely, that the respondents have not complied with the Act, nor was there any compliance with the rules of natural justice, to wit, the *audi alterem partem* rule. There are also other submissions by the applicants as to why the expropriation should be set aside. These submissions will be dealt with hereafter. The applicants also took two preliminary points of which only one needs to be dealt with. The first preliminary point was in regard to the application by the third applicant, but after a concession by Mr Semenye on behalf of the respondents, it does not need any further discussion. The second preliminary point by the applicants involves three submissions, namely:

- (a) that the expropriation notices in respect of the applicant *Kessl* were factually inaccurate, because they did not refer to Mr Kessl by name as being the owner of the two farms;
- (b) that in contradiction with the provisions of section 20 (2) and (4) of the Act, the expropriation notices were not served on the applicant *personally*, but on a legal representative, Mr H Diekmann of Diekmann Associates or a foreman; and
- (c) that the dates provided in the notices to make an application to the Lands Tribunal for determination of the compensation, if the amount of compensation offered was not acceptable, is shorter than what is provided by section 23 (4)(a) of the Act, namely, ninety days.

[34] The first submission, i.e. a) above, namely that the notices were factually inaccurate, have not been pursued in oral argument by Mr de Bourbon. These notices were originally inaccurate and not in compliance with the Act, but they were subsequently substituted with new notices. This was the objection raised in the original application by the applicant Günther Kessl, which was thereafter not pursued and for which costs have been claimed, as previously referred to. It is not our understanding that the applicant Kessl requires any further decision in this regard and it is consequently unnecessary to deal with this argument any further.

[35] The remainder of the next two submissions, i.e. (b) and (c) referred to above, namely, that service was not effected on the applicants personally, and that the minimum period of ninety days, as required by the Act, was not afforded to the applicants, remain live issues and will be discussed later on.

[36] We have earlier referred to the provisions in the Namibian Constitution regarding property rights as contained in several articles in Chapter 3, dealing with the protection of fundamental rights and freedoms, in particular Article 16 thereof. Despite the fact that the constitutionality of compulsory acquisition of property, namely, expropriation of land for the purpose of land distribution and land reform is not in issue, tension always exists between the protection of existing private property rights on one hand and the protection of the public interest on the other. This tension is clearly evident when the provisions of Article 16 (1) and Article 16 (2) of the Namibian Constitution are read together. Although we do not intend to analyse the different types of constitutional provisions that exist in the constitutions of many democracies in this regard, one should be alert to the fact that these constitutional provisions differ. A J van der Walt in his authoritative work, *Constitutional Property Clauses*, analyses the different property clauses of the constitutions of several countries, including the relevant provisions in the Namibian Constitution (Article 16) and others, eg. the South African Interim and Final Constitutions of 1993 and 1994, respectively. After analysing the property clauses contained in these different constitutions, he makes a comparison thereof. With regard to Article 16 of the Namibian Constitution, the learned author makes the following remarks at page 310:

*“The format of Article 16 is not unique. It consists of a combination of a positive guarantee and a negative guarantee, and resembles the property clause in the **German Basic Law 1949** and in the interim South African Constitution of 1993. The second part of the clause is a more or less traditional, negative guarantee that ensues that expropriations only takes place in the public interest and against compensation, and as such it does not create any new or unique problems. However, the first part of the clause is formulated positively, and that does create certain interpretation problems.*

*The first part of the clause establishes a positive guarantee of the right to acquire, own and dispose of property. It includes the following elements: (a) The guarantee is provided for the benefit of all persons, individually or in association with others, provided that Parliament may regulate or prohibit the right to acquire property by non-citizens. (b) The guarantee includes all forms of property, movable and immovable. (c) The guarantee explicitly includes the right to acquire, own and dispose of property and to bequeath it to heirs or legatees, subject to certain parliamentary powers to regulate the acquisition of property by non-citizens. In **Cultura 2000 and Another v Government of the Republic of Namibia and Others** the Namibia High Court confirmed that a guarantee in article 16 (1) applies to all persons, including both natural and juristic persons, such as companies; and also that the guarantee refers to both tangible and intangible property.*

The first part of the guarantee in article 16 (1) must probably, given the positive phraseology and content, be seen as a constitutional duty placed upon the state to uphold the institutional framework within which it is possible for people to acquire, own and dispose of property as meant in the article – in other words, what is referred to in German law as an institutional guarantee. Briefly, such an institutional guarantee means that the state is not obliged to provide property, but to uphold (not to abolish) the institutional conditions that enable citizens to exercise this right as set out in the provision. ...On the contrary, the state can expropriate and regulate the use of property, provided the general framework within which the rights can be exercised is not abrogated.”

The case of *Cultura 2000 and Another v Government of the Republic of Namibia and Others* is reported in the following Namibian and South African Law Reports: 1992 NR 110 (HC); 1993 NR 328 (SC); and 1993 (2) SA 12 (NHC).

In *The Constitutional Property Clause, supra*, the author discusses the property clause contained in the (Final) South African Constitution (1994), namely, section 25. As an introduction to that work, van der Walt deals with the phraseology of section 25 in comparison to that of section 28 of the Interim South African Constitution (1993) and points out that section 25 makes no specific provision for the protection of the right to acquire, hold and dispose of property as section 28 of the Interim Constitution did. In this regard, he explicitly refers to Article 16 (1) of the Namibian Constitution. On page 22 van der Walt says the following:

“This raises the question whether a purely negative property clause like section 25 is fundamentally different from a positive (or, more accurately, a combination between a negative and a positive) property clause, where the right to acquire, hold and dispose of property is guaranteed, in one form or another, explicitly and in positive terms.”

In *Constitutional Property Clauses, supra*, he expressly states that the property clauses in the *German Basic Law 1949* and the South African Interim Constitution of 1993 coincide with Article 16 (1) of the Namibian Constitution, which must be read together with Article 22 of the Namibian Constitution.

It would, therefore, be unsafe to blindly follow decisions in respect of property rights by the South African Constitutional Court based on section 25 of the new South African Constitution in the Namibian context.

[37] The reference to *Cultura 2000 and Another v Government of the Republic of Namibia and Others* 1992, *supra*, and the appeal case in the same matter, namely, *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1993 NR 328 (SC) confirmed that Article 16 of the Namibian Constitution includes both tangible and intangible property and that Article 16 (2) of the Constitution does not apply with regard to money in respect of the expropriation.

[38] In *Constitutional Property Clauses, supra*, Van der Walt deals with limitations of property rights contained in the Namibian Constitution in the following words, at page 316:

*“Usually the function of a limitation clause is to prescribe the requirements which must be met before limitation of the rights in question will be constitutional. A number of provisions in the **Constitution of the Republic of Namibia Act 1990** have a limitation function, in that they allow, within certain limits and subject to certain requirements, for legitimate state interferences with guaranteed rights. The most important of this for the purposes of property, are article 22, which provides the general requirements for limitations of the fundamental rights and freedoms and article 16 (2), which provides additional or specific requirements for limitations that assume the form of expropriations.*

Article 22, the general limitation clause, sets out the requirements for legitimate limitations of the fundamental rights and freedoms. As far as property is concerned, this provision applies to both compensable expropriations and non-compensable regulatory limitations. The requirements are that (a) the law which provides for the limitation should be of general application, (b) shall not negate the essential content of the right, (c) shall not be aimed at the specific individual, (d) shall specify the ascertainable extent of the limitation and identify the article (in this case article 16 (2)) on the authority of which the limitation is based.”

In the *Cultura 2000 case, supra*, the Namibian High Court held, with regard to the requirement in Article 22 (a), that the limitation should be of general application and should not be aimed at a particular individual. In that case, the applicants challenged the constitutionality of section 2 (1) of the *State Repudiation (Cultura 2000). Act, 32 of 1991*, which repudiated any sale,

donation or other alienation of movable or immovable property prior to the independence of Namibia. The Supreme Court of Namibia decided that section 2 (1) of the Act does not invade the property rights or other rights of the respondent, because the only effect of this section was that the Namibian Government restored the real state of affairs, namely, that the action by which the property was given to the respondent was an action of the former administration and not of the Namibian Government. The learned author, van der Walt, came to the following conclusion at page 319:

“Apart from the requirements in article 22, the provisions in article 16 (2) should probably be seen as additional or specific limitation requirements that apply to a specific category of limitations, namely expropriations. The effect is that regulatory provisions of property have to satisfy the requirements in article 22, while expropriations have to satisfy both the requirements in article 22 and the requirements in article 16(2).”

