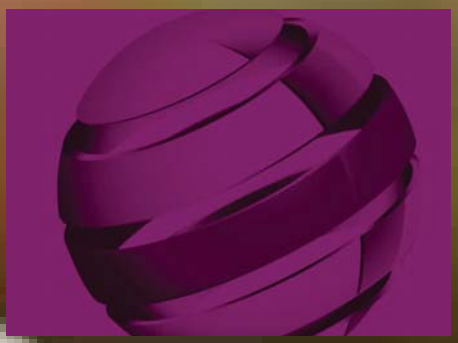
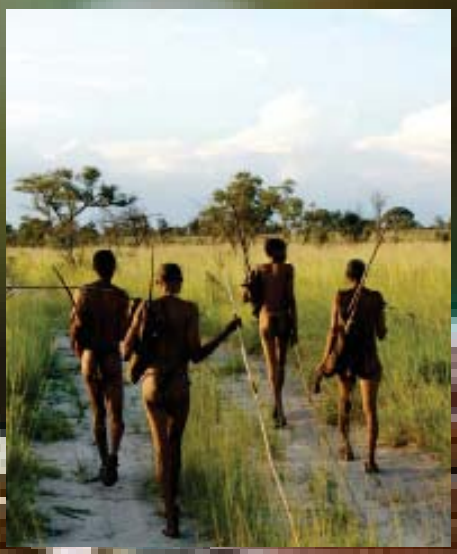
BOTSWANA INSTITUTE OF VALUERS

JAN-DEC 2021

The VALUER

A **BIV** publication for **Valuers, Surveyors, Auctioneers and Estate Agents.**



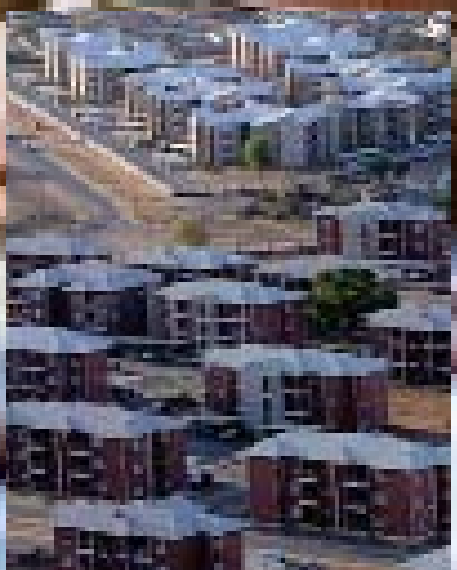


2022 INTERNATIONAL VALUATION STANDARDS

TRANSFER DUTY AMENDMENT ACT : FURTHER LIBERALIZATION OF TRIBAL LAND RIGHTS

USE OF HYBRID ADJUSTMENT TECHNIQUES AND OUTCOMES IN DEVELOPING REAL ESTATE MARKETS : LESSONS FOR BOTSWANA

JUST COMPENSATION FOR EXPROPRIATION OF TRIBAL LAND IN BOTSWANA? A CONTRIBUTION FOR REFORM



REAL ESTATE ADVISORY COUNCIL

EDITOR'S NOTE

By: Donald Mengwe

That regulation of property surveying in Botswana suffers from amnesia is an understatement. If that is an unfair statement then the profession simply does not care about its public image. For many surveyors profiteering and building up businesses take precedence over involvement in the affairs of professional body. This is short term-ism and lack of foresight. We need to do much more to elevate the profession by, for example participating in schools' career guidance sessions to attract the best talent, by explaining what a career in surveying is all about. For years, although much has been done in terms of raising the profile of property surveying, very little has been done in terms of developing professional standards and improving the quality of service. Zeroing in on real estate valuations, one could be forgiven for thinking that service standards are a serious potential hazard to the domestic economy. On a pessimistic mode, everything seems to be done willy nilly without any semblance of meaningful professional regulation that puts the public interest at the heart of its operations. Indeed, it does boggles the mind, that for a profession that has relentlessly lobbied for legislation to regulate its members ahead of other related built environment professions following the Kgabo Commission, we are approaching twenty years since the enactment of the Real Estate Professional Act, 2003, but there are still no traces of critical activities to improve consistency, accuracy and transparency in the valuation process. One would expect that this would certainly be at the forefront of the priorities of any duly appointed governing council of the established regulatory authority, to reduce risks for valuation users such as banks and institutional investors. Government also has vast valuation requirements in terms of asset management,ad valorem property taxes and compensation for compulsory acquisitions, yet there is clearly no broader engagement with stakeholders to improve professional standards in the interest of meeting the Sustainable Development Goals (SDGs). On that account, it is inevitable that there would be a clarion call from active members to fill the vacuum, to address loss of credibility and public confidence. Increasing complexity and innovation within the financial markets, digital technology advances, artificial intelligence and growing investors' expectations are putting pressure on the valuation profession to come out with necessary interventions so that valuations remain relevant for financial decision making. Locally, the sad reality is that valuers are slow to embrace technological developments and embark on continued professional development in an evolving competitive market environment that is also driving professional fees down. The result is declining standards of practice in an environment of informal land markets and non - transparent real estate markets that are not well functioning due to an inappropriate regulatory regime. However, the demand for valuation services despite these challenges is increasing due to increased regulatory requirements in the financial sector, as necessary response to 2008 financial crisis. Climate change adaptation and mitigation also demand that valuers increase their understanding of sustainability matters. Furthermore, valuers are also required to integrate sustainability in the valuation process and also investigate awareness of the local investment community on how sustainability affects buildings.

