Leasehold as a Vehicle for Economic Development

A case study of small-scale farmers in Namibia's Oshikoto Region

Wolfgang Werner and **Charl-Thom Bayer**

Department of Land and Property Sciences
Namibia University of Science and Technology

for

Land, Environment and Development Project
Legal Assistance Centre

Windhoek
Namibia

November 2016

NAMIBIA UNIVERSITY OF SCIENCE AND TECHNOLOGY

Brot für die Welt

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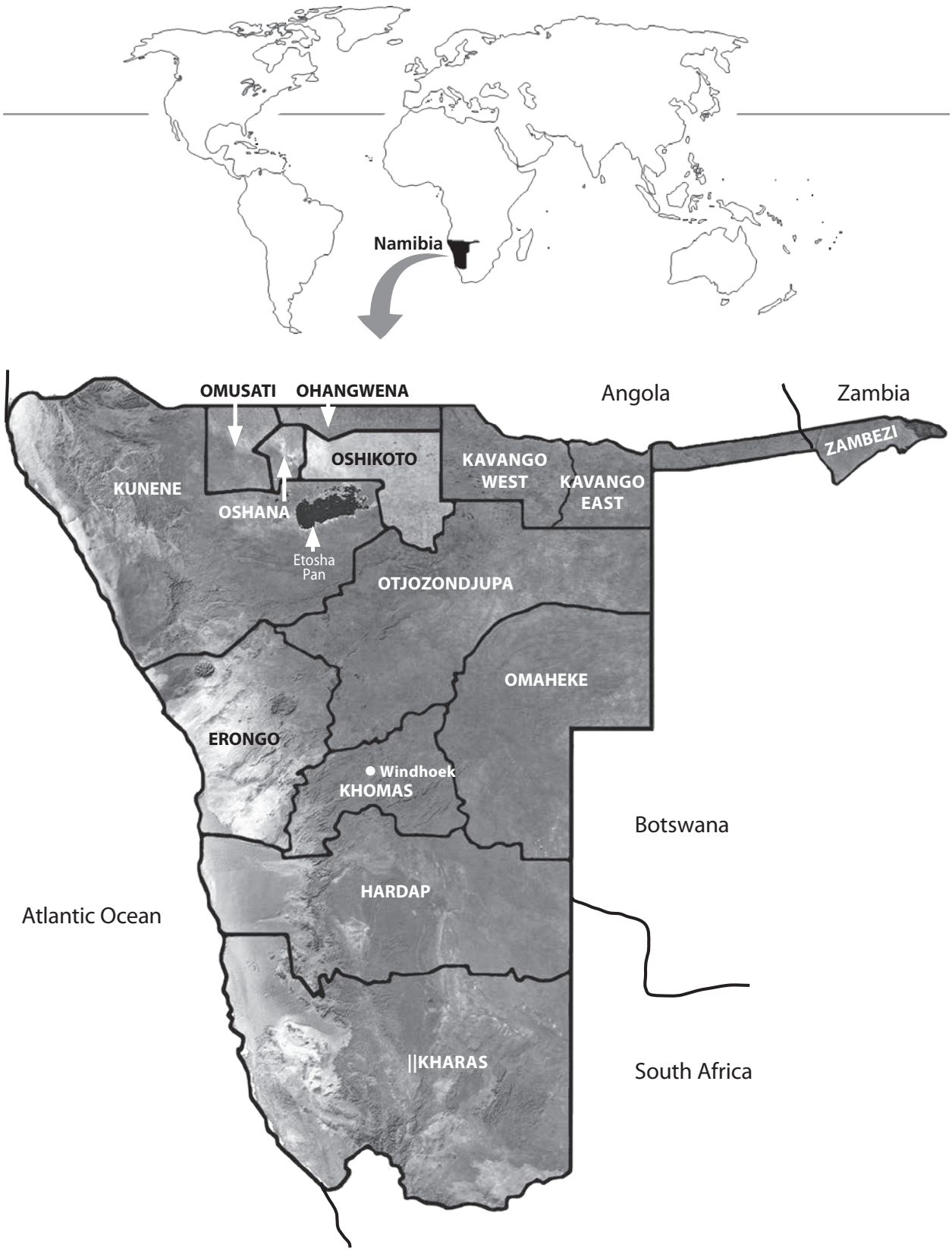
List of Abbreviations

ACLRA	Agricultural (Commercial) Land Reform Act, 1995 (Act No. 6 of 1995), as amended
CLRA	Communal Land Reform Act, 2002 (Act No. 5 of 2002)
GIS	Geographical Information System
GPS	Global Positioning System
CLB	Communal Land Board
MAWF	Ministry of Agriculture, Water and Forestry
MAWRD	Ministry of Agriculture, Water and Rural Development (former name)
MLR	Ministry of Land Reform / Ministry of Lands and Resettlement (previous name)
MLRR	Ministry of Lands, Resettlement and Rehabilitation (initial name)
NRP	National Resettlement Policy
NSDI	National Spatial Data Infrastructure
PSSF	Post Settlement Support Fund
SALA	Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970)
TA	Traditional Authority

Map of Namibia's Regions



1
Introduction

> ***"CEO of Agribank, we, the upcoming farmers in the North, are losing trust in your bank, because we applied for loans without collateral in September 2015, but until now are on a waiting list. When are we going to start farming if you do not give us the loans? Give the people money to start farming so they can feed the nation."***
>
> – SMS in *The Namibian* newspaper, 22 July 2016.

In 1990, the newly independent Republic of Namibia committed itself to redressing the imbalances in land ownership in the country. It developed a land reform programme in both the non-freehold or communal areas and the freehold or commercial farming sector.

In the communal areas the land reform programme seeks to formalise private customary land rights in land use for residential and cultivation purposes. Each parcel is mapped and the land rights holder is identified. This information is captured in the land register which each Communal Land Board has established, and a certificate is issued to the land rights holder upon registration. In addition, leasehold is being introduced in communal areas in a bid to encourage more investment in land and hence accelerate economic development.

Land reform in the freehold sector is aimed at broadening access to land through the land sales market and land rental. The formal programme, called the Affirmative Action Loan Scheme (AALS), is aimed at higher income sectors of the previously disadvantaged communities. The AALS is administered by Agribank of Namibia, which avails subsidised loans to successful applicants to buy large-scale commercial farms. Interest rates increase on a sliding scale after two years, to reach market rates after year 10.

Under the National Resettlement Programme (NRP), by contrast, land is accessed on a rental or leasehold basis. To facilitate this, the state purchases freehold commercial farms on the open market on a willing-seller willing-buyer basis. This approach is supply led, in

that the supply of commercial farms on the open market and budgetary constraints are the main determinants of the pace of redistribution. Although the expropriation of land for resettlement purposes is another legal option for acquiring land, this has happened in very few cases. This option has not been utilised since the Government of Namibia was taken to court in 2007 over the manner in which expropriations had taken place (Harring & Odendaal, 2008). In any case, the acquisition of land for resettlement is not driven by effective demand, but by what the state is able and willing to acquire. This may be one of the reasons for the regular complaints about the slow pace of land redistribution, and it suggests that the demand for agricultural land far exceeds the supply to the Ministry of Land Reform (MLR).

Upon acquisition, commercial farms are subdivided into smaller land parcels. Once demarcated, applications for resettlement are invited through advertisements. Successful applicants are then allocated individual farm units, which should not be smaller than 1 000 hectares (ha) in the central and northern regions of the country and 3 000 ha in the semi-arid southern regions. Most of this land is suitable for extensive livestock farming only, as 60% of agricultural land in the freehold sector receives less than 300 mm of rainfall per annum, while only 5% receives sufficient rain to make dryland cropping a possibility (Brown, 1993, as cited in Werner & Kruger, 2007, p. 5).

The National Resettlement Policy (NRP) (Ministry of Lands, Resettlement and Rehabilitation (MLRR), 2001, pp. 2-3) states that –

> *"the immediate aim of the resettlement programme is to make settlers self-reliant either in terms of food production or self-employment and income generating skills …* [and] *to bring small-holder farms into the mainstream of the Namibian economy by producing for the open market and to contribute to the country's economy".*

Thus, agricultural production on resettlement farms was firmly envisaged in a commercial market environment.

The initial criteria for beneficiary selection were at odds with the economic objectives of the NRP. The main target groups for resettlement included those with "*neither land, income nor livestock*" and those with "*neither land nor income, but* [a] *few livestock*" (ibid., p. 3). Despite the good intentions to assist these two categories by providing them with access to land, it became clear during the first 10 years of land reform that this reform would not adequately reduce poverty levels and contribute to the national economy unless the beneficiaries were able to acquire assets, in particular livestock, in order to utilise the land productively. In 1998 the MLRR called for a "*paradigm shift*" in its "*search for an integrated and sustainable resettlement process*" (cited in Werner & Odendaal, 2010, pp. 12-13).

In 2008, the Ministry of Lands and Resettlement (MLR) (the Ministry's new name as from 2005) drafted new selection criteria. The "Draft Resettlement Manual" of 2008, in which the new criteria were set out, stated that –

> *"it is not sustainable to resettle persons with little or no resources and expect them to maintain or improve the level of economic production on the resettled units … farming is a capital intensive activity requiring large inputs up front"* (MLR, 2008, p. 15).

The published "Resettlement Criteria" (MLR, n.d.(a)) reiterated the emphasis on economic productivity and output. Productivity was recognised as a central theme in the criteria "*because it contributes towards poverty reduction, improving living standards and fostering economic development*". The ability of applicants to farm productively was regarded as "*crucial and of paramount importance, to the success of the Resettlement Programme*" (ibid., p. 4), and criteria were developed to facilitate productive farming. The criterion for "*current agricultural income (number of livestock)*" states that applicants who own livestock and are engaged in agricultural production at the time of applying, will be favourably considered. "*This will help to ensure the continued productivity of the agricultural allotments and contribute to the economic development of the country*" (ibid., p. 7).

One facet of the paradigm shift in the MLR was the development of different resettlement models, signalling a more differentiated approach to beneficiaries and their respective needs. The rationale for this was that the MLR wants to focus on economic development and not on the needs of destitute people who should be supported through what the Ministry refers to as social welfare programmes. Informing this line of thought was an acknowledgement that "*there are cheaper and more effective means of providing social welfare to the needy population*" than resettling them on agricultural land (MLR, 2008, p. 19).

Through its "Welfare Model" the MLR sought to transfer responsibility for destitute beneficiaries to other line ministries. In the financial year 2011/12 it prepared "Social Welfare Resettlement Criteria" and drafted an "Agenda Memorandum for Cabinet" on the transfer of resettlement projects. In its response to the draft Memorandum, the Ministry of Regional and Local Government, Housing and Rural Development (MRLGHRD) advised that the transfer should happen as part of decentralising other functions of the MLR to the Regional Councils, which was expected to happen in the 2012/13 financial year (MLR, 2013a, p. 22).

1.1 Economic development and leases

Of more immediate interest to this study is the "Economic Development Model", which was developed in the "Draft Resettlement Manual" (MLR, 2008, pp. 19-20) but was not mentioned explicitly in the published criteria. The focus of this model is signalled by

its name – it is meant to provide economic opportunities to previously disadvantaged Namibians with a view to contributing to the country's economy. To achieve this, "*a re-evaluation of parcel sizes to make them more attractive for suitable applicants*" is proposed, suggesting that the MLR is looking for a different kind of applicant than in the past, i.e. one who could make "*a significant input … in terms of livestock or capital or other relevant assets for the proposed activity*". Such applicants should "*have strong potential to be economically productive …* [and] *ideally commit to full-time farming activities*" (MLR, 2008, p. 19).

In order to achieve the economic aims of the resettlement programme, the NRP (MLRR, 2001) provides for a lease tenure system which "*will be arranged so that the settlers can use the Lease Agreement as collateral to get a loan from lending institutions for* ***agricultural production purposes***" (original emphasis). Section 42 of the Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA) provides that beneficiaries should register long-term lease agreements with the state over the land parcels allocated to them.

First proposals for the introduction of a leasehold system after Independence can be found in the "Perspectives for National Reconstruction and Development" produced by the United Nations Institute for Namibia (UNIN) in 1986 (UNIN, 1986), in which it is argued that under a general system of leasehold, "*all land is owned by the state on behalf of the people …* [and the state] *can allow the user to continue tilling the land as tenant with leasehold rights by renting the land from the state*". The rent would be a fixed rent contract, and the main advantage of leasehold would be that the state, as absolute owner of the land, "*can ensure that its agrarian reform and other socio-economic and political objectives are met through several institutions and financial means*" (ibid., p. 132). The notion of leasehold expressed here is a tool designed to define the relationship between subjects and the state as far as land rights are concerned, rather than as a tool for opening up access to land to the majority of Namibians who do not have the assets to buy land on the free market. This may help to explain why the Namibian state is averse to the tradability of leaseholds and development of a land rental market.

The inability of small-scale farmers in both the freehold and non-freehold farming areas to use their land rights as collateral to access credit for agricultural production has been the subject of some debate in Namibia. In 2006 Kaakunga and Ndalikokule (2006, pp. 13-14) concluded in their short report on property rights and access to credit, that resettlement beneficiaries were unable to use their allocations as collateral for loans, as the land belonged to government and could not be traded. They recommended that the MLR "*should ensure the lease agreement (used as collateral) should be allowed to be repossessed by a financial institution in the case the borrower defaults and to be sold to another potential lessee*". In 2012 the Bank of Namibia made "Unlocking the Economic Potential of Communal Land" the theme of its 14th Annual Symposium

(Bank of Namibia, 2012). Although the focus of the symposium was on property rights in communal areas, the discussion on tradable land rights to obtain credit applies equally to the resettlement sector.

In his keynote address to the symposium, the Minister of Lands and Resettlement argued that registered leasehold in communal areas – and by implication, resettlement land – "*grants the lessees the opportunity to access financial capital to invest in their properties and this improves their living standard*" (ibid., p. 18). In their contribution to the symposium, Mendelsohn et al (2012, p. 27) argued that the inability to use land as collateral and obtain credit results in land having no capital value. Moreover, the inability to trade land rights severely limits incentives for investments. Consequently, they recommended that land rights holders in communal areas – and by implication, lessees of resettlement land – should be able to engage in land transactions (ibid., p. 33). According to these authors, formalised property rights and access to credit will provide the "*severely poor living in communal areas … [with] new opportunities to create wealth*" (ibid., p. 37). These views echo those of the Peruvian economist, Hernando de Soto, who argued that formalised land rights will lead to the conversion of "*'dead capital' into capital that can be used as collateral*" (Lawry et al., 2014, p. 63).[1] As will be shown below, this conversion can only occur under certain circumstances, most importantly the existence of a rental market where formal land rights can be traded.

Despite the importance attached to using resettlement land as collateral for loans, the pace of issuing and registering leaseholds has been remarkably slow. In the financial year 2009/10, for example, 160 lease agreements were signed and issued to beneficiaries "*as a form of security*" (MLR, 2011, p. 19). In the following year the number declined dramatically to only 19 lease agreements issued, with 28 pending (MLR, 2013a, p. 21). In 2012/13 the number rose again to 26 lease agreements. By mid-2016 a total of 264 lease agreements had been signed across the regions (Niita Iipinge, pers. comm., 8 August 2016). The only reason for the refusal of beneficiaries to sign lease agreements with the MLR was that they "*demanded that the infrastructure be fixed first*" (MLR, 2014, p. 28). However, as this report will try to show, there are other reasons also.

The registration of leaseholds in the Deeds Office was even slower, with only 6 lease agreements over land allocated under the NRP registered by April 2016. No mortgages were registered over these leases (Deputy Registrar of Deeds, pers. comm., 27 May 2016). This is a very low figure, bearing in mind that the MLR has resettled more than 5 000 beneficiaries. During the financial year 2013/14, "*the total number of 11 lease agreements were … handed over to the Notary Public through the Attorney General's Office for preparation and lodgement in the Deeds Office*" (Minister of Lands and Resettlement,

1 For a critique of De Soto's arguments, see for example Kingwill et al., 2006.

2014, p. 10). Moreover, the actual number of lease agreements issued and registered does not approximate the targets set for the strategic planning period 2013-2017. Over this period the MLR intended to grant a total of 620 notarial lease agreements (MLR, n.d.(b), p. 15).[2]

These low registration figures should be of concern to policy makers and implementers, and they raise a number of questions which require critical analysis. This report provides such analysis, firstly on the question of why financial institutions are presently hesitant to accept registered lease agreements over resettlement land as collateral, and secondly on the institutional framework governing the registration of leasehold and accompanying transaction costs. The main research objectives are as follows:

- Describe the legal and institutional leasehold registration framework/process for resettlement allocations.
- Determine the nature (value and purpose) and number of resettlement leaseholds that have been registered with the Registrar of Deeds.
- Understand the beneficiaries' perceptions about the nature (value and purpose) of their registered lease agreements.
- Analyse the impact of registered leaseholds on the beneficiaries' ability to access to credit.

The first part of this report focuses on the general frameworks operating at national level. Another part investigates the perceptions, expectations and reservations of resettlement beneficiaries themselves regarding lease agreements – the key question being, what are the reasons for beneficiaries abstaining from applying for leases? Based on the findings of this study, recommendations will be made as to what the policy and legal framework governing leaseholds should look like if commercial financial institutions are to accept registered leaseholds over resettlement land as collateral.

2 Annual targets looked as follows: 2003-14: 20; 2014-15: 100; 2015-16: 200; 2016-17: 300.

2
Institutional Framework

Institutions are more formally defined as the rules and regulations that shape society's interactions. These rules and regulations may be either formal (such as laws, policies and regulations) or informal (such as customs, conventions and behaviour) (North, 1990). One might also think of institutions as being facts that are accepted as such, but which exist only because people collectively agree to accept them as such. Examples of such facts are the existence of the Tropic of Capricorn, the boundaries of Namibia's Omaheke Region, and property rights. The philosopher John Searle (1995) defines such facts as "institutional facts", and he contrasts these with "brute facts", which are facts that exist irrespective of whether human beings exist, an example being the existence of the Khomas Hochland mountains in Namibia.

Thus, property may be regarded as an institutional fact by virtue of its owing its existence to a complex network of rules, regulations and customs. This is best illustrated by looking at the situation in a typical communal area in Namibia. If you want to own property in a north-central communal area, it is generally required that you are perceived to be a Namibian citizen with links to a traditional authority, which in turn is governed by the legislation on traditional authorities and communal land as well as local customs. Then, there are family, kinship, ethnic and business relationships which are often intertwined in determining who should access land rights under the legislative and local conditions. These conditions and relationships do not exclude foreigners or other individuals, but they make it much more difficult for foreigners to penetrate the network, as the network rules are often unspoken and not very obviously transparent. It is this complexity of rules, regulations and customs that govern people's actions that is referred to collectively as the "institutional framework".

This link between institutions and property rights gained notoriety especially under the assumption that land titles automatically lead to development (De Soto, 1989 and 2000). However, it is commonly accepted that there is no such straightforward correlation between land titling and development, and that a range of other institutions, both formal and informal, play a role in how property rights can support economic development. It is generally accepted that changing economic needs and development drive changes in institutional arrangements. Consequently, property rights regimes are also subject to these forces of change.

2.1 Land administration institutions

It is important to understand not only the broader philosophical underpinning of institutions in relation to land rights, but also land administration institutions or systems specifically. Land can be defined as both a physical thing and an abstract thing (Dale & McLaughlin, 1999) – the physical thing being the soil, vegetation or topography, and the abstract thing being the set of rights to use and transfer value even though the physical thing cannot be traded. The first physical thing and the abstract thing are the same as the institutional facts and brute facts described by Searle (1995) or the institutions as described by North (1990). A further distinction can be made between the formal (legal) institutions and the informal (customary) institutions. Land administration is defined as those activities that support the "*alienation, development, use, valuation and transfer*" functions of land (Dale & McLaughlin, 1999).

Generally this means that land administration may be seen to incorporate the policies, legislative and customary frameworks (institutional) as well as the implementation (technical) aspects for the functions listed above. Recent advances in technologies for surveying (Global Positioning System (GPS) and drones) and information management (Geographical Information System (GIS) and National Spatial Data Infrastructure (NSDI)) have meant that the technical aspects of land administration are no longer seen as the key constraints for land administration systems to support development. Only now is it appreciated that the failure of a land administration system is more likely to be caused by weak and inappropriate institutional arrangements rather than technical issues.