[39] Mr de Bourbon, on behalf of the applicants, referred us to Article 16 (1) of the Namibian Constitution, which sets out fundamental rights of people in a constitutional democracy concept of which Namibia is a part, to wit, the right of ownership of property. He concedes that the Namibian Government is afforded the right to expropriate property in terms of Article 16 (2) in accordance with what is usually called the *eminent domain*, entitling the State to take property. He submitted, however, that the right of ownership to property as embodied in Article 16 (1) of the Constitution, can only be derogated from if two main preconditions exist, namely, adherence to the rule of law; and payment of compensation. He recognised the rights in terms of Articles 23 (2) of the Namibian Constitution, which have the object to redress the imbalances of the past; and he further pointed out that Article 10 (2) is in particular mentioned in the Act. He drew the attention of the Court to the fact that the Court should jealously guard against any abuse of the fundamental right of property in order to ensure that that fundamental right is given as much protection as is judicially possible in terms of the laws of Namibia. Mr de Bourbon referred further to the approach that the Court should adopt in interpreting provisions of the Constitution and submitted that this approach should be a purposive approach to the interpretation of fundamental rights, as was enunciated by Lord Wilberforce in an opinion in *Minister of Home Affairs (Bermuda) and Another v Fisher and Another* [1980] AC 319 at pages 328-329. In this regard, Mr de Bourbon referred to certain Namibian cases in which that approach had been followed, namely, the *Minister of Defence, Namibia v Mwandighi* 1993 NR 63 (SC) at 70B-C; *Cultura 2000 and Another v Government of the Republic of Namibia and Others* 1992 NR 110 (HC) at 122D-E; and on appeal in *Government of the Republic of Namibia and Others v Cultura 2000 and Another* 1993 NR 328 (SC) 332H-333B, 333H-I and 340B-F. In this regard, reference is also made to *S v Zuma and Others* 1995 (2) SA 642 (CC) at 650-653, paragraphs [13]-[18], and finally to what the author, Allen, says on this issue in his work, *The Right to Property in Commonwealth Constitutions; (2000)*, Cambridge University Press at 83 *et seq.*

These submissions have not been challenged or dealt with in any way by Mr Semenyé, on behalf of the respondents.

[40] The same approach was followed by Kentridge AJ in *S v Zuma and Others* 1995 (2) SA 642 (CC) at paragraphs [13]-[18], pages 650-653. In that judgment, he referred with approval to the Supreme Court decision in *Minister of Defence v Mwandighi, supra*, and specifically to the approach to be followed. In the *Cultura 200* case, Mahomed CJ, said the following at 340B-C:

“A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and disciplining the Government.”

With further reference to the much quoted passage from the judgment of Lord Wilberforce in the *Minister of Home Affairs (Bermuda) v Fisher*, *supra*, Kentridge AJ said at paragraph [18] on p653 in the *Zuma case*, namely, that one must be reminded that a Constitution is a legal instrument, the language of which must be respected.

“If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination. If I may again quote S v Moagi (supra at 184), I would say that a Constitution

‘embodying fundamental rights should as far as its language permits be given a broad construction’.”

The case that Kentridge AJ referred to is *Attorney-General v Moagi* 1982 (2) Botswana LR 124 at 184.

[41] An Act that provides for fundamental rights of individuals should be interpreted restrictively or in such a manner as to place the least possible burden on subjects or to restrict their rights as little as possible. According to Mr de Bourbon, this would require a proper balancing of the rights of the public against those of individuals concerned, thereby adhering to the requirement of “public interest” as it appears in Article 16 (2) of the Namibian Constitution, as well as section 14 of the Act. In this regard, he referred to *Dadoo and Others v Klerksdorp Municipal Council* 1920 AD 552 and to what the author, Steyn, said in his work, *Die Uitleg van Wette*, 5th edition, page 104 and the authorities quoted therein.

[42] We are in agreement with what was held by the Supreme Court of Namibia with regard to the approach of interpreting the Namibian Constitution in the cases previously quoted. We further agree with the submission by Mr de Bourbon that those fundamental rights of a person to own property should be observed and that there should be strict adherence to the provisions of the enabling Act. In this instance, the provisions of the Agricultural (Commercial) Land Reform Act, should be strictly adhered to.

[43] Before we can address the applicant’s submissions regarding the alleged irregularity of the process, i.e. the alleged non-compliance with the requirements of the Act by the first respondent on which the relief by the applicants is craved, it is necessary to consider two crucial submissions on which counsel for both sides spent much time in argument. These are: firstly, the submission by Mr Semenyé that Article 16(2) of the Namibian Constitution is a self-contained provision, not permitting of any other consideration; and secondly, the submission by Mr de Bourbon that *audi alterem partem* is a prerequisite before the Minister can decide to expropriate property.

We shall deal with these submissions separately, although Mr Semenyé’s submission is based on the premise that *audi* is of no application in cases such as those under consideration.

Is Article 16(2) self-contained or not?

[44] Mr Semenyé argued that the only requirements for expropriation by the State are contained in Article 16(2) itself and no other statutory provision is applicable. In other words, the argument is that the provisions of Article 16(2) are self-contained. According to this argument, the right to *audi alterem partem* is also excluded. Mr Semenyé relied on the Namibian Supreme Court case of *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others* 2004 NR 194 (SC) at 211J-212C, in support of his argument that the State’s power of *eminent domain* allows it as a sovereign to take the property for public use without the owner’s consent.

Mr de Bourbon submitted that the respondent's argument means that the State's right to expropriate is "walled in", which he submitted is untenable. He submitted that Article 18 of the Constitution cannot be excluded, since it provides for the testing of actions of administrative bodies or officials against the requirements of fairness, reasonableness and legality, namely, compliance with the provisions of the law and the relevant legislation, as well as other constitutional provisions as contained in Articles 12 and 22. He submitted that the principle of *audi* is not excluded as it entails fairness. Finally, he also pointed out that the support the respondents seek in terms of the *Grape Growers*-decision, does not favour them when the Court's decision in respect of Article 16 is read in context. Mr de Bourbon referred the Court to the Namibian High Court decision in *WestAir Aviation (Pty) Ltd and Others v Airports Company Ltd and Another* 2001 NR 256 (HC) in respect of the applicability of the *audi* principle in similar circumstances.

[45] We do not agree with Mr Semenye's argument that Article 16(2) should be "walled in" or "ring fenced" to the effect that it excludes the principles of the rules of natural justice, eg. the *audi* principle. According to Article 16(2), the State or a competent body or authorised organ may expropriate property. This must be done in accordance with the requirements and procedures laid down in the Act. The decision-maker then has to act fairly, reasonably and in compliance with the statutory requirements, the requirements of the common law and of Article 16 of the Constitution. Article 18 cannot be disregarded during the process of expropriation of property in terms of Article 16(2), even if it is in the public interest to expropriate such property. Although expropriation usually takes place as part of the State's *eminent domain*, the requirements of both Articles 16(2) and 18 must still be adhered to. We have already dealt with the background of Article 16 (1), which provides that the right to acquire, own and dispose of property in Namibia is a fundamental right, which is protected, but subject to sections 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 of Act No. 6 of 1995, as amended, and, of course, of Article 16(2). Article 22 of the Constitution provides for the only limitation of these fundamental rights and freedoms described in Chapter 3, under which Article 16(2) also falls.

[46] When the Supreme Court decision of *Namibia Grape Growers* is read in context, it is evident that Mr Semenye's reliance on one paragraph of that decision is misplaced. In that paragraph, Strydom CJ, as he then was, quoted with approval the often followed exposition of the powers of the State by *H M Seervai, Constitutional Law of India*, 3rd ed, Vol II, paragraph 14.24. In the *Namibia Grape Growers*-case, the subject of dispute was the State's right to regulate the use and exercise of rights applicable to ownership by legislation and whether such regulation would constitute a limitation on the right of ownership, rendering it unconstitutional. That case was not about expropriation in terms of Article 16(2) at all. Strydom CJ said the following at 212F-G:

"To the extent set out above I agree with the submissions by counsel for the respondents. This case, as far as I know, is the first concerning the interpretation of Article 16. I therefore do not want to imply that the requirements in the previous paragraph are a close list and the final interpretation of the Article. It should in my opinion be allowed to develop as the need arises, if any."

The support that Mr Semenye seeks for his argument in respect of the exclusiveness of Article 16(2) in the *Namibia Grape Growers* case is simply not there and his interpretation of that Article is untenable.

Audi alterem partem

[47] Rejecting, as we do, the argument that Article 16 stands alone, means that the requirements of Article 18 are applicable and the conduct of the "administrative official", the

Minister in this case, must be fair and reasonable, as well as legitimate. For administrative action to be fair, it is implied that the rules of natural justice, and in particular the principle of *audi alterem partem*, have to be applied by the decision-maker before he makes his decision. In the case of *WestAir Aviation (Pty) Ltd v Namibia Airports Company Ltd*, Hannah J, dealt with a situation where the applicants had not been afforded a hearing before the decision was made. The argument in that case was that, in the light of the undisputed facts, the applicant had a legitimate expectation to a hearing and that the provisions of the applicable Act did not disentitle them from such a hearing. The learned judge referred, with approval, to the summary of English law as set out by Corbett CJ in *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (AD) at 756E-757C. Hannah J rejected the argument that a particular section of the applicable Act (section 5(2)) excluded the right to seek a hearing and stated on page 265D-E:

“The approach to the audi alterem partem rule with reference to its application in statutes was set out by Rumpff JA (as he then was) in Publications Control Board v Central News Agency (Pty) Ltd 1970 (3) SA 479 (AD) at 489C-D as follows:

‘One begins with a presumption that the kind of statute referred to impliedly enacts that the audi alterem partem rule is to be observed, and, because there is a presumption of an implied enactment, the implication will stand unless the clear intention of Parliament negatives and excludes the implication.’

