



Responsible Land Governance: Towards an Evidence Based Approach

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LEASEHOLD RIGHTS AS A VEHICLE FOR ECONOMIC DEVELOPMENT: A CASE STUDY OF SMALL SCALE FARMERS IN OSHIKOTO REGION

WOLFGANG WERNER, CHARL-THOM H BAYER

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

wwerner@nust.na, cbayer@nust.na

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Abstract

Secure tenure and registered land rights are widely believed to be necessary for access to credit, well functioning land markets and economic development. As a result Namibia introduced long term leasehold rights over communal and commercial land for resettlement purposes in order to address pre-independence imbalances in land holdings. The purpose is to bring the resettled beneficiaries into the mainstream of the economy, but this has not happened. The research analysed the institutional framework for resettlement allocations and the transaction costs in order to understand the impact of leaseholds on the beneficiaries ability to access credit and mobilise investments. The findings suggest that the transaction cost were low when compared with similar transaction internationally, but high in comparison with the production value of the parcels of land. The lack of resources available to the beneficiaries and their resultant inability to service loans is a major contributor to the lack of economic development. Poor access to information on the registration requirements for leases, combined with the requirements from financial institutions and the lack of a market for leasehold rights meant that beneficiaries are not able to register their leases in order participate meaningfully in economic development.

Key Words: Credit, Governance, Institutions, Land Administration, Transaction Costs



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Introduction

In 1990, the newly independent Republic of Namibia committed itself to redress the imbalances in land ownership in the country. It developed a land reform programme in the non-freehold or communal areas and the freehold, or commercial farming areas. The Namibian government has embarked on what Migot-Adholla and Bruce (1993) called state-imposed tenure reform to provide long-term leasehold rights to communal (non-freehold) areas. Similarly the state is providing rights of leaseholds to land acquired by the state for resettlement purposes in the commercial (free-hold) areas for allocation to formerly disadvantaged Namibians. In the communal areas the reform programme seeks to formalise private customary land rights in land use for residential and agricultural purposes. In addition, leasehold rights were introduced to communal areas in a bid to encourage more investment in land and hence accelerate economic development. Land reform in the freehold areas aims to broaden access to land through the National Resettlement Programme (NRP) on the basis of allocating leasehold rights to beneficiaries on farms acquired by the government on a willing-seller, willing-buyer basis. Once the government acquires the land, the farms are typically demarcated into smaller units and advertised for potential beneficiaries to apply for resettlement. These farms are mostly suitable only for extensive livestock farming only (Brown, 1993, as cited in Werner & Kruger, 2007).

The National Resettlement Policy (NRP) intends that resettled beneficiaries of the land reform program should be able to join the “... *mainstream of the Namibian economy by producing for the open market and to contribute to the country’s economy*” (Ministry of Lands, 2001pp. 2-3). The NRP provides for a lease tenure system that “*will be arranged so that the beneficiaries 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 No. 6 of 1995,” 1995) provides that beneficiaries should register long-term lease agreements with the state over their allocated land parcels. Agricultural production on resettlement farms was thus firmly envisaged in a commercial market environment.

Increasingly leasehold rights were being seen as the means by which to effect the anticipated commercial activity of resettled farmers. The Bank of Namibia at their 14th Annual Symposium, as well as the Minister in his keynote address focused on the opportunities for lessees to be able to access capital to invest in their properties, both in communal and commercial areas. In a similar vein 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 communal land rights severely limits incentives for investments.



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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 Secure tenure is widely believed by development practitioners and politicians to be a necessary condition for economic development. It is generally assumed that secure rights to land leads to an increase in the level of access to credit while reducing conflicts and maintaining well functioning land markets. Research has also indicated that although there is a correlation between formal registration and poverty alleviation, this was not always as a result of increased access to credit but rather the result of increased investment by the rights holders (Galiani & Scharfrodsky, 2010).

Despite this the registration of long-term leaseholds on resettlement land and communal areas has been very slow. During the financial year 2013-2014 “*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*” (Ministry of Lands, 2014). Considering that the MLR claims to have settled 5006 families since 1990 (Ministry of Lands, 2014), this appears to be an insignificant number, particularly in view of the fact that the MLR stresses the importance of “*accord[ing] resettlement beneficiaries entitlement and security of tenure which can afford them an opportunity to access financial assistance and contribute to the national development goals*” (Ministry of Lands, 2014). This suggests that the registration of lease agreements generates transaction costs that appear to be an impediment to the full implementation of government policy and legal framework. These are costs typically associated with the effort of engaging in the transaction, in this case of registering a lease on the resettlement land. Different types of transaction costs can be identified such as measurement and enforcement costs (North, 1990) or with more specificity; such as a) search costs, b) legal costs, c) administrative costs, d) development cost, e) financial costs and f) uncertainty costs (Quigley, 1996) as reported by Zevenbergen, Frank, and Stubkjaer (2007).

In the first place, registration requires that each land parcel is professionally surveyed and survey diagrams produced. Once this has been done, the Valuer-General values the surveyed land parcel. A major bottleneck has been to survey all land parcels, due to staff shortages in the Surveyor-General’s

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



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office (Werner & Odendaal, 2010b). However, a study on the registration costs of urban land by De Vries, Lewis, and Georgiadou (2002) indicated that there are significant administrative and financial costs associated with the surveying and registration of land in Namibia. The alleged unwillingness of beneficiaries to apply for the registration of leaseholds suggests that the costs of doing so might outweigh the potential benefits. More generally it is worth understanding the processes that could help to explain the perceived unwillingness to apply or tardiness to register, leasehold rights. In this respect analysis of local level rights and institutions against the centralized systems that allocate rights and resources becomes more relevant. Research has shown that the beneficiaries actions might be better explained, or influenced, by having local level institutions that are appropriate (Enemark & Sevetdal, 1999). They argue that “*local institutions matter*” and that “*peoples’ behaviour patterns are framed more by local than central institutions*”.

Understanding these processes requires us to examine the official policies and the legal frameworks. The position taken in the National Resettlement Policy (Ministry of Lands, 2001) is that beneficiaries should be able to use their leased land as collateral, in contrast to Section 46(1)(a) of the ACLRA, 1995, which “*prohibits any encumbrance of a lease except with permission of the Minister upon recommendation of the Land Reform Advisory Commission*” (Harring & Odendaal, 2002). To add to the ambiguities, a legal opinion prepared by the Attorney-General for the MLR in 2000, stated that ‘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...the lease so mortgaged can be sold in execution if the monies due in terms of the bond are not paid’ (Attorney-General, 2000). However, commercial banks do not accept such leases, as the state does not permit them to be traded (Werner & Odendaal, 2010b). Additionally the impact of using formal titles in accessing credit for economic development and poverty alleviation has often been accepted as orthodoxy despite conflicting evidence (Galiani & Schargrodsky, 2010).

Fundamental questions about increased levels of investments and hence increased agricultural productivity in the wake of long-term registered leases, for example, remain unanswered. Similarly, it is not documented who the people are who apply for the registration of long-term leases, and what their motivations are. Conversely, what prevents larger numbers of beneficiaries to apply for registration, particularly in view of widespread cash flow constraints on resettlement farms (Odendaal & Werner, 2010)? These low registration figures should be of concern to policy makers and land reform implementers, and raise a number of pertinent questions. The questions involve a critical analysis of why financial institutions at the moment are hesitant to accept registered lease agreements over resettlement



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land as collateral as well as the institutional framework governing the registration of leasehold and accompanying transaction costs. The main research objectives are to describe and analyze the legal and institutional leasehold registration framework/process for resettlement allocations and analyse the impact of registered leaseholds on the beneficiaries' ability to access to credit.

The first part of the study will focus on the general frameworks operating at national level. The researchers analyzed the administrative and institutional processes that are required to register a long-term lease agreement. Douglas C. North (1990) argues, that the impact of institutions are vastly underestimated by economic analysts and that the costliness of information is critical to evaluating the cost of attributes that are being exchanged. These are the costs such as those that one might find in a resettlement leasehold agreement (Arrunada, 2001; North, 1990). This provides a framework for analyzing the cost and impact of the institutional arrangements on the registration of resettlement leaseholds. Interviews with the Registrar of Deeds should help to establish the legal process and requirements for registration of leases and whether current *pro forma* lease agreements satisfy those requirements. This will also allow us to analyze the leasehold registration process, and compare the leasehold registration process that has been documented by this research, with the formal expectations of the land administration system (Dale & McLaughlin, 1999). Through comparison of the leasehold registration process and the expectations from a land administration perspective, it will allow us to identify any systemic flaws in the resettlement leasehold registration process. If leases are registered in their current form, interviews with some financial institutions will seek to confirm whether they accept or not registered lease agreements as collateral for credit. Leaseholders will also be interviewed to determine their levels of investment in the resettlement farms as a result of having lease agreements.

The field work for the second part was conducted in Oshikoto region. This provided data to help determine the local level motivations and impediments to the registrations of lease agreements and allow us to determine the perceived nature and value of formal lease agreements. The Oshikoto region has the advantage of being home to some of the oldest resettlement farms, as well as communal land that was surveyed in the 1980s for allocation to individual farmers in the Owambo Mangetti. The Ministry of Land Reform has designated this area in terms of the Communal Land Reform Act and has embarked on a process to clarify ownership of these units in order to register lease agreements. This process has been documented to gain an understanding of the possible difficulties encountered. A better understanding of this process and its possible impacts is of assistance in redefining the resettlement programme and more generally provide valuable insights into the form and nature of formal land administration systems for



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Namibia. The data collected from the interviews will be used to develop an understanding of the value and purpose of leaseholds from the perspective of the resettled persons. It will also allow for a better understanding of the role of leaseholds in improving livelihoods and contribute to the previous research on land reform and livelihoods in Namibia (Werner & Odendaal, 2010a).

Institutional Analysis

Institutions are more formally defined as the rules and regulations that shape society's interaction. 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 may also think of institutions as being any facts that are accepted as such, but that exist only because people collectively agree to accept them as such. An example of such facts would be the existence of the Tropic of Capricorn, the boundaries of the Oshikoto Region or property rights. John Searle (1995) defines these facts as stated above as institutional facts and he contrasts them with brute facts, such as the fact the Khomas Hochland mountains exist. As such property may be seen as an institutional fact by virtue of 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 order 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 is governed by the legislation on traditional authorities and communal land as well as local customs. Family, kinship, ethnic and business relationships are often intertwined in determining access to land rights under these conditions. This does not exclude foreigners or other individuals, but it makes it much more difficult to penetrate these networks and gain access information as the rules are often unspoken and not very obviously transparent. It is this complexity of rules and regulations that govern peoples' actions that is referred to collectively as the institutional framework. This link between institutions and property gained notoriety especially under the assumption that land titles would automatically lead to development (De Soto, 1989, 2000). It is, however, commonly accepted that there is no such straightforward correlation between titling and development and that a range of other institutions, 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.

Land can be defined as a physical thing and an abstract thing (Dale & McLaughlin, 1999). The physical thing being the soil, vegetation, topography and the abstract thing being the set of rights to use and transfer value even though the physical object cannot be traded. The physical thing and the abstract thing



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is 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 implementational (technical) aspects for the functions listed above. Recent advances in technologies for surveying (GPS, drones) and information management (GIS, 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 and that weak and inappropriate institutional arrangements are more likely to be the cause for the failure of land administration systems, rather than technical issues.

Leasehold rights are generally defined as temporary property rights of ownership, which is defined as a private right, where an individual is assigned the rights. Usually the lessor would hold the property right as some form of title or deed, and the lessee takes on those rights (including the benefits and responsibilities) for a specified period. Generally during the period of the lease, the lessor may not re-acquire the property, 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, which are transferred from the state are virtually indistinguishable from full property rights. The leasehold certificate or agreement and the title deed of the lessor are the institutional facts and 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 make decisions as to whether they can extend credit, or otherwise transact with the individuals holding the rights over the land. Therefore the nature of the agreements, contracts and other safeguards such as registration become increasingly more 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 enforcement of these rights. The institutional framework for the registration of leaseholds as a developmental tool within the wider land reform programme is provided by the NRP (Ministry of Lands, Resettlement and Rehabilitation, 2001), the Agricultural (Commercial) Land Reform Act No. 6 of 1995, the Communal Land Reform Act No. 5 of 2002 and the Deeds Registries Act No. 14 of 2015.



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The NRP provides the rationale and objectives for registering leasehold hold rights providing a broad framework and expectations within which the resettlement parcels must be administered. The NRP (2001) explicitly states that, “*applicants should adhere to the stipulations of the lease/resettlement agreement ...*” and that beneficiaries shall get 99 year lease agreements in order to be able to acquire credit. It provides for the surveying of parcels for the registration of real rights. This is a clear, deliberate and precise articulation of the institutional framework within which the rights of resettlement beneficiaries are to be located. It provides for the following key rights 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.** The leasehold rights should be able to be used as collateral for loans and be acceptable to financial institutions.

Inferred Rights

- i.** The leasehold rights should conform to the basic characteristics of leasehold agreements in the national context.
- ii.** The leasehold rights should form the basis for allowing the holders to participate in the mainstream of the Namibia economy.
- iii.** The leasehold rights must be transferable.

The Agricultural (Commercial) Land Reform Act No. 6 of 1995 (ACLRA) is less clear in that it makes provision for land to be leased, alienated or disposed of for resettlement purposes. This creates a grey area by which land is “*allotted*” with no clear rights. Where land is to be leased for resettlement purposes it is clear however that it must be surveyed and registered in accordance with the Survey Act (“Land Survey Act No 33 of 1993,” 1993) and the Deeds Registries Act 47 of 1937. 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.



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The Communal Land Reform Act (CLRA) No. 5 of 2002, Section 33 (1) makes provision for short-term leasehold rights that do not have to be registered except with the CLB. However Section 33 (2) states that 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. There is however no evidence of any communal leasehold being registered in the deeds office. It appears that the Regional Offices of the MLR receive and store the leasehold registers, rather than the CLB itself. However a copy of the communal leaseholds are also sent to the Head Office for their records.

The Deeds Registries Act No 14 of 2015 makes provision for the alienation of previously surveyed and un-surveyed state land, which also requires a survey, however it is expected that the farming units available for allotment are all parts of farms that have been surveyed previously ("Deeds Registries Act No. 14 of 2015," 2015). It is clear that the state may only alienate land by means of a deed of grant or a deed of transfer; applicable in the case of the resettlement programme. There are no other provisions made for the transfer of state land. This is argued to mean that the letter of allotment or the unregistered lease agreements have no legal affect with regards to the transfer of any real rights of state land. No real rights in land are 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 Office of the Registrar of Deeds.

The Deeds Registries Act requires 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*”. Section 54 provides that immovable property with a mortgage may not be transferred without release from the cancellation of the bond and consent of the holder of the bond and 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. This 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 is critical for the functioning of a credit supply to property rights holders and is perhaps key to



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understanding the reticence of financing institutions to providing credit where property is used as security without being registered in the Deeds Office.

Copies of the lease agreements used by the MLR for communal leaseholds and commercial leaseholds are in essence identical. The contents of the agreements, the rights transferred and the rights that are reserved are the same. The focus here is to determine the extent to which these leasehold rights can be registered in the Deeds Office. Section 1 of the lease agreement makes provision for the description of the spatial extent and location of the land subject to the lease agreement. Reference is made to a “*leasehold diagram*” and provision is made for the inclusion of a ‘*Diagram No.*’. The diagram and its number refer to the legal description of a property for registration in the Office of the Surveyor General. This implies that the lease agreement is intended, or at least able to be registered in the Office of the Deeds Registrar. Section 2 states that the lease agreement is “... *subject to notarial registration as hereinafter provided for*”. Section 17 of the agreement states that the “*agreement of lease will be executed and notarially registered against the title deed of the whole farm ...*”. This would appear to indicate that the intention is that the lease agreements must be registered in the deeds office in accordance with the Deeds Registries Act and the Survey Act of Namibia.

The process for the registration of communal and commercial leaseholds starts with the identification of the land to be acquired by the state (Step 1). Once the land has been identified for acquisition, the land must be registered in the name of the state in the deeds office (Step 2 & 3). Once the state has formally acquired the rights to the land, several crucial steps must be completed to ensure that the leasehold agreement may be registered in the deeds office in the name of the beneficiary (Step 4 & 5). The state typically allocates a freehold farming unit it acquired to more than one lessee. In preparation for this, the ACLRA requires that the MLR draws up an allotment plan and advertises the units as indicated on the allotment plans. However these allotments plans are not formal subdivisions and have no legal standing as a subdivision plan. The land must 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. These 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. The Mangetti area farms are formally surveyed but have not been registered in the name of the individuals occupying those farms. However no leasehold in respect of the Mangetti farms may 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 No. 70 of 1970. Section 3 (d) of the SALA No. 70 of 1970 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”. Therefore the consent from the Minister responsible for Agriculture must be sought, if not already provided, in order to be able to register these leaseholds over the Mangetti farms. It is therefore argued that any communal land that is designated as being for agricultural purposes should require the consent from the Minister responsible for agriculture as per the requirements of the SALA No 70 of 1970. It requires that any leasehold right for a period longer than ten years is treated as a subdivision requiring the consent of the Minister responsible for Agriculture. In addition the lease agreement must also contain the diagram (formally subdivided parcel) to enable registration in the Deeds Office. The CLRA No 5 of 2002 also requires that all leases longer than ten years must be registered in the Deeds Office. In the case study area of Oshikoto Region (commercial farms and Mangetti Farms) no leasehold rights have been registered in the Deeds Office.