2.2 Leaseholds rights

Internationally, land tenure and property rights are generally classified into four types or categories: open access, communal, private and state (Feder & Feeny, 1991). In an open-access regime, the rights are not allocated to any group or individual (whether natural or juristic). In a communal regime, the rights are allocated to individuals and groups belonging to a specific wider group or community. State rights naturally belong to the state, or the crown, which generally means that the land is under public sector management. Private rights are rights allocated to individuals (natural or juristic) for their exclusive use.

A leasehold right is generally defined as a temporary right of property ownership, which in turn is defined as a private right, allocated to an individual. Usually the lessor holds the property right as some form of title or deed, and the lessee takes on the right (including the benefits and responsibilities) for a specified period. Generally, the lessor may not re-acquire the property during the lease period, unless there has been a clear breach of contract (Dale & McLaughlin, 1999). Typically there is an agreement between the lessor and

the lessee. The lessee may even take out a mortgage on the lease agreement. Feder and Feeny (1991) state that use rights, such as a long-term leasehold,[3] which are transferred from the state are virtually indistinguishable from full property rights.

Land rights and leasehold rights must therefore be viewed within the context of this institutional setting. The leasehold certificate or agreement and the lessor's title deed are the institutional facts, and they represent the rights that their bearers have over a particular piece of land. These representations are also what banks and other interested parties will examine in order to decide whether they can extend credit to, or otherwise transact with, the individuals holding the rights over the land. These representations and the institutional arrangements that support the titles and leasehold certificates are all that investors or creditors will consider, as physical inspections and other determinations, or the validity of the arrangements between the lessee and lessor, are typically not more efficient or more reliable. Thus the nature of the agreements, contracts and other safeguards such as registration become increasingly important as the circle of interested parties expands. It is therefore necessary to describe and understand the institutions that constitute leasehold rights and the mechanisms for enforcing these rights.

2.3 Registration of leasehold rights

The institutional framework for the registration of leaseholds as a developmental tool within the wider land reform programme is provided by the National Resettlement Policy (NRP) (MLRR, 2001), the Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA), the Communal Land Reform Act 5 of 2002 (CLRA) and the Deeds Registries Act 14 of 2015.

2.3.1 Leasehold rights in the National Resettlement Policy

The NRP does not define or describe the process for the registration of resettlement leaseholds so much as it does the rationale and objectives for registering leasehold rights. However, all these definitions and descriptions provide the broad framework and make clear the expectations for administering the resettlement parcels. As we are investigating the impact of leasehold rights on tenure security and livelihoods, it is instructive to understand what the NRP states regarding its goals.

The Government of the Republic of Namibia's objective as stated in the "Introduction" to the NRP (MLRR, 2001) is to resettle people in a way that is "*institutionally, sociologically, economically and environmentally sustainable*" so that beneficiaries can "*become self-supporting*".

3 Considering that leasehold rights for 10 years or more have to be registered in the Office of the Registrar of Deeds, one assumes that in Namibia a long-term leasehold is for a period of 10 years or more.

Several objectives for resettlement are described, which include: (a) redressing past imbalances; (b) producing food for target groups; (c) bringing smallholder farmers into the mainstream of the economy; (d) creating employment; (e) reducing communal livestock pressure; and (f) giving displaced and destitute persons the opportunity to integrate onto society.

The third objective is fully stated as follows: "… *to bring small holder farmers into the mainstream of the Namibian economy by producing for the open market and to contribute to the country's Gross Domestic Product*".

In describing the selection of settlers, the NRP explicitly states that "*applicants should adhere to the stipulations of the lease/resettlement agreement …*".

The section in the NRP that describes the occupational rights of beneficiaries states unequivocally the following:

> *"Land acquired for resettlement purposes will be provided to beneficiaries on leasehold of 99 years. The leasehold tenure system will be arranged so that settlers can use the Lease Agreement as collateral to get a loan from lending institutions for agricultural purposes."*

Finally, the general provisions of the NRP provide for the survey of resettlement parcels by the Office of the Surveyor General, and also provide for the Deeds Office to have the "*overall responsibility for the assurance of property rights and the provision of services in the registration and safekeeping of lease agreements and other real rights*".

Thus the NRP provides a clear, deliberate and precise articulation of the institutional framework within which the rights of resettlement beneficiaries are to be located. The following key rights are provided for explicitly or by inference:

Explicit rights

i. Resettlement beneficiaries will be provided with leasehold rights.
ii. These leasehold rights shall be registered with the Deeds Office.
iii. Beneficiaries should be able to use the leasehold rights as collateral for loans, thus financial institutions should find these rights acceptable as collateral.

Inferred rights

iv. The leasehold rights should conform to the basic characteristics of leasehold agreements in the national context.
v. The leasehold rights should serve as the basis for the holders to participate in the mainstream economy of Namibia.
vi. The leasehold rights must be transferable.

What this means for the current process of awarding land rights under the national resettlement programme, specifically leasehold rights, must be considered in relation to the framework for such rights as determined by the ACLRA and the Deeds Registries Act.

2.3.2 Leasehold right in the Agricultural (Commercial) Land Reform Act, 1995 (Act No. 6 of 1995)

The land acquired for resettlement is defined as being available for resettlement or alienation if it has been surveyed. The term "surveyed" is not defined here, but it can reasonably be inferred that the land should be surveyed in terms of the Land Survey Act 33 of 1993. This requires that a professional land surveyor carries out the survey and submits the appropriate records to the Surveyor General for registration.

According to the ACLRA, the Minister may alienate, lease or dispose of state land or agricultural land acquired for resettlement purposes.[4] The rights associated with an allotment are not defined in the ACLRA, and the "Letter of Allotment" does not contain or refer to any rights or responsibilities.[5] Section 38 of the Act states that the Minister may cause any land that is to be allotted to be surveyed. The ACLRA does state that for the purposes of allotment, an allotment plan shall be drawn up and advertised. It appears that the allotment plan for the purposes of allotment does not have to conform to the requirements of the Land Survey Act 33 of 1993.

Where land is allotted for the purposes of a lease, the ACLRA states that the lease shall be registered in accordance with the Deeds Registries Act 47 of 1937.[6] This explicitly requires the land to be surveyed in terms of the Land Survey Act 33 of 1993.

The rights for such a lease shall be contained in the lease agreement and shall be for 99 years as per the ACLRA. If beneficiaries are expected to be able to access credit using their lease agreements as collateral, the leasehold agreement should not only conform to the legal requirements for the registration of leases as per the relevant legislation, but should also conform to the requirements of the financial institutions with regard to the provision of credit using lease agreements as security for loans. However, for a lease agreement to be used as security, the Minister must give prior written consent, after receipt of a written request for such.[7]

A comparison of the NRP and the ACLRA makes clear that the former expects that all land allotted under the NRP shall be leased to the beneficiaries. This stands in some

4 See section 37 of the amended ACLRA – Act 13 of 2002.
5 See Appendix A – Sample Letter of Allotment.
6 See section 42(2) of the ACLRA (Act 6 of 1995).
7 See section 46(1) of the ACLRA (Act 6 of 1995).

contrast with the ACLRA which makes allowance for the Minister to alienate, lease or dispose of certain state land to the beneficiaries. A lease agreement is therefore only one of the options available to the Minister for the transfer of land rights from the state to the citizenry under the resettlement programme.

2.3.3 Leasehold right in the Communal Land Reform Act, 2002 (Act No. 5 of 2002)

The Communal Land Reform Act 5 of 2002 (CLRA) makes provision for the designation of agricultural areas where leasehold rights may be acquired.[8] Section 30 of this Act gives the Communal Land Board (CLB) the power to grant agricultural leasehold rights in the designated area. Persons may also apply to the Minister for a leasehold right outside a designated area, and the Minister may approve such a leasehold on condition that the relevant Traditional Authority (TA) and CLB are consulted. Section 32 of the Act makes reference to conditions that may be applicable to the right of leasehold, and subsection 32(4)(a) includes the requirement that the applicant "*… may be required to cause the land in question to be surveyed, at his or her own expense, before the registration of such right in his or her name is effected*". Subsection 32(4)(b) makes provision for the applicant to be "*granted permission to cause the land in question to be surveyed at his or her own expense*". This implies that applicants may apply to have their land surveyed if they choose to do so.

Section 33(1) of the CLRA states that the CLB must register the right of leasehold in the appropriate register and issue a certificate of leasehold in the prescribed manner. This section is interpreted to refer not to the Deeds Registries Act 47 of 1937, but rather to the procedures and registers of the CLB. This implies that not all leases are intended for registration in the Deeds Office. However, section 33(2) states the following:

> *"If the land in respect of which the right of leasehold is granted is surveyed land which is shown on a diagram as defined in section 1 of the Land Survey Act, 1993 (Act No. 33 of 1993) and the term of lease is for a period of 10 years or more, the leasehold must be registered in accordance with the provisions of the Deeds Registries Act, 1937 (Act No. 47 of 1937)."*

This makes compulsory the registration of leases that are for a period of more than 10 years on surveyed land. This also creates an opportunity for lessees to apply to have their land surveyed in accordance with the provisions of section 32(4)(b) of the CLRA, and then compels them to register their leases if the period of the lease is for more than 10 years. There is no evidence of any communal leaseholds being registered in the Deeds Office. It appears that the Ministry's regional offices, rather than the CLBs themselves,

8 See section 30 of the CLRA (Act 5 of 2002).

receive and store the leasehold registers. However, a copy of each communal leasehold is also sent to the Ministry's head office for its records.

2.3.4 Leasehold rights in the Deeds Registries Act, 2015 (Act No. 14 of 2015)

The alienation of state land requires that the land be surveyed in accordance with the provisions of the Land Survey Act 33 of 1993 and the Deeds Registries Act 14 of 2015. The Deeds Registries Act makes provision for the alienation of previously unsurveyed state land, which also requires a survey in accordance with the Land Survey Act, however it is expected that all farming units available for allotment are parts of farms that have been surveyed previously. It is clear that the state may only alienate land by means of a deed of grant or a deed of transfer, and this applies in the case of the resettlement programme. There are no other provisions made for the transfer of state land. This could be argued to mean that the letter of allotment or the unregistered lease agreements have no legal effect with regard to the transfer of any real rights of state land.

In accordance with section 14 of the Deeds Registries Act, state land may be transferred by deed of grant or deed of transfer to the transferee. Attached to the deed of grant or transfer must be a reference to the title deed by which the state holds the land, the diagram describing the land, the conditions upon which the land is alienated, and the rights that are reserved by the state. If the land in question has never been registered in the name of any person, a certificate of registered state title must first be issued in respect of the land in question.

No real rights in land can be considered to be transferred from one person or entity to another unless those rights are registered in the Deeds Office. Section 11(1)(b) of the Deeds Registries Act clearly states that "*any real right in land … may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar*". This therefore raises the question as to the legal status of any real rights expected to be transferred through any allotment or lease that is not registered in the Deeds Office. The question that can be asked is whether any allotment letter from the MLR to an individual, or even an unregistered lease agreement, carries with it the effect of transferring any real rights in land from the lessee to the lessor.

The Deeds Registries Act does not require the registration of leases, but rather it provides that "*leases relating to immovable property which property is registered in a deeds registry in the name of the lessor may be registered in the deeds registry*". However, section 54 provides that immovable property with a mortgage may not be transferred without release from the cancellation of the bond and the consent of the holder of the bond. This section also provides that no cession may be registered on a mortgaged lease without the cancellation of the bond and the consent of the holder of the bond.

Section 54 thus provides a guarantee to institutions that have supplied credit to persons using the real property rights as security, that their interest in the secured property will not be abrogated without their consent. This section is critical for the functioning of a credit supply to property right holders, and is perhaps key to understanding the reticence of financing institutions to providing credit where property is used as security without it being registered in the Deeds Office.

2.3.5 Rights and obligations described in Ministry of Land Reform leasehold agreements

The copies at hand of the lease/leasehold[9] agreements that the MLR uses for communal and commercial leaseholds are in essence identical. The contents of these agreements, the rights transferred and the rights reserved are the same. The contents of these rights and their appropriateness for promoting commercial agricultural activities are discussed in greater detail later in this report. The focus here is to determine the extent to which these leasehold rights can be registered in the Deeds Office.

Section 1[10] of the MLR leasehold agreement makes provision for the description of the spatial extent and location of the land, subject to the agreement. Reference is made to a "leasehold diagram" and provision is made for the inclusion of a "Diagram No.". The diagram and its number are generally understood to refer to the legal description of a property for registration in the Office of the Surveyor General. This therefore implies that the leasehold agreement is intended for registration, or at least can be registered, in the Office of the Registrar of Deeds ("Deeds Office").

Section 2 of the leasehold agreement states that this agreement is "*… subject to notarial registration as hereinafter provided fo*r", and Section 17 states that the "*agreement of lease will be executed and notarially registered against the title deed of the whole farm …*". This seems to indicate that the intention is that leasehold agreements are registered in the Deeds Office in accordance with the Deeds Registries Act and the Land Survey Act.

2.3.6 Leasehold rights in terms of the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970)

The Subdivision of Agricultural Land Act 70 of 1970 (SALA) makes provision for the Minister responsible for Agriculture to be consulted and to provide consent for the subdivision

9 A "lease" can be defined as "a contract by which one party conveys land, property, services, etc. to another for a specified time, usually in return for a periodic payment", and a "leasehold" can be defined as "the holding of property by lease" or "a property held by lease" (www.google.com). The Deeds Registries Act 14 of 2015 defines "lease" as including a right of leasehold to be registered under any law.

10 See Appendix B – Sample MLR Leasehold Agreement.

of any agricultural land in Namibia. No subdivision diagrams may be approved and no deeds registered if this Minister's consent has not been provided where appropriate. As the provision of agricultural leaseholds in terms of the ACLRA and the CLRA generally include the subdivision of land, it is important to consider compliance with the provisions of the SALA.

Land that is excluded from the definition of agricultural land for the purposes of this Act is described in section 1 of the SALA, and includes urban land and communal land. However, for the purposes of agricultural leaseholds in a designated area, the provision of the SALA would appear to apply. Section 30(2) of the CLRA allows for the granting of agricultural leaseholds in designated areas without requiring consultation with or permission from the TA. The authors would argue that once land is designated and gazetted, it is no longer used communally, and if the designated portion of land is subdivided, the provision of the CLRA could be argued to apply. Similarly, the SALA provides in section 3(d) that the registration of any leasehold right for a period longer than 10 years is subject to the consent of the Minister responsible for Agriculture. This could be argued to mean that even if the land is still considered communal, once a leasehold right is to be registered for a period of more than 10 years, the provisions of the SALA would apply. However, this is quite a technical legal question and no firm conclusion should be drawn as to the application of the SALA to the subdivision of designated agricultural land in a communal area.

The ACLRA[11] contains a clause that exempts the MLR from requiring the consent of the Minister responsible for Agriculture, but only requires consultation. It also provides for the Surveyor General to approve any subdivision diagrams and for the Registrar General to register any transfers of such land. This would include any leasehold right longer than 10 years. As a result, the subdivision and registration of resettlement leasehold does not require consent from the MAWF. It is not clear whether evidence of the consultation must be submitted to the Surveyor General and the Registrar General, but it could be argued that in order to ensure administrative justice, such evidence should be submitted.

2.4 Description of the process model for the registration of lease agreements

Step 1

The process for the registration of communal and commercial leaseholds starts with the acquisition of the land by the state. In the case of the resettlement programme this is in most cases fairly straightforward as the land is acquired through the purchase of

11 See section 38 of the principal Act – Act 6 of 1995.

the land by the state from a willing seller.[12] Typically this land is already registered in the Deeds Office in the name of the seller. In this case the agreement needs to be reached only between the state and the seller, and this process is managed in terms of the CLRA.

The MLR has three-and-a-half months[13] to make a decision on whether or not to acquire the land. The MLR "*… shall within 60 days after receipt of an offer … refer such offer to the Land Reform Advisory Commission, which shall consider the offer and make its recommendation to the Minister within 30 days …"*. On receipt of the recommendation from the Commission, the MLR must notify the owner of its intentions within another 14 days.

This does not mean that the transfer of land takes place within the three-and-a-half months; typically the process takes longer because agreement needs to be reached on the terms and conditions of the purchase.

The procedure of applying for a lease agreement over agricultural land falling outside a designated area is different. Non-designated communal land refers to communal land that has not been previously registered in the name of the state or any other individual, and therefore is under the jurisdiction of a TA. In this case the TA and the CLB must consent to the leasehold application, which is then forwarded to the Minister for his consideration and final approval. This can be a somewhat cumbersome process, but once agreement is reached about the parcel of land that is to be leased to the applicant, the land must first be demarcated. If the land is designated as agricultural, then the Minister's permission is not needed. There are no minimum time periods described for the allocation and the manner of dealing with communal leasehold applications. However, experience has shown that this is a lengthy process taking in the order of years, not months. Interviews with officials of the MLR and the Mangetti Farmers Association confirmed that only five communal leaseholds had been signed in the case study area to date, none had been registered in the Deeds Office, and no agricultural leaseholds had been signed.

Steps 2 & 3:

Once the land has been identified for acquisition, it must be registered in the name of the state in the Deeds Office. In the case of the commercial leasehold (where land has been acquired by the state for resettlement purposes), the transfer is executed by an endorsement on the existing deed of transfer in favour of the MLR or its representatives. If the land has never been registered before, the state may alienate the land by deed of grant to the leaseholder, provided that such deed of grant refers to the title deed by

12 Land may also be expropriated, but this is an infinitely more complex process, and one which is not considered here due to the fact that government has not really exercised this option thus far. When it has expropriated land for land reform purposes it has not gone well for the government. (See Harring and Odendaal, Kessel: *A new Jurisprudence for Land Reform in Namibia*, 2008.)

13 See section 17(5) of the amended ACLRA – Act 13 of 2002.

which the state holds the land. It is important to note that communal land would typically not have been registered in the name of the state before. There are exceptions to this rule, such as the surveyed Mangetti farms in Oshikoto Region under consideration in this case study, but this is not expected to be the norm.

Therefore, this would require that before land over which the communal leasehold is to be registered may be alienated, it must first be registered in the name of the state in the Deeds Office. This process, referred to in the CLRA as "designation", effectively excises the designated land from the jurisdiction of TAs and vests ownership rights in the state. Only as the registered owner of land can the state alienate the aforementioned rights by way of a leasehold agreement. This appears to have been an area of contestation between the Deeds Registry and the Ministry.

The expectation is that, as per the CLRA, the relevant CLB has the power to allocate leasehold rights over land for agricultural purposes in a designated area.[14] But, even if the leasehold right has been granted and the conditions of section 32 of the CLRA have been met, the leasehold right is still not registerable in the Deeds Office unless the land has been formally surveyed. The Deeds Registries Act also requires that the lessor of any lease agreement must consent, and must have the legal authority to transact with that land. In other words the lessor must be the registered owner of the portion of land in question as described in section 14 of the Deeds Registries Act. This requires that the portion of land that is the subject of the lease agreement must be registered in the name of the lessor (deed of state title) in the Deeds Office.

The registration of a lease amounts to the alienation of state land, and the Minister of Land Reform cannot alienate state land without prior consultation with the Minister responsible for Works.[15] There are no durations specified for this consultation process, but a period of three months has been allocated for it, to make sure that the Minister of Land Reform has enough time to consult the Minister of Works. This is probably an over-optimistic estimate of the time needed for such a process.

For both communal and commercial lease registrations, a period of one month has been allocated for the execution of the deeds in the name of the state. The legal paperwork must be prepared by a conveyancer and submitted to the Deeds Office for examination.

Steps 4 & 5

Once the state has formally acquired the rights to the land, several crucial steps must be taken to ensure that the leasehold agreement can be registered in the Deeds Office.