The proposal by government to review the legislative framework for regulations such that there is a single multi – disciplinary regulatory authority for the so – called land management practitioners on cost-containment grounds has left most thinking whether or not this approach can better safeguard public interest. It is doubtful whether the targeted professions will support this approach than the self-regulation model. It is more likely to provide justification to strengthen voluntary professional associations to address government overreach and develop valuation standards. What is not beyond doubt is that there is need for partnerships between professional bodies and government to promote competence and improve public accountability through monitoring professional standards.

The International Valuations Standards Council has published the latest version of International Valuations Standards effective 31st January 2022. BIV members are urged to use the standards to avoid producing sub -standard work.

COP 26 has delivered the Glasgow Climate Pact, which puts pressure on the real estate sector to decarbonise the built environment, a major contributor to greenhouse gas emissions. The real estate investment community has a broader moral duty to generate both social and environmental returns alongside financial gains. As valuers we need to discuss the role of property and construction sectors in transitioning to net zero economy. Developing countries, such as the semi- arid drought prone Botswana, are vulnerable to climate change and were frustrated by the outcome of COP 26 and failure to provide critical funding for adaptation by the rich countries. But then again, carbon abatement is a catch 22 situation for countries such as Botswana with huge coal reserves considering its contribution to the economy as source of energy and potential to expand revenue base. According to Mmegi online article dated 4 November 2021, Botswana signed COP26 deal but opted out of committing to issue licenses for coal, making it possible to explore untapped coal resources using clean energy.

Lastly, members are invited to use space within this Journal to deepen debate and share knowledge on valuation matters.

Stay alive and observe all health protocols against Covid – 19.

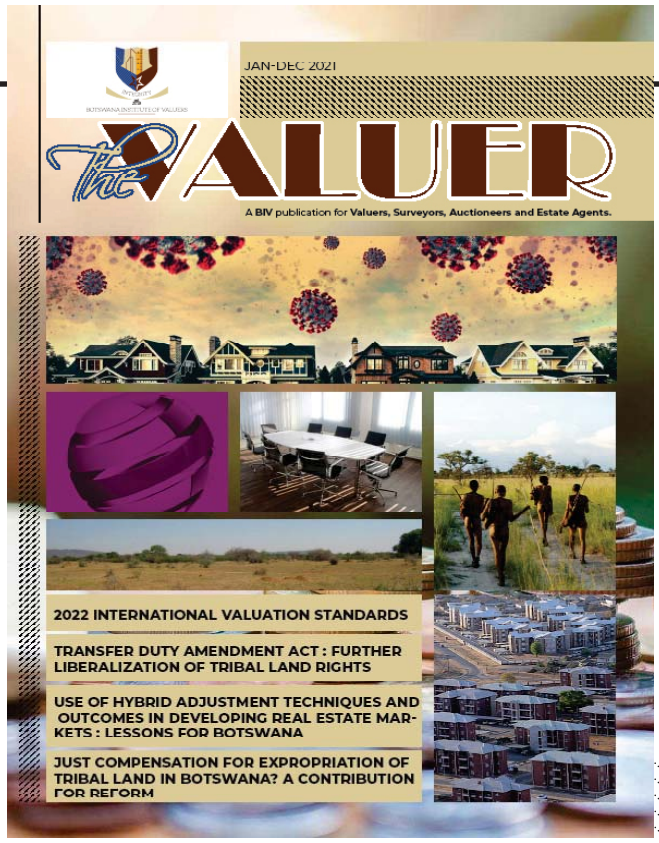


Table of
CONTENTS

INTEGRITY
est 2018
BOTSWANA INSTITUTE OF VALUERS

Editor :
Donald Kagiso Mengwe

Advertising and Marketing
BIV Secretariat
Tel : 7220 8551
www.biv.org.bw
admin@biv.org.bw

Publisher : BIV

Designer: FOLIO (PTY) LTD

BIV
ANNUAL GENERAL MEETING – 2021

The 2nd Annual General Meeting (AGM) of Botswana Institute of Valuers(BIV) was held on 24 August 2021. It was the first virtual meeting AGM due to Covid 19 pandemic which continues to ravage livelihoods and cause loss of lives. The President reported that the main activities of the outgoing committee for the preceding year as follows :

- Ministry of Land Management , Water and Sanitation Services (MLMWSS) invited BIV to make comments and inputs on a consultative document on proposed reform for regulation of land management practitioners in December 2021. In a nutshell, BIV did not support a multi – disciplinary regulation body where regulation of all professionals under land management sector is consolidated and undertaken by a single agency. BIV suggested a principle based approach when granting self- regulatory status to all professions.