Furthermore, it was stated by Hannah J on page 265H:

“In my view there is nothing in the Act which sanctions or justifies the unfairness of which the complaint is made. There is nothing in the Act which displaces the presumption referred to by Rumpff JA in Publications Control Board v Central News Agency (supra). In my judgment, the applicants have made out a case of legitimate expectation...”

[48] In an article in the 1994 South African Law Journal, Vol III, Ranjit J Purshotam dealt with the subject of entitlement to a hearing by an expropriatee before the decision to expropriate its property is made. The writer analysed what he calls an “unbelievable situation” that this was the law at the hands of the South African Appellate Division. He referred to the case of *Pretoria City Council v Modimola* 1966 (3) SA 250 (AD), where the rationale was explained for not granting a hearing. According to Purshotam, the South African Court of Appeal, fortunately, subsequently departed from that view and placed more emphasis on the administrative act and its effects on rights and freedoms. According to him, the first landmark-decision was that in the *Traub* case (supra), followed by *Administrator, Transvaal and Others v Zenile and Others* 1991 (1) SA 21 (AD), and thereafter by *Minister of Education and Training and Others v Ndluvo* 1993 (1) SA 89 (AD). The writer concludes his article with the following words:

“Insistence that authority should in principle adhere to the precepts of natural justice before implementation of the expropriation principle cannot be regarded as unduly onerous. In any event, as Hoexter JA observed in Zenile (at 40 A-G), the rules of natural justice are flexible enough to allow for their attenuation in the circumstances of extreme urgency. The onus, however, should always rest on the public authority to justify departure from the rules of natural justice in the case of an expropriation.”

This article was written before the final South African Constitution was adopted, but indicates the view of the South African Courts of adhering to the rules of natural justice as a prerequisite before an administrative decision is taken. This is also the view of the Namibia High Court, as expressed by Hannah J in the *WestAir* case, *supra*.

[49] The Agriculture (Commercial) Land Reform Act does not exclude the application of the principle of *audi alterem partem*. We have no doubt that before the Minister can take a decision to expropriate, he is duty-bound to apply the principle of *audi*. It implies that he must afford the land-owner an opportunity to be heard in order to persuade him that he should not take the decision to expropriate his property. Of course, only the Minister has the right to decide, but before he does so, the land-owner has to be heard in order to put whatever fact he may consider relevant before the Minister, however weak or insubstantial that may seem, in order to persuade the Minister to come to another conclusion. If this is done, but the Minister still remains unpersuaded, the landowner cannot complain.

[50] From the first applicant's own conduct, it appears that (although disputed during argument before us) the principle of *audi* was in the contemplation of the Government. The letters of 11 October 2004 by the Minister to the applicants expressly affords the applicants an opportunity to make representations in terms of Article 18. Why was that done if the principle of *audi* was not regarded to be applicable to Article 16(2), as argued by Mr Semenye? Mr Semenye used these letters as a basis for his alternative argument, with which we shall deal later, but the very fact that it was done, negates his original argument, which we have already rejected.

[51] It is evident that even before the new Constitutional dispensation came into existence in South Africa, decisions of the South African Courts, as analysed by Purshotam, indicate that there was a gradual, but definite, movement towards the application of the *audi* principle in expropriation matters. In our view, the application of the principle of *audi alterem partem* is a prerequisite before the Minister takes a decision, in terms of the Act, to expropriate. Failure to do so may lead to a declaration that the action of the Minister is invalid. Important considerations for the Court in this regard are that even if the principle of *audi* was applied, it must have been genuine and not mere lip service, as well as that the owner of the property subject to expropriation has a fundamental right in terms of Article 16, which calls for strict adherence to the requirements of the enabling Act. These requirements are applicable to all the applications before us and we have to consider whether the conduct of the Minister was in compliance with the Act or not.

[52] Mr Semenye proffered an alternative submission to his argument that the principle of *audi* was not necessary in respect of a decision to expropriate in terms of Article 16(2). He submitted in the alternative that the Minister did comply with the *audi* principle by inviting the applicants in his letter addressed to them on 11 October 2004, to make representations in terms of Article 18 of the Constitution. That letter elicited responses from the applicants via their legal representatives and similar letters were addressed by Diekmann and Associates on behalf of all three applicants on 21 October 2004 to the Minister in which the Minister was requested to answer five questions which would enable the applicants to give effect to Article 18 of the Constitution. In paragraph 4 of each of those letters, the legal representatives stated:

“What the above indicates is a process already tainted by illegality and irregularity”.

It is common cause that the Minister did not respond to these letters. Mr Semenye submitted that the quoted statement by the applicants made it clear to the Minister that the applicants regarded the process so far to be irregular and that no response was necessary. Mr de Bourbon differed entirely from this submission and argued that the Minister's failure to respond to the letters of 21 October 2004 is indicative of a lack of a genuine application of the principle of *audi alterem partem*. He further submitted that, seen in the chronological context, a decision to expropriate had already been taken and that was the real reason for the Minister's failure to respond to the letters of 21 October 2004.

[53] When one has regard to what the Minister stated in the previous letters of 23 September 2004, addressed to all three applicants, it is clear that “they were warned” (to put it mildly) that if they did not adhere to the deadline (unilaterally set by the Minister) for replying to his section 14(1) letter to offer their farms for sale or to enter into negotiations to sell them, he would have no option but to assume that they did not want to enter into negotiations regarding the sale of their respective property and that he would proceed with expropriation of the farms in terms of the Act. When the Minister said in his letter of 11 November 2004 “*In line with the requirements of article 18 of the Namibian Constitution*” it would appear that it was his intention to act fairly in terms of the provisions of the Act. The Minister clearly invited representations. The replies of the applicants’ legal representatives of 21 October 2007 must be read in this context. It is stated in those letters that the applicants needed certain further particulars and the obvious question is why were these particulars required if the applicants did not want the Minister to respond to them? If the applicants’ attitude was that no response was necessary, because they regarded the whole process was already irregular and illegal, they could have said so without requesting further particulars. It should also be observed that they did not say that the process was irregular and illegal, they said it was “tainted” with irregularity and illegality. Furthermore, it seems that paragraph 4 also refers to paragraph 3 where the Minister’s unilateral time frame was mentioned. The letter concludes with a statement that the rights of the applicants are reserved. By stating that, the applicants appeared to convey to the Minister that they would be open to the process of discussion when the particulars are provided, but that they reserved their rights in respect of further action.

[54] By perusing these letters, we cannot come to any other conclusion than that if the letters of 11 October 2004 constituted a genuine attempt by the Minister to apply the principle of *audi*, the letters of 21 October 2004 by the applicants’ lawyers should have been responded to. The reason provided by Mr Semenye why no response was necessary in the light of paragraph 4, cannot be accepted if the Minister had the genuine intention to consider the representations of the applicants. No question arises that the applicants waived their rights to *audi*. We have nothing else before us to verify the Minister’s reaction, than Mr Semenye’s submission, which is not supported by evidence. Consequently, the alternative submission by Mr Semenye is rejected.

Public Interest

[55] Expropriation can only take place if it is in the public interest. The parties do not disagree that this is a prerequisite for expropriation in terms of Article 16(2) of the Constitution. However, they disagree that the expropriation of the four farms of the three applicants was in the public interest. The requirement of public interest does not stand alone: it should be read together with section 14(1) of the Act. Mr de Bourbon referred to several international decisions which deal with factors that need to be considered in determining the meaning of what is “in the public interest”. He summarised that, as far as international law is concerned, it must be:

- (a) that the expropriation is done for reasons of “*public utility*” and similar other lawful measures;
- (b) the furtherance of public interest requires the striking of a fair balance between the demands of the general interest and the requirements of the individual’s fundamental rights; and
- (c) that lawful expropriation must not be discriminatory.

The international authorities that he referred to are:

Sporrong v Lonnrof v Sweden 1982 (5) EHRR 35; *Tre Traktorer AB v Sweden* (1989) ECHR series A, vol 159; Permanent Court of International Justice in the case concerning certain German interests in Polish Upper Silesia (1926) PCIJ series A, No. 7, page 22 and *A J van der Walt-Constitutional Property Clauses*, supra, page 101.

With regard to the Namibian situation, he referred to the requirements contained in Article 18 of the Constitution, namely, reasonable and fair decisions based on reasonable grounds, but submitted that it is inherent in the requirements of Article 18 that the procedures should be transparent. In this regard, he referred to the case of *Aorin Fishing (Pty) Ltd v Ministry of Fisheries and Marine Resources*, 1998 NR 147 at 150 G-H. It is clear that it is required that the Minister can only act within the limits of the statutory discretion and should properly apply his mind to the requirements. If he cannot decide, he has to investigate (or require the Commission to investigate) and to consider the criteria according to which he should take his decisions.

[56] Expropriation of land will certainly not be in the public interest in the context of Article 16(2) if that land is not suitable for the purpose of expropriation. In order to expropriate land, it must be done in compliance with the provisions of the Act, which involves a double-barrel process, namely, that provided for in sections 14 and 20 of the Act. Although it is not peremptory that the section 20 process should necessarily follow the section 14(1) one, it is equally clear that the section 20 process (expropriation) cannot take place if there was no section 14 process. More about the specific requirements will be said later when the processes followed by the respondents are analysed. Suffice it to say at this stage that each of these two processes have their own requirements.

[57] The first process, where the Minister informs a landowner that the Government is interested to buy his farm or enter into negotiations for the purpose of buying it on a willing buyer/willing seller basis, is contained in section 14. The purpose is to make that particular farm available for agricultural use to certain persons who are specified in the section. Those must be Namibian citizens who do not own agricultural land and/or have the use of agricultural land or adequate agricultural land. Furthermore, such persons must come from a specific section of the Namibian society, namely those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices. In summary, the people who need to be resettled in terms of the Act are Namibian citizens or those who neither have the use, nor adequate use of agricultural land, especially those that have been disadvantaged as mentioned before. The resettlement of such people is the reason for the intention of the Minister to acquire the particular farms in the public interest. Public interest should, therefore, be interpreted to mean that the particular farm must be suitable for resettlement of this specific category of people and that the Minister must be satisfied that the farm he intends to acquire, complies with these requirements. The Minister must consequently be in possession of enough information regarding the suitability of the specific farm to have enabled him to take an informed decision thereon at the section 14 stage. How does he do it? This is where the Commission comes in. The functions of the Commission are set out in section 3 of the Act. The Minister does not have to take any decision which he is authorised to take under the Act without basing it on adequate information placed before him. He has the Commission that can carry out investigations and make recommendations to him. In certain matters, he is in fact obliged to consult the Commission *before* he makes a decision, such as the decision to acquire a farm that is suitable for the purpose of resettlement. Although such a mandatory consultation is contained in section 20(1) of the Act, which deals with the expropriation stage, its wording makes it clear that the Minister must consult the Commission *before he decides to acquire* the property. The legal requirements for proper consultation are dealt with hereinafter. Performance of the Commission's functions is done by sub-committees or persons employed to assist the Commission. Section 3(b) of the Act provides that one of the Commission's functions is to investigate "*either of its own accord,*

or upon a request of the Minister any...matter relating to the exercise of the powers of the Minister...

[58] Section 15 of the Act entitles the Commission in so many words to authorise anyone to enter upon and inspect any agricultural land in order to “...ascertain whether such land is **suitable for acquisition for the purposes contemplated in section 14 (1)**...” (Our emphasis).

[59] There cannot be any doubt that the Act provides the foundation for proper investigation in respect of a specific farm to enable the Minister to come to a well informed and considered decision as to whether such particular farm is suitable to be acquired for the purpose of section 14. In the present cases, the question that arises is whether there was proper investigation regarding the four farms to enable the Minister to come to a well informed and considered decision as to the suitability of the said farms for the purpose of resettlement. In our view, the answer is in the negative. The Commission did not investigate the farms either of its own accord or at the request of the Minister to ascertain whether they were suitable in terms of section 15 of the Act. The argument advanced by Mr Tsheehama in the first respondent’s answering affidavit and by Mr Semenye in this Court, is that the first respondent had data available of all agricultural land in Namibia and that such investigations were unnecessary. This reply, or this argument, has two problems. Firstly, it begs the question why were inspections necessary just before the second stage, namely, the expropriation stage, if all data was available from the beginning? Secondly, the Minister is the functionary in terms of section 14 and he had to determine whether the farms were suitable to be acquired for the purpose of resettlement, but he does not say on what grounds he decided the question of suitability. The first Minister had the power and the obligation to determine whether the farms that he intended to acquire were suitable for resettlement, but he merely confirmed what Mr Tsheehama had said. The question is whether the Minister was satisfied that he had adequate data on which to take such a decision, and if so, what that data was? If he did not have enough data, the second question is whether he required the Commission to investigate the question of suitability and to act in terms of section 15 of the Act. On the basis of the papers before us, this didn’t happen.

[60] The applicants made the point clearly in their respective founding affidavits, namely, that they were not aware of any criteria which existed relating to the identification of their particular farms in respect of the suitability thereof for acquisition or expropriation. They alleged that nobody from any of the respondents visited the farms at the initial stage in order to determine the suitability thereof.

[61] Mr Semenye submitted that had in fact been done prior to the Minister’s decision to expropriate the farms in question. It is common cause that inspections were done subsequent to the Minister’s decision to expropriate and that reports in respect of the farms in this connection were presented to the Minister, which reports were annexed to the papers. Mr Semenye’s argument in this regard falls flat on account of the dates of the inspections. The Minister has to determine the suitability of the farms *before he decides to acquire them in terms of section 14* and the investigations that Mr Semenye relies on were done more than a year later, namely, during July 2005. The fact that people were sent to inspect the farms in July 2005 proves that the issue of suitability could not have been considered and resolved in May 2004 when the Minister concluded that the farms were suitable to be acquired for the purpose of resettlement. The only inference to be drawn from this is that there was no compliance with the requirements of section 14 of the Act.

[62] The second stage provided in the Act is the expropriation process in terms of section 20. As previously stated, this process only follows after there has been compliance with section 14 of the Act. If there is proper compliance with the requirements of section 14 and the Minister,

as well as the owner of the property are unable to negotiate the sale of the property by mutual agreement, the Minister is then entitled to decide to expropriate such property, subject to payment of compensation. The Minister is obliged to convey this decision to the owner of the property by service of a notice that complies with the requirements prescribed by section 20 (2) of the Act.

[63] At this stage, the Commission has an obligation. Section 20(6) requires the Commission to consider the interest of any persons employed and lawfully residing on the land and the families of such persons residing with them. This is a peremptory provision. Once the Commission has considered the interest of such persons, it may recommend to the Minister what he may do in that regard. The Minister's conduct must be fair and equitable.

[64] From the papers, it is evident that the Commission disregarded this obligation. The only answer that Mr Semenye could provide in this regard was that the inspection reports made certain references to the employees of the applicants. However, making references in a report to employees of a landowner does amount to a recommendation. Because the Commission did not comply with its obligation, the Minister was not provided with any recommendation in respect of the employees and the families of the residents on the farms. Before the Minister could consider this aspect and make a decision on an informed basis, namely, whether it would be in the public interest to displace all these persons who may qualify as landless and disadvantaged persons, in terms of the Act, along with other landless and disadvantaged persons by expropriating the farms on which they reside, he ought to have such information at his disposal. According to his letter, it appears that the Minister arranged for inspections of the farms of the applicants. It is clearly not his function to do that, but that of the Commission. The applicant Kessl in fact informed the Minister right at the start when he received the Minister's letter conveying the intention to acquire the farms that there were some fifty-six people residing on his two farms. This was apparently not considered and no mention is made of it in the inspection report relating to those two farms.

[65] The applicants put the aspect of not determining the suitability of the farms in issue in the founding affidavits to their applications. From the documents before us, it is apparent that there was no compliance with the provision of the Act in this regard at the appropriate stage.

Legality and Reasonableness

[66] Article 18 of the Constitution requires that the administrative action must also be fair and reasonable. The legality of the exercise of the Minister's powers will later on be judged against the provisions of the Act. This is a constitutional concept and it was held in *Pharmaceutical Manufacturers of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at 687 paragraph [20] that:

“The exercise of all public power must comply with the Constitution, which is supreme law, and the doctrine of legality, which is part of that law.”

This doctrine of legality was further described in the case of *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at 272, paragraph [49], as follows:

“The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that the Legislature and the Executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.”

In this regard, Mr de Bourbon also referred us to what was stated by Rose-Innes in his work *Judicial Review of Administrative Tribunals in South Africa* at page 91:

“Administration is thus the exercise of power which is conferred upon specifically designated authorities by statute, and which, however great the power which is conferred may be, and however wide the discretion which may be exercised, is a power limited by statute. The Administration can only do what he has statutory authority to do, and it must justify all its acts by pointing to a statute. If a public authority exceeds these powers, it acts unlawfully.”

[67] Moreover, the decision of the Minister must be reasonable. This Court held in the case of *Sikunda v Government of the Republic of Namibia* (3) 2001 NR 181 (HC) that a Court of law will examine the discretionary power of the decision-maker to determine whether his decision was fair and reasonable. On page 191J-192B, the Court stated (per Mainga J, with Hoff J concurring):

“The traditional common law approach regarding unreasonableness as a reasonable ground for review, was that the Courts will not interfere with the exercise of a discretion on the mere ground of its unreasonableness, art 18 constitutes a departure from the traditional common law grounds of review. A Court of law will examine the discretionary power to determine whether it is fair and reasonable. If he does not need those requirements the Court will strike down the discretionary power as repugnant to the Constitution.”

In *Bato Star Fishing Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC). O'Regan J stated in paragraph [45] on page 513:

“What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interest involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

Affidavits by the functionaries

[68] Although we have referred to the fact that both successive Ministers only filed confirmatory affidavits, it is necessary to deal with these affidavits. The two Ministers were the Ministers of the Ministry of Lands and Resettlement at the relevant times. When the process commenced in terms of section 14 of the Act, the Honourable Hifikepunye Pohamba was the Minister of Lands and Resettlement, but during the second process in terms of section 20, namely, the expropriation process, the Honourable Jerry Ekandjo was the Minister of that Ministry. It is common cause that these functionaries are cited in their capacity as political heads of the first respondent. Both of them only made confirmatory affidavits to the founding affidavit of the Permanent Secretary of the said Ministry, who is also the second respondent.

[69] Both confirmatory affidavits only confirm what Mr Tsheehama deposed to in his capacity as Permanent Secretary of the Ministry. The Minister is the functionary and decision-maker in terms of several provisions of the Act, but *not* the Permanent Secretary. The appropriate Minister (at the time) was required to state whether he did consider a particular

issue, which only he was empowered to consider, or how he applied his mind in making a certain decision. The position in these papers is that the functionaries or decision-makers unfortunately were silent in this regard, but only confirmed what the Permanent Secretary had attested to. When the affidavits deposed to by Mr Tsheehama in all the applications are scrutinised, only the following three issues, as far as the Minister's powers are concerned, are dealt with by him:

“(a) ...**the decision** of the first respondent to expropriate...the farms...**was not arrived at haphazardly, but was done after a long process of consultations, research and informed by the recommendations** made by the LRAC;”

“(b) I admit that the discretion is one that must be exercised judiciously.

I submit that the discretion was exercised properly and according to the provisions of the Act”;

“(c) **It is clear that the first respondent considers** the farms in this application appropriate for Land Resettlement within the meaning of Section 14 (1) and 14 (2) of the Act.”

(Our emphasis)

Not only did the respective Ministers fail to deal with the requirements and duties they were empowered to perform at the time that they were authorised to do so, but there is no indication who did what and when.

[70] Both Ministers did not attest to what had occurred when the one took over office from the other in respect of these four farms, because the Act provides for an expropriation process following failure of the willing seller/willing buyer process. To expropriate in terms of section 20 of the Act there must have first been an attempt to acquire agricultural land on the basis of willing seller/willing buyer. A vacuum exists in this regard, because the new decision-maker (Minister) does not inform the Court that he accepted what his predecessor did, or what he accepted from his predecessor. The following pertinent issues are left in the dark, namely, was the new Minister satisfied that:

- (a) there was proper compliance with s14?
- (b) there were proper consultations before the decision to acquire the farms?
- (c) the farms were suitable for the purpose of resettlement?
- (d) the previous Minister's response to the letters written on behalf of the three applicants by their legal representative was correct?
- (e) in his own estimation, expropriation was the correct procedure? The Court was not enlightened in this regard and we are constrained to consider all the issues without any input by the new Minister. What is clear is that unless the new Minister accepted the decisions taken by his predecessor in respect of the section 14 process, he had to do it over again and take his own decisions in compliance with the provisions of the Act.

Compliance with the Act

[71] We have earlier herein alluded to the sequence of events as reflected in the chronology which was submitted by the applicants without objection by Mr Semenye. In the following paragraphs, these events, which represent the steps taken by the first respondent, will be analysed against what the Act requires in order to ascertain whether the first respondent did comply with the requirements of the Act. The sequence of the steps taken is of importance. To afford clarity, the provisions of the Act and the steps taken by first and second respondents will

be dealt with under appropriate headings and in each category the requirements of the Act will firstly be dealt with, followed by the steps taken by the first respondent.

The right to acquire, own and dispose of property

[72] Article 16 (1) of the Namibian Constitution embodies the fundamental right to acquire, own and dispose of property. If the State intends to acquire the property of an individual owner, whose fundamental right to acquire, own or dispose of his property is protected in terms of Article 16(1) of the Constitution, the procedure to do so as set out in the relevant Act, must be strictly followed.

Statutory procedure to be followed if the State intends to acquire land owned by an individual

[73] As mentioned, this is the starting point and this procedure is described in Part II, sections 14 and 15 of the Act as quoted above. This is not a compulsory acquisition of land and we refer to it further herein as a “voluntary” acquisition of land in contrast of the expropriation of land. It is based on economic principles of willing buyer/willing seller. Section 14 (1) provides the *rationale* and in terms whereof the Minister may acquire agricultural land subject to the requirements described in section 14 (2) of the Act. This *rationale* embodies two prerequisites, namely, that there must be money for payment of such land *available in the fund* created for such purpose and that the purpose to acquire such land is complied with.

[74] The “first” prerequisite is that the fund must have money available. The Minister cannot buy land out of any other funds. The Minister has the statutory duty to establish that such monies are available in the fund. If not, he cannot proceed under Section 14 to acquire such privately owned agricultural land.

[75] The “second” prerequisite expressed in section 14 (2) deals with the *purpose* for the acquisition of such agricultural land. The first respondent clearly exercised his discretion in terms of this subsection, but he failed to attest to what the reasons for his decisions were. His discretion is clearly limited to what we have underlined and that brings one back to the requirements under section 14 (1), which we have already referred to and which the Minister did not disclose to the Court.

Although s14 does not refer to the consultation process, it is mentioned as a requirement in section 20(1) and it appears (and it was accepted by counsel) that this process has to take place already at the initial stage, namely, the section 14(1) stage.

[76] The manner in which the letter of 10 May 2003 in terms of section 14 (1) was delivered is unnecessary. There is no special requirement for the manner of service of such a letter, which is understandable as it is only an invitation to the appropriate owner to discuss the possible acquisition of his farm. There are specific prescriptions in respect of the manner of service for the further procedure under section 20 (expropriation). Despite the nature of such a letter under section 14, it is undisputed that armed members of the forces arrived on the farms and delivered the letters to the foremen of all three applicants.

Section 15 requirements

[77] Section 15 is still part and parcel of the process of voluntary acquisition of agricultural land. The relevant subsection of section 15 has been quoted above. Briefly, it is a function of the Commission and it provides a discretion to the Commission to enter a particular farm and to inspect it for the following two purposes namely:

- (a) to ascertain whether such land is suitable for acquisition as contemplated in section 14 (1) or
- (b) to determine the value thereof.

It is clear that this discretion was never exercised by the Commission and the second respondent in fact says so. This should not be confused with the eventual inspection of the land just before the expropriation thereof. The fact of the matter is that such no inspection for these purposes was done.

[78] We have quoted earlier herein the contents of the minutes of three meetings namely that of 10th March 2004, 6th and 10th May 2004 and 1 and 2 December 2004. The special meeting of the 10th March was before the letter of voluntary acquisition of the farms of Günther Kessl was written.

This meeting consisted of questions put to the Minister and answers provided by the Minister and it may be regarded as a general discussion of the procedures to be followed if expropriation should take place.

However, when the minutes of the meeting of 10 May 2004 are considered, the question arises whether this was not a purposive procedure in order to expropriate the farms of individual owners. This meeting was minuted as an extraordinary meeting of the Commission. Its purpose is set out in the following words:

“Hon Minister called the meeting to consult the LRAC on the expropriation of farms as provided in Section 20 (1) of the Agricultural (Commercial) Land Reform Act, Act 6 of 1995.”

There cannot be any doubt that this was a meeting intended to be a “consultation” in terms of section 20 (1) of the Act. The date of this meeting is in fact the same date when the section 14 (1) letter was written to Mr Günther Kessl and delivered to his foreman at approximately 14:30. As previously pointed out, no requirement for such a consultation is contained in section 14, but from the wording of section 20 of the Act, it seems that the consultation must be done before the Minister decides to acquire agricultural land. The minutes make it clear that the Commission was in fact confronted with the memorandum by the Minister already at that stage in terms of section 20 (1) of the Act and that specific farms of specific owners were identified to be expropriated. Finally, it is evident from these minutes that after the Minister left, the Commission was divided and could not arrive at a decision. No resolution was taken. The Minister returned at 14:00, half an hour before the section 14 (1) letter was served on the foreman of Mr Kessl. The Minister informed the Commission that he would probably publish a list of the farms to be acquired when he has finally taken such a decision. It is disputed by the applicants that there was a proper consultation as required by the Act between the Minister and the Commission. This issue will be dealt with later.

[79] Having taken the decision to expropriate property, the procedure is described in section 20(2) of the Act. The main requirement is that an expropriation notice has to be served on the owner of that property. Section 20 (2)(a) 2(b) stipulate what that notice should contain.

On 19 August 2005 such written notices of expropriation were given by the Minister to all three applicants. We have already referred to the incorrect notices to the applicant Kessl, which were later substituted by corrected notices of expropriation and which were the subject matter of the first application by the applicant Kessl. It is common cause that the notices of expropriation to the applicants Riedmaier and Heimaterde CC were delivered to the offices of Diekman &

Associates and were received without prejudice. The corrected notices of expropriation in respect of the two farms of the applicant Kessl were delivered to his foreman, Mr Kersten. Mr de Bourbon, on behalf of the applicants submitted that the service of an expropriation notices requires strict compliance with the provisions of section 20 of the Act, which was not done, and consequently, he submitted that the application should succeed on that basis alone. Mr Semanye's argument was that there was substantial compliance with the provisions of the Act. We shall deal with this issue later.

[80] Section 20 (6) of the Act requires that when the Minister decides to expropriate agricultural land, the Commission **shall** consider the interest of the employees, residents on the land and their families and that the Commission may make recommendations in that regard to the Minister which it considers fair and equitable. This obligation rests on the Commission, notwithstanding anything to the contrary in the Act.

The Commission did not comply with this obligation and Mr de Bourbon submitted that this failure is fatal because there was no compliance with the expressed duty that rested on the Commission and nobody else. Mr Semanye referred to an inspection that had been done on the 12th or the 13th of July on the farms of the applicants, of which they were given advance notice. In this regard, we have already referred to the letter of the Minister dated 30 June 2005. If we understand Mr Semanye's argument in this regard, he seemed to rely on the "inspection" as proof of compliance with the requirement in sections 20 (6). We shall deal with this argument later.

[81] With reference to the aforementioned two issues that counsel differed as to whether the provisions of section 20 of the Act had been complied with; whether service of the notices of expropriation in terms of section 20(2) and the inspection of the properties in terms of section 20(6) of the Act had equally been complied with. We shall deal with these two issues hereinafter.

Service of the Expropriation Notice

[82] As already pointed out, it is not in dispute that the expropriation notices in terms of section 20 of the Act in respect of all four farms were not served on the applicants personally, but on the original legal representative of the applicants. Mr De Bourbon submitted that on this basis alone, the applications of the three applicants must succeed. He based his argument upon the non-compliance with section 20 (2) of the Act, which requires that the Minister shall cause service "**on the owner concerned**" of a section 20 notice of expropriation. If agricultural land in which somebody else has an interest is to be expropriated, section 20 (4) requires such service to be effected on anyone who has such interest, according to the deed to that land. Mr Simenye's argument was that Diekmann and Associates were the attorneys of the applicants, who wrote certain letters in response, to *inter alia*, the section 14 notice to all three applicants, as well as other letters to the first respondent in which they had made it clear that they were acting for the respective applicants. Furthermore, Mr Simenye submitted that section 20 requires only substantial compliance, which was done. Mr de Bourbon argued that this submission was untenable, adding that the provisions of the Act are in fact mandatory, requiring strict compliance and not only substantial compliance. He further referred to what *Hoexter* says in his work *The New Constitutional and Administrative Law, Volume 2*, page 27, namely:

"As a general rule statutory requirements must be observed; a Court will not lightly assume that the legislature has used words in vein."

Mr de Bourbon further referred to what is stated by *Devenish, Govender, Hulme* in their work: *Administrative Law and Justice in South Africa* (2001) at page 248:

“As indicated above the general rule is that non compliance with the statutory prescription results in nullity... Therefore, precise compliance in the minutest detail may not be the criterion: in particular, the performed act may not have to be identical to the prescribed act. Or, as the Natal provincial division explained “there must be real compliance though not necessarily literal compliance”. The underlying reason for this is that there must be a compliance or aim of the prescription in the context of this statute as a whole, rather than its detail, in order to ensure that the object of the statute is fulfilled, taking into account the principles and ethos of both our Constitution and the common law, which requires that Justice may be done to the parties concerned.”

With regard to the argument that only substantial compliance is required, Mr de Bourbon referred us to what the same authors said at page 250 of their aforementioned work:

“The answer to whether there has been substantial compliance must be sought in the purpose of the statutory requirement, which must be ascertained from its language, in the context of the legislation as whole.”

According to Mr de Bourbon, the provisions of the statute make it clear that there must be real compliance with the requirements of section 20 of the Act. He further referred to the case of *Pole v Gundelfinger* 1909 TSC 734 where Innes J, as he then was, dealt with the Rules of Court and held that service in that case was bad. Mr de Bourbon submitted that, compared to that decision, the position is even worse in this matter, where the Act requires specific compliance. He also submitted that the sequence of events supports his contention that the legal practitioners Diekmann and Associates did not have any further mandate after eight months since they last acted on behalf of the applicants on 21 October 2004.

[83] It is so that approximately eight months elapsed between the last letters of Diekmann and Associates on behalf of the applicants dated 21 October 2004 and the Minister’s letters of 30 June 2005 to the applicants indicating that a team of landplanners and valuers would visit the farms. It does not seem that the manner in which the service of the expropriation notices had been effected prejudiced the applicants. The notices came to their attention and they acted thereon. In the light thereof, we shall leave the issue of service of the expropriation notices open.

[84] If Mr Semenye is correct that substantial compliance is enough and the latter would suffice, then the service on the foreman of Mr Kessl may constitute such substantial compliance, but definitely not service on legal practitioners whose mandates are not proved. In our view, the effect of such notice of expropriation supports the submission that this notice must be served personally. This notice conveys the decision of the Minister and the effect thereof is that ownership in terms of section 21 of the Act vests in the State on the date of expropriation, which date in all these matters is the 5th September 2005, approximately sixteen days after the date of the notices. In our view, strict compliance is necessary in respect of service of the notice of expropriation and the first respondent failed to comply with this requirement.

Non compliance with section 23(4)(a) – less than 90 days

[85] The next preliminary issue is the submission that there was no compliance with section 23 (4) (a) of the Act, in the sense that in each case the time provided in the expropriation notice was shorter than the prescribed period of ninety days. Mr Semenye’s argument is that this time frame is only in respect of the compensation offered to the applicants and that, because it is common cause between the parties that compensation is not an issue, it is irrelevant that a shorter period than ninety days was given in each instance. It is clear from the date given in the expropriation notices in respect of all three applicants that the period is less than ninety days,

while the notice said that the date provided is “*a date being not sooner than ninety days from the date of this notice*”. This is also what the Act provides, but it was not done.

Although compensation is not in issue since the applicants objected to the principle of how the purported expropriation was done, it is part and parcel of the expropriation process which is provided for in both the Constitution and the Act. Section 23 falls under that part of the Act that deals with expropriation. It is clear that the first respondent also saw it in that light, as the expropriation notices appear to show. Such a notice cannot, on a proper interpretation of section 23(4) of the Act, be less than ninety days, otherwise there would be a failure of compliance with the Act. It follows that the argument to the effect that compensation was never an issue is not a valid one. Any person upon whom a section 20 notice of expropriation is served is entitled to be afforded all the rights that the Act provides, and that includes being given at least the time specified therein to respond.

[86] Mr de Bourbon submitted that a decision in the applicants’ favour on this preliminary point would entitle the applicants to the relief prayed for in the Notices of Motion on this basis alone.

[87] From the foregoing, it is clear that the Minister and the Commission have failed to comply with several of these requirements of the Act. The effect thereof will be dealt with later. There remain certain specific issues which were argued. We shall refer to these issues hereinafter under specific headings.

Consultation

[88] We have previously indicated that section 20 (1) of the Act requires the Minister to consult with the Commission *before* he decides to acquire any property, namely, before he acts in terms of section 14 of the Act. The meaning of this obligation has to be examined against the meaning of the word: “consultation” and whether such consultation was done in respect of the farms of the three applicants.

[89] Our law knows the concept of “consultation” as an essential part of the process of decision making. Not only should it not be treated as a mere formality, but it should constitute a meaningful exchange of views to achieve the object of the legislature.

“Meaningful consultation” has been defined by Donaldson, J in the case of *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 AER 280 (QB) at 284E-F:

“The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice...”

This definition of consultation has been followed in several cases. (*Robertson and Another v City of Cape Town and Another*; *Truman-Baker v City of Cape Town* 2004 (5) SA 412 CPD at 446, para [108]; *Maqoma v Sebe NO and Another* 1987 (1) SA 483 CkGD at 491E).

[90] Pickard J said the following in this regard in the *Maqoma case, supra*, at 490C-E:

“For the aforementioned it seems that ‘consultation’ in its normal sense, without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party (also indicative of the prefixed ‘con-’) in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate.

The word ‘consultation’ in itself does not pre-suppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocable basis” (Our emphasis)

Later in the same judgment at page 491E-I, Pickard J dealt with the manner in which the “empowered authority” should approach such a consultation:

“However convinced the empowered authority maybe at the outset, of the wisdom or advisability of the intended course of action, he is obliged to constrain his enthusiasm and to extent a genuine invitation to those to be consulted and to inform them adequately of his intention and to keep an open and receptive mind to the extent that he is able to appreciate and understand views expressed by them; to access the views so expressed and the validity of objections to the proposals and to generally conduct meaningful and free discussion and debate regarding the merits or de-merits of the relevant issues. So receptive must his mind be that, if sound arguments are raised or other relevant matters should emerge during consultation, he would be receptive to suggestions to amend or vary the intended course to the extent that at least a possibility exists for those with whom he consults to persuade him to alter his intentions if not to abandon them.

In stating the aforesaid, I am fully mindful of the fact that despite the imperative requirements of consultation in the Act, he is not obliged to give effect to the wishes of those whom he has to consult. He is the sole decision-maker regarding the actions eventually to be taken but, nevertheless, he is enjoined by the enactment not to act in terms thereof until and unless he has given full, proper and bona fide consideration to the views expressed during consultations conducted as I have attempted to set out hereinbefore.”

[91] In the case of *Government of the Republic of South Africa and Another v Government of Kwazulu and Another* 1983 (1) SA 164 AD, the Court also dealt with the issue of declaring a territory as a self-governing territory of South Africa prior to the acceptance of the new South African Constitution. The essence of consultation before such a decision could be made was described by Rabie CJ at 200 A in the following words:

“It is clear from the foregoing that the State President’s powers under the 1971 Act to amend the area of a self-governing territory are subject to the limitation that they may be exercised only after there has been consultation by the Minister with the Cabinet of the self-governing territory concerned.”

[92] Selikowitz J stated the following at 7 in the case of *Stellenbosch Municipality v Director of Valuations and Others* 1993 (1) SA 1 CPD:

“It is further common cause that a prerequisite for his reaching that opinion is that he must first consult with the ‘parties concerned’. The consultation with those parties is a mandatory requirement without which first respondent cannot hold the necessary opinion.”

[93] We have referred to some of the meetings of the Commission that were held and in particular that of 10 May 2004 in which the heading of the Minutes refers to a consultation between the Minister and the Commission in terms of section 20 (1) of the Act. There are other minutes of meetings which were produced, but which are not relevant in respect of this issue. The meeting of 20 March 2004 was a question-and-answer meeting and does not take this issue any further. The relevant meeting was that of 10 May 2004 which would provide the answer to the question whether there was proper consultation between the Commission and the Minister as envisaged by the Act.

[94] Mr de Bourbon strongly argued that the Cabinet had already taken a decision to expropriate certain farms and in particular those of the three applicants. He submitted that farms belonging to foreigners were specifically targeted and that the consultation process referred to in the minutes of the meeting of 10 May 2004 was only lip service to this requirement of the Act and that there was thus no genuine consultation as required by the Act. Mr de Bourbon relied on the following in support of this submission:

- (a) the Cabinet decision of 17 February 2004;
- (b) the statement in speeches and other pronouncements by the Minister and other officials of the Minister; and
- (c) the procedure of the meeting of 10 May 2004 as minuted.

[95] Annexure 2 relates to the Minutes of the Cabinet meeting of 17 February 2004. On the face of the minutes, it appears that there are some pages missing. Mr Semenye pointed out that this document related to the expropriation of two farms which were not the subject-matter of these applications. He further submitted that even if some of the pages of this resolution were missing, the applicants could have obtained them in terms of the Rules of Court.

Mr de Bourbon continued that the applicants did in fact require additional discovery in terms of Rules 53 and 35, but that it was too late to compel the respondents to make such discovery for the purpose of this hearing.

[96] The Minister made a speech which the Permanent Secretary attached to the minutes of 10 May 2004 as if it was delivered at that meeting. Mr de Bourbon questioned whether this speech was indeed delivered on 10 May 2004, because in it the Minister wishes the Commission a prosperous new year and it was already nearly midyear. He suggested that the speech was in fact delivered at the previous meeting on 10 March 2004. However, the Minister made the following statement in that speech which, according to Mr de Bourbon, indicates that a decision to expropriate had already been taken before the meeting that was allegedly convened for the purpose of consultation between the Commission and the Minister.

Although it appears from the speech of the Minister to the Commission that it was Government's policy to expropriate certain farms for the purpose of resettlement, it was still necessary for the Minister to act in terms of the provisions of the Act. We do not consider the inference that Mr de Bourbon sought to draw on this point is sound.

[97] The minutes of the meeting of 10 May 2004 which was held at the commencement of the section 14 process reflect the following:

- (a) The heading reflects that it was a meeting between the Commission and the Minister for the purpose of the latter consulting the former.
- (b) In his opening remarks, the Chairman who was also the Permanent Secretary of the first respondents Ministry, welcomed everybody and invited the Minister to address the meeting. He further said this was at the request of the Minister **“as part of the requirement of the Act, that, before any expropriation is done, he should consult”** the Commission.
- (c) The Minister then presented a memorandum to the Commission.
- (d) A list of farms contained in files were handed to the Chairman for the consideration of the Commission.
- (e) Eight specified criteria parts for expropriation were apparently mentioned, but not minuted.

The Minister left the meeting and only returned at 14:00. In the meantime, the members of the Commission apparently discussed the farms on the list for the purpose of negotiation. The Chairman discussed these farms in the light of the Ministers urgent request and the minutes note that the farms were those that the Minister wanted to “*acquire compulsorily*” and the Chairman requested comments “*on properties identified*”.

The farms that were *identified*, according to the Minister, were listed and included the four farms belonging to the three applicants.

After discussion, the Commission was divided and could not arrive at a decision and no resolution was taken.

When the Minister returned at 14:00 and was briefed by the Chairman on the outcome of the meeting, he then made certain comments in which he recognised that the Commission had been divided. No mention is made of any further communication between the Minister and the Commission or that any resolution was taken.

[98] The minutes of the meeting of 1 and 2 December 2004 mainly indicate that some of the farms that are relevant in these applications were to be expropriated and that appropriate steps were to be taken in that regard. They do not indicate that the Commission was consulted, but merely that it was advised of what processes were taking place and that the Minister wanted to proceed with the expropriation notices in liaison with the Attorney-General’s office.

[99] From the documentation before us, it seems that that was the end of the involvement of the Commission.

The facts do not indicate that the Commission was really consulted. The Minister’s speech to the Commission, previously referred to, appears to confirm the impression that Cabinet had already decided to expropriate certain farms and that the Minister presented the Commission with a list of those farms.

[100] From the documentation before us, it does not appear that what has been done constitutes a proper consultation in conformity with the requirements of the Act. The consultation that the Act requires, has to take place before the Minister decides to acquire any farm, ie, at the section 14 stage. At that stage, no inspection was done and neither the Minister nor the Commission had any requisite information regarding the particular farms. That was probably the problem that the members of the Commission experienced and why they failed to reach a decision. We cannot come to any other conclusion than that *there was no proper consultation* as required by the Act, before a decision to acquire was taken.

Discrimination against foreign nationals?

[101] Article 16(1) of the Namibian Constitution recognises the fundamental right of “all persons” to acquire, own and dispose of property, but contains a specific proviso in respect of foreigners, which reads:

“...*provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by the **persons who are not Namibian citizens.***” (Emphasis provided)

The effect of this provision is that Parliament may pass a law which either prohibits foreigners from acquiring property within Namibia or regulates and determines specific requirements and conditions under which non-Namibians would be permitted to acquire and hold property.

Once property has been acquired by a foreigner, he cannot be deprived of it, unless it is expropriated in terms of Article 16(2) of the Constitution. This exposé of the effect of Article 16(2) of the Constitution appears in the report of the Technical Committee on Commercial Farm Land (TCCF), which committee was appointed after the holding of the land conference by Cabinet on 26 November 1991, with the specific mandate to research and report to Cabinet.

[102] Despite the recommendation by the TCCF, the legislation passed by Parliament, namely the Agricultural (Commercial) Land Reform Act, No. 6 of 1995, did not include any provision to restrict the acquisition of land in Namibia by foreigners, save that land acquired by foreigners in contravention of the provisions of sections 58 and 59 (without permission of the Minister) can be acquired by the State in terms of section 14 (2)(b). A “foreign national” is defined in section 1 of the Act. The act does not contain any definition of an “absentee landlord”.

In argument Mr Semenye attempted to place accent not on “foreign land owners”, but on “absentee land owners”, probably because he realised that the Act, which is the only legislation that Parliament produced in this regard and which could be regarded as what was envisaged in the quoted proviso of Article 16(1), did not prohibit a “foreigner” to acquire land. The reference to such a land-owner as a “foreigner” can consequently never be a criterion for acquisition, nor for expropriation of the land of that person. Realising this, Mr Semenye accentuated absenteeism to fit that criterion.

[103] All three applicants attached to their founding affidavits copies of an internet news letter, “**Business in Africa online**”, in which article the Permanent Secretary of this Ministry is quoted to have said, *inter alia*:

*“He said the Government was **targeting** the acquisition of farms belonging to “foreign absentee landlords”, adding: “The Ministry is currently preparing to send notices to these farm owners”.*

[104] In an annexure to each of the applications a document which purports to derive from this Ministry and with the heading: “**Government aims to expropriate nine million hectares**”, the Minister, at the time, is quoted to have said the following:

*“Lands Minister Hifekepunye Pohamba on Wednesday said that **land would be expropriated from absentee landlords, foreigners and individuals with excessive land**. He said the expropriation would not target white commercial farmers alone but indicated that land would also be taken from blacks to address the socio-economic imbalances. It is estimated that 75 percent of the countries’ arable land is owned by an estimated five percent white population.*

*Minister Pohamba said officials from his Ministry on Wednesday started with a process of identifying **farms targeted to be expropriated**. The Lands Minister had explained that the expropriation process would be triggered by a notice of expropriation served upon the owner of the agricultural land.*

On receipt of the expropriation notice, the owner would be required to prepare and submit a claim for compensation to the MLRR. The Government said the expropriation requires of the farm owner not to make any new improvements on the property except for maintenance on the existing infrastructure.

The expropriation notice is to be followed by an inspection and valuation of the property and the counter-offer to the owner’s claim for compensation should the minister deem the owner’s claim for compensation excessive.”

(Emphasis provided)

Neither the Permanent Secretary, nor the Minister, denied that this document emanated from the Ministry of Lands and Resettlement.

[105] It is common cause that all three applicants are Germans. Although they live in Germany, they acquired (or inherited) their respective farms long before the independence of Namibia in 1990, namely, Kessl since 1986, Riedmaier since 1973 and Heimaterde CC since 1981. All three applicants are thus foreigners, but none of them obtained their farms contrary to the provisions of section 58 and 59 of the Act. All three applicants have several employees, who live on the farms and for whom accommodation is provided. All these employees have families. All the applicants farm with cattle and regularly visit their farms. All three applicants have employed foremen to run their farms. It is not disputed that all these farms are commercially viable entities.

[106] From the aforementioned, it is evident that all three applicants are absentee landlords, in the sense that they are not permanently resident on the farms. As German citizens, the three applicants are entitled to the same treatment as Namibian citizens in terms of the Encouragement and Reciprocal Protection of Investments Treaty (the Treaty) which was entered into by the Government of the Republic of Namibia and the Government of the Federal Republic of Germany. Mr de Bourbon relied on this treaty only in the sense that it is something which the Minister should have considered in arriving at his decision to acquire the property of the three applicants in terms of section 14 of the Act.

[107] All these factors relating to the three applicants and their property required consideration by the Minister before he decided to acquire their farms. As mentioned earlier, *before* he could decide to acquire the farms, the Minister was obliged to act in terms of sections 14 and 15 of the Act, to:

- (a) properly consult with the Commission in respect of these farms;
- (b) ascertain whether these farms were suitable for the purpose that he wanted to achieve by acquiring them;
- (c) consider the effect of the Treaty on these three German applicants; and
- (d) ascertain whether there was enough money available in the fund to acquire these farms for which the Ministry would have to pay.

Decision must be that of the decision maker.

[108] This legal requirement is closely linked to what occurred at the stages when the Minister, with the power to take such a decision in terms of the Act:

- (a) decided to acquire the farms of the applicants, and
- (b) decided to expropriate the said farms.

[109] Our Courts have in several decisions in the past expressly held that where a particular person is authorised by legislation to take decisions, he, and he alone, should take those decisions. The designated and authorised decision-maker cannot abdicate or delegate these powers. Of course, he is entitled to take recommendations of others or other bodies, that may have specific expertise in a certain field, into consideration, but ultimately it remains his decision. (*Kauima Riruako and 46 Others v The Minister of Regional, Local Government and Housing and Others*, Case No. (P) A 336/2001, delivered on 13 December 2001, page 24-26; *Disposable Medical Products v Tender Board of Namibia* 1997 NR 129 at 135 D-H).

In *Leech v Secretary for Justice Transkeian Government* 1965 (3) SA 1 (EC) the Court considered whether the Cabinet could assist the Minister, who was the functionary. On page 12H-13A, Munnik J referred to the decision by the Cabinet:

“By doing this the respondent has in fact not exercised his discretion at all in excluding this class of applicant. He has been guided by the views of somebody else. I cannot imagine a clear case of failure to exercise one’s own discretion which is what the respondent was by law called upon to do.”

[110] We cannot come to any other conclusion than that the Minister failed to comply with the provisions of the Act when he decided to expropriate the applicants’ farms.

Grounds for review

[111] The applicants relied on several common law grounds for review. Mr de Bourbon submitted the applicant only has to succeed on one of these grounds to be successful, but that if the provisions of Article 18 of the Constitution are considered, any decision by the Minister must be fair, or reasonable, or have legality. Mr Semenye, on the other hand, submitted that the notice of motion does not contain a prayer to have the Minister’s decisions in respect of section 14 set aside, only that taken in respect of section 20, namely, expropriation. He also argued that the applicants should have challenged the constitutionality of the Act, which they failed to do. Mr de Bourbon denied that it was necessary to challenge the procedure followed up to the section 14 stage, because no rights were trampled upon at that stage and there was nothing to set aside. The applicants simply said they were not selling and that was the end of the matter. Consequently, there was no necessity for any review in respect of section 14 process standing alone. The Minister decided to expropriate the farms and that immediately brought the previous stage under section 14 into play. The decision to be reviewed was the decision to expropriate, but that was preceded by certain statutory obligations which rested on the Minister, e.g., he must have consulted the Commission, et cetera.

[112] The authorities are clear that since the adoption of the Constitution in Namibia, Article 18 governs the reviewability by this Court of administrative decisions. However, the common law grounds for review did not disappear, they should be interpreted in terms of these constitutional grounds for review. Strydom CJ, as he then was, stated in *Immigration Selection Board v Frank* 2001 NR 107 at 171A:

“Article 18 further entrenches the common law pertaining to administrative justice insofar as it is not in conflict with the Constitution.”

Although Strydom CJ delivered the minority judgment in that matter, this principle was not dealt with by the majority decision. (See also *Aonin Fishing (Pty) Ltd v Minister of Fisheries and Marine Resources* 1998 NR 147 (HC)).

Conclusion

[113] Article 25 of the Namibian Constitution is the last Article in Chapter 3 that deals with fundamental human rights and freedoms. Article 25’s heading is: **Enforcement of Fundamental Rights and Freedoms**. The relevant parts of Article 25 provide:

“1. Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

- (a) a competent Court, instead of declaring such law or action to be invalid;...
2. Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right freedom, ...
 3. Subject to the provisions of this Constitution, the Court referred to in Sub Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provision of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.”

[114] We have earlier indicated that the exercise of the principle of *audi alterem partem* is not excluded in the exercise of the powers given to the Minister as decision-maker by the Act and that a failure to observe that principle, which is part of the rules of natural justice, would have the effect that the Minister did not act fairly, as required by Article 18 of the Constitution. We have also rejected the attempt to rely selectively on any part of the wording contained in the letters of the applicants’ legal representative dated 21 October 2004 as an alternative that the Minister did apply the *audi alterem partem* principle.

[115] We have pointed out the Court’s difficulty in determining what the two Ministers, as the respective functionaries in terms of the Act, at different times, considered and took into account when applying their minds *before* making the decisions that culminated in the expropriation of the farms, without attesting to that effect. We have indicated that the use of confirmatory affidavits to confirm what someone else, other than these functionaries who were given those powers, could depose to, left a vacuum in that regard. We have also discussed and pointed out that the consultation process as required by section 20 of the Act and in terms of the law which obliged the Commission and the Minister to consult *before* the Minister could decide to acquire the farms of the three applicants, did not take place, despite their attempt to clothe it in that way. We concluded that no genuine consultation occurred.

[116] Finally, we have discussed in detail and considered each requirement of the Act step by step and illustrated where the prerequisites in terms of the Act had not been complied with, or fully complied with.

[117] The cumulative effect of all the failures of the Minister to comply with the provisions of the Constitution and the Act clearly indicate that the fundamental rights of the three applicants were infringed by the action of the Minister and that the Court has no option but to declare such decisions by the Minister to expropriate the four farms of the three applicants invalid.

Guidelines

[118] The Court acknowledges the right of Government (acting through the Minister responsible) to expropriate property in terms of Article 16(2) of the Constitution; and that Cabinet is under pressure from different interested groups to provide land to those disadvantaged people described in the Constitution and the Act and to correct imbalances of the past in respect of ownership of land. However, that process should be done in terms of the provisions of the Act.

In the light of the aforesaid, it seems that when the Minister intends to expropriate agricultural land, the following steps should be followed in sequence:

- (a) The function to decide to expropriate agricultural land in terms of the Act, is that of the Minister of Land and Resettlement and of nobody else;
- (b) The requirements of section 14 of the Act must be followed whenever the Minister decides to acquire agricultural land, including proper consultations with the Commission. Generally, the following matters should be addressed and considered during such consultations:
 - (i) the Commission, in the exercise of its functions, is obliged to investigate all relevant factors regarding any particular farm or farms;
 - (ii) factors such as the effect that acquiring farms for resettlement purposes may have on the present employees, other residents and their families;

and to make recommendations to the Minister on (i) and (ii).
- (c) When the Minister considers to expropriate a particular farm, he must observe the principle of *audi alterem partem*, namely, he must afford the land-owner the right to be heard on the issue. This may, for instance, be achieved by the Minister inviting representations in writing from the affected landowner and such landowner responding to the invitation. Where clarification is needed, this should be provided.
- (d) If the Minister nevertheless decides to expropriate a farm in terms of section 20(1) of the Act, he must notify the particular land owner in terms of section 20(2) and such notice must be served on the particular landowner.

Although the present applications do not go further than the decision to expropriate and the service of the notice of expropriation, other requirements of the Act and the notice must be complied with.

Order

[119] The following orders are made:

1. The first and second respondents are ordered to pay the costs of the applicant Günther Kessl jointly and severally in the application No. (P) A 266/2006:

A: In respect of applicant Günther Kessl:

The decision of the first respondent to expropriate the farms Gross Ozombutu No. 124, Otjozondjupa Region and Okozongutu West No. 100, Otjozondjupa Region and all rights attaching to them as well as the notices of expropriation dated 5 September 2005, in respect of the abovementioned farms, are set aside.

B: In respect of applicant Martin Josef Riedmaier:

The decision of the first respondent to expropriate the farm Welgelegen no. 303, Otjozondjupa Region and all rights attaching to it, as well as the notice of expropriation dated 16 April 2005, are set aside.

C: In respect of the applicant Heimaterde CC:

The decision of the first respondent to expropriate the farm Heimaterde no. 391, Otjozondjupa Region and all rights attached to it, as well as the notice of expropriation dated 19 August 2005, are set aside.

D: Costs:

The first and second respondents are ordered to pay the costs of the application of the applicants Günther Kessl, Martin Josef Riedmaier and Heimaterde CC jointly and severally, taking into account that at the hearing, all three applications were argued simultaneously as a consolidated application. Such costs should include the costs of one instructing and two instructed counsel.

MULLER, J.

I agree

SILUNGWE, A.J.

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