14 See section 30(2)-(3) of the CLRA (Act 5 of 2002).
15 See section 14(5) of the Deeds Registries Act 14 of 2015.

The state typically allocates a freehold farming unit which it has acquired to more than one lessee. The ACLRA requires the MLR to prepare for the allocation by drawing up an allotment plan and advertising the units indicated in the plan. However, these allotment plans are not formal subdivision plans and they have no legal standing as subdivision plans. Normally, for the allotment to carry the weight of a legal subdivision, the formal consent of the Minister responsible for Agriculture must be applied for in terms of the Subdivision of Agricultural Land Act 70 of 1970 (SALA). In terms of the ACLRA, the Minister of Land Reform need only consult the Minister responsible for Agriculture,[16] i.e. the ACLRA does not say that this consultation requires the consent of the Minister of Agriculture, but it makes sense that the latter gives consent in terms of the SALA. A review of the survey files for the case study area did not contain any agricultural consent in terms of the SALA, nor any evidence of other consultation with the Ministry of Agriculture, Water and Forestry (MAWF), but this does not imply that no consultation took place.

Once the consent is applied for and approved (or the consultation has taken place), the land may be formally subdivided into the individual allotments and surveyed in terms of the Land Survey Act, in order to register leasehold rights over those parcels. The parcels are then registered in the Office of the Surveyor General, and must be appended to the lease agreements. At the same time the leasehold agreements can be signed between the lessor and lessee.

In the case of communal land, it can be assumed that the spatial extent that is the subject of the lease agreement has to be specified. There is no clause in the CLRA indicating that the SALA does not apply to the subdivision of land designated for agricultural purposes in terms of the CLRA. The land on which the agricultural leasehold applies would also typically be in an area designated by the Minister as agricultural land, and would have to be subdivided in order to allot individual parcels for the registration of leaseholds. As such, in terms of the definition of agricultural land, it is argued that the consent of the Minister responsible for Agriculture is in fact required.[17]

This interpretation is supported by evidence showing that in 2001 an Agricultural Consent (Consent No. 01178)[18] in terms of the SALA was requested and granted for the subdivision of communal land in Eastern Reserve No. 792, located south-west of Grootfontein next to the Otjituuo Reserve.[19] This land is formally surveyed and held by the Government of Namibia under Certificate of Registered Title T5331/1998, even though it is treated as communal land. The application for the consent supports the proposition that a subdivision of communal land designated for agricultural purposes requires the consent of, and not just consultation with, the Minister responsible for Agriculture.

16 See section 38(1) of the ACLRA (Act 6 of 1995).
17 See section 1 of the SALA (Act 70 of 1970).
18 See Appendix F – Agricultural Consent No. 01178.
19 See Appendix G – Locality Plan for Eastern Reserve No 792.

This situation is replicated on the farms in the Mangetti area in Oshikoto Region, which are formally surveyed but have not been registered in the names of the individuals occupying them. No agricultural consent could be found in this study, but this does not mean that consent has not been granted. Nonetheless, no leasehold in respect of the Mangetti farms can be registered in the Deeds Registry if the Minister responsible for Agriculture has not consented to the subdivision of these parcels in accordance with the requirements of the SALA. Section 3(d) of the SALA states that "*no lease in respect of a portion of agricultural land of which the period is 10 years or longer, … shall be entered into; … unless the Minister has consented in writing*". Thus the consent of the Minister responsible for Agriculture must be sought, if not already provided, to make possible the registration of these leaseholds on the Mangetti farms.

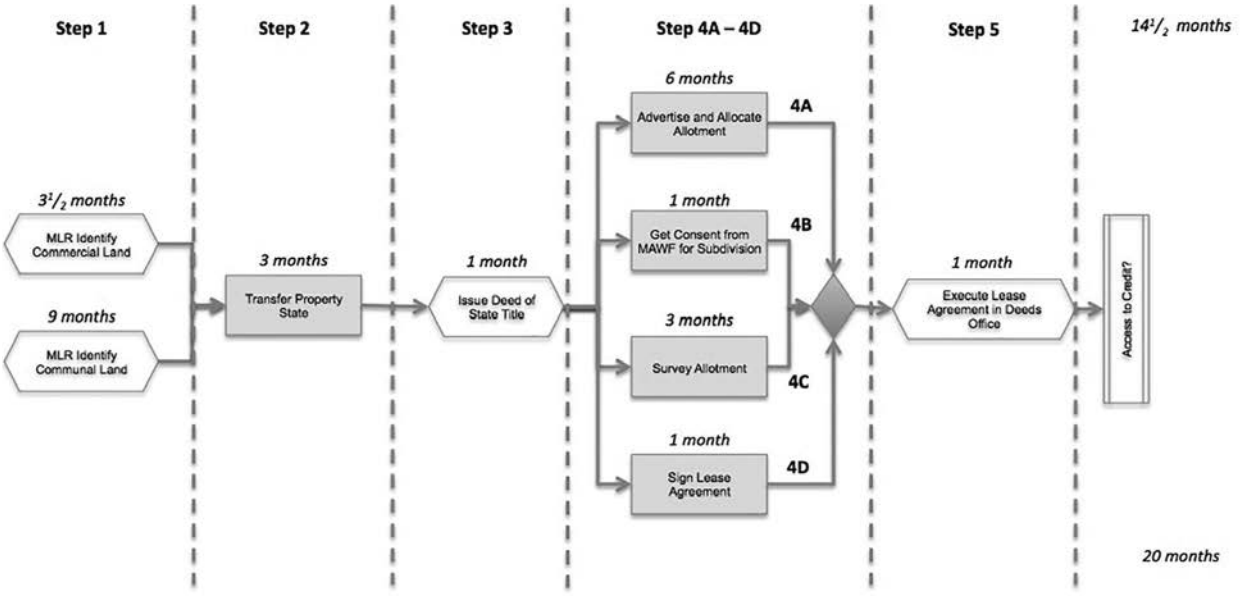
It is therefore argued that any designation of communal land for agricultural purposes should require the consent of the Minister responsible for Agriculture as per the SALA's requirements, i.e. this Act requires that any leasehold right for a period of 10 years or more be treated as a subdivision requiring the consent of the Minister responsible for Agriculture.

In addition, the lease agreement must contain the diagram of the formally subdivided parcel to enable registration in the Deeds Office. The CLRA also requires that all leases for a period of 10 years or more must be registered in the Deeds Office. Section 33 of the CLRA states the following:

> ***33.*** *(1) Subject to subsection (2), if an application for a right of leasehold is granted by a board, the board must –*
>
> *(a) cause such right to be registered in the prescribed register in the name of the applicant; and*
>
> *(b) issue to the applicant a certificate of leasehold in the prescribed form and manner.*
>
> *(2) If the land in respect of which the right of leasehold is granted is surveyed land which is shown on a diagram as defined in section 1 of the Land Survey Act, 1993 (Act No. 33 of 1993) and the term of lease is for a period of 10 years or more, the leasehold must be registered in accordance with the provisions of the Deeds Registries Act, 1937 (Act No. 47 of 1937).*

This implies that the CLB must ensure that the registration is effected in the appropriate register, irrespective of whether the appropriate register is that of the CLB or the Deeds Office.

Figure 1: **Process Model for the Registration of Commercial and Communal Leasehold Agreements**



2.5 Analysis of the process for the registration of leasehold rights

For Oshikoto's commercial farms and Mangetti farms constituting the case study area, no leasehold rights have been registered in the Deeds Office. The steps that must be taken for registration (as outlined in Figure 1 above) are essentially the same for commercial and communal agricultural leaseholds – only Step 1 is not the same.

In the case of the commercial farms, Steps 1, 2 and 3 have been complied with. This is expected as the farms are transferred from the willing seller to the state. However, it seems that after the acquisition of the land, problems arise at different points as regards the registration of the leasehold agreements in the Deeds Office.

In the case of Farm Urwald No. 1150, where a group resettlement scheme was started in the 1990s, there is evidence of increasing informal subdivisions taking place. The records suggest that the farm was initially subdivided into three lease areas – "A" (2 632 ha), "B" (1 501 ha) and "C" (710 ha) – for which a survey diagram exists. Prior to this an attempt was made to subdivide the farm into 115 plots of 10 hectares each, in accordance with a layout plan which is mentioned in correspondence but could not be traced. Whether this plan covers only one of the three portions could not be determined. However, we know that no leaseholds were registered on this farm, and it seems that no leasehold agreements were entered into, thus Steps 4 and 5 were not completed.

This pattern was more or less repeated on all the other farms – with one or more sub-steps of Step 4 completed in some cases. Generally subdivision diagrams exist, but it cannot

not be established whether people were resettled in accordance with the subdivision plan. This is because the occupants themselves generally had no map or defined spatial extent for their allocations, even though they made reference to camps and fences. Short of conducting a detailed survey to re-establish the boundaries, it is not possible to determine whether the occupants were resettled in accordance with the subdivision plan held in the Office of the Surveyor General. Although the subdivisions were effected very recently (2014-2015), it could not be established whether this was done in anticipation of signing leasehold agreements with the occupants. If such agreements were anticipated, then it is reasonable to assume that the surveys were conducted in accordance with the current spatial arrangement and occupation of the allotments.

Secondly, most respondents had some sort of letter of allotment/allocation, but only one had an actual lease agreement, although it was not registered. This respondent had also applied for a loan, with fixed property in an urban area serving as security. Therefore, this person is clearly familiar with the process of registering property and a mortgage in the Deeds Office. On this farm significant production was noticeable, with charcoal manufacturing and planting and harvesting of hay and lucerne amongst the activities witnessed. However, in order to register the leases in the Deeds Office, Steps 4C, 4D and Step 5 would still have to be completed. This is likely to mean that the portions have to be surveyed again, or at least that a beacon relocation survey has to be conducted, and that lease agreements have to be signed. Once the lease agreements have been completed and signed, they would have to be submitted to the Deeds Office for examination and registration. It is likely that the same would apply for most of the other farms allocated for resettlement.

In the case of communal agricultural leaseholds on the Mangetti farms, the study found that the farms had not yet been registered in the name of the state, as is required by the CLRA for the registration of leaseholds in the names of the beneficiaries, although the farms had been surveyed and the records lodged with the Office of the Surveyor General. The Mangetti area has been designated as agricultural land, therefore it can be registered in the name of the state in the Deeds Office, but Steps 3, 4 and 5 would still have to be completed.

Typically in a designated agricultural area, the surveying would have to be carried out and the leasehold agreements signed. Legally the subdivision of the land would happen after the designation of the land as an agricultural area, even if in practice the survey of the subdivision happens at the same time. As designation extracts the land from the communal regime, the SALA would apply and an agricultural consent must be obtained, and this would apply to the Mangetti farms too. Generally in the Mangetti area, the farm occupants or potential lessees are known, and could be relatively quickly and definitively established for the purpose of entering into lease agreements. The registration of the leases in this area could then be a relatively straightforward matter.

3
Transaction Costs

In 2014 the Minister of Lands and Resettlement stated that the process of registering a notarial lease agreement is lengthy and cumbersome. It involves several stakeholders such as the MLR and the MAWF as well as a notary public who must be appointed by the Attorney-General.

"*On the other hand some beneficiaries are refusing to sign the lease agreements thus it becomes difficult to submit such leases to be converted into notarial* [sic]."

– Minister of Lands and Resettlement, 2014, p.10.

Despite the fact that leaseholds are registerable, it seems that almost none are being registered in the Deeds Office. This represents a significant constraint on the ability of rights holders to invest in their property and access credit, which in turn limits their ability to commercialise production as intended by the institutional framework described in the previous section of this report. There could be a number of reasons for this inability to register leasehold rights in the Deeds Office as intended. One reason offered in the literature generally is that institutional frameworks are often not supportive of the policy goals which they are meant to support, but this was not found to be the case in this study, which found instead that the existing institutional framework generally supports, encourages and in some instances requires the registration of agricultural leaseholds. The process does not seem to be excessively complex, lengthy or different to what is generally regarded as the norm in Namibia for the registration of leaseholds.

An aspect of the institutional framework that could be a barrier to registering leaseholds is the cost of transacting. To determine whether transaction costs in Namibia are indeed impeding this registration, this study sought information about the costs associated with the registration of leaseholds.

Transaction costs are costs incurred in an exchange of goods and services. In the case of registering an agricultural leasehold, costs are incurred for acquiring the relevant rights and then for registering those rights, and these costs exclude the purchase price, if any

(De Vries, Lewis & Georgiadou, 2002). This is a narrow definition of "transaction costs", but it suffices for calculating these costs for the purposes of this report.

De Vries et al. (ibid.) identified four main types of transaction costs:

- government fees;
- professional fees;
- taxes; and
- opportunity or investment costs.

The transaction costs for the registration of one agricultural leasehold plot of between 1 000 ha and 1 500 ha in the Mangetti area are presented in Table 1 (next page). These costs include only the government fees, professional fees and taxes. Investment or opportunity costs are not included in this calculation as they are difficult to quantify. However, the investment cost is discussed separately further on.

At first glance, the fixed transaction costs (government fees, professional fees and taxes) appear to be significant and would lead many to conclude that this is not affordable, given the perceived scale of economic activity on many resettlement farms. However, the cost should be seen in the context of the value of the asset and the advantages that may accrue from the registration of the leasehold agreement. Using commercial rates, the minimum value of land is currently at around N$1 000 per hectare for unimproved land. For a communal land parcel to be used for an agricultural leasehold of between 1 000 ha and 1 500 ha in size,[20] this would translate to a communal land parcel value of between N$ 1 000 000 and N$ 1 500 000, with the transaction costs constituting between 3.5% and 5% of the value of the parcel.

This is a relatively low transaction cost if compared to global standards for transaction in real estate. Transaction costs in Finland constitute approximately 10% of the value of the property (Zevenbergen, Frank & Stubkjaer, 2007). Transaction costs as a percentage of the property value measured across 25 countries vary from as low as 0.1% in the United Kingdom to 27% in Nigeria. The only other countries where the transaction costs exceed 10% are Belgium (12.8%) and Greece (13.7%) (ibid.). This clearly demonstrates that the transaction costs for registration of an agricultural lease of 99 years is very much within the norm globally, and would not generally be considered an obstacle to registration.

It is assumed in the calculation in Table 1 that the average farm size is between 1 500 ha and 2 000 ha. The fees increase slightly as the parcel size increases. So, for example, the fee for a parcel of 1 000-1 500 ha would be N$20 268. As the number of parcels to be surveyed increases, there is also a slight reduction in the fee per parcel surveyed.

20 No significant study has been conducted to determine the average size of agricultural leaseholds in communal areas. However, this is representative of the farm sizes in the Mangetti case study area.

Table 1: **Leasehold Registration Fees in Mangetti, Oshikoto Region, Namibia**[21]

Type of Fee	Activity	Cost (N$)
Government Fees	Applying to Communal Land Board (CLB)	25
Government Fees	Obtaining the certificate	50
Professional Fees	Surveying the land	21 646
	Preparing the diagram	500
Professional Fees[1]	Transport: Windhoek – 1 200 km @ N$ 10,07 per km	12 084
	Accommodation: 1 surveyor N$ 1 054; 1 assistant N$ 820	3 748
	Time: N$ 647 per hour for 16 hours	10 352
	Time: N$ 450 per hour for technical assistant for 16 hours – 0.15% of N$ 300 000	7 200
Professional Fees	Lodging the deed	300
Professional Fees	Preparing and lodging the deed at the Deeds Registry (conveyancer fee)	2 500
Taxes and Stamp Duties	The taxes would be calculated as a percentage of the purchase price, but are not applicable in this case.	0
	Stamp duties would typically be waived in the case of state property being alienated.	0
Total Fees		**58 405**

1 These figures are based on the assumption that the land surveyor is travelling from Windhoek to survey a communal leasehold located in the Mangetti area, but the same kilometre fee applies irrespective of where the surveyor is travelling from.

Source: Adapted from Bayer, 2012, p. 20.

If it is considered that commercial land values for agricultural properties in Namibia are currently above the production value of the land, it is appropriate to compare the transaction costs to the production potential of the parcel. Rough calculations suggest that a cattle farmer on a parcel of 1 000 ha producing under optimum conditions (such as appropriate rainfall, no bush encroachment, suitable infrastructure and sufficient water sources for animals) would have an annual profit of N$ 49 000. With this income, the farmer would be able to service a loan of about N$ 60 000 over five years (see Tables 3 and 4 on page 46). Assuming that registration costs have to be borne by the lessee, these would be equivalent to one year's income, or if the farmer were to spread the costs, they would typically be affordable over a five-year period – if she/he requires no capital for other activities. This is a significant cost burden for the lessee, but not prohibitively so, if the leasehold period is the generally accepted 99 years. Therefore, while it can be concluded that the transaction costs are significant, they are perhaps affordable in the long term given the period of the lease. However, it is still a significant burden for a cattle farmer, given the low-income potential of the farms. The national income taxation

21 For comparison we calculated the cost of the transfer of a house valued at N$ 2 000 000, assuming that there are no survey costs and including only the conveyance fees, stamp duties and taxes. The estimated total cost of this transfer is N$ 85 665 – the stamp duties and taxes costing N$ 68 300 and the professional (conveyancer) fees costing N$ 17 365.

regime in Namibia exempts people earning less than N$ 50 000 per annum from paying tax, as they are considered to be amongst the lowest wage earners.

This indicates that the problem is not the registration costs per se, but rather it is the small sizes of the parcels that have to be registered, considering their economic potential. This is an important point because the requirement that the subdivision of agricultural land is subject to approval from the MAWF has been waived in the ACLRA. This creates the possibility that land will be subdivided into units that are not economically viable. Combined with the resettlement of asset-poor individuals, it becomes inevitable that leaseholds will not be registered due to the leaseholders' inability to service loans, rather than the cost being exorbitant or the institutional framework being unusually complex.

In the case study area, the cost of surveying is by far the largest component of the transaction costs – 95.5% of the total cost. The cost per unit drops significantly if more than one parcel is surveyed at the same time. Travel and accommodation costs are also significantly reduced, as the travel cost may only be charged once for a survey. Therefore, if multiple agricultural leaseholds are surveyed at the same time in a designated area, the costs can be significantly reduced to about 50% of the current cost per parcel.

All of the farms in the Mangetti area have been surveyed[22] as have the resettlement farms visited, at least in the case of individual allotments.[23] Despite the fact that more than 95% of the registration costs have already been incurred, leaseholds have still not been registered. That the leaseholds have still not been registered indicates that even if the costs of registration are significant, they are not a sufficient condition preventing the registration of parcels. Therefore it is reasonable to conclude that the fixed transaction costs are not the only consideration, and that some other conditions exist that discourage or prevent the registration of the leasehold agreements.

As noted earlier, the transaction costs reflected in Table 1 are not the only fixed costs; there are also investment or opportunity costs to consider. These are costs for alternative uses such as alternative investments or the risk associated with the investment. In the case study area there is no scenario equating with the example used by De Vries et al. (2002), where the opportunity cost was based on the cost of the investment in subdividing the properties. As investment or opportunity costs are difficult to quantify in the case study area, to discuss these costs, one must revert to the understanding of institutions and their impact on economic activity as developed by North (1990).

The transaction cost theory of exchange as outlined by North (ibid.) offers an interesting perspective that is very useful in seeking to understand the transactions in the case study

22 See Appendix C – Example of Approved Survey Diagram for Mangetti Farm No. 1240.
23 See Appendix E – Example of Approved Survey Diagram for Lease Area 'A', Farm Excelsior No. 825.

area. In essence he argues that besides the fixed transaction costs considered above, one should consider the cost of measuring the valuable attributes of the objects of exchange as well as the cost of enforcing agreements. Zevenbergen et al. (2007) describe these costs as costs that may arise prior to and after an agreement. Therefore the ex-ante costs (costs prior to the agreement) and ex-post costs (costs after the agreement) may be considered as the measurement cost and the enforcement cost respectively.

The cost of measuring an attribute value in exchange is significant, especially in communal areas, where the restriction on land sales prevents the determination of a market value for the commodity. Also, in these areas there are no other clear instruments in place for measuring the value of the assets (e.g. production) under consideration. This cost of determining value is further increased by the cost of access to information. Parties transacting often do not have the same information at their disposal, and this allows for parties to reveal or not reveal what they know about the value of the asset being transacted upon. North (1990, p.31) argues as follows:

> *"Because it is costly to measure valued attributes fully, the opportunity for wealth capture by devoting resources to acquiring more information is ever present. … The more easily others can affect the income flow from someone's assets without bearing the full cost of their action, the lower is the value of that asset."*

This means that the persons who have the ability to influence the residual value of an asset should be the rights holders, or to put it another way, when persons acquire the rights to an income stream, they should be the determinants of the asset value. In practical terms this means that rights holders of agricultural leaseholds should have control over the value of their asset so that they may take responsibility for their investment decisions, otherwise the asset value will remain low. Leaseholders should be able to transact with their rights without the government holding residual rights over the asset, which serves to lower the asset value.

