Second National Land Conference

1 – 5 October 2018

Windhoek, Namibia

Presentation by Sisa Namandje

Legal Implications and Constitutional Framework and Context

Sisa Namandje

Legal Practitioner of the High Court

and Supreme Court of Namibia

This presentation will be made available during the morning of 1 October 2018, prior to its presentation during the deliberations of the Conference.

1. I received an invitation from the President during the week of 17 to 20 September 2018, to address this important Second National Land Conference, particularly on the relevant key constitutional and statutory provisions that may be implicated when discussing various issues of land reform at this Conference.

2. I accepted the invitation without hesitation. I am convinced that key to the success of this Conference is frankness and serious interrogation of issues. I am profoundly privileged to be part of this Conference and to contribute – in my small way – to the ensuing discussions and debate. All this must however take place on the back of awareness that we are a constitutional State.

3. Because of our dark history and background, particularly injustices meted out against Namibia's indigenous communities, time and again in the last 28 years various calls have, understandably, been made from certain sectors of our society for tangible reforms in order to find and achieve restorative justice to such communities because of the untold suffering and losses they were subjected to when it comes to land. We must attend to such calls with compassionate understanding of our brutal past.

4. The Herero, Nama and Damara suffered unlawful land dispossession in monumental and unmatched proportions. If their calls in respect of indigenous land claims restitution cannot be entertained due to our constitutional architecture (as it appears to be the case), somehow within the legislative context we must seek to find an amicable solution to their claims and others through alternative but equitable redress for their claims. This could be achieved, for example, by introducing factors, say, in our land resettlement laws to consider a person's past injustices in relation to land dispossession subject to the restrictions provided for under Articles 21 (2) and 22[1] of the Namibian Constitution.

---

[1] *"Article 22 Limitation upon Fundamental Rights and Freedoms*
Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:
(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest."

5. I must however recognise that our difficult past injustices relating to land must be decisively addressed without necessarily jettisoning our constitutional values and undermining our foundational constitutional values such as unity and reconciliation.

6. This would entail that when one considers the Constitution and interpret it when making reforms, it must be interpreted not only with reference to our brutal history and background but also by looking at our future objectives including unity of our people and total elimination of division based on race or tribes. The Supreme Court of Namibia in fact in this respect, while dealing with a difficult question of labour hire when considered against the repugnant and painful memories of the abusive contract labour system, in the case of *Africa Personnel Services v Government of Namibia*[2] stated as follows:

> *"[42] The purpose of the freedom in art 21(1)(j) must also be assessed, not only by referring to its history and background but also by looking forward at its objectives. The Constitution, after all, is not a memorial of a bygone era but an ever-present compass, its constituent parts carefully composed of our People's collective experiences, values, desires, commitments, principles, hopes and aspirations, by which we seek to navigate a course for the future of our Nation in a changing and challenging world."* (Own emphasis)

7. That the land reform question must be decisively addressed appears to be a rare point of universal agreement by Namibians. The problem appears to be how and at what cost. One of the biggest questions will be how far does our Constitution allow us to make the intended land reforms. This is because all laws and action in Namibia are subject to the Constitution. Anything inconsistent with the Constitution is invalid simply on that basis.

---

[2] 2009 (2) NR 596 at 631 para. 42

8. Of course, Namibians – like other Africans – prior to successive colonial regimes that caused untold suffering and disturbance to the indigenous Namibians' way of life in the late 18th and early 19th century, had names for themselves, their regions, lands, rivers, mountains, etcetera.[3] It was therefore not surprising that the struggle against colonialism started by Hendrik Witbooi, Jakob Marenga, Nehale lya Mpingana, Mandume Ndemufayo and Samuel Maharero and others, and ending with the modern armed liberation struggle generation led by Dr Sam Nujoma, was in essence aimed at reclamation – to reclaim the humanity of Namibians, their land and resources, and to reclaim their identity and the identity of their land.

9. One can understand why some choose to brand the land reform conversation as sensitive, emotional, sentimental and some even – perhaps naively – would brazenly declare that such conversation ought not to take place at all. In this context, but in relation to indigenous land claims in South Africa (where such, unlike in Namibia, is constitutionally ordained – see reference to section 25 of the Constitution of South Africa below) Joanna Bezerra et al stated of land as follows:[4]

> *"Land is much more than a resource. It also has a strong symbolic value. People develop bonds to land, known as place attachment. A person's life experiences happen in a particular place. These experiences – the type of event, the people that were there, the meaning of it to the person - shape the connection with a place.*

---

[3] Alfred T. Moleah, *Namibia: The Struggle for Liberation*, Disa Press Inc. 1983

[4] https://amp-own-co-za.cdn.ampproject.org, retrieved on 23 September 2018. The Namibian Constitution does not make provision for ancestral land claim rights and restitution as the Constitution of South Africa does under section 25. Whether it could be introduced in Namibia is a question for delegates to discuss, subject to our Constitution. In my view the indigenous land claim question is a difficult constitutional question because of the various special provisions in our Constitution. This is because its discussion implicates various constitutional provisions including some entrenched under Chapter 3, and it potentially implicates many statutes. This does not however mean that the calls for such land claims must be dismissed without considering whether or not such, with proper regulation, could be accommodated within land legislation through alternative just and equitable remedy as the restitution of land lost may be difficult to achieve.

We looked at these elements in our research on a successful land claim in South Africa's Eastern Cape province. What we found was that land is culturally and historically important to people and this is often ignored in the co-management arrangements put in place after a claim has been settled.

This concept of place attachment can be broken down into two components:

- *place identity – drawing on identity, history, community life, understanding, behaviour, and*
- *Place dependence – the opportunities a person had there, the functional quality of the place, and livelihoods.*

These bonds are very unique to a specific place and cannot be replaced. Values attached to a particular place and natural resources shape how people use them."

10. The brief but eye-opening history of unfair land deprivation and ownership in Namibia was lucidly summarised by the High Court of Namibia recently in the matter of *Njagna Conservancy Committee v Minister of Lands and Resettlement and 35 Others*[5], at paras. 10 to 18 as follows:

"History of land ownership in Namibia

[10] Namibia became a German Protectorate in 1884 and the colonial administration negotiated a number of land purchases and protection treaties with local leaders to give the German Government and German companies rights to use land. It is recorded in historical annals that by 1902 only 6% of Namibia's total land surface area was freehold farmland while 30% was formally recognised as communal land.

[5] Case number A 276/2013, judgment delivered on 13 September 2018

[11] The historical annals furthermore record that when the indigenous leaders realized that they were being dispossessed of their land they attempted to reclaim it and that those attempts led to war (between the years 1904 and 1907) between the German colonial forces on the one hand and the Herero and Nama people on the other hand. After the 1904 – 1907 war, large tracts of land were confiscated from the Herero and Nama people by proclamation[6]. By 1911, some 21% of the total land surface area had been allocated as freehold farmland while the total land surface area which made up communal land had shrunk from 30% to a mere 9% while the commercial (freehold) farm land had increased from 6% to 21%.

[12] It is further common historical knowledge that after the First World War Germany lost all its colonies and Namibia became a Protectorate of Great Britain with the British King's mandate held by South Africa in terms of the Treaty of Versailles. South Africa did not do as it was expected of it to administer Namibia for the benefit of its inhabitants. During the 1920s South Africa followed a policy of settling poor white South Africans in Namibia. In order to achieve its policy settling poor which South Africans in Namibia, the South African Administration introduced Proclamation 11 of 1922 which amongst other things authorized the Administrator General to set aside areas as 'native reserves' for the sole use and occupation of natives generally or for ay race or tribe in particular. By 1925 a total of just 2 813 741 hectares of land south of the Police Zone accommodated a black population of 11 740 people while 7 481 371 hectares (880 freehold holdings) were available for 1 106 white settlers. The process of allocating farms to whites was completed in 1960, by that time Namibia had 5 214 farming units (all in the hands of white settlers) comprising approximately 39 million hectares of land.

---

[6] The Herero in particular suffered not only land dispossession but they were almost wiped out as a tribe.

[13] At independence in 1990 the Government of Namibia inherited two agricultural sub sectors of communal and commercial land, which divided Namibia in terms of land utilization. Of the 82.4 million hectares of surface area in Namibia, 38% is described as communal land (making up approximately 33.8 million hectares of land). Much of the remaining land is allocated for freehold farm land (44%), national parks (17%) and declared urban areas (1%). Approximately 1.1 million people live in communal areas. This is just over half of the total population; whilst approximately 900 000 (or 42% of the people) live in urban areas and approximately 132 000 (or 6% of the people) live on freehold farms.

[14] The skewed development which was pursued by the South African administration manifested itself in all aspects of life and the utilisation exploitation of Namibia's natural resources. The South African Administration had granted commercial farmers some rights over wildlife, but these rights did not extend to communal areas. During the period over which the war for liberation of Namibia was waged many animals were hunted almost to extinction, and communal farmers were often in conflict with animals such as hippos and elephants which damaged their crops, and therefore adversely affected their livelihoods.

[15] At independence the system under which commercial land was regulated was well organized. In the commercial field land is properly surveyed and is held under title deeds kept in the central deeds registry for commercial land in Windhoek and in a separate deeds registry for property in respect of the Rehoboth Gebiet. When a farm or an erf is sold or leased, the transaction is recorded on the title deed of the particular piece of land. Holders of title deeds are free to sell or lease their land subject to the conditions of the title deed. The situation with regards to communal land was much less clear. The uncertainties

stemmed from the fact that the extent and role that traditional authorities played over the allocation and utilization of land over communal lands lacked a legal basis and was uncertain.

[16] The Government in a quest to address the challenges posed by the dual land tenure system responded by convening a land conference in 1991 in Windhoek. The land conference resulted in the adoption of a National Land Policy in 1998, in which a unitary land system is proposed. Under this unitary system, "all citizens have equal rights, opportunities and security across a range of tenure and management systems." This proposed system would ensure that communal forms of land tenure are equally recognized and protected by the law, and that communal land is administered according to a uniform system.

[17] Apart from the challenges that the Namibian Government faced with respect to the inequitable distribution of land, it also faced the tasks of improving the management of wildlife resources, which as I have indicated above were severely decimated due to poor management and the armed conflict that raged in Namibia. In 1996 the Government of Namibia introduced legislation to allow for the formation of Communal Conservancies 'to promote activities that demonstrate that sustainably managed natural resources can result in social development and economic growth, and in suitable partnership between local communities and government'.

[18] Four years after the National Land Policy was adopted the Government introduced the Communal Land Reform Act, 2002 (I will, in this judgment refer to the Communal Land Reform Act, 2002 as 'the Act') which aims to improve the system of communal land tenure by setting out the functions of Chiefs, Traditional Authorities and Communal Land Boards with regard to the administration of communal lands. I will in the following paragraphs briefly set

out the provisions of the Communal Land Reform, Act, 2002 and the Nature Conservation Amendment Act, 1996."

11. To add to the above, the Supreme Court of Namibia in the case of *Nekwaya v Nekwaya and Another*[7] in relation to the history of land rights in communal areas, particularly in relation to occupational allotments, and partly quoting from a High Court judgment, stated that:

> *"The law*
>
> *[8] Before Independence no private individual, could own landed property in, what had then been known, as a native or Bantu reserve. In order to secure certainty of tenure an occupier of land could apply for a Permission to Occupy (PTO) such property. Generally speaking the PTO protected the possession of the holder thereof against all comers, except the State. Certainty of tenure had the further effect that holders thereof started to develop their properties.*
>
> *[9] The court a quo dealt with the law concerning PTO's and pointed out that according to reg 1 of the Bantu Areas Land Regulation made under s 25(1) of the Bantu Administration Act, 1927 (Act 38 of 1927) read with s 21(1) and 48(1) of the Bantu Trust and Land Act, 1936 (Act 18 of 1936) a permission to occupy means:*
>
> > *'. . . permission in writing granted or deemed to have been granted in the prescribed form to any person to occupy a specified area of Trust Land for a specific purpose. . . . '*
>
> *[10] The learned judge, who wrote the judgment of the court, concluded as follows:*

[7] Case No. SA 5/2010, Supreme Court of Namibia, judgment delivered on 13 December 2016

'[14] Thus, in the scheme of things of the applicable colonial law, "ownership" of land was the exclusive preserve of whites, and "permission to occupy" land applied exclusively to blacks. By the South African Bantu Trust in South West Africa Proclamation, 1978 (AG 19 of 1978), the administration of the South African Bantu Trust was transferred to the Administrator-General of South West Africa. A significant effect of AG 19 was that the system of PTO that applied to Bantus or blacks in South Africa became applicable to blacks in South West Africa. Thus, in South West Africa like in South Africa, blacks could only be granted "permission to occupy" land in the so-called homelands, as opposed to "ownership" of land. "Homelands" was part of land north of the Police zone as defined in the First Schedule to the Prohibited Areas Proclamation, 1928 (Proclamation 26 of 1928)."[8] (Own emphasis)

12. The above represents the brief historical land deprivation and land tenure system and government's attempts and efforts to address the unequitable land system in Namibia since independence. In formulating land reform policies many structural, historical, legal and human resource issues will prove pivotal to the implementation of such policies going forward. Further, one must remember that resolutions of this Conference would not in themselves be law. Further statutory enactment subject to the Constitution will have to take place. The legislature, the executive and the judiciary would also be required in seeking to implement the resolutions to be made to respect and protect the fundamental rights provided for under Chapter 3 of our Constitution as required under Article 5.

13. While the Namibian people remarkably cherished the arrival of independence and their total freedom and liberation on 21 March 1990, and committed themselves to map out their own destiny for the good of all the citizens of Namibia, irrespective of their colour,

[8] In this case it was held that the trading plot allotments PTOs were not capable of transfer from one black person to another without the prescribed consent.

race and social status, it was inevitable that the effect of divisive and yet repugnant colonial policies and laws would be felt by generations after the Namibian independence, particularly when it comes to issues of property rights and restoration of justice to indigenous communities that have over the years been deliberately subjected to apartheid systems, laws and policies.

14. The apartheid laws and policies gravely degraded and devalued not only the human dignity particularly of black people, but also impeded their ability to embark upon progressive social and economic enterprises necessary for the upliftment of their standard of life and to enjoy decent living conditions, which include access to and ownership (or at least simply access to and occupation), of land.

15. The Founding Fathers of our Constitution on our behalf recognised that the inherent dignity and equal rights of all were indispensable for sustainable freedom, justice and peace in our country. They were thus on behalf of the Namibian people determined to adopt a Constitution which expresses for all Namibian people their resolve to cherish and protect the gains of a bitter and long struggle for national liberation,[9] the core of which was to fight for the dispossessed land. They therefore on behalf of the Namibian people accepted and adopted our Constitution as the fundamental law against which our laws, policies and actions will all be subjected.[10]

---

[9] Liberation and victory were achieved through costly sacrifices, described by the Supreme Court of Namibia as follows in *Rally for Democracy and Progress v Electoral Commission for Namibia and Others* 2010 (2) NR 487 at para. 2:

> "*[2] Self-evident as this right may now seem to sovereign nations who, by revolution or political evolution, attained democratic self-governance long ago, it has been denied the people of Namibia by successive colonial and foreign regimes for more than a century in recent history. It was ultimately won only two decades ago after a protracted struggle for liberation and independence. The cost of victory, measured in human lives, suffering, endurance and endeavor, was incalculable. Determined that the rights which they have gained as individuals and as a people should be* ***preserved*** *and* ***protected*** *for themselves and their children, Namibians resolved that it could be done 'most effectively' 'in a democratic society, where the government is responsible to freely elected representatives of the people, operating* ***under a sovereign constitution*** *and a free and independent judiciary.*"

[10] Preamble to the Namibian Constitution

16. It was therefore not surprising – and probably because of the exclusion particularly of the black people of Namibia in the past in having a say in the manner in which our nation was run – that our Constitution provides for real and impactful principles of State policy, inclusive of an obligation to the State to promote and maintain the welfare of the Namibian people through, *inter alia*, their encouragement through education and activities such as this Land Conference to influence government policies by debating its decisions and proposed policies.[11]

17. This Conference, I am convinced, is part of such a process through which the masses of our people seek to influence government land reform policies, so we must encourage an open, frank and fearless debate[12], while at the same time avoiding wasteful, vulgar and insult-laden conversations. We must also – all of us – avoid unyielding and

---

[11] Article 96(k)

[12] Even Courts in pre-independent Namibia, at least in some instances, recognised and in fact encouraged freedom of expression and fearless debate, i.e. in *S v Nathaniel, Ekandjo and Kambangula* 1987 (2) 225 at 232 H to J, and at 233 A to C:

> *"This dictum is not only applicable to citizens (burgers) but to all individuals within the State.*
>
> *These principles were clearly and succinctly stated by Rumpff JA (as he then was) in Publications Control Board v William Heinemann Ltd 1965 (4) SA 137 (A) at 160 when dealing with the question of the banning of a book in terms of certain censorship legislation. The learned Judge said:*
>
> *'The freedom of speech – which includes the freedom to print – is a facet of civilization which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. the other is the inclination of those who want to protect it to repress more than is necessary. The latter is also fraught with danger. It is based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which one does not agree. When a court of law is called upon to decide whether liberty should be repressed – in this case the freedom to publish a story – it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won precious asset, yet easily lost. And in its approach to the law, including any statute by which the court may be bound, it should assume that Parliament, itself a product of political liberty, in every case intends liberty to be repressed only to such an extent as it in clear term declares, and, if it gives a discretion to a court of law, only to such extent as is absolutely necessary.'*
>
> *In S v Turrell 1973 (1) SA 248 (C) at 256 Van Zijl J stated these principles with equal clarity when he said:*
>
> *'Freedom of speech and freedom of assembly are part of the democratic right of every citizen of the Republic and Parliament guards these rights jealously for they are part of the very foundation upon which Parliament itself rests. Free assembly is a most important right for it is generally only organized public opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly."*
>
> (Own emphasis)

uncompromising positions. We must let the people express themselves as they may well suggest acceptable and constitutionally-compliant land reform policies.

18. As a precursor to a fruitful debate taking place with the awareness that we are a constitutional State *inter alia* based on the rule of law, and that our Constitution is the fundamental and supreme law, I wish to highlight certain legal and constitutional aspects which may well guide our discussions without necessarily inhibiting a free, measured and fearless debate of issues laid bare for discussion by the Conference programme and agenda.

19. In the days leading to this Conference it is my understanding that the government embarked upon regional consultations during the month of July 2018 for the purposes of gathering views and recommendations from all 14 regions of this country. It is further my understanding that the regions embraced and took the opportunity, and certain recommendations and/or resolutions were made which will necessarily form part of the discussions at this Conference.

20. The issues raised by the regions range from the question of ancestral land claims and restitution of lost rights in land, the suitability and effectiveness of the willing seller-willing buyer principle in respect of agricultural commercial land acquisition by government, national resettlement programmes and resettlement criteria, questions in respect of expropriation with or without compensation, just compensation, questions of foreign land ownership, as well as issues relating to urban and communal land.

21. Inevitably such questions, important and difficult as they are, can never be discussed without any regard to the constitutional architecture and values of our Constitution, as well as existing legislation and perhaps our common law and customary law.[13]

[13] In terms of Article 66(1) of the Namibian Constitution, both common law and customary law as existed on the date of independence will remain in force to the extent that they are not in conflict with legislation and the Constitution.

22. I wish to start by touching upon the establishment of the Namibian State. The Republic of Namibia was established as a *"sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all"*.[14]

23. The unitary and democratic constitutional form chosen at Independence, together with many other constitutional imperatives, will in one way or the other either give this Conference an opportunity to make far-reaching and progressive land reform, while on the other hand same may in certain instances prove to be impediments and/or obstacles to us making progressive and far-reaching land reform.

24. Immediately I am of the view that the following constitutional provisions, in addition to Article 1(1), will in one way or the other be relevant and of importance during these discussions. They are:

24.1 Article 5, which provides:

"Protection of Fundamental Rights and Freedoms

The fundamental rights and freedoms enshrined in this Chapter[15] *shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed."*

"(1) 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 or common law does not conflict with this Constitution or any other statutory law." (Own emphasis)

[14] Article 1(1). Justice for all in this context may include giving justice to those who may have suffered injustice in relation to land.

[15] Chapter 3 of the Namibian Constitution

24.2 Article 10, which provides:

"Equality and Freedom from Discrimination

(1) All persons shall be equal before the law.

*(2) No persons may be discriminated against on the grounds of sex, race, colour, **ethnic origin**,[16] religion, creed or social or economic status."*

24.3 Article 16, which provides:

"Property

*(1) All persons shall have the right **in any part** of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.*

(2) *The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament."*

24.4 Article 18, which provides:

"Administrative Justice

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise

[16] For instance, one cannot be discriminated by being prohibited from residing in any part of Namibia on the basis of ethnic origin. But, because of the restriction and limitations provided for under Article 21 (2) and 22, there may be instances where residing in a particular part of Namibia, if found to be reasonable and necessary in our democratic society, could be justifiable. This may particularly be so in case of resettlement by introducing a factor to consider a person's area of origin in respect of resettlement as an important criterion.

of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."[17]

24.5 Article 21(1)(g) and (h), which provide:

*"**Fundamental Freedoms***

(1) All persons shall have the right to:

(g) move freely throughout Namibia;

(h) reside and settle in any part of Namibia;"

24.6 Article 23(2), which provides:

*"**Apartheid and Affirmative Action***

(2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service."

---

[17] Article 18 was used by the Full Bench of the High Court of Namibia in the well-known failed land expropriation cases *Kessl v Minister of Lands, Resettlement and Rehabilitation, and two similar cases* 2008 (1) NR 167, at paras. 49 and 50:

"[49] The Agriculture (Commercial) Land Reform Act does not exclude the application of the principle of audi alteram partem. We have no doubt that before the Minister can take a decision to expropriate, he is duty-bound to apply the principle of audi. It implies that he must afford the landowner an opportunity to be heard in order to persuade him that he should not take the decision to expropriate his property. Of course, only the Minister has the right to decide, but before he does so, the land-owner has to be heard in order to put whatever fact he may consider relevant before the Minister, however weak or insubstantial that may seem, in order to persuade the Minister to come to another conclusion. If this is done, but the Minister still remains unpersuaded, the landowner cannot complain.".

24.7 Article 25(2), (3) and (4), which provide:

"***Enforcement of Fundamental Rights and Freedoms***

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases."[18]

[18] The Courts in Namibia were given power in the Constitution, upon proof of violation of any fundamental rights, to *inter alia* award monetary compensation. So whether or not there is a law making provision for compensation in case of expropriation, the Courts exercising their constitutional jurisdiction would still have a discretion to award monetary compensation upon proof of violation of rights, which may be property rights.

24.8 Article 45, which provides:

*"**Representative Nature***

The members of the National Assembly shall be representative of all the people and shall in the performance of their duties be guided by the objectives of this Constitution, by the public interest and by their conscience."

24.9 Article 95(j), (k) and (l), which provide:

*"**Promotion of the Welfare of the People***

The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:

(j) consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health;

(k) encouragement of the mass of the population through education and other activities and through their organisations to influence Government policy by debating its decisions;

(l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory."

24.10 Article 100, which provides:

*"**Sovereign Ownership of Natural Resources***

Land, 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 belong to the State if they are not otherwise lawfully owned."[19]

(Own emphasis)

---

[19] This means if land, water and natural resources are not otherwise lawfully owned by someone, then such would belong to the State.

24.11 Article 101, which provides:

*"**Application of the Principles contained in this Chapter***

The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them."

24.12 Article 102(1) and (2), which provide:

*"**Structures of Regional and Local Government***

(1) For purposes of regional and local government, Namibia shall be divided into regional and local units, which shall consist of such region and Local Authorities as may be determined and defined by Act of Parliament.

*(2) The delineation of the boundaries of the regions and Local Authorities referred to in Sub-Article (1) hereof shall be geographical only, without any reference to the **race**, colour or **ethnic origin** of the inhabitants of such areas."* (Own emphasis)

24.13 Article 131, which provides:

*"**Entrenchment of Fundamental Rights and Freedoms***

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect."

24.14 Article 132(5)(a) and (b), which provide:

*"**Repeal and Amendment of the Constitution***

(5) Nothing contained in this Article:

(a) shall detract in any way from the entrenchment provided for in Article 131 hereof of the fundamental rights and freedoms contained and defined in Chapter 3 hereof;

(b) shall prevent Parliament from changing its own composition or structures by amending or repealing any of the provisions of this Constitution: provided always that such repeals or amendments are effected in accordance with the provisions of this Constitution."

24.15 Article 140(1), which provides:

*"**The Law in Force at the Date of Independence***

(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court."

24.16 Schedule 5, which provides:

*"**Property vesting in The Government of Namibia***

(1) All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.

(2) *For the purpose of this Schedule, "property" shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein.*

(3) *All such immovable property shall be transferred to the Government of Namibia without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.*

(4) *The Registrar of Deeds concerned shall upon production to him or her of the title deed to any immovable property mentioned in paragraph (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Namibia and shall make the necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Namibia to the said property."*

25. In a brief summary, arising from the provisions quoted earlier are important constitutional imperatives discussed herein below from which our Founding Fathers' constitutional vision for our young country is neatly apparent. All such imperatives have some effect on the difficult land-related questions we will be grappling with in the next five days.

26. I would assume because of the past divisive policies based on the question of race and tribalism, Namibia was founded as a "unitary State". Namibians and those who lawfully reside in Namibia lawfully were given the right to move freely throughout Namibia and reside and settle in any part of Namibia.[20] Already, while traditional authorities and/or communities may have been recognised by implication in the Namibian Constitution

[20] Article 21(1)(g) and (h)

(Article 102(5)),[21] it appears that the constitutional provisions - that any person in Namibia would have freedom to move freely and to reside and settle anywhere in Namibia, read together with Article 102(2) to the effect that the delineation of the boundaries of regions and local authorities shall be geographically only, without any reference to race, colour or ethnic origin of inhabitants – have made the existence of traditional authorities and communities based on a particular ethnic group a difficult question if considered against features of a unitary State and constitutional provisions aimed at unifying Namibians as one nation. It may also have effect on the often-raised and understandable question of ancestral land claims and restitution by certain communities who may have occupied a specified geographical area prior to the unlawful deprivation by successive colonial regimes.[22]

27. Unlike in Namibia, the South Africans specifically inserted an ancestral land claim (in respect of dispossession after 19 June 1913) provision in their Constitution under section 25, which reads:

> *"25. Property*
>
> *(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
>
> *(2) Property may be expropriated only in terms of law of general application—*
>
> *(a) for a public purpose or in the public interest; and*
>
> *(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*

---

[21] "*Article 102 Structures of Regional and Local Government*
(5) There shall be a Council of Traditional Leaders to be established in terms of an Act of Parliament in order to advise the President on the control and utilization of communal land and on all such other matters as may be referred to it by the President for advice."

[22] This is particularly, but not exclusively, Nama, Damara, Herero and San speaking.

(3) *The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—*

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) *For the purposes of this section—*

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) *The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*

(6) *A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*

(7) *A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

(8) *No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any*

departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6)."

28. As can be seen, the South African constitutional provisions on property rights are more elaborate and prescriptive than the Namibian provisions. Further, in South Africa ancestral land rights restitution is constitutionally recognised and given.

29. It is, however, interesting that in South Africa, even when the ancestral land claim rights are provided for in the Constitution, enforcement thereof has in certain instances been a challenge, as is clear from some statements by the South African Land Claims Court in the matter of *Nkomazi Municipality v Ngomane of Lugedlane Community and Others*[23]. The Court stated at para. 29:

> *"Then there is the reality that restoration of land within the towns could well require, as envisaged by the ninth respondent, towns people to be expropriated of their houses, the expropriation of schools, churches, parks and other facilities, as could occur also in respect of the numerous businesses, industries and other economic activities in the town. Major social disruption, the avoiding whereof is advocated at section 33(d) of the Restitution Act, would be inevitable."*[24] (Own emphasis)

30. Further, in the matter of *Department of Land Affairs v Goedgelegen Tropical Fruits*[25] the South African Constitutional Court in respect of land claim restitution, after commenting on the history of dispossession of certain communities and individuals, found itself in a somewhat difficult position when grappling with the appropriate remedy within the

---

[23] 2010 (3) All SA 563 (LCC)

[24] This complication occurs mostly when claimants of ancestral land opt for restitution of the lost land as opposed to other and alternative just and equitable remedies.

[25] 2007 (6) SA 199

context of the Constitution and the relevant legislation, when it commented as follows at paragraphs 6, 7 and 8:

> *"History of dispossession*
>
> *[6] . At the very outset, certain mainly uncontested background facts loom large and cast a wide shadow over this tale of dispossession of rights to land. The narrative has all the hallmarks of forcible dispossession of indigenous ownership of land, which in time, has degenerated into dispossession of mere labour tenancy.*
>
> *[7] On all accounts, the ancestors of the individual applicants originally settled on the farm Boomplaats in the 1800s. The individual applicants, most of whom bear the family name Maake, trace their uninterrupted family settlement on the Boomplaats land back to the mid-19th century. According to the individual applicants, their forebears enjoyed undisturbed indigenous rights to the land and exercised all the rights that came with it. These rights included living on the land as families; bringing up their children on it; tending the elderly; paying spiritual tribute to their ancestors; and burying the dead. They were entitled to cultivate the land and to use it for livestock.*
>
> *[8] They did in fact exercise these rights. They lived on the land; they built families and inevitably a community; they buried their dead on it; and the graves are still there. On the same land, they paid homage to their ancestors. They tilled the land and reared livestock on it. The land provided subsistence necessary for the families without them being beholden to anyone. The applicants say these land rights were capable of being passed on to direct descendants and that their ancestors did transmit them to successive generations. However, this seemingly idyllic and rustic mode of living was not to last forever."*

And further at paragraphs 20 and 21:

> *"The claims*
>
> *[20] Given the background that I have sketched, it is vital, at the outset, to characterise the claims for restitution of land rights accurately. In this Court, particularly in relation to remedy, applicants vacillated over the nature of their claims. On occasion, they tended to invoke the loss of their indigenous land rights rather than dispossession of labour tenancy rights. It is indeed plain that the forebears of the applicants were deprived of their indigenous rights to the Boomplaats land during the second half of the 1800s. For better, for worse and perhaps for reasons better left unexplored, our Constitution has chosen not to provide for restitution of or equitable redress for property dispossessed prior to 19 June 1913. Since the dispossession of the indigenous title occurred before 1913, it seems self-evident that it is outside the restitutionary beneficence of section 25(7) of the Constitution.*
>
> *[21] This, of course, means that ordinarily, even if the applicants were to establish dispossession of indigenous communal ownership that occurred before the constitutional cut-off date of 19 June 1913, they would not be entitled to exact restitution or redress. In the words of this Court in Alexkor Ltd and Another v Richtersveld Community and Others, dispossessions that took effect before 19 June 1913 are not actionable. . . ."*

31. It is clear from the above that there are multiple problems, some relating to the conflict between modern title to land which is registered title to land, and the olden and indigenous title to land which was an unregistered title to land and more communal in nature. Some of the challenges the South African Courts find themselves relate to the fact that certain dispossessions took place not necessarily because of discriminatory practices, but more because of economic policies such as mining statutes, and so forth.

32. Further, if restitution or alternative equitable redress of ancestral land rights were to be introduced in Namibia, the abstract land transfer system and presumable stronger registered title to land as opposed to indigenous ownership to land will all have to be considered for reform. This is because indigenous ownership appears not to have been given the due recognition it deserves at independence thereby perpetuating, albeit inadvertently, the past discriminatory policies in respect of land rights.

33. In Namibia the vexing question is this: In view of our constitutional architecture and entrenchment of fundamental rights under Article 3, including property rights and Namibia's unitary statehood, how does ancestral land restitution or alternative equitable redress of land dispossession fit in which, I accept, for all equitable reasons, appears to be a justified and perhaps a fair question? These questions are difficult and constitutionally and practically challenging. My part is simply to highlight what our laws, particularly the Constitution, currently provide for and the difficulty and/or opportunities it presents.

34. The next important constitutional provision quoted above is Article 16 (2), which provides that people in Namibia would have the right to acquire, own and dispose of all forms of immovable and movable property **in any part** of Namibia. The above constitutional provision is subject to the proviso that Parliament is given the right, through legislation, to prohibit or regulate as it deems expedient, the right to acquire (strangely, not to own or dispose of, but only to acquire) property by persons who are not Namibian citizens. It follows from the above that the Namibian Parliament may prohibit through legislation acquisition of property in general, including land, by persons who are not Namibian citizens. This may not be limited to commercial land. It may be in towns and villages.

35. Further, under Article 16(2) the State and other State authorities are given right to expropriate property (it may be mining licences) in general (not only land) in the public

interest, subject to the proviso that government must pay just compensation in accordance with the requirement and procedure to be determined by Act of Parliament.

36. When people discuss expropriation they usually discuss the question of compensation. It is important to note that there are actually two difficult questions to answer when expropriation is being considered. One is, because of the provisions of Article 18 of the Namibian Constitution which provide for fair and reasonable administrative actions, an owner of a property to be expropriated first has the right to be heard whether or not his or her property must be expropriated, never mind compensation. The Ministry of Land Reform failed the first question in the 2009 High Court judgment (*Kessl and Others*) referred to above. Its attempt to expropriate three commercial farms was found to have been hopelessly flawed, even before the question of just compensation was considered.

37. It is only if the public authority that intends expropriating a property discharges its obligations under Article 18, i.e. to act fairly and reasonably (including giving an opportunity to the owner of the property to make representations why his or her property should not be expropriated) that one would move to the next question which is: If expropriation has to be done, what is a just compensation to be paid in terms of the enabling statute? The compensation to be paid in terms of the Constitution "should be done in accordance with the requirements and procedures to be determined by an Act of Parliament". That means that one does not pay just compensation simply and directly on the basis of the constitutional provision. There must be an Act of Parliament that makes provision for requirements and procedures of paying just compensation.

38. In Namibia there are at least two statutes dealing with paying compensation upon expropriation. The Agricultural (Commercial) Land Reform Act of 2005 makes provision for expropriation by the Minister of Land Reform for resettlement purposes, while the Expropriation Ordinance, No. 13 of 1973, makes provision for expropriation of any property in general.

39. The compensation to be paid to the owner of property in terms of the 1973 Ordinance is determined in terms of section 9 and 10 of the Ordinance, which provide as follows:

"Basis upon which compensation is calculated

9. (1) The amount which is to be paid as compensation to an owner in terms of the provisions of this Ordinance in respect of property which has been expropriated from him in terms of the provisions of this Ordinance, or in respect of the taking, in terms of the provisions of this Ordinance, of a right to use his property temporarily, shall not, subject to the provisions of subsection (2), exceed –

(a) in the case where the property in question consists of property other than a right, the aggregate of –

(i) the amount which would have been paid for the property in question if that property had been sold on the date of notice in the open market by a willing seller to a willing buyer; and

(ii) an amount to make good the actual financial loss which is caused by the expropriation; and

(b) in the case of a right, an amount to make good the actual financial loss or the inconvenience which is caused by the expropriation or taking of the right.

(2) Notwithstanding any provisions to the contrary contained in this Ordinance, an amount, equal to ten per cent of the amount payable in accordance with the provisions of subsection (1)(a)(i) shall, in the case of land,

be added to the last-mentioned amount: Provided that the amount which is thus added shall not exceed ten thousand rand.

(3) Subject to the provisions of subsection (4) interest at a rate determined from time to time by the Executive Committee shall be paid in respect of any outstanding portion of the amount of the compensation payable in accordance with the provisions of subsection (1)(a)(i) in respect of expropriated property with effect from the date upon which the Administration, in terms of the provisions of section 6(3) or (5), takes possession of the property in question: Provided that in a case contemplated in section 16(4), in respect of the period calculated as from the expiration of thirty days from the date upon which –

(a) the property in question was so taken possession of, if compensation for the said property was offered or agreed upon before that date; or

(b) compensation for the property in question was offered or agreed upon, if the date of such offer or agreement is later than the date upon which the said property was so taken possession of

to the date upon which, within the meaning of the said section 16(4), the dispute was settled or the doubt was resolved or the owner and the buyer or the mortgagee notified the Executive Republic of Namibia 13 Annotated Statutes Expropriation Ordinance 13 of 1978 Committee in terms of the provisions of section 14 as to the payment of the compensation money, the amount which is so payable shall for the purposes of the payment of interest not be deemed to be an outstanding amount.

(4) If the owner of property which has been expropriated occupies or utilises that property or any portion thereof, no interest shall in respect of the period

during which he so occupies or utilises the said property, be paid in terms of the provisions of subsection (3) on so much of the outstanding amount as, in the opinion of the Executive Committee, relates to the property which is so occupied or utilised.

(5) In determining the amount of compensation which is to be paid in terms of the provisions of this Ordinance, the following rules shall apply, namely –

(a) the fact that the property or the right to use property temporarily has been taken without the consent of the owner concerned, shall not be taken into account;[26]

(b) the special suitability or usefulness of the property in question for the purpose for which, it is required by the Administration, shall not be taken into consideration if it is unlikely that the said property would have been purchased for that purpose on the open market or that the right to use the property for that purpose would have been so purchased;

(c) if the value of the property has been enhanced in consequence of the use of such property in a manner which is unlawful or detrimental to the health of any person, such enhancement shall not be taken into account;

(d) improvements which, after the date of notice, were made on or to the property in question (except where such improvements were necessary for the proper maintenance of improvements which existed up to and on that date or where those improvements were undertaken in pursuance of obligations entered into before the date of notice), shall not be taken into consideration;

[26] This appears not to be in accordance with Article 18 of the Namibian Constitution.

(e) *an unregistered right in respect of any other property or any indirect damage or anything which is done with the object of obtaining compensation therefor shall not be taken into account;*

(f) *any enhancement or depreciation before or after the date of notice in the value of the property in question which may be attributed to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is the result of any work or act which the Administration carries out or performs or has already carried out or performed or intends to carry out or perform in connection with that purpose, shall not be taken into consideration;*

(g) *account shall also be taken of –*

(i) *any benefit which the person who is to be compensated in terms of the provisions of this Ordinance, obtains or will obtain from any works which the Administration has built or constructed or has undertaken to build or construct on behalf of that person in order to compensate the said person in whole or in part for any financial loss which he suffers or will suffer in consequence of the expropriation or, as the case may be, the taking of the right in question;*

(ii) *any benefit which the person concerned obtains or will obtain in consequence of the expropriation of the property or the use thereof for the purpose for which it was expropriated or, as the case may be, the right in question was taken;*

(iii) *any amount payable as compensation in terms of the provisions of section 10(1) in respect of an unregistered right;*

(h) *in respect of the goodwill of any business or profession which is, on the date of expropriation, conducted or pursued by any person upon the land which has been expropriated, there shall be paid no more than* –

(i) *the highest net profit which, according to written proof, had been obtained from such business or profession during any twelve consecutive months of the period of thirty-six months or part thereof which immediately preceded the date of expropriation; or*

(ii) *where such business or profession has, on the date of expropriation, been conducted or pursued for a period of less than twelve months, an amount equal to the net profit for a period of twelve months, which amount shall be computed in relation to the net profit which was; according to written proof, in fact obtained from that business or profession during the period in which such business or profession was conducted or pursued on the land in question.*

Payment of compensation in respect of certain unregistered rights in respect of expropriated land

10. (1) Any person who by virtue of a contract contemplated in section 7(1)(d)(i), (iii) or (iv), possesses a right in respect of land, which right is, in terms of the provisions of section 17 terminated on the date upon which that land is expropriated, shall, subject to the provisions of subsections (2) and (3) of this section, after the expropriation of that land, be entitled to the payment of compensation as if the said right were a registered right in respect of the land

in question and such registered right were also expropriated on the date of expropriation in respect of such land.

(2) The Executive Committee shall, in the manner, mutatis mutandis, contemplated in section 5(3) or (5), offer any person contemplated in subsection (1) of this section an amount as compensation and, in applying this Ordinance such an amount so offered shall be deemed to have been offered in terms of the provisions of section 5(2)(c).

(3) If an owner of expropriated land fails to comply with the provisions of section 7(1)(d)(i), (iii) or (iv), the Administration shall not be obliged to pay compensation to the lessee, builder or sharecropper concerned in respect of the unregistered right in question, but such owner shall be liable to any such lessee, builder or sharecropper for any damage sustained by him in consequence of the expropriation of the land in question."

40. On the other hand, the Agricultural (Commercial) Land Reform Act, Act 6 of 1995, in respect of compensation for expropriation of agricultural commercial land for purposes of resettlement, provides as follows:

"Basis on which compensation is to be determined

25. (1) The amount of compensation to be paid to an owner in respect of property expropriated in terms of this Act, shall be determined with due regard to the provisions of subsection (5), but shall not, subject to subsection (2), exceed-

(a) where the property expropriated is agricultural land, the aggregate of-

(i) the amount which the land would have realized if sold on the date of notice on the open market by a willing seller to a willing buyer; and

(ii) an amount to compensate any actual financial loss caused by the expropriation; and

(b) where the property expropriated is a right, an amount to compensate any actual financial loss caused by the expropriation of the right.

(2) Notwithstanding anything to the contrary contained in this Act, there shall, if the Commission so recommends, be added to the total amount payable in

accordance with subsection (I) an amount equal to 10 per cent of such total amount, but not more than N$1 0 000.

(3) Interest at the standard interest rate determined in terms of section 35(a) of the State Finance Act, 1991 (Act 31 of 1991), shall, subject to subsection (4), be payable from the date on which the State takes possession of the property in question in terms of section 21(2) on any outstanding portion of the amount of compensation payable in accordance with subsection (1): Provided that-

(a) in a case contemplated in section 31(4), in respect of the period calculated from the termination of 30 days from the date on which -

(i) the property was so taken possession of, if prior to that date compensation for the property was offered or agreed upon; or

(ii) compensation for the property was offered or agreed upon, if possession thereof was taken before such offer or agreement, to the date on which the dispute was settled or the doubt was removed or the owner and the buyer or

the mortgagee or the builder notified the Minister, as contemplated in section 30, as to the payment of the compensation money, the amount so payable shall, for the purposes of the payment of interest, be deemed not to be an outstanding amount.

(b) *if the owner fails to comply with the provisions of subsection (l) of section 22 within the period referred to in that subsection or an extension of that period under subsection (4) of that section, the amount so payable shall during the period of such failure and for the purpose of the payment of interest be deemed not to be an outstanding amount.*

(4) If the owner of expropriated property occupies or uses that property or any portion thereof, interest in terms of subsection (3) shall, in respect of the period of such occupation or use, be paid only on that portion of the outstanding amount as exceeds the reasonable value, as determined by the Minister on the recommendation of the Commission, of the benefit procured by the owner by such occupation or use.

(5) In determining the amount of compensation to be paid for property expropriated in terms of section 20, the following considerations shall apply, namely -

(a) if the value of the property was enhanced in consequence of the use thereof in a manner which is unlawful, such enhancement shall not be taken into account;

(b) improvements made after the date of notice on or to the property in question, except where they were necessary for the proper maintenance of existing improvements or where they were undertaken in pursuance of obligations entered into before that date, shall not be taken into account;

(c) no allowance shall be made for any unregistered right in respect of any other property or for any indirect damage or anything done with the object of obtaining compensation therefor;

(d) any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose

for which or in connection with which the property is being expropriated, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account;

(e) account shall be taken of any benefit which will enure to the person to be compensated -

(i) from any works which the State has built or constructed or has undertaken to build or construct on behalf of such person to compensate in whole or in part any financial loss which such person will suffer in consequence of the expropriation;

(ii) in consequence of the expropriation of the property for the purpose for which it was expropriated." (Own emphasis)

41. If one has regard to the basis of compensation set out both in the Expropriation Ordinance and the Agricultural (Commercial) Land Reform Act it is clear that, unlike in South Africa where the history of the acquisition by the owner of a property and use of property and the extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the property are considerations, Namibia unfortunately chose a formula which is more aligned with day-to-day commercial dealings on the open market. These are interesting questions to debate whether or not Parliament, by fixing such formulae, fully and attentively took into consideration the presence of the word "**just**"[27] in Article 16(2) in relation to compensation.

---

[27] "**Just**" must be considered, in my view, with due consideration to the interest of the owner of property and the public interest with special emphasis to our special dark history. This could be a factor to compensation in expropriation, for example if there are two commercial farmers who have, in extent equal, similar farms, one acquired it as a reward for participating in the Kasinga massacre and one acquired it through own acquisition through hard work as a lawyer or doctor. I would contend that the history of acquisition in that regard should be a factor in determining the compensation in case of expropriation. Such a factor would fairly put the price of the farm acquired as a reward for participating in the Kasinga massacre lower than the one acquired through hard work.

42. Another constitutional imperative is the fact that the government – Parliament, in particular – was given constitutional power[28] to enact legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, and to implement policies and programmes aimed at redressing social, economic and educational imbalances caused by repugnant and discriminatory laws and practices. This is a deliberate constitutional licence to equitably redress past injustices through legislation.

43. It is directly because of such constitutional provisions that our Parliament, as required in terms of Article 45, should in the performance of its duties be guided by the objectives of the Constitution and by the public interest to make targeted policies to better the living conditions of the formerly disadvantaged and redress the imbalances in all spheres of life. Land reform and the redressing of social and economic injustice (associated with land) caused by past discriminatory laws and practices particularly against the black people, is particularly one area where our parliamentarians attending this Conference need to take tangible, targeted and direct reform obviously within the confines of the Constitution, as time may be running out.

44. Because of the limited time to discuss all the important constitutional provisions and imperatives set out above I will now immediately address the constitutional provision under Article 131 and 132(5)(a) and (b). this is because these provisions are, with respect, misunderstood by many, leading to far-reaching public pronouncements with no regard to the constitutional entrenchment of fundamental rights under Chapter 3 and the constitutional bar to any constitutional amendment or repeal while seeking to detract from the rights under Chapter 3.

---

[28] Article 23(2)

45. Article 131 of the Namibian Constitution prohibits any repeal or amendment of any provision of the Constitution under Chapter 3, if such a repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained therein. It is provided that no such purported repeal or amendment shall be valid or have any force or effect. On the other hand, Article 132(5)(a) makes it clear that nothing contained under Article 132 relating to the repeal and amendment of the Constitution shall detract from the entrenchment provided for in Article 131. That will mean that while the Constitution could be amended by Parliament or through referendum, nothing contained under Article 132 will give the right to Parliament or to the people of Namibia through a referendum to seek to diminish entrenched rights and fundamental freedoms under Chapter 3 of the Namibian Constitution. The end result of such provision is that no repeal or amendment, however it was arrived at, whether it was through parliamentary amendment or through referendum, will seek to detract from any freedom or right thereunder. But this does not mean we cannot, through Acts of Parliament (to the extent allowed by the Constitution), address people's land reform questions even through restrictions and limitations as provided for under Articles 21 (2) and 22 of the Namibian Constitution, which could be limitation of certain rights under Chapter 3. In my view, the people's frustrations over the pace of land reform in our country now deserve urgent and decisive action so as to achieve decent living conditions for all, including equitable access to land.

46. The right to fair and reasonable administrative decisions and the right to property subject to just compensation in case of expropriation are unfortunately entrenched under Chapter 3. They are therefore part of the rights that can never be touched through any amendment. Any amendment to Chapter 3 can only be valid if it enhances or strengthens such a right, not if it detracts therefrom. This is a constitutional reality we unfortunately cannot do anything about.

47. The next provision of the Constitution I wish to briefly discuss is Article 100 relating to sovereign ownership of natural resources, including land, if such is not otherwise "lawfully owned". Article 100 bestows on the State sovereign ownership of land otherwise not

"lawfully owned" at independence. The vexing question, however, is: Did the Founding Fathers simply have in mind, particularly when it comes to reserves and areas north of the police zone, ownership as in a private registered title in terms of the Registry of Deeds Act, No. 47 of 1937, or did they intend to recognise indigenous ownership of land by people living in villages and so forth? Does the term "not otherwise lawfully owned" include indigenous and common law forms of ownership of land – not registered in the Deeds Office – or does it not?

48. It appears to be that the interpretation the Founding Fathers appear to have chosen to lawful ownership unfortunately is ownership as contemplated in terms of registered land title ownership. This is clear if one has regard to Article 100 and section 3(1), (2) and (3) of the Local Authorities Act of 1992 (as amended), which read as follows:

> "***Declaration of areas of local authorities as municipalities, towns or villages, and existing municipalities***
>
> ***3.*** *(1) Subject to the provisions of this section, the Minister may from time to time by notice in the Gazette establish any area specified in such notice as the area of a local authority, and declare such area to be a municipality, town or village under the name specified in such notice.*
>
> *(2) The Minister shall not declare any area referred to in subsection (1) to be -*
>
> *(a) a municipality, unless -*
>
> *(i) an approved township exists in such area;*
>
> *(ii) its municipal council will in the opinion of the Minister be able -*
>
> *(aa) to exercise and perform the powers, duties and functions conferred and imposed upon a municipal council m terms of the provisions of this Act;*
>
> *(bb) to pay out of its own funds its debts incurred in the exercise and performance of such powers, duties and functions;*

(cc) to comply with all its other liabilities and obligations so incurred;

(b) a town, unless -

(i) an approved township exists in such area or a town exists in such area which in his or her opinion complies with the requirements of an approved township;

(ii) its town council will in the opinion of the Minister be able -

(aa) to exercise and perform the powers, duties and functions conferred and imposed upon a town council in terms of the provisions of this Act;

(bb) to pay, whether with or without any financial or other assistance by the Government of Namibia or any regional council, out of its funds its debts incurred in the exercise and performance of such powers, duties and functions;

(cc) to comply, whether with or without any such assistance, with all its other liabilities and obligations so incurred;

(c) a village, unless -

(i) it consists of a community which in the opinion of the Minister is in need of the services which are required to be rendered or may be rendered in terms of the provisions of this Act by a village council;

(ii) its village council will in the opinion of the Minister be able to exercise and perform, whether with or without any assistance by the Government of Namibia or any regional council or other local authority council, the powers, duties and functions conferred and imposed upon a village council in terms of the provisions of this Act.

(3)(a) If the area of any township or village management area established or purporting to have been established by or under any law on the

establishment of townships or village management boards on communal land is, in terms of subsection (1), declared to be, or, in terms of subsection (5), deemed to have been declared to be, a municipality, town or village, the assets used in relation to such township or village management area and all rights, liabilities and obligations connected with such assets shall vest in the municipal council, town council or village council of such municipality, town or village, as the case may be, to such extent and as from such date as may be determined by the Minister.

(b) The registrar of deeds shall, in the case of any asset referred to in paragraph (a) consisting of immovable property which vests by virtue of the provisions of that subsection in a municipal council, town council or village council, upon production to him or her of the deed of any such immovable property, endorse such deed to the effect that the immovable property described therein vests in that municipal council, town council or village council and shall make the necessary entries in his or her registers, and thereupon that deed shall serve and avail for all purposes as proof of the title of that municipal council, town council or village council.

(c) No transfer duty, stamp duty or any other fee or charge shall be payable in respect of any endorsement or entry referred to in paragraph (b).

(d) Notwithstanding the declaration of any township or village management area under paragraph (a) to be a municipality, town or village, any provision of any law referred to in that paragraph which relates to any matter which may be determined or prescribed under any provision of this Act shall be deemed to have been so determined or prescribed.

(e) *Anything done under any law referred to in paragraph (a) by or in relation to a township or village management area so referred to which may be done under any corresponding provision of this Act, shall be deemed to have been done in relation to such municipality, town or village, as the case may be, under such corresponding provision."*

49. It is clear from the above that Parliament (whether correctly or incorrectly) assumed that where one declares a town in a communal area and/or in villages the land owned is not "lawfully owned" as contemplated under Article 100, hence a mere declaration of a town or municipality which almost automatically makes the whole land within the town boundary as the land of the municipality or town established without much more. While the Local Authorities Act speaks of no compensation, the Communal Land Reform Act only provides for compensation in certain defined instances and in fact prohibits compensation for improvement to land in the communal areas under section 40 thereof.

50. The Namibian law in that regard is lacking in certain respects if considered against what the South African law provides. The South African situation was described in *Kwalindile Community v King Sabata Dalindyebo Municipality and Others and Zimbane Community v King Sabata Dalindyebo Municipality and Others*[29] as follows:

"[9] On 1 April 1997 the Minister for Land Affairs (Minister), properly authorised by statute (see section 2(1)(a)(i) of the Land Administration Act 2 of 1995 read with the State Land Disposal Act 48 of 1961), in writing delegated his powers to dispose of state property to the Member of the Executive Council for Housing and Local Government in the Eastern Cape (MEC) (as per the Delegation of Ministerial Powers of 1 April 1997 (delegation)). Paragraph 3 of the delegation required that if delegated state land is to be developed, the MEC or any other

[29] Constitutional Court of South Africa, case number CCT 52/12 and case number CCT 55/12, judgment delivered on 28 March 2013

competent authority must first satisfy themselves beforehand that the development will not result—

> *"in the dispossession of people's rights (formal or informal) granted on or over such commonage land and in the event people's rights are affected, it is a pre-requisite that other arrangements satisfactory to those people have been made, in consultation with the Department of Land Affairs and in accordance with the provisions and/or conditions stated in the Policy and Procedures on Municipal Commonage document by the said Department".*

51. It is then clear from the above that when the Minister of Land Affairs in South Africa, authorised by the Land Administration Act, No. 2 of 1995, read with the State Land Disposal Act, No. 48 of 1961, makes provisions in his delegation to the effect that if the delegated State land is to be developed the authorities must first satisfy themselves beforehand that the development will not result in the dispossession of people's rights, formal or informal, granted on or over such commonage land, and in the event of people's rights affected it is a mandatory prerequisite that other arrangements satisfactory to those people have to be made if their formal or informal rights are affected by the development or establishment of towns.

52. If one considers the above, it is clear that the Namibian Local Authorities Act is lacking, from a humanity perspective, as it does not pertinently make provision for a remedy to the disturbance of people's rights prior to declaration of towns and municipalities when the land that they owned at an indigenous level of ownership immediately becomes a townland. While there may have been policies in place in Namibia to compensate such persons, such policies appear not to have been codified as law. In many cases people are evicted even before they receive a meagre compensation. This area needs urgent reform, in my view.

53. Deputy Chief Justice Moseneke of the South African Constitutional Court, in criticising a more western perspective on land ownership in comparison to indigenous ownership, *inter alia* stated in *Department of Land Affairs v Goedgelegen Tropical Fruits, supra*:

> *"[22] By this I do not mean to convey that registered ownership of land always enjoys primacy over indigenous title. To do that would be to elevate ownership notions of the common law to the detriment of indigenous law ownership for purposes of restitution of land rights. Rights acquired under indigenous law must be determined with reference to that law subject only to the Constitution[30] In appropriate cases, under the jurisdiction crafted by the Restitution Act, registered ownership in land will not be held to have extinguished rights in land recognised under indigenous law. One such case is Prinsloo and Another v Ndebele-Ndzundza Community and Others[31] where Cameron JA correctly observes that:*
>
> > *"The Act recognises complexities of this kind and attempts to create practical solutions for them in its pursuit of equitable redress. The statute also recognises the significance of registered title. But it does not afford it unblemished primacy. I consider that, in this case, the farm's residents established rights in the land that registered ownership neither extinguished nor precluded from arising."*

54. The above problems are compounded by the fact that our Constitution does not establish what is currently known as communal land. It simply makes any land that was otherwise "not lawfully owned" at independence to be State land. So, did people in the communal areas at independence not lawfully own their land in terms of customary or indigenous law? If the answer is that people in the communal areas (at independence) owned their

---

[30] Id at paras 50-51.

[31] 2005 (6) SA 144 (SCA); [2005] 3 All SA 528 (SCA).

land, albeit as the community, how did it then happen that their respective communal land became owned by the State at independence as if such was not otherwise 'lawfully owned'? These are admittedly difficult questions to answer.

55. I am afraid, given the definition of communal land in the Communal Land Reform Act, No. 5 of 2002, and subject to section 15 of the said Act, communal land appears to be land that was "not otherwise lawfully owned" as contemplated under Article 100 of the Constitution. Hence, it is considered as State land. Sections 15, 16 and 17 of the Communal Land Reform Act provide that:

> *"**Extent of communal land***
>
> *15. (1) Subject to subsection (2), communal land consists of -*
>
> *(a) the areas described in Schedule 1 to this Act;*
>
> *(b) any area which is declared to be communal land under section 16(1)(a); and*
>
> *(c) any land which is incorporated under section 16(1)(b) into a communal land area referred to in paragraph (a) or (b).*
>
> *(2) 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.* (Own emphasis)
>
> ***Establishment of new communal land areas and additions to or subtractions from communal land areas***
>
> *16. (1) The President, with the approval of the National Assembly, may by proclamation in the Gazette, -*

(a) declare any defined portion of unalienated State land to be a communal land area;

(b) incorporate as part of any existing communal land area any defined portion of unalienated State land; or

(c) withdraw from any communal land area, subject to the provisions of subsection (2), any defined portion thereof which is required for any purpose in the public interest,

and in such proclamation make appropriate amendments to Schedule 1 to this Act so as to include the description of any new communal land area declared under paragraph (a) or to redefine any communal land area affected by any change under paragraph (b) or (c).

(2) Land may not be withdrawn from any communal land area under subsection (1)(c), unless all rights held by persons under this Act in respect of such land or any portion thereof have first been acquired by the State and just compensation for the acquisition of such rights is paid to the persons concerned.[32]

(3) The compensation payable to a person in terms of subsection (2) must be determined -

(a) by agreement between the Minister and the person concerned; or

(b) failing such agreement, by arbitration in accordance with the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965).

---

[32] Does it mean compensation only comes in in respect of withdrawal of communal land by the President in terms of section 16(1)(c) but not upon declaration of a town in a communal area by the Minister in terms of section 3 of the Local Authorities Act? There appears to be a duplication or clash between the power of the Minister in terms of section 3 of the Local Authorities Act and the President's powers under section 16(1) and (2) of the Communal Land Reform Act.

(4) Any portion of a communal land area withdrawn under subsection (l)(c) ceases to be communal land and becomes available for disposal as State-owned land.

Vesting of communal land

17. (1) Subject to the provisions of this Act, all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.

(2) No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land."

See further Schedule 1 of the Communal Land Reform Act, attached to this presentation as Annexure A.

56. Further, section 40 of the Communal Land Reform Act provides as follows:

"Compensation for improvements

40. (1) No person -

(a) has any claim against a Chief, a Traditional Authority, a board or the State for compensation in respect of any improvement effected by him or her or any other person on land in respect of which such person holds

or held a customary land right or a right of leasehold under this Act, including a right referred to in section 28(1) or 35(1); or

(b) may remove or cause to be removed from such land, or destroy or damage or cause to be destroyed or damaged on such land, any improvement when he or she vacates or intends to vacate the land, whether such improvement was effected by such person or any other person, but the board concerned, after consultation with the Minister, may grant consent for the removal of any such improvement.

(2) Subsection (1) is not to be construed as precluding the holder of a customary land right or a right of leasehold who proposes to transfer his or her customary land right or right of leasehold to another person in accordance with the provisions of this Act from accepting, in accordance with an agreement entered into between such holder and that person, payment of compensation for any improvement on the land in respect of which the right is to be transferred.

(3) Notwithstanding subsection (1), and except if compensation is paid in the circumstances referred to in subsection (2) or in terms of subsection (4), the Minister, after consultation with the board concerned, may, upon the termination of a customary land right or a right of leasehold, pay to the person whose right has terminated compensation in respect of any necessary improvement effected by that person on the land concerned.

(4) If -

(a) a right of leasehold has terminated in respect of land on which any improvement exists which was effected by the leaseholder during the currency of the lease; and

(b) *upon a subsequent grant of a further right of leasehold in respect of that land to another person, that person is required by the board in terms section 32(1) to pay any consideration in respect of that improvement,*

the board must, from the moneys so recovered in respect of that improvement, pay compensation to the former leaseholder in such amount as may be determined in terms of subsection (5), except to the extent that any compensation has been paid to that leaseholder in terms of subsection (3).

(5) *The amount of compensation payable to a person in terms of subsection (3) or (4) must be determined by agreement between the board concerned and such person, subject to the approval of the Minister, and failing such agreement or approval, by arbitration in accordance with the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965).*

(6) *Compensation payable to a person in terms of subsection (3) must be paid from moneys appropriated by Parliament for the purpose.*

(7) *If compensation in respect of any improvement has been paid from the State Revenue Fund in terms of subsection (3), and on a subsequent allocation of a customary land right or a right of leasehold in respect of the land concerned, the grantee is required to pay, and pays, to the board any consideration in respect of that improvement, the board must, from the moneys so received by it, make a refund to the State Revenue Fund equal to the amount of the compensation paid therefrom, or, if the consideration received by the board is insufficient,*

such lesser amount as the Minister, with the consent of the Minister of Finance, may approve."[33]

57. The law, in particular section 40 of the Communal Land Reform Act, actually prohibits compensation for improvements of communal land, unless in respect of exemptions made under section 40(2), (3) and (4). But, as one can see, the provisions invite more questions than providing answers. The above provisions require urgent attention in the form of amendment now that we have the benefit, over the last two decades, of witnessing and observing problems being experienced by our people in communal areas.

CONCLUSION

58. There is a lot to say about key constitutional and statutory provisions which one cannot exhaust within the time available. However, in respect of highly contested issues such as

58.1 whether or not Chapter 3 of the Namibian Constitution could be amended to diminish the content of the right given therein;

58.2 including compensation in case of expropriation of property;

58.3 indigenous land rights claims, if considered against our Constitution and various pieces of legislation and the common law

I have the following to say.

59. Chapter 3 of the Namibian Constitution cannot be repealed or amended to diminish the rights given therein as provided for under Article 131. It can only be amended to enhance and/or strengthen rights and freedoms. But of course the issues being raised by

[33] These provisions are, with respect, confusing and not certain.

communities could be accommodated through legislation, subject to the Constitution, so as to once and for all address our people's long-standing cries for justice on issues of land.

60. In terms of Article 132(5), although through Parliament or through referendum the Constitution could be amended or repealed, there is a prohibition to any amendment or repeal of the entrenchment of Article 131 if such repeal or amendment seeks to diminish the rights provided for under Chapter 3 of the Constitution. In view of the aforesaid no amendment of Chapter 3 is possible if such amendment seeks to diminish the rights given therein. This includes just compensation in case of expropriation of property. But legislation with due regard to injustices committed by the successive colonial regimes for over a century can give, through statutory reforms, a proper and fair meaning to the term "just compensation"

61. In respect of indigenous land claims, there are several constitutional provisions that such fair but difficult claims implicate. They are:

61.1 Article 1(1), (5) and (6)

61.2 Article 5

61.3 Article 10

61.4 Article 16

61.5 Article 18

61.6 Article 21(1)(g) and (h)

61.7 Article 100

61.8 Article 102(2)

61.9 Schedule 5

62. In my view there needs to be statutory reform with due emphasis to introducing just redress for individuals and communities that may have been subject to untold injustices particularly in land dispossession, or may have been adversely affected by developments, particularly when it comes to establishment of towns, and to give due and proper

recognition to such people's customary land rights and leaseholds in cases of adverse effects of development and establishment of towns. Our Supreme Law must, however, at all times be respected when all such reforms are being considered.

Mine was a frank, open and direct assessment of various legal provisions and principles that may present opportunities for the government to make desired land reforms, or that may in themselves create legal impediments to the government achieving its desired objectives.

Sisa Namandje

Windhoek, 1 October 2018