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The High Court of Namibia: *Günther Kessl v Ministry of Lands and Resettlement and 2 others. Case No 27/2006 and 266/2006* – A test case for the Namibian land reform programme

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A. Introduction

The judgment in *Günther Kessl v Ministry of Lands and Resettlement and 2 others, Case No 27/2006 and 266/2006* (hereinafter *Kessl*) rendered by the High Court of Namibia on 6 March 2008 concluded the first case in which the procedure of expropriations of commercial farms was challenged. Expropriations are part of the Namibian land reform process that started after the country's independence in 1990.[1] Land reform is one of the key questions in Namibia still awaiting a solution that satisfies the majority of the population.[2] In this context the decision is a "test case" as the Court itself acknowledged in its judgment and was extensively debated and discussed by the media and civil society.[3] The case sets an example in strengthening the rule of law for further expropriation procedures and in the whole ongoing land reform process. Thus the case is highly significant for the future of land reform in Namibia. The case has also to be seen in the light of land reform processes in neighboring countries such as South Africa and Zimbabwe.[4] Consequently, it has significance for the whole Southern African region. An interesting additional fact given the history of Namibia as a German colony is that the expropriated farmers were all of German nationality. The case comment is structured in 2 parts. Firstly the history and legal background of the Namibian land reform process is given, whilst also commenting on some of the problems facing the process. In the second part the judgment itself will be presented

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1 Agricultural (Commercial) Land Reform Act, 1995, Part IV Section 19 ff on the "compulsory acquisition of agricultural land".

2 *Wolfgang Werner/Bertus Kruger*, Redistributive Land Reform and Poverty Reduction in Namibia, 03.2007, p. 4, http://www.lalr.org.za/namibia/namibia_final-draftv2_wernerkruger.pdf/view (checked 28.02.2009).

3 *Kessl*, para 1; *see* for example: Farm-Enteignung. Deutsche vor Gericht erfolgreich, Allgemeine Zeitung http://www.az.com.na/politik/farm-enteignung.66225.php (checked 28.02.2009); *Catherine Sasman*, Court Rules Expropriation ‚invalid', New Era 11.03.2008, http://www.newera.com.na/article.php?db=oldarchive&articleid=19848 (checked 28.02.2009).

4 *Kessl*, para 10.

with the final section containing some conclusions concerning the implications of the judgment.

B. Background

I. History of land reform in Namibia

Firstly, to give a background to the case, it has to be seen in the context of the history of land reform in Namibia. The Court itself starts by outlining the history of land ownership to provide a better understanding of the complexity of the issue.[5]

The territory that is today called Namibia was firstly colonised by the Germans and remained a German colony from 1884 to 1915.[6] In the aftermath of World War I the League of Nations granted South Africa a mandate over the territory.[7] Before Namibia gained its independence from the South African mandate in 1990, it was governed by colonial apartheid rule extended from South Africa as an occupying country.[8] These apartheid rules led to a parallel agricultural system: firstly, communal lands for blacks were created and secondly, large commercial farms were established almost exclusively for the white population.[9] An apartheid-era land law had blocked the access of black people to these commercial farms.[10] Accordingly, when the country gained its independence, roughly 52 per cent of the agriculturally usable land was held by about 3500 white land owners, while 48 per cent fell within the communal areas where nearly a million blacks live.[11] Today, 85 per cent of the commercial farm land is still owned by whites.[12] This situation reflects the racial division of the country but in order to understand the importance of this fact, one has to know that agriculture plays a major role within the Namibian population.[13] Upon

5 *Kessl*, para 7.

6 *Geraldine Mwanza Geraldo/Isabella Skeffers*, Researching Namibian Law and the Namibian Legal System, GlobaLex 12.2007, http://www.nyulawglobal.org/globalex/Namibia.htm (checked 28.02.09).

7 The Covenant of the League of Nations, 28.06.1919, Article 22.

8 Note 7.

9 *Stefan Kreutzberger*, Schlüssel für die Landreform, akzente 4.04, p. 29.

10 *Willem Odendaal*, The SADC Land and Agrarian Reform Initiative. The case of Namibia, NEPRU Working Paper No. 111, 12.2006, p. 6.

11 *Sidney L. Harring/Willem Odendaal*, No resettlement available. An assessment of the expropriation principle and its impact on land reform in Namibia, Windhoek 2007, p. 2; *Werner/ Kruger*, note 2, p. 5.

12 *Werner/Kruger*, note 2, p. 5; however, German citizens own only a very small percentage of all the farms in Namibia.

13 The mining sector contributes most to the country's economy, but about 70% of the population depend on agricultural activities and they are a major source of income and employment for the bulk of the population: IIASA Country Briefs: Namibia 02.2001 http://www.iiasa.ac.at/Research/POP/pde/briefs/na-econ.html (checked 28.02.2009).

independence, land reform was a major promise of the new Namibian government,[14] and the 1990 Constitution of the Republic of Namibia provides for the legal basis of the land reform project. Article 16 of the Constitution guarantees, in paragraph 1, the protection of property rights while authorising, in its next paragraph, expropriation as a limitation to the above mentioned right. The competence for the ambitious land reform programme of the new government was given to the Ministry of Lands and Resettlement that was specially created for this purpose.[15] In July 1991, a National Conference on Land Reform and the Land Question took place with the participation of dozens of Namibian organizations.[16] Based on that consultation, the Agricultural (Commercial) Land Reform Act of 1995 was implemented as a statutory basis for the land reform process, providing for different instruments through which the process can proceed. For the following 14 years, the Ministry of Lands and Resettlement operated on the basis of "willing buyer, willing seller",[17] a principle pursued through free market forces that focuses on farmers who decide voluntarily to sell their land.[18] In this case the Act vests the State with a preferential right to purchase such land.[19] But the chosen approach has faced two main problems: it did not work fast enough and did not deliver enough land of sufficient quality to ensure a politically sustainable land reform process.[20] Consequently, the government was pressurised by different interest groups such as the Namibian Farm Workers Union, which demanded a speeding up of the process of redistribution, being influenced by the example of expropriations in Zimbabwe.[21] Accordingly, in 2004, the government announced as a next step the beginning of the land expropriation process.[22] The first legal expropriations took place in 2005 but these have not been challenged in court.[23] The presented case is the first one that

14 *Harring/Odendaal*, note 11, p. 3; *Werner/ Kruger*, note 2, p. 6.

15 Until 2005 it was named „Ministry of Lands, Resettlement and Rehabilitation".

16 *Justine Hunter*, Who should own the land? An introduction, in: Justin Hunter (ed.), Who should own the land? Analyses and Views on Land Reform and the Land Question in Namibia and Southern Africa, Windhoek 2004, p. 3.

17 *Ben Fuller*, A Namibian path for land reform, in: note 16, p. 83.

18 Part II Agricultural (Commercial) Land Reform Act, 1995.

19 Part III Agricultural (Commercial) Land Reform Act, 1995.

20 *Clemens H. Kashuupulwa*, Namibia, Land Reform – Prospects and Challenges, New Era 18.07.2008, http://allafrica.com/stories/200807180708.html (checked 28.02.2009); *Werner/ Kruger*, note 2, p. 26.

21 *Kreutzberger,* note 9, p.29.

22 *Theo-Ben Gurirab*, Statement on the acceleration of land reform in the Republic of Namibia, Windhoek 25.02. 2004, http://www.sarpn.org.za/documents/d0000745/P826-Namibia_land_reform_Gurirab.pdf (checked 28.02.2009).

23 Initially the expropriation of the Ongombo West farm in 2005 was uncontested. In the case of the Okorusu and Marburg farms (expropriated in 2006) only the amount offered in compensation was challenged in court - the administrative process remained unchallenged.

reviews the procedure of an expropriation before the High Court of Namibia. It is a "test case". The commercial farmers of Namibia, who are represented in the Namibia Agricultural Union, had been developing this legal attack on the entire land reform process for some time, preparing for a test case that was sure to arrive at some point.[24]

II. Legal Background

1. The Namibian law

After outlining the historical background of the process, the legal background of land reform in Namibia will be discussed.

As mentioned earlier, the principle of land expropriation is grounded in Article 16 of the Constitution:

> (1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.
> (2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

Thus the constitutional requirements on expropriation are that a just compensation is given; that it is in the public interest; and finally, that the statutory requirements are fulfilled as imposed by the applicable Act of Parliament, i.e. the *Agricultural (Commercial) Land Reform Act of 1995* (ACLRA). It provides for the acquisition of agricultural land by the State for the purpose of land reform by vesting the State with the preferential right to purchase agricultural land.[25] The ACLRA also regulates the expropriation of certain agricultural land if negotiations on a sale by mutual agreement fail and gives the *Minister of Lands and Resettlement* the competence to decide over expropriations and confers on him great discretionary power on the redistribution of land.[26] Before the Minister comes to the decision to either buy or to expropriate land after the Act, he/she must consult the *Land Reform Advisory Commission*. The establishment of this Commission is also contained in the ACLRA and it has, in general, the function of making recommendations or giving advice to the Minister when he is carrying out his duties under the ACLRA.[27] For this

[24] *Sidney L. Harring/Willem Odendaal*, Kessl: A New Jurisprudence of Land Reform in Namibia, Windhoek 2008, p. 10.

[25] Part II and III ACLRA.

[26] Part IV Section 20 ACLRA.

[27] Part I ACLRA; after Section 4 (1) the Commission consists of government and non-governmental representatives: two officers of the Ministry of Lands and Resettlement, two officers of the Ministry of Agriculture, two persons nominated by each of such associations involved in agricultural affairs, one person nominated by the Agricultural Bank of Namibia, 5 persons who are not

purpose the Commission can undertake investigations and can authorise inspections of any agricultural land.[28]

Furthermore, the constitutional requirement of the payment of a just compensation is regulated in the ACLRA.[29] As a basic principle, the amount for compensation that is determined by the Minister upon recommendation of the Commission, is the open market value on the date of the expropriation notice.[30] The ACLRA stipulates that as a rule, a small additional amount will be paid, notwithstanding anything to the contrary contained in the Act.[31] However, there can be specific circumstances in which a smaller amount than the open market value can be fixed as compensation. Some examples are given by the ACLRA.[32]

The other important provision of the Constitution relevant to this case is Article 18 that gives a right to Administrative Justice. Article 18 reads:

> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Administrative law in Namibia has been greatly influenced by English common law.[33] There is, at present, no Act of Parliament that provides any legal source for administrative procedural law. Thus Article 18 of the Constitution is the only basis and is interpreted in the context of the major principles of common law by the Namibian Superior Courts.[34]

One of these principles that administrative bodies have to respect is *natural justice* that comprises most notably the *audi alteram partem* rule,[35] which is the right of an aggrieved person to receive a hearing.[36] Administrative bodies have to meet these procedural standards when they take an administrative decision such as expropriation which is an administrative action under Article 18.[37]

employed in the public service. The members are appointed by the Minister, the last five only with the approval of the National Assembly; Section 3 ACLRA on the functions of the Commission.

28 Section 15 ACLRA.

29 Section 23 ff ACLRA.

30 Section 25 (1) (a) (i) ACLRA.

31 After Section 25 (2) ACLRA an amount equal to 10%, but not more than N$ 10 000 is added to the total amount.

32 Section 25 (5) ACLRA.

33 *Collins Parker*, The "Administrative Justice" provision of the constitution of the Republic of Namibia: a constitutional protection of judicial review and tribunal adjudication under administrative law, XXIV CILSA, 1991, 84, p. 89.

34 *Parker*, note 33, p. 89

35 Viljoen and Another v Inspector-General of the Namibian Police, 2004 NR 225.

36 *Parker*, note 33, p. 92 ff; *Kessl*, para 47.

37 *Kessl*, para 47 ff.

2. References to international law

A final remark needs to be made to complete the legal background: because the concerned farm owners are not of Namibian nationality, the International Investment Agreements may play an important role. Namibia has ratified "Reciprocal Investment Promotion and Protection Treaties" with several countries, notably with Germany[38]. Under this Treaty, movable and immovable property are considered "investments" and therefore are to be treated in accordance with certain investment protection standards in the State party's territory.[39] For example, discriminatory and arbitrary measures are illegitimate.[40] Also, investments shall not be expropriated except for public benefit and with full compensation. The legality of such expropriation shall be subject to judicial review by due process of law.[41] If a dispute arises between a State and a foreign investor from the other State party, international arbitration can be requested by one of the parties to the dispute.[42] Thus, in addition to the review of the proceeding before the Namibian Courts, the German farmers have the possibility of seeking to resolve the dispute by way of international arbitration.

In order to complete the picture, another international body - this time in the Southern African region - should be mentioned: the SACD-Tribunal, which is the regional justice Tribunal of the Southern African Development Community (SADC) located in Windhoek.[43] After the exhaustion of local remedies, the case could fall under the jurisdiction of the Tribunal since under the SADC Protocol on Tribunal, it is competent to decide disputes between natural persons and States.[44] As this provision does not request nor exclude persons from certain nationalities, it gives the German farmers the possibility to file an application. However, like the recent case of Zimbabwean farmers taking legal action against expropriations in the Zimbabwean land reform process shows,[45] the SADC-Tribunal has only a weak position. In the latter case, the Zimbabwean government declared it would ignore the judgment rendered in favour of the aggrieved farmers because it considered itself

38 Treaty between the Federal Republic of Germany and the Republic of Namibia concerning the Encouragement and Reciprocal Protection of Investment, 21.01.1994 (signed), 21.12.1997 (entered into force), Bundesgesetzblatt 1997 Teil II Nr. 4, 28 January 1997.

39 Note 38, Article 1, 1 and 2 ff.

40 Note 38, Article 2, 2.

41 Note 38, Article 4 (2).

42 Note 38, Article 11.

43 Article 16 of the Treaty of the Southern African Development Community, 32 I.L.M. 120 (1993), 17.08.1992 (signed), 13.09.1993 (entered into force), amended by SADC treaty-amendment (2001), 14 member States (checked 28.02.2009).

44 Article 15 of the SADC Protocol on Tribunal.

45 Mike Campbell and Others v Republic of Zimbabwe, Case No. 2/2007.

not to be bound by the Tribunal's decision.[46] So far the protest of the other SADC member States remained reluctant. Considering this deficit on the enforcement side, the competence of the Tribunal exerts a rather theoretical influence and thus has only a minor significance for this case.

III. Problems of the Land Reform process

The land reform process, with the aim of poverty alleviation, is a highly complex process that faces many different challenges and problems of a legal, sociological, economical and environmental nature. One aspect, that had become a political issue, was the dispossession of farm workers by the land reform process.[47] About 30 000 black farm workers live with their families on white-owned farms, amounting to about 200 000 people in total. These are among the lowest-paid workers in Namibia and there is little possibility of their finding other employment.[48] No provision was made in the land reform process for farm workers who are displaced as a result of land redistribution so they lose their jobs without compensation.[49] However, their interests have to be considered before an expropriation takes place.[50]

Another problem is choosing the beneficiaries of the new distributed land.[51] Under the Act, land reform aims to resettle Namibian citizens who have no or no adequate land and who have been disadvantaged in the past.[52] The *Ministry of Lands and Resettlement* provides a figure of 240 000 people, who are the poorest of the Namibian population, that need

46 *See Michel Djimgou Djomeni*, Décision du Tribunal de la SADC en faveur de 78 fermiers zimbabwéens: un contrôle de conventionalité de la mise en oeuvre de la réforme agraire, sentinelle 14.12.2008, http://wwwsfdi.org/actualites/a2008/Sentinelle%20170.htm#sadc (checked 28.02. 2009).

47 *Sharon LaFraniere*, Tensions simmer as Namibia Divides its farmland, The New York Times 25.12.2004: The farm workers who are organized in the Namibian Farm Workers Union pressurised the government to recognize their interests.

48 *Harring/Odendaal*, note 24, p. 5; *Werner/Kruger*, note 2, p. 24.

49 *Wolfgang Werner*, Recent Developments in Land Issues in Namibia, Windhoek 02.2003, p. 6, http://www.lalr.org.za/further-resources/werner-on-recent-developments-in-land-issues-in-namibia.pdf/view (checked 28.02.2009).

50 Section 20 (6) ACLRA. Despite this provision, in the second and third expropriation cases (concerning the Okorusu and Marburg farms), the Ministry of Lands and Resettlement failed to consider the interests of the farm workers in the expropriation process.

51 The allotment of land for resettlement is determined in Part V of the ACLRA.

52 Article 14 (1) ACLRA.

to be resettled but does not provide a list of the names of these people.[53] Thus there is no transparency in the process of selecting the potential beneficiaries.[54]

After the termination of the resettlement, the poor people who moved to those projects need adequate support to fulfill their new job as farmers. They must be provided with the necessary financial resources that are required to effectively run the farm. They also need some agricultural know-how and skills about financial management for commercial farming because they have no experience in this field. So far there has been a lack of support to the resettled people, another reason why the past resettlement projects were a failure.[55]

Finally a restriction on the realization of land reform is finance:[56] huge amounts must be spent over the coming years to run the programme. Funds will be needed, for example, to pay the compensations demanded by the Act, to sustainably support the beneficiaries, to give opportunities to the displaced farm workers and to produce effective planning and administration of land reform.

C. The Judgment

The decision was taken by the High Court of Namibia. Under the Constitution, the judiciary in Namibia consists of three levels: the Lower Courts, the High Court and the Supreme Court at the top.[57] The case was decided by a two-judge panel of the High Court, one a white permanent judge and the other a black acting judge. Rule 53 of the High Court Rules vests in the Court the original jurisdiction to review administrative action but the decision of the High Court can be appealed in the Supreme Court of Namibia.[58]

I. The facts

The facts of the case are as follows: There are three applicants; the first being Mr. Kessl after whom the case is named. They are the owners of four farms in Namibia that have been expropriated by the Ministry of Lands and Resettlement. All three are German citizens and

53 *Theo-Ben Gurirab*, note 22.

54 *Werner*, note 49, p. 9: It was revealed that beneficiaries included at least one Permanent Secretary, a Regional Governor and several people who were employed either in the civil service or elsewhere; *Oliver Horsthemke*, Land reform in Namibia: Opportunity or opportunism? in: note 16, p. 88; *Shadrack Tjiramba*, Transparency in Land Administration – a closer look, Legal Assistance Centre 20.06.2008, http://www.lac.org.na/news/pressreleases/pressr-landadminist.html (checked 28.02.2009).

55 See the expropriation of the Ongombo West farm that was once a very profitable farm and was recently in a bad condition: *Dirk Heinrich*, Viele Familien, kein Einkommen, Allgemeine Zeitung, 23.12.2008, http://www.az.com.na/lokales/viele-familien-kein-einkommen.78378.php (checked 28.02.2009); *Werner/Kruger* note 2, pp. 6, 28.

56 *Hunter*, note 16, p. 2.

57 Article 78 of the Constitution of the Republic of Namibia.

58 Section 14 (1) of the Supreme Court Act of 1990.

residents of Germany, but have owned their farms in Namibia for many years, visiting them two or three times annually. On the farms live several farm workers and their dependents. In March 2004, the then Minister of Lands and Resettlement, Mr. Pohamba (who is now the Namibian President) consulted the Land Reform Advisory Commission at an extraordinary meeting regarding the expropriation of farms. Expressing urgency on the matter he handed a list of farms to the Chairman of the Commission for consideration but in this meeting the Commissioners had no opportunity to deal with any substantive issues regarding the selection of farms for expropriation because they had no information about any of the potential farms. An inspection of the farms only took place more than one year later in July 2005. That is why, at the end of the meeting, the Commissioners could not arrive at a decision and no resolution was taken. The Minister himself was not present for most of the meeting and, therefore, did not discuss the issues with the Commissioners. An interesting point is the fact that a letter was served to Mr. Kessl on the same day of the meeting, informing him of the decision that his farm had been chosen as appropriate for acquisition whilst the issue was still in discussion in the Commission. When an official of the Ministry served the letter on Mr. Kessl, he was accompanied by several heavily armed members of the Namibian police force and the special field force. Only seven months later, in October 2004, did the Minister give Mr. Kessl an opportunity to make representations about the case. Mr. Kessl responded by seeking documents and information from the authorities so that he could make such representations but he never received any. An expropriation notice was finally issued in September 2005 signed by the Minister, offering a certain amount as compensation.

The farmers addressed their applications against the Ministry of Lands and Resettlement before the High Court. They asked the Court to review and to set aside the decision and notice of the Ministry to expropriate the farms. The applicants concede that the Government of Namibia has the right to expropriate farms but, in so doing, it must respect Namibian law. There are two main issues that the parties agreed need to be decided by the Court: firstly, whether the *audi alteram partem* principle is relevant in expropriation cases and secondly, whether the procedure that was followed in all these three cases is in conformity with the law. Besides the violations of the Namibian Constitution and land law, the applicants argued that the Ministry breached the protections offered under the bilateral Investment Treaty between Germany and Namibia.

II. The decision

In its decision the Court treats the three cases as analytically identical, referring only to the first application of Mr. Günther Kessl and his two farms. The Court starts with the focus on the two crucial submissions.

Firstly, the question is whether Article 18 of the Constitution on Administrative Justice is applicable in expropriation cases. This would mean that the *common law* principles on *natural justice* and consequently the *audi alteram partem* rule would apply. The respondent

argued that the only requirements for expropriation by the State are contained in Article 16 of the Constitution itself and no other statutory provision is applicable. The Court decided on the issue that the requirements of both Articles 16 and 18 must be adhered to. Article 16, which provides for the right to property, is part of the fundamental rights of the Namibian Constitution and accordingly, there should be strict compliance with procedural requirements when limitations to this right to property are realized such as in the case of expropriation. This result brings the Court to the next important point: the question of whether the constitutional right to be heard was granted to the applicant. The Minister had invited the applicant in his letter to make representations but this letter did not give any information as to the basis of these ministerial decisions. When the applicant asked for more detailed information he received no reply. The Court states that the right to be heard was violated by the Ministry as its duty was to answer the applicant and to give him the required information about the expropriation process so that he could make representations on the basis of this information. The next point discussed by the Court was whether the expropriation was in the public interest as required by Article 16 of the Constitution. The meaning of public interest is clarified by a provision of the ACLRA: it is the resettlement of Namibian citizens who either have no or no adequate use of agricultural land, especially those who have been disadvantaged by past discriminatory practices. Accordingly, to comply with the public interest condition, the particular farm must be suitable for resettlement of this specific category of people and the Minister must be satisfied by these conditions. Consequently, he must be in possession of enough information regarding the suitability of the specific farm. For this purpose he has the support of the *Land Reform Advisory Commission* that can carry out investigations and make recommendations to him. The Minister is even obliged under the Act to consult the Commission before he makes a decision regarding the farm.

The Court judges that the Minister did not comply with these standards. The Minister had no adequate data concerning the farms available when he took the decision. It is unknown on what grounds he decided the question of suitability. Inspectors were only sent to investigate the farms more than a year after the first decision was taken. Additionally, for the decision of the Minister regarding the public interest requirement, it is necessary under the Act that the Commission considers the interest of any person employed and lawfully residing on the land and their families residing with them. Once the Commission has considered the interest of those persons it may recommend to the Minister what he may do in that regard. In this respect the Court comes to the conclusion that the Commission disregarded this obligation. The Minister was not provided with any recommendation in respect of the employees and their families. As the Minister had no such information at his disposal he could not decide whether it would be in the public interest to displace all those persons. Besides, the Court considers over several pages each requirement of the ACLRA step by step and illustrates where the conditions in terms of the Act had either not been or fully complied with. The Court expressly criticises the former Minister of Lands and Resettle-

ment Mr. Pohamba who took the first decisions in the process, concluding that he failed to deal with the requirements and duties he was empowered to perform.

After that, the Court considers the question of whether the expropriation against the farmers of German nationality is a discrimination against foreign nationals. Deriving from the Constitution the Court states that Article 16 (1) protects the property of "all persons" but contains a specific provision in respect of foreigners with the effect that Parliament may pass a law which constrains the acquisition of property by foreigners. However the ACLRA did not include any provision to restrict the acquisition of land in Namibia by foreigners,[59] so consequently, the Court concludes that the reference to a land-owner as a foreigner can never be a criterion for acquisition, nor for expropriation of the land of that person. Likewise, from the fact that the farmers live in Germany and that they can therefore be seen as "absentee landlords" provides no legal basis for expropriation under the Act. Concerning the Investment Treaty between Germany and Namibia, the Court states that the applicants – as German citizens – are entitled to the same treatment as Namibian citizens and that the Minister was obliged to consider this Treaty before taking a decision against the German owners of the farms, albeit without going so far as to rule on the alleged breach of the Treaty by the government. Finally the Court produces some concrete guidelines on the procedure to be followed for each expropriation case under the Act, as a summary of all the procedural violations revealed in the judgment.

The Court comes to the conclusion that the cumulative effect of all the failures of the Minister to comply with the provisions of the Constitution and the Act clearly indicate that the fundamental rights of the three applicants were infringed by the action of the Minister. Thus the Court sees no option but to declare such decisions by the Minister to expropriate the farms as invalid and it makes the orders to set aside the decisions and notices of expropriation. With regard to the enforcement of the expropriations during the process, the applicants were granted an *interim relief* meaning that the Ministry did not proceed with the expropriations of the farms until a decision was taken by the Court. The enforcement of the expropriations was finally completely stopped by the judgment.

The respondent exercised its right to appeal to the Supreme Court and the decision is still pending – neither has a date for the beginning of the procedure been determined yet. It is hard to speculate on the result of this appeal but the decision of the High Court is so well-reasoned that it is likely that the Supreme Court will follow it. So far the government did not proceed with further expropriations and indicated to wait for the outstanding decision. However, even if the case is upheld on appeal, the Ministry could expropriate the farms again, this time in line with the process set out in the ACLRA.[60] In such case the farmers can reconsider international arbitration under the Investment Treaty.

59 Except for Sections 58 and 59 which determine the requirement of the permission of the Minister for the acquisition of agricultural land by foreign nationals.

60 Luke Eric Peterson (ed.), Investment Arbitration Reporter Volume 1 No. 4, 01.07.2008, http://www.iareporter.com/Archive/IAR-07-01-08.pdf (checked 28.02.2009).

D. Conclusions

In expressly applying Article 18 of the Constitution to an expropriation procedure, the judgment strengthens the role of Administrative Justice as a fundamental right. It is a well-reasoned judgment that scrutinises in detail all the relevant provisions of the ACLRA in a highly political issue. Therefore it can be seen as a victory for the rule of law in Namibia.

But, on the other hand, the statements of the Court make apparent that there are deep administrative problems in practice within the *Ministry of Lands and Resettlement* and there is an immense lack of transparency in the whole land reform process. These problems are so serious that it is unclear if the Ministry is able and has the capacity to meet the constitutional requirements on Administrative Justice. Consequently, it is a huge task to improve the expropriation procedure in practice. This could be done, for example, by training officials to provide them with the necessary knowledge of the legal requirements. Therefore the Ministry needs the financial resources to fulfill its tasks so that significant efforts can be made to achieve an effective land reform process with full respect of the rule of law.