

**Confiscation or compensation?
An analysis of the Namibian Commercial Agricultural Land Reform Process**

by

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Abstract

The former white-ruled colonies of Southern Africa share a common history of expropriation of land from indigenous peoples. This resulted in an agricultural dualism, with black subsistence agriculture on the one hand, and white commercial farming on the other. Furthermore, their post-colonial constitutional and legal frameworks shaped their ability to address the skewed land distribution patterns, the notable recent exception being the “fast tract” land reform programme of Zimbabwe.

In Namibia, the instruments adopted in addressing commercial land reform, are government purchases of commercial farms for the purpose of resettling landless communities, and Affirmative Action Loans for the purchase of commercial farms by previously disadvantaged individuals. In February 2004, the Namibian government announced plans to implement the option of expropriating commercial agricultural land in order to speed up its land reform and resettlement programme after increased criticism of the “willing buyer-willing seller” principle, describing it as “a cumbersome approach that is unable to keep up with the high public demand for agricultural land”.

While the process of expropriation is supported by adequate legislation, the expropriation criteria used by the government to identify suitable land, appear to be ill-defined. This paper argues that such criteria should be incorporated in policy documents of the government.

Moreover, the need for land reform and land redistribution not only arises against Namibia’s political and colonial past. The Namibian land reform experience also shows the importance of striking a balance between improving agricultural productivity and preserving the natural resource base.

Viewed against the background of 15 years of land reform in Namibia, the aim of this paper is twofold: firstly it provides an analysis of the successes and failures of land reform in Namibia, and secondly, it considers options through which the shortcomings of the land reform programme could be addressed.

Keywords:

Land Reform

Commercial Agriculture

Willing buyer willing seller

Expropriation

Just compensation

Public interest

Resettlement

Constitution

Affirmative action

Background:

Land use and farming practices in Namibia

The former white-ruled colonies of Southern Africa share a common history of expropriation of land from indigenous peoples. This resulted in an agricultural dualism, with black subsistence agriculture on the one hand, and white commercial farming on the other. Furthermore, their post-colonial constitutional and legal frameworks¹ shaped their ability to address the skewed land distribution patterns, the notable recent exception being the “fast tract” land reform programme of Zimbabwe.

Namibia, with a geographical land area of 824 295 km and an estimated population of 1,805,227² is Southern Africa’s most sparsely populated and arid country. On average, this means about 2 persons per square kilometre. Namibia, therefore, presents a much more hopeful possibility of an orderly land reform process than many other African countries, simply because there is so much land, and so few people.

But, the trade-off here is that Namibia’s land is very dry, and suited only to a few kinds of agriculture. Namibia is situated between two deserts. The Namib Desert stretches along Namibia’s west coast while the Kalahari Desert borders its eastern and southern neighbours, Botswana and South Africa.

The largest part of Namibian agricultural land is utilised by both commercial and communal farmers for livestock farming, with natural vegetation used for grazing. Thus, Namibia is largely occupied by vast cattle and small-stock farms. Namibia’s commercial farms are large and mainly orientated towards red meat production for local and export markets. Beef is the agricultural sector’s main export product, but the world-wide overproduction of cattle and the increased degradation of grazing lands threatens Namibia’s commercial farming sector.³

Namibia’s low and unreliable rainfall pattern limits its potential as a commercial, self-sufficient and reliable agricultural crop producer. Extended periods of drought impact heavily on Namibia's agricultural sector and the tenuous food security of the rural poor. Also, during the 1990’s livestock losses were heavy due to drought. In recent years, commercial livestock farmers have moved increasingly towards mixed game/livestock farming and many have embarked upon wildlife-based tourism enterprises. This trend in stock diversification has helped to maintain bio-diversity and creates a valuable buffer against the effects of drought. In addition, the demand for horticulture exceeds the local

¹ I.e. the willing buyer-willing seller and expropriation concepts being inseparably linked to the just compensation and public interest provisions in both Namibian and South African constitutions and land legislation.

² 2001 estimates made by the Central Statistics Office in Windhoek.

³ “Beef Industry under threat”, New Era, 24 June 2005

production in Namibia by far. It is estimated that local Namibian producers supply only 18% according to value of the demand while 82% is imported.⁴

Agricultural incomes for the estimated 150 000 households living on communal land are very low, mainly because they are excluded from benefits such as improved farming techniques, technology, access to formal credit facilities and regulated markets. Communal farmers are mostly dependent on rain-fed crops (mainly millet) and livestock and receive little income at all from their work: almost all of their production is consumed by their own households.

