

# DEVELOPING CRITERIA FOR THE IDENTIFICATION OF SUITABLE AGRICULTURAL LAND FOR EXPROPRIATION AND REDISTRIBUTION IN SOUTH AFRICA: LESSONS LEARNT FROM NAMIBIA

Tina Kotzé

BA (Law) LLB LLM LLD

Research fellow at the South African Research Chair in Property Law, Department of Public Law, Stellenbosch University\*

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## Abstract

*There has been a plethora of policy initiatives and academic debate focusing on how land should be acquired in South Africa for redistribution purposes and, if expropriation is to take place, at what value or for how much compensation. However, little attention has been paid to how land will be identified for acquisition in general, and expropriation specifically, for redistribution purposes. Therefore, the aim of this article is not to explore which approach is more suitable for specifically acquiring agricultural land, but rather how agricultural land should be identified prior to being acquired, specifically through expropriation, for redistribution purposes. To this end, the approach and criteria for identifying suitable agricultural land for expropriation as provided for in Namibia's regulations to the Agricultural (Commercial) Land Reform Act 6 of 1995 may prove to be useful in formulating criteria for the South African context. The article concludes with the recommendation that for the sake of a transparent, procedurally fair and effective redistribution process in South Africa, objective, non-arbitrary criteria for identifying suitable agricultural land for redistribution purposes should be developed and provided for in regulations or policy. The development of criteria for identifying suitable agricultural land will provide the South African government with a useful tool in selecting agricultural land for acquisition and redistribution. The use of the criteria will not only contribute to a transparent, non-arbitrary and procedurally fair selection process, but will also assist landowners in determining the likelihood of their land being earmarked for redistribution.*

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## 1 Introduction

Broadening access to land on an equitable basis for South African citizens is a constitutional mandate as envisaged by section 25(5) of the Constitution of the Republic of South Africa, 1996 (the “Constitution”) as well as a societal goal.<sup>1</sup> In particular, and in line with section 25(5) of the Constitution, the 1997 *White Paper on South African Land Policy* (“*White Paper*”) highlighted that the purpose of the redistribution programme is to

“provide the poor with land for residential and productive purposes in order to improve their livelihoods ... Land redistribution is intended to assist the urban and rural poor, farmworkers, labour tenants, as well as emergent farmers.”<sup>2</sup>

To this extent, the land redistribution programme requires that “legislation has to be drafted and other steps have to be taken specifically to effect access”<sup>3</sup> to *all* (rural and urban) land.<sup>4</sup> However, there is still a need to address the “inequalities in relation to *agricultural land* ownership and land use”.<sup>5</sup> For that reason, the focus of this article falls on the identification of suitable *agricultural land* for redistribution purposes.<sup>6</sup>

The legislation that aims to give effect to section 25(5) of the Constitution is the Land Reform: Provision of Land and Assistance Act 126 of 1993 (“Provision of Land and Assistance Act”). In terms of this Act the Minister of Agriculture, Land Reform and Rural Development may acquire and designate land and develop such land for purposes of small-scale farming, residential, public, community and business or similar purposes<sup>7</sup> and provide funds for

<sup>1</sup> S 25(5) of the Constitution of the Republic of South Africa, 1996 (the “Constitution”) provides that:

“The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”

<sup>2</sup> Department of Land Affairs *The White Paper on South African Land Policy* (1997) 12, 61

<sup>3</sup> 32, 35

<sup>4</sup> In general, a rural area or the countryside is a geographic area that is located outside towns and cities. Agricultural land, although it forms part of rural land, should rather be regarded as a narrower category of land, that is, a subset of rural land. Urban land or urban areas encompass human settlements with high population density and the infrastructure of a built environment. Urban areas are created through urbanisation and are categorised by urban morphology as cities, towns, conurbations or suburbs. Department of Land Affairs *White Paper* 32, 35. See also JM Pienaar *Land Reform* (2014) 286, 346; Advisory Panel on Land Reform and Agriculture “Final Report of the Presidential Advisory Panel on Land Reform and Agriculture” (04-05-2019) *Government of South Africa* 17-18 <<https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000>> (accessed 10-08-2021)

<sup>5</sup> Preamble of the Regulation of Agricultural Landholdings Bill in GN 229 GG 40697 of 17-03-2017 (emphasis added). See HJ Kloppers & GJ Pienaar “The historical context of land reform in South Africa and early policies” (2014) 17 *PELJ* 677 677; S Tsawu *An Historical Overview and Evaluation of the Sustainability of the Land Redistribution for Agricultural Development (LRAD) Programme in South Africa* LLM thesis, Stellenbosch University (2006) 1-2; Pienaar *Land Reform* 375

<sup>6</sup> T Kepe & R Hall “Land redistribution in South Africa: Commissioned report for the High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa” (28-09-2016) *Parliament of the Republic of South Africa* <[https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/Commissioned\\_Report\\_land/Commissioned\\_Report\\_on\\_Land\\_Redistribution\\_Kepe\\_and\\_Hall.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf)> (accessed 10-08-2021) 29, 84

<sup>7</sup> S 3 of the Land Reform: Provision of Land and Assistance Act 126 of 1993 (“Provision of Land and Assistance Act”)

land purchase.<sup>8</sup> Moreover, the Provision of Land and Assistance Act allows the state to acquire land by way of purchase or through expropriation.

Despite the fact that various statutes provide for expropriation for land reform purposes,<sup>9</sup> and that expropriation is aptly suited for the acquisition of agricultural land,<sup>10</sup> the state has underutilised its expropriation powers in redistribution cases.<sup>11</sup> To date, expropriation has only been used as a mechanism of last resort in cases where unreasonable objections or delays have prevented the acquisition of land for redistributive purposes by way of market-led approaches.<sup>12</sup> However, recent cries emphasising the slow pace of redistribution have urged the South African government to use its expropriation powers more readily in future to accelerate redistribution.<sup>13</sup> Moreover, while there has been a “plethora of policy initiatives”<sup>14</sup> and academic debates

<sup>8</sup> S 10

<sup>9</sup> The following provisions specifically allow for the expropriation of property for land reform purposes: ss 10, 10A and 12 of the Provision of Land and Assistance Act and s 26 of the Extension of Security Tenure Act 62 of 1997. Further measures are also contained in Part 4, s 9 of the Housing Act 107 of 1997; s 2 read with the definition of “acquire” in the definition list of the Eastern Cape Disposal Act 7 of 2000; ss 22, 35, 42A, 42C and specifically s 42E of the Restitution of Land Rights Act 22 of 1994 and s 3 of the Land Reform (Labour Tenants) Act 3 of 1996 (“Land Reform Act”). See also cl 26 of the Regulation of Agricultural Land Holdings Bill (draft) in GN 229 GG 40697 of 17-03-2017. See also Pienaar *Land Reform* 365-368; AJ van der Walt *Constitutional Property Law* 3 ed (2011) 395, 462

<sup>10</sup> Pienaar *Land Reform* 365-368; Van der Walt *Constitutional Property Law* 395, 462

<sup>11</sup> L Ntsebeza “Land redistribution in South Africa: The property clause revisited” in L Ntsebeza & R Hall (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 107; Pienaar *Land Reform* 121

<sup>12</sup> A Pope, E du Plessis & PJ Badenhorst (eds) *The Principles of the Law of Property in South Africa* 2 ed (2020) 193; E du Plessis “Silence is golden: The lack of direction on compensation for expropriation in the 2011 Green Paper on Land Reform” (2014) 17 *PELJ* 798 802

<sup>13</sup> Advisory Panel on Land Reform and Agriculture “Final Report of the Presidential Advisory Panel on Land Reform and Agriculture” *Government of South Africa* 12, 42, 44. See also L Dentlinger “Nkwinti: Government must start expropriating land without compensation” (14-02-2017) *Eyewitness News (EWN)* <<http://ewn.co.za/2017/02/14/expropriating-land-must-begin-to-speed-up-socio-economic-reform>> (accessed 10-08-2021); S Graham “Jacob Zuma calls for confiscation of white land without expropriation” (03-03-2017) *The Telegraph* <<http://www.telegraph.co.uk/news/2017/03/03/jacob-zuma-calls-confiscation-white-land-without-compensation/>> (accessed 10-08-2021); A Makinana “Land Reform: Zuma moves for expropriation with no compensation” (31-03-2017) *City Press* <<http://city-press.news24.com/News/land-reform-zuma-moves-for-expropriation-with-no-compensation-20170331>> (accessed 10-08-2021); P Herman “Parliament votes 261 to 33 against expropriation without compensation” (01-03-2017) *Huffpost* <[https://www.huffingtonpost.co.uk/2017/02/28/parliament-votes-261-to-33-against-land-grabs\\_a\\_21858861/](https://www.huffingtonpost.co.uk/2017/02/28/parliament-votes-261-to-33-against-land-grabs_a_21858861/)> (accessed 10-08-2021); C Smith “What prevents expropriation without compensation in SA?” (11-04-2017) *Fin24* <<http://www.fin24.com/Economy/what-prevents-expropriation-without-compensation-in-sa-20170411>> (accessed 10-08-2021); C Paton “ANC must lobby society on expropriation of land, says Dlamini-Zuma” (06-04-2017) *BusinessDay* <<https://www.businesslive.co.za/bd/national/2017-04-06-anc-must-lobby-society-on-expropriation-of-land-says-dlamini-zuma/>> (accessed 10-08-2021)

<sup>14</sup> Kepe & Hall “Land Redistribution in South Africa” *Parliament of the Republic of South Africa* 29, 84; SRA Dlamini *Taking Land Reform Seriously: From Willing Seller-Willing Buyer to Expropriation* LLM thesis, University of Cape Town (2014) discusses the different redistribution policies or programmes, namely the Settlement/Land Acquisition Grant (“SLAG”) as proposed in the Department of Land Affairs *White Paper* part 47: Grants and Services; the Land Redistribution for Agricultural Development (“LRAD”); and the Proactive Land Acquisition Strategy (“PLAS”); Department of Rural Development and Land Reform *A Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context and for the Establishment of the Office of the Valuer-General* (18 October 2012); Department of Rural Development and Land Reform *State Land Lease and Disposal Policy* (25 July 2013); Department of Rural Development and Land Reform *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017). See further MC Lyne & MAG Darroch “Land Redistribution in South Africa: Past Performance and Future Policy” (2003) *Digest Project 1* <<http://crsps.net/wp-content/downloads/BASIS/Inventoried%2027/13-2003-7-118.pdf>> (accessed 10-08-2021)

focusing on how land should be *acquired* in South Africa and at what value or for how much compensation,<sup>15</sup> little attention has been paid to how land will be identified for acquisition in general, and expropriation specifically, for redistribution purposes.<sup>16</sup> It is this *lacuna* that this article aims to address.

Interestingly enough, Namibia also seems to be moving towards the acquisition of agricultural land through expropriation.<sup>17</sup> Arguably, this shift towards expropriation as the approach to acquiring agricultural land for redistribution took place following the landmark judgment in *Kessl v Ministry of Lands and Resettlement*<sup>18</sup> (“*Kessl*”). In response to this judgment, the Agricultural Commercial Land Reform Act 6 of 1995 (“*ACLRA*”) was also amended to provide the Minister of Lands, Resettlement and Rehabilitation in Namibia with the authority to prescribe criteria for identifying suitable agricultural land for expropriation aimed at “resettlement”.<sup>19</sup>

South Africa has not had a similar landmark decision on expropriation; however, the *Kessl* judgment provides valuable insights that may be important for South Africa’s way forward in identifying agricultural land suitable for redistribution. In particular, one of the most important aspects highlighted in the *Kessl* judgment is that the expropriation procedure requires a uniform and clear approach to identifying agricultural land suitable for expropriation for redistribution purposes from the outset. In other words, it should be clear *why* and *how* certain agricultural land or parcels of agricultural land were identified. In this regard, the identification criteria for suitable agricultural land for expropriation in Namibia are of particular importance for developing or formulating similar criteria in South Africa.