- On stakeholder engagement, BIV sought clarification on the criteria for evaluation for Bank Panel from National Development Bank (NDB) and First National Bank (FNB). NDB demands registration with (Real Estate Advisory Council (REAC) and FNB places strong emphasis of REP Act. BIV will continue to develop lasting relationship with the banking sector in order to share ideas to improve valuation standards.

- Botswana Open University requested members of BIV to participate in a survey, with the objective of identifying potential educational services required. Members were urged to participate in the survey as this has potential to address training and development needs.

The incoming Council appointed by members comprises ;

President:
Ms O Zhikhwa

Vice President:
Mr C. Matobolo

General Secretary:
Mr D Mengwe

Deputy General Secretary:
Ms M Keolopile

Treasurer:
Mr O.G Moalosi

ADDITIONAL MEMBERS
Mr K Mpatane
Mr O Selolwane – Sechele
Mr S. Sedie
Mr E. Richard

The 2nd Annual General Meeting (AGM) of Botswana Institute of Valuers(BIV) was held on 24 August 2021. It was the first virtual meeting AGM due to Covid 19 pandemic which continues to ravage livelihoods and cause loss of lives.

2022 INTERNATIONAL VALUATION STANDARDS (EFFECTIVE 31 JANUARY 2022 (MANDATORY))

The IVSC Standards Review Board on 29 January 2021 issued IVS Additional Technical Revision 2021 Exposure Draft, seeking feedback and comments from relevant stakeholders such as valuation professional associations and major firms of valuers and accountants on or before 30 April 2021. Following the consultative process, the proposed changes which have been incorporated in the latest version of the published IVS are indicated below :

1) **New chapter** on 'IVS 230 Inventory' as part of intangible asset standards.

2) **Technical Revisions :** Updates also include the technical revisions consulted on throughout 2020 and 2021.

3) **Introduction :** The introduction has been revised to incorporate core valuation setting principles and core valuation principles as set out in the IVS Additional Technical Revision 2021 Exposure Draft.

4) **Glossary :** This has been updated to include additional new terms to provide additional technical clarification.

5) **IVS Framework :** This contains general principles for valuers adhering to IVS in terms of objectivity, judgment, competence and acceptable departures from IVS, and have been modified slightly to provide additional clarification. The revised sections are " compliance with standards", " Assets and liabilities", "Valuer", " Competence" and " Departures"

6) **IVS 104 – Bases of Value :** This chapter includes a new section on ' Allocation of Value' to provide additional clarification.

7) **IVS 105 – Valuation Approaches and Methods :** The Introduction has been revised to provide additional clarification that one or more valuation approaches may be used in order to arrive at the value reported in accordance with the basis of value.

8) **IVS 200 – Businesses and Business Interests :** There is a revision in the introduction to provide further clarification on what constitutes business and business interest.

9) **IVS 400 – Real Property :** The introduction has been revised to provide additional clarification that this chapter includes agriculture and land and to incorporate the valuation of unregistered and communal land.

The IVSC Standards Review Board on 29 January 2021 issued IVS Additional Technical Revision 2021 Exposure Draft.

COVID – 19 AND REAL ESTATE VALUATIONS

By: Secretariat

The Covid – 19 outbreak has severely affected the global and national economy due to rise in unemployment, supply disruptions, travel and mobility restrictions, loss of life, business closures and disintegration of the tourism industry.

As the second anniversary of COVID -19 approaches, the January 202 International Monetary Fund (IMF) World Economic Outlook states that global growth enters 2022 in a weaker position than previous expectations, on account of markdowns in the two largest economies China and USA and new Omicron COVID -19 variant which has caused re-imposition of mobility restrictions. Rising energy prices and supply disruptions have also led to higher inflation than expected in advanced economies, emerging markets and developing economies. This soaring inflation is expected to persist into 2022 longer than envisaged due to continuing supply chain disruptions and high energy prices. The Jan 2022 IMF economic perspective cautions that the emergence of new COVID -19 variants could perpetuate the pandemic and trigger revived economic disruptions. Energy prices volatility and supply chain disruptions signify high uncertainty around inflation and policy paths. In this regard the Jan 2022 IMF panorama states that lifting policy rates by advanced economies may give rise to emergence of risks to financial stability and emerging markets and developing economies' capital flows, currencies and fiscal position more so, considering that in the past two years debt levels have increased significantly. On the domestic front, the Ministry of Finance and Economic Development projects economic growth rate of 9.7% in 2021 and moderate growth of 4.3% in 202. The IMF estimates the national economy to expand by 9.2% in 2021 and slashes growth to 4.7% in 2022. The forecasts are dependent on successful vaccine roll out. According to Bank of Botswana's Monetary Policy Committee's 02 December 2021 statement inflation rose from 8.4% in September 2021 to 8.8% in October 2021, remaining above the upper bound of the Bank's medium objective range of 3 – 6 %. The increase is on account of upward adjustment in domestic fuel prices in October 2021. Furthermore, risks to inflation outlook are assessed to be skewed to the upside, and these cover potential increases in international commodity prices; persistence of supply and logistical disruptions due to lag in production; possible extension of travel restrictions and containment measures; domestic risk factors of regular price adjustments, including second round effects of recent increases in administered prices; inflation expectations that could lead to generalized higher price adjustments; concerted economic revival action by government in terms of Economic and Recovery and Transformation Plan (ERTP); major central banks decision to boost aggregate demand and successful roll out of the COVID -19 vaccination programmes. However, MPC expects weak domestic and global economic activity; decline in international commodity prices; capacity constraints in implementing ERTP programmes; strong possibility of further dampening effect on productivity due to supply chain