Several examples of this cost can be seen in the agricultural leaseholds examined thus far. In some instances farmers are allocated a resettlement leasehold where the water right is located on another person's holding, with a condition that the water must be shared. This creates a scenario where one leaseholder, Leaseholder A, who does not have water on his land, is subject to decisions taken by Leaseholder B, who does have water on his land. According to North (1990), this means that Leaseholder A's income flow from his use of his asset can be affected by an action of Leaseholder B who does not bear the cost of his action. This reduces the value of the asset, and also renders the investment in production sufficiently insecure to lessen its worth.

Moreover, this scenario significantly increases the risk to which investors are exposed, whether the investor is the leaseholder or a financial institution that he approaches for

a loan. In fact the researchers argue that this risk is so high that it arrests the potential for further investment, with the result that little to no economic development will take place. Likewise, the financial institutions interviewed stated that this risk element makes it impossible for them to finance any activity in which the lessee is not fully responsible for decisions taken, and that no other party should be able to take decisions which have the potential to fatally compromise the lessee's economic activity and viability.

The enforcement of agreements does not happen automatically and is not costless. If leaseholders' rights are infringed and they have no immediate remedies, this adds a risk premium. Similarly, if the lessor – in this case the Government of Namibia through the MLR – reaches an agreement with the lessee but does not contribute to upholding the agreement, then the lessor creates insecurity. An example would be a restriction on the use of resources such as game, wood or stone on a farm for economic benefits. Such a restriction requires that the state monitors and supervises the lessee's use of these resources through regular inspections, and this generates costs. Unless there is good enforcement of such agreements, they are likely to result in one party neglecting its responsibility and the other party carrying the cost of that neglect. Generally, the higher the costs and the risk, the less the likelihood of significant economic development.

4
Using Leasehold as Collateral

Across the continent, the predominant form of land rights formalisation has entailed the conversion of various forms of customary land rights into freehold title. The most prominent example in this regard is Kenya. Leasehold as a form of formalised land rights is far less common (Platteau, 1996, p. 50). Not surprisingly, therefore, the bulk of the existing literature on the impact of formalised land rights on the uptake of credit and increased farm productivity in Africa and elsewhere has focused on freehold title. According to key informants in Namibia's commercial banking sector, it is very rare that loan applicants offer registered leasehold as collateral, partly because freehold title is so common. In many ways, therefore, an extension of loans to the growing small-scale farming sector in the communal and freehold agricultural sector, which will hold land under lease from the state, is new territory. It should be pointed out that although this study focuses on the resettlement farming sector, the findings apply equally to the communal areas where farmers will be able to enter into registered lease agreements with the state. In both cases, the residual rights vest with the state as lessor (Bruce, 1986, p. 59).

4.1 Experiences with land titling programmes

The anticipated increase in credit uptake and subsequent economic development as a result of land titling programmes has not materialised in most parts of the continent. There is considerable evidence relating to the conversion of customary land rights into freehold title, which suggests that although tenure security was important for agricultural development, land titling was not a critical factor in promoting economic development (Moyo & Chambati, 2012, p. 66).

> *"Rather, a wider range of investments and agricultural policies involving state agricultural interventions, private market and investment incentives and direct support to small producers have been critical in promoting agricultural growth and development … even though the scale of this remains limited."* (Ibid.)

A recent review of evidence on the impact of land property rights interventions on investments and agricultural productivity, by Lawry et al. (2014), found little evidence

that the formalisation of land rights, mostly through titling programmes, increases the use of such land as collateral. The authors identified the following reasons for this finding (ibid., p. 63):

- The character of properties: Properties of small-scale farmers – which in this review were smallholdings of the rural poor – may not be attractive to financial institutions as collateral, regardless of their tenure status.
- Secondly, and importantly for this study in Oshikoto, tenure status does not affect the bankability of landholders. Lawry et al. cite research from South Africa which suggests that the most important factor leading to poor credit uptake by small-scale farmers is asset poverty, i.e. the fact that farmers do not have sufficient capital or equity to leverage a loan.
- Poor access to information.
- The length of time taken to process loan applications.
- The quality of business plans.

Although the experiences discussed in the review refer to tenure reforms introducing freehold title into customary systems, the cited evidence is helpful in discussing the slow pace of leasehold registration and its use as collateral in Namibia. The common thread between such tenure reforms and the Namibian situation is that in both cases formalised property rights are expected to lead to an increased use of registered land rights as collateral for loans in order to improve agricultural productivity. The main difference is that the extension of leasehold in communal areas and the resettlement sector is voluntary, i.e. it responds to a demand by certain sectors of the population.

4.2 What is collateral?

In view of the many simplistic notions of what collateral means and implies, it is in order to look at an actual definition of the term. This is how *Investopedia* defines "collateral" (www.investopedia.com, accessed 11 June 2016):

> "*Collateral is a property or other asset that a borrower offers as a way for a lender to secure the loan. If the borrower stops making the promised loan payments, the lender can seize the collateral to recoup its losses.*"

Fundamental to collateral is the ability of the lender to take possession of the leased land if the debt repayments cease. This is done through a process called "foreclosure", whereby the lender takes possession of the property and can then sell it to get back the money that it loaned. A more comprehensive legal definition of "foreclosure" is as follows (http://legal-dictionary.thefreedictionary.com/Foreclosure, accessed 20 October 2016):

> "*A procedure by which the holder of a mortgage – an interest in land providing security for the performance of a duty or the payment of a debt – sells the property upon the failure of the debtor to pay the mortgage debt and, thereby, terminates his or her rights in the property.* Statutory foreclosure *is foreclosure by performance of a power of sale clause in the mortgage without need for court action, since the foreclosure must be done in accordance with the statutory provisions governing such sales.*"

Land cannot serve as security or collateral unless the rights to it can be traded. Atwood (1990, p. 664) pointed out that without an active land market that allows for easy land transfers, collateral has little economic value:

> "*Banks are not likely to accept as collateral land for which foreclosure in case of default is difficult, costly, or forbidden by law or social custom. In addition, banks are likely to accept land as collateral only in situations where the land market is sufficiently active for foreclosed land to be disposed of fairly easily.*"

Land must be easily transferable to a person who wants to use it and is prepared to pay a price that is sufficient to cover the outstanding debt. Moreover, it is not sufficient to make legal provisions for the mortgagability and transferability of leased land in the absence of a pre-existing "*market and reliable, effective demand upon which a market relies*" (ibid.) . Permitting mortgagability by law before a land market exists may frustrate expectations (Bruce, 1986, p. 40).

To summarise: "*If foreclosure is impossible, land loses its attractiveness as collateral.*" (Binswanger & Van den Brink, 2005, p. 280)

However, collateral is only one requirement for securing a loan. Even more important is the loan applicant's ability to service the loan, which depends on his or her assets. This ability or requirement is commonly referred to as the applicant's "bankability", an issue discussed in Sections 5 and 6 of this report.

In identifying impediments to the use of leased resettlement land as collateral, it is useful to follow Platteau's (1996, pp. 59-63) conceptualisation of these as failures in supply and/or demand. Supply failures relate to financial institutions and demand failures relate to possible reasons for beneficiaries not using their land as collateral for loans.

5
Supply Failures

In the context of this study, supply failures relate to financial institutions being unwilling or unable to extend loans to the small-scale farming sector. In the Namibian context this refers to land parcels redistributed under the National Resettlement Programme. The recommended minimum sizes of these parcels range from 1 000 ha in the northern regions to 3 000 ha in the southern half of the country. In the non-freehold or communal areas, small-scale commercial farms are on average 2 500 ha in size.

In Namibia and elsewhere in Africa, the main reasons for financial institutions being reluctant to accept registered titles or leaseholds as collateral for loans include any of the following, according to Platteau (2000, pp. 60-61) and Barrows & Roth (1990, p. 295):

- The judicial system is ineffective or partial. If political pressures prevent foreclosures, lenders are not likely to accepts registered leaseholds as collateral (Barrows & Roth).
- Foreclosing may be difficult because of the presence of extended families on the land.
- Ineffective operation of the land registration system: Failure to maintain valid records of succession leads to an absence of updated records. Government may not have the resources to monitor or control land exchanges.
- The continued strength of customary tenure rules may result in failures to register transactions such as subdivision among sons, for example.
- Bankers prefer lending against income streams that are more reliable than agriculture.
- Administrative costs may lead credit institutions to minimum loan sizes or refusal to lend "*on the ground that their property is costly to dispose of in the event of foreclosure due to the tiny size of fragmented landholdings*" (Platteau, p. 61).
- The lack of a market preventing the conversion of foreclosed land into a financial asset (Barrows & Roth).

To summarise: Supply failures exist where land records are at variance with the reality on the ground and the registered lessee cannot be clearly identified. This may be the result of inadequate land and property rights registration systems, or people other than the registered lessee obtaining derived rights on his/her land parcel. As will be shown further on, this is a common situation in Namibia's resettlement sector and on many small-scale commercial farms in this country's communal areas. Financial institutions will remain hesitant to advance loans if foreclosure involves having to clarify land rights.

5.1 Namibia's financial institutions

There are two broad categories of financial institutions in Namibia: commercial and developmental.

There are four major commercial banks in the country: Bank Windhoek; First National Bank (FNB) of Namibia; Nedbank Namibia; and Standard Bank of Namibia. The financial policies of these institutions are guided by purely commercial principles. This involves managing risks associated with loans to ensure that loans will be granted to enterprises that are financially and economically as well as environmentally sustainable. Typical risks include the following (J. Cloete, FNB, pers. comm., 7 June 2016):

- Financial risk: What is the applicant's financial position and can the applicant honour his/her commitments? Of what quality are the applicant's assets? Is the applicant's enterprise under- or over-capitalised?
- Affordability or repayment risk: Is the applicant's cash-flow position healthy? Can the loan be repaid?
- Credit risk: Is the applicant able to service the loan? What is the applicant's mortality risk? Of what quality is the security provided?
- Performance risk: What is the applicant's age and state of health? Does the applicant have a succession plan? Does the applicant have the skills and infrastructure such as water, fences and implements to farm the land sustainably?
- Farming risk: This refers to drought, floods, hail, disease, etc.

Then there is Agribank, which also operates along commercial lines, but with a strong developmental mandate. Unlike commercial banks, this bank is partly capitalised by the state for specific developmental purposes, such as providing subsidised loans to various categories of farmers.

In Namibia there appears to be no history of financial institutions accepting registered leasehold as collateral for loans. The three commercial banks consulted in this study mentioned only two or three such cases each. However, all three expressed an interest in principle to get involved in the small-scale farming sector, arguing that it is less risky to provide small loans to a large number of farmers than to provide large loans to just a few farmers. Presumably a large number of smaller loans spreads the risk of lending more widely. Using registered leaseholds as collateral for a loan is thus uncharted territory for Namibia's commercial banks.

However, collateral on its own does not suffice to qualify for a loan. Bankability, or an applicant's ability to repay a loan, is considered to be more important than collateral. The following sections discuss both of these loan requirements, after considering the legal framework governing leasehold on resettlement land.

5.2 The legal and regulatory framework

The institutional and legal framework governing leaseholds in the resettlement and communal sectors has been discussed in Section 2 of this report, thus it suffices to say here that the ACLRA does not prescribe an absolute prohibition on mortgaging leased resettlement land, and this is confirmed in a legal opinion obtained by the MLR from the Office of the Attorney-General in 2000:

> "… *once a lease is registered in the deeds registry, it becomes immovable property and therefore it is possible to register a mortgage bond over such lease …* [and] *the lease so mortgaged can be sold in execution if the monies due in terms of the bond are not paid.*" (Attorney-General, 16 August 2000)

Registration of leasehold in the Deeds Office guarantees that the lessee and his/her personal particulars can be easily traced, and that the land leased from the state is properly demarcated by a professional land surveyor. Moreover, the lease period of 99 years provides a lessee with "*a secure expectation of continuing in possession to reap the returns on his investment*" (Bruce, 1986, p. 38). On the formal legal level, therefore, all the elements are in place for using leased land as collateral.

This notwithstanding, the procedures and controls prescribed by the ACLRA amount to "*controls over commercial transactions*" (McAuslan, Behnke & Howard, 1995, p. 31). The ACLRA requires the written consent of the Minister on the recommendation of the Land Reform Advisory Commission for someone to use their leased land as security for a loan. This is spelt out in section 46 of the ACLRA:

> ***46.*** *(1) Except with the prior written consent of the Minister, granted upon a recommendation of the* [Land Reform Advisory] *Commission, a lessee shall not -*
>
> *(a) assign, sublet, mortgage or in any manner whatsoever encumber, or part with possession of the farming unit in question or any part thereof; or*
>
> *(b) enter into any partnership for the working of such farming unit.*

The provisions of section 46 are included in all previous lease agreements, the first of which was gazetted in Government Notice No. 50 of 1999 (*Government Gazette No. 2075* of 1 April 1999). The current pro forma lease agreement was revised in 2004.

Against this background, why banks are reluctant to accept registered lease agreements as collateral for loans is a pertinent question.

5.3 Collateral and tradability of a registered leasehold

Bruce (1986, p. 38) drew attention to the fact that offering land as security is not the only necessary condition for obtaining a loan. In addition, a lender must be able to legally take the land and transfer it to another person at a price that satisfies an outstanding debt. This process is commonly referred to as foreclosure, which, as already noted, is only possible with the written consent of the Minister.

Officials in commercial financial institutions say that inability to foreclose on leased land is the single most important stumbling block in accepting a leasehold as collateral. No legal provisions exist to regulate the terms and conditions under which mortgages may be granted using leased land as collateral. As it stands, the process prescribed by law for lessees to obtain permission to mortgage their land is cumbersome, involving the Land Reform Advisory Commission and the Minister. This is likely to give rise to bureaucratic delays. Moreover, there are no regulations laying down how financial institutions should deal with foreclosure.

In terms of section 50 of the ACLRA, the Minister may cancel a lease if the lessee fails to observe the conditions of lease. With regard to debts of a lessee whose lease is either cancelled or surrendered, the Act only refers to debts due to the state, which remain the lessee's responsibility. No provision is made for possible debts to a financial institution.

In addition, the ACLRA provides for only two kinds of transfers of leased land. The first involves insolvency of a lessee, in which case "*the trustee of the insolvent estate or the liquidator of the company or close corporation, as the case may be, may assign the lease to any person approved in writing by the Minister on the recommendation of the Commission*" (section 52). The second case involves death or mental illness of a lessee, in which event the executor of the estate or a curator "*appointed for a lessee under any law relating to mental health … may assign the lease to any person who is approved in writing by the Minister on the recommendation of the Commission*" (section 53). In both cases a time frame of three months or any period agreed to by the Minister is prescribed, within which the provisions of the Act must be executed, failing which the lease will be cancelled and the land will revert to the state.

The Minister's involvement in these decisions is likely to beget unnecessary bureaucratic delays. Financial institutions have lamented the fact that it is not clear who to approach in the MLR with regard to leasehold and mortgaging issues. The ACLRA does not specify which official in the MLR is to execute a lease on behalf of the state, nor does it stipulate that leases have to be registered in order to be legal (McAuslan et al., 1995, p. 48).

Key informants have also expressed the concern that the absence of clear regulations on how to deal with foreclosed state land may open the door for political considerations

to influence decisions and make it difficult to foreclose on wealthy and well-connected lessees. The only foreclosures in Namibia to date have involved AALS borrowers who defaulted on their loans, and Agribank auctioned off those farms. Despite the absence of any evidence that well-connected and wealthy defaulters were spared foreclosure, it is important that possible regulations are clear on this. Platteau (1996, p. 60) noted that "*registration is obviously ineffective if titled land is not considered a reliable collateral by credit-givers, either because it is difficult to foreclose or because, the market being thin is not easy to dispose of in case of default*".

One possible way to minimise bureaucratic delays is to require that cessions of lease agreements are accompanied by pre-approval to foreclose in the event of a borrower defaulting on his/her repayments.

Private financial institutions raised another issue which is likely to slow down the process of foreclosure in Namibia. This concerns the provisions of Rule 108 of the High Court of Namibia, on the "Conditions precedent to execution against immovable property and transfer of judgments" (Republic of Namibia, 2014). The issue is that this rule "*does not take away the creditor's right to execute against the properties of the debtor, but merely sets down procedures as to how it should be done*" (Miller, 2015, p. 12). The procedures require, among other things, that in the event of foreclosure, less drastic action than the selling of a property should be considered, particularly when the property is the primary or only home of a defaulter. The overall intention of these provisions is to protect single landholders and lessees from becoming landless or homeless as a result of judgements that declare their properties or leases executable.

5.4 Bankability

Making registered leaseholds legally tradable will not suffice to enable lessees to obtain credit from financial institutions.

First and foremost, an applicant for a loan must be creditworthy and able to service the loan (Bruce, 1986, p. 40). Officials of commercial banks consulted in this study confirmed that the ability to repay a loan is more important than the form of collateral. None of these officials entertained security lending, i.e. granting a loan purely on collateral.

Even Agribank as a development bank dispensing loans from a dedicated credit facility for resettlement farmers, namely the Post Settlement Support Fund, requires applicants to complete an 8-page application form which includes a statement on assets and liabilities, income and expenditure (Joint Technical Committee on Post Settlement Support for Resettled Farmers, n.d.(a)). Agribank's "Checklist on Applications" includes the following (Joint Technical Committee on Post Settlement Support for Resettled Farmers, n.d.(b)):

- Valuation report
- Search sheet (BF274a – title deeds registration)
- Surrendering value of policy(ies) / proof of investment(s)
- Lease agreement (or letter of allotment)
- ITC report[24]
- Three credit references
- Salary slips / financial statements of business
- Income statement (if applicable)

These criteria are followed more or less by all financial institutions in Namibia. They are aimed at reducing the lending risk by ascertaining the overall sustainability of the enterprise for which the loan is intended. Typically, a business plan is required to make sure that the applicant has sufficient financial resources and cash flow to keep his/her enterprise afloat and to service the loan.

5.4.1 Financial sustainability of small-scale resettlement farms

The requirement of a business plan to demonstrate the financial viability of an enterprise – and hence demonstrate its bankability – raises the question of whether the average resettlement allotment is commercially sustainable. It is a self-evident truth that no amount of credit is likely to make an unsustainable enterprise sustainable. Farm size is important in determining whether the land can be farmed in a financially sustainable manner. The PTT on Land Reform (2005b, p. 22) has pointed out that "*there is a cut-off point below which a piece of land cannot be farmed on an economically viable basis*", i.e. where the realistic revenues derived from farming are too small to cover living expenses as well as running and maintenance costs. Anything above this absolute minimum has to be determined by the income expectations that people have. This is essentially a socio-political question: whether the expected income should be pitched at the level of a Permanent Secretary, Director or Deputy Director is the subject of negotiations.

The waiving of the requirement that the MAWF must consent to the subdivision of agricultural land also raises important questions, concerning the sizes of the units (and sustainable farming) that are allocated for farming in the resettlement programme. If the MAWF, which is responsible for agricultural production in the country, does not have the power to prevent the subdivision of land into unsustainable units, then it is possible that this will inadvertently happen in the resettlement programme. This is key in determining the financial sustainability of the leasehold farming operations.

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24 ITC is the former name of what is now the Trans Union Credit Bureau, which checks loan applicants' credit behaviour by checking "*… what debt you have incurred over the past 24 months and if there has been any critical changes to your credit profile. These changes can include negative listings such as a late payment to your account or non-payment which could lead to a judgement against you.*" (www.itc.co.za, accessed 24 October 2016.)

This question of potential farm income is fundamental in discussing the importance or otherwise of using registered lease agreements for loan purposes. If an applicant cannot service a loan due to a lack of assets, cash in particular, and therefore does not qualify, the major impediment to investments on the farm is not primarily a tenure or collateral issue, but asset poverty, which is discussed in section 6.4. This calls for different interventions that commercial banks and Agribank are not likely to be able to provide.