This article begins with an exposition of the land reform programme in Namibia (part 2). The aim of this discussion is not only to provide a brief historical overview of the redistribution programme in Namibia to date, but

<sup>15</sup> S Viljoen “Expropriation without compensation: Principled decision-making instead of arbitrariness in the land reform context (Part 1)” (2020) *TSAR* 35; S Viljoen “Expropriation without compensation: Principled decision-making instead of arbitrariness in the land reform context (Part 2)” (2020) *TSAR* 259; N Sibanda “Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: Some theoretical considerations of the social-obligation norm of ownership” (2019) 35 *SAJHR* 129; J Dugard “Unpacking section 25: What, if any, are the legal barriers to transformative land reform?” (2019) 9 *CCR* 135; E du Plessis “How the determination of compensation is influenced by the disjunction between the concept of ‘value’ and ‘compensation’” in B Hoops, EJ Marais, H Mostert, L van Schalkwyk & NK Tagliarino (eds) *Rethinking Expropriation Law III: Fair Compensation* (2018) 189; J van Wyk “Compensation for land reform expropriation” (2017) *TSAR* 21; WJ du Plessis “Valuation in the constitutional era” (2015) 18 *PELJ* 1726; Du Plessis (2014) *PELJ* 798; ZT Boggenpoel “Compliance with section 25(2)(b) of the Constitution: When should compensation for expropriation be determined?” (2012) 129 *SALJ* 605

<sup>16</sup> Advisory Panel on Land Reform and Agriculture “Final Report of the Presidential Advisory Panel on Land Reform and Agriculture” *Government of South Africa* 94-95; Kepe & Hall “Land Redistribution in South Africa” *Parliament of the Republic of South Africa* 29, 84

<sup>17</sup> Ministry of Land Reform “Resolutions of the Second National Land Conference, 1<sup>st</sup>-5<sup>th</sup> October 2018” (05-10-2018) *My Namibia* <<https://cms.my.na/assets/documents/plcq5q2c0a1mvjo921i9113mmeo54.pdf>> (accessed 10-08-2021) See further G Berti “Namibia moves towards land expropriation” (29-11-2018) *African Business* <<https://africanbusiness/2018/11/economy/namibia-moves-towards-land-expropriation/>> (accessed 10-08-2021); N Nyaungwa “Namibian president wants land expropriated to boost black ownership” (01-10-2018) *Reuters* <<https://www.reuters.com/article/us-namibia-land-idUSKCN1MB2TM>> (accessed 10-08-2021)

<sup>18</sup> 2008 1 NR 167 (HC)

<sup>19</sup> The term “resettlement” in Namibia can be equated with redistribution as envisaged in the Department of Land Affairs *White Paper* 12, 61

also to show that South Africa and Namibia are unique choices for comparative study. Both jurisdictions seem to be moving away from the use of market-led approaches in acquiring agricultural land towards expropriation as a means of accelerating the slow pace of redistribution. In this regard, the *Kessl* judgment not only sets out the relevant legislative framework and correct procedure for a valid expropriation,<sup>20</sup> but also highlights the importance of identifying suitable agricultural land *before* making the decision to expropriate.<sup>21</sup> The next part, consequently, provides an exposition of: (a) the legislative framework for expropriations in Namibia; and (b) an in-depth discussion of the *Kessl* judgment. Overall, to facilitate and ensure a transparent expropriation process, in line with the rules of natural justice and the procedure set out in expropriation legislation,<sup>22</sup> criteria for the identification of suitable agricultural land for expropriation are critical in Namibia and South Africa. Therefore, in part 3, the criteria formulated in Namibia for this purpose are discussed in detail as a basis for formulating similar criteria for the South African context (in part 4). Part 5 concludes this article with the recommendation that for the sake of a transparent, procedurally fair and effective redistribution process in South Africa, objective, non-arbitrary criteria for identifying suitable agricultural land for redistribution purposes should be developed and provided for in regulations or policy.<sup>23</sup>

## 2 Land reform in Namibia

Upon independence in 1990, Namibia had “one of the most unequal distributions of agricultural land in the world”.<sup>24</sup> Three decades later, ownership of agricultural land remains unfairly distributed in Namibia.<sup>25</sup> The unequal distribution of agricultural land in Namibia and the need for

<sup>20</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 56; s 20(1A) of the Agricultural Commercial Land Reform Act 6 of 1995 (“ACLRA”)

<sup>21</sup> Para 115

<sup>22</sup> S 20(1A) of the ACLRA read with Regulations on Criteria to be used for Expropriation of Agricultural Land GN 209 of 2016 GG 6115 of 01-09-2016 (“Expropriation Regulations”) and the Expropriation Act 63 of 1975 (“Expropriation Act”) The latter Act is the overarching expropriation legislation applicable in South Africa and Namibia See, however, the Expropriation Bill B23-2020 (draft) in GN 1082 GG 43798 of 09-10-2020 (“Expropriation Bill”) which is set to replace the Expropriation Act in South Africa once promulgated

<sup>23</sup> JM Pienaar “Willing-seller-willing-buyer and expropriations as land reform tools: What can South Africa learn from the Namibian experience?” (2018) 10 *Namibia Law Journal* 41 62

<sup>24</sup> E Hongslo & TA Benjaminsen “Turning Landscapes into ‘Nothing’: A Narrative on Land Reform in Namibia” (2002) 29 *Forum for Development Studies* 321 321; SK Amoo & SL Harring “Post-independence land reform jurisprudence in Namibia and its relevance for social development” (2018) 10 *Namibia Law Journal* 3 5

<sup>25</sup> Amoo & Harring (2018) *Namibia Law Journal* 3; L Lenggenhager, L Bloemert & R Nghtevelekma “Turning land into money: Land, inequality and reforms in Namibia” (2021) 11 *Review of Agrarian Studies* 1 1-2 <[https://www.researchgate.net/profile/Luregn-Lenggenhager/publication/353515416\\_Turning\\_Land\\_into\\_Money\\_Land\\_Inequality\\_and\\_Reforms\\_in\\_Namibia/links/61014418169a1a0103c01141/Turning-Land-into-Money-Land-Inequality-and-Reforms-in-Namibia.pdf](https://www.researchgate.net/profile/Luregn-Lenggenhager/publication/353515416_Turning_Land_into_Money_Land_Inequality_and_Reforms_in_Namibia/links/61014418169a1a0103c01141/Turning-Land-into-Money-Land-Inequality-and-Reforms-in-Namibia.pdf)> (accessed 10-08-2021); H Melber “No land in sight” (09-06-2017) <<https://www.dandc.eu/en/article/despite-independence-1990-land-ownership-remains-unfairly-distributed-namibia>> (accessed 10-08-2021); World Bank “Overview: Namibia” (16-03-2021) *Worldbank* <<http://www.worldbank.org/en/country/namibia/overview#1>> (accessed 10-08-2021)

the redistribution thereof resulted from the former German colonial rule<sup>26</sup> and South African apartheid land control systems.<sup>27</sup> The colonial apartheid rules<sup>28</sup> created a “parallel agricultural system”<sup>29</sup> comprising (a) large commercial farms established for the white minority in Namibia, and (b) communal or homelands for the black population.<sup>30</sup> Furthermore, these rules prohibited black people from gaining or having access to commercial agricultural land.<sup>31</sup> Under apartheid, white people could hold land title, whereas black people possessed land, but their rights to the land were not legally recognised.<sup>32</sup> Consequently, upon independence, the majority of arable and viable agricultural land was held by white landowners, while the rest of the land largely formed part of

<sup>26</sup> Pienaar (2018) *Namibia Law Journal* 41 41; SK Amoo *Property Law in Namibia* (2014) 13-16; Amoo & Harring (2018) *Namibia Law Journal* 4 Namibia was first colonised by the Germans and remained a German colony from 1884 to 1915 Following the aftermath of World War I, South Africa was subsequently granted a mandate over the territory See AN Kamkuemah *A Comparative Study of Black Rural Women’s Tenure Security in South Africa and Namibia* LLM thesis, Stellenbosch University (2012) 140-161

<sup>27</sup> Amoo & Harring (2018) *Namibia Law Journal* 4 As Hongslo & Benjaminsen (2002) *Forum for Development Studies* 322 explain:

“After the First World War, German South West Africa became a League of Nations South African mandated territory and was henceforth administered basically as a South African province Under South African rule and reinforced by the Apartheid policy from 1948, the two land tenure systems – freehold for white farmers, and communal tenure under state authority for Africans – continued to develop in isolation from each other until independence”

See also Kamkuemah *Black Rural Women’s Tenure Security in South Africa and Namibia* 151-161; Amoo *Property Law in Namibia* 13-16, 224-226; D Shriver “Rectifying land ownership disparities through expropriation: Why recent land reform measures in Namibia are unconstitutional and unnecessary” (2006) 15 *Transnational Law and Contemporary Problems* 419 422-425; M Tong “Decolonialisation and comparative land reform with a special focus on Africa” (2014) 9 *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 16 17-20; P Mufune “Land reform management in Namibia, South Africa and Zimbabwe: A comparative perspective” (2010) 6 *International Journal of Rural Management* 18-19; SM Kariuki “Political compromise on land reform: A study of South Africa and Namibia” (2007) 14 *South African Journal of International Affairs* 99 99-103

<sup>28</sup> Amoo *Property Law in Namibia* 17 where the author explains:

“The legal mechanism that was used by the colonial powers in South-West Africa was legislation that was primarily geared at dividing the land on the basis of the settler-native dichotomy This was done by the initial declaration of the territory as crown land, followed by the declaration of tribal and trust land or communal land over land originally belonging to the natives”

For legislative measures creating crown and state land see the Transvaal Crown Land Disposal Ordinance of 1903, made applicable to South-West Africa by virtue of the Crown Land Disposal Proclamation 13 of 1920 See also the Reservation of State Land for Natives Ordinance 35 of 1967 For legislative measures creating reserves, trusts and communal land see the Native Administration Proclamation 11 of 1922; the Native Administration Proclamation 15 of 1928; the Native Reserve Regulation 68 of 1924; the Development Trust and Land Act 18 of 1936; the Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968 repealed later by s 52 of the Representative Authorities Proclamation Amoo *Property Law in Namibia* 17 explains further:

“Ownership of land in the area demarcated as crown land vested in the colonial power, whilst part of the land was reserved for the occupation and use of the natives Within the area of crown land the received law of the settlers applied Customary law applied to areas reserved for the natives”

See also Kamkuemah *Black Rural Women’s Tenure Security in South Africa and Namibia* 149-161

<sup>29</sup> C Glintz “The High Court of Namibia: Gunther Kessl v Ministry of Lands and Resettlement and two others Case No 27/2006 and 266/2006 - A test case for the Namibian land reform programme” (2009) 42 *Law and Politics in Africa, Asia and Latin America* 263 264

<sup>30</sup> Amoo & Harring (2018) *Namibia Law Journal* 4-6; Amoo *Property Law in Namibia* 16-19, 208; Hongslo & Benjaminsen (2002) *Forum for Development Studies* 321; Kamkuemah *Black Rural Women’s Tenure Security in South Africa and Namibia* 149-161

<sup>31</sup> Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 264

<sup>32</sup> Amoo & Harring (2018) *Namibia Law Journal* 5



the communal areas.<sup>33</sup> A legal framework for land reform in Namibia was, therefore, required.<sup>34</sup>

Accordingly, South Africa and Namibia are not only neighbouring countries,<sup>35</sup> but also unique choices for a comparative study, since they share a history of colonialism and race-based minority rule under apartheid,<sup>36</sup> characterised by extensive land appropriation,<sup>37</sup> which resulted in skewed patterns of ownership in both countries.<sup>38</sup> Both countries also experienced negotiated settlements<sup>39</sup> whereby new political dispensations were established in terms of which the respective constitutions provide for the protection of property rights in principle.<sup>40</sup> South Africa undertook an overarching land reform programme consisting of three inter-connected pillars, namely redistribution, restitution and tenure reform, as embedded in section 25 of the Constitution.<sup>41</sup> A variety of complex statutory land reform measures emerged to give effect to the land reform programme in general.<sup>42</sup> Unlike the South African Constitution, the Constitution of the Republic of Namibia, 1990

<sup>33</sup> At independence, approximately 52% of the agricultural farmland was in the hands of the white commercial farmer community, who made up 6% of the Namibian population. The remaining 94% of the population owned only 48% of the agricultural land. See J Hunter “Who should own the land? An introduction” in J Hunter (ed) *Who Should Own the Land? Analyses and Views on Land Reform and the Land Question in Namibia and Southern Africa* (2004) 1; Glantz (2009) *Law and Politics in Africa, Asia and Latin America* 263

<sup>34</sup> The legal framework consists of the Constitution of the Republic of Namibia, 1990 (the “Namibian Constitution”); the ACLRA; the Communal Land Reform Act 5 of 2002 (“CLRA”); and the Flexible Land Reform Act 4 of 2012. See Amoo & Harring (2018) *Namibia Law Journal* 3-4. Furthermore, see Amoo *Property Law in Namibia* 16-19, 208 who notes that the distinction between commercial farms and communal lands has been maintained to a large degree by the Namibian Constitution and the corresponding legislation. The status of crown or state land is affirmed and maintained in Art 100, read with Sch 5(1) of the Namibian Constitution. Furthermore, Art 16(1) of the Namibian Constitution, which maintains the status of private property, affirms the fundamental right to acquire, own and dispose of property. Art 102(5) of the Namibian Constitution and the promulgation of the ACLRA indicates that the status of communal land has also been maintained.

<sup>35</sup> Pienaar (2018) *Namibia Law Journal* 41

<sup>36</sup> Amoo & Harring (2018) *Namibia Law Journal* 4-5; Pienaar (2018) *Namibia Law Journal* 41

<sup>37</sup> Kamkuehah *Black Rural Women's Tenure Security In South Africa and Namibia* 25-50. See generally Amoo *Property Law in Namibia* 13-16, 224-226; Shriver (2006) *Transnational Law and Contemporary Problems* 422-425; Tong (2014) *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 17-20; Mufune (2010) *International Journal of Rural Management* 8-19; Kariuki (2007) *South African Journal of International Affairs* 99-103; S Pazvakavambwa & V Hungwe “Land redistribution in Zimbabwe” in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural Land Redistribution: Toward Greater Consensus* (2009) 137 137; R Hall “A comparative analysis of land reform in South Africa and Zimbabwe” in MC Lee & K Colvard (eds) *Unfinished Business: The Land Crisis in Southern Africa* (2003) 256

<sup>38</sup> Amoo *Property Law in Namibia* 13-16, 224-226; Shriver (2006) *Transnational Law and Contemporary Problems* 422-425; Tong (2014) *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 17-20; Mufune (2010) *International Journal of Rural Management* 8-19; Kariuki (2007) *South African Journal of International Affairs* 99-103

<sup>39</sup> Amoo & Harring (2018) *Namibia Law Journal* 9; C Mapaire “Land reform needing more reform(s): Issues in Namibian land reform process” (2018) 10 *Namibia Law Journal* 85 86

<sup>40</sup> S 25 of the Constitution, and Art 16 of the Namibian Constitution. See Pienaar *Land Reform* 815-831; Amoo *Property Law in Namibia* 224-234; Shriver (2006) *Transnational Law and Contemporary Problems* 422-425; Tong (2014) *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 17-20; Mufune (2010) *International Journal of Rural Management* 8-19; Kariuki (2007) *South African Journal of International Affairs* 99-103; Pazvakavambwa & Hungwe “Land redistribution in Zimbabwe” in *Agricultural Land Redistribution* 137; Hall “A comparative analysis of land reform in South Africa and Zimbabwe” *Unfinished Business* 256

<sup>41</sup> S 25(5)-(9) of the Constitution; Pienaar (2018) *Namibia Law Journal* 41

<sup>42</sup> Pienaar *Land Reform* chs 7-9 in general

(the “Namibian Constitution”) does not explicitly entrench its land reform programme. However, the Namibian land reform programme nevertheless focuses on broadening access to land and resettling the landless.<sup>43</sup>

The property clause in the Namibian Constitution consists of two parts: Article 16(1) provides for the acknowledgement and protection of existing private property rights,<sup>44</sup> whereas Article 16(2) allows for the expropriation of property in the public interest, subject to the payment of just compensation, in accordance with requirements and procedures to be determined by an Act of Parliament.<sup>45</sup> Furthermore, in 1991, a year after the Namibian Constitution was adopted, the National Land Conference on Land Reform and the Land Question was held to decide on the course of the land reform programme.<sup>46</sup> Generally, the land conference resolved to compensate for the dispossession of land, and that government would focus on the inequity of land ownership in the commercial agricultural areas.<sup>47</sup> It was, for instance, determined that abandoned and underutilised commercial agricultural land would be reallocated and used productively,<sup>48</sup> that land owned by absent landowners, primarily foreign national landowners,<sup>49</sup> would be expropriated<sup>50</sup> and that very large farms and single ownership of multiple farms would not be permitted.<sup>51</sup>

Like South Africa, Namibia initially followed a market-led approach to acquiring agricultural land for land reform purposes – an approach essentially based on the willing-buyer-willing-seller principle.<sup>52</sup> However, in 2004, the former Prime Minister Theo-Ben Gurirab recognised the failure of the willing-

<sup>43</sup> Pienaar (2018) *Namibia Law Journal* 42; Amoo *Property Law in Namibia* 224; Kariuki (2007) *South African Journal of International Affairs* 107; Hongso & Benjaminsen (2002) *Forum for Development Studies* 322

<sup>44</sup> Art 16(1) of the Namibian Constitution provides that:

“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.”

<sup>45</sup> Art 16(2) of the Namibian Constitution provides that:

“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.”

<sup>46</sup> See Ministry of Land Reform *The National Land Conference on Land Reform and the Land Question* (June/July 1991) 30-40 for the main topics of discussion at the conference. See also H Melber “Colonialism, Land, Ethnicity and Class: Namibia after the Second National Land Conference” (2019) 54 *African Spectrum* 73 75-78

<sup>47</sup> Ministry of Land Reform *National Land Conference on Land Reform and the Land Question* 30-35

<sup>48</sup> 32

<sup>49</sup> Nyaungwa “Namibian president wants land expropriated to boost black ownership” *Reuters*

<sup>50</sup> Ministry of Land Reform *The National Land Conference on Land Reform and the Land Question* 31-32

<sup>51</sup> 32

<sup>52</sup> B Fuller “A Namibian path for land reform” in J Hunter (ed) *Who Should Own the Land? Analyses and Views on Land Reform and the Land Question in Namibia and Southern Africa* (2004) 83 83; Pienaar (2018) *Namibia Law Journal* 44; NN Angola *Land Reform: A Critical Analysis of the Willing-Seller-Willing Buyer Policy as a Mode of Acquiring Commercial Land and the Categorization of the Beneficiaries and their Ability to Pay Back the Agribank Loan* LLB research paper, University of Namibia (2007); MP Sebola & JP Tsheola “Economics of agricultural land restitution and redistribution in South Africa: Willing buyer, willing seller business imperatives versus socio-political transformation?” (2014) 46 *Journal of Human Ecology* 113



buyer-willing-seller process<sup>53</sup> because it did not acquire a sufficient amount of agricultural land fast enough to ensure a politically sustainable land reform process. In essence, the acquisition of agricultural land by way of market-led approaches failed in Namibia.<sup>54</sup> Consequently, the Minister announced that expropriation of private commercial agricultural land would begin. The first expropriations took place in 2005. However, these expropriations were not contested in court.<sup>55</sup>

In 2008, the first landmark “test case” dealing with the expropriation of agricultural land in Namibia was handed down. As mentioned previously, the *Kessl* judgment not only sets out the relevant legislative framework and correct procedure for a valid expropriation,<sup>56</sup> but also highlights the importance of identifying suitable agricultural land *before* making the decision to expropriate.<sup>57</sup> Consequently, the next part provides an exposition of: (a) the legislative framework for expropriations in Namibia; and (b) a discussion of the *Kessl* judgment.

### 3 Identifying suitable agricultural land for redistribution in Namibia

#### 3.1 The legislative framework

Article 16(2) of the Namibian Constitution provides the legal basis for expropriation in Namibia.<sup>58</sup> It provides for the expropriation of private property provided that it is: (a) in the public interest; (b) subject to the payment of just compensation; and (c) in accordance with the procedure for expropriation set out in expropriation legislation. The ACLRA deals specifically with the acquisition and redistribution of agricultural land in Namibia. The purpose of the ACLRA is to provide for the acquisition of agricultural land by the

<sup>53</sup> See also *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 7-11 referring to two detailed reports. The first was compiled by B Fuller & G Eiseb “The Commercial Farm Market in Namibia: Evidence from the First Eleven Years” (2002) *IPPR Paper No 15* <[https://sarpn.org/documents/d0000119/P118\\_IPPR\\_Briefing\\_Paper.pdf](https://sarpn.org/documents/d0000119/P118_IPPR_Briefing_Paper.pdf)> (accessed 08-10-2021) prepared for the Institute for Public Policy Research in 2002. The report, an empirical analysis of commercial land sales, revealed that the failure of the “willing buyer, willing seller” scheme for black people to acquire white-owned farms was proceeding at a slow pace, that white farmers were avoiding offering their land to the Government by creating close corporations, and that any progress in land redistribution under this scheme was being offset by a continuing gap between white and black agriculture. The second report, SL Harring & W Odendaal *One Day We Will All Be Equal: A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process* (2002) published by the Legal Assistance Centre, is a detailed empirical study that is focused on the resettlement process itself and which shows that many farms taken for resettlement under the “willing buyer, willing seller scheme” had not actually been resettled.

<sup>54</sup> See SL Harring & W Odendaal *Kessl: A New Jurisprudence for Land Reform in Namibia?* (2008); “Statement by the Right Honourable Theo-Ben Gurirab, Prime Minister of the Republic of Namibia, on the Acceleration of Land Reform in the Republic of Namibia” (25-02-2004) *SARPN* <[https://sarpn.org/documents/d0000745/P826-Namibia\\_land\\_reform\\_Gurirab.pdf](https://sarpn.org/documents/d0000745/P826-Namibia_land_reform_Gurirab.pdf)> (accessed 10-08-2021)

<sup>55</sup> Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 265; Harring & Odendaal *Kessl: A New Jurisprudence?* 4-6

<sup>56</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 56; s 20(1A) of the ACLRA

<sup>57</sup> Para 115

<sup>58</sup> *Amoo Property Law in Namibia* 70. Various pieces of legislation provide for expropriation in Namibia including the ACLRA, the Expropriation Act and the Expropriation Ordinance 13 of 1978

state for land reform and for the allocation of such land to Namibian citizens<sup>59</sup> who do not own or otherwise have the use of any or of adequate agricultural land.<sup>60</sup> The circumstances in which the Minister of Lands, Resettlement and Rehabilitation in Namibia may acquire agricultural land are threefold: (a) where agricultural land is offered for sale to the Minister,<sup>61</sup> (b) where agricultural land is held by a foreign national,<sup>62</sup> or (c) where the Minister considers the agricultural land to be appropriate for land reform.<sup>63</sup> In this regard, the ACLRA provides for two methods of acquiring agricultural land for redistribution and resettlement: (a) market-led approaches; and (b) expropriation.<sup>64</sup> For purposes of this article, the focus falls on expropriation.