bottlenecks; diseases containment measures and other forms of restrictions in response to emergence of new variants, to reduce inflationary pressure or moderate the aforementioned inflation risks.

This cloud of economic uncertainty presents unprecedented challenges to valuers in providing valuation advice. Valuers are expected to navigate through an unchartered environment in order to make a professional judgment on the value of an asset, which is made more difficult when operating in informal and formal thin real estate markets which are non - transparent, inefficient, poorly regulated and immature as in developing countries such as Botswana. Even during the pre-pandemic era, provision of reliable and ethical valuations necessary for informed decision making was a matter of serious public concern. It goes without saying that Covid 19 pandemic has worsened the situation and has disrupted the real estate market in Botswana, as valuers are now confronted with unfamiliar circumstances of limited direct transactional evidence and increasing paucity of market data, making market intelligence and analysis incredibly challenging. Botswana Institute of Valuers (BIV) has intervened by providing valuation guidance to members valuing under conditions of market uncertainty, and in this regard reinforcing International Valuations Standards Council (IVSC) communique on " Dealing with Valuation Uncertainty at times of Market Unrest'. Considering the alarming decline in transaction volumes, it is advisable to keep abreast of the latest insights by working closely with property specialists and real estate brokers in order to benefit from recommended best practice. Providing market valuations under current conditions carries with it above normal risk and it is therefore not surprising that valuation professional bodies recommended best practice is the addition of "Valuation Uncertainty" clause in valuation reports. The emergence of new variants of Covid - 19 and impositions of containment measures make it difficult to make judgments as to when markets will stabilize, hence many valuations should be attached to material valuation uncertainty. For example, the hospitality, retail and office sectors have been significantly affected by pandemic, so in valuing commercial properties, challenges relate to dealing with uncertainty around demand, occupancy and future economic trends. Concerns about variants are making remote working a likely permanent feature in office sector, requiring the valuer to make judgments about future office space usage and thoughtful reflections on the impact of pandemic on cash- flow assumptions such as terminal capitalization rates, discount rates and income streams when applying the income approach and valuing trade related properties.

At the heart of the market valuation process is comparable evidence, which is not easily obtainable in this country, largely because of informality and a thin formal estate markets. The most useful advice therefore may relate to how to use and analyze available information. Covid-19 has made the use of historical evidence debatable, in that valuations are forward looking and in these uncertain times valuers may have to extrapolate beyond historical data. Further during uncertain times transaction may take place without reflecting the true value of the asset but rather the seller or buyer's motivation, because economic trends are not known. Valuers should discern this unusual pricing which is not consistent with the concept of market value There should not be misunderstanding of market value and worth or investment worth. Considering these uncertain times, it may not be far-fetched that the unique set of circumstances created by Covid -19 provide justification for valuing assets in a range.

As it is difficult to know when there will be recovery, when removing material valuation uncertainty in investment valuations, the valuer should use his professional judgment, and the following must be considered amongst other factors;

- New evidence of sufficient number of market participants for normal functioning market.
- Government funding and lending is adequately available for the relevant sector, type of property and typical occupier to facilitate trading and the immediate short term funding of occupiers.
- Repeal of restrictions that prevent operational use of assets such as in hospitality sector and retail outlets
- Sufficient evidence of property market indicators to support valuations.

In the end, given this challenging times we urge members of BIV to exercise caution and stay informed as conditions evolve. Proving an opinion of value may require competency that is of higher level than that required prior to the pandemic.

TRANSFER DUTY AMENDMENT ACT : FURTHER LIBERALIZATION OF TRIBAL LAND RIGHTS

By: Donald Mengwe, Bsc (Hons) Estate management, Valuation Surveyor

Introduction

Transfer duty, like all taxes, plays a re-distributive function of reducing unequal distribution of income and wealth due to normal operations of a market economy and another role of raising revenue to improve the welfare of citizens. Raising revenue, through various taxes, is important rather than depending on volatile commodity markets as it improves representation by creating a social contract between citizens and the state, thus enhancing government discipline and the likelihood of good policy outcomes. Taxation, particularly for fragile African states, is important for state building. In this respect, Moore et al (2015) argue that tax collection expands the state's presence and reach over its territory, curtailing potential competitors such as insurgents from forging mutually beneficial relationships with local inhabitants.