Thus, the logic and potential of the land reform process should not only be analysed against the legacy of colonialism and apartheid, but also against the reality of the agricultural potential and the environmental realities of Namibia.

The commercial land reform process in Namibia since independence

When Namibia gained its independence in 1990, it inherited two agricultural sub-sectors from the colonial era, communal and commercial agriculture. These parallel agricultural systems not only divided Namibia almost equally in terms of land utilization, but also reflect the racial division in the country at the time of independence. The majority of white Namibians, and a small, but growing black middle class, enjoy one of the world's highest standards of living, while the majority of black Namibians live in abject poverty, making Namibia one of the most unequal societies in the world. It has been argued that this inequality is rooted in the fact that the majority of Namibia's black population lacks secure tenure to land.⁵

However, with independence, Namibia also inherited some myths about the commercial agricultural sector that now are the source of very deep misunderstandings about agriculture and about land. The central myth is that successful commercial farming in Namibia is associated with wealth. It is easy to see how this myth came into being. Before independence, most white commercial farmers were provided with subsidies in the form of concessionary finance, direct subsidies and veterinary services.⁶ Subsidies, in other words, contributed to raising agricultural income, for mainly white commercial farmers during the pre-independence period. In addition, Namibia's white social order was based on land and agriculture. The present irony of unproductive white farms, deeply in debt makes no sense at all to poor black communal farmers. Thus, while the political and social reality is that land reform is required, this goal needs to be separated from the idea that farming is a source of great wealth.

⁴ National Horticulture Development Initiative: Feasibility Study into the Development of Infrastructure for the Marketing of Horticultural Produce in Namibia compiled by International Development Consultants (IDC) in Association with Agritel and MBB Consulting Engineers for the Namibian Agronomic Board as implementing Agent for the Ministry of Agriculture, Water and Rural Development, May 2004, p.5

⁵ Statement by the Right Honourable Theo-Ben Gurirab, MP, Prime Minister of the Republic of Namibia on the acceleration of land reform in the Republic of Namibia, Windhoek, 25 February 2005

⁶ Wolfgang Werner. 2001. "Rights and Reality: farm workers and human security in Namibia." CIIR publication, London, p. 7

Commercial agriculture in Namibia after independence underwent a number of changes. Firstly, a combination of reduced subsidised support to established farmers and sporadic droughts during the 1990's had a negative impact on commercial agriculture. Secondly, after independence the government was forced to address the inequitable access to commercial land ownership. A Land Conference was held in Windhoek in 1991. During the Land Conference a policy was adopted stating that rectifying specific historical wrongs involving the seizure of land from peoples of European decent, who acquired land under successive German or South African colonial powers, were not to be attempted. Instead, the new government adopted a policy, aiming at redressing Namibia's history of skewed land ownership through a process of national reconciliation and within the constitutional provisions of Article 16.

Article 16 provides that;

- (1) All persons shall have the right in any part of Namibia to acquire, own and 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.
- (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.

The 1991 Land Conference furthermore set a platform from which the land reform programme, policies and legislation were to be developed. It took the government nearly five years to pass its first major piece of legislation on land reform, the Agricultural (Commercial) Land Reform Act 6 of 1995. Perhaps the major reason for this delay is the fact that the Namibian government had little capacity at independence in dealing with land reform management, land reform planning and the drafting land reform legislation.

The Agricultural (Commercial) Land Reform Act contains a number of provisions to ensure that the market would perform as expected. These provisions include:⁷

- A requirement that any commercial farm that is offered for sale, should first be offered to the Government for the purposes of resettlement.
- A provision against ownership of multiple land holdings by a single individual.
- A provision against ownership of commercial farmland by non-Namibians.

However, in some government and public circles, it has been argued that the pace of land redistribution has been far too slow. Since independence the government has purchased

⁷ Namibia Country Paper

<http://www.grnnet.gov.na/News/Archive/2001/September/Week4/land_acquisition_rpt.htm> (Accessed on 9/9/05)

only 142 farms totalling 843 789 hectares of land on which 1 526 families have been accommodated.⁸

In February 2004, the Namibian government announced plans to implement the option of expropriating commercial agricultural land to speed up its efforts to buy more land for its resettlement programme. This announcement came after the government became increasingly critical of the “willing buyer willing seller” principle, describing it as a cumbersome process.⁹

On the one hand, the government blamed commercial farmers for the slow pace of land reform, arguing that they only offer to sell small, uneconomical plots for resettlement under the “willing buyer willing seller” option. In his farewell speech as Minister of Lands and Resettlement, Namibia’s President Pohamba stated that “...those who have land to sell [should sell] a little land to the Government at fair prices so that we [the government] have land to give to the landless people.” President Pohamba further stated that the government fears that Namibia could be made ungovernable if the “have-nots” patience with the current slow process of land reform runs out.¹⁰ This belief surely reflects a view of recent African history, particularly the failure of land reform in Zimbabwe.