In terms of the ACLRA, the Minister responsible for land reform has the power to expropriate private property provided that the power is exercised in terms of the procedures set out in the Act.<sup>65</sup> To prevent the potential abuse of the state's expropriation powers, the procedure for expropriation provided in the ACLRA is a legal requirement,<sup>66</sup> with the aim of "ensuring procedural justice, transparency, recognition of the rule of law and the protection of individual rights".<sup>67</sup> The *Kessl* judgment<sup>68</sup> exemplifies this point<sup>69</sup> and therefore it is necessary to discuss it. Of particular importance for this article is the need to identify suitable agricultural land *before* a decision is made to expropriate the land.<sup>70</sup>

## 3 2 *Kessl v Ministry of Lands and Resettlement*

### 3 2 1 *The facts*

The case concerned the review of the Ministry's decision to expropriate four farms owned by three different foreign landowners. All three applicants were German citizens who resided in Germany and had owned the farms in question for many years.<sup>71</sup> The respective owners also visited their landholdings regularly.<sup>72</sup> Furthermore, several farmworkers and their families resided on

<sup>59</sup> For a definition of "Namibian citizen" see Art 4 of the Namibian Constitution, read with s 1 of the Namibian Citizenship Act 14 of 1990

<sup>60</sup> Preamble and s 14 of the ACLRA; Amoo *Property Law in Namibia* 82

<sup>61</sup> S 14(2)(a) of the ACLRA

<sup>62</sup> S 14(2)(b) read with ss 58 and 59

<sup>63</sup> S 14(2)(c)

<sup>64</sup> Amoo *Property Law in Namibia* 82-84, 90-92; *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 8

<sup>65</sup> Amoo *Property Law in Namibia* 71 See ss 14 and 20 of the ACLRA See further *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC)

<sup>66</sup> Amoo *Property Law in Namibia* 73

<sup>67</sup> 73

<sup>68</sup> For a detailed discussion of the *Kessl* judgment see Harring & Odendaal *Kessl: A New Jurisprudence?*; Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 263

<sup>69</sup> Pienaar (2018) *Namibia Law Journal* 45

<sup>70</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 115

<sup>71</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 32, 105 See further Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 270-271; Harring & Odendaal *Kessl: A New Jurisprudence?* 8-9 for an exposition of the facts

<sup>72</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 32, 105 See also Glintz (2009) *Law and Politics in Africa, Asia and Latin America* 270-271; Harring & Odendaal *Kessl: A New Jurisprudence?* 8-9

the farms.<sup>73</sup> The respondent was the Minister of Lands, Resettlement and Rehabilitation.

In 2004, and after consulting the Land Reform Advisory Commission<sup>74</sup> (“Commission”) at an extraordinary meeting, the Minister decided to expropriate the applicants’ farms. However, various procedural mistakes were made during the expropriation process. For one, the members of the Commission were not afforded the opportunity to discuss: (a) the criteria used to select the farms for expropriation; (b) the purpose of the expropriation; (c) the identity of potential beneficiaries; or (d) how such beneficiaries were to be selected.<sup>75</sup> Furthermore, the inspection of the farms only took place a year after the extraordinary meeting was held to determine which farms should be expropriated. In essence, the Commission could not reach a resolution to justify why the farms in question were chosen to be expropriated, because it had no particulars pertaining to the owners or the farms. Interestingly, however, the applicants received a letter indicating that their farms would be expropriated on the same day the meeting was held. The applicants, after receiving the letter, were only afforded the opportunity to make representations seven months after the fact.<sup>76</sup> The applicants requested documents and information regarding the expropriation, but never received such information on which to base their representations. In 2005, an expropriation notice was issued and signed by the Minister.<sup>77</sup> Accordingly, the applicants alleged that the Minister did not follow the correct procedure and consequently instituted legal action. The court was asked to review and set aside the decision and the corresponding notices of the Minister to expropriate the farms.

### 3 2 2 *The legal issues*

While the applicants conceded that the government of Namibia had the right to expropriate agricultural land under certain conditions,<sup>78</sup> two main issues formed the basis of the legal challenge:<sup>79</sup> first, whether the *audi alteram partem* principle was relevant in expropriation cases and, secondly, whether the government of Namibia followed the correct procedure for the expropriation to be valid.<sup>80</sup> Pienaar notes that it is not the fact that the expropriation was resorted to which is questionable, but rather the manner in which the expropriation took place.<sup>81</sup> Each of these issues is discussed separately below.

<sup>73</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 32, 105 for full information regarding the particulars of the respective owners and their farms

<sup>74</sup> Ss 2-13 of the ACLRA

<sup>75</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 17-22; Pienaar (2018) *Namibia Law Journal* 46

<sup>76</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 17-22

<sup>77</sup> Paras 17-22

<sup>78</sup> Para 1

<sup>79</sup> Paras 2, 33

<sup>80</sup> Paras 2, 33

<sup>81</sup> Pienaar (2018) *Namibia Law Journal* 46

The first issue is whether Article 18 of the Namibian Constitution, which guarantees administrative justice, is applicable in expropriation cases.<sup>82</sup> If the Article applies, it would mean that the common-law principles of natural justice, which include the *audi alteram partem* principle, would be applicable in expropriation cases. This requires the Minister to provide reasons for his decision to expropriate the respective farms and to allow the landowners to make representations, based on the reasons provided. It was argued on behalf of the respondent that the only requirements for a valid expropriation are found in Article 16(2) of the Namibian Constitution, which excludes the *audi alteram partem* rule.<sup>83</sup> However, it was submitted by counsel for the applicants that this argument is untenable.<sup>84</sup> It was argued that the *audi alteram partem* principle under Article 18 of the Namibian Constitution<sup>85</sup> cannot be excluded because

“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”.<sup>86</sup>

The court agreed with this argument and held that Article 16(2) of the Namibian Constitution should not be “walled in”<sup>87</sup> to operate in isolation of other human rights and therefore to exclude the principles and rules of natural justice.<sup>88</sup> In this context, the court held that this means that the Minister must apply the rules of natural justice before making a decision to expropriate property.<sup>89</sup> Therefore, the landowner must be afforded the opportunity to be heard and to place all the relevant considerations before the decision-maker

<sup>82</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 33, 39–41

<sup>83</sup> Para 44

<sup>84</sup> Para 44

<sup>85</sup> Art 18 of the Namibian Constitution provides for the right to administrative justice. Under the common law the *audi alteram partem* principle is part of the right to administrative justice.

<sup>86</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 44

<sup>87</sup> Para 45

<sup>88</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 45. Similarly, in South African law, constitutional provisions should not be construed in isolation but rather in conjunction with the Constitution as a whole. Constitutional provisions must be construed in a way that secures an individual the full measure of their protection as held in *S v Makwanyane* 1995 6 BCLR 665 (CC) para 10. See further *Ferreira v Levin* 1996 1 SA 984 (CC).

<sup>89</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 47–48. Similarly, this common-law principle forms part of the right to just administrative justice under s 33 of the South African Constitution read with the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). In the South African context, the landowner should be afforded the opportunity to be heard in the expropriation process. See RJ Purshotam “The expropriatee’s right to a hearing before the decision is made to expropriate” (1994) 111 *SALJ* 237–240 in general. In principle, the decision to expropriate property may be challenged either in terms of s 25(1) or s 33 of the South African Constitution. Where the expropriation takes place *via* administrative action, it must be reviewed under s 33 of the Constitution, in conjunction with PAJA. However, where the decision to expropriate does not amount to an administrative action, it must be reviewed under s 25 of the Constitution. See further S Viljoen “Substantive adjudication of the decision to expropriate property” (2017) 28 *Stell LR* 444; G Quinot & E van der Sijde “Reflections on the single system of law principle with reference to the regulation of property and the right to just administrative action” in G Muller, R Brits, BV Slade & J van Wyk (eds) *Transformative Property Law: Festschrift in Honour of AJ van der Walt* (2018) 447; EJ Marais & PJH Maree “At the intersection between expropriation law and administrative law: Two critical views on the Constitutional Court’s *Arun* judgment” (2016) 19 *PELJ* 2 and E van der Sijde *Reconsidering the Relationship between Property and Regulation: A Systemic Constitutional approach* LL.D dissertation Stellenbosch University (2015) on the relationship between the constitutional property clause and the right to administrative justice in South Africa.

which could persuade him or her not to expropriate his or her property.<sup>90</sup> *In casu*, the Minister invited the applicants in a letter to make representations. However, the letter did not provide information regarding the basis for the Minister's decision to expropriate the farms. Furthermore, the applicants, after requesting more information, did not receive a reply from the Minister. Therefore, the court found that the Minister had violated the applicants' right to be heard, because he failed to provide the applicants with the relevant information, without which they could not make representations of their own.<sup>91</sup>

The judgment is, therefore, important because it directs the government to adhere to the requirements of Articles 16(2) and 18 of the Namibian Constitution during the expropriation process.<sup>92</sup> If the landowner is not afforded the opportunity to be heard, the expropriation will be regarded as invalid, and the expropriation process will have to start afresh. It is thus critical that, during the expropriation procedure, the rules of natural justice are adhered to. The expropriation procedure must also be followed in accordance with the provisions of the ACLRA. In other words, both the common law<sup>93</sup> (such as the rules of natural justice) and statutory requirements set out in the ACLRA must be followed for the expropriation to be valid.

This leads to the second issue addressed by the court, namely whether the government followed the correct procedure as provided in the ACLRA.<sup>94</sup> In this regard, the court divides the discussion of the correct expropriation process the Minister must follow into two stages, which it refers to as a "double-barrel process".<sup>95</sup> A number of procedural requirements have to be fulfilled for the expropriation to be valid during the first and/or second process.

The first of the two-staged expropriation process is where the Minister informs the landowner that the government is interested in purchasing the land and the parties enter into negotiations for the purchase of the farm.<sup>96</sup> Importantly, the court held that the expropriation process cannot take place if there was no previous attempt to acquire the land by way of market-led approaches.<sup>97</sup> It follows that the expropriation process is a method of last resort in Namibia. Whether expropriation should always be a method of last resort is questionable. Generally speaking, the power to expropriate agricultural land for redistribution is part of the state's power of eminent domain.<sup>98</sup> In principle, the state has the authority to use its expropriation powers without first negotiating with the landowner in question, provided the correct procedure is

<sup>90</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 49. See Purshotam (1994) *SALJ* 237-240 in general.

<sup>91</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 54.

<sup>92</sup> Pienaar (2018) *Namibia Law Journal* 47.

<sup>93</sup> South African law, especially its common-law elements, also forms the basis of the laws in Namibia.

<sup>94</sup> S 14, read with s 20 of the ACLRA.

<sup>95</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 56.

<sup>96</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 57, 73; s 14 of the ACLRA.

<sup>97</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 56, 70, 73.

<sup>98</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 44; Van der Walt *Constitutional Property Law* 459; J Murphy "Property rights in the new constitution: An analytical framework for constitutional review" (1993) 56 *THRHR* 623-630.

followed in terms of the expropriation legislation.<sup>99</sup> Therefore, the manner in which a state exercises its expropriation powers may affect the validity of the expropriation. Moreover, the circumstances may warrant that the state uses its expropriation powers as a method of first, rather than last, resort.<sup>100</sup>

Once it is clear that the Minister and the owner are unable to negotiate for the sale of the property by way of mutual agreement,<sup>101</sup> or where the whereabouts of the owner cannot be ascertained to negotiate a sale,<sup>102</sup> the Minister may expropriate the property in accordance with the procedure set out in the ACLRA. Accordingly, during the first stage of the expropriation process, an investigation must be lodged to determine whether the particular farm or piece of land is suitable for resettlement.<sup>103</sup> The role of the Commission becomes pivotal during this stage of the expropriation process.<sup>104</sup> Importantly, under section 15 of ACLRA, the Commission is required to carry out investigations and make recommendations to the Minister regarding the *suitability* of the land.<sup>105</sup> These investigations have to take place before the Minister decides to acquire the property.<sup>106</sup> Once there has been an investigation concerning the suitability of the agricultural land and the parties are unable to negotiate a sale of the property, then only may the Minister expropriate the property.<sup>107</sup> This procedural step allows the Minister to arrive at a well-informed and considered decision as to whether the agricultural land is suitable<sup>108</sup> to be expropriated for resettlement purposes.<sup>109</sup> *In casu*, the Commission did not investigate the farms *mero motu* or on request of the Minister as required by the ACLRA.<sup>110</sup> Accordingly, no criteria were identified to determine whether the particular farms in question were suitable for expropriation.<sup>111</sup>

The second stage of the process entails the expropriation of the property. Several procedural requirements must be adhered to for the expropriation to be valid. First, the Minister is procedurally obliged to inform the landowner of his or her decision to expropriate the property by serving a notice on the particular landowner.<sup>112</sup> The notice itself must also contain the relevant

<sup>99</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 44; Van der Walt *Constitutional Property Law* 459; Murphy (1993) *THRHR* 630

<sup>100</sup> For example, cl 22 of the Expropriation Bill in South Africa makes provision for “urgent expropriations” which allow the state to acquire “property temporarily for as long as it is urgently required”, such as in the case of a disaster as defined in the Disaster Management Act 57 of 2002 or where the court grants an order for an urgent expropriation

<sup>101</sup> S 20(1)(a) of the ACLRA

<sup>102</sup> S 20(1)(b)

<sup>103</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 57

<sup>104</sup> Harring & Odendaal *Kessl: A New Jurisprudence?* 18

<sup>105</sup> S 15 read with s 20(1) of the ACLRA; *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 57, 59, 88-89

<sup>106</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 61

<sup>107</sup> S 20 of the ACLRA

<sup>108</sup> See also part 3 3 below dealing with the criteria that the Commission can use to determine if the land is suitable for expropriation and resettlement

<sup>109</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 59

<sup>110</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 59, 77; s 20(1) of the ACLRA

<sup>111</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 60 See s 20(1A) of the ACLRA which provides that the Minister may prescribe criteria to be used for the expropriation of agricultural land S 20(1A) was inserted by the Agricultural (Commercial) Land Reform Amendment Act 1 of 2014

<sup>112</sup> S 20(2) of the ACLRA; *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 62



information, as required by the ACLRA.<sup>113</sup> Secondly, the Commission has an obligation to consider the interests of any persons employed or lawfully residing on the land, as well as the families of such persons.<sup>114</sup> Once the interests are considered, the Commission may recommend to the Minister what to do with the possibly displaced persons.<sup>115</sup> However, *in casu*, the Commission failed to consider the interests of the persons living on the respective farms.<sup>116</sup> The Minister could, therefore, not determine whether it would be in the public interest to displace all the persons and their families working or residing on the farm.<sup>117</sup> In fact, information regarding the relevant persons who would be affected by the expropriation was non-existent.

### 3 2 3 *The judgment and order of the court*

In handing down its judgment, the court provided guidelines and set out the sequence of steps the Minister had to take for the expropriation to be valid.<sup>118</sup> In essence, the guidelines provided that: (a) the Minister, acting on the advice or guidance of the Commission, is the only authority who has the power to decide whether to expropriate agricultural land; (b) the procedural requirements, including investigations regarding the suitability of the property for resettlement and proper consultations with the Commission, must be followed whenever the Minister decides to acquire agricultural land; (c) the Minister must observe the principle of *audi alteram partem* by affording the landowner the right to be heard by inviting representations and by responding to such representations; and (d) the landowner must be notified of the Minister's decision (and reasons) to expropriate his or her property and such notice must be served on the particular landowner.<sup>119</sup>

In conclusion, the court found that the cumulative effect of all the mistakes and failures by the Minister and the Commission to comply with the Namibian Constitution and the procedural requirements of the first and second stages of the expropriation process set out in the ACLRA resulted in the infringement of the landowners' fundamental rights under Articles 16(2) and 18 of the Namibian Constitution.<sup>120</sup> The court had no choice but to set aside the decision and notices to expropriate the respective farms.<sup>121</sup> If the constitutional and procedural requirements had been followed, the Minister could still decide to expropriate the farms, but the expropriation process would have to start anew.

### 3 2 4 *Lessons learnt from the Kessl judgment*

A well-administered land expropriation model founded on legality, transparency, and the principles of natural justice is critical in the land reform

<sup>113</sup> S 20(2)(a)-(e) of the ACLRA

<sup>114</sup> S 20(6); *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) para 63

<sup>115</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 64-65

<sup>116</sup> Paras 64, 80

<sup>117</sup> Paras 64-65

<sup>118</sup> Paras 75, 118

<sup>119</sup> Para 118

<sup>120</sup> Para 117

<sup>121</sup> Para 119

process in general and in the expropriation process in particular.<sup>122</sup> Despite the court's effort to reiterate the importance of the rule of law and to set out the correct procedure to be followed for the expropriation process to be valid,<sup>123</sup> the case illustrates an array of problems, including: (a) a complete disregard for the rule of law; (b) a lack of transparency between (i) the Minister and the Commission, and (ii) the Ministry, landowners and potential beneficiaries; and (c) administrative and capacity problems within the Ministry.<sup>124</sup> Furthermore, the Commission never conducted investigations regarding the suitability of the agricultural land for expropriation,<sup>125</sup> which resulted in the Minister making an ill-informed and unfounded decision to expropriate the farms.<sup>126</sup> The lack of criteria for determining whether the farms were suitable for expropriation also resulted in the lack of information provided to the landowner. Therefore, to facilitate and ensure a transparent expropriation process in line with the rules of natural justice and the procedure set out in the ACLRA or any other expropriation legislation, it is clear that criteria for the identification of suitable agricultural land for expropriation are crucial.<sup>127</sup> In principle, the identification of suitable agricultural land not only informs the decision of the Minister to expropriate the property in question but also provides the landowner with reasons for the expropriation, which he or she, in turn, can use to make representations. It follows that one of the most important aspects highlighted in the *Kessl* judgment is that the expropriation procedure requires a uniform and clear approach to identifying agricultural land suitable for expropriation for redistribution purposes from the outset. In other words, it should be clear *why* and *how* certain agricultural land was, or parcels of agricultural land were, identified for expropriation for redistribution purposes.

Pienaar points out that it is still unclear what criteria the Minister used to identify the farms as suitable for expropriation and resettlement in the *Kessl* scenario.<sup>128</sup> She questions whether the farms were expropriated because the landowners were foreigners, because they were absentee owners or because they were owners who were both foreign and absent.<sup>129</sup> In fact, it is unclear how the Minister could have decided to expropriate the agricultural land in question at all, given that the ACLRA does not provide for criteria to identify suitable agricultural land for expropriation. Moreover, the case illustrates the state's failure to follow the correct expropriation procedure resulting in time-consuming and costly litigation, which in turn makes the redistribution process unaffordable and unsustainable.

<sup>122</sup> Harring & Odendaal *Kessl: A New Jurisprudence?* 4, 27; Glinz (2009) *Law and Politics in Africa, Asia and Latin America* 274

<sup>123</sup> Glinz (2009) *Law and Politics in Africa, Asia and Latin America* 274

<sup>124</sup> Harring & Odendaal *Kessl: A New Jurisprudence?* 27; Pienaar (2018) *Namibia Law Journal* 47; Glinz (2009) *Law and Politics in Africa, Asia and Latin America* 274

<sup>125</sup> *Kessl v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC) paras 59-61

<sup>126</sup> Pienaar (2018) *Namibia Law Journal* 47

<sup>127</sup> 62

<sup>128</sup> 47

<sup>129</sup> 47

Subsequent to the *Kessl* judgment, the ACLRA was amended to provide the Minister with the authority to prescribe criteria to be used for the identification of suitable agricultural land that may be expropriated by the Minister.<sup>130</sup>

### 3 3 Criteria for expropriating agricultural land for resettlement purposes in Namibia

In September 2016, the Minister gazetted “Regulations on Criteria to be used for Expropriation of Agricultural Land”<sup>131</sup> in identifying suitable agricultural land for expropriation aimed at land reform purposes. The regulations provide for a scorecard with different weightings for different identification and suitability criteria, the content of which is copied in the annexure to this article. The regulations specifically provide that if the Minister, after consultation with the Commission, decides to expropriate property,<sup>132</sup> the Minister is obliged (a) to use the identification criteria in selecting agricultural land eligible for expropriation,<sup>133</sup> and (b) to conduct a suitability assessment to determine if the agricultural land is suitable for resettlement.<sup>134</sup>

For purposes of identifying whether the agricultural land is eligible for expropriation, the following must be ascertained, *inter alia*: (a) the ownership of the land with help of the deeds registry as well as any condition imposed on the property;<sup>135</sup> (b) whether the agricultural land is owned by a citizen or foreign national;<sup>136</sup> and (c) whether the agricultural land is owned by a natural or juristic person.<sup>137</sup> Other considerations also come into play, such as whether the agricultural land is managed and by whom,<sup>138</sup> leased;<sup>139</sup> abandoned by the owner;<sup>140</sup> neglected or underutilised;<sup>141</sup> and whether it will contribute to the utilisation of adjacent state land.<sup>142</sup>

As mentioned above, the Minister must also determine whether the identified land is *suitable* for resettlement.<sup>143</sup> In doing so, the Minister must, based on the assessment report of the Commission, establish and verify: (a) the size of the agricultural land,<sup>144</sup> (b) the location of the land,<sup>145</sup> (c) the infrastructure

<sup>130</sup> S 20(1A) of the ACLRA

<sup>131</sup> See n 22

<sup>132</sup> In accordance with s 20(1) of the ACLRA

<sup>133</sup> Reg 2(1)(a) of the Expropriation Regulations

<sup>134</sup> Reg 2(1)(b)

<sup>135</sup> Reg 3(2)(a)

<sup>136</sup> Reg 3(2)(b)

<sup>137</sup> Reg 3(2)(c)

<sup>138</sup> Reg 3(2)(d)(i)

<sup>139</sup> Reg 3(2)(d)(ii)

<sup>140</sup> Reg 3(2)(d)(iii)

<sup>141</sup> Reg 3(2)(d)(iv)

<sup>142</sup> Reg 3(2)(d)(vi)

<sup>143</sup> S 14(1) of the ACLRA read with reg 4 of the Expropriation Regulations

<sup>144</sup> Including (i) the carrying capacity of the agricultural land; (ii) the hydrological area (ground water potential); and (iii) the number and condition of boreholes and water quality and quantity in terms of reg 4(1)(a) of the Expropriation Regulations

<sup>145</sup> Including (i) the region and registration division; and (ii) the agro-ecological zone as set out in reg 4(1)(b)

on the land,<sup>146</sup> and (d) “the climate, relief and soil of the land”.<sup>147</sup> Each of these considerations has specific factors that have to be taken into account and scored. Additionally, the Minister must also assess the Certificate of Status Investment (in terms of section 4 of the Foreign Investments Act 27 of 1990 (“FIA”)) issued to a foreign national where he or she intends to expropriate agricultural land owned, possessed or occupied by a foreigner.<sup>148</sup> A Certificate of Status Investment is awarded to an “eligible investment”, which is defined as:

“(a) an investment, or proposed investment, in Namibia by a foreign national of foreign assets of a value of not less than the amount which the Minister may determine from time to time by notice in the Gazette for this purpose; (b) if it is a reinvestment, or proposed reinvestment, by a foreign national of the profit or proceeds of sale of an enterprise specified in a Certificate, irrespective of the amount of such reinvestment”.<sup>149</sup>

The aim of the FIA is the promotion of foreign investment in Namibia. The inclusion of this consideration in the regulations is seemingly to safeguard foreign investors’ ownership or interests in land, without which food production or the (sustainable) development of agricultural land in Namibia might not be possible.

As the information set out in the criteria is collected, the agricultural land must also be scored in accordance with the scoring criteria provided for in the regulations (contained in the annexure to this article).<sup>150</sup> In this regard, the regulations provide for a checklist and formula to determine whether the agricultural land is either highly suitable, suitable, moderately suitable, or not suitable at all. A weight is attached to each scoring criterion. For example, in terms of the scoring system, agricultural land owned by Namibian citizens is less likely to be expropriated than land owned by foreigners due to the weight attached to the citizenship-component of persons.<sup>151</sup>

The formula<sup>152</sup> provides that the total score is calculated by adding the scores pertaining to the identification criteria and the suitability criteria together and subtracting the citizenship preference<sup>153</sup> criteria. The regulations provide:

<sup>146</sup> Such as (i) boreholes, troughs, reservoirs, water distribution, water quality and quantity; and (ii) internal camps in terms of reg 4(1)(c)

<sup>147</sup> Including (i) topography (contour and spot heights - topographic map) and (ii) rainfall pattern as provided for in reg 4(1)(d)

<sup>148</sup> Reg 2(2) of the Expropriation Regulations, read with s 58 of the ACLRA

<sup>149</sup> S 5(1) of the Foreign Investments Act 27 of 1990 (“FIA”) See in general MF Qumba “Safeguarding foreign direct investment in South Africa: Does the Protection of Investment Act live up to its name?” (2018) 25 *South African Journal of International Affairs* 341

<sup>150</sup> Reg 2(2) of the Expropriation Regulations

<sup>151</sup> Depending on whether the agricultural land is owned by (a) a Namibian natural person; (b) a Namibian citizen whose land is adjacent to a resettlement farm or State land; and (c) a Namibian juristic person, either 15 or 25 points are subtracted from the identification and suitability criteria, which makes it less likely that citizens will be expropriated

<sup>152</sup> The regulations provide the following: Scores of identification criteria + suitability criteria – citizenship preference criteria = total scores

<sup>153</sup> In terms of the citizenship preference criteria, the regulations distinguish between agricultural land owned by (a) a Namibian natural person; (b) a Namibian citizen whose land is adjacent to a resettlement farm or State land; and (c) a Namibian juristic person

“[In terms of the scoring system, a score of] (a) at least 80 percent is considered as highly suitable for expropriation; (b) 60 percent to 79 percent is considered as suitable for expropriation; (c) 40 percent to 59 percent is considered as moderately suitable for expropriation; and (d) less than 39 percent is considered not suitable for expropriation.”<sup>154</sup>

The scoring system is arguably not the best way of identifying eligible and suitable agricultural land for redistribution purposes, but it will, at the very least, add a measure of transparency, certainty and consistency in selecting suitable agricultural land for expropriation. In this way, a justification is provided to ensure that agricultural land is expropriated in a non-arbitrary manner, thereby ensuring a procedurally fair procedure. The scorecard or investigation also provides reasons for the decision to expropriate the land, which should be provided to the landowner in terms of the principles of natural justice.

Drawing from the criteria established in Namibia, and for the sake of a transparent, procedurally fair and sustainable redistribution process in South Africa, similar objective non-arbitrary criteria for identifying suitable agricultural land for redistribution purposes should be developed and provided for in regulations or policy.<sup>155</sup>

#### 4 Developing criteria for identifying suitable agricultural land for expropriation in South Africa: Can lessons be learnt from Namibia?

##### 4.1 The legislative framework

Section 25(2) of the South African Constitution currently allows for the expropriation of property in line with authorising legislation, for a public purpose or in the public interest, against the payment of compensation. Despite the fact that the government’s expropriation powers are embedded in this section, Viljoen recently pointed out that “an alarmingly limited number of properties have been expropriated”<sup>156</sup> for redistribution purposes. To speed up the slow pace of redistribution, the South African government has published (a) a Bill to amend section 25 of the Constitution to provide for expropriation without compensation;<sup>157</sup> and (b) drafted a new 2020 Expropriation Bill (“Expropriation Bill”), which provides for categories of land that may be expropriated for nil compensation.<sup>158</sup> However, the focus here is not on whether compensation is payable or whether the possible amendment to the Constitution to provide for the payment of nil compensation will speed up the redistribution process.<sup>159</sup> Instead, the focus falls on *how* the South African government should decide which land or parcel of land should be expropriated for redistribution purposes. I argue that formulating criteria for *identifying*

<sup>154</sup> Reg 5 of the Expropriation Regulations

<sup>155</sup> Pienaar (2018) *Namibian Law Journal* 62

<sup>156</sup> Viljoen (2020) *TSAR* (Part 1) 35 35

<sup>157</sup> Constitutional Eighteenth Amendment Bill (draft) in GN 652 *GG* 42902 of 13-12-2019

<sup>158</sup> Cl 12(3) of the Expropriation Bill

<sup>159</sup> Viljoen (2020) *TSAR* (Part 1) 35; Viljoen (2020) *TSAR* (Part 2) 259; Sibanda (2019) *SAJHR* 129; Dugard (2019) *CCR* 135; B Hoops “Expropriation without compensation: A yawning gap in the justification for expropriation?” (2019) 136 *SALJ* 261

suitable agricultural land for expropriation for redistribution purposes will contribute to and ensure a streamlined and sustainable redistribution process founded on the rule of law,<sup>160</sup> transparency and just administrative action.<sup>161</sup>

The Expropriation Act 63 of 1975 (“Expropriation Act”), which is the current legislative framework still applicable to expropriations, provides that any particular property may be subject to inspection to determine whether the property is “suitable for the purposes or use contemplated”.<sup>162</sup> The Expropriation Bill also places an obligation on the expropriating authority to ascertain “(a) the suitability of the property for the purpose for which it is required; and (b) the existence of registered or unregistered rights in such property”<sup>163</sup> when considering the expropriation of property. This step in the expropriation process forms part of the investigation phase before a notice of intention to expropriate and subsequent notice of expropriation is issued.<sup>164</sup> While the Expropriation Act and Expropriation Bill mention “suitability” they do not provide for identification or suitability criteria, as set out in the regulations to the ACLRA. In other words, there are currently no prescribed suitability criteria which the expropriating authority<sup>165</sup> may use to determine whether the property in question will be suitable for redistribution purposes specifically.

Using the regulations and criteria developed in Namibia as a basis, former envisaged and new legislative measures in South Africa, such as the Regulation of Agricultural Land Holdings Bill<sup>166</sup> (“Regulation Bill”) and the 2016 and 2021 Preservation and Development of Agricultural Land Bills<sup>167</sup> (respectively the “2016 Preservation Bill” and the “2021 Preservation Bill”),<sup>168</sup> as well as the Expropriation Bill may provide some guidance in developing criteria for identifying suitable agricultural land for expropriation purposes. The proposed criteria will be particularly useful during the investigation phase of the expropriation process.

#### 4 2 Identification criteria: Targeted agricultural land

In line with the criteria developed by the Namibian government, the identification criteria in South Africa should arguably include ascertaining whether the agricultural land:

<sup>160</sup> Pienaar (2018) *Namibia Law Journal* 47; *Amoo Property Law in Namibia* 73; *Kessi v Ministry of Lands and Resettlement* 2008 1 NR 167 (HC)

<sup>161</sup> S 33 of the Constitution read with PAJA

<sup>162</sup> S 6(1) of the Expropriation Act

<sup>163</sup> Cl 5(1) of the Expropriation Bill

<sup>164</sup> Cls 5, 6 and 7

<sup>165</sup> S 2 of the Expropriation Act; cl 3 of the Expropriation Bill

<sup>166</sup> Regulation of Agricultural Land Holdings Bill (draft) in GN 229 GG 40697 of 17-03-2017 (“Regulation Bill”) It seems that the Regulation Bill, aimed at imposing agricultural land ceilings, among other things, has been abandoned. However, other provisions of the Bill may be useful in formulating criteria for expropriation of agricultural land for redistribution purposes

<sup>167</sup> Preservation and Development of Agricultural Land Bill (draft) in GN 984 GG 40247 of 02-09-2016 (“2016 Preservation Bill”) A new version of the Preservation Bill was also tabled in April 2021, namely the Preservation and Development of Agricultural Land Bill B8-2020 (“2021 Preservation Bill”) While the 2016 Preservation Bill forms the focus here, reference to the 2021 Preservation Bill will also be made where necessary

<sup>168</sup> All three Bills fall under the newly constituted Department of Agriculture, Land Reform and Rural Development



- (a) has any registered and unregistered rights in such property and the impact of such rights on the intended use of the property;<sup>169</sup>
- (b) is owned by (i) a South African citizen or foreign national;<sup>170</sup> and (ii) a natural or juristic person;<sup>171</sup> (iii) a black or white person; and (iv) a male or female;
- (c) is managed and by whom;<sup>172</sup>
- (d) is leased;<sup>173</sup>
- (e) has been abandoned by the owner;<sup>174</sup>
- (f) has been neglected or underutilised;<sup>175</sup> and
- (g) will contribute to the utilisation of adjacent state land.<sup>176</sup>

Interestingly, some of these criteria are also required in terms of the formerly envisaged Regulation Bill. Even if the Regulation Bill is never to be promulgated, it may still provide useful mechanisms for the collection of information pertaining to the suggested criteria above. The envisaged Regulation Bill proposes the establishment of a National Land Commission responsible for the creation (and maintenance) of a national agricultural land register (or national agricultural land audit) in terms of which agricultural land “owners”<sup>177</sup> are required to disclose information pertaining to their:

- (a) “race, as Black, Indian, Coloured, White or other”,<sup>178</sup>
- (b) “gender, as male or female”,<sup>179</sup>
- (c) nationality;<sup>180</sup>
- (d) the size and use of the landholding;
- (e) any real right registered<sup>181</sup> against and licence allocated to the parcel of land; and any other information as may be prescribed.<sup>182</sup>

Other prescribed information could include whether the land is leased, managed and by whom, and whether there are any unregistered rights in relation to the land.

<sup>169</sup> Reg 3(2)(a) of the Expropriation Regulations See cl 5(1)(b) of the Expropriation Bill

<sup>170</sup> Reg 3(2)(b) of the Expropriation Regulations See ch 2 of the South African Citizenship Act 88 of 1995 (“Citizenship Act”)

<sup>171</sup> Reg 3(2)(c) of the Expropriation Regulations

<sup>172</sup> Reg 3(2)(d)

<sup>173</sup> Reg 3(2)(d)(ii)

<sup>174</sup> Reg 3(2)(d)(iii) of the Expropriation Regulations; Advisory Panel on Land Reform and Agriculture “Final Report of the Presidential Advisory Panel on Land Reform and Agriculture” *Government of South Africa* 80; R Cramer “The abandonment of landownership in South African and Swiss law” (2017) 134 *SALJ* 870

<sup>175</sup> Reg 3(2)(d)(iv) of the Expropriation Regulations

<sup>176</sup> Reg 3(2)(d)(vi)

<sup>177</sup> Cl 1 of the Regulation Bill

<sup>178</sup> Cl 1(4)(a)

<sup>179</sup> Cl 1(4)(b)

<sup>180</sup> See ch 2 of the South African Citizenship Act

<sup>181</sup> See also cl 5(1)(b) of the Expropriation Bill which provides that the expropriating authority must ascertain the existence of registered *and unregistered rights* in such property and the impact of such rights on the intended use of the property

<sup>182</sup> Cl 15(2) of the Regulation Bill; JM Pienaar “Land Reform: January to March” (2017) 1 *JQR* 1

The other considerations above, such as whether the land is abandoned by the owner,<sup>183</sup> neglected or underutilised, or will contribute to the utilisation of adjacent state land,<sup>184</sup> will have to be determined by the Land Commission or an independent advisory committee or valuer, such as the Valuer-General.<sup>185</sup> However, the role of the Valuer-General is only to assess the “value” of the land under consideration and not the *suitability* thereof. The determination of this information will also, in principle, allow the South African government to monitor the distribution and redistribution of agricultural land in the country.

Considering South Africa’s differential topography and current and/or changing climatic conditions, it is proposed that nine Provincial Land Commissions, overseen by a National Land Commission, be established to compile and maintain an agricultural land register per province. In this way, the Provincial Land Commission must, as part of the investigation phase of the expropriation process, investigate and establish whether the agricultural land is abandoned, underutilised or neglected, or whether it will contribute to the utilisation of adjacent state land. While the creation of a Land Commission or Commissions and the proposed endeavours undertaken by it is likely to be protracted and expensive, it is essential for the sake of a well-administered and transparent expropriation process. Moreover, the data obtained in the process can be used for multiple purposes across different national departments, not limited to the land reform project only. In this regard, optimal use of data is also envisioned for development planning in general, as well as for spatial and resources development, housing and conservation.

Apart from the criteria listed above, the “Final Report of the Presidential Advisory Panel on Land Reform and Agriculture” (“Land Reform Report”) compiled by the Advisory Panel on Land Reform and Agriculture also proposes a wider array of circumstances or categories of land (urban and rural) that may be *targeted* and acquired for redistribution (against nil compensation):

“including but not limited to: (a) abandoned land; (b) hopelessly indebted land; (c) land held purely for speculative purposes; (d) unutilised land held by state entities; (e) land obtained through criminal activity; (f) land already occupied and used by labour tenants and former labour tenants; (g) informal settlements areas; (h) inner city buildings with absentee landlords; (i) land donations (as a form of EWC); and (j) farm equity schemes”.<sup>186</sup>

In other words, as in Namibia, owners of agricultural land who are citizens of South Africa should be less likely to be expropriated for redistribution

<sup>183</sup> Advisory Panel on Land Reform and Agriculture “Final Report of the Presidential Advisory Panel on Land Reform and Agriculture” *Government of South Africa* 80; Cramer (2017) *SALJ* 870

<sup>184</sup> Reg 3(2)(d)(vi) of the Expropriation Regulations

<sup>185</sup> Ch 2 of the Property Valuation Act 17 of 2014. See *Moloto Community v Minister of Rural Development and Land Reform* LCC 04-02-2019 case no 204/2010 and *Emakhasaneni Community v Minister of Rural Development and Land Reform* LLC 06-03-2019 case no 03/2009. From these two judgments it is clear that clarity regarding the impact of the Property Valuation Act remains unaddressed. Further clarification, specifically in jurisprudence, is needed regarding the exact scope of the Act; when the Act must be used and at what stage of the expropriation process; and what the relationship, duties and responsibilities of courts are *vis-à-vis* the Office of the Valuer-General. See further s 15(1) of the ACLRA and Haring & Odendaal *Kessl: A New Jurisprudence?* 16

<sup>186</sup> Advisory Panel on Land Reform and Agriculture “Final Report of the Presidential Advisory Panel on Land Reform and Agriculture” *Government of South Africa* 80

purposes than foreigners.<sup>187</sup> Abandoned and neglected or underutilised land will also be more likely to be expropriated for redistribution purposes.

Some of these categories listed in the Land Reform Report also coincide with those categories listed in the Expropriation Bill:

“It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to: (a) where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value; (b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration; (c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it; (d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and (e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property. (4) When a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996).”<sup>188</sup>

However, there is still great uncertainty regarding what constitutes “abandoned land”;<sup>189</sup> “hopelessly indebted land”; “land held for speculative purposes”; “underutilised” (or neglected) land or how it will be determined.<sup>190</sup> For example, while there are numerous cases of abandoned buildings on urban land,<sup>191</sup> agricultural land is generally not abandoned by the owner. In the case of agricultural land, the land (or parts of the land) that may appear to be abandoned is instead “fallow due to seasonal and planting requirements and schedules”.<sup>192</sup> Other difficulties arise regarding the legal position or the status of immovable property once it is abandoned. In this regard, commentators disagree about the classification of land where it is abandoned. There is no consensus or legal certainty whether the unclaimed land (*bona vacantia*) becomes a *res nullius* or whether it becomes the property of the state (*res publicae*).<sup>193</sup> Furthermore, it is also extremely difficult to prove that the property has indeed been abandoned.<sup>194</sup> In particular, questions arise relating to how and by whom the land will be identified or what criteria will be used to demarcate land as falling within one of these categories.<sup>195</sup> This, in turn, may make it difficult to score the criteria and determine whether the land should be identified for expropriation for purposes of redistribution.

<sup>187</sup> As is also set out on the scoring card of the Expropriation Regulations

<sup>188</sup> Cl 12(3) of the Expropriation Bill. The numbering of the last category is presumably due to a typographical error

<sup>189</sup> Cramer (2017) *SALJ* 870

<sup>190</sup> See also cl 12(3)(b) of the Expropriation Bill

<sup>191</sup> See eg, *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA). See further Cramer (2017) *SALJ* 870

<sup>192</sup> JM Pienaar “Land Reform: October to December” (2018) 4 *JQR* 1 3

<sup>193</sup> G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman’s The Law of Property* 6 ed (2019) 158-159, 305-306. See also GJ Pienaar “The effect of original acquisition of ownership of immovable property on existing limited real rights” (2015) 18 *PELJ* 1483-1484 and Pienaar (2018) *JQR* 3

<sup>194</sup> Cramer (2017) *SALJ* 870; CG van der Merwe *Sakereg* 2 ed (1989) 227; Muller et al *Silberberg and Schoeman’s The Law of Property* 39, 159, 305-306

<sup>195</sup> Pienaar (2018) *JQR* 3

### 4 3 Suitability criteria

#### 4 3 1 Land capability factors

Apart from identifying land for redistribution purposes, the regulations to the ACLRA also require a suitability assessment. In view of the required suitability assessment, the 2016 and 2021 Preservation Bills also provides for the establishment of a national agricultural land register (or “national agro-eco information system”)<sup>196</sup> to provide data and information on, *inter alia*, “the capability, *suitability*, potential, status and use”<sup>197</sup> of agricultural resources, including land for the preservation, sustainable use and management of agricultural land. However, neither the 2016 nor the 2021 Preservation Bill provides further details or criteria to determine the suitability of the land.<sup>198</sup>

The Regulation Bill envisaged the determination and implementation of land ceilings.<sup>199</sup> In principle, any land falling above the ceiling limit will be *suitable* for acquisition for redistribution purposes. In this way, the imposition of a land ceiling inherently identifies suitable agricultural land for redistribution purposes. However, even if the agricultural land ceilings are not implemented, the criteria used to determine the land ceiling will, in any event, be useful in identifying suitable agricultural land for redistribution purposes. In particular, the following criteria and factors are listed in the Regulation Bill: (a) land capability factors;<sup>200</sup> (b) capital requirements (infrastructure) of different enterprises; (c) measuring expected household and agro-enterprise income; (d) annual turnover; (e) relationship between product prices and price margins; and (f) any other matter as may be prescribed.<sup>201</sup> In particular, land capability factors include:

“(i) high, medium and unique agricultural land, grazing and cropping land, climatic factors; (ii) matters pertaining to the current production output, commodity-specific constraints, farm size, farm viability, economies of scale, agro-industries on farms, number of farm workers and their dependents; (iii) variations in physical potential in terms of soil type, soil depth and quality, grazing capacity, water availability and quality, distances from markets, available infrastructure and any other relevant factor; and (iv) the relationship between resources, such as between cultivated land and

<sup>196</sup> Cl 26 of the 2021 Preservation Bill provides that a

“national agro-eco information system may contain the following information— (a) a record of all agricultural land; (c) a record of all agricultural areas; (d) a record of all protected agricultural areas; (e) data sets on the agricultural potential, capability, suitability, the conservation status and the use of agricultural land; (f) spatial information on agricultural land, including— (i) agricultural potential, capability, suitability, conservation status, use; and (ii) socio-economic information; (g) per farming unit— (i) the use of agricultural land; and (ii) information on the land owner, and on the land user where applicable, concerning nationality and gender; and (h) any other information as may be prescribed”

<sup>197</sup> Cl 46(1)(iii) of the 2016 Preservation Bill (emphasis added) Similarly, cl 26 of the 2021 Preservation Bill also provides that the national agro-eco information system may contain information on agricultural land, “including agricultural potential, capability, suitability, conservation status” etc

<sup>198</sup> Eg cl 1 of the 2021 Preservation Bill provides for a definition of “land suitability assessment” but does not provide for criteria to determine the suitability of the land *per se*.

<sup>199</sup> Essentially, land ceilings impose restrictions with regard to the maximum size of land any person or entity may own. Any land over and above the ceiling limit is regarded as surplus land. If an individual, a family or entity owns more land than the ceiling limit, then the surplus land is to be acquired in order to be redistributed. Land ceilings function as a redistributive regulatory measure, because it makes more land available to be redistributed for agricultural use, be it for subsistence, smallholder and/or emerging farmers’ utilisation

<sup>200</sup> Cl 25(2)(a) of the Regulation Bill

<sup>201</sup> Cl 25 of the Regulation Bill; JM Pienaar “Land Reform: January to March” (2017) 1 *JQR* 3

natural pasture, dry land and irrigated land, soil types on cropland and any other relevant factor that will have an influence in determining the economic size within an area".<sup>202</sup>

These considerations, such as (a) the size of the agricultural land,<sup>203</sup> (b) the location of the land,<sup>204</sup> (c) the infrastructure on the land,<sup>205</sup> and (d) the climate, relief and soil of the land,<sup>206</sup> are similar to those set out in the regulations to the ACLRA and are, therefore, useful in developing suitability criteria.

#### 4 3 2 *The impact of the expropriation*

Apart from the criteria pertaining to the agricultural land itself, suitability also turns on the *impact* of the expropriation in question. In particular, the expropriation may have an impact on (a) foreign or domestic investment; (b) the rights and interests of surrounding communities, land claimants, potential beneficiaries and vulnerable persons (such as farmworkers and tenants); and (c) food security. These are also factors that need to be considered in determining whether agricultural land should be expropriated for redistribution purposes.

As mentioned above, the regulations formulated in Namibia also, *prima facie*, provide for the protection of foreign investors.<sup>207</sup> The Commission and the Minister are obliged to consider the impact that the expropriation of agricultural land may have on foreign investment. In South Africa, the Protection of Investment Act 22 of 2015<sup>208</sup> aims to provide for the protection of investors (domestic or foreign) and their investments.<sup>209</sup> In light of the importance that investment plays in job creation, economic growth and sustainable development,<sup>210</sup> the impact that the expropriation may have on investment (foreign or otherwise) must also be taken into account in determining whether the land is suitable for expropriation for redistribution purposes.