The introduction of transfer duty on the 1st March 2020, to also cover tribal land, is progressive as over 70% of the land mass of Botswana is tribal and 60% of the population is urbanized, meaning livelihoods are no longer based on subsistence agriculture.

Expansion of the tax base of transfer duty mainly to cover tribal land is reasonable considering investment in pubic goods by government through successive national development plans which focused on building infrastructure and providing highly subsidized social services. Improvements in tribal land administration and gradual incremental land tenure reforms have also facilitated the development of informal and formal property markets in tribal territories particularly in per-urban areas supported by the banking and financial system. The Transfer Duty (Amendment) Act 2019, requires submission of credible valuation reports on the basis of fair market value, prepared by registered valuers to avoid undermining the tax system, through misrepresentation of the sale prices by buyers and sellers.

" Taxes are what we pay for a civilized society..."
Oliver Wendell Homes

In this article, I argue that although expansion of the tax base of transfer duty to cover tribal land is progressive, it is a further entrenchment of liberalization of customary tenure, to conform with the neo liberal approach to development adopted by the post colonial state. I also submit that the appropriate valuation methodology applicable for valuing tribal land interests for transfer duty purposes is the cost approach, which requires the determination of unearned land value as a component of market value. This assessment of land values is contradictory to other government policies of legally prohibiting tribal land market and appropriating land values. One of the essential features of market oriented economy is the institution of private property. However the disposition of land boards is to curb land speculation and consol-

idate customary law that tribal land cannot be held in private ownership as confirmed by the passing of the Tribal Land (Amendment) Act, 1993. This exposes the complexity of taxing uneraned land value. I conclude by stating that implementation of amended transfer duty legislation provides adequate fodder, for the Court of *Appeal to overturn its decision in Kweneng Land Board (KLB) vs Mpofu & Another*, if a similar matter is brought for its adjudication on account of socio economic transformation. In the *Mpofu* case the Court of Appeal decided that tribal land cannot be held in personal or private capacity, which suggests that it is not a tradeable commodity.

Transfer Duty : The Legislative Framework

Transfer duty is a tax on transfer of ownership of immovable property from one party to another and also on assignment of lease contracts. The Transfer Duty Act, 1891 was amended on the 28th August 2019. Prior to the amendment, the tax rate was set at 5% for the higher.

The transaction or purchase price and valuation of immovable property for all use types bar agricultural property, in which case the rate was 30% for non – citizens and 5% for citizens. The Registrar of Deeds was responsible for assessment and collection of the duty and could rely on the approved valuation roll for levying rates by a rating authority or some competent and disinterested person on solemn declaration, to determine the just and fair value of such property. Just and fair value is not defined in the Transfer Duty Act, 1891, but in practice it was considered market value. In a case a professional market valuation is required ' the excess by one third of the purchase price rule' is applied to determine whether to assess duty based on the valuation or declared value. The tax base covered state land in townships, allocated in accordance with the State Land Act, 1966 and freehold properties which are largely privatized agricultural land during the colonial era. The tax payer was purchaser as the substantive registered owner after transfer.
Under the Transfer Duty (Amendment) Act, 2019 (TDAA,2019), transfer duty is chargeable on the sale, exchange or transfer of shares, deemed to constitute transactions involving immovable property for the purposes of payment of transfer duty. For compliance and monitoring purposes, any individual who transfers shares shall notify BURS of such transaction within 30 days of the transfer. The TDAA, 2019, places the responsibility for assessment, valuation, enforcement and appeal procedures on the Commissioner General of Botswana Unified Revenue Services (BURS), to improve collection efficiency due to administrative capacity. The tax threshold is set at P1 000 000.00, from the previous P200 000.00 prior to the amendment and citizen first time home buyers are not liable for transfer duty. For all property types the tax rate is 30% for non-citizens and 5% for citizens and companies incorporated in Botswana wholly owned by citizens. Before the amendment, 51% majority shareholding by citizens qualified for 5% tax rate. It is obvious that the tax rate is heftily raised on pure nationalistic pose to deter acquisition of land and real estate by non- citizens and foreign owned entities. The amendment also requires individuals or entities eligible for exemptions to apply for such, in order to be issued with exemption certificates upon approval. The exemptions are generous mainly to facilitate home-ownership by citizens. This is a major intervention considering that transfer duty as wealth tax may be considered regressive, because the tax burden is higher on lower income households as they tend to spend a large proportion of their income on housing. After the set prescribed limit of 60 days within which to pay the assessed duty, interest at a rate of 1.5% compounded daily is added, until the date of full and final settlement. The Commissioner General is also legally empowered to institute proceedings at the High Court for recovery of tax

arrears.