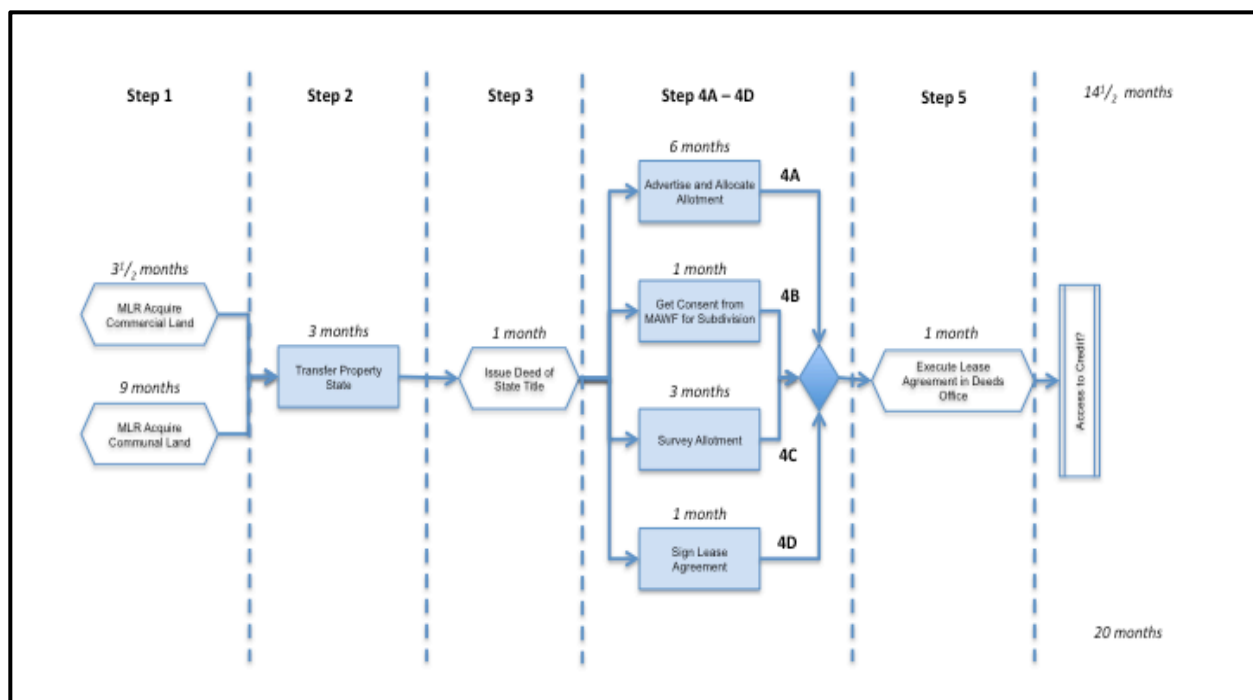


Figure 1: Process Model for the Registration of Commercial and Communal Leasehold Agreements

Transaction Costs

Despite the fact that leaseholds are registerable, it seems that almost none are being registered in the Deeds Office. This acts as a significant constraint on the ability of rights holders to invest in their property and access credit thus limiting their ability to commercialise production as intended. There could be a number of reasons for this inability to register leasehold rights in the Deeds Office as intended. One



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such reason offered in the literature generally is that the institutional frameworks are often not supportive of the policy goals. In the case study situation it is argued that this is not the case and that the institutional framework generally is in support of, encourages and in some instances requires the registration of agricultural leaseholds. The process does not seem to be excessively complex, lengthy or different from what is generally regarded as the norm in Namibia for the registration of leaseholds. However it seems that for resettlement parcels and communal parcels there is no real will or effort to ensure that these leases are registered unlike in the commercial sector.

An aspect that could serve as a barrier to registration is the cost of transacting. Therefore it is of interest to understand the costs associated with the registration of leaseholds in order to determine whether this is an impediment in the registration of leaseholds. Transaction costs are costs incurred during the exchange of goods and services. In the case of registering an agricultural leasehold, it is the cost of acquiring the rights and the registration thereof, excluding the purchase price, if any (De Vries, Lewis, & Georgiadou, 2002). This is a relatively narrow definition of transaction costs, but will suffice to calculate these costs for purposes of this paper. Four main types of transaction costs were identified by De Vries et al. (2002). These costs include professional fees, government fees, taxes and investment or opportunity costs.

Type of Fee	Activity	Cost
Government Fees	Apply to CLB	N\$ 25.00
Government Fees	Obtain Certificate	N\$ 50.00
Professional Fees	Survey of Land Diagram Preparation	N\$ 21,646.00 N\$ 500.00
Professional Fees	Transport: Windhoek (1200km @N\$10.07 per km) Accommodation (1 surveyor-N\$1054), 1 ast.-N\$ 820) Time (N\$ 647 per hour for 16 hours) Time (0.15% of N\$300 000 – N\$450 per hour for technical assistant for 16 hours)	N\$ 12,084.00 N\$3,748.00 N\$10,352.00 N\$ 7,200.00
Professional Fees	Lodge Deed	N\$ 300.00
Professional Fees	Prepare and Lodge at Deeds Registry (Conveyancer Fee)	N\$ 2,500.00
Taxes and Stamp Duties	The taxes would be calculated as a percentage of the purchase price, but not applicable in this case. Stamp duties would typically be waived in the case of state property being alienated.	N\$ 0.00 N\$ 0.00
Total Fees		N\$ 58,405.00

Table 1: Leasehold Registration Fees²

² For comparison we have calculated the cost for the transfer of a house with a value of N\$2,000,000 and assumed there are no survey costs and included only conveyance fees, stamp duties and taxes. It is estimated that the cost of transfer would be about N\$85, 665.00 (Government Costs – N\$68,300 and the Professional Fees (Conveyancer) – N\$17,365).



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

The cost for the registration of one agricultural leasehold plot of between one thousand hectares and one thousand five hundred hectares in the Mangetti area is illustrated in Table 1 above. It includes only the government fees, professional fees and taxes. Investment or opportunity costs are not included in this calculation. However the investment cost will be discussed separately.

The fixed transaction costs (government fees, professional fees, taxes) at first glance appear to be a significant cost and would lead many to conclude that this is not affordable, given the perceived scale of economic activity on many resettlement farmers. 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 having a size of between 1000 and 1500 Ha³, this would translate to a communal land parcel value of between N\$ 1,000,000 and N\$ 1,500,000 and the transaction costs constitute between 5% and 3.5% 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.

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 hectares 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, (s)he would be able to service a loan of about N\$60 000 over five years (See Tables 2 and 3). Assuming that registration costs have to be borne by the lessee, these would be equivalent to one years'

³ No significant study was carried out to determine the average size of agricultural leaseholds in communal areas. However this is representative of the size of the farms in the case study area of the Mangetti block.



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income, or if (s)he were to spread the cost, would typically be affordable over a five year period, if (s)he were to require no capital for other activities. This is a significant cost burden to the lessee, but not prohibitively so, if the leasehold period is for the generally accepted 99 year period. 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 on a cattle farmer, given the low-income potential of the farms. The national income taxation 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.

What this indicates is that the problem is not the registration costs per se, but rather 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 Ministry of Agriculture has been waived in the ACLRA. This creates the possibility that land is 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 fact the leaseholders are unable to service loans, rather than the cost being exorbitant or that 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 comes down significantly if more than one parcel is surveyed at the same time. Travelling costs 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 fifty percent of the current cost per parcel. All the farms in the Mangetti area have been surveyed as well as the resettlement farms that were visited, at least in the case of individual allotments. Despite the fact that more than 95% of the registration costs have already been incurred, leaseholds have still not been registered. The fact that the leasehold have still not been registered, indicates that even if the costs of registration is significant, it is 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 discourages or prevents the registration of the leasehold agreements.

The transaction costs are not only the fixed costs indicated in Table 1, but that there are also investment or opportunity costs that have not been considered yet. The investment or opportunity costs are those alternative uses that may be considered, such as alternative investments, or the risk that is associated with the investment. Unlike in the example used by De Vries et al. (2002) where the opportunity cost was



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based on the cost of the investment in subdividing the properties, there is no such equivalent scenario that is appropriate in the case study area. As this part of the cost is difficult to quantify in the case study area, one must revert back 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 (1990) provides an interesting perspective that is very useful in understanding the transactions in the case study area. In essence he argues that besides the fixed transaction costs as considered above one should include the costs of measuring the valuable attributes of the objects of exchange as well as the cost of enforcement of agreements. Zevenbergen et al. (2007) describe these costs as the costs that may arise prior to an agreement and those costs that come after the 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 for communal areas, where the restriction on land sales prevent a market value being determined for the commodity. There are also no other clear instruments in place for measuring the value (production for example) of the assets 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 parties to reveal, or not, what they know about the value of the asset being transacted upon. North (1990, p. 31) argues that *“because it is costly to measure valued attributes fully, the opportunity for wealth capture by devoting resources to acquiring more information is ever present”*. He goes on to state that *“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”*.

What this means is 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 that have been 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



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must be shared. This creates a scenario where one leaseholder, Leaseholder A, who does not have water on his land is subject to the decision taken by Leaseholder B, who does have water on his land. According to North (1990) that means that Leaseholder A can have his income flow from his use of his asset affected by a person (Leaseholder B) who does not bear the cost of his action. This serves to reduce the value of the asset and creates sufficient insecurity for the investment in production to become worth less as a result.

This also increases significantly the risk that investors are exposed to, either the leaseholder, or a financial institution that he might approach for a loan. In fact it is argued by the researchers that this risk is so high, that in essence the potential for further investment is essentially halted and little to no economic development will take place. The financial institutions interviewed have also expressed the opinion that this risk element makes it impossible for them to finance any activity where 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 economic activity and viability of the lessee.

Enforcement of agreements are not costless and do not automatically happen. If leaseholders' rights are infringed upon and he/she has 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 the lessor does not contribute to the upholding the agreements it 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. It requires that the state monitor and supervise the use of resources on the farm through regular inspections and this generates costs. Unless there is good enforcement, this will generally result in one party neglecting their responsibility and the other party carrying the cost of such neglect. Generally the greater these costs are and the higher the risk, the less the likelihood of significant economic development.

Access to Credit

Across the continent, the predominant form of land rights formalisation involved the conversion of various forms of customary land rights to freehold title. Leasehold as a form of formalised land rights is far less common (Platteau, 1996 p. 50). 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. In both cases, the residual rights vest with the state as lessor (Bruce, 1986 p. 59). 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 related to the conversion of



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customary land rights to freehold 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.).

Our findings are supported by 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, led to an increased use of such land as collateral. The reasons identified by the authors include the following (Lawry et al., 2014, p. 63):

- The character of properties: properties of small-scale farmers – in the case of the review, smallholdings of the rural poor - may not be attractive to financial institutions as collateral, regardless of their tenure status.
- Tenure status does not affect the bankability of landholders. Research from South Africa suggests that the most important factor leading to poor credit uptake by small-scale farmers was asset poverty, i.e. the fact that farmers did not have sufficient capital or equity to leverage a loan.
- Poor access to information.
- The length of time for processing loan applications; and
- Quality of business plans.

Collateral is only attractive because the lender is able to re-possess the leased land and dispose of it in order to refund the principle debt in a foreclosure. Land can only serve as security or collateral, if 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 transferrable 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



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mortgagability and transferability of leased land, 'but the existence of a market and reliable, effective demand upon which a market relies' must already exist. 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). Collateral is only one component of securing a loan. More important is the ability of an applicant to service a loan, which in turn depends on his or her assets. In identifying the impediments for using leased resettlement land as collateral, it is useful to follow Platteau's (1996, pp. 59–63) conceptualisation of these as supply and demand failures respectively. The former relate to financial institutions while demand failures deal with possible reasons for beneficiaries not using their land as collateral for loans.