Moreover, when assessing the potential impact of the expropriation, the rights and interests of the community or land claimants<sup>211</sup> such as their cultural, historical or religious connections to the land should also be considered. In this respect, communities and land claimants should be able to express their concerns or interest in the agricultural land where it is determined whether the land is suitable for expropriation for *redistribution* purposes. While these are important considerations, it may be difficult to measure or weigh these subjective factors as part of the criteria for identifying suitable agricultural land. Furthermore, one of the greatest concerns or problems of expropriating agricultural land for redistribution purposes is the possible

<sup>202</sup> Cl 25(2)(a) of the Regulation Bill

<sup>203</sup> Reg 4(1)(a) of the Expropriation Regulations

<sup>204</sup> Reg 4(1)(b)

<sup>205</sup> Reg 4(1)(c)

<sup>206</sup> Reg 4(1)(d)

<sup>207</sup> S 4 read with s 5 of the FIA

<sup>208</sup> Preamble and s 4 of the Protection of Investment Act 22 of 2015

<sup>209</sup> Investments are defined in s 1. No distinction is made between the protection of foreign or national investments. Presumably, "investments" include both foreign and national investments

<sup>210</sup> Preamble

<sup>211</sup> For example, communities or individuals may have a claim in terms of the Restitution of Land Rights Act 22 of 1994

large-scale displacement of people living or working on agricultural land.<sup>212</sup> While the expropriation may ensure that land is redistributed to one or more beneficiaries, the process may adversely impact a larger group of vulnerable people in relation to the group that it benefits. In South Africa, many non-owners are also dependent on the land, particularly agricultural land, for their livelihood.<sup>213</sup> To minimise the potential displacement of vulnerable people, such as labour tenants<sup>214</sup> or occupiers,<sup>215</sup> it may be necessary for the proposed Provincial Land Commissions to conduct a social impact assessment study when investigating and determining whether the land is suitable for expropriation for redistribution. The number of families likely to be displaced and the costs of minimising displacement should be included in the identification or suitability criteria. In particular, the social impact assessment study should include an estimation of the affected families and the number of families among them likely to be displaced; steps that will be taken by the state (or Commission) to minimise displacement; and, importantly, employment opportunities to be allocated to the affected family or families. Alternatively, or in conjunction with the social impact assessment, each province should establish a rehabilitation and resettlement scheme in cases where it may be necessary to expropriate agricultural land even when displacement ensues. These measures ensure that people who are dependent on the land for their livelihoods, such as farm workers and their dependants, are not displaced or rendered homeless.

Other considerations should also be taken into account, such as the impact the expropriation may have on food security. It is in this light that the 2016 and 2021 Preservation Bills envisage that “high value agricultural land”<sup>216</sup> or “protected agricultural areas”<sup>217</sup> may, as a rule, not be acquired or subdivided in terms of the Provision of Land and Assistance Act for development purposes. However, high value (prime) agricultural land and protected agricultural areas may still be expropriated and redistributed to competent beneficiaries, provided that the land is used for agricultural purposes. In this way, redistribution is still affected without changing the quality or size of these types of agricultural land. It is suggested that a register of all agricultural land, which also provides for a scheduled list of protected agricultural areas, may be useful in this context.

The land capability factors and impact of the expropriation mentioned above are largely based on financial, physical and practical considerations, because it would arguably be too difficult to measure or attach a score to subjective factors such as an individual or communities’ cultural, historical and/or religious connection to the land.

<sup>212</sup> Harring & Odendaal *Kessl: A New Jurisprudence?* 5-7

<sup>213</sup> Advisory Panel on Land Reform and Agriculture “Final Report of the Presidential Advisory Panel on Land Reform and Agriculture” *Government of South Africa* 37-40

<sup>214</sup> In terms of the Land Reform: Labour Tenants Act 3 of 1996

<sup>215</sup> In terms of the Extension of Security of Tenure Act 62 of 1997

<sup>216</sup> Cl 1 of the 2016 Preservation Bill See also cl 1 read with part 4 of the 2021 Preservation Bill which provides for “protected agricultural areas”, including high-value agricultural land

<sup>217</sup> Cl 1 of the 2016 Preservation Bill See also cl 1 of the 2021 Preservation Bill which similarly provides for a definition of “protected agricultural area”



## 5 Evaluation

Once all the information pertaining to the land and the impact of the potential expropriation is gathered by the relevant Provincial Land Commission, each land parcel should be evaluated in accordance with the criteria suggested above. Importantly, the criteria should be used regardless of whether the land is acquired by way of market-led approaches or expropriation. In this light, the criteria can be provided for in a policy or in regulations, which can form part of the Expropriation Bill or a newly drafted Agricultural Land Bill.<sup>218</sup> The policy or regulations should also, as in Namibia, provide for a checklist and formula to determine whether the agricultural land is either highly suitable, suitable, moderately suitable, or not suitable for redistribution purposes in accordance with the score awarded to each criterion. The scoring system will arguably allow, at the very least, for a measure of transparency in the identification process, which is currently lacking in the South African context. The identification of suitable agricultural land informs the decision of the Minister to expropriate the property in question, which should be set out in the notice of intention to expropriate<sup>219</sup> in terms of the Expropriation Bill.<sup>220</sup> This determination will also provide the landowner with reasons for the expropriation, which he or she can use to object to and make representations regarding the intended expropriation.<sup>221</sup>

Once land is identified as being suitable for acquisition, it has to be valued and acquired by the state. There are various approaches available to the Minister in acquiring agricultural land, including (a) market-led approaches; and (b) expropriation (with or without compensation). While the focus of this article is on developing identification or suitability criteria for the *expropriation* of agricultural land, the same criteria can also be used in identifying suitable agricultural land for acquisition by way of a supply-driven market-led approach.<sup>222</sup> Furthermore, while the focus of this article is on identifying suitable *agricultural* land, different suitability criteria should be developed for the identification of suitable *urban* land.<sup>223</sup> Once land is

<sup>218</sup> The Agricultural Land Bill (as a combination of the Regulation Bill and the Preservation Bills) could provide for the creation of the National Land Commission and Provincial Land Commissions and the establishment of an agricultural land register (or registers)

<sup>219</sup> Cls 7(1) and 8(1) read with cl 8(2)(d) of the Expropriation Bill which provides that the notice to expropriate must also include the reason for the intended expropriation

<sup>220</sup> Cl 7(2)(d)

<sup>221</sup> Cl 7(2)(g)

<sup>222</sup> A market-led approach is generally either a demand-led or supply-led approach. With a demand-led approach, the initiative to acquire land lies with potential buyers or, more specifically, with the potential beneficiaries of the redistribution programme and not with the state. In this regard, the role of the state is limited to screening applicants, approving and supplying grants to them, subsidising the land transfer and planning land use. In terms of a supply-led approach to the acquisition of land, the state purchases land upfront from the land owners (willing sellers) and later identifies beneficiaries to whom the land can be transferred in terms of lease or title. It would be too difficult under a demand-driven approach for claimants to prove whether the criteria are met or not. Moreover, the Department of Agriculture, Land Reform and Rural Development *National Policy for Beneficiary Selection and Land Allocation* GN 2 in GG 42939 of 03-01-2020 provides for a supply-driven approach, in terms of which the onus rests on the state to prove that the criteria are met. See MC Lyne & MAG Darroch "Land Redistribution in South Africa: Past Performance and Future Policy" *Digest Project 4-5*; Pienaar *Land Reform* 226-227, 344

<sup>223</sup> Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" *Government of South Africa* 33

acquired, questions pertaining to (a) who the beneficiaries ought to be; (b) how the beneficiaries ought to be selected; (c) how much land the beneficiary ought to acquire; and (d) what type of right(s) or benefits the beneficiaries ought to receive under the redistribution programme arise.<sup>224</sup>

## 6 Conclusion

The aim of this article was not to explore which approach is more suitable for acquiring agricultural land but rather *how* agricultural land should be identified prior to being acquired, specifically through expropriation, for redistribution purposes.<sup>225</sup> Formulating criteria for the identification of suitable agricultural land for expropriation is a difficult task. Multiple aspects need to be considered to determine whether the land in question is eligible and suitable to be expropriated for redistribution purposes.

The approach and criteria for identifying suitable agricultural land for expropriation as provided for in Namibia's regulations have proven to be useful in formulating criteria for the South African context. Apart from the identification criteria, namely which land should be targeted, suitability criteria such as land capability factors and the impact of the expropriation on foreign investment, vulnerable people residing on or occupying the land and food security should also be considered in developing suitability criteria in the South African context.

Moreover, questions pertaining to who should identify suitable agricultural land for expropriation also arise. In this light, it was recommended that a National Land Commission, responsible for monitoring nine Provincial Land Commissions, be established. The establishment of the Land Commissions may be challenging in itself; it requires financial resources and trained personnel, both of which are in short supply in South Africa.<sup>226</sup>

The respective Provincial Land Commissions will be responsible for the collection of data in terms of the identification and suitability criteria, and for compiling a report and making recommendations to the Minister on whether the identified land should be expropriated. Regarding the identification criteria suggested above, it is recommended that each province creates, maintains and updates an agricultural land register. The Land Commissions will also be responsible for scoring the identified land in terms of the suitability assessment and suggested scorecard (see annexure) and conducting a social impact assessment to determine whether the expropriation will adversely affect the people residing or occupying the land, (foreign) investment and food security. Once such a comprehensive assessment is made, the Commission may make a recommendation to the Minister on whether the identified agricultural land should be expropriated.

<sup>224</sup> Kepe & Hall "Land Redistribution in South Africa" *Parliament of the Republic of South Africa* 84-85  
See Department of Agriculture, Land Reform and Rural Development *National Policy for Beneficiary Selection and Land Allocation* GN 2 in GG 42939 of 03-01-2020 in this regard

<sup>225</sup> Kepe & Hall "Land Redistribution in South Africa" *Parliament of the Republic of South Africa* 84-85

<sup>226</sup> 5, 41, 45-46, 76-80

It is hoped that the suggestions made in this article may assist in accelerating land reform initiatives in the context of land redistribution. The development of criteria for identifying suitable agricultural land will provide the South African government with a useful tool in selecting agricultural land for acquisition and redistribution. The use of the criteria will not only contribute to a transparent, non-arbitrary and procedurally fair selection process, but will also assist landowners in determining the likelihood of their land being earmarked for redistribution.

**Annexure: Scoring criteria<sup>227</sup>**

Code	Identification criteria	Identification criteria description	Qualification indicators	Weight	Score
01	Ownership identified under regulation 3(2)(a) to (c)	Natural or juristic person	agricultural land owned by a natural person or juristic person	5	
		Foreign national	agricultural land owned by a foreign national	15	
02	Other relevant information in terms of regulation 3(2)(d)	*absent foreign owner	agricultural land managed by another person on behalf of a foreign owner who resides in a foreign country	15	
			agricultural land leased to another person by a foreign owner	15	
		*abandoned, undeveloped or underutilised agricultural land	abandoned agricultural land	4	
			underdeveloped, underutilised agricultural land	4	
		multiple ownership	foreign owner owns more than one agricultural land	20	

<sup>227</sup> The table is a replica of the table provided for in the Expropriation Regulations, read with the ACLRA.

<b>Plus</b>					
<b>Code</b>	<b>Suitability criteria</b>	<b>Suitability criteria description</b>	<b>Qualification indicators</b>	<b>Weight</b>	<b>Score</b>
03	suitability criteria in terms of regulation 4	Size	carrying capacity area	5	
			groundwater potential	5	
		*location	agricultural land adjacent to state land or resettlement farm	15	
			Agricultural land not adjacent to resettlement farm or state land	15	
		Infrastructure	boreholes, troughs, reservoirs or other infrastructure	4	
			internal camps	4	
		Climate, relief	Topography	4	
			Rainfall	4	
<b>Total</b>					<b>/100</b>
<b>Minus</b>					
<b>Code</b>	<b>Citizen preference criteria</b>	<b>Citizen preference</b>	<b>Qualification indicators</b>	<b>Weight</b>	<b>Scores</b>
04	Citizenship	Citizen preference	agricultural land owned by a Namibian natural person	25	
			agricultural land owned by a Namibian juristic person	15	
			agricultural land owned by Namibian citizen and adjacent to resettlement farm or state land	25	
<b>SUBTOTAL</b>					

\* Choose whichever is applicable in respect of the qualification indicator in Column 4 and weight in Column 5.