Property Valuations

The TDAA, 2019 came into effect on the 1st March 2020. To ensure smooth implementation of the Act, BURS requires that all transactions be lodged with valuation reports of immovable properties which are subject of transfers, undertaken by registered valuers in terms of the Real Estate Professional Act, 2003. Valuation reports will only be valid, if signed within a period of two years prior to the date of submission to BURS of the Transfer Duty Declaration Form. Any person who undervalues property, will be liable to pay the uncollected duty plus a penalty of not less P 20 000.00 plus interest at 1.5% per month or part of month for which the contravention continues.

Tax Base Expansion

Prior to the amendment, transfer duty was not levied on properties situate on tribal territories or tribal

land. The tax base has been expanded to cover tribal land and transfer of shares in a company, where the transfer changes beneficial ownership of the immovable property of such company. Effectively, acquisition of shares in a company with immovable property, regardless of the value of the immovable property in relation to other assets, is liable for duty on transfer.

The expansion of the tax base into tribal territories is reasonable and progressive, considering that tribal land constitutes approximately 70% of Botswana land mass, over 60% of the population is urbanized and because most rural areas have undergone significant socio –economic development progress since independence. During the colonial era and early years of independence, rural livelihoods were mainly based on subsistence agriculture and economic opportunities were few to justify adoption of land based taxes. Through successive National Development Plans there has been considerable investment in housing and public goods such as provision of basic infrastructure and services including water reticulation, sewers, tarred roads, schools, health and emergency services, transport and communication facilities and mobilization of housing finance and financial markets in rural settlements. This has resulted in social and economic transformation demanding new innovative tenure forms that are in consonance with neo liberal economic policies adopted by the post - colonial state. During the colonial era, land allocation and administration observed a set of traditional rules and customs of certain tribal communities. Government recognized the customary land tenure system on independence by enactment of the Tribal Land Act, 1968 albeit by replacing tribal administration with decentralized land boards and introducing documentation or land records, to improve service delivery. The market oriented economic system, monetization, rapid urbanization and population growth required commodification and individualization of tribal land rights and government responded over the years through a number of instruments such Tribal Grazing Land Policy (1975), National Policy on Land Tenure(1985), Tribal Land (Amendment) Act, 1993, Improvement of Land Administration Procedures, Capacity and System (LAPCAS) project and Revised Botswana Land Policy (2019) to facilitate amongst others rural development. These policies entrenched the commodification of tribal land rights and created bankable interests meeting the needs of capital. This has led to the development of informal and formal land and property markets in peri urban villages and major villages with a considerable industrial base such as Palapye, facilitated by availability of financial services and access to credit from government financial institutions and Botswana Building Society who have penetrated rural areas. Tribal land titling

The tax threshold is set at P1 000 000.00, from previous P 200 000.00 prior to the amendment and citizen first time home buyers are not liable for transfer duty. For all property types the tax rate is 30% for non-citizens and 5% for citizens and companies incorporated in Botswana wholly owned by citizens. Before the amendment, 51% majority shareholding by citizens qualified for 5% tax rate.

and registration by land agencies reduced information asymmetry, ownership uncertainty, thus, improving tenure security, increases greater access to credit, supports the development of land and property markets and improves the basis of land based taxes. As the tax base (i.e boundaries and tribal plot sizes, owners) is specifically identified, this provides the necessary information to address tax evasion.

Basis of Valuation and the nature of the taxable tribal land interest.

It shall be competent for the Commissioner General of BURS to apply fair market value and the excess by one – third of purchase price or declared value rule' if the sale price is less than the just and fair value or if the valuation report is not credible. Fair market value is not defined but Botswana Institute of Valuers (BIV) recommends to its members to adopt the 2022 International Valuation Standards (IVS) definition of Market Value under IVS 104 Bases of Value, section 30.1 viz" the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.." The definition of fair market value for tax purposes has not been established by the Courts and the concept of market value presumes a market price negotiated in an open and competitive market where the market participants are acting freely. Valuers also have to observe the code of ethical conduct to ensure the integrity of the valuation process. Of critical importance to the valuation process , as well as determining the basis of valuation ,the valuation report should also include a full description of the legal tenure(s) (whether registered or unregistered), different usufruct rights on the land, any challenges and lack of clarity relating to the tenure(s) and the assumptions made about the tenure(s). Government position over the years has been to allow for gradual and progressive emergence of property and credit markets in rural areas, by improving the legal framework,

investments in land administration infrastructure and mobilization of financial markets, in parallel to egalitarian principles in customary tenure which protects the land rights of weaker segments of society. Government Paper no. 1 of 2019 on Revised Botswana Land Policy states that the current land tenure systems in Botswana will be retained as they have served the country well, and that the law will be amended to make it mandatory for all land rights holders to register their rights with land agencies. In this respect, the Deeds Registry (Amendment) Act, 2017 and Tribal Land Act, 2018 (still to commence) were designed for compulsory registration of customary land grants, as previously customary land grants became registrable after conversion to common law leases, a process that is cumbersome to poor people.