Supply failures refer to financial institutions being unwilling or unable to extend loans to the small-scale farming sector. Despite the clear regulatory framework, foreclosures, for political and other reasons are unpalatable and therefore quite difficult in the case of land reform parcels. A parallel record system is also created with the MLR keeping the records instead of registering the rights in the deeds registry. Financial institutions also consider the agricultural sector to be a high risk investment and are not keen to administer very small loans due to the administrative costs. The non-existent land market due to unregistered and un-tradable leases prevents their conversion into a bankable asset. These findings are corroborated by Platteau (2000 p. 60-61) and Barrows & Roth (1990 p. 295). Supply failures exist because land records are at variance with the reality on the ground and the registered lessee cannot always be clearly identified because these rights are not registered in the deeds registry. This is a common situation in the resettlement sector and on many small-scale commercial farms in communal areas. Financial institutions remain hesitant to advance loans, if foreclosure involves having to clarify land rights beneficiaries. The commercial financial 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 sustainable. Aside from the issue of collateral they are concerned with whether the applicant enterprise is financially sustainable (financial risk) and whether the means exist to service the debt (repayment risk). They are also interested in whether the applicant has the required skills and infrastructure to carry out the proposed business (performance risk) as well as natural disasters (farming risk) (J. Cloete, FNB, pers. Comm, 7 June 2016).

The institutional and legal framework governing leaseholds as described in the ACLRA does not prescribe an absolute prohibition on mortgaging leased resettlement land. 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



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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 a formal legal level, therefore, all the elements are in place to use leased land as collateral. However, the procedures and controls prescribed by the ACLRA amount to “*controls over commercial transactions*” (McAuslan, Benhke, & Howard, 1995 p. 31). The ACLRA requires the written consent of the Minister on recommendations of the Land Reform Advisory Commission for someone to use their leased land as security for a loan (Section 46" *Agricultural (Commerical) Land Reform Act No. 6 of 1995,*" 1995). This partly explains why banks are reluctant to accept registered lease agreements as collateral loans.

Bruce (1986, p. 38) drew attention to the fact that offering land as security is not the only necessary condition to obtain 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 is only possible with the written consent of the Minister. Officials in commercial financial institutions have raised the inability to foreclose on leasehold land as the single most important stumbling block in accepting leasehold land 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. Key informants have also expressed concerns 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. 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*”.

Making registered leaseholds legally tradable will not be sufficient to obtain credit from financial institutions. An applicant for a loan must be credit-worthy and able to service a loan (Bruce, 1986, p. 40). Officials of commercial banks confirmed in interviews that the ability to repay a loan was more important than the form of collateral. None of them entertained security lending, i.e. granting a loan purely on collateral. Even as a development bank dispensing loans from a dedicated credit facility for resettlement farmers, the Post Settlement Support Fund, Agribank requires applicants to complete an 8 page application form including a statement on assets and liabilities, income and expenditure, credit report, valuation report and surrender value of any investments. 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 PPT (2005b, p. 22) has pointed out “*that there is a cut-off point below which a*



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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. The waiving of the requirement that MAWF must consent to the subdivision of agricultural land also raises important questions about 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, it opens the possibility that this may inadvertently happen in the resettlement programme and is key in determining the financial sustainability of the leasehold farming operations.

For collateral to have value to 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. Normally on a formal legal level this is guaranteed by registering a lease agreement in the Deeds Office. Situations may occur, however, where the situation on the ground is at variance with the registered right, especially when the rights are not registered in the deeds registry. This is likely to cause financial institutions to be hesitant in accepting 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 lessee 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 farms, are not deprived of access to water. Apart from potential disputes between the lessee and the neighbouring beneficiary who is depended 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 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. Earlier we indicated that the ability of third parties to take decisions that affect the lessee, without being held accountable for the decision, 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



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potential of their allocation or are averse to taking the risk associated with this type of institutional arrangement. Not only does it increase the risk but it also 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 (s)he has to share resources with other parties.

Small-holder farmers may be reluctant to offer their land as collateral for loans (demand failure) due to the perceived risk of losing land through foreclosure as a result of the lack of capital (See also Barrows & Roth, 1990, p. 275). Asset poverty of beneficiaries may also hold back demand. 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). The absence of critical conditions to exploit investment opportunities reduces the demand for credit. *“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).

In 2016, the MLR had a total of 24 resettlement farms in the freehold sector of the region. In addition, there are 100 surveyed farm units in the communal area of the region. Four of these units house the Ministry of Agriculture, Water and Forestry's Livestock Development Centre at Okapya (Ministry of Lands and Resettlement / KfW, 2009, p. 21).

The Resettlement Audit of 2008-09 indicated that 15 farms had been allocated to 134 beneficiaries with only 24 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 with only 11 out of 134 beneficiaries (8%) having land allocations exceeding 1,000 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.

Of the one hundred Mangetti farms, ninety-six were allocated to individuals in the 1980s and four were kept by the MAWF for the livestock development centre at Okapya. Anecdotal evidence based on discussions with the extension technicians at the Okapya Livestock Development Centre (LDC) suggests



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that many farmers are not farming commercially⁴. Farmers were described as not being sufficiently trained in financial aspects of their farming (costing, budgeting), livestock breeding and marketing. According to the extension officer at Okapya LDC, Mangetti farmers generally do not have clear production objectives. Farms are poorly managed, cattle are wild, and combined with deficient infrastructure, impacts negatively on marketing cattle.

Only one resettlement beneficiary was in possession of a signed lease agreement, all other informants either had no documentary proof of their rights, or, at best, a letter of allocation. This suggests that the situation as depicted by the Resettlement Audit in 2009 has not changed dramatically with only 24 of the 134 beneficiaries had letters of allotment, while 98 had settled by word of mouth. Beneficiaries who have been settled officially felt powerless to prevent others from settling on the land, as the land, according to them, belonged to the state and not to them. It is not uncommon for a number of households sharing two or three camps. At Urwald, two individuals were selling land parcels of about 10 ha to anyone who had money. Several people had already, or were in the process of fencing off these parcels. Complaints about this to the regional MLR office by the original beneficiaries reportedly fell on deaf ears. Beneficiaries, while utilising their own individual land parcel, are forced to share water with a neighbour on account of not having their own. Problems arising from shared and derived rights for financial institutions have been discussed earlier but on the demand side, individuals sharing camps are not likely to be able to apply for loans, as not all the people sharing the parcel may agree to do so.

Initial allocations of surveyed farming units in the Mangetti were made to individuals by the Department of Agriculture in the previous administration. Beneficiaries had 'lease agreements for grazing' (Afrikaans: *huurooreenkoms vir weiding*), which were renewed annually until 1989. Over the years, land was transacted, primarily as owners died. By early 2014, 41 of 88 farmers surveyed by the Secretariat of the Land Board had obtained their farms through inheritance, transfers by family and a friend, all with the approval of the Ndonga Traditional Authority (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 Traditional Authority, the map of the Mangetti farms was the only record of farm owners.

Single ownership of farming units as originally contemplated, was gradually compromised by several factors. Firstly, while farm allocations were made to individual beneficiaries, it is common that cattle of up to 10 livestock owners are grazing on a farm nominally 'owned' by one individual. These can belong to

⁴ The information below should be interpreted with caution, as it was not possible to meet farmers and hear their views.



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family members or friends. Inheritance disputes appear to be common. In some cases such disputes arise after the families of deceased parents decide to appoint foster parents to manage the inherited farm on behalf of minors and refuse to leave once the children reach adulthood. Although the land may be registered in one name, the fact that livestock of many other owners are utilising a farming unit implies that in the event of foreclosure, financial institutions will have difficulty in doing so. It also illustrates the extent to which communal practices persevere in the absence of enforcement of the formal property rights.

The primary consideration of any financial institution in considering an application for a loan, is whether an applicant is able to repay the loan.

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

Table 2: Gross Farm Income on Cattle Resettlement Farm, 2015

Source: Werner, 2015, p. 10

The current resettlement model severely restricts bankability of full-time farmers with 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. A very rough calculation using the ‘Maximum income derivation formula’ of the MLR suggests that a 1,000 ha land parcel with a carrying capacity of 15 ha/LSU will generate a gross annual income of less than N\$ 50,000 under the best possible conditions as Table 2 above shows.

Interest rate	Cattle farmers (repayment N\$ 1,200 per month)
Prime (10.75%)	N\$ 57,000
Prime less 1 (9.75%)	N\$ 59,000
Prime less 2 (8.75%)	N\$ 60,000
Agribank 4%	N\$ 65,000

Table 3: Estimated Maximum Loan Amounts of DURS Beneficiaries

Financial institutions are not likely to grant loans to applicants if the servicing of such loans exceeds 30 per cent of their income. Using 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 thus not be able to obtain a loan which requires him/her to repay more than N\$ 1,200 per month, assuming that (s)he has no other



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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 3. In all cases a 5 year repayment period was assumed and a repayment amount of approximately 30% of monthly income (Updated from Werner, 2009 p. 24-25).

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’. The Namibian government has been loath to permit and encourage the development a land market in the resettlement programme and in communal areas. There is a political concern that trading lease agreements will defeat the objectives 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. “It 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 5 years. This provision was repealed in 2002, so that currently long-term leases between the MLR and beneficiaries are the only form of tenure that can be registered.

Allowing a regulated land market in leased land to develop would make it possible for financial institutions to accept registered leaseholds as collateral and 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 potentially transferring land to more efficient producers. A formal land market will enable those farmers who are unable to farm effectively to earn 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’ (Deininger, 2003, p. 85).

A 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. Accessing resettlement land through a land rental market



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implies, however, that instead of receiving land free of charge from the MLR, prospective lessees have to compensate the original lessee. This may act 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.⁵ Legalising sub-leasing through a controlled land rental markets 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. 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 able to acquire their own agricultural land’ as the Minister of Lands anticipated (Republic of Namibia, 2002, p. 23).

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, they have no economic value, but mainly serve to regulate the relationship between the state and beneficiaries (Sakkie Coetzee, pers. communication, 27.4.2016). 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). Renting land from the state 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 rather than land sales markets’. The former do 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).

⁵ This is not to imply that the current resettlement model does not attract people who apply for resettlement for lifestyle purposes.



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Conclusion

The policy environment encourages the registration of resettlement leases. The institutional framework allows for and in some cases requires the registration of resettlement leaseholds. The requirements are clear and the process is not excessively complex so 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. Instead a parallel registration process has been encouraged, inadvertently or deliberately, placing the land record into the hands of Communal Land Boards, Traditional Authorities and MLR official rather than in the Office of the Registrar of Deeds, thus rendering the land allocations worthless for use as collateral. 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 cost reveals that they are significant in relation to the earning potential of beneficiaries but compare very favourably with international practices and costs. This further supports the notion that while there are complaints about the costs associated with registration, it is not so much that these costs are outside the norm, but rather that 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. This requires the development of a land market that is not unreasonably constrained by restrictive rules and regulations. This will ensure that financial institutions are more able to invest in registered leaseholds as they are still able to sell leaseholds swiftly in the event of foreclosures. A land market in the small-scale farming sector will also make the current resettlement model more flexible. Ambitious and asset strong beneficiaries will be able to lease additional land legally, while those who are unable to farm their land optimally – be it due to a lack of assets, ill-health or age – will be able to benefit from their allocation through subleasing. Finally, the option to offer registered leasehold as collateral for loans will only become attractive to farmers, 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 the livelihoods of people, while leaving enough cash flow to maintain farm infrastructure, make capital investments and service a loan.



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References

- Agricultural (Commerical) Land Reform Act No. 6 of 1995, No. 6 (1995).
- Arrunada, B. (Ed.). (2001). *The Role of Institutions in the Contractual Process*. Amsterdam, Netherlands: Elsevier Science.
- Attorney-General, Office of the (2000, 16 August 2000). [Letter to Agribank].
- Atwood, D. (1990). Land Registration in Africa: The Impact on Agricultural Production. *World Development*, 18(5), 659-671.
- Barrows, R., & Roth, M. (1990). Land Tenure and Investment in African Agriculture: Theory and Evidence. *The Journal of Modern African Studies*, 28(2), 265-297.
- Bayer, C-T. H. (2012). *Access to Credit for Communal Land Residents*. GIZ.
- Binswanger, H. P. , & Van Den Brink, R. (2005). Credit for Smal Farmers in Africa Revisited: Pathologies and Remedies. *Savings and Development*, 29(3), 275-292.
- Bruce, J. W. (1986). Land Tenure Issues in Project Design and Strategies for Agricultural Development in Sub-Saharan Africa *LTC Paper No. 128*. Madison, Wisconsin: Land Tenure Centre at the University of Wisconsin-Madison.
- Dale, P., & McLaughlin, J. (1999). *Land Administration*. Oxford, United Kingdom: Oxford University Press.
- De Soto, H. (1989). *The Other Path*. New York: Basic Books.
- De Soto, H. (2000). *The Mystery of Capital: Why Capitalism Triumphs in th West and Fails Everywhere Else*. New York: Basic Books.
- De Vries, W. T., Lewis, J., & Georgiadou, Y. (2002). The Cost of Land Registration: A Case Study of Cost Efficiency in Namibia.
- Deeds Registries Act No. 14 of 2015, No. 14 (2015).
- Deininger, K. (2003). *Land Policies for Growth and Poverty Reduction*. Washington: World Bank and Oxford University Press.
- Deininger, K, & Mpuga, P. (2003). *Land Markets in Uganda: Incidence, Impact and Evolution over Time*. Paper presented at the 25th International Conference of Agricultural Economists (IAAE), Durban, south Africa.
- Enemark, S., & Sevetdal, H. (1999). *Cadastrs, Land Information Systems and Planning - Is Decentralization a significant key to Sustainable Development?* Paper presented at the UN-FIG Conference on Land Tenure and Cadastral Infrastructures for Development, Melbourne, Australia.
- Feder, G., & Feeny, D. (1991). Land Tenure and Property Rights: Theory and Implications for Development Policy. *The World Bank Economic Review*, 5(1), 135-153.
- Galiani, S., & Schargrodsky, E. (2010). Property Rights for the Poor: Effects of Land Titling. *Journal of Public Economics*, 94, 700 - 729.
- Harring, S. L., & Odendaal, W. (2002). "One Day We Will All Be Equal": A Socio-Legal Perspective on the Namibia Land Reform and Resettlement Process. Windhoek, Namibia: Legal Assistance Centre.
- Land Survey Act No 33 of 1993, No 33, Republic of Namibia (1993).
- Lawry, S., Samii, C., Hall, R., Leopold, A., Hornby, D., & Mtero, F. (2014). The Impact of Land Property rights Interventions on Investment and Agricultural Productivity in Developing Countries: A Systematic Review *Campbell Systematic Reviews No.1*. Cambridge, MA: John F Kennedy School of Government.
- McAuslan, P., Benhke, R., & Howard, J. (1995). Namibia: Assistance in Implementation of Agricultural (Commercial) Land Reform Act - Final Report. Rome: UNDP/FAO.



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- Migot-Adholla, S. E., & Bruce, J. W. (Eds.). (1993). *Introduction: Are Indigenous African Tenure Systems Insecure?* Washington DC: The World Bank.
- Ministry of Lands, Resettlement and Rehabilitation. (2001). *National Resettlement Policy*. Windhoek, Namibia: Ministry of Lands Resettlement and Rehabilitation.
- Ministry of Lands, Resettlement and Rehabilitation. (2014). Budget Technical Report: 2014/2015 Financial Year. Windhoek, Namibia: National Assembly of Namibia.
- Moyo, S., & Chambati, W. (2012). *Unlocking the Economic Potential of Communal Land: Regional/African Experiences*. Paper presented at the 14th Annual Symposium of the Bank of Namibia, Windhoek, Namibia.
- North, Douglass C. (1990). *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press.
- Odendaal, W., & Werner, W. (2010). Financing Resettlement and Securing Tenure: Are Leasehold Agreements the Key to Success? *Policy Brief No. 2*. Windhoek, Namibia: Legal Assistance Centre.
- Platteau, J. P. (1996). The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment. *Development and Change*, 27(1), 29-86.
- Platteau, J. P. (Ed.). (2000). *Does Africa Need Land Reform*. London: DFID/IIED/NRI.
- Quigley, J. M. (1996). Mortgage Default and Low Downpayment Loans: The Costs of Public Subsidy. *Regional Science and Urban Economics*, 26(3-4), 63-285.
- Searle, John R. (1995). *The Construction of Social Reality*. New York, United States of America: The Free Press.
- Werner, W. (2009). Post-Settlement Support Strategy. Windhoek: Ministry of Lands and Resettlement/GIZ.
- Werner, W. (2010). Resettlement Audit - Revised Synthesis Report. Windhoek: Ministry of Lands and Resettlement/GIZ.
- Werner, W., & Kruger, B. (2007). Redistributive Land Reform and Poverty Reduction in Namibia: Livelihoods After Land Reform - Country Paper Windhoek: Desert Research Foundation of Namibia.
- Werner, W., & Odendaal, W. (2010a). The Impacts of Land Reform on Livelihoods in Namibia (Vol. B). Windhoek, Namibia: LEAD Project, Legal Assistance Centre.
- Werner, W., & Odendaal, W. (2010b). Livelihoods After Land Reform: Namibia Country Report. Windhoek, Namibia: LEAD Project, Legal Assistance Centre.
- Zevenbergen, J., Frank, A., & Stubkjaer, E. (Eds.). (2007). *Real Property Transactions: Procedures, Transaction Costs and Models*. Amsterdam, Netherlands: IOS Press BV.