On the other hand, it has been argued that much more land was available for purchase than the government could buy. The Institute for Public Policy Research, an independent research organisation in Namibia, has pointed out that the slow process of land reform should be attributed to “leaden-footed bureaucracy, rather than commercial farmers dragging their heels.” For example, the Institute found that out of 142 farms that were offered for sale to the government in 1999, only 4 were acquired, while in 2000 only 15 out of 125 farms were acquired for resettlement purposes.¹¹ Thus, instead of overspending its budget for purchasing farms, it appears that the Ministry has been under spending. It is also possible that most farms that have been waived by the Ministry, have been made available to emerging black farmers to buy under the Affirmative Action Loan Scheme (AALS), hence the fact that by beginning of 2005, approximately 612 farms¹², have been bought by emerging black commercial farmers either through the AALS financed by the government, or through private banks.

In addition to the announcement by government that expropriation would run concurrently with the “willing buyer willing seller” policy, the year 2004 also saw the completion of the valuation process of commercial agricultural land, an important step towards the implementation of the first commercial agricultural land tax in Namibia, which was implemented during the 2004/05 financial year. Land tax is progressive, meaning that the percentage of tax payable increases with the number of farms owned by

⁸ Statistics on resettlement obtained from Ministry of Lands and Resettlement, February 2005

⁹ Statement by Prime Minister, *supra* note 5.

¹⁰ The Namibian, “Pohamba warns of ‘revolution’ over land reform” 22 March 2005.

¹¹ B de Villiers, 2003 “Land Reform: Issues and Challenges – A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia” Konrad Adenauer Foundation, Occasional Papers, Johannesburg, p.38

¹² Information from Ministry of Agriculture, Water and Forestry, March 2005

an individual. In other words, the desired outcome of imposing such a progressive tax on every additional farming unit is twofold – firstly it aims to persuade individuals to give up some of their land units because they cannot afford to pay the tax, secondly it creates revenue to buy more commercial agricultural land for the resettlement programme.

The Two Land Reform Programmes: the Resettlement Programme and the Affirmative Action Loan Scheme

After independence, the Namibian government embarked upon two land reform programmes, namely, the Affirmative Action Loan Scheme (AALS) and the resettlement programme. Below follows an overview and evaluation of the two programmes.

The Resettlement Programme

The resettlement programme is run by the Ministry of Lands and Resettlement in order to resettle poor and landless Namibians on State-acquired commercial farmland. The aim of the resettlement programme is “to make settlers (*sic*) self-reliant, either in terms of food production or self-employment and income generating skills.”¹³ In addition, among the most important objectives of the resettlement programme are to redress past imbalances in the distribution of natural resources, particularly land, to give an opportunity to the target groups to produce their own food with a view to attaining self-sufficiency and to bring small-holder farmers into the mainstream economy by producing for the open market.¹⁴

According to the Ministry of Lands and Resettlement, approximately 243,000 poor and landless Namibians are in need of resettlement. In March 2004 the Ministry considered plans to expropriate 9 million hectares of commercial agricultural land to resettle 230,000 applicants in the next five years.¹⁵

However, resettlement statistics obtained from the Ministry in February 2005, shows that only 1,526 families have been resettled on 142 commercial farms, which comprise some 843, 789 hectares at a total cost of N\$127 836 132. On average, this means approximately 610 persons have been resettled per year on commercial agricultural land over the last 15 years. If the total costs of buying 142 farms are divided by the total number of people who have been resettled since independence, then the average cost it takes to resettle one person amounts to approximately N\$14 000. This amount excludes food rations, housing and technical services that the Ministry provides for resettlement beneficiaries.

Judging by the number of people that has been resettled over the last 15 years, it is clear that to resettle 230,000 people over the next five years is not only economically unrealistic, but also logistically impossible.

¹³ Republic of Namibia, National Resettlement Policy, Ministry of Lands, Resettlement and Rehabilitation, 2001, p.2

¹⁴ Ibid.