5.5 Derived rights

For collateral to have value for financial institutions, the underlying registered right must accurately reflect the actual rights and obligations as well as the subject holding the rights as reflected in the lease agreement. On a formal legal level this is guaranteed by registering a lease agreement in the Deeds Office. Situations can arise, however, where the situation on the ground is at variance with the registered right. This is likely to cause financial institutions to be hesitant to accept registered lease agreements as collateral, as these are encumbered in a sense, not financially, but by people who rely on access to the land.

It is not uncommon that people other than the registered lessee obtain secondary or derived rights to the leased land. To start with, the conditions of lease include a provision which obliges lessees –

> *"to use in common with other lessees on the farm in which his property forms a part, all boreholes, windmills, pumps, water pipelines and such other installations established for the supply of water, whether it is situated within the boundary of his or her property or not, and shall also jointly with such other lessees be responsible for the maintenance of such installations normal wear and tear"* (MLR, 2004, p. 5).

These conditions are intended to ensure that those beneficiaries who do not have water points of their own on their farms, are not deprived of access to water. However, the system is prone to disputes. Apart from potential disputes between the lessee and the neighbouring beneficiary who is dependent on the former's water, such disputes can potentially be amplified when a financial institution seeks to attach the land for resale. This also increases the risk for the financial institutions and the owners, because the person holding the rights to the water may make decisions affecting the former's ability to economic activity. It has been indicated in Section 3, on Transaction Costs, that this ability of third parties to take decisions that affect the lessee, without being held accountable for their decisions, greatly increases the risk for the lessee. This increased risk for the economic sustainability of the undertaking is a current and significant deterrent for banks. Thus the lessees are often unable to realise the economic potential of their allocation, or are averse to taking the risk associated with this type of institutional arrangement.

North (1990) provided a detailed and well-articulated discussion on how this type of arrangement increases the risks associated with an economic activity, and how this constrains economic development.

Not only does this 'third-party interference' increase the risk, but also it reduces the banks' ability to sell the leasehold right as swiftly as possible, without solving disputes first. Banks may also find it more difficult to find a buyer if he/she has to share resources with other parties.

Registered leaseholds do not guarantee that land rights will not be transferred in informal ways that are not captured in land registries. Ways of accessing registered land may include inheritance, loans or rights of usufruct enjoyed by kin. Foreclosure may become difficult where the presence of family members – kin – on mortgaged land makes it politically unfeasible to auction such land. Even where land is being auctioned off and relatives are not able to buy it, new owners may be unable to take possession out of fear of reprisals. In this event, government may not want to oppose resistance for political reasons. The observation was made in Kenya that government was loathe to evict people from land which they had fought for out of fear of "*risk*[ing] *the wrath of the true believers in the nationalist revolution*" (Platteau, 1996, pp. 60-61). The situation of farm labourers on farms acquired by government illustrates the point. The MLR has consistently argued that it was the responsibility of the beneficiaries to deal with farm labourers whom they inherited with an allocation – ducking the responsibility of stepping in itself.[25] Where such situations are allowed to prevail, "*the costs entailed in realising land assets are thus likely to discourage bankers, who usually prefer lending against more reliable streams of income than those found in agriculture*" (Platteau, 2000, p. 62).

25 However, section 20(6) of the ACLRA seeks to protect the interest of affected persons:

> "*Notwithstanding anything to the contrary contained in this Act, the Commission shall, where the Minister decides in terms of subsection (1) to expropriate any agricultural land, consider the interests of any persons employed and lawfully residing on such land, and the families of such persons residing with them, and may make such recommendation to the Minister in relation to such employees and their families as it may consider fair and equitable in the circumstances.*"

6
Demand Failures

Demand failures, or the reluctance of small-holder farmers to offer their land as collateral for loans, may be due to any of the following possible factors:

- A perceived risk of losing land through foreclosure. Such fears may be reinforced by a realisation that they are not able to repay loans due to a lack of capital. (See also Barrows & Roth, 1990, p. 275.)
- Asset poverty of beneficiaries may also hold back demand. This is also referred to as bankability of lessees. Evidence from South Africa has identified the lack of capital or loan equity with which to leverage a loan as the main constraint in accessing finance (Lawry et al., 2014, p. 63).
- A lack of attractive investment opportunities or the absence of critical conditions for their successful exploitation is likely to slow down demand for leasehold registration and accessing finance. "*This applies when the required infrastructure, input-delivery, output-marketing or extension services are not available*", or where appropriate technology for agriculture is non-existent or inaccessible (Platteau, 1996, pp. 62-63).
- Institutions that govern land administration can constrain responsiveness to credit uptake "*if inflexible rules of tenure prevent movement of resources among individuals, or if tenure insecurity lowers investment demand*" (Barrows & Roth, 1990, p. 296).

6.1 Farming in Oshikoto Region

In order to understand why resettlement beneficiaries and other small-scale farmers did not make use of their leaseholds as collateral, field work was done in Oshikoto Region. While this was by no means exhaustive, it provided important pointers that are likely to apply to all regions to a greater or lesser extent.

Oshikoto Region was selected for this field work because it accommodates some of the oldest resettlement farms. In 2016 the MLR had a total of 24 resettlement farms in Oshikoto's freehold sector. In addition, there are 100 surveyed farm units in the region's communal area. Four of these units house the MAWF's Livestock Development Centre (LDC) at Okapya (MLR/KfW, 2009, p. 21). These farms were established primarily for the development of livestock and beef production in the 1980s (Werner, 2016). The MAWF

administered them until 2005 when they were transferred to the MLR and designated by the latter as a leasehold area – in Government Notice No. 228, *Government Gazette No. 4843* of 1 December 2011) (Oshikoto Communal Land Board Secretariat, 2014, p. 3).

The most complete and most recent figures on the characteristics of resettlement and group farms in Oshikoto Region were produced by the Resettlement Audit of 2008-09. It recorded a total of 15 farms that had been allocated to 134 people. Only 24 of them were able to produce a letter of allocation. The remainder were reported to have obtained rights to these farms by word of mouth (Werner, 2010, p. 26).

The average land area available to 134 people residing on the 46 000 ha of farm land in total was too small to sustain agricultural production. Only 11 out of the 134 beneficiaries (8%) had land allocations exceeding 1 000 ha. They lived on 8 of the 15 farms. However, 14 respondents stated that they had access to demarcated land, with demarcated units averaging 1 639 ha. If the 11 beneficiaries with more than 1 000 ha are excluded from the calculation, the average land area per beneficiary in the category of less than 1 000 ha decreases to 184 ha. On farm Urwald the average amount of land for 48 beneficiaries was a meagre 101 ha (ibid.).

Table 2: Resettlement Farms in Oshikoto Region, 2009

UPI	Farm Name	Farm No.	Farm Size (ha)	No. of Beneficiaries	Average per beneficiary (ha)	Proof of Validity			
						Letter of Allotment	Word of Mouth	Other	No response
FMB/01150	Oerwoud	1 150	4 842	48	101	2	44	1	1
FMB/01137	Chudib-Nuut	1 137	6 288	3	2 096	2			1
FMB/00886	Ramona	886	1 024	1	1 024	1			
FMB/00848/00002	Welmoed	848	6 716	22	305		18	4	
FMB/01224	Groot Sandhup PTN.1	1 224	1 224	1	1 224	1			
FMB/01247	Hugeland & Leeupos	1 247	1 599	5	320	5			
FMB/00315	Nakuseb	315	2 204	1	2 204	1			
FMB/00829	Emmanuel	829	1 600	1	1 600	1			
FMB/00545	Walroda Ost	545	1 702	2	851	2			
	Ludwigshafen Rem. Ext. of PTN.6	480	90	10	9	6		4	
	Lukasbank		3 374	1	3 374	1			
	Tsumore	761	1 043	16	65	1	15		
FMB/00849	Vlakte	849	6 423	2	3 212		1	1	
FMB/00850	Welgevonde	850	6 684	20	334		20		
	Wolvolt/Tsubit		1 205	1	1 205	1			
Total	**15**		**46 018**	**134**	**343**	**24**	**98**	**10**	**2**

Source: Werner, 2010, p. 26.

The only recent information available on the Mangetti farms is contained in two reports prepared by the MLR (MLR/KfW, 2009) and the Oshikoto Communal Land Board Secretariat (2014). In the wake of the Odendaal Commission (Republic of South Africa, 1964), 100 farms were surveyed in the Mangetti area, mostly on and added to the former native reserve as a result of the Commission's recommendations. Ninety-six farms were

allocated to individuals in the 1980s and four were kept by the MAWF for the Okapya LDC. These farms were designated in Government Notice No. 228 on 1 December 2011 and thus can be allocated by the MLR under long-term leases (Oshikoto Communal Land Board Secretariat, 2014, p. 3). In addition, 141 parcels of land adjacent to the surveyed Mangetti farms have been fenced privately (MLR/KfW, 2009, p. 22). These farms have not been surveyed, hence some consider them to be illegal. They will not be considered in the following discussion as they fall outside of a designated area.[26]

The original rationale for surveying and developing the Mangetti farms was to promote commercial farming in the communal area. The extent to which farming in the Mangetti area can be described as commercial requires considerably more research. Anecdotal evidence based on discussions with extension technicians at the Okapya LDC suggests that many farmers are not farming commercially.[27] They stated that many farms are still operating as cattle posts for their owners. Farmers were described as not being sufficiently trained in financial aspects of their farming (costing and budgeting), livestock breeding and marketing. According to the extension officer at the Okapya LDC, Mangetti farmers generally do not have clear production objectives. The basic question of whether to farm for beef or milk has not been clearly answered in many cases. This clarity is necessary for composing herds accordingly. In the current situation, rates of off-take are low, while cows are being milked by farm workers, leading to high mortality rates among calves. Also it was said that farmers were not selling old and unproductive cows and were not buying lick and supplementary feed.

The state of agriculture in the Mangetti case study area was ascribed to a large extent to many people farming on a part-time basis. This, in the opinion of the technician in charge of the Okapya LDC, is resulting in poor management of the farms. Cattle are 'wild' because they are not properly looked after, and this, combined with insufficient infrastructure, impacts negatively on the marketing of cattle. Potential buyers have to travel a long distance to these farms and then have to wait until the cattle are caught in the bush, which increases the transaction costs of buying cattle. He expressed the opinion that farmers sold cattle only if they had liabilities.

The extension officer at the Okapya LDC stated that some absentee farmers had been able to raise loans, using their urban assets as collateral. He assumed that full-time farmers without any off-farm assets and income streams were poorer.

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26 In terms of section 30 of the CLRA, "*a designated area is an area specified by the Minister in the Government Gazette in respect of which a Communal Land Board may grant rights of leaseholds for agricultural purposes. This land is identified after consultations with the Traditional Authority and the Communal Land Board concerned.*" (Source: Legal Assistance Centre, 2009, p. 36.)

27 The information that follows should be interpreted with caution, as it was not possible to meet with farmers and hear their views. This information is presented here with a view to raising questions for future research.

Regarding infrastructure and income-generating opportunities, the key findings were as follows:

- The boundary fences were properly maintained on 50% of the farms. On the other farms the fences were dilapidated.
- Four farming units had to share one water point. Out of the 38 boreholes visited, 10 had been privately drilled, and out of the other 28, eight were dysfunctional and 20 had private pumps.
- Altogether 28 farms were overstocked, although it was suspected that some farmers did not give the correct stock numbers.
- Only 16 of the 88 farmers interviewed were farming with livestock only. The other 72 were rearing livestock and practising cultivation.
- On four farms the occupants ran shebeens, where they brewed and sold alcohol.

These findings reiterate information provided by the Oshikoto Communal Land Board Secretariat in its report on the Mangetti farms in 2014 (pp. 11-13, 15).

6.2 Tenure rights

6.2.1 Resettlement farmers

Only one of the resettlement beneficiaries interviewed was in possession of a signed lease agreement. All other informants either had no documentary proof of their rights, or, at best, had a letter of allocation. This suggests that the situation as depicted by the Resettlement Audit in 2009 has not changed dramatically. As Table 2 (page 40) shows, only 24 of the 134 beneficiaries captured in the audit had a letter of allotment, while 98 had settled by word of mouth. Whether the category "Other" in Table 2 includes lease agreements is not clear. Although none of the informants felt threatened by possible eviction, the absence of documentary proof of rights presented several problems, some of which are relevant to the ability to raise a loan.

The most notable issue is that the beneficiaries who claim to have been settled officially had no power to prevent others from settling on the same land, because the land, according to them, belongs to the state, not to them. This implies that many people had settled unofficially on some farms. Consequently it is not uncommon for a number of households to share two or three camps. At Urwald, two individuals were selling land parcels of about 10 ha to people who, in the words of one informant, were "*working for CDM*",[28] this being a local metaphor for having money. During a visit to Urwald in early

28 CDM (Consolidated Diamond Mines) was reformed as the Namdeb Diamond Corporation in 1994. Many inhabitants of Oshikoto had worked in the CDM mines in Tsumeb, hence this local metaphor.

July 2016, several people had already fenced off these parcels or were in the process of doing so. Reportedly the original beneficiaries' complaints about this fell on deaf ears in the MLR's regional office.

Similar issues exist where beneficiaries, while utilising their own individual land parcel, have no water source of their own and so are forced to share water with a neighbour. Problems arising for financial institutions from such shared and derived rights have been discussed in Section 5.5 of this report. On the demand side, individuals sharing camps are unlikely to be able to apply for loans, because some of them might not agree to do so.

Attention has to be drawn to a potential issue which, although not observed during the field visits for this study, has been documented elsewhere on the continent. It concerns the resilience of customary tenure arrangements and practices on land allocated to individual beneficiaries, and raises the question of whether the individualisation of land tenure through leasehold has "*altered the conceptualisation of land as a collective asset with family or clan title still predominant in the identification of land ownership*" (Moyo & Chambati, 2012, p. 50). To the extent that this situation prevails in some cases, foreclosure will be very difficult and land transactions are likely to occur outside the formal registration framework. Barrows and Roth (1990, p. 277) found that despite land registration and a land market in Kenya, "*customary law continues to determine sales and succession*". In many instances, people resided on land which was registered in the name of a person who was neither a household member nor deceased.

6.2.2 Mangetti farms

Initial allocations of surveyed farming units in the Mangetti area were made to individuals by the Department of Agriculture in the previous administration. The beneficiaries had "lease agreements for grazing" (Afrikaans: "*huurooreenkoms vir weiding*"), which were renewed annually until 1989. Close to half of these farmers were still in possession of copies of the signed lease agreement. The MAWF sent out reminders for the payment of outstanding annual rentals until September 2013. Over the years, land was transacted, primarily as owners died. By early 2014, 41 of the 88 farmers surveyed by the Oshikoto Communal Land Board Secretariat had obtained their farms through inheritance transfers by family and in one case a friend, all with the approval of the Ndonga TA (Oshikoto Communal Land Board Secretariat, 2014, pp. 13-14). One informant stated that apart from a list of beneficiaries in the office of the Ndonga TA, the map of the Mangetti farms was the only record of these farm owners.

Several factors have gradually compromised the individual ownership of farming units as originally contemplated. Firstly, although farm allocations were made to individual beneficiaries, it is common that cattle of up to 10 livestock owners are grazing on a farm that is nominally 'owned' by one individual. These may belong to family members

or friends. It is tempting to call this "sub-leasing" of land, but locally it is referred to as "*net saamboer*", meaning "simply farming together". Money is not normally paid, but contributions are made for the operation and maintenance of infrastructure.

Inheritance disputes appear to be common. In some cases such disputes arise after the families of deceased parents of minor children decide to appoint foster parents to manage the inherited farm on behalf of the minors. Once the children have come of age and are able to run the farm themselves, the foster parents won't leave. To compound matters, customary inheritance practices often overrule statutory wills. The TA is central in solving inheritance disputes.

In two recorded cases, farms had been turned into villages with about six households each (Oshikoto Communal Land Board Secretariat, 2014, p. 11). This raises the question of who takes decision when it comes to farm development or the marketing of livestock. Traditionally, the father under whose authority livestock are kept takes the decisions, not his sons. If a son disagrees, he may be chased off the farm. The importance of this for leaseholds is that although the land may be registered in one name, the fact that the livestock of many other owners are utilising a farming unit implies that in the event of foreclosure, financial institutions will have difficulty in foreclosing.

6.3 Information deficiencies

Across the spectrum of resettlement beneficiaries interviewed in Oshikoto, there was a need for loans and clear priorities for investing the capital. Smaller, asset-poor farmers intended to use loans to invest in means of production such as livestock, fencing and their houses. A successful beneficiary bought a tractor, trailer and plough with a loan from Agribank, for which he used his house in Tsumeb as collateral. Officials of the MLR apparently encouraged beneficiaries to obtain loans to buy cattle and maintain the farm infrastructure.

However, knowledge about the nature of collateral, and specifically about using leased land as collateral, was poor. All informants were aware that a loan has to be repaid, but none of them knew that financial institutions require some kind of security which they can sell in the event of a debtor defaulting on repayments. More specifically, most informants were unaware of the legal provision that a long-term, registered leasehold can serve as collateral. The only person who had a signed lease agreement and had offered his house as collateral for a loan was unaware that a leasehold has to be registered in the Deeds Office before it can be used as collateral.

When it was explained to the informants that they could lose their land as a result of a financial institution foreclosing on them, they indicated that if this is really possible, they

would not be interested in using their leasehold as collateral. This confirms observations elsewhere that borrowers are wary of "*risking the loss of their main economic asset and source of social security. For people who lack marketable skills and opportunities for other careers, the loss of and through default would have severe consequences.*" (Migot-Adholla, Place & Oluoch-Kosura, 1993, p. 135)

Apart from major information deficiencies about using registered lease agreements as collateral, some beneficiaries were reportedly refusing to sign lease agreements with the MLR, demanding that the infrastructure be fixed first. This places them in a catch-22 situation, as "*it is … a policy of the Ministry that infrastructure development can only take place once the Lease Agreement has been signed by a beneficiary*" (MLR, 2014, p. 28).

6.4 Asset poverty or bankability

The point has been made in previous sections that the primary consideration of any financial institution in considering an application for a loan is whether the applicant is able to repay the loan. Several beneficiaries interviewed in the field were of the opinion that they are not able to get loans because they would not be able to repay them due to a shortage of cash. The field visits provided anecdotal evidence that the beneficiaries' asset endowments span a wide spectrum, including households with sufficient assets, including cash to sustain themselves and their farms, and households with few assets who face cash-flow problems. Although reliable data on income streams and cash flows does not exist,[29] it is clear that for many households the only reliable income stream consists of monthly pensions. The exact number of pensioners among the resettlement beneficiaries is not known, but anecdotal evidence suggests that it is substantial.[30] In other cases, children working in towns provide financial support. This can lead to situations where beneficiaries are unable to take decisions on their own without consulting their offspring. One female beneficiary argued that she has to consult her children as they pay for fodder and medicine.

The current resettlement model severely restricts the bankability of full-time farmers who have little or no access to off-farm income. It provides for the allocation of land parcels that are too small to farm on a sustainable basis, both financially and environmentally.

29 Six years ago the MLR provided information on sources of income (MLR, 2010, pp. 37-40). However, the sample on which the data was based was too small for extrapolation across all individual and group resettlement farms.

30 An advertisement placed by the MLR in early August 2016 to announce the allocation of farms to 16 beneficiaries revealed that 6 of these beneficiaries were over 60 years old (the oldest being 85) and 8 were over 50 (MLR, 2016, p. 9). Government policy on resettling pensioners remains ambiguous. On the same day that the advert was placed, the MLR spokesperson told *New Era* newspaper that it was not the intention of the resettlement programme to satisfy people who "*were looking for retirement villages and prestige*" (Nakale, 2016).

This model also precludes the flexibility required to accumulate livestock to qualify for an AALS loan.

A very rough calculation using the MLR's "maximum income derivation formula" suggests that a 1 000 ha land parcel with a carrying capacity of 15 ha per large-stock unit (LSU) will generate a gross annual income of less than N$ 50 000 under the best possible conditions, as Table 3 below shows.

Table 3: Gross Farm Income on Cattle Resettlement Farm, 2015

LSU	Females (60%)	Calves (75% calving rate)	Replacement calves (15%)	Calves for sale	Price per calf	Turnover	Expenditure (40% of turnover)	Gross income per annum
67	40	30	5	25	3 289	82 225	32 890	49 335

Source: Werner, 2015, p. 10.

Financial institutions are not likely to grant a loan if the servicing of the loan exceeds 30% of the applicant's income. Thus, going by the rough income calculations presented above, the average resettled cattle farmer for whom the sale of livestock is his/her main source of income will not be able to obtain a loan which requires a repayment of more than N$1 200 per month, assuming that the farmer has no other liabilities or assets that can be used as collateral. A rough calculation of what farmers in those income brackets can afford at different interest rates is presented in Table 4 below. In all cases, a 5-year repayment period was assumed, with a repayment amount of approximately 30% of the farmer's monthly income.[31]

Table 4: Estimated Maximum Loan Amounts for Farm Unit Resettlement Scheme (FURS) Beneficiaries

Interest Rate	Amount for Cattle Farmers (N$) (repayment of N$ 1 200 per month)
Prime (10.75%)	57 000
Prime less 1 (9.75%)	59 000
Prime less 2 (8.75%)	60 000
Agribank 4%	65 000

Source: Updated from Werner, 2009, pp. 24-25.

31 These rough calculations were obtained by using www.calculator.net/loan-calculator.html?cloanamount=65000&cloanterm=5&cloantermmonth=0&cinterestrate=4&ccompound=monthly&cpayback=month&x=0&y=0, on 12 August 2016.

7
Agribank: Post Settlement Support Fund

Acknowledging commercial banks' hesitation to accept 99-year leases as collateral, the Permanent Technical Team on Land Reform (PTT) recommended that "*the MLR should introduce a loan guarantee fund for resettlement beneficiaries for the purpose of obtaining farming credit using the lease as security*" (PTT, 2005a, p. 31), and that the proposed fund should be similar to the AALS and should be administered by Agribank (ibid.). The Post Settlement Support Fund (PSSF) was established when the MLR and Agribank signed a Memorandum of Understanding in 2009. The objective of the PSSF is to empower resettled farmers and "*to enable them to enhance agricultural productivity*" (Agribank of Namibia, n.d., p. 46). The MLR and Agribank contributed N$10 million each to set up the PSSF (MLR, 2011b, p. 20). Agribank acts as an agent for the management of these funds on behalf of the MLR. Loans are fixed at 4% per annum. Agribank's contribution ended in 2014/15 when the 3-year agreement with the MLR lapsed and was due for review. By then, more than 500 resettlement beneficiaries had benefited from the PSSF. Table 5 below summarises the disbursements for the three financial years – 2012/13, 2013/14, 2014/15.

Table 5: Post Settlement Support Fund – Disbursements in 2012/13, 2013/14, 2014/15

Year	Total Amount (N$)	Number of Clients	Average Amount per Client (N$)
2012/2013	4 930 295	79	62 409
2013/2014	15 408 043	164	93 952
2014/2015	10 596 000	109	97 211
Total for 3 Years	**30 934 338**	**352**	–

Source: Agribank of Namibia, 2014, p. 20; Agribank of Namibia, 2016, pp. 39, 43.

Table 5 shows that there was a dramatic increase in the number of loans as well as the average size of the loans between 2012/13 and 2013/14, but that 2014/15 saw a decline of 31% in the total amount disbursed (Agribank of Namibia, 2016, pp. 37-38).

Table 6 (next page) summarises the types of loans and the repayment periods.

Table 6: **Post Settlement Support Fund – Types of Loans, Repayment Periods and Interest Rates**

Type of Loan	Repayment Period	Interest Rate
Crop production	2 years	4%
Production inputs and small equipment (working capital)	2 years	4%
Large stock	10 years	4%
Small stock	8 years	4%
Poultry, pigs and rabbits	2 years	4%
Water provision, fencing and other improvements	10-15 years	4%

Source: Agribank of Namibia, 2014, p. 23.

Despite the fact that the PSSF is a dedicated fund to support resettlement beneficiaries, Agribank ensures that applicants are able to pay back their loans. The loan application requirements are as follows (Agribank of Namibia, n.d., p. 47):

- Applicants must be Namibian citizens.
- Applicants must provide an allocation letter / lease agreement signed by the Minister of Land Reform.
- Applicants should be prepared to show ability to repay the loan.
- Applicants with a registered business should provide proof of tax payment (PAYE).
- For game farming or lodges, applicants are expected to submit business plans.
- Applicants should provide income statements (if any).

8
Land Market

It has been pointed out that a registered lease agreement loses its value as collateral if it cannot be traded. Atwood (1990, p. 664) has argued that "*collateral itself may only be valuable where there is an active land market which permits easy land transfers*". Foreclosure is only effective if financial institutions are able to sell the land swiftly to recover outstanding debts. Without a land market, therefore, beneficiaries will not be able to use their registered leaseholds as collateral for loans.

The Government of Namibia has been loathe to permit and encourage the development of a land market in the resettlement areas. The reasons for this are easy to understand. There is a political concern that trading lease agreements will defeat the main objective of the National Resettlement Programme, which is to provide small-scale farmers with access to freehold agricultural land. In 2002 the Minister of Lands and Resettlement stated in the National Assembly that land purchased by the state for resettlement should not be sold, but "*should rather serve as a place where some future commercial farmers should graduate from and be able to acquire their own agricultural land*". The context of this statement was his motivation for the deletion of a clause in the ACLRA that provided for the possible purchase of resettlement units by beneficiaries after five years (Republic of Namibia, 2002, p. 23). As this provision was repealed in 2002, currently, long-term leases between the MLR and beneficiaries are the only form of tenure that can be registered.

There is irrefutable evidence that an informal, illegal land rental market has developed since the inception of the National Resettlement Programme. In 2004 the Permanent Technical Team on Land Reform (PTT) (2005b, pp. 52, 69) found that "*in many cases, beneficiaries who do not own livestock sublease their land in order to generate an income*". More recently the Auditor-General confirmed this trend in his audit report of the land reform and resettlement programme for 2010-2013. Out of 182 farms visited, he found that 105 or 68% were being sub-leased, chiefly because the beneficiaries were unable to maintain the farms (Immanuel, 2015, citing the audit report). He explains further:

> *"Therefore they bring someone to assist them with putting up or maintaining infrastructure or for financial reasons. Another reason for subleasing is that resettled farmers are not farming productively."* (Auditor-General, as quoted in Immanuel, 2015.)

This confirms the PTT's findings that for many asset-poor beneficiaries – those who lack capital and/or livestock – sub-leasing their land was an important source of income (PTT, 2005b, pp. 52, 69). The PTT has pointed out, however, that because sub-leasing is illegal –

> *"beneficiaries find themselves in weak bargaining positions. Income from sub-leasing tended to be lower than it would be if sub-leasing were to be permitted. Most beneficiaries had not been paid by their lessees, but had no legal recourse."* (PTT, 2005b, p. 52.)

The only mechanism to protect lessees' interests is to legalise the sub-leasing of leased land, and to develop a regulated framework for sub-leasing (ibid., p. 70), and standard forms of agreement that support both lessees and sub-lessees. Evidence suggests that –

> *"subletting can promote equity because it gives the holder the option of deriving a cash income for the temporary disposal of a property without having to part with it permanently. Such transactions can be achieved by drafting the appropriate regulations … and by gazetting of standard forms, which can be conveniently used by the parties involved."* (Natural Resource Services (Pty) Ltd & LANDflow Solutions (Pty) Ltd., 2003, p. 60.)

A small step has been taken towards legalising the sub-leasing of resettlement farms. In terms of section 46 of the Commercial (Agricultural) Land Reform Act 1995 as amended resettlement beneficiaries may sub-lease their allocations subject to the written consent of the Minister upon a recommendation of the Land Reform Advisory Commission. The "Regulations on Procedure to Sublease Portion of Farming Unit: Agricultural (Commercial) Land Reform Act, 1995" (MLR, 2013b) stipulate the maximum size that may be sub-let, as well as the maximum lease period, how rentals are to be determined and the conditions of sub-letting.

Briefly, a beneficiary may not sub-let more than 50% of his/her land parcel. If the area to be sub-let exceeds 25% of the allocated land, the applicant must furnish reasons for his/her intention to sub-lease such a portion. The maximum period of a sub-lease is five years, and the conditions for sub-letting include that the sub-lessor is a full-time farmer, or if employed elsewhere, that he/she received the allocation less than three years before entering into a sub-lease agreement. This suggests that part-time farmers who have been occupying their farm units for more than three years may not sub-lease land. In addition, lessees of resettlement land may sub-let if their units have no water or if they have limited farming knowledge and the sub-lessees are willing to train them. The reasons for these regulations could not be established.

Although the conditions for sub-leasing resettlement land as contained in the "Regulations" are rather cumbersome and unnecessarily restrictive, they are a first step in regulating

the existing illegal and informal land market in the resettlement sector. They facilitate and hasten changes that are already well underway as a result of "*fundamental economic forces*" (Bruce, 1989, p. 51, in Platteau, 1996, p. 38). Granting legal permission for sub-leasing lays the foundations for a regulated land rental market, the development of which should be encouraged. As is argued further on, this is not only a necessity for registered leasehold to become valid collateral and be accepted by banks as such, but also it is likely to have other economic benefits for resettlement beneficiaries. A regulated land market can provide more options and flexibility for beneficiaries. The PTT (2005b, pp. 69-69) characterised the existing lease agreements as inflexible, or as –

> *"effectively enforc*[ing] *certain forms of agriculture, regardless of the skills, abilities and/or needs of the beneficiaries".*

This inflexibility, the PTT argued, served as a disincentive for beneficiaries to take full ownership of their land and improve it, "*let alone take responsibility for its maintenance*". Moreover, the lack of flexibility to sub-lease their allocated land was a major obstacle for beneficiaries with no livestock or capital or those living with HIV/AIDS to generate incomes through sub-leasing their land. It is recommended that the current regulations on sub-letting resettlement land be amended to do away with unnecessary restriction and to allow a regulated land market to develop.

8.1 Land rental markets and improved productivity

Allowing a regulated land market in leased land to develop would not only make it possible for financial institutions to accept registered leaseholds as collateral, but would also have positive impacts on the productivity of the entire resettlement sector. Deininger and Mpuga (2003, p. 335) have argued that land rental markets can lead to "*efficiency-enhancing outcomes*". They have the potential to "*transfer land to more efficient and relatively poor producers, thereby providing an opportunity for the landless to access land*". To the extent that this is true, a land rental market in the leasehold sector may be the answer to a question posed by the Minister of Justice in 2002 on how to deal with resettlement beneficiaries who "*are not up to the challenges of modern farming*". He expressed the opinion in the National Assembly that this question needed looking at properly in the interest of economic output, and concluded his intervention by stating that he did not know what mechanisms could be put in place to remove this class of beneficiary and replace it with people who can produce (Republic of Namibia, 2002, p. 93).

A formal land market will give those farmers who "*are not up to the challenges of modern farming*" options for earning a livelihood without becoming a burden on the state. A regulated land market would provide them with an option to get out of resettlement farming altogether in response to off-farm economic opportunities after receiving some

form of compensation from a new lessee. Alternatively, they may choose to continue to reside on the land with limited livestock and sub-lease their grazing land in return for a market-related rental. In any event, allowing a land rental market to develop will "*facilitate easy reallocation of land toward more efficient users than current owners, especially if current owners are old, are non-cultivating heirs, are urban beneficiaries of restitutions and so on*" (Klaus Deininger, 2003, p. 85).

The proposed land rental market would also make it possible for new beneficiaries to benefit from resettlement without having to apply to the MLR for resettlement. Accessing land through a land rental market has low entry barriers relative to land sale markets. The former have the advantage of requiring "*only a limited capital outlay, thereby leaving some liquidity available for productive investments rather than locking it all up in land*" (ibid.). The amount of people interested in sub-leasing resettlement land is not known. However, judging by the public dissatisfaction with the slow pace of redistribution, and the extent of illegal sub-leasing, the demand for resettlement land appears to exceed the supply by far.

Accessing resettlement land through a land rental market implies, however, that instead of receiving land free of charge from the MLR, prospective lessees have to compensate the original lessee. This may serve as a process of self-selection, as it is likely to attract only those people who are interested in farming and have the requisite assets. The risk is that it may also attract wealthy individuals who may access land for investment or lifestyle purposes.[32]

Legalising sub-leasing through a controlled land rental market will enable successful beneficiaries to lease additional land to expand their farming operations and asset base. The current model of resettlement, which restricts beneficiaries to a minimum allocation, inadvertently locks them into a position that does not provide for much more than subsistence farming and makes it impossible to accumulate the livestock numbers required to qualify for an AALS loan. The prescribed minimum farm sizes limit the maximum amount of livestock that can be sustainably grazed to less than two-thirds of the livestock required to be considered for an AALS loan. The prescribed minimum for the latter is at least 150 large stock units or its small stock equivalent. With the prohibition on sub-leasing allocated land, beneficiaries have no legal opportunity to fill this gap on resettlement farms. It is thus not legally possible for beneficiaries to become future commercial farmers by "*graduating*" from resettlement land "*and be*[ing] *able to acquire their own agricultural land*" as the Minister of Lands anticipated (Republic of Namibia, 2002, p. 23).

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[32] This is not meant to imply that the current resettlement model does not attract people who apply for resettlement for lifestyle purposes.

Regulations will have to be developed to prescribe who the possible buyers of leased land should be, to guarantee the integrity of the objectives of resettlement. In developing such criteria, care must be taken to ensure that they do not become so restrictive as to limit the market for leased land. If the market becomes too small, commercial banks will find it difficult to sell land offered as security swiftly. Similar to ensuring that no freehold farms are registered without a valid waiver, the Registrar of Deeds should ensure that registering a new lease on foreclosed land satisfies the regulations. This clearly entails more non-title work for the Registrar's office. Anticipating an increase in leased land to be registered, McAuslan et al. (1995, p. 49) have sounded a note of caution by arguing that "*the more 'non-title' work imposed on the registry, the higher the costs of registration (or, if more staff cannot be appointed, the slower the process) and the greater the chance of errors creeping into the process*". This, in their opinion, raises the question of "*whether the present system of doing business is appropriate for smallholders*".

To summarise: The absence of land rental markets results in financial institutions not accepting registered leasehold as collateral for loans. It also prevents beneficiaries from accumulating livestock beyond a certain threshold, thus making it impossible to reach the livestock numbers needed to qualify for an AALS loan. Without the ability to trade lease agreements, such agreements have no economic value, but serve mainly to regulate the relationship between the state and the beneficiaries (Sakkie Coetzee, pers. comm., 27 April 2016). A future land rental market should "*provide households with secure and flexible rights in … rental to adapt land holdings to personal needs, whether for full-time farming, part-time farming, or a residence*" (Roth, 1994, p. 24).

8.2 Land transfers[33]

A major concern about legalising transactions in leased resettlement land is that short-term considerations will lead beneficiaries to sell their rights and hence become landless again. While this may be a valid concern, it cannot be confirmed or refuted due to a lack of evidence from Namibia. Suffice it to say, therefore, that in other parts of the continent where land titling programmes have been implemented, land transfers have not increased. Evidence particularly from Kenya suggests that when land parcels are transferred, this happens according to customary practices, chiefly inheritance.

Moreover, there is often an apparent persistence of indigenous control over land transfers even when lands are duly registered, thus many owners of titled lands do not consider

33 Significantly, these recommendations of the Permanent Technical Team on Land Reform (PTT) in its report on background research work and findings were not included in the *Strategic Options and Action Plan for Land Reform in Namibia* (PTT, 2005a), which was submitted to and approved by Cabinet in May 2006.

that they can transfer their lands outside the lineage, or that they can make permanent transfers without approval by the community (Platteau, 1996, p. 49).

Apart from limitations posed by prevailing customary practices, the general absence of investment possibilities outside agriculture implies that "*liquidity of land assets is likely to remain a matter of limited interest to most African farmers*". However, this is unlikely to hold true for outside, speculative investors (Bruce, 1986, p. 42, in Platteau, 1996, p. 53).

Renting land from the state, on the other hand, is "*more friendly to the rural poor than land sales markets in allowing them access to land*" (De Janvry & Sadoulet, 2001, p. 12). The main reasons for this observation include that "*there are lower transaction costs in land rental* [than in] *land sales markets*". The former does not require costly procedures of title verification and registration. Secondly, rents charged for leased land "*cannot exceed the tenant's ability to pay based on the use of land*". Rents, therefore, are based on the productive value of the land, precluding costs of overpriced land being carried to rents (ibid.). Thirdly, lease contracts can be tailored to tenants, to mitigate the market failures that disadvantage the poor, "*and to specifically make them benefit from the market failures that play in their favour*". Finally, leases do not require the poor to tie up large amounts of capital in long-term mortgages, which theoretically can be used as working capital (ibid, p. 13).

9
Conclusion

The farms in the case study area offer interesting insights regarding the registration of leasehold for resettlement and communal farmers. Although no leaseholds had been registered, it seems that it should not be too difficult to register these leaseholds in a relatively short time frame. The process and the requirements for registration are relatively straightforward and transparent.

In Case Study Area A (resettlement farms), it was found that the beneficiaries generally occupied their farms and knew their boundaries as well their neighbours' boundaries, and possessed some form of proof of allocation. Conflict about the occupants' rights and identities and the spatial extent of their boundaries did not appear to be a significant factor for the people interviewed. This implies that an intensive but straightforward adjudication process could resolve any outstanding questions, and that lessees could be identified in a matter of months. Similarly, a boundary relocation survey, where required, could quickly establish whether the perceived spatial extent of the allotments corresponds with the actual subdivision on record in the Office of the Surveyor General.[34] Lease agreements that are standard could be signed with the lessees, if not already signed, and then registered in the Office of the Registrar General. Such a process (Steps 4 and 5 in Figure 1 on page 20) should not take more than seven months to complete.

In Case Study Area B (Mangetti farms) the situation is very similar to that in Case Study Area A. The only significant difference is that a certificate of state title over the area must still be issued so that the state can alienate the land to the lessees. The land has been designated for agricultural purposes and the occupants are generally known, even if there do seem to be some conflicts about allocations and multiple allocations per farm. Although generally there seems to be a distinction between the "owner" of a farm and those who are allowed to share access to the land with the owner or who are farming with the owner, the people interviewed generally held the view that most of the farmers are absentee farmers and had other businesses and occupations. This implies that these are not people who are completely unfamiliar with the institutional requirements for the registration of property rights.

34 Where surveys have not yet been carried out, a subdivision diagram would have to be completed, but this would not alter the required time frames.

The study found that the policy environment encourages the registration of resettlement leasehold, and the institutional framework allows for, and in some cases requires, such registration. The requirements are clear and the process is not so complex as to render it impossible to register leaseholds. However, in practice this has not happened.

The findings suggest two major reasons for the lack of registration of leaseholds. Firstly, there seems to be a general lack of information about the process and requirements for registration among beneficiaries, implementing agencies and financial institutions. The second reason relates to financial, technical and other capabilities of the beneficiaries as well as the economic potential of the parcels, rather than the leasehold registration process itself. Analysis of the transaction costs reveals that they are significant in relation to the beneficiaries' earning potential, but compare very favourably with international practices and costs. This further supports the notion that although there are complaints about the costs associated with registration, the problem is not that the costs are outside the norm, but rather, the beneficiaries are simply unable to afford these costs, given their assets and economic activities.

The ability to turn registered leasehold into collateral also hinges on the ability of financial institutions to sell leaseholds in the event of foreclosure. This presupposes an active land market in the small-scale farming sector on resettlement land and in designated areas on communal land. At this stage it is legal to sublease a small portion of a resettlement farm. However, it is recommended that the restriction on the amount of land that a beneficiary may sub-lease be rescinded in the interest of supporting the development of a land market that is not unreasonably constrained by restrictive rules and regulations. This would better enable financial institutions to invest in registered leaseholds, as they would able to sell leaseholds swiftly in the event of foreclosures.

A land market in the small-scale farming sector will also make the resettlement model more flexible, in that ambitious and asset-strong beneficiaries could lease additional land legally, and those who are unable to farm their land optimally – whether due to a lack of assets, ill-health or age – could benefit from their allocation through subleasing.

To avoid compromising the objectives of the NRP, a land market in the small-scale farming sector should be regulated, and the criteria developed should ensure that resettlement land is still available to the previously disadvantaged target group.

Finally, the option of offering registered leasehold as collateral for loans will become attractive to farmers only if they are able service a loan. This requires that farmers have sufficient assets to do so, which in turn depends on a number of factors, particularly farm sizes. It was argued that the minimum farm sizes recommended for resettlement beneficiaries are too small to substantially improve their livelihoods while leaving enough cash flow to maintain farm infrastructure, make capital investments and service a loan.

Appendix A
Sample Letter of Allotment

REPUBLIC OF NAMIBIA

MINISTRY OF LANDS, RESETTLEMENT AND REHABILITATION

Tel: (061) 2852111
Fax: (061) 228248/247107

Brendan Sisilwaye Square
Block A
Private Bag 13343
WINDHOEK

NOTIFICATION OF RESETTLEMENT

Mr. P. Hanab
P.O. Box 463
Tsumeb

ID. No. 7301010300118

Dear Mr. Hanab

Resettlement at Excelsior Farm Rural Development Project refers.

This letter serves to inform you that, you are now formally resettled at the above mentioned project, situated at farm **Excelsior No. 825** in the **Oshikoto Region.**

We trust that you will utilise this opportunity productively.

Best of Luck

..... 03, 08, 2000

M. Shanyengana
Chairman: National Resettlement Committee

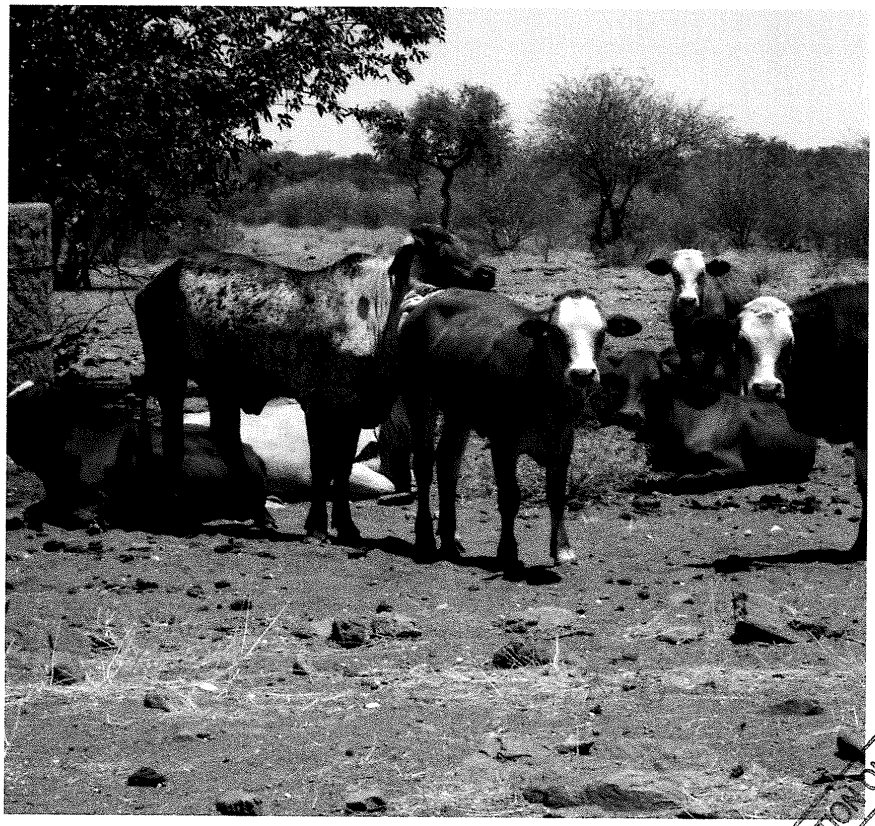
.....

F.M. Tsheehama
Permanent Secretary

Appendix B
Sample MLR Leasehold Agreement

REPUBLIC OF NAMIBIA

AGREEMENT OF LEASE



MINISTRY OF LAND REFORM

ISSUED FOR INFORMATION ONLY

No.

AGREEMENT OF LEASE

This Memorandum of Agreement of Lease entered into between the

GOVERNMENT OF NAMIBIA

(Herein represented by the Minister responsible for Land Reform-

Name:

Private Bag 13343

WINDHOEK

(hereinafter referred to as the Lessor)

AND

Born on _____

and

_____

Born on _____

Married in Community of Property/Married Out of Community of property/ Married by Customry Law of Namibia/Unmarried (if married, attach marriage certificate)

Address: _____

_____

_____

(hereinafter referred to as the Lessee)

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1. PROPERTY

The Lessor hereby lets and the Lessee hereby hires a certain piece of land described as follows:

CERTAIN **Lease Area over Farm described as**

_____

No._____Unit _____

Registration Division " _____"

_____ Region

MEASURING _____

(_____) Hectares as shown and more fully described on leasehold diagram No. A _____/ _____ attached hereto as annexure "A"

(hereinafter referred to as the property)

2. LEASE PERIOD

The lease shall be for a period of 99 (ninety-nine) years,(hereinafter referred to as the lease period) and shall commence on the _____ day of _____20____, subject to notarial registration as hereinafter provided for.

3. RENTAL

3.1 The annual rental of the lease shall be determined by the Minister of Lands and Resettlement after consultation with the Land Reform Advisory Commission (hereinafter referred to as the Commission) subject however to the following conditions:

3.1.1 6 (six) calendar months prior to the expiry of the initial 5 years of the 99 years lease period, the Minister, after consultation with the Commission shall review the annual rental payable by the Lessee for the following 5 (five) years and such a review of the rental shall be

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done every 5 (five) years thereafter in the same manner as aforesaid;

3.1.2 the Lessee shall be notified in writing of such rental as determined by the Minister which rental shall then constitute the annual rental payable by the Lessee for each of the following 5 (five) years and thereafter in respect of every successive 5 (five) year period.

3.2 The annual rental payable for the initial 5 (five) years of the lease period (hereinafter referred to as the initial lease period) shall be **N$**_____(_____ _____) per annum subject to the following conditions.

3.2.1 For the first 5 (Five), 3 (Three) and 2 (Two) years of the initial lease period, the Lessee under the categories 0-0-0; 0-0-1 and; 0-1-1, respectively, shall not be required to pay any rental which period shall be regarded as a probation period within which the Lessee shall be required to prove himself or herself as a competent Lessee and/or settler and able to comply with all the terms and conditions hereof and of any such other conditions and/or rules and regulations laid down by the Lessor;

3.2.2 With effect from the commencement of the 5th (fifth), 3rd (third) and 2nd (second) years respectively, of the initial lease period the Lessee shall pay the rental annually in advance with the first payment on or before the last day of the first month of the specific year applicable and subsequent payments anuually thereafter on the same date which payment shall be effected in Namibian monetary currency free from commission or any deductions at the offices of the

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Lessor at Windhoek or such other place as the Lessor may determine.

4. OCCUPATION OF THE PROPERTY

4.1 The property shall be effectively occupied by the Lessee for the personal residence of himself or herself and his or her family or where applicable, the Lessees' manager as approved by the Minister as provided for in Section 44(1) of the Agricultural (Commercial) Land Reform Act 1995 (Act No. 6 of 1995) (hereinafter referred to as the Act) and such employees as may be necessary for the Lessees' farming operations on the property.

4.2 The Lessee shall, not later than 3 (three) months after the date of commencement of the lease, or such extended period as the Minister on recommendation of the Commission, in a particular case may approve, take up such effective occupation of the property either personally or through a manager in the full time employment of the Lessee approved by the Minister on the recommendation of the Commission.

5. USE OF LAND

5.1 After taking up effective occupation of the property by the Lessee as provided for in clause 4 hereof, the Lessee shall be obliged, at all times to beneficially use such property for Agricultural purposes, subject to the following terms and conditions:.

5.1.1 for the purposes of clause 4 hereof "beneficially use" means -

5.1.1.1 from the date of taking up effective occupation as required by clause 5.1 hereof;

5.1.1.2 reside on the property, either by the lessee personally or by a manager referred to in clause 5.1 hereof;

5.1.1.3 practice sound methods of good husbandry;

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5.1.1.4 take proper care and maintain all improvements on the property.

5.1.2 before the expiration of the preceding year after the grace period and after the date of the Lessee taking up occupation as required by clause 4 hereof the annual cultivation of such portion of the area of the property or the maintenance of livestock and other land uses in accordance with the terms and conditions hereof and such other conditions and requirements as may be laid down by the Minister on the recommendation of the Commission;

5.2 the property, together with all improvements thereon shall be used for Agricultural purposes or such other purposes as the Minister in his or her discretion may permit and any other purposes ancillary thereto which purposes may inter alia include the cultivation of the land and maintenance of livestock subject however, to the following;

5.2.1 the Lessee shall at all times during the currency of this lease observe and follow sustainable farming practices established in that particular region and/or allotment area where the property is situated;

5.2.2 the Lessee shall be obliged to use in common with other Lessees on the farm in which his or her property forms a part, all boreholes, windmills, pumps, waterpipelines and such other installations established for the supply of water whether it is situated within the boundary of his or her property or not, and shall also be jointly with such other Lessees be responsible for the maintenance of such installations normal wear and tear excepted.

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5.2.3 The Lessee shall abide by the rules of the farm mangement committee when ever there is such a committee in existence on the resettlement farm.

5.2.4 The Lessee shall further be responsible at his or her cost for the maintenance and upkeep of all existing boundary and inner fencing including such fencing which borders any other lease hold or allotment area which maintenance and upkeep shall be done in accordance with the applicable legislation on fencing and in accordance with the guidelines as laid down by the Lessor.

5.2.5 At no time during the currency of this lease shall the Lessee exceeds the prescribed maximum agricultural number of heads of cattle, sheep or goats, nor shall the Lessee exceeds the prescribed carrying capacity of the property as determined by the Lessor;

5.2.6 No animals of any description which are not the property of the Lessee may be allowed to graze upon the property whether for hire or gratuitously without the written consent first having been obtained from the Lessor;

5.2.7 The Lessee may only with the prior written consent of the Lessor cut any trees on or remove any bushes from the property which may deem necessary for the proper cultivation of the property and the Lessee shall be allowed to use all dead wood for personal purposes and shall further be allowed to cut such other wood as may be necessary in this regard, but otherwise he or she shall not cut or remove or be allowed to be cut or removed any wood, nor shall he or she sell any wood

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for his or her own account and benefit without the prior written approval of the Lessor.

6. GAME

The parties hereto specifically agree that all game on the property shall remain the property of the Lessor and that no hunting rights are leased or ceded to the Lessee in respect thereof, provided however that the Lessee shall be entitled to hunt for personal use and own consumption such a number of game as has been agreed upon with the Lessor and only after the Lessee has complied with all the applicable legislation and regulations pertaining to the hunting of game in Namibia.

7. IMPROVEMENTS AND COMPENSATION

7.1 The Lessee shall be entitled to, after obtaining the written consent of the Lessor, at his or her own expense, erect or establish any additional improvements, structures, fencing, pipelines, dams, reservoirs or establish orchards, plantations for the purposes of effective occupation and the beneficial use of the property under this agreement of lease.

7.2 On the termination of the lease by effluction of time or otherwise except in the event of the Lessees' death or insolvency as provided for in clause 7.7 and 7.8 hereof compensation shall be payable to a Lessee in respect of all such building and/or improvements effected on the property after occupation thereof subject however to the terms and conditions hereinafter referred to.

7.3 The Commission shall make recommendations to the Minister in relation to the compensation to be paid in terms of clause 7.2 hereof and, in the determination of such compensation, regard shall be had to-

7.3.1 the value of the buildings or improvements concerned and the period of the lease;

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7.3.2 the economic state, at the date of termination of the lease, of the agricultural industry in the area in which the property is situated;

7.3.3 contributions made from public funds towards the cost of permanent improvements on the property;

7.4 Notwithstanding anything to the contrary in any other law contained, there may, when any compensation determined under clause 7.3 hereof is payable to a Lessee, be deducted from the amount so payable, any rent due and payable under this lease and any other debts owing to the State by the Lessee.

7.5 The Minister shall, by written notice, inform a Lessee of the amount-

7.5.1 of any compensation payable to the Lessee in terms of clause 7.2 hereof and;

7.5.2 when compensation is so payable to the Lessee, of any deductions under clause 7.4 hereof.

7.6 Any Lessee who is aggrieved by the amount of any compensation determined by the Minister under clause 7.3 hereof, or by the amount of any deductions made under clause 7.4 hereof from the compensation payable to him or her or it, may within 30 days from the date of notice of the amount so determined or deducted, or such extended period as the Minister in a particular case may allow, appeal against the determination of that compensation or that deduction, or both, to the Lands Tribunal.

7.7 In the event of the Lessee becomes insolvent or, in the case of a Lessee which is a company or close corporation, the company or close corporation is placed under liquidation, and the agreement be cancelled by the Lessor due to the failure by the trustee and/or liquidator to cede and assign the said lease to any other person as

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provided for in section 52(1) of the Act compensation for any improvements as determined in clause 7.3 hereof shall be payable for the benefit of the insolvent estate or the company or close corporation under liquidation as the case may be subject to the deduction of any rentals still due or any other debt owed to the State.

7.8 In the event of the death or mental incapability of the Lessee, and the agreement be cancelled by the Lessor due to the failure by the executor and/or trustee to cede and/or assign the said lease to any other person as provided for in section 53 of the Act, compensation for any improvements as provided for in clause 7.3 hereof shall be paid by the Lessor for the benefit of the estate of the Lessee as the case may be, subject however to the deduction of any rentals still due or any other debt owed to the State.

8 LEVIES

The Lessee shall make own arrangements to use water from Namwater and electricity from Nampower and shall pay all charges and other levies for water and or electricity by any competent authority where applicable.

9. MAINTENANCE

9.1 The Lessee shall at all times keep and maintain the property including fencing, water points and pumps and installations and maintain any other improvements on the property in the same good order and repair as they were at the time of the commencement of this lease, fair wear and tear however excepted.

9.2 The Lessee shall bear the costs related to the supply of diesel and/or any kind of fuel as required for all day to day operations of the farm.

10. RIGHT OF INSPECTION

10.1 Any member of the Commission or person authorised thereto in writing by the Commission may at all reasonable times enter and

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inspect the property for the purpose of ascertaining whether the terms and provisions of the Act, or the terms and conditions of this agreement of lease are being complied with in respect of the property.

10.2 Before exercising the powers conferred by clause 10.1 hereof the member of the Commission or person concerned shall, whenever reasonably practicable, either obtain the consent of the Lessee of the property or give the Lessee not less than 48 hours notice in writing of his or her intention to enter and inspect the property and unless such consent has been obtained or such notice has been given, the member of the Commission or person concerned shall not, in the exercise only of the powers conferred by this clause, enter into any enclosed building or dwelling-house without the consent of the Lessee.

11. SUBLETTING, CESSION AND ASSIGNMENT

10.1 Except with the prior written consent of the Minister, granted upon recommendation of the Commission, a Lessee shall not-

11.1.1 assign, sublet, mortgage or in any manner whatsoever encumber, or part with possession of the property in question or any part thereof; or

11.1.2 enter into any partnership for the working of such property;

11.2 If a Lessee becomes insolvent or in the case of a Lessee which is a company or close corporation, the company or close corporation is placed under liquidation or in the event of the death or mental incapability of a Lessee, the appointed trustee, liquidator, executor or curator as the case may be, may assign this lease to any person who is approved in writing by the Lessor on the recommendation of the Commission.

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11.3 An application for the Minister's consent for the purposes of clause 11.1 and 11.2 hereof shall be made in writing.

11.4 The Minister shall, by written notice, inform the Lessee concerned of his or her decision under clause 11.1 and 11.2 hereof.

11.5 Any Lessee who is aggrieved by a decision of the Minister under clause 11.1 and 11.2 hereof may, within 30 days from the date of notice of that decision, or such extended period as the Minister in a particular case may allow, appeal against that decision to the Lands Tribunal.

11.6 No act referred to in clause 11.1.1 hereof which entails the registration, execution or attestation of any deed or other document in a deeds registery shall be so registered, executed or attested, unless proof of the required consent of the Minister under clause 11.1 hereof is submitted to the Registrar.

12. BREACH

12.1 Subject to the provisions of clause 12.3 hereof, if a Lessee fails to comply with any provision of the Act which is applicable to the Lessee or to fulfil any term or condition of the lease, the Lessor may cause written notice to be served upon such Lessee calling upon that Lessee to remedy any default within a period specified by the Lessor in the notice, and if the Lessee fails to remedy such default within that period, the Lessor, acting on the recommendation of the Commission, may cancel the lease, and, if the lease is so cancelled, the Lessor shall by written notice inform the Lessee of such cancellation"

12.2 Subject to clause 12.3 hereof upon cancellation of a lease under clause 12.1 hereof, the right to occupy the property and all improvements thereon shall vest in the State, subject to the payment of compensation in accordance with the provisions of clause 7.3 hereof;

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12.3 A cancellation of a lease under clause 12.1 hereof shall not take effect unless and until –

12.3.1 the period for noting an appeal under clause 12.4 hereof has expired and the Lessee concerned has not noted an appeal; or

12.3.2 where an appeal has been noted under clause 12.4 hereof, the appeal has been abandoned or dismissed.

12.4 Any Lessee who is aggrieved by a decision of the Lessor under clause 12.1 hereof to cancel his or her or its lease may, within 30 days from the date of notice of the Lessor's decision to cancel the lease, or such extended period as the Lessor's in a particular case may allow, appeal against that decision to the Lands Tribunal.

12.5 Upon cancellation of the lease in any of the circumstances as aforesaid the Lessee shall immediately vacate the property and the Lessor shall be entitled to claim such damage from the Lessee as the Lessor may suffer as a result of such cancellation.

12.6 In the event of the insolvency, liquidation, death or mental incapability of the Lessee during the currency of this lease, the Lessor may notwithstanding any conditions contained herein to the contrary, cancel this lease in the event of the trustee, liquidator, executor or curator, as the case may be, has failed to cede or assign this lease to a person approved by the Lessor acting on the recommendation of the Commission within a period of 3 (three) months after the date of his or her appointment as such.

13. WAIVER

Notwithstanding any express or implied provisions of this agreement of lease to the contrary, any latitude or extension of time which may be allowed by the Lessor in respect of any matter or thing that the Lessee is bound to perform or observe in terms hereof, shall not under any

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circumstances be deemed to be a waiver of the Lessor's rights at any time, who will be entitled without notice, to require strict and punctual compliance with each and every provision or term hereof by the Lessee.

14. JURISDICTION

The Lessee hereby consents to the jurisdiction of the Magistrate's Court in any action that might be instituted in respect hereof, despite the fact that such action falls outside the Lessor's right to institute any such action in the High Court of Namibia.

15. DOMICILIUM

The parties hereto choose a *"domicilium citandi et executandi"* the following addresses:

LESSOR

Ministry of Lands and Resettlement
Robert Mugabe Avenue 55
WINDHOEK

LESSEE

_____

_____

_____

16. ENTIRE AGREEMENT

This agreement constitutes the entire agreement between the parties and no agreement at variance with any term of this lease shall be binding upon either the Lessor or the Lessee unless contained in a written document signed by each of them.

17. NOTARIAL REGISTRATION

This agreement of lease will be executed notarially and registered against the title deed of the whole farm of which the property form part and all costs and stamp duty in respect thereof will be paid by the Lessee.

ISSUED FOR INFORMATION ONLY

SIGNED and agreed to by the Lessor at WINDHOEK

on this _____ day of _____ 20

in the presence of the undersigned witnesses:

AS WITNESSES:

1. _____

2. _____ _____

The Minister responsible for Lands and Resettlement : for and on behalf of the GOVERNMENT OF NAMIBIA.

SIGNED and agreed to by the Lessee at _____

on this _____ day of _____ 20

in the presence of the undersigned witnesses:

AS WITNESSES:

1. _____

2. _____ _____

LESSEE

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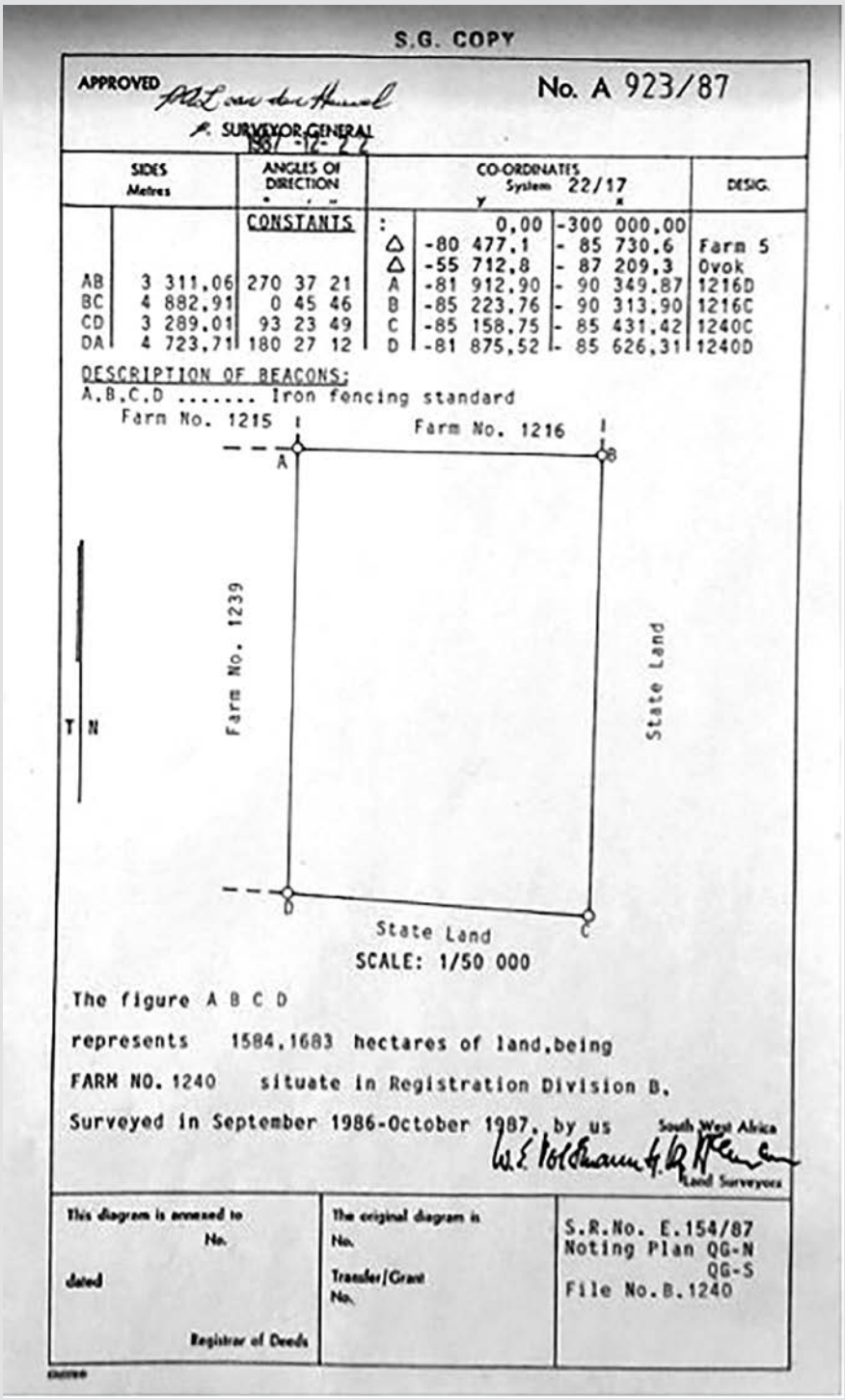
Appendix C
Example of Approved Survey Diagram: Mangetti Farm No. 1240



S.G. COPY

APPROVED [signature] No. A 923/87

P. SURVEYOR-GENERAL

1987 -12- 22

SIDES Metres	ANGLES OF DIRECTION ° ' "		CO-ORDINATES System 22/17 Y	X	DESIG.
	CONSTANTS	:	0,00	-300 000,00	
		△	-80 477,1	- 85 730,6	Farm 5
		△	-55 712,8	- 87 209,3	Ovok
AB 3 311,06	270 37 21	A	-81 912,90	- 90 349,87	1216D
BC 4 882,91	0 45 46	B	-85 223,76	- 90 313,90	1216C
CD 3 289,01	93 23 49	C	-85 158,75	- 85 431,42	1240C
DA 4 723,71	180 27 12	D	-81 875,52	- 85 626,31	1240D

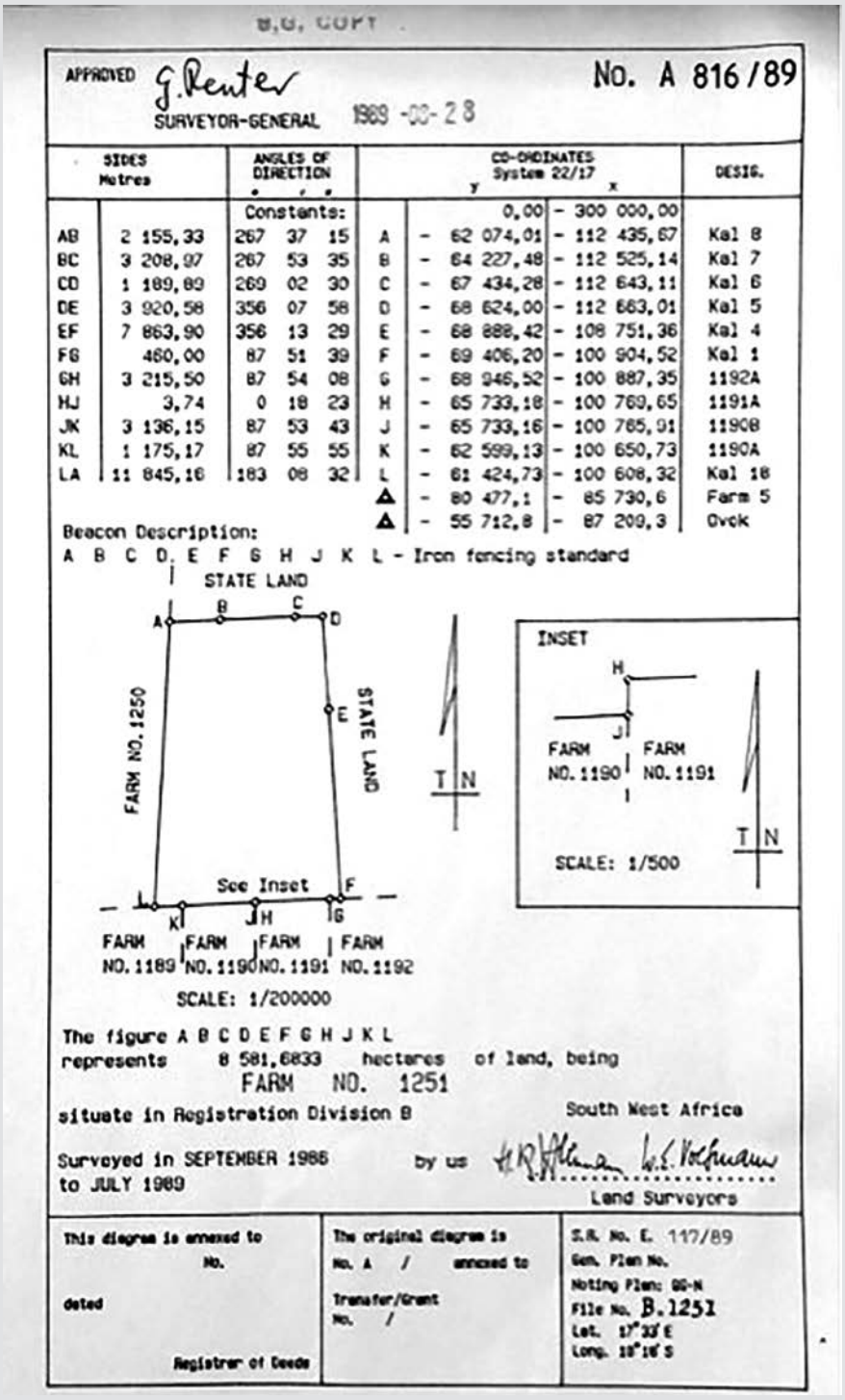
DESCRIPTION OF BEACONS:
A,B,C,D ..... Iron fencing standard

SCALE: 1/50 000

The figure A B C D
represents 1584,1683 hectares of land, being
FARM NO. 1240 situate in Registration Division B,
Surveyed in September 1986-October 1987, by us South West Africa
[signature] Land Surveyors

This diagram is annexed to No. dated Registrar of Deeds	The original diagram is No. Transfer/Grant No.	S.R.No. E.154/87 Noting Plan QG-N QG-S File No.B.1240

Appendix D
Example of Approved Survey Diagram: Mangetti Farm No. 1251



S.G. COPY

APPROVED g.Reuter SURVEYOR-GENERAL 1989 -00- 28

No. A 816/89

SIDES Metres		ANGLES OF DIRECTION ° ′ ″			CO-ORDINATES System 22/17 y		x		DESIG.
		Constants:				0,00	- 300 000,00		
AB	2 155,33	267	37	15	A	- 62 074,01	- 112 435,67		Kal 8
BC	3 208,97	267	53	35	B	- 64 227,48	- 112 525,14		Kal 7
CD	1 189,89	269	02	30	C	- 67 434,28	- 112 643,11		Kal 6
DE	3 920,58	356	07	58	D	- 68 624,00	- 112 663,01		Kal 5
EF	7 863,90	356	13	29	E	- 68 888,42	- 108 751,36		Kal 4
FG	460,00	87	51	39	F	- 69 406,20	- 100 904,52		Kal 1
GH	3 215,50	87	54	08	G	- 68 946,52	- 100 887,35		1192A
HJ	3,74	0	18	23	H	- 65 733,18	- 100 769,65		1191A
JK	3 136,15	87	53	43	J	- 65 733,16	- 100 765,91		1190B
KL	1 175,17	87	55	55	K	- 62 599,13	- 100 650,73		1190A
LA	11 845,16	183	08	32	L	- 61 424,73	- 100 608,32		Kal 18
					▲	- 80 477,1	- 85 730,6		Farm 5
					▲	- 55 712,8	- 87 209,3		Ovck

Beacon Description:
A B C D E F G H J K L - Iron fencing standard

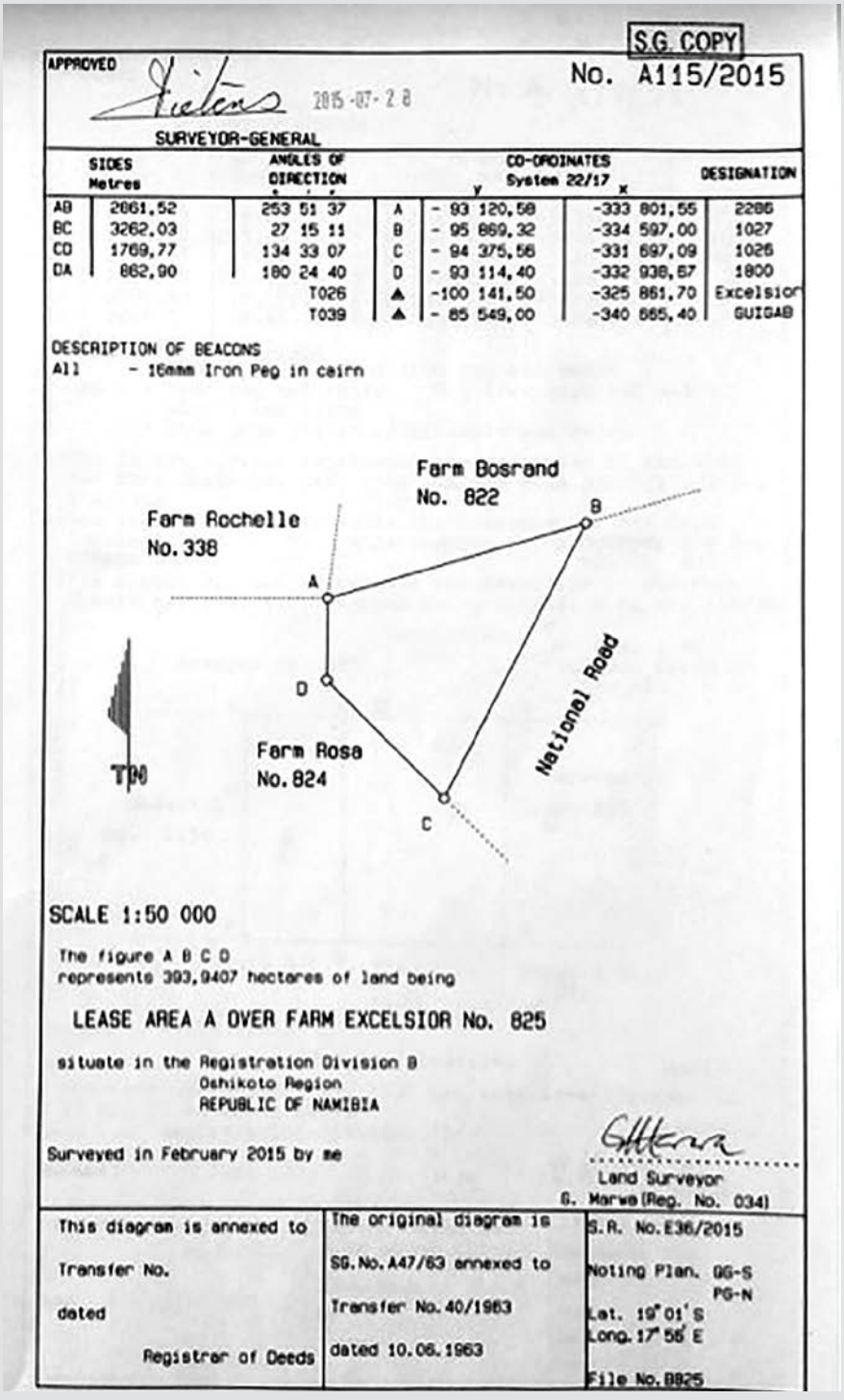
SCALE: 1/200000

The figure A B C D E F G H J K L
represents 8 581,6833 hectares of land, being
FARM NO. 1251
situate in Registration Division B South West Africa

Surveyed in SEPTEMBER 1988 by us H.R. Hallenberg W.S. Hochmann
to JULY 1989 Land Surveyors

This diagram is annexed to No. dated Registrar of Deeds	The original diagram is No. A / annexed to Transfer/Grant No. /	S.R. No. E. 117/89 Gen. Plan No. Noting Plan: 88-N File No. B.1251 Lat. 17°33' E Long. 18°18' S

Appendix E
Example of Approved Survey Diagram: Lease Area 'A', Farm Excelsior No. 825



S.G. COPY

APPROVED

2015-07-28

No. A115/2015

SURVEYOR-GENERAL

	SIDES Metres	ANGLES OF DIRECTION ° ' "		CO-ORDINATES System 22/17 y	x	DESIGNATION
AB	2861,52	253 51 37	A	- 93 120,58	-333 801,55	2286
BC	3262,03	27 15 11	B	- 95 869,32	-334 597,00	1027
CD	1769,77	134 33 07	C	- 94 375,56	-331 697,09	1026
DA	862,90	180 24 40	D	- 93 114,40	-332 938,57	1800
		T026	▲	-100 141,50	-325 861,70	Excelsior
		T039	▲	- 85 549,00	-340 665,40	GUIGAB

DESCRIPTION OF BEACONS
All - 16mm Iron Peg in cairn

Farm Bosrand No. 822

Farm Rochelle No. 338

Farm Rosa No. 824

National Road

A

B

C

D

T90

SCALE 1:50 000

The figure A B C D
represents 393,9407 hectares of land being

LEASE AREA A OVER FARM EXCELSIOR No. 825

situate in the Registration Division B
Oshikoto Region
REPUBLIC OF NAMIBIA

Surveyed in February 2015 by me

Land Surveyor
G. Marwe (Reg. No. 034)

This diagram is annexed to	The original diagram is	S.R. No. E36/2015
Transfer No.	SG. No. A47/63 annexed to	Noting Plan. GG-S PG-N
dated	Transfer No. 40/1963	Lat. 19°01'S
Registrar of Deeds	dated 10.06.1963	Long. 17°56'E
		File No. 8825

Appendix F
Agricultural Consent No. 01178

Rue: L 792

REPUBLIC OF NAMIBIA

MINISTRY OF AGRICULTURE, WATER AND RURAL DEVELOPMENT

Reference	CONSENT	Consent No.:
16/6/2/596	In terms of Subdivision of Agricultural Land Act, 1970	01178

By virtue of the powers delegated to me by the Government of the Republic of Namibia consent is hereby granted in terms of Section 4 (2) of the Subdivision of Agricultural Land Act, Act 70 of 1970, for the subdivision of the agricultural land described in paragraph 1, into units indicated in paragraph 2, subject to the conditions set out in paragraph 3.

PARAGRAPH 1. THE AGRICULTURAL LAND TO WHICH THIS CONSENT APPLIES.

Certain Farm No. 792 (Eastern Reserve) situated in the registration division "L" and measuring 1 279 265, 0007 hectares.

PARAGRAPH 2. CONSENT GRANTED.

The subdivision of the agricultural land described in paragraph 1 into portions measuring approximately 1 361, 5750 hectares and 1 277 904 hectares respectively, represented by the figures marked Portion 45 and Remainder as shown on the sketch plan which is attached to this consent.

1. Simultaneously with registration of transfer;
a condition must be registered against the title deed of the portion measuring 1 361 hectares to the effect that the portion may only be used for the purpose of resettlement.

2. This consent is valid for three years from the date of issue.

3. This Consent does not exempt any person from any provision of any other law, and does not purport to interfere with the right of any person who might have an interest in the agricultural land.

pp. DR. VAINO SHIVUTE
PERMANENT SECRETARY

8/8/01
DATE

Certified a true copy of the original document and bears no signs of unauthorized inscriptions or alterations

Permanent Secretary
Ministry of Agriculture, Water and Rural Development

All official correspondence must be addressed to the Permanent Secretary

Appendix G
Locality Plan: Eastern Reserve No. 792

Appendix H
Persons Consulted

Resettlement Beneficiaries (Oshikoto Region)	
Farm Chudib	R. Shiimi, J. Uses, C. Xamises
Farm Leeupos	H. Mupetami, J. Mupetami, L. Mupetami, E. Ottoman
Farm Excelsior – Grootplaas – Pos Makalani – Thank you Kaarina	M. Awases T. Ketro, T. Kaosab P. Haneb, P. Nanab
Farm Sandup	G. Shipanga (brother of resettlement beneficiary)

Bank Officials (Windhoek branches)		
Agribank	R. Mwazi	Manager: Marketing Communication & Research
Bank Windhoek	C. Matthee	Executive Officer: Retail Banking
	A. Robberts	Manager: Collateral Compliance
	A. Smit	Executive Officer: Credit
	C. Matthee	Executive Officer: Retail Banking
First National Bank (FNB)	J. Cloete	Agri-Manager
	C. Viljoen	Head: Agriculture & Tourism
Standard Bank	B. Beukes	Head: Customer Channels
	N. Daniels	Head: Credit
	G. Mukwaima	Head: AGRI
	S. Tjijorokisa	Head: Legal, Governance and Corporate Social Investment (CSI)

Officials of Agricultural Unions/Associations		
Mangetti Farmers Association, Omuthiya	M. Nangombe	Public Relations Officer
	I. Shaelemo	Chairman
Namibia Agricultural Union, Windhoek	S. Coetzee	Executive Manager

Officials of the Ministry of Land Reform and Ministry of Agriculture, Water & Forestry	
W. Eiseb	MLR: Deputy Registrar of Deeds, Windhoek
F. Enkali	MLR: Chief Regional Officer, Oshikoto Region
D. Kapitango	MLR: Chief Development Planner, Tsumeb, Oshikoto Region
E. Shali	MAWF: Livestock Development Centre, Okapya, Oshikoto Region
T. Sheuyange	MAWF: Livestock Development Centre, Okapya, Oshikoto Region

11
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