CHAPTER 11

LAND REFORM IN NAMIBIA

1 Introduction

As stated in the previous chapter, the concern for land reform in Namibia is raised in the opening paragraph of the *White Paper* in the following terms:

> Access to and tenure of land were among the most important concerns of the Namibian people in their struggle for independence. Since 1990, and following the 1991 National Conference on Land Reform, and the Consultative Conference on Communal Land Administration 1996 Namibia's democratically elected Government has maintained and developed its commitments to redressing the injustices of the past in a spirit of national reconciliation and to promoting sustainable economic development. The wise and fair allocation, administration and use of the nation's urban and rural land resources are essential if these goals are to be met.[1]

At the time of the attainment of independence and sovereignty, Namibia inherited a skewed land tenure system which had to be redressed by the duly elected Government of the Republic of Namibia (GRN). The subsequent land reform policies and the legal regime embarked upon by the GRN have been premised on underpinnings and imperatives such as the concepts of sovereignty emanating from relevant provisions of the United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962 on Permanent Sovereignty Over Natural Resources; the right to property under article 17 of the Universal Declaration of Human Rights; and article 14 of the African Charter on Human and Peoples' Rights. These conventions guarantee the right to property and the right to housing under the UN-Habitat standards, which in turn are based on international human rights law that recognises

1 Government of the Republic of Namibia *White paper on national land policy* (1997).

everyone's right to an adequate standard of living, including adequate housing.[2]

On the basis of the imperatives of these international conventions, similar provisions in the Namibian Constitution and the dire need for access to land and adequate housing, the GRN has adopted policies and promulgated various pieces of legislation to address and ameliorate the land question inherited at the time of independence.

For almost three decades of independence, however, the land question in Namibia has remained an issue of national concern. Pronouncements by the GRN, activists, and a sector of traditional authorities all attest to the fact that matters such as informal settlement in peri-urban areas and the redistribution of GRN land, whether unalienated or acquired in terms of the provisions of the Namibian Constitution, the Agricultural (Commercial) Land Reform Act (No. 6 of 1995) (ACLRA) or the land rights provided for by the Communal Land Reform Act (No. 5 of 2002) (CLRA), must be addressed. The question of the right to ancestral land, which does not seem to have been adequately addressed by policy or a legal instrument, has also featured prominently in the land reform debate.

To address these concerns, the Second National Land Conference was held in October 2018. The papers presented and debates from the floor covered, *inter alia*, areas such as expropriation of private property without compensation, the effectiveness of the willing buyer, willing seller option, the recognition of the right to occupy state land occupied illegally or informally in peri-urban areas, rent control, and the right to ancestral land, including the related principle of public trust that has been the legal underpinning for the pedigree of rights of use provided for by the CLRA.

Whilst recognising the dire need for reform in areas such as access to land in the urban centres, the redistribution of land to the landless members of the Namibian community, and the reappraisal of the question of rights to ancestral land, participants also generally reaffirmed the recognition of the existing legal regime of the land tenure system in Namibia and both the substantive and procedural rights of persons whose properties are earmarked for expropriation by the state.

Recommendations also included the establishment of various committees to be vested with the mandate to consult and make appropriate recommendations for the effective implementation of the conference resolutions or recommendations.

2 SK Amoo 'Land Reform in Namibia: Beyond 2018' in W Odendaal & W Werner (eds) (2020) *Neither here nor there: Indegeneity, marginalisation and land rights in post-indepence Namibia* Windhoek: Legal Assistance Center, pp 13-17.

The implementation of some of the resolutions on land reform in Namibia will require a legislative process. However, for purposes of legitimacy, one would expect the legislative process to be preceded by national consultative conferences for an objective evaluation of the resolutions, especially on decisions relating to ancestral land rights and restitution claims.

2 Land reform since independence

Land reform is among the most challenging processes allowed for by the law. This is because it requires a major transformation of property rights in impoverished and skewed agrarian societies, of which Namibia is one, through peaceful, legal means. The recent calls for ancestral land titles and the reforms we see in customary land tenure regimes is a vivid manifestation of not only rising contestations as far as land claims are concerned, but also the potential of law in addressing the "land question".[3] These challenging possibilities of law in the land reform process can also be traced to the potential that law and legal mechanisms have in transforming inherited and existing political, social and economic conditions of the most vulnerable in society. In Namibia, the Grundnorm for land reform can be traced to the sovereign right over natural resources and the right to expropriate private property in the public interest subject to the payment of compensation vested in the state in terms of articles 100 and 16 of the Namibian Constitution respectively.

Pursuant to various national conferences on the land question[4] and consistent with its avowed policy of land reform the Government had the Agricultural (Commercial) Land Reform Act No 6 of 1995 promulgated. This Act is meant to provide the Namibian government with the necessary legal tools to acquire commercial farms for the resettlement of displaced persons, and for the purposes of land reform. To date the implementation of the policy has been facilitated by the state and by market-assisted acquisition schemes based on the 'willing seller, willing buyer' principle. In terms of the acquisition scheme known as the National Resettlement Programme (NRP) the state acquires land for resettlement purposes in the market under the auspices of the Ministry of Lands and Resettlement (MLR). The Affirmative Action Loan Scheme (AALS) is a programme implemented by the Agricultural Bank of Namibia on behalf of the Ministry of Agriculture, Water and Forestry. This

3 A Commission of Inquiry into Claims of Ancestral Land Rights and Restitution has been established to make recommendations to the President regarding claims to ancestral land rights and restitution. See also *Centre for Minority Rights Development (Kenya), Minority Rights Group International and Endorois Welfare Council (on Behalf of the Endorois Community) v Kenya* (276/2003).

4 The Namibian Government has held a number of consultative conferences on the land question since the National Conference in 1991. These have led to the enactment of legislation on land and related matters and to the drafting of the *White paper on national land policy.* References to appropriate legislation and the *White Paper* are made elsewhere in this book.

programme was introduced by the Agricultural Bank Amendment Act 27 of 1991 and the Agricultural Bank Matters Amendment Act 15 of 1992 with the aim *inter alia* of resettling well-established and strong communal farmers on commercial farmland so as to minimise the pressure on grazing in communal areas. It assists formerly disadvantaged persons to acquire land themselves on the open market at subsidised interest rates. Between 1990 and October 2004 the two programmes together redistributed 4.31 million hectares, or 12 per cent, of the total area of freehold land in Namibia, benefiting some 2151 families. Since 1992 the AALS has distributed nearly four times the amount of land the NRP has distributed since 1990, namely 3.47 million hectares compared with some 874 000 hectares. In addition, the MAWF transferred 398 859 hectares to the MLR in 1992.[5] In his address to the National Assembly in May 2010 the Minister, Alpheus! Naruseb, indicated that the Ministry of Lands and Resettlement had earmarked 15 million hectares of freehold land to be redistributed by the year 2020.[6] The Minister added that in the 2009/10 Financial Year, the Ministry acquired eight farms covering a total area of 26 000 hectares at a cost of N$21.2 million, and he pointed out that this figure fell short of the set annual target of 534 000 hectares. He explained that the slow pace at which land was acquired had negatively impacted on the rate at which government could resettle people.

The implementation of the Act has, however, not been free from problems. As pointed out by the then Minister of Lands, Resettlement and Rehabilitation, Pendukeni Ithana, the Government's policy of 'willing seller, willing buyer' has imposed constraints on its ability to acquire fertile and more productive commercial farms.[7] This constraint was also alluded to by Minister Alpheus! Naruseb in his address mentioned earlier. However, an option that is open to the Government as a possible solution to this constraint may be found under the provisions of chapter IV of the Act. Section 20, read with section 14(1), in terms of which the Minister is empowered to expropriate any commercial land for purposes of land reform in case of failure to negotiate the sale of property by mutual agreement. Under article 16 of the Constitution the government of Namibia has the sovereign power to expropriate private property.[8] Consistent with the norms of international law,[9] the Namibian Constitution provides for the justification of such expropriation on grounds of public interest and the payment of compensation. The power to expropriate is therefore a legal matter, while the decision to expropriate and determine the public interest is a political one. It is worth mentioning also that this clause is not entrenched and

5 'Strategic options and action plan for land reform in Namibia' Government of the Republic of Namibia, November 2005.
6 *The Namibian Sun* 20 May 2010.
7 See T Nandjaa 'The land question: Namibians demand urgent answers' *Namibia Review* (1997) 1-4 and note 89.
8 See art 16(2) of the Namibian Constitution and sec 14(1) and 20 of the Agricultural (Commercial) Land Reform Act.
9 See the Resolution on Permanent Sovereignty over Natural Resources, 1962 adopted in the case of *Texaco v Libya* (1977) 53 ILR 389.

therefore can be derogated from should a state of emergency be declared under articles 24(3) and 26 of the Constitution.[10] The Namibian government has to date expropriated about nine farms. This may be attributed both to political reasons and budgetary constraints relating to the payment of compensation.

3 White agriculture in modern day Namibia

Just as land dispossession has its history, so does the white agricultural order which followed. Namibian agriculture, under colonialism and apartheid, took on particular forms. In a state where farm ownership is politically and racially charged, it is not easy to determine exactly who owns the land because some ownership is concealed through various legal devices.[11] It is generally thought that about 4 200 families own about 6 000 commercial farms, with up to 700 of these farms held by blacks. Since independence black businessmen and politicians have purchased farms and about up to 700 black farmers have been loaned money through various state affirmative action programmes to buy commercial farms[12] but the commercial agricultural sector is still overwhelmingly white, and is so perceived by Namibian blacks. The 4 200 families referred to above represent much of the wealth in Namibia, with many urban residents owning farms that they use on weekends and holidays. At the same time, little of this wealth is actually generated by these farms, a situation much different from Zimbabwe where white-owned commercial farms were major sources of income, particularly in the form of foreign exchange. Many Namibian farms are held as 'hobby farms', one asset of people wealthy from other areas of enterprise. Again, this data is difficult to get access to but it is clear that the average Namibian farm is not a profitable enterprise and is in fact suffering under severe debt. At least 60 per cent, and up to as many as 70 per cent of all Namibian farms, are unprofitable. Debt loads are large, with debt repayment amounting to about N$300 million a year, representing about one-third of Namibia's estimated agricultural income.[13] Debt loads are also rapidly increasing: in

10 This clearly means that the government, under such a state of emergency, can expropriate private property without compensation.

11 Because these various legal arrangements are secret it is not possible to say precisely how common these devices are, or even exactly what they are. Some 'foreign' ownership, for example, is concealed by registering farms in the name of Namibian citizens. Other farms are held in the name of relatives, or corporations. Corporately held farms may legally appear in individual ownership. Still other farms may still be legally registered to their former owners, although ownership has been secretly transferred by an unregistered legal arrangement. Some affirmative action scheme farmers have apparently bought land from whites at inflated prices, then leased these farms back to the original owners. There are rumours that politicians do not want farms in their own names because it would reveal wealth that cannot be accounted for, thus the number of politicians (mostly black) who own farms is not known.

12 There is no firm data on the number of blacks who own commercial farms. While 700 loans have been taken out under an affirmative action farm loan scheme, it is not clear that 700 farms have been purchased with this money.

13 W Werner 'Agriculture and Land' in H Melber *Namibia: A decade of independence* (2000) 33.

1991 the average commercial farmer had to sell 31 per cent of his livestock to pay his debts; in 1998 this had increased to 64 per cent, effectively doubling debt in seven years.[14]

Debt per farmer has doubled since 1990, increasing from N$112 000 to N$227 000. Given that some farmers – perhaps as many as 30 per cent – carry no debt, the remaining farmers are even further in debt than these 'average' data would indicate.[15] The farms of such remaining farmers, averaging about 8 000 hectares each, 20 000 in the south, are running at an increasing annual loss. This means that the present generation of white farmers, averaging about 55 years of age, are content with agricultural enterprises producing little cash income and forcing them to borrow against their capital investments in order to maintain their agrarian life styles.[16]

Ironically, it now seems that this was always the case with Namibian farms: they were never profitable and always heavily subsidised by the state. Initially, the German government, using the model of the yeoman German farmer that worked so well in Canada and the United States, subsidised small farmers in order to populate its colony with Germans, a necessary requirement to create a colonial settler society on the model of North America or South Africa. Later, the South African government moved thousands of poor Afrikaners to Namibia, setting them up in a rural welfare scheme, a bulwark of agrarian Afrikaner values.[17] Even the choice of cattle or small stock as the major 'crop' was determined by South African officials who granted loans only for particular types of agricultural enterprises. A vast road system was built which is still among the best in Africa.[18] Wells were sunk all over the country in order to insure a constant supply of water in a semi-desert environment.[19] Dams and canal projects were built with plans developed to divert water from the Kunene and Kavango Rivers into central Namibia.[20]

Even with elaborate state efforts to develop water sources, drought is a periodic occurrence in Namibian agriculture. What rainfall that exists occurs during a few months between November and March[21] but rainfall, even in the 'rainy' season, is often irregular. It is therefore difficult to plan for herd

14 As above.
15 As above.
16 M Adams & J Howell 'Redistributive land reform in Southern Africa' ODI (64) January 2001,4-5. This is a logical conclusion, drawn from the above data. The farming sector is distrustful of the Namibian government and may want to appear stronger and more important to the nation's economy than it is, therefore accurate economic data is not easily gained. It should also be noted that the threat of expropriation has encouraged farmers to use various devices to raise the value of their farms, both to discourage expropriation and to increase the payment in the event of expropriation.
17 W Schmokel 'The myth of white agriculture: Commercial agriculture in Namibia, 1900-1983' (1985) 18 *International Journal of African Historical Studies* 1.
18 R Moorsom *Transforming a wasted land*(1982) 11-14; JH van der Merwe (ed) *National atlas of South-West Africa* (1983) plates 10-14; J Mendelsohn *et al A profile of North-Central Namibia* (2000) 9-11.
19 C Stern & B Lau *Namibian water resources and their management: A preliminary history* (1990).
20 HW Stengel *Water Affairs in S.W.A Windhoek: Afrika-Verlag der Kreis* (1963).
21 See also Moorsom (n 16 above) 9-36.

development.[22] Periodic drought has also resulted in high levels of environmental degradation which ironically, is lowering the value of the farms, making it easier for the government to purchase them but also making it harder to successfully resettle black farmers on the land. Namibian grazing lands are stressed even under good conditions. Drought forces overgrazing, which has led to the permanent depletion of grasslands, desertification,[23] and bush encroachment, as worthless species of brush take hold where grass is gone, converting grasslands into shrubby wastelands.[24]

Since the 1950s, Namibian agriculture has become increasingly monocultural: cattle are the main cash source, and most farms are now 'ranches', raising nothing but cattle.[25] Cattle herds in the commercial areas have declined by 27 per cent since 1990, now numbering under 1 000 000 head.[26] Because Namibia has little grain, its cattle are grass fed, further stressing the environment. This means that it takes longer to raise cattle to market weight and they therefore produce an inferior grade of meat in the world market.[27] In the south, where there is too little grass for cattle, farmers raise over 2 000 000 sheep.[28] Namibia, a vast agricultural land, is self-supporting only in beef and mutton. Most of its food products must be imported, almost exclusively from South Africa.[29] Although cattle and small stock production dominates Namibian agriculture, there are several regions that support commercial crop production. A 'maize triangle' in the north, where there is more rainfall, produces about half of Namibia's corn and wheat requirements.[30]

What are now left of Namibian agriculture are the remnants of a wasteful, politically determined and subsidised system that never originally belonged in Namibia but was introduced for concealed purposes which related to a colonial policy that no longer exists.[31] The irony here is striking:

22 J Sweet 'Livestock: Coping with drought: Namibia – A case study' unpublished paper, December 1998.

23 M Seely & K Jacobson 'Desertification in Namibia' *Namibia Environment* 1 (1996) 170-174; M Seely 'Environment: Harsh constraints, political flexibility,' in I Diener & O Graefe (eds) *Contemporary Namibia: The first landmarks of a post-apartheid society* (1948) 35-52; J Timberlake 'Soils and land use' in M Chenje & P Johnson (eds) *State of the environment in Southern Africa* (1994) 105-132; MK Seely & KM Jacobson 'Desertification and Namibia: a perspective 1994' *Journal of African Zoology* 108(1) 21-26.

24 B Bester 'Bush encroachment: A thorny problem' *Namibia Environment* 1 (1996) 175-177. Bush infestation is estimated to cover between 8 and 14.4 million hectares, the latter figure about 50 per cent of the commercial farming area. J Sweet 'Livestock – Coping with drought' 13.

25 B Lau & P Reiner *100 Years of Agricultural Development in Colonial Namibia* (1993) 20-22, 43.

26 Werner (n 11 above) 30-31; Sweet (n 20 above) 4 puts the number of cattle on commercial farms as 790 699 in 1997. The same year blacks held 1.3 million cattle in the communal areas.

27 Cattle fed on poor grass take longer to mature and yield tougher, poorer quality meat.

28 Sweet (n 20 above) 4.

29 Lau &Reiner (n 23 above) 11-14. W Elkan *Namibian agriculture: policies and prospects* 1992.

30 Sweet (n 20 above) 3.

31 R Moorsom (n 16 above) 30-36.

even if those farms were vacated tomorrow, it is not clear that they should – or even could – be re-occupied as farms. To do so would simply continue a wasteful form of colonial era agriculture. If white farmers required vast subsidies to operate in Namibia, black farmers will in all likelihood require the same. Thus, the major expense of land reform is probably not the cost of the land itself but the cost of government subsidies for future generations.

These commercial farms are at the core of an agrarian social structure that may provide jobs for about 15 per cent of the population. In 1997, 42 277 farm workers were employed in the commercial agricultural sector. An additional 38 125 were 'unpaid family workers'. With an average household size of 5.1, about 211 000 blacks are employed or supported by commercial agriculture.[32] Many black Namibians have worked on these farms their whole lives, and often have known no other home. While farm wages are generally low, farm workers may also draw benefits in terms of food, housing, and medical care that are much better than similar benefits available to the average Namibian. Any change in the ownership of these commercial farming operations will therefore displace large numbers of poor blacks with no other homes, low educational levels, and few other job skills.[33] The irony of 'land reform' is obvious: most of the people displaced are poor blacks while most of the whites who own farms already live in cities.

4 Security of tenure in the informal areas

In terms of land holding rights and security of tenure, the other category that needs to be considered are residents of the informal areas. Most of these people obtain their rights of occupation from traditional leaders. Such rights approximate to rights of usufruct. This category of residence has, however, never been granted official land rights by the authorities. It is this group of residents, together with those in the spontaneous settlements on the fringes of proclaimed urban areas, at which Tenure Rights provided for by the Flexible Land Tenure Act, 2012 are aimed.[34]

With the advent of independence, more Africans were absorbed into the public service and, to a lesser extent, into the private and commercial sectors. This has resulted in the influx of more affluent Africans into the urban centres. The character of black settlement in the urban centres has consequently become more heterogeneous and, with the right of private ownership guaranteed by article 16 of the Constitution, more black urban dwellers are able to acquire property in the form of freehold title. Although this phenomenon may have corrected to a certain degree the injustices of the skewed colonial land policies, the effects of past racial discrimination and

32 W Werner *Promoting development among farm workers: Some options for Namibia* 2002 4.
33 Werner (n 30 above) 6-9.
34 These titles are the subject matter of the Flexible Land Tenure Act 4 of 2012.

urbanisation had their own inherent problems. It is estimated that urban areas in Namibia are growing at a rate of 3.75 per cent per annum on average. The fastest growing towns, Walvis Bay, Katima Mulilo and Rundu are estimated to be growing at a rate of approximately 6.5 per cent per annum. The City of Windhoek, for example, grew rapidly following independence, from 141 562 inhabitants in 1991 to 322 300 residents in 2011, this constituting growth of 128 per cent at an annual growth rate of 4.2 per cent. At that rate, the population in 2017 can be estimated to have been about 413 000 people. Much of this growth occurred in the city's informal settlements. While in 1991, only 3 per cent of all houses in Windhoek were shacks, they made up about one-third (32 per cent) of all homes by the time of the 2011 census.[35] This growth means that there is not only need for more land for urban settlement but also for security of tenure for people whose rights are not recognised by the existing system. It was estimated in 1995 that about 30 000 families living in informal settlements in urban areas did not enjoy security of tenure.[36] Most of these residents were squatters on land belonging to individuals or local authorities.

One reason for the non-existence of a more secure tenure system for urban settlements in the former Bantustan areas was the deliberate policy of the colonial administration to deny these urban centres official recognition as municipalities. A different policy would have led to the establishment of local authorities with the jurisdiction to grant freehold title after the satisfaction of infrastructural and surveying requirements.[37]

The first democratic Government of Namibia reacted to this situation by establishing local authorities in these areas under the Local Authorities Act 23 of 1992. The formalisation of urban centres in terms of this statute involves, firstly, the proclamation of the area as an urban area under the jurisdiction of the relevant local authority. This step is then followed by the registration of the town in the name of the state or relevant local authority. The proclamation and subsequent registration enable the local authority to subdivide the area and create plots or erven of urban land. The occupants of such plots receive freehold title. In the formal areas the intention is to sell existing erven to the relevant local authority, 'subject to the holders of

35 Weber, Beat & John Mendelsohn *Informal settlements in Namibia: Their nature and growth: Exploring ways to make Namibian urban development more socially just and inclusive*, NCE/DW/German Cooperation/GIZ, 2017 (https://www.raison.com.na/sites/default/files/Informal-Settlementsin-Namibia-Book-Web.pdf) p 73; see SF Christensen & PD Hojgaard *Report on flexible land tenure system for Namibia* (1997) Ministry of Lands, Resettlement and Rehabilitation, Windhoek, 1997. See also chapter 2 at 2.4.4.

36 Christensen & Hojgaard (n 33 above) 6.

37 According to the *White Paper on urban land and the proclamation of local authorities* the development of many urban areas prior to independence took place as a result of the discriminatory policies of the colonial regime in terms of which such areas were never proclaimed as municipalities or townships in which local authority administration could develop. The *White Paper on National Land Policy* requires the establishment and proclamation of urban and urbanising areas as townships and municipalities, where appropriate, to promote decentralisation of government and the close involvement of communities in their own administration.

Permissions to Occupy being given the first option on the plots they occupy at the sale date'.[38] Although these measures may to some degree have corrected the injustices of the skewed colonial land policies, the effects of past racial discrimination and urbanisation had their own inherent problems whilst the right to freehold titles has been made accessible to all Namibians as a result of the combined effect of article 16(1) of the Namibian Constitution and the promulgation of the Local Authorities Act, there has been (as indicated earlier), an increased influx of people into the urban areas. This has led to considerable growth of informal settlements in the peri-urban areas. This growth means that there is not only need for more land for urban settlement but also for security of tenure for people whose rights are not recognised by the existing system.

4.1 The Flexible Land Tenure Act 4 of 2012

4.1.1 The objectives of the Act

As part of the Government's commitment to addressing the problems of the informal settlements in the peri-urban areas in Namibia, the Government promulgated the Flexible Land Tenure Act 4 of 2012, the basic objectives of which are the formalisation of the settlements by granting the legal recognition and the provision of formal land rights and security of tenure over the land occupied informally in the peri-urban areas by the vast majority of the urban poor and thereby promoting affordable access to land and tenure rights in these peri-urban areas.

The Act also seeks to address the issues of land registration and the high cost of land in the urban areas. The informal settlement areas are almost invariably not surveyed for demarcation and subdivision of the land into plots and their eventual registration. But the present land registration system is too bureaucratic, procedurally and technically to accommodate the needs of the vast majority of the urban poor. The pace of land registration under the current system is too slow. Another burden experienced under the current system is the fact that local authorities demand high standards for infrastructure.

Furthermore, the freehold title, besides being costly, requires high and complex expertise in as far as surveying and transfer of land are concerned. It is therefore not responsive to the needs and financial capabilities of the rural poor. The Flexible Land Tenure Act 4 of 2012 seeks to remedy this situation by introducing a parallel interchangeable land system, where the initial secure right is not only simple and affordable, but also upgradable overtime. This it does by creating starter and land hold title schemes both of which are models for a parallel interchangeable property registration system.

38 As above.

Therefore, the most basic feature or characteristic of the Flexible Land Tenure system is its parallelism and interchangeability.

The system would operate parallel to the existing registration system. This means that the same land parcel would be the subject of registration in both the starter and land hold title registry at the deeds registry. However, the deeds registry would only reflect the ownership of the whole block erf of land and the fact that a starter and land hold title registry exists. Individual starter title and land hold title rights within that block erf would not be visible in the main registry, but only in the starter and land hold title registry. Interchangeability on the other hand, makes reference to the fact that the different tenure types listed in the parallel registries can be upgraded, over time, from a basic security of tenure into individual freehold title granting full ownership.[39]

The objects of the Act take a tripartite form by creating alternative forms of land title that are simpler and cheaper to administer (compared to existing forms of land title); by the provision of security of title for persons who live in informal settlements or who are provided with low income housing schemes; and thereby empowering these persons concerned economically by means of land rights through settlement formalisation and regularisation.[40]

4.1.2 The establishment of title schemes

The application of the title schemes, however remains limited, in that they may only be established on land situated within the boundaries of a municipality, town or village council or in the alternative within the boundaries of a settlement.[41]

Three different legal entities may establish these housing schemes. First, they may be established on motion by a municipality, a town or a village council, referred to as a relevant authority. Secondly, they may also be established by the owner of a piece of land or one or more persons who reside on a piece of land after an application has been made to the relevant authority for consideration.[42]

Before the establishment of a starter title scheme or a land hold title scheme is considered, the land concerned must be subdivided or consolidated in such a manner that the scheme concerned would be situated on one portion of land registered as such in the deeds registry and any mortgage, usufruct, *fideicommissum* or similar right on that piece of land must be cancelled.[43]

39 Sections 14 and 15.
40 Section 2 of the Flexible Land Tenure Act 4 of 2012.
41 Section 3 of the Flexible Land Tenure Act 4 of 2012.
42 Section 3 read together with section 1(a).
43 Section 11(2).

The requirements for the establishment of the starter or land hold title scheme include the payment of specified amount of money by the owner of the piece of land on which the establishment of a starter title scheme or a land hold title scheme is considered or an association to which a group of people occupying a piece of land belongs, as the case may be, to the relevant authority. If the application is by individuals who reside on a piece land, the relevant authority may contract with the occupiers for the payment of a specified amount by every occupier by instalments. The money is meant to be used to defray the cost that may be incurred by the relevant authority in the establishment of the scheme concerned.[44]

With respect to the establishment of a land hold title scheme, there are technical requirements and procedure that must be complied with before the establishment of a land hold title scheme may be considered.

First, the plot that will form part of the scheme concerned must be measured in the prescribed manner by a land measurer and the physical boundaries must be indicated in the prescribed manner on the blockerf concerned by the land measurer.[45] Secondly, the land measurer must prepare a form, in the prescribed manner, indicating the physical boundaries of the plots and the numbers allocated to the plots that will form part of the scheme concerned.[46] Thirdly, if the request for the establishment of the land hold title scheme has been made by a person other than the relevant authority, such a person must prepare and submit to the relevant authority a list of persons with whom contracts have been concluded for the transfer of plots on the establishment of the scheme together with number of the plot that must be transferred.[47]

In considering the requests for the establishment of either a starter title scheme or a land hold title scheme, the relevant authority is obligated to cause a feasibility to be conducted in order to investigate the feasibility and desirability of creating a starter title scheme or a land hold title scheme on the piece of land concerned. [48] In determining the feasibility and desirability of a scheme, the relevant authority may consider environmental and geological factors and concerns and compliance with the provisions of all relevant legislation and any town planning scheme applicable to the area in which the piece of land concerned is situated and be guided by the letter and spirit of the objects of the Act.[49]

If the relevant authority is satisfied with compliance of the procedures stipulated under section 11 of the Act and that the establishment of the

44 Section 11(3)(a)(b)(c).
45 Section 11(4)(a).
46 Section 11(4)(b).
47 Section 11(5).
48 Section 11(6).
49 Sections 11(7)(a-e) and (8).

starter title is desirable, it may approve the establishment of the scheme concerned.[50]

After approving the establishment of the starter title scheme, the relevant authority must send a notice to that effect to the Registrar of Deeds and the Registrar of the local property office in whose jurisdiction the land concerned is situated. Upon receipt of such notice, the Registrar of Deeds is obligated to make an endorsement on the title deed of the blockerf concerned that a starter title scheme has been established on that blockerf.[51]

4.1.3 The starter title

A starter title therefore is a statutory land title and provides the holder of such a title with the right to occupy and erect a dwelling on a blockerf at a specified location. Such occupation can be in perpetuity depending on whether the holder of the title in question opts to upgrade to another form of tenure. The holder can bequeath the dwelling to his or her heirs or lease it to another person.[52] The holder is also entitled to transfer his or her rights to any other person, whether that person is the heir of the holder of those rights or whether the transfer is another transaction recognised by law.[53] In addition the holder of such title is entitled to utilise such services as may be provided to the scheme as a whole by a local authority or any other person.[54] A starter title therefore constitutes a right of use and not a right of ownership. However, it does provide a statutory form of security over a piece of land on the blockerf.

Another feature of a starter title is the fact that it cannot be mortgaged. This is the case, because the holder in title has no real right over the land he or she is occupying. Depending on the specific geographical setting in which a starter holder may be occupying land, *ie*, municipality area, village council , town council, the relevant authority in whose jurisdiction a starter title scheme is created may, on the availability of resources, provide services to the scheme as a whole (or individually) under such conditions as may be determined by such authority.[55]

Section 9 (4) explicitly provides:

> [S]tarter title rights may be transferred by agreement followed by occupation of the dwelling concerned by the person to whom the right has been transferred or any person assigned by him or her to occupy that dwelling.

50 Section 12(1).
51 Section 12(3).
52 Section 9 (1) (a-e).
53 Section 9(1)(e).
54 See section 9(1) (d) in this respect.
55 Section 9(2).

Drawing from the above, it becomes clear that the holder of a starter title may transfer or dispose of his or her occupation right(s), subject to some restrictions. It is the duty of both the transferrer and transferee and all other holders of rights in a starter title scheme to inform the Registrar of the property office in whose jurisdiction the scheme is situated of any transfer of rights.[56] This is to allow re-registration in the name of the new holder and such registration will then serve as *prima facie* proof of the transaction concerned.[57]

There are certain limitations placed in the acquisition of starter titles. To take standard examples, no juristic person(s) may hold any starter title right and except for persons who are married in community of property, a starter title right may not be held by more than one person jointly.[58] In the case of natural persons, there are two limitations as far as the acquisition of starter titles is concerned. Firstly, no acquisition of starter tile is allowed where such a person owns any immovable property, or, a land title right in any part in Namibia, and, secondly, one individual cannot hold more than one starter title right.[59]

4.1.4 Upgrading of the starter title to a land hold title

Provisions are made for the upgrading of a starter title over time to a land hold title, or where appropriate directly to freehold title.[60] Upgrading from starter title, to any other title is only possible if the majority occupying the block of land agrees on this decision.[61]

A simple procedure in this regard is necessary, starting with the lodging of an application in the prescribed form with the relevant authority concerned.[62] A formal planning layout needs to be finalised and approval given in order for individual sites to be defined and allocated.[63] Where the authority concerned grants the application for the upgrading of a starter title scheme to a land hold title scheme, the holders of rights in that scheme who do not agree with the upgrading, must be granted starter title rights in a similar scheme by the relevant authority.[64] More specially, when a starter title scheme is upgraded to a land hold title scheme, every holder of the starter title rights must be allocated a plot in the land hold title scheme which must correspond as closely as possible to the piece of ground actually occupied by that person on the blocker concerned.[65]

56 Section 9(5).
57 Section 9(7).
58 Section 9 (9) and 9 (8) respectively. In terms of section 9 (11) any contravention of these two sections will be regarded void.
59 Section 9 (10)
60 Section 15(1).
61 Section 14(1).
62 Section 14(1).
63 Section 15(2).
64 Section 14(2).

4.1.5 The establishment of a land hold title scheme

The procedure for the establishment of a starter title scheme described above applies to the establishment of a land hold title scheme. However, with respect to evidence or proof of right to a particular title, with respect to the starter title, such evidence or proof will be the registration of the name of a holder on the title deed of the blockerf in the starter title register.[66] In the case of the right to a land hold title, such proof will be a document in the prescribed form indicating that he or she is the holder of the rights concerned.[67]

4.1.6 The land hold title

A land hold title, like the starter title, is a statutory form of land tenure, enabling the holder of such a title to exercise rights over the land acquired that an owner would have in respect of the land under common law.[68] Therefore, a land hold title holder may perform all the juristic acts in respect of the plot concerned that an owner may perform in respect of his or her erf or land under the common law.[69] Furthermore, a land hold tenure a holder of such a title to have an undivided share in the common property.[70]

Land under land hold title may be sold, donated, inherited and mortgaged, and as such be sold in execution. Again, like the starter titles, land hold title is an inexpensive form of land registration recognising the occupation of land by certain beneficiaries in perpetuity. Certain transaction under land hold titles are subject to registration in the land hold title register;[71] namely those involving the transfer of land hold title rights to another holder, creating or cancelling a mortgage or any other form of any security for a debt executable on the plot concerned, transactions creating or cancelling a right of way in favour of any owner of land hold title rights in any plot on the same scheme as the plot concerned and those transactions creating or cancelling servitudes relating to the provision of water, electricity, telecommunications or any similar service(s) or the removal of sewerage from any plot on the scheme.[72] The general effect of registration of these transaction is the same as the legal effect of registration in the deeds registry of a similar transaction.[73]

65 Section 14(5).
66 Section 12(8) read together with 12(10).
67 Section 13(12).
68 Section 10(1)(a).
69 Section 10(1)(b).
70 Section 10(1)(c).
71 Section 10(5).
72 Section 10(5)(d).
73 Section 10(8)(a).

4.1.7 Upgrading of land hold title to full ownership

The Act also provides for the upgrading of a land hold title to full ownership.[74] If a land hold title scheme is situated within the area of an approved township; such scheme may be upgraded to full ownership.[75] Furthermore, if 75 per cent of the holders of rights in the scheme agree with an upgrading, the relevant authority may pay fair compensation to the holders of rights that do not agree with the upgrading and the relevant authority may sell the erven that would have been allocated to the persons who were compensated for its own account.[76] Usually the cost of such upgrading are borne by the holders of rights in the scheme concerned in the same proportion as the surface area of the plot or piece of land of such person to the surface area of all the plots or pieces of land on the scheme concerned.[77]

5 Reform of customary land tenure

5.1 Nature of customary land tenure

Apart from the misdistribution of land along racial lines, the Namibian land programme has to be analysed from the perspective of customary land tenure systems that operated in the communal areas within the general context of customary law. Some of the issues of customary land tenure discussed in this book focus on the recognition and status of customary law and the nature of customary land tenure.

One of the legacies of colonisation in Africa is the juxtaposition of the received law emanating from the legal systems of the colonial countries alongside the customary law of the indigenous African communities. This juxtaposition subjected the application of customary law to various tests of recognition. As Max Gluckman[78] and other students of the jurisprudence and legal systems of traditional African societies have acknowledged, before the advent of colonialism African communities had their own laws and legal systems regulating the behaviour of individuals in society. These laws covered areas like civil and criminal liability, marriage, inheritance and succession and land tenure systems. Faced with the problem of accommodation, the colonial administration accorded limited recognition to customary law by subsuming it under the received law and by subjecting it to the all too familiar repugnancy clause test for equity, good conscience, and morality. This precondition for the recognition of customary law still exists in the constitutions and statute books of many African countries.

74 Section 15(1).
75 Section 15(1).
76 Section 15(4)(5).
77 Section 15(6).
78 M Gluckman *Judicial process among the Barotse of Northern Rhodesia (Zambia)* (1967).

Customary law principles relating to criminal law generally did not withstand scrutiny under the repugnancy clause test. In the area of land law, however, the recognition and survival of indigenous legal principles depended upon different factors and considerations, including the ultimate colonial intent and design, economic factors, public domain concerns, and environmental and land use preoccupations. The general pattern was that in territories where the colonial administration did not intend to settle immigrants from the colonial country or from elsewhere in Europe, customary law relating to land tenure was given a fair amount of recognition.[79] In territories where the settlement of immigrants from Europe was the ultimate goal of the colonial powers, indigenous land tenure systems and property rights were given marginal recognition only and the indigenous communities were dispossessed of their property rights in favour of the immigrants and their property rights regimes. By legislation land was classified into crown (or state land) and native reserves (or communal lands) so that, as pointed out by TW Bennett,[80] 'the authority of customary law recognised in the administration of communal lands was a creation of colonial authorities'. In other words, native land was not communal land until the colonial authorities defined away all other forms of native land tenure. The latter pattern was more prominent in Southern Africa so that in these areas the characteristic feature of the customary law of land tenure is either the adulteration or lack of development of the indigenous systems. The Namibian pattern of classification, as described earlier, fits into this general Southern African pattern.

With the promulgation of the Namibia Independence Constitution customary law was recognised as one of the sources of law in Namibia. In its recognition of customary law as a source of law,[81] the Constitution removes the repugnancy clause and equates customary law with the common law. However, the Constitution left open the question of whether the new constitutional status of customary law in Namibia means that ownership of the communal lands is vested in the indigenous people as the holders of allodial titles to their ancestral lands. Article 100 of the Constitution vests ownership of all land in Namibia in the state, except for the land otherwise lawfully owned. The application of customary law in the communal areas, coupled with the fact that communal lands were the creation of legislation,

79 BJ da Rocha & CHK Lodoh *Ghana land law and conveyancing* (1995) state that in Ghana, for example, neither in theory nor in practice can it be said that all land is held from the state. Land in Ghana is held from various stools (skins) or families or clans, which are the allodial owners. The state holds lands only by acquisition from these traditional allodial owners. This right was recognised by Rayner CJ in a report on land tenure in West Africa, cited in the judgment of the Privy Council in the case of *Amodu Tijani v Secretary, Government of Southern Nigeria* 1921 2 AC 399.

80 TW Bennett & NS Peart *A source book of African customary law for Southern Africa* (1991) 384-96.

81 Article 66(1) of the Constitution states that both the customary law and the common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary and common law does not conflict with this Constitution or any other statutory law.

has left many uncertainties regarding the exact rights of the indigenous people who occupy the communal lands and the administrative authority of the chiefs.

The position adopted in the *White Paper* on National Land Policy is that in terms of Schedule 5(1) of the Constitution, communal land is vested in the state to be administered in trust for the benefit of traditional communities and for the purpose of promoting the economic and social development of the Namibian people. This position constitutes one of the underlying principles of the Communal Land Reform Act 5 of 2002.

5.2 The Communal Land Reform Act

Article 100[82] of the Constitution and section 17 of the Communal Land Reform Act have maintained the position that the communal lands are vested in the state in trust for the benefit of the traditional communities residing in those communal areas and for the purpose of promoting the economic and social development of the people, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agricultural activities. This position goes further than the position of the communal lands at the time of independence, as will be explained later.

The claims arising from article 100 and Schedule 5 of the Constitution have an international law foundation supported in a series of resolutions of the United Nations. In the 1970s, developing countries attempted to establish what they termed the 'New International Economic Order' (NIEO) through a series of UN resolutions, including the 1973 Resolution on Permanent Sovereignty over Natural Resources,[83] the Charter of Economic Rights and Duties of States,[84] and the Declaration on the Establishment of a New International Economic Order.[85] In contrast with Resolution 1803, the 1973 Resolution on Permanent Sovereignty over Natural Resources 'affirmed' that:

> the application of the principle of nationalization as carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures.

82 Article 100 provides that: '[l]and, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned'.
83 GA Res 3171 XXVIII 1973.
84 GA Res 3281 XXIX 1974.
85 GA Res 3201 XXIX 1974.

The extent of these sweeping claims of state ownership at community level is, however, truly staggering. These international resolutions are meant to cover mainly rights regarding compensation when the state nationalises private property.[86] In many countries, the nation-state claims ownership to well over half of the land base. In this regard the word 'vested' in section 17(1) of the Communal Land Reform Act is of particular relevance because of the confusion it creates regarding the ownership of communal land and resources like trees found on that land. Section 17 therefore requires closer analyses.

Since independence the ruling Government has, under the empowerment of the constitution and international law, embarked upon a land reform agenda which also included reform of communal land. The Government's proposals on communal land reform in the *White paper* on Land Policy have been addressed in the Communal Land Reform Act.[87] As stated in chapter 10, the primary purpose of this Act is to make the process of land allocation and land administration fair and transparent, and to enhance security of tenure in the communal areas by giving statutory recognition to existing land rights and by creating new rights. The Act also seeks to introduce a certain degree of uniformity in land policy throughout the country by laying down new procedures regarding land allocation, utilisation and transfer or inheritance. It addresses, *inter alia*, issues relevant to administration of communal land, titles to communal land, security of tenure and as stated earlier, it reiterates the position in the *White Paper* that ownership of rural land is vested in the state.

With regard to rights over communal land, whilst recognising the underlining principle that the ownership of communal lands is vested in the state, the Act creates two rights that may be allocated in respect of communal land: customary land rights and rights of leasehold.[88] The Act thus reaffirms customary rights of usufruct[89] granted to occupiers of communal land and seeks to confer statutory recognition on this tenure system. The Act does not go beyond the right of usufruct. It does, however, specify the duration of customary land rights[90] and makes provision for their registration[91] and upgrading to the status of leaseholds in order to encourage and promote the development of the communal lands. Registration only

86 PB Gann (1985) 23 Col. JTL. 615.
87 The Communal Land Reform Act contains the proposed provisions on the question of ownership, types of titles, security of tenure, and administration of communal land. In addition to this, the Traditional Authorities Act 17 of 1995 and the Council of Traditional Leaders Act 19 of 1997 provide for jurisdiction with regard to certain matters pertaining to the allocation and administration of communal land to the traditional authorities.
88 See sec 19 of the Act.
89 Under section 21 the customary rights that may be allocated comprise a right to a farming unit and a right to a residential unit. Section 20 vests the power to allocate or cancel any customary land right in the communal area of a traditional community in the Chiefs and Traditional Authorities.
90 See sec 26.
91 See sec 25(1)(b).

constitutes publicity or proof of title. It does not confer on the holder any additional power for example, the power to use the title as collateral.

The other right created by the Act is the right of leasehold, or statutory leasehold.[92] This right is intended to replace the existing PTO, which is granted by the Ministry of Lands for the use of land for any specific purpose, especially for commercial undertakings. In terms of the Act, the power to grant leasehold rights is vested in the Communal Land Board,[93] and not in the Ministry of Lands. The right is granted for a maximum statutory period of 99 years. If the right is granted for a period exceeding 10 years, it is invalid unless approved by the Minister.[94] The grant of leasehold rights is subject to registration.[95] If the land in respect of which the right of leasehold is granted is surveyed land, in other words land which is shown on a diagram as defined in section 1 of the Land Survey Act 33 of 1993, and the lease is for a period of 10 years or more, the leasehold must be registered in accordance with the Deeds Registries Act 47 of 1937.[96] These provisions therefore guarantee security of tenure, and could serve as a catalyst for the development of commercial activities in the communal areas.

The Act recognises the role of traditional authorities in communal land administration by vesting in the Chiefs and the traditional authorities the power to allocate communal land, subject to supervision by the Communal Land Boards.[97] This provision should not be interpreted as a potential threat to the rights of traditional leaders under article 102(5) of the Constitution, which provides for the establishment of a Council of Traditional Leaders by Act of Parliament 'to advise the President on the control and utilization of communal land'. The role of the Communal Land Boards must rather be seen as administrative and advisory.

The establishment of the Communal Land Boards will be a completely new development in the law relating to communal land in Namibia, though Botswana and other countries have similar Boards.

As stated earlier, the Act[98] vests the right to grant the right of leasehold in the Board concerned. It is therefore within the remit of the Board to consider applications for the grant of leasehold over designated communal land but in the process of exercising this mandate, the interests of harmonious relationships and propriety will require the consent of the Traditional Authority concerned.[99] The mandate of a Traditional Authority

92 See secs 19(b) and 30(1).
93 The Communal Land Boards are created under section 2(1) of the Act.
94 See sec 34.
95 See sec 33(1).
96 See sec 33(2).
97 See secs 2 and 3. The establishment of the Communal Land Boards will be a completely new development in the law relating to communal land in Namibia, though Botswana and other countries have similar Boards.
98 Section 30(1)(2) of the Communal Land Reform Act 5 of 2002.
99 Section 30(4).

with respect to the approval of an application for the grant of the right of leasehold in relation to the powers and functions of the Board as provided for by subsection 30(4) are as follows:

> Subject to subsection (5) a board may grant a right of leasehold only if the Traditional Authority of the traditional community in whose communal area the land is situated consents to the grant of the right.

A Traditional Authority is not vested with the absolute right to grant a right of leasehold. This Is also supported by the principles relating to the exercise of powers granted to statutory bodies as stated by LA Rose-Innes in his work, *Judicial Review of Administrative Tribunals in South Africa* at 91 and also quoted in the case of *Kessl v Ministry of Lands Resettlement and Others,*[100] are as follows:

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

A Traditional Authority is a creation of an Act of Parliament. It is vested with statutory mandate. Its powers and functions and the exercise of these powers and functions are prescribed by the Act, more specifically, section 30 of the Act. Ueitele, J in the case of *Chaune v Ditshabue and Others*[101] with reference to the exercise of the powers conferred on traditional authorities stated thus:

> There is nothing private or personal about the exercise of the powers conferred on traditional authorities. The powers are given to the traditional authorities in the interests of the proper conduct of the affairs of traditional communities. In my view therefore the exercise of power by traditional authorities pursuant to the Traditional Authorities Act 2000 is plainly the exercise of a public power, and in exercising those powers the traditional authority is an administrative body as contemplated in article 18 of the Namibian Constitution.

This comment was made with respect to the exercise of the mandate of the traditional authorities as provided for by the Traditional Authorities Act 2000. However, the principle is relevant and applicable in the context of the exercise of the mandate of the traditional authorities as provided for by the Communal Land Reform Act.

In the Supreme Court case of the *Chairperson of the Immigration Control Board v Elizabeth Frank and Others*,[102] the Court laid down the principle that

100 2008 (1) NR 167 at 206
101 Case A5/2011 [2013] NAHCMD111.
102 2001 NR 107(SCA)65. See also *Sikunda v Government of the Republic of Namibia* (3) 2001 NR 181 (HC).

the provisions of article 18 of the Namibian Constitution demand *inter alia* that the exercise of a discretionary power granted by a statute must comply with the principles of natural justice, including the *audi alteram partem* rule and the provision of reason(s) for a decision or action taken by the repository of such statutory power. In that case, O'linn J stated thus;

> The principles of administrative justice require that in circumstances such as the present, the Board should have disclosed such facts, principles and policies to the applicant for the resident permit and allowed an opportunity to respond thereto by letter or personal appearance before the Board or both.
>
> The Court *a quo* misdirected itself in regard to interpretation and application of the law and applicable procedure. That Court should have set aside the decision of the Board but for the reason that the Board had failed to apply the *audi alteram partem* rule properly. In the premises, the application should have been remitted to the Board for rehearing, where the applicants are given the opportunity to respond to the contents of the aforesaid paragraphs 10 and 12 of the Board's replying affidavit.
>
> This was not the case where exceptional circumstances existed, e.g. where there were long periods of delay, where applicant would suffer grave prejudice or where it would otherwise be grossly unfair.

This affirms the position of Namibian jurisprudence on the exercise of the statutory powers given to both the Traditional Authorities an the Communal Land Boards; that is that the exercise of such powers are subject to the provisions of article 18 of the Namibian Constitution.

The Act also makes provisions for the legal status of rights over communal lands granted before the commencement of the Act and the change in the designation of a communal land area following the establishment of a local authority area within the boundaries of a communal land area.

Before the independence of Namibia and the promulgation of the Communal Land Reform Act, certain rights had been created over the communal lands. This category of land rights included PTO's but the PTO's are not included in the customary land rights and the right of leasehold created by the Act.[103] These rights are recognised by the Act[104] and provisions are made for the holders of such rights to be granted the rights of leasehold upon application to the relevant Communal Land Board for the recognition of the offer of a right of leasehold in respect of the land.[105] The statutory requirements for the recognition of the existing land right include a letter with prescribed information from the Chief or Traditional Authority of the traditional community within whose communal area the land in question is

103 Section 19 of the Communal Land Reform Act 5 of 2002.
104 Section 35(1)(a).
105 Section 35(2)(a-b).

situated.[106] The mandate conferred upon the Communal Land Boards, the Chiefs and Traditional Authorities in terms of the decisions in the cases of *Chaune v Ditshabue and Others*[107] and *Chairperson of the Immigration Control Board v Elizabeth Frank and Others*[108] must be exercised in compliance with the principles of natural justice.

Another aspect of the legal status of land rights granted over lands situated in communal land was addressed by the Supreme Court of Namibia in the case of *Agnes Kahimbi Kashela v Katima Mulilo Town Council*.[109] The Act provides that where a local authority area is situated or established within the boundaries of any communal land area, the land comprising such local authority area shall not form part of that communal land area and shall not be communal land.[110] A person whose customary land right has been terminated under such circumstances, i.e. due to the establishment of a local authority area within the boundaries of a communal land area, is entitled to compensation only in respect of any necessary improvement effected by that person.[111] Such person is not entitled to compensation with respect to the loss of the title to the land since he or she has not been vested with a freehold title.[112]

In the case of *Agnes Kahimbi Kashela v Katima Mulilo Town Council*[113] the appellant's late father was allocated a piece of land in 1985 in the then Caprivi Region (now the Zambezi Region) by the Mafwe Traditional Authority (MTA) on communal land. Following independence on 21 March 1990, all communal lands in Namibia became the property of the State of Namibia by virtue of Art 124 read with Schedule 5(1) of the Namibian Constitution but, in terms of Schedule 5(3) of the Constitution, subject to, amongst other, the 'rights', 'obligations' and 'trusts' existing on or over that land.

Appellant's father was still alive at the time of independence and continued to live without interference on the land (the land in dispute) allocated to him by the MTA with his family, including the appellant.

In 1995, the Government of Namibia which by certificate of State title owned the communal land of which the land in dispute was part, transferred a surveyed portion of it to the newly created Katima Mulilo Town Council (KTC) in terms of the Local Authorities Act 23 of 1992 (LAA). The appellant's father was still alive then and continued to live on the land as aforesaid. He died in 2001 with the appellant as only surviving heir who continued to live

106 Section 35(5)(b)
107 Case A5/2011 [2013] NAHCMD111.
108 2001 NR 107(SCA)65.
109 Case SA 15/2017.
110 Communal Land Reform Act 5 of 2002.
111 Section 40.
112 Section 17(1)(2).
113 n 107 above.

on the land – according to her as 'heir' to the land in terms of Mafwe customary law.

Whilst the appellant was living on the land in dispute, KTC as new registered title holder of the land rented out certain portions of it to fourth to eighth respondents, and subsequently offered to sell those rented portions to fourth to eight respondents in varying amounts.

The appellant issued summons in the High Court (Main Division) claiming that KTC was unjustly enriched (to her prejudice) by unlawfully renting out the land in dispute. She also claimed that, by offering to sell the land, KTC unlawfully 'expropriated' her land 'without just compensation' 'at market value'. The appellant relied for those allegations on Art 16(1) of the Constitution which guarantees property rights and Art 16(2) which provides that property may only be expropriated upon payment of just compensation. She also relied on s 16(2) of the Communal Land Reform Act 5 of 2002 (CLRA) which states that land may not be removed from a communal land area without just compensation to the persons affected.

The appellant therefore claimed as damages the rental amounts received by KTC as claim one and under claim two the amount for which the lands were offered for sale as being reasonable compensation for the 'expropriation'.

KTC pleaded that the appellant was not entitled to the relief sought because at independence and also upon transfer of the land to KTC the land in dispute ceased to be communal land and the appellant could not claim any communal land tenure right in that land. KTC, having become the absolute owner of the land could deal with it as owner without any encumbrance thereon.

The High Court agreed with KTC and dismissed the appellant's claim with costs, holding in the main that in terms of s 15(2) of the CLRA the land in dispute ceased to be communal land and that no communal land right claimed by the appellant could exist therein. The court a quo also held that if the appellant had any right to compensation it would be enforceable only against the Government of Namibia and not KTC and that, in any event, such a claim was prescribed.

On appeal it was held that the issue of compensation was not put forward by the parties in their stated case to the court and therefore should not have been decided. Also, held that since prescription was not pleaded by the respondents it could not have been invoked against the appellant.

It was further held that Schedule 5(3) of the Constitution creates a *sui generis* right in favour of the appellant and those similarly situated over communal lands succeeded to by the Government of Namibia and such right continued to exist even when transferred to a local authority such as KTC.

In rejecting the respondents' argument to the contrary, it was held that such right did not need to be registered in terms of s 16 of the Deeds Registries Act 47 of 1937 to be enforceable.

It was also held that a right created by Schedule 5(3) of the Constitution did not necessarily have to be vindicated in terms of Art 16(2) of the Constitution because the framers of the Constitution must have intended a remedy to be fashioned by the courts to give effect to the right created by the schedule. In other words, where there is a right, there must be a remedy.

5.3 Registration of Communal Lands in Namibia[114]

The distinction between communal and land held under a freehold title including commercial land creates a dual system of land ownership and an even more complicated system of land registration.

As stated in chapter 2, land alienation by Europeans[115] and the introduction of new property rights by both the German Imperial Government[116] and the erstwhile South African administration[117] resulted in the classification of land in Namibia as crown (state) land, private land and communal land.[118] This can legitimately be regarded as the genesis of the imbalances in land distribution and ownership in present-day Namibia.[119]

In 1990, at the time of its independence from the South African colonial administration, Namibia inherited two broad categories of land rights, namely freehold titles and customary land rights of usufruct. These titles and rights have been recognised and incorporated in the Constitution of Namibia and relevant legislation for the purposes of legal continuity. For legal certainty and prevention of the creation of a legal vacuum, the framers of the Namibian Constitution found it both politically and legally prudent to accord constitutional recognition to pre-independence land rights.

The Government embarked on a land reform agenda including reform of the communal lands. [120] This reform was mandated by the Constitution and International Law.[121] The Government's proposals on communal land reform

114 See SK Amoo and C Mapaure 'Registration of Communal Lands in Namibia" in H Mostert et al (ed) *Land law and governance*: *African perspectives on land tenure and title.*(2017) 171-187

115 See SK Amoo *Property law in Namibia* (2014) 13-22; SK Amoo and S Harring 'Property rights and land reform in Namibia' in B Chigara (ed) *Southern African development community land issues*: *Towards a new sustainable land relations policy* (2012) 223-226.

116 As above.

117 As above.

118 As above.

119 As above.

120 The Communal Land Reform Act 5 of 2002.

121 Articles 16(1)(2) and 23(2) of the Namibian Constitution; article 17 of the Universal Declaration of Human Rights and article 14 of the African Charter on Human and Peoples' Rights.

in the White Paper on Land Policy [122] were addressed in the Communal Land Reform Act.[123] As indicated in the Preamble, the primary purpose of this Act is to make the process of land allocation and land administration fair and transparent, and to enhance security of tenure in the communal areas by giving statutory recognition to existing land rights and by creating new rights.[124] The Act also seeks to introduce a certain degree of uniformity in land policy throughout the country by setting out new procedures relating to land allocation, utilisation, transfer or inheritance and registration.[125] It addresses, *inter alia*, the issues of administration of communal land, titles to communal land and security of tenure. It also reiterates the position in the White Paper that the ownership of rural land is vested in the state.

Namibia has a dual land registration system: A deeds registry system (as opposed to the Torrens system) applies under the provisions of the Deeds Registries Act;[126]except in the Rehoboth Gebiet, which historically operated under a different registry system, which resembles the Torrens system of registration.

Under the deeds registry system (the 'notarial system'), title deeds are executed and registered by the Registrar of Deeds. Other documents such as ante-nuptial contracts, lease agreements, and servitudes are registered in the Deeds Office (in Windhoek) after they have been prepared and executed by a notary public.

Before the promulgation of the Namibian Constitution,[127] the Rehoboth Baster Community or the Rehoboth Gebiet was administered as a self-governing entity within the South West African territory, under the provisions of the Rehoboth Self-Government Act.[128] The governing authority ('Kaptein's Council' and Legislative Council) passed the Registration of Deeds in Rehoboth Act.[129] It applies still, in amended form, but only to the Rehoboth District.[130] This Act is based on the endorsement of titles system which is consistent with the Torrens system.[131] For ease of reference it is referred to here as 'the Rehoboth system'.

122 Government of the Republic of Namibia *White paper on national land po0licy* (1997).
123 The Communal Land Reform Act 5 of 2002 contains the proposed provisions on the question of ownership, types of titles, security of tenure, and administration of communal land. In addition to this, the Traditional Authorities Act 17 of 1995 and the Council of Traditional Leaders Act 19 of 1997 give certain jurisdiction over the allocation and administration of communal lands to the traditional authorities.
124 See sections 19,29 and 30 of the Communal Land Reform Act 5 of 2002.
125 See sections 2,3 and generally chapter IV of the Communal Land Reform Act 5 of 2002.
126 Act 47 of 1937.
127 Act 1 of 1990.
128 Act 56 of 1976, in accordance with the Paternal Law of 1872. The Rehoboth Self-Government Act *inter alia* provided for the establishment of a Kaptein's Council and a Legislative Council.
129 Act 93 of 1976.
130 As defined in section 6 of the Rehoboth Self-Government Act 56 of 1976.
131 Currently there is a draft Deeds Bill which is intended to harmonise and consolidate the two Acts, namely the Registration of Deeds in Rehoboth Act, 1976 and the Deeds Registries Act, 1937.

The two registration systems mentioned are fundamentally different. One major difference is that the notarial system requires the services of a qualified conveyancer or a notary public for the preparation of deeds or other documents for registration.[132] The Rehoboth system,[133] by contrast, does not contain a similar requirement. In terms of the system of registration of land rights provided for by the Communal Land Reform Act, the services of a qualified conveyancer or a notary public will be required for the registration of a right of leasehold in accordance with the provisions of the Deeds Registries Act 47 of 1937[134] if the land in respect of which the right of leasehold is granted is surveyed land and the term of lease is for a period of 10 years or more.[135] If on the other hand the right to be registered is a customary land right[136] or the right of leasehold is in respect of un-surveyed land and the term of the leasehold is for a period of less than 10 years, then the law requires mere registration in the prescribed register.[137] This will not require the services of a conveyancer or a notary public.

5.4 Registration

In Namibia, the registration of land rights is governed by the deeds registry system, which is meant to ensure certainty and security of land rights and title, but the Communal Land Reform Act generally governs the registration of land titles over communal lands. Land registration facilitates the flow of and access to capital from financial institutions to holders of registered rights, generally through mortgages.[138] Flow of capital is therefore underpinned by registered rights. However, given the differing interests in land, registration *per se* does not guarantee equity in access to capital. Rights created by short-term leases, or even statutory leases, created over communal lands and customary land rights do not attract the level of security that financial institutions require for the release of capital. This is attributed to the basic fact that because the holders of these land rights are not vested with ownership rights, there are uncertainties surrounding sureties in cases of defaults in payment of the loans.

132 It is provided Under the Deeds Registries Act, Act 47 of 1937, specifically section 15, that no deed of transfer, mortgage bond or certificate of title or registration of any kind mentioned in the Act shall be attested, executed or registered by a Registrar unless it has been prepared by a conveyancer practicing within the province within which his registry is situate.
133 Registration of Deeds in Rehoboth Act 93 of 1976.
134 Section 15.
135 See section 33 (2) of the Communal Land Reform Act.
136 See section 25 of the Communal Land Reform Act.
137 See sections 33(1)(a)(b) and 33(2) of the Communal Land Reform Act.
138 It would be interesting for one to conduct research into the various ways of accessing credit in Namibia through the registration of various land titles, as mentioned in the text.

Registration is a process or a series of processes whereby information is collected, consolidated and recorded in a centralised and accessible system.[139] This can happen in two ways: deeds registration and title registration. The latter connotes a record of transactions rather than a record of only registrable rights. It connotes the consolidation of current facts about a parcel of land, including its boundaries, the names of the registered proprietors, and any other interests that affect title to the land.[140] This is consistent with the Torrens system of registration. The Torrens system consists of the State keeping a register of land holdings, which guarantees an indefeasible title to the land holdings included in the register. Ownership of land is transferred through the registration of title instead of the use of deeds.

In contrast, the Notarial system is based on a deeds system and under this system a deed serves as evidence of title to the land. Thus, registration under the Notarial system is legally defined as the legal act whereby full ownership passes from transferor to transferee, regardless of whether delivery of title deeds has taken place. Registration is necessary for the validity of servitudes, encumbrances, or other restrictions on full ownership. Under this system, it is not possible for ownership to be transferred by any person other than the owner through the process provided for in the Deeds Registries Act.[141] The above description of the nature of registration does not reflect the practice of communal land registration. This practice, its process and consequences are considered in more detail in section 4 below.

5.5 Surveying

The foundation of land registration is the land surveying system managed by the Surveyor General under the Ministry of Lands and Resettlement.[142] This means that any piece of land has to be registered and before such piece of land is registered it must be surveyed.[143] Such registration has to be recorded in the Deeds Registry with the said ministry.[144] The result is that there is a complete miniature picture of the country in the Surveyor General's Office.

Furthermore, an owner of land who wants to subdivide land or consolidate two or more pieces of land must first obtain the approval of the Surveyor General, since the subdivision of the land is only permissible if that

139 For a more comprehensive definition see also Maasdorp's *Institutes of South African Law: Vol II The Law of Property* 10th ed (1976) at 73.
140 Commonwealth of Australia *Making Land Work: Volume One –Reconciling Customary Land and Development in the Pacific* (Australian Agency for International Development 2008) 28.
141 Act 47 of 1937.
142 See Sections 2 and 3 of the Land Survey Act 33 of 1993.
143 See Sections 3(2)(b) and (g) read together with section 35 of the Land Survey Act 33 of 1993.
144 See section 35(1) of the Land Survey Act 33 of 1993.

piece of land has been approved by the Surveyor-General.[145] Corporate entities including government offices such as municipalities must obtain the required approvals as well.[146] It is common practice that the plans and diagrams in respect of pieces of land are drawn up by a land surveyor and submitted to the Surveyor-General for approval.[147]

Although the Surveyor General and the Registrar of Deeds both fall under the Ministry of Lands and Resettlement, they maintain independent offices. They do, however, work together in the maintenance of land records of the country. In this context, the Registrar of Deeds keeps all general plans[148] from the Surveyor General's office. Small scale diagrams[149] that accompany transfer documents are also kept in the Registry. Further, registrations of 'new' erven will be noted in the Surveyor-General's office by way of noting the title deed number. There is accordingly interconnectedness between the two offices, although each is regulated by different Acts of Parliament and their regulations.

5.6 Registration of communal lands, its process and consequences

Namibia's deeds registration process is – and always has been – one way to protect land title for that sector of the population that has freehold title in proclaimed areas.[150] Registration, apart from evidence of ownership, affords security of title needed for the land to serve as collateral for the advancement of loans by financial institutions and building societies.

5.7 Statutory provisions

Occupiers of communal lands were deprived of titles of ownership and all other facilities accruing there-from.[151] This imbalance or discrimination has been addressed by the Communal Land Reform Act.[152] The Act specially provides for registration of statutory leasehold, under the provisions of section 33(2). In terms of the section, if the land is surveyed and shown on a diagram,[153] and the term of lease is for 10 years or more, the leasehold must

145 See section 43 of the Deeds Registries Act 47 of 1937 read together with sections 3(2)(b) and (g) read together with section 35(1) of the Land Survey Act.
146 See section 42(1) of the Land Survey Act.
147 See section 3(2)(g) of the Land Survey Act.
148 In terms of section 1 of the Land Survey Act 'general plan' is defined as 'a plan which represents the relevant positions and dimensions of two or more pieces of land …'.
149 In terms of section 1 of the Land Survey Act 'diagram' is defined as 'a document, containing geometrical, numerical and verbal representations of a piece of land, line, feature or area forming the basis for registration of a real right …'.
150 See sections 3 and 63 of the Deeds Registries Act and section 17(1) and (2) of the Communal Land Reform Act.
151 See generally SK Amoo 'Towards a comprehensive land tenure systems and land reform in Namibia' (2000) 17 *South African Journal on Human Rights* 87; Amoo & Harring (n 113 above) 222-262; SK Amoo & SL Harring 'Namibian land law: Reform and the restructuring of post-apartheid Namibia' (2009) 9 *University of Botswana Law Journal* 87-121.
152 Act 5 of 2002.

be registered in accordance with the provisions of the Deeds Registries Act.[154] The position is, however, different with respect to the registration of customary land rights. The Communal Land Reform Act provides that if a Board ratifies the allocation of a customary land right under section 24(4)(a), it must cause such right to be registered in the prescribed register in the name of the person to whom it has been allocated, and issue to that person a certificate of registration in the prescribed form and manner.[155]

As a matter of principle, since customary land rights amount to limited real rights,[156] they qualify to be registered under the Deeds Registries Act.[157] However, in practice, since these rights are short of the right of ownership, they are inherently incapable of creating the security needed to access loans by commercial banks and building societies. This shortcoming is being addressed by the proposed Consolidated Land Bill, which includes a provision for the registration of these rights in the Deeds Registry under the Deeds Registries Act.[158]

5.8 The registration process

The registration process commences after allocation of a specific land right over communal land by the Traditional Authority and Communal Land Board.[159] In terms of section 22, an application for a customary land right must be made in writing, on the prescribed form and handed to the Chief of the traditional community, where the land is situated. Additionally, this application must contain all the relevant documentation that the Chief or Traditional Authority may require in order to decide the matter.[160] When considering an application made in terms of the Act, the Chief or Traditional Authority may make investigations and consult persons in connection with the application.[161] If any member of the traditional community objects to the allocation of the right, the Chief or the Traditional Authority may conduct a hearing to afford the applicant and such objector the opportunity to make representations in connection with the application.[162] The Chief or Traditional Authority may then refuse or grant the application.[163] In terms of the language of the Act, the requirement to conduct a hearing is not mandatory or peremptory. It is submitted that in the interest of justice and transparency, the principles of natural justice must nevertheless be strictly

153 As defined in section 1 of the Land Survey Act 33 of 1993.
154 Section 33(2) of the Communal Land Reform Act.
155 Section 25(1) (a) and (b) of the Communal Land Reform Act.
156 See section 63(1) of the Deeds Registries Act and the doctrine of subtraction from the test as laid down in the case of *Ex parte Geldenhuys* (1926) OPD 155.
157 See section 63(1).
158 The proposed Consolidated Land Bill is currently being revised as part of the legislative process in order to address some of the criticisms leveled against it.
159 See sections 24(4)(a) and 25 of the Communal Land Reform Act.
160 See section 22(2) of the Communal Land Reform Act.
161 See section 22(3)(a) of the Communal Land Reform Act.
162 See section 22(3)(b) of the Communal Land Reform Act.
163 Section 22(a) of the Communal Land Reform Act.

complied with when the Chief or Traditional Authority is exercising that function, as demanded and expected by the provisions of article 18 of the Namibian Constitution which requires administrative bodies and administrative officials to act fairly and reasonably when exercising their statutory functions.

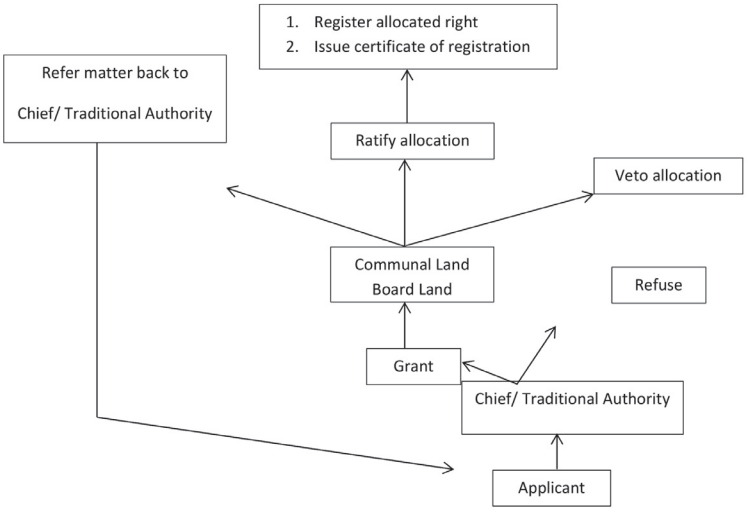
The Chief or Traditional Authority may allocate rights in respect of a specific portion of land for which an applicant is applying or, by agreement with the applicant, any other portion of land; and subject to limitations on the size of the land that can be allocated.[164] Although the respective Traditional Authorities are entrusted to determine the size and the boundaries of the portion of land in respect of which a land right is allocated, field teams assess the boundaries (geometries) of the applicable land parcel and validate the claim.[165] The mapped parcels are then digitised in a communal cadaster.[166]

Section 24 of the Communal Land Reform Act provides for the ratification of allocation of customary land rights. In terms of this section, any allocation of a customary land right made by a Chief or a Traditional Authority under section 22 has no legal effect unless the allocation is ratified by the relevant Communal Land Board.[167] Upon the allocation of a customary land right, the Chief or Traditional Authority who allocated the right must forthwith notify the relevant Communal Land Board thereof and furnish the Communal Land Board with the prescribed particulars pertaining to the allocation.[168] Upon receipt of a notification and the particulars, the relevant Communal Land Board must determine whether the allocation of the right in the particular case was properly made in accordance with the provisions of the Act.[169] In determining whether the allocation of the right in the particular case was properly made in accordance with the provisions of the Act, a Board may make such enquiries and consult such persons as it may consider necessary or expedient for that purpose and must ratify the allocation of the right if it is satisfied that such allocation was made in accordance with the provisions of the Act.[170] The Land Board is also empowered to refer the matter back to the Chief or Traditional Authority concerned for reconsideration in the light of any comments which the board may make.[171] The Act further requires the board to veto the allocation of the right in three instances; namely if the right has been allocated in respect of land in which another person has a right;[172] the size of the land concerned exceeds the maximum prescribed size;[173] or the right has been allocated in respect of land which is reserved for common usage or any other purpose in the public interest.[174]

164 Section 22(4)(a) read with section 23 of the Communal Land Reform Act.
165 A P Resch & J Kinahan *Immovable property law in Namibia* (2014) 25.
166 As above.
167 Section 24(1) of the Communal Land Reform Act.
168 Section 24(2) of the Communal Land Reform Act.
169 Section 24(3) of the Communal Land Reform Act.
170 Section 24(a) of the Communal Land Reform Act.
171 Section 24(b) of the Communal Land Reform Act.
172 Section 24(4)(c)(i) of the Act.
173 Section 24(4)(c)(ii) of the Act.

If a board vetoes the allocation of a right, it must inform the Chief or Traditional Authority and the applicant concerned in writing of the reasons for its decision.[175] If a board ratifies the allocation of a customary land right under section 24 it must cause such right to be registered in the prescribed register in the name of the person to whom it was allocated;[176] and issue to that person a certificate of registration in the prescribed form and manner. The board must keep a duplicate copy of every certificate of registration issued under section 25(1). Once the allocation, mapping and processing processes are completed, the ratification and registration is undertaken -this being the step which finally establishes a 'registered land right'. At this stage a communal land registration certificate is issued. The current communal land registration process is not comprehensive, it is fraught with shortcomings. This point has been raised on several consultative meetings and conferences with the relevant line-ministry. In its response, as of 2007 the Ministry of Lands and Resettlement undertook a Communal Land Administration System (CLAS) which consists of two components, namely a communal deeds (based on an MS Access database) and communal cadaster (based on an ArcGIS geodatabase).[177] The former stores any applicant-related data whilst the latter contains the geometries of the parcels sampled. Although separate in operation, the two databases are linked by a unique parcel identifier (UPI) system. The overall objective of the CLAS is to integrate the commercial and communal land registration systems eventually.

174 Section 24(4)(c)(iii) of the Act.
175 Section 24(5) of the Act.
176 Section 25(1) of the Act.
177 Ministry of Lands and Resettlement/MLR 'A Decade of Communal Land Reform in Namibia: Review and Lessons Learnt, with a Focus on Communal Land Rights Registration' (Deutsche Gesellschaft Für Internationale 2014) p 42.



Source: Mandimika & Matthaei[178]

5.9 Collateral and access to credit

One of the handicaps of occupiers of communal land is their inability to access credit from financial institutions, because of their inability to use their titles as collateral. This is primarily the social responsibility of Government, but financial institutions and building societies have the equal responsibility to assist the Government in its effort to reform land rights in the communal areas and ensure access to credit. There might be the need for an appropriate legislative intervention and progressive policies by these institutions to roll out credit facilities to develop the communal lands. Some banking institutions have initiated the granting of loans for the purpose of building houses in communal lands or un-proclaimed areas, against a guarantee issued by a pension fund to which the member belongs, in terms of the provisions of the Pension Funds Act.[179] Even though this initiative in practice accords with the social responsibility of the State and financial institutions, it can only be implemented within an appropriate legal framework. For example, Section 19(5) (a) of the Pension Funds Act provides as follows:

> A registered fund may, if its rules so permit, grant a loan to a member by way of investment of its funds to enable the member –

178 See P Mandimika & E Matthaei *Ensuring tenure security for women: A case study on Namibia's Communal Land Rights Registration Programme* presented at the 2013 Annual World Bank Conference on Land and Poverty, p 30.

179 Section 19 of Act 24 of 1956.

(i) to redeem a loan granted to the member by a person other than the fund, against security of immovable property which *belongs to* the member or his or her spouse and on which a dwelling has been or 'will be erected which is occupied or, as the case may be, will be occupied by the member or a dependant of the member;

(ii) *to purchase* a dwelling, or to *purchase* land and erect a dwelling on it, for occupation by the member or a dependant of the member; or

(iii) to make additions or alterations to or to maintain or repair a dwelling which *belongs to* the member or his or her spouse and which is occupied or will be occupied by the member or a dependant of the member.'(Emphasis supplied.)

It is obvious that these provisions have to be amended to extend their applicability to un-proclaimed or communal areas. In the first place the use of the phrase 'belongs to' raises issues of ownership of the property.[180] This same interpretation will apply to the use of the word "purchase" in the other subsection.[181]

The home loan is meant to form part of the investment strategy of the pension fund to ensure that it meets its objective of providing retirement benefits.[182] Therefore the home loan granted by the fund must have a return on investment, which is in the form of interest.The Regulations of the Pension Fund Act prescribe the rate of interest to be charged. The rules of most registered pension funds in Namibia provide for the respective pension funds to act as guarantors for members of their funds who wish to acquire housing through commercial banks.

Provisions have been made under the Pension Funds Amendment Act[183] for a registered fund to redeem a loan granted to a member by a person other than the fund for the purposes of erecting a dwelling on a portion of land in respect of which a valid customary land right or right of leasehold has been allocated or granted to the member in terms of the Communal Land Reform Act.[184] Furthermore, the registered fund may grant a loan to the member to either erect a dwelling on a portion of land in respect of which a valid customary land right or right of leasehold has been allocated or granted or to make additions or alterations to or maintain or repair a dwelling which is erected on a portion of land in respect of which a valid customary land right or right of leasehold has been allocated or granted.[185] However, this means of availing credit for the purchase or maintenance of immovable property is only available to those who are in formal employment and fortunate enough to be members of the retirement fund.[186] It does not cater for other members of the rural community.

180 Contained in section 19(5)(a)(i) and (iii) of the Act.
181 Contained in section 19(5)(a)(ii) of the Act.
182 Section 19(5)(a)(i) of the Pension Funds Act.
183 Act 6 of 2014.
184 Act 5 of 2002.
185 See section 19(5)(a)(iii) of the Pension Funds Act 24 of 1956 as amended.
186 See section 19(5)(a) of the Pension Fund Act 24 of 1956.

The above legislative interventions are made to facilitate a meaningful implementation of the intended purposes of the Government's communal land reform programme. The recommendations are also meant as strategies to ensure the security of land tenure granted to occupiers of communal land. As part of the social responsibility of the State, the State can by legislative intervention underwrite the loans to be granted to occupiers of communal land. Government will have to establish a special fund to assist those in communal lands in this respect. The issue of the ownership of the communal lands will have to be revisited in order to avoid the ambiguity over the ownership of communal land.

5.10 Concluding remarks: Challenges and resistance to registration

The provisions of the Communal Land Reform Act[187] requiring registration of communal land show that registration is a matter of great importance. It influences secure and affordable access to land and the enjoyment of land and resource rights. These issues are significant in the quest for alleviating poverty and increasing food security at the regional, national and international levels. Access to land and other natural resources is an important way of ensuring that the citizenry contributes to and benefits from economic growth.[188]

It has been argued that registration increases conflict over competing land rights, especially for groups that customarily had non-formal access to natural resources.[189] The educational, economic and political elites are generally able to benefit disproportionately from land titling.[190] Empirical evidence shows that recognition of formal title does not necessarily translate to better tenure security and many studies have raised questions about the effects of title registration.[191] Furthermore, the cost involved in the process of registration might negatively impact on the financial capacity of holders of various customary land rights to comply with the requirements of registration. Registration also inherently inhibits the communal land use in Namibia which is characterised by grazing, at times over-grazing, and shifting cultivation. These are some of the underlying factors that explain why

187 See section 25.

188 M Saruchera *Securing land and resource rights: Pan-African perspectives* (Programme for Land and Agrarian Studies, Cape Town 2004) 48.

189 See generally EN Namwoonde *A rejected import: Registration of customary land rights in Kavango* (Unpublished LLB Thesis, University of Namibia 2010); Ministry of Lands and Resettlement/MLR 'A Decade of Communal Land Reform in Namibia: Review and Lessons Learnt, with a Focus on Communal Land Rights Registration' (Deutsche Gesellschaft Für Internationale 2014) 72-74.

190 Platteau *Reforming land rights in Sub-Saharan Africa: Issues of efficiency and equity* UN Research Institute for Social Development, Discussion Paper (1998).

191 R Palmer *Contested lands in Southern and Eastern Africa: A literature survey* (Oxfam 1997) 60.

traditional communities in some parts of Namibia, especially in the Kavango Region, have persistently refused to register their land.[192]

The resistance to registration seems to hinge on a number of reasons across the regions. In Kavango Region, the residents of those communal lands argue that their traditional mode of cultivation, which is very much akin to shifting cultivation, will be negatively affected if registration takes place.[193] They argue that if a piece of land is demarcated as belonging to a particular family, that family is fixed to that piece of land and can no longer move to another piece of land.[194] Therefore, the fear of these residence is that registration will bring about a significant change to this mode of agricultural practices in Kavango communal lands.

The arguments of traditional communities are understandable because during the pre-colonial era, no fixed boundaries existed between the various communities,[195] although loosely defined areas of jurisdiction of lower-level chiefs were generally recognised.[196] Members belonging to these defined areas of jurisdiction recognised and practised communal ownership of land.[197] In the northern regions, which include the Kavango, the indigenous population combined settled agriculture with animal husbandry and land was owned by the community as a whole.[198] Permanent usufruct was granted in respect of arable plots, but the allodial title vested in the community.[199] It is quite obvious that customary land rights registration did not feature in this era, at least not in the sense envisaged in the Act.[200] Registration was meant to afford a record of inhabitants of a particular community rather than a register of land rights. Falk states that:

> [c]ustomary law follows a complex registration procedure. Newcomers need a letter of personal record where they lived before. Should they come from another region an additional letter is required from the Hompa or Chief of this region. The Hompa would keep a register with the names of people found in his

192 EN Namwoonde *A rejected import: Registration of customary land rights in Kavango* (unpublished LLB Thesis, University of Namibia 2010.
193 n 190 above.
194 n 190 above.
195 n 190 above.
196 MO Hinz 'The Project of "Tradition": Constitutionalism in Africa' In M O Hinz & FT Gatter (eds) *Global responsibility – local agenda. The legitimacy of modern self-determination and African traditional authority* (Lit Verlag 2006) pp17-28.
197 C Mapaure 2009 'Jurisprudential aspects of proclaiming towns in communal areas in Namibia' 1(2) *Namibia Law Journal* pp 32 - 37. See also D'Engelbronner-Kolff *The people as law-makers: The judicial foundation of the legislative power of Namibian traditional communities* in M D'Engelbronner, MO Hinz and J L Sindano (eds) *Traditional authority and democracy in Southern Africa* (1998) and EM Loeb *In Feudal Africa* (1962) pp 33f, but also FN Williams *Precolonial communities of Southwestern Africa* (National Archives of Namibia 1991) pp 187f.
198 SK Amoo 'Towards comprehensive land tenure systems and land reform in Namibia' (2001) 17 *South African Journal on Human Rights* 88 at 89.
199 See generally, F Adams & W Werner *The land issue in Namibia: An inquiry* (Namibia Institute for Social and Applied Sciences 1990).
200 Amoo 'Towards comprehensive land tenure systems and land reform in Namibia' 89.

> community, but there was no mandatory provision that people should register and be issued with certificates.[201]

Traditional Authorities in the Kavango Region have also reiterated that the concept of registration of communal land does not accord with the traditional way of life of their people.[202] The major reason is the shifting cultivation mode of agriculture which they follow.[203] In addition, they are unhappy about the 20 hectares of land which is the maximum to be registered.[204]Traditional authorities reiterate that the 20 hectares is insufficient to cater to the needs of a Kavango family and therefore a bigger piece of land under traditional farming methods, as currently practised, is necessary to satisfy their demands. In this light, registration is seen as a way of limiting agricultural space.[205]

The other major reason cited by community members as to why they do not want to register is that of land disputes and security of tenure.[206]Whereas the Government says that registration will bring about security of tenure and will reduce land disputes, community members are of the opinion that their customary laws take care of all that and hence the provisions of the Act are redundant in the presence of customary laws to the same effect.[207] For example in Kavango the Mbunza have a Land and Farming Committee consisting of twelve members. The Committee has the responsibility of assisting the Chief with the distribution of land within the community and in investigating amicable resolution of any land disputes conflicts, should any exist.[208] In the presence of such a Committee, the Mbunza do not accept the argument of the government officials that registration is a solution to conflicts and this constitutes the basis of the persistent resistance to the process.[209]

During the regional and national consultative conferences that were held to sensitise the nation about the proposed bill, there was a certain degree of misgivings from particular regions about the concept of registration of rights over the communal lands.[210] There were a variety of reasons for this reaction,[211] but the basis could be attributed to the lack of proper grounding of the rationale and benefits of title registration.[212] for example, in situations where an erstwhile communal area has been proclaimed a town under the

201 T Falk *Communal farmer's natural resource use and biodiversity preservation: A new institutional economic analysis from case studies in Namibia and South Africa*' (unpublished PhD thesis, Phillips University 2007) 87.
202 n 190 above.
203 n 190 above.
204 Section 25 of the Communal Land Reform Act 5 of 2002.
205 n 190 above.
206 n 190 above.
207 n 190 above.
208 n 190 above.
209 n 190 above.
210 Author's observation as a facilitator of the conference.
211 As above.
212 As above.

Local Authorities Act, occupiers of communal lands have been prejudiced in terms of assessment of compensation on account of their inability to submit adequate proof of rights over a communal land for lack of proper documentation of rights.[213]

There is also the problem of double allocation of land by the traditional authorities.[214] A summary of the data from disputes referred to the Land Board Tribunals from April until November 2010, as provided in the table below, indicates that the fundamental causes of communal land disputes brought before Communal Land Boards relate to double allocation and rights of 'ownership'.[215] The problem of double allocation could be attributed either directly or indirectly to lack of registration of land rights.The registration process constitutes an effective mechanism of not only preventing the occurrence of this anomaly but also identifying and correcting it.The essence of registration is *inter alia* to address these issues.

213 As above.
214 See Table 1 below.
215 As above.

Table 1: Land Disputes[216]

Nature of dispute	**Region**	**Number of cases**
Double allocation	Caprivi (now changed to Zambezi) Oshikoto **Total**	3 1 **4**
Land claim	Caprivi Omaheke **Total**	1 1 **2**
Conversion of permission to occupy	Caprivi **Total**	1 **1**
Ownership of land	Otjozondjupa **Total**	2 **2**
P.T.O. to ownership	Otjozondjupa Okavango **Total**	1 1 **2**
Denial of residence by Maherero T.A	Omaheke **Total**	1 **1**
Customary land rights	Omaheke Erongo **Total**	1 1 **2**
Customary land occupation	Omaheke **Total**	3 **3**

It is widely believed that registration provides incentives for agricultural investment, gives farmers access to credit, reduces fragmentation of land holding and reduces conflicts.[217] However the registration of communal land under the Communal Land Reform Act is widely seen as an importation of a western notion of ownership into the arena of traditional communities living on communal land largely according to customary law.[218] In this light, State law and customary law have locked horns. On the one hand, State law requires people to register; on the other hand the people living according to

216 Ministry of Lands and Resettlement/MLR 'Disputes Referred to the Land Boards and Traditional Authorities April – November 2010' (unpublished Reports from the Ministry of Lands and Resettlement 2010) pp 1-7.

217 M Meijs and D Kapitango *Communal land registration* (Namibia Institute for Democracy, Ministry of Lands and Resettlement 2009).

218 J Malan *Guide to the Communal Land Reform Act 5 of 2002* (Legal Assistance Centre and Namibia National Farmers Union, 2003).

customary land tenure, especially in the Kavango Region, have refused to register and raised their customary practices as a defence thereto.[219]

5.11 Development of settlement areas in the land reform strategies of Namibia

The Government's land reform strategies have included the resettlement programme under the general rubric of the decentralisation programme,[220]and as well as discussed above, reform of the communal land,[221] the provision of affordable and more secure land rights in the informal settlements, especially in the peri-urban areas,[222] under the jurisdiction of the local authorities, and the Affirmative Action Loan Scheme.

Decentralisation in Namibia is a constitutional requirement which should give certain powers and responsibilities to regions. Namibian Government's decentralisation programme has been seen as an effective implementation strategy of the Namibian land reform programme. Namibia has a three layer government structure, made up of the Central Government, local authorities and regional councils. Key services like health and education are centralised under line ministries while the regional government is responsible for specified service delivery in rural areas and lastly the local authorities share the responsibility with central government for service delivery in urban areas.

One area where both the local authorities and central government share such responsibility is in the development of growth points or settlement areas in the communal land areas under the jurisdiction of the Traditional Chiefs, Traditional Authorities and the Land Boards and until the subsequent declaration of such areas as settlement areas.

In terms of section 31(1) of the Regional Council Act 22 of 1992, a regional council may by notice in the *Gazette* declare any area falling within the region in respect of which a regional council has been established, but outside any such local authority area, as a settlement area.

Such declaration will be necessitated by reason of the fact that the prevailing circumstances in such area demand that provision should be made for the management, control and regulation of matters pertaining to the health and welfare of the inhabitants of such area and consequently *ipso facto* such area ought to be developed and established as a local authority. The declaration is a step in the process of the eventual upgrading of the area to the status of a local authority. The process includes an application by the Government for the issue of a Certificate of Registered State Tittle under the

219 n 190 above.
220 Article 16(2) of the Namibian Constitution and sections 14 and 20 of the Agricultural (Commercial Land) Reform Act 6 of 1995.
221 Communal Land Reform Act 5 of 2002.
222 The Flexible Land Tenure Act 4 of 2012.

provisions of section 18 of the Deeds Registries Act. 47 of 1937 in respect of the un-alienated State land which has been declared a settlement area. This will be followed by the endorsement of the name of the relevant regional council on the Certificate of Registered State Title, symbolising that the land is vested in the regional council. Such declaration affords the legal basis for the provision of services and land rights by the Regional Councils. Settlements in Namibia are non-self-governed populated places under the jurisdiction of the Regional Councils. There are currently about 70 settlement areas in Namibia.

In the context of land reform and development strategies in Namibia, the establishment of a settlement affords access to serviced land. It is a catalyst for development and therefore contributes to the arrest of the rural urban migration. In terms of section 32 of the Regional Councils Act, the declaration of a settlement area vests the mandate for the management and control of such settlement area in a regional council 'as if such regional council were a village council, with the proviso that certain sections of the Local Authorities Act will not be applicable'. Through comprehensive and intensive development involving relevant line ministries, the Council ought to be capable of providing certain services in the settlement areas. These will include services such as community development and early childhood development; rural water development and management; primary health care; pre-primary education; forest development and management; physical and economic planning (including capital development projects) emergency management; vehicle testing and licensing; responsibility and accountability for electricity distribution; full responsibility for town planning schemes within the framework of approved master plans; business registration; housing provisions; electricity distribution; liquor licensing; full responsibility for environment and conservation; social services; youth, sports and recreational activities; collection of some form of taxes; non-personal health services; libraries; agency services to towns villages and settlements; traffic control and control of aerodromes etc.

As stated earlier, one fundamental principle of decentralisation is the provision of structures for the concentration of development at the regional level. In the context of land form it provides access to serviced land and helps reduce the incidence of rural urban migration resulting in the proliferation of informal settlements in the peri-urban areas. However, Regional Councils have been confronted with limitations and challenges in the implementation of their mandate in the context of land reform generally and the developments of their respective regions as envisaged under the decentralisation policy.

A major principle of local government in Namibia is that the local authorities should ideally be financially autonomous. However, with respect to the existing finance system of the settlement areas, this fiscal autonomy is

fictional. Firstly, under the Regional Council's Act,[223] upon the declaration of an area as a settlement area, the assets of the area, all rights, liabilities and obligations connected with such assets shall vest in the regional council concerned. Furthermore, in terms of the State Finance Act, the budget of the settlement area cannot be submitted directly to the Ministry of Finance/ Treasury. It will have to be submitted through the regional council responsible for the administration and management of the settlement area. As contrasted with the fiscal arrangements of local authorities, the local authorities enjoy more fiscal autonomy.This deprives the settlement areas that fiscal autonomy that is a necessary requisite for the effective running and development of the settlement areas. It is recommended that Regional Council should get a direct vote from Treasury but not through the line Ministry for the running of the settlement areas.

Secondly, the Traditional Authorities Act 25 of 2000 recognises traditional authorities (e.g., chiefs, headmen) as legal entities, provides for their designation as leaders, and defines their powers and duties. Traditional authorities have in terms of this Act, the obligation to supervise and ensure observation of customary law, to assist the local government with development of land-use plans, and to ensure that their communities are using natural resources in a sustainable manner. Growth points that can potentially be declared settlement areas come under the jurisdiction and management of the Traditional authorities and the Communal Land Boards. There have been reported cases where the process of declaration of settlement areas has been fraught with tensions between the traditional authorities and officials of the Regional Councils. Regional Councils are advised to build good working relationship with Traditional Authorities and engage them on issues concerning the management and development of undeclared areas or areas under their jurisdictions. Legislation may not be effective to resolve tension

A related challenge pertains to the tenure rights that are available to the residents of the settlement areas. Under the current law, residents of settlement areas cannot be vested with freehold titles. In terms of the Regional Council Act the Regional Councils are empowered in terms of section 32(1)-(4) of the Act to manage the settlement areas as if such regional council were a village council but there are limitations which hamper a comprehensive execution of this as a result of the provisions of sections 30(1)(s)(t) of the Local Authorities. These provisions vest in the local authorities the power to acquire both movable and immovable property and to hypothecate and alienate both movable and immovable property under their jurisdiction. But the regional councils do not have a similar mandate to grant freehold titles. There is evidence that this has discouraged investors from investing in the settlement areas as leasehold titles do not attract the security that are attached to freehold titles. There is therefore the need for

223 Section 33(1)(b).

the residents of the settlement areas to be vested with freehold titles, especially for development purposes. It is therefore recommended that Section 30(1)(t) of the Local Authorities Act on land alienation and disposal be made applicable to the settlements areas to facilitate the provision of serviced land to attract Investors. This will ultimately involve the amendment of the relevant provisions of the Regional Council Act.[224] It is also recommended that the process of proclamation of Settlement Areas to Village Councils be expedited where conditions justify such proclamation to enable residents to benefit from the rights of ownership over immovable properties of the proclaimed areas.

5.12 Ancestral Land Rights

In its avowed commitment in seeking solutions to the land question in Namibia, the ruling Government since independence has held two historic national land conferences in 1990 and 2018. One significant resolution of the 2018 Conference was the establishment of a commission of inquiry to investigate claims of ancestral land rights and restitution.

On 15 March 2019, the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution (The Commission) was established by the President of the Republic of Namibia, Hage Geingorb to inquire into and report on claims of ancestral land rights and restitution[225] The Commission has since presented its Report to the President, Hon Dr G H Geingob.

The Commission received both written and oral submissions from the members of the public and based on these submissions, historical and legal studies of experts, the Commission made certain findings derived from certain historical and legal facts and some of the findings and recommendations of the Commission are presented hereunder.

Firstly, the Commission relying on contemporary human rights jurisprudence on ancestral land rights found that pre-colonial Namibia could not be classified as *terra nullius* and thereby rejected as a legal fallacy the argument for the justification of German intrusion based on the theory that vast parts of the territory that today constitute Namibia were unoccupied or that those who occupied them were 'uncivilised nations of people'.

Secondly, historical evidence presented to the Commission provided clear testimony of colonial land losses by different communities through dubious land transactions, racially biased laws, proclamations, colonial wars, genocide, and forced removals of black communities from land they occupied so as to give away to mainly white settlement and the arbitrary setting of

224 Section 28(c)(j) & (i) of the Regional Council Act, Act 22 of 1992, be amended to grant resident the right of ownership to properties.
225 Government Gazette No.6558, Government Notice 59 of 2019.

Namibian boundaries.This systematic land dispossession did not only lead to loss of assets such as livestock, natural resources and natural features on the land but also to loss of cultural and spiritual values of the communities.

Thirdly, it was also found that all indigenous communities currently living in Namibia, were, in one way or the other, victim of colonialism, have endured land dispossession at the hands of both the colonial government as well as settlers and consequently lost ancestral rights.

Fourthly, based on the analysis of human rights and constitutional jurisprudence, including international treaties, on ancestral land rights, the Commission found that even though the Namibian Constitution is silent on the question of ancestral land, if purposively interpreted from the Namibian constitutional values, a claim for ancestral land right is inferred. This will consequently justify a redress in the form of restitution and compensation for areas claimed as ancestral land.

As part of its mandate from its terms of reference, the Commission recommended the promulgation of a piece of legislation to provide the requisite legal framework for the recognition of claims to ancestral land rights, restitution and matters incidental thereto.

6 Conclusion

As stated earlier, access to land and tenure of land were among the most important concerns of the Namibian people in their struggle for independence. Consequently, since independence Namibia's democratically elected Government has maintained and developed its commitments to redressing the injustices of the past in a spirit of national reconciliation and to promoting sustainable economic development. Namibia's land reform is premised on correcting the imbalance created by the apartheid-skewed land policy. It is driven by the policy of reconciliation and it is geared towards poverty alleviation and social and economic equity. In this sense it is aimed at redistribution and restitution which is necessary to ensure the long term stability of the country. Poverty alleviation in the context of land reform can be realised through effective and productive utilisation of the distributed land, which in turn contributes to increased agricultural productivity and improvement in gross national income.