Legally, it can be argued that there is no tribal land market, as trading of unimproved sites not developed for habitation or beneficial occupation is prohibited to mitigate land speculation and sales. The Court of Appeal case, *Kweneng Land Board (KLB) v Mpofu& Another* has set the precedent that tribal land is not privately owned and is not a tradeable commodity. Basically land and improvements are considered as two separate entities and sovereignty of tribal land is in the hands of the state, allotees being restricted to usufruct rights. However, an essential feature of market oriented economy is private property rights, to allow individuals to dispose, use and control and earn rental income from the property. Government facilitated the development of formal property markets in rural areas though the improvement of tribal land administration system to reduce information asymmetry by investment in land titling and registration and formalization by enacting statutory law recognizing customary tenure. In this respect the formal transactions in tribal land interests relate to registered common law leases and subject to compliance with development covenant, What is no doubt is that the value system of the old customary land tenure is incompatible with neo liberal system. Property markets in a democratic liberal economy generally trade in defined legal interests and rights in land, protected by sovereign power and these have limitations, as they are exclusive but not absolute. These rights can be packaged in terms of the individual preferences of market participants through the price mechanism.

In practice though, the reality is that socio – economic transformation has brought pressure on the old customary land tenure system as society is witnessing informal land markets, where there is trading in tribal land interests outside the formal legal system because tribal land is recognized as a source of wealth and high value economic commodity. Unimproved tribal land sales where money is exchanged are pervasive, despite legal restrictions by the state. Development agreements as personal contracts protected by the state are devised by market participants to circumvent legal regulatory systems such as those of development covenant or certificate of compliance. These transactions are not registered at Deeds Registry on the knowledge that the contractual rights are secure. This clearly shows that certain sections of society recognize these customary land rights as private property rights which may be traded, without fear of ostracism and penalties which may be meted out by the long arm of the law. This may reflect the observation of Williamson (2011) that in order for markets to exist and function properly, property rights do not need to be necessarily imposed on a society from a formal legal system. After all, value is a social construct.

Where the parties elect to formalize the transfer of tribal land interest they have to apply to the land board, which will approve, provided there is compliance with development covenant. The land board will invariably not record purchase price or seek declaration of value, because tribal land is not considered as a tradeable commodity. At this juncture, where the land board approves the application for transfer, there is alienation as the transferor does not have legal interest in the tribal plot and usufruct rights are now held by the transferee. In this case transfer duty will not be payable if the land board is not required by law to report the transfer to BURS. Furthermore, if the land board operates in a jurisdiction where there is an active informal land market, transfers of this nature will be outside the transfer duty coverage. The registration system at land boards is not sophisticated as that applicable at Deeds Registry, because it was not deliberately designed to facilitate land and property markets but for security of tenure. After completion of transfer by land board, an individual or entity may apply for a common law lease and register it at Deeds Registry, which makes it possible to pledge the tribal land interest as collateral. In this scenario, the Registrar of Deeds will not register the common law lease without the approval or tax exemption certificate issued by BURS. Conversion to a registered common lease is an 'upgrade' through formalization of the tribal land rights through registration, in order to gain a state backed guarantee securing title against potential fraud.

Legally, it can be argued that there is no tribal land market, as trading of unimproved sites not fit for habitation or beneficial occupation is prohibited to mitigate land speculation and sales.

The deeds registration system is more sophisticated than the registration system at land boards because it not only shows the 'actual state' of ownership (i.e what rights are held, mortgage bonds, cadastral survey e.t.c), it facilitates the development of land and property markets, and also enhances security of tenure. In the case of an 'upgrade', transfer duty is not payable as there are no tribal land rights being transferred. The tribal land rights subject to transfer duty, therefore are those in respect of registered notarial deed of lease cessions or assignments. In this respect, there is a need to declare the purchase price to BURS and provide a valuation report of the tribal land interest being traded. Based on the foregoing, the tax base in respect of tribal land interests are lease cessions which are registrable at Deed Registry and such transactions are more likely to be supported by the banking and financial system. The taxable tribal land interest is therefore the common law lease cession.

Valuation of the taxable tribal land interest

The valuation process entails estimating the market price of the common lease cession. At the heart of the market valuation process is comparable or transactional evidence. However property markets in emerging economies where customary tenure is dominant are notoriously. Known for non-transparency and excessive or insufficient government regulation which impede market efficiency. There is generally lack of published transactional data and where it is available it lacks sufficient detail as the property markets are immature and still developing. Without access to direct transactional evidence the valuer will resort to publicly available information, reliable contacts with estate agents and property managers and asking prices in the media such as Botswana Advertiser. The valuer may have to even look further afield such as historical and transactional evidence of other property types and locations. In the end there is no substitute for personal knowledge and experience of the markets for production of credible valuation.

