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INFORMATION ABOUT NAMIBIA'S LAW

The Ancestral Land Rights and Restitution Bill

Background

In one of our previous ProBono columns we talked about the Commission of Inquiry's report on Claims of Ancestral Land Rights and Restitution. The Commission, along with making several recommendations to the government on ancestral land rights and restitution claims, drafted the Ancestral Land Rights and Restitution Bill (the "Bill"). In this column, we give an overview of the Bill. Given Namibia's shared political and legal history with South Africa, we also consider what Namibia could learn from the South African land rights restitution experience.

The Objectives of the Bill

The Bill supports the restitution of land rights to persons or communities that have lost their land rights as a result of past discriminatory laws or practices. It proposes the following remedies: financial compensation where resettlement is not appropriate; the acquisition of State land not currently held under title deed; rights of access to grave or burial sites; and the construction of monuments in remembrance of those who lost their ancestral land during the colonial and apartheid period.

The Bill complies with Article 16(2) of the Namibian Constitution on property rights, as well as the Agricultural (Commercial) Land Reform Act 6 of 1995 in that it provides for the compulsory acquisition of land by the State for the purposes of allocating it to Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices. However, given the economic hardships that many Namibians continue to experience since independence, it might be more fitting to refer to *currently disadvantaged persons* as opposed to *previously disadvantaged persons*. This is because some previously disadvantaged persons under the apartheid system have already become economically privileged, while for many others, the current reality is that they continue to live lives of

abject poverty in which the promise of improved socio-economic rights at independence remains an illusion.

The Bill states that claimants will receive adequate land rights and security of tenure, but it is unclear on how these rights will materialise. Given that ancestral land rights are rooted in customary laws and practices, it is probable that such rights will be registered as customary land rights or rights of leaseholds, similar to provisions that exist under the Communal Land Reform Act 5 of 2002.

The Bill also provides for restitution in respect of post-independence land dispossessions resulting from town proclamations and illegal fencing. Since independence several towns have been proclaimed in communal areas in terms of the Local Authorities Act 23 of 1992, resulting in communal land rights holders losing their customary land rights once such land has been proclaimed as freehold land. Likewise, some communal land rights holders continue to lose land as a result of the illegal fencing of communal land by others. While existing Namibian legislation and case law already provide some legal remedies to people who have lost their ancestral land as a result of these activities, new restitution legislation could offer some welcome additional relief to complainants.

Administering the Bill

The Bill establishes a Commission on Restitution of Land Rights, an Ancestral Land Rights Claims and Restitution Tribunal and an Ancestral Land Rights Claims and Restitution Fund. The Commission will determine compensation matters and the Tribunal will settle disputes among claimants, encouraging them to mediate their differences, instead of opting for expensive litigation. The Tribunal's decisions will be subject to review or appeal to the Namibian High Court. The Ancestral Land Rights Claims and Restitution Fund functions will administer the Restitution Fund and be accountable for expenditures from the Fund.

The Bill acknowledges that ancestral land rights cannot be extinguished. Instead, it suggests a prescription period of three years for the submission of claims, unless the Minister provides an extension to this deadline. A similar provision exists under the Communal Land Reform Act for the registration of customary land rights.

The Bill further proposes that where historical land dispossessions are traceable to individuals or corporations that are still in business, these entities must be held accountable and required to pay compensation to claimants.

Land Restitution in South Africa

South Africa's Restitution of Land Rights Act 22 of 1994 applies to both rural and urban land restitution claims. It provides for the restitution of land rights to black persons or communities who lost

land rights when a law enacted in 1913 prohibited black South Africans from owning land outside of designated reserves. .

South Africa has approximately 122 million hectares of land. From 1994 to 2018 more than 12.8 million hectares were acquired for land reform purposes. From this total, more than 3.6 million hectares have been acquired by claimants through the restitution process. The country's other two other land reform programmes, the land tenure reform programme and the land redistribution programme, have resulted in the redistribution of more than 4.9 million hectares, while an additional 4.8 million hectares were distributed through private transactions involving blacks or were obtained by the government but have yet to be distributed to beneficiaries. Consequently, the restitution programme in South Africa has succeeded in contributing to the overall land reform process in South Africa.

Criticism against the South African restitution programme is that it was initially meant to be a limited and short-term process, designed specifically to deal with cases in which people and communities were forced off their land after the enactment of the 1913 legislation. In addition, the process of finalising claims has been slow, with some 19 000 cases as of March 2018. At that time, it was estimated that it would take another 43 years at a cost of R30 billion to complete the consideration of these claims. While the dynamics of the South African land reform process are different from those in Namibia, the South African restitution experience shows that implementing a land restitution programme requires good management and planning, especially regarding the submission of evidence to support restitution cases. South Africa's process also shows that implementing a restitution programme entails substantial financial costs to the State.

Conclusion

An advantage of stand-alone land rights restitution legislation is that it focuses on specific objectives. The proposed Bill would complement Namibia's existing land reform legislative framework which does not deal with ancestral land rights and restitution issues. A statute on restitution will help with the interpretation and application of what is required in this complex field of land reform law. While there is evidently more work to be done before the Bill is finalised, the draft on the table provides a basic impression of what future ancestral land rights restitution legislation in Namibia might look like.

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