¹⁵ “Government Aims to Expropriate 9 Million Hectares” <www.grnnet.gov.na/News/Archive/2004/march/government_aims.htm> (Accessed 2/9/2005)

The National Resettlement Programme stipulates that beneficiaries to be self-reliant and self-sufficient by the fourth year.¹⁶ However, virtually all resettlement projects older than four years still depend heavily on government support for things like food, drought aid and technical assistance and as a result have not achieved self-sufficiency.¹⁷

A major shortcoming on these resettlement projects seems to be a lack of capacity to manage them efficiently, a crucial element in achieving self-sufficiency. Moreover, it appears that beneficiaries are not encouraged to participate in the decision-making processes of their respective projects. In most instances, resettlement beneficiaries seem to wait for the Ministry to make decisions for them. On most projects, beneficiaries complain that the Ministry seldom visits these projects, and as a result they are not always aware of the beneficiaries' needs.

In addition, a lack of basic agricultural skills among beneficiaries in turn results in low sustainable incomes and continued reliance on government. In other words, providing specific agricultural training and skills to resettlement beneficiaries are paramount in making resettlement projects self-sufficient, as this could lead to more skilful farming methods and higher incomes.

The Affirmative Action Loan Scheme (AALS)

The AALS is implemented by the Agricultural Bank of Namibia (Agribank), to assist mainly strong communal farmers to acquire commercial farms through subsidised interest rates and loan guarantees by the State.

As was mentioned above, approximately 612 farms have been bought by emerging black commercial farmers through the Affirmative Action Loan Scheme (AALS) – nearly four times the number of farms that the Ministry has acquired for its resettlement programme. Despite this impressive exchange of landownership from mainly white to black hands, the AALS has not been without its controversies. In March 2004 it was reported that at least 199 out of 544, approximately 37% of AALS farmers, have defaulted on their payments.¹⁸ In December 2004 the government suspended its 35% guarantee on AALS loans. This means that prospective farmers now first have to pay 10% of the purchase price before they can qualify for the AALS.

In January 2005, the Agribank put a moratorium on the AALS, arguing that farm prices have gone out of control, mainly because buyers had access to large loans and were buying farms at inflated prices. In some cases, farms had less production value than quoted when loans were applied for, while in other cases the valuation was based on full

¹⁶ National Resettlement Policy, op. cit. p. 7

¹⁷ See in general – Haring, S and Odendaal, W “One day we will all be equal...” A socio-legal study of the Namibian land reform and resettlement process. Legal Assistance Centre Publication, January 2002 and Odendaal, W “An Assessment of the Commercial Agricultural Land Reform Process in Namibia” A study funded by the Royal Netherlands Embassy in Namibia, Legal Assistance Centre, September 2005

¹⁸ “Angula Admits AA Loan Scheme Defective”, The Namibian, 23 March 2004

production. In this regard, some of the AALS farmers are currently under utilizing their farms, in that they had fewer cattle on the farm than what the farm could carry. This appears to have had a negative knock-on effect on the AALS, as full-scale production is a crucial factor in being able to pay back AA loans.

AALS farmers argue that they often do not have enough running capital to develop and maintain infrastructure. In addition, AALS farmers say that interest rates are too high and that the “grace” period of 1-3 years is too short. Currently loans are made available for periods of 25 years. Years 1-3 are free of interest and capital repayment for full-time farmers, while over the remaining 22 years, the capital amount is to be repaid at an escalating rate, which starts with 2% and reach 14% after the tenth year in the case of full-time farmers. Part-time farmers with a gross annual income of N\$300 000 to N\$400 000 starts with an interest rate of more than 12% during the first three years and assume 14% interest during the fourth year until the loan is fully repaid. The end result for many AALS farmers is that by trying to make ends meet, they have to sell off their cattle herd which in turn has negative effects on farming profitably and paying off mortgages.

Currently, the Agribank does not have a requirement which stipulates that prospective farmers must first be equipped with the much needed practical and financial information in order to assist them in making the switch from being a communal farmer to becoming a commercial farmer.

Over recent years some established farmers have been offering training to emerging farmers (mostly AALS) under the Emerging Commercial Farmers Support Programme (ECFSP) on issues such as livestock breeding, selection, animal husbandry, infrastructure maintenance, sustainable rangeland management, the sustainable management and protection of wildlife, and most importantly, financial management. But, the sustainability of the Programme is dependent on European donor funding and technical support and would have to be continued over the long term in order for the Programme to achieve its desired results.

Land Expropriation: Constitutional issues

The right to own property in Namibia is protected by Article 16(1) of the Namibian Constitution. However, ownership of property is not absolute, and is limited by Article 16(2) of the Namibian Constitution, which provides for the expropriation of private property “in the public interest” upon payment of “just compensation”.

Despite the fact that expropriation of private property is sanctioned by Article 16(2) the Namibian Constitution, it remains a drastic inroad into the rights of individuals. It would therefore not be uncommon that, in instances of infringements or limitations of constitutional rights, strong protective provisions have to be built into legislation to provide for remedies for such infringements or limitations.

Two concerns are raised under the Agricultural (Commercial) Land Reform Act, Act No. 6 of 1995.

Firstly, in terms of section 20 of the Act, once the Minister has decided to expropriate property, there are no provisions in the Act to protect a land owner against a *mala fide* decision, apart from challenging the decision to expropriate under administrative law and in the High Court. It might therefore be appropriate to give the Lands Tribunal¹⁹ the powers to administratively review the decision of the Minister when an owner has grounds to bring forth such an application. Such procedure might help to speed-up the process of land reform and be less expensive than bringing review applications in the High Court. Article 18 of the Namibian Constitution provides that persons aggrieved by the exercise of acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Secondly, the Minister has a discretion to nominate for appointment by the National Assembly, all five members of the Tribunal, with the exception that such members must have such backgrounds as required in terms of section 63(2)(a) – (c) of the Act. The National Assembly may reject a particular nominee of the Minister, but there is no requirement that such persons to be nominated must be independent and impartial. In particular instances, one or all of the members of the Tribunal might have a direct or indirect interest in a subject-matter before the Tribunal, which may put in question the Tribunal's constitutionality required independence and impartiality. The appointment procedures of the Lands Tribunal might be in conflict with provisions of Article 12(1)(a) of the Constitution, which provides that "all persons are entitled to a fair and public hearing by an independent Court or Tribunal established by law".

This means that the persons appointed on the Tribunal, their manner of recruitment and ultimate appointment, their security of tenure, and the grounds and manner of removal from the Tribunal would have to demonstrate that the Tribunal is ultimately complying with the Constitution.

The nature of the land reform and especially in contentious issues such as expropriation, the State will always be an interested party – in fact, be one of the parties in the process. If a public servant is nominated and appointed to the Tribunal, the independence and impartiality of the Tribunal will open for a constitutional challenge.

However, to date the Land Tribunal has never been used for the purposes it has been established under the Act²⁰, thus the independence and impartiality of the Tribunal has not yet been challenged. The fact that the Tribunal has never been used to deal with land disputes, undermines the Government's claim that farms are too expensive to purchase for land reform purposes, if the Government itself is not using the mechanisms created by Parliament to resolve the very issue that Government is complaining about.

Expropriation in the "public interest"

¹⁹ The Act provides for a Lands Tribunal with a wide range of legal powers to administer the Act.

²⁰ According to Mr Dirk Conradie, Chairperson of the Lands Tribunal, interviewed on 8 June 2005

Article 16(2) of the Constitution requires that property may be expropriated “in the public interest”. The Agricultural (Commercial) Land Reform Amendment Act No. 14 of 2003 amended section 14(1) of the principal Act with the inclusion of the phrase “in the public interest”, which now reads as follows;

“Subject to subsection (2), the Minister may, out of moneys appropriated by Parliament for the purpose, 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 and practices.”

Although fairly easy to define, the phrase “in the public interest” may be open to different interpretation. For example, land expropriation of land for land reform purposes could be interpreted as in “public interest.” However, disputes may arise as to whether the expropriation of a particular piece of land is in the public interest. In this regard factors such as, current and future land use patterns, the real and potential benefit of such land to the public, the financial costs of expropriating land to the State, the environmental condition of the land, and the availability of other land for the same or similar purpose should be considered when making decisions to expropriate land.

Evidently, numerous factors are to be considered when land is targeted for expropriation. Land expropriation should therefore be dealt with in accordance with a set criteria list. Such criteria should be contained in policy documents of the Government. The Government is bound to follow the guidelines of its policies when making decisions, unless there is a justifiable reason or ground to deviate from it by virtue of Article 18 of the Namibian Constitution. The flexibility of a Government policy (as opposed to an act of Parliament) will allow the Government to, without great expense, amend or adapt the policy as circumstances may require. For the sake of clarity and certainty, it might be appropriate to make a provision in the Agricultural Commercial Land Reform Act to direct the Government to consider the provisions of the relevant Government policies.

In addition to making provision for expropriation in “the public interest”, Article 16(2) of the Constitution also concerns itself with the term “just compensation”.

Section 25 of the Commercial (Agricultural) Land Reform Act deals with the basis on which compensation for expropriation is to be determined. Section 25 (5)(a) provides for that the improved value of the property should be taken into account when compensation is awarded. However, section 25(5)(b) provides that improvements made after the date of the expropriation notice was given to the owner, will not be compensated for. Compensation will only be given for maintenance of existing infrastructure on the property in question.

Section 25(1)(a)(i) stipulates that the amount of compensation for agricultural land should not exceed the aggregate of the amount which the land would have realised if sold

on the date of notice on the open market on a willing-buyer willing seller basis. Subsection (ii), however, provides that an amount could be required by the owner to be fully compensated for the actual loss caused by expropriation.

The Act is not clear as to whether or not the compensation that must be paid in terms of Article 25 must reflect the actual market value of the expropriated property. Although the government has on numerous occasions committed itself to carrying out land reform in accordance with the law, it has been criticised for not explaining the criteria for expropriation.

The Agricultural (Commercial) Land Reform Amendment Act No. 14 of 2003 amended section 14 (2) of the principle Act, nevertheless provides some guidelines regarding the type of agricultural land the Minister may acquire for the purposes of land reform. This includes –

- (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; or
- (c) any agricultural land which the Minister considers to be appropriate for the purposes contemplated in that subsection.

It is interesting to note that the Amendment Act 14 of 2003 has amended the principal Act of 1995 in so far as that the principal Act specifically provided for the “expropriation of under-utilised and excessive land”. The amended Act now has a much broader application, in that it provides that “any agricultural land which the Minister considers to be appropriate for the purposes contemplated in that subsection” could now be earmarked for expropriation.

Section 14 (2) clearly provides the Minister with considerable powers to select any type of commercial agricultural land that could be expropriated for purposes of land reform. In fact, if any type of commercial agricultural land could be expropriated, then it would include anyone’s property, whether he or she is black or white, Namibian or foreigner, absentee landlord or not. According to the former Minister of Lands and Resettlement, even productive farms could be expropriated if the government feels that “it can be used better”.²¹

The Agricultural (Commercial) Land Reform Act does not provide for the expropriation of land from absentee landlords. Should the government wish to include such provision in the Act, then the Act would have to be amended. However, if the term “absentee landlords” apply without distinguishing between Namibian landlords (who are either part-time farmers or who live abroad), or foreign owners, who permanently live abroad, it could create some challenges to law reformers. One could assume that the rationale behind expropriating land from absentee landlords would be to provide such land to

²¹ “We take any farm we need: Govt”, The Namibian, 4 March 2004

Namibian farmers who lack sufficient land to farm to make an adequate living, while absentee landlords frequently have access to alternative sources of income.²²

An issue that needs resolving is who should be regarded as absentee landlords and who not. For example, should part-time Affirmative Action Loan Scheme farmers (AALS), who make out approximately 41% of all AALS farmers²³, be regarded as absentee landlords? Expropriating land bought under the AALS would surely defeat the objectives of the Scheme. It could be argued that some of these absentee landlords have farm managers who permanently live on the farm, but then the same argument should also be used where for example a foreign land owner employs a Namibian farm manager, who manages his farm in his absence.

In addition, questions remain unanswered on whether the government is targeting the land of farmers for expropriation where such farmers have been involved in labour disputes with their farm workers. Neither the Namibian Constitution nor the Agricultural (Commercial) Land Reform Act makes provision for the expropriation of commercial agricultural land based on grounds of labour disputes.

It should be kept in mind that the government has yet to announce publicly its criteria on which land is to be expropriated. Should the government develop a criterion, which compels the government to expropriate land based on “the mistreatment and eviction of farm workers”, then such criterion would most probably be unconstitutional, as it would mix together the need to protect farm workers from unfair labour practices and the need for land reform. Moreover, in light of the non-existence of effective farm worker tenure legislation, farm workers remain among some of the poorest and most vulnerable wage earners in Namibia. Thus, instead of strengthening the labour inspectorate and building in strong provisions in the labour laws to protect farm workers from evictions, it appears that the Government wants to solve labour disputes by expropriating land from the perceived problematic land owners. But the justification for expropriating land on this basis would leave the door open to arbitrary expropriation, as it could reduce the expropriation process to a punitive measure rather than a means of achieving just redistribution of land in the public interest. In addition, it will also lead to the unequal treatment of current land owners.²⁴

Expropriation is a restriction on the constitutionality guaranteed right to own property and should only be legitimate if there is a strict compliance with legal requirements and procedures as determined by an Act of Parliament.²⁵ Expropriation should therefore always be foreseeable, non-discriminatory and based on reason or principle.

Will Expropriation Speed up the Land Reform Process?

²² Christina Treeger, “Legal analysis of farmland expropriation in Namibia” Published by Konrad Adenauer Stiftung and the Namibia Institute for Democracy, May 2004, p.4

²³ Sherbourne, R, “A rich man’s hobby”. IPPR opinion, No. 11. Windhoek: Institute for Public Policy Research, December 2003, p.6

²⁴ Treeger, op.cit. p.5

²⁵ Ibid.

There is little evidence to suggest that the Ministry of Lands and Resettlement is proceeding to purchase farms for resettlement based on any kind of plan. Isolated farms are acquired when they are offered for sale, but only if they are “suitable” for resettlement given unknown criteria.

Also, since 2003, the Government has increased its budget to acquire more farms. (This was after Government under spent its previous small budget). The budget was increased from N\$ 20 million to N\$ 50 million. Whilst the budget for acquisitions was increased, the Government failed to likewise increase the capacity of its technical services. For example, the Ministry of Lands and Resettlement has a shortage of land evaluators. Because of their small number, they are unable to effectively do their work, which results in too few or non-viable farms being purchased. With an increased budget, as well as an option of choosing between either the willing buyer willing seller” principle or expropriation – thus more farms to be purchased – it is likely that the Ministry’s capacity to run an effective resettlement programme would be even more stretched.

Against the above-mentioned evidence, it is doubtful whether expropriation would speed up the land reform process in Namibia.

Recommendations

1. Providing clear criteria for expropriation of land

A criterion, which compels the government to expropriate land based on “the mistreatment and eviction of farm workers”, would most probably be found unconstitutional if challenged in court, as it would mix together the need to protect farm workers from unfair labour practices and the need for land reform. The justification for expropriating land based on labour disputes would leave the door open to arbitrary expropriation, as it could reduce the expropriation process to a punitive measure rather than a means of achieving just redistribution of land in the public interest.

If the government is serious about protecting the rights of farm workers, they should strengthen the labour inspectorate (for example in the Omaheke Region it is reported that there is only one labour inspector) and build in strong provisions in the current Labour Law to protect farm workers from arbitrary evictions.

2. Factors to be considered when land is expropriated

Disputes may arise as to whether the expropriation of a particular piece of land is in the public interest. In this regard factors such as, current and future land use patterns, the real and potential benefit of such land to the public, the financial costs of expropriating land to the State, the environmental condition of the land, and the availability of other land for the same or similar purpose should be considered when making decisions to expropriate land. Evidently, numerous factors could be considered when land is targeted for expropriation. It is therefore recommended that land expropriation should be dealt with in

accordance with a set criteria list, which ideally would be contained in policy documents of the Government.

3. Farm workers

Farm workers should not only be included in the land reform programme, but should become a primary and priority target group in land reform projects.

This view is based on the following considerations:²⁶

- Farm workers have the skills to be farmers (this is especially true in a country such as Namibia with its very high incidence of part-time farmers or multiple farm holding patterns);
- Land reform is a political priority in Namibia;
- Commercial agriculture is an important contributor to the economy and settlement patterns which compromise agricultural output should be avoided;
- Farm workers' preference for the on-farm lifestyle;
- The high cost-low opportunity of re-employment in other sectors;
- The level of value added to the economy by workers on commercial farms (N\$18 461) as opposed to communal farmers (N\$ 5 231)²⁷; and
- The relatively stable work force.

However, farm workers lack the management skills become effective farmers overnight. In this regard, current commercial farmers should be the primary source of skills transfer to emerging farmers. These views, coupled with farm workers' strong preference for commercial farming and co-operation with commercial farmers, leads to the following recommendation: joint ventures and shared ownership models between commercial farmers and farm workers should be encouraged as an appropriate land reform strategy. Such an approach would transfer land from white commercial farmers to emerging black farmers, without compromising the important contribution of commercial farming to Namibia's economy. In pursuit of such strategy funds for settlement should be made available to farm workers in the form of a land acquisition grant, provided that they can prove a partnership with a skilled commercial farmer while the AA loan scheme should be extended to farm workers, on the condition of compulsory training.

4. Sustainability of Resettlement Projects

The Ministry of Lands and Resettlement states in its White Paper on Resettlement Policy that it will restrict its support for individual resettlement projects to four years. It reasons that, "within this period it is expected of settlers (beneficiaries) to have gained enough experience and self-confidence to be able to support themselves."²⁸ Indications from various research studies on the resettlement programme have not find a single

²⁶ Unpublished findings by Keulder, Odendaal and Hamman, 2004.

²⁷ Angula, M and Sherbourne, R. 2003. *Agricultural Employment in Namibia: Not the Engine of Wage Employment Growth*, Institute for Public Policy Research Briefing Paper, Windhoek, Namibia , p.5

²⁸ MLRR, "White Paper on Resettlement Policy," (July 1997), p.9

resettlement project that is sustainable after five years. Sustainability can only be achieved if development projects are implemented over a longer-term period of ten to fifteen years, on condition that projects are monitored independently by consultants on a tender and five year renewable contract basis. Even then, this monitoring process must be active, and the Ministry of Lands and Resettlement must be prepared to intervene and restructure failing projects. It must also provide more education and technical support.

5. Environmental Issues

Given the widespread existence of degraded pasture and farming lands in Namibia, it may be necessary for the Ministry of Lands and Resettlement to build its own capability to restore farms before they are allocated to the resettlement process. Obviously, land with little carrying capacity cannot provide meaningful employment for hundreds of resettlement beneficiaries. In other words, “land reform” has an ecological quality as well as a social and political quality: degraded lands cannot be resettled, so they either must be left idle or restored. Land reform and resettlement policy should be a part of a broader policy of agricultural and rural redevelopment. Thus, greater emphasis should be placed on environmental and land reform policies in order to provide for the rehabilitation of overgrazed and bush encroached land that has environmentally degraded the value of land. Financial assistance in the form of an environmental reconstruction fund should be given priority to help with rehabilitation of degraded land earmarked for resettlement. Land with little carrying capacity cannot provide meaningful employment for hundreds of resettlement beneficiaries. It is thus recommended that both Commercial (Agricultural) Land Reform Act and Communal Land Reform Act be amended to include provisions that support the rehabilitation of degraded agricultural land.

Ironically, the ground work for this reconstruction can provide both jobs and skills for labourers that can later be used in resettlement projects. Land reform must therefore begin with the land, based on a rational assessment of the future potential of each commercial farm selected for resettlement.

6. Using resettlement farms as collateral

Financial institutions accept land as collateral security, but communal and resettlement farms are not acceptable as collateral as this land is not owned by people. Currently, the Agribank is cautious with regard to granting loans to resettlement beneficiaries because they have no legal ownership interest in their land. Agribank is not clear what procedures to follow should such a resettlement farmer default in repayment. The repossession of land, should a resettlement farmer default on his or her mortgage bond, would surely defeat the aims of resettlement. At the same time, denying resettlement farmers commercial credit may undermine their ability to farm successfully. The government should investigate how to improve property rights in both communal and resettlement areas to facilitate access to credit.²⁹ The idea behind creating full rights to use land (instead of creating full ownership of the land) is a way of trying to make leaseholds tradeable to be used as collateral security to help communal and resettlement

²⁹ “How to redefine property rights for access to credit” The Namibian Economist, 7 July 2005

communities. A possible solution to avoid default payments is to use the Land Acquisition Fund to cover a farmer's loan default.

Conclusion

Given Namibia's history of unequal land distribution based on racial and ethnic lines during pre-independence Namibia, the land reform process is not only desirable from a social and political point of view, but crucial in assuring long-term peace and economic prosperity in Namibia.

It is nevertheless evident that after nearly 15 years of the resettlement programme, the programme has failed so far in empowering the poor and the landless of Namibia to become self-reliant, either in terms of food production or self employment and income generating skills. Resettling people does not only involve buying or expropriating land from the haves in order to give more land to the have-nots. In fact, resettlement involves a complex human process, which requires careful social and economic planning in order for it to be successful. It is therefore crucial that the government together with all other stakeholders in agriculture evaluate the land reform process on a regular and transparent basis.

There is enough justification to believe that the AALS could become an effective programme in the land reform process. If the current setbacks in the AALS could be overcome, there is no reason why the current generation of emerging black farmers should not become successful commercial farmers. But, in order for this happen, there must be a continued, combined and coordinated effort between the government, the commercial farming sector and the donor community to support emerging farmers. There is enough goodwill among most white established farmers, in sharing their wealth of farming experience with emerging farmers as well as resettlement beneficiaries.

Furthermore, the challenges of land reform and resettlement lay the context of the problems facing Namibian agriculture as a whole. The Namibian government should focus on a clear agricultural development policy that includes the restructuring of the existing commercial agricultural sector, improving agriculture on the communal lands through capital and skills investment, as well as a bold and creative policy of land reform and land resettlement in commercial and communal areas alike. This policy will be both expensive and involve a substantial governmental subsidy. Thus, it is not just "land reform policy" that is expensive – all agricultural policy is.

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