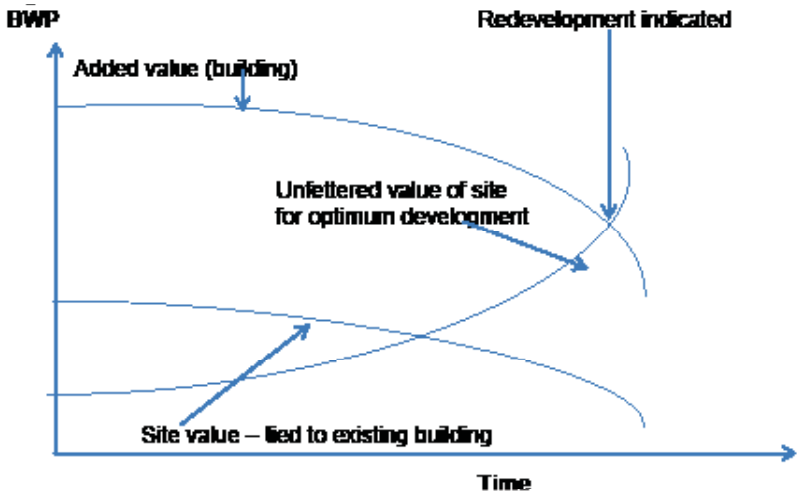
The formal property market mainly involves trading in common law lease cessions and there is bound to be considerable activity in peri - urban villages such as Tlokweng, Oodi, Mogoditshane and Mmopane, as well as village with considerable industrial base such as Palapye. Some of these peri urban villages are part of the agglomeration economies or major cities , thus some of commercial and statutory banks have penetrated these areas, albeit with stricter underwriting requirements, This development is essential for emergence of a symbiotic relationship between properly regulated banking system and efficient property market. The property market is not well functioning in the capital city, Gaborone because of supply side constraints such as an overly restrictive regulatory regime which is unresponsive to demand driven by rural to urban drift and expansion of property finance. The development of bulk services and the inefficient state land allocation process lags behind effective demand. This result is negative market outcomes such higher property values relative to household income levels. It follows then that peri urban villages are sanctuaries for low and middle income households, who have been priced out of the Gaborone property market. Low income and middle income households together with private developers are the main participants of informal and formal property markets in peri–urban areas.

Generally transfer duty has a narrow tax base because it is based on one-time transaction of the value of property when ownership is transferred. It is also volatile because it bears a relation to the property cycle. Arguably most transactions in tribal areas will be in peri urban villages and in respect of residential property, because the communities are less homogeneous without shared cultural identities and increasing competition for land for housing. In traditional communities which are less urbanized and require infrastructure upgrading to attract investment, there is likely to be deferment to traditional arrangements and real estate markets are generally non–existent. The most desirable properties in less urbanized communities are owned by government institutions and executive retirement homessignal social status rather than an intention to earning a return on investment.

Property values in peri urban areas are mainly driven by tribal land prices in the informal market and building costs, where building construction is mainly on incremental basis and tribal land is accessed for free from land authorities. The cost approach although recommended for properties that are rarely exchanged on the open market, is applicable as the main appropriate methodology for estimating market value in peri urban and rural areas and for limited use for income producing and trade related properties. Considering the paucity of direct comparable evidence in non-transparent property markets, it may not be advisable to use the sales comparison method. However, it is best practice to avoid reliance on a single method. Therefore the cost approach should be cross checked by reference to other methods relevant to valuation assignment. The cost approach is based on the principle of substitution meaning prudent investors will not pay more for a property than they would for substitute property of equivalent utility or that a rational and informed buyer will pay no more for a property that the cost of acquiring the site and constructing a similar improvement. Whipple (1995) posits that the price of real estate is a function of the benefits it confers, the level of demand for it, its scarcity compared with the supply of close substitutes and the cost of acquiring it. In many instances in peri urban villages , potential purchasers do not have the option of substitutes other than developing a replacement or reproduction. Most property devel-

opments are for owner occupation or investment purposes, the market is compelled to build rather than purchasing the property that is subject of valuation. The cost approach is most appropriate for use in respect of tribal land interests where allocation by land authorities is on waiting list basis and *gratis* rather being based on highest and best use, meaning potential purchasers have the alternative of acquiring speculative unimproved sites for development. The cost approach requires a distribution of the valuation between the land and improvement which is one of its weaknesses. In strict logic these components cannot be assigned market value, because the improvements are unmarketable as they are unproductive without the site on which they rest (Ratcliff (1972) as quoted by Whipple (1995). However, in practice, there may be a requirement to show the interrelationship between the land and improvements for the purpose of utilization of the valuation report. For example, the basis for redevelopment of property can be considered as an interaction of the value of deteriorating building over time and a site no longer optimally utilized by the building on it and which could be improved through redevelopment as indicated in Figure 1.

Figure 1 : Redevelopment decision



(Source : Scarrett (1991)

This illustration is helpful in the analysis of land held in terms of customary tenure, where economic efficiency does not play a dominant role in the allocative system, and tribal land dealings are not incentivised. This is due to the fact that tribal land is not considered as a tradeable commodity but rather a source of livelihood, thus the emphasis is on equitable distribution of land. As stated earlier the *Mpofu* case reaffirms this disposition by land boards, but the reality is that informal land markets are pervasive because of socio –economic transformation which demands adaptation of customary tenure practices or changes to property relations. Despite conservative opposition to tribal land sales, the underlying forces cause changