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 **1ST RESPONDENT**
THE CHAIRPERSON OF THE LANDS REFORM ADVISORY COMMISSION **2ND RESPONDENT**
THE REGISTRAR OF DEEDS **3RD RESPONDENT**

CASE NO.: [P] A 269/2005

In the matter between:

HEIMATERDE CC

APPLICANT

and

MINISTRY OF LANDS AND RESETTLEMENT **1ST RESPONDENT**
THE CHAIRPERSON OF THE LANDS REFORM ADVISORY COMMISSION **2ND RESPONDENT**
THE REGISTRAR OF DEEDS **3RD RESPONDENT**

CASE NO.: [P] A 267/2005

In the matter between:

MARTIN JOSEPH RIEDMAIER **APPLICANT**

and

MINISTRY OF LANDS AND RESETTLEMENT **1ST RESPONDENT**
THE CHAIRPERSON OF THE LANDS REFORM ADVISORY COMMISSION **2ND RESPONDENT**
THE REGISTRAR OF DEEDS **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◊ A previous application by the First Applicant was withdrawn and only the costs thereof played a further role.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 ommission 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 Mwandinghi* 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); *Robebrtson 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 Hosing 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.

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

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GüNTHER KESSL **APPLICANT**

and

MINISTRY OF LANDS AND RESETTLEMENT **1ST RESPONDENT**
THE CHAIRPERSON OF THE LANDS REFORM ADVISORY COMMISSION **2ND RESPONDENT**
THE REGISTRAR OF DEEDS **3RD RESPONDENT**

CASE NO.: [P] A 269/2005

In the matter between:

HEIMATERDE CC **APPLICANT**

and

MINISTRY OF LANDS AND RESETTLEMENT **1ST RESPONDENT**
THE CHAIRPERSON OF THE LANDS

REFORM ADVISORY COMMISSION **2ND RESPONDENT**
THE REGISTRAR OF DEEDS **3RD RESPONDENT**

CASE NO.: [P] A 267/2005

In the matter between:

MARTIN JOSEPH RIEDMAIER **APPLICANT**

and
MINISTRY OF LANDS AND RESETTLEMENT **1ST RESPONDENT**
THE CHAIRPERSON OF THE LANDS REFORM ADVISORY COMMISSION **2ND RESPONDENT**
THE REGISTRAR OF DEEDS **3RD RESPONDENT**

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

Heard on: 2007 July, 24 & 25

Delivered on: 2008 March 06

JUDGMENT

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 Semenye 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 Harring 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 identity 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.

(1) 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

(b) 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:

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

5 September 2005	***Kessl signs his founding affidavit in review application Case P (A) 266/05***
6 September 2005	***First review application Case P (A) 266/05 instituted***
6 September 2005	***Second set of expropriation notices served***

[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. <u>Present</u>

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

1.2 <u>Apologies</u>

Mr F M Tsheehama	***MLRR***

1.3 <u>Absent</u>

None

1.4 <u>Staff Members</u>

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***

<u>Questions Asked and Responses:</u>

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 advice 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

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	**Welgeleten**	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 Ruigter	992	5918	Omaheke	South Africa	L	Serve Notice of intent

Kalkpan
Omitara West
Omitara Oos

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. <u>Farm Welgelegen No. 303 Reg. Division D</u>**
>
> **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.**
>
> **<u>Resolution</u>**
>
> **Ministry to proceed with expropriation notices in liaison with the Attorney General's office.**
>
> **8. <u>Farms Okozonguty West No. 100 and Gross Ozombutu No. 124 Registration Division D</u>**
> **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.**
>
> **<u>Resolution</u>**
>
> **Ministry to proceed with expropriation notices in liaison with the Attorney General's office.**
>
> **9. <u>Farms Hoheinstein No. 39 and Kurumakatiti No. 749 Registration Division D</u>**
>
> **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.**
>
> **<u>Resolution</u>**
>
> **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 Hifikepunye 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 authorative 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 Mwandinghi* 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 Semenye, 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 Mwandinghi*, *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 Semenye 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 Semenye'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 Semenye 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 Semenye 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 Ndlovo* 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 adhearing 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 *Aonin 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 if 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 aforegoing, 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 aforegoing 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 exposè 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.

ON BEHALF OF APPLICANTS:	**Adv. Adrian Bourbon SC**,
	Assisted by **Adv. Rudie Cohrssen**
Instructed by:	**Etzold-Duvenhage**
ON BEHALF OF RESPONDENTS :	**Adv. Semenye SC,**
	Assisted by **Adv. G Hinda**.
Instructed by:	**Government Attorneys**