

# EDITOR'S *guest*



Editor's Guest

## • WOLFGANG WERNER

EXPROPRIATION of freehold agricultural land without compensation is hotly debated in South Africa at present. In Namibia, the expropriation issue has been largely dormant since the Kessl case in 2007. However, demands for expropriation and expropriation without compensation are likely to pick up, spurred on by demands to restore ancestral land rights.

The topic needs to be put on the agenda of the impending land conference to have informed debates and agreement on it. To be sure, expropriation in the public interest and subject to payment of just compensation is provided for in Article 16 of the Namibian Constitution and Part IV of the Agricultural (Commercial) Land Reform Act 6 of 1995 as amended. Government Notice 209 of 2016 sets out the criteria for expropriation.

Expropriation is frequently touted as a simple solution to the slow pace of land acquisition. After considering the recommendations of the permanent technical team on land reform (PTT), Cabinet decided in April 2006 that "expropriation should be used in conjunction with targeting specific land areas for specific purposes (e.g. small holder resettlement projects would be appropriate in the maize triangle".

The land reform ministry undertook to strengthen the expropriation principle as one of its strategies to accelerate land redistribution and gazetted the expropriation criteria in 2016.

Expropriation of land has clear advantages and disadvantages for land reform. One of the potential advantages of expropriation is that it would enable the lands ministry to identify land for acquisition in specific areas without having to wait for it to be offered in the market.

It would also allow the Ministry of Land Reform to acquire large areas of contiguous farms. Providing support services to beneficiaries on large land clusters will be cheaper and more efficient than on widely dispersed farms. However, some serious questions need to be answered. These include what land is going to be targeted in what area and for what specific purpose. Since this is likely to be a highly contentious issue, clear and unambiguous criteria need to be developed, which would also require an institutional framework that ensures state accountability for its decisions.

Criteria for expropriation have been developed but never subjected to public debate. In 2005 the Namibia Agricultural Union developed and presented a land ownership and utilisation scorecard. The scorecard identified four main assessment criteria: personal information, presence on farm; number/size of farms and economic activities. These criteria aim to prioritise foreign, white absentee landowners of several farms as primary targets for expropriation and make the land of previously disadvantaged Namibians the least likely to be expropriated.

In September 2016 the Ministry of Land Reform gazetted regulations on criteria to be used for expropriation of agricultural land. A scorecard with different weightings for different criteria forms part of the regulations. These include identification criteria for agricultural land, such as nationality of owner, whether the farm has been abandoned and 'whether the identified land will contribute to the utilisation of the adjacent state land'. In addition, a suitability report on the land to be expropriated must be developed, detailing the agro-ecological characteristics of the land.

The scorecard principle has the advantage that it facilitates consistency in identifying farms for acquisition and/or expropriation. Once criteria have been agreed upon, it will also become possible to encourage farm owners falling into the category targeted for expropriation to offer their land to the ministry.

However, without an institutional framework to oversee the process and hold the state to account for its actions, there will be a risk of abuse and favouritism. The government notice is silent on this issue, except to refer to consultations between the minister and the Land Reform Advisory Commission as required by the act. The NAU has proposed a 'board on expropriation of commercial farmland' to act as mediator between farmers and the authorities.

The merits of following this proposal should be critically assessed and compared to the advantages or disadvantages of making use of the LRAC to oversee the implementation of expropriation. The latter is appointed by the minister, and its ability to account for any actions in the land reform programme is severely circumscribed by a secrecy clause in the legislation.

The potential advantages of expropriation may be outweighed by disadvantages. The PTT has drawn attention to the fact that expropriation is not necessarily a cheaper option for land acquisition, as fair compensation must be paid. This was confirmed by the then minister of lands and resettlement in the National Assembly in 2004 when he stated that compensation for expropriated land will be based 'upon the market value of the land...[which] will be determined as the amount that would have been paid for the land if it had been sold on the date of expropriation in the open market by a willing seller to a willing buyer'. Reference to market value as compensation has been the chosen path of the state to acquire land for redistribution. But it is not the same as just compensation. To establish what just compensation is and under what conditions, will be contested.

Policy insecurity about expropriation is likely to result in a decline in agricultural investments, and possibly in the wider economy. This risk will increase should land be expropriated without compensation, as some people are demanding. Such demands more often than not forget that this is not simply a matter of land, but fundamentally also of finances. Financial

institutions – both private and Agribank – are heavily invested in agriculture through long-term loans and overdrafts. An assessment of the financial position of commercial farmers drawn up in 2012 by the NAU suggests that total indebtedness of freehold farmers was N\$3,4 billion. This is likely to have increased because of the recent drought. Many loans are secured by land.

Expropriation of land transfers land title to the state and deprives former landowners of the income streams that helped to service the loans. Current legislation, which provides for expropriation with market-related compensation, regulates the repayment of agricultural debt in so far as the Minister may only pay out compensation regarding land that has been mortgaged 'on such terms as may have been agreed upon between the owner of such land and the mortgagee'. However expropriation without compensation will impact negatively on financial institutions and former landowners. Banks lose the security for repayment of loans as the new title holder – the state – has no contractual obligations to banks. Former farm owners, on the other hand, would still be contractually bound to financial institutions to repay loans. Clearly, the financial implications of such a course of land acquisition need to be debated by all stakeholders should government accede to demands for expropriation without compensation.

Expropriation can play a useful role in targeting specific areas for specific purposes. Approaches to expropriation by the NAU and MLR should be reviewed to arrive at a set of criteria that will make the process consistent and transparent. The option of expropriation without compensation should only be applied as last resort, as the likely financial impact will be very negative.

*\* Wolfgang Werner is working in the department of land and property sciences of the Namibia University of Science and Technology (NUST). The views expressed in this opinion piece are his own, and do not reflect those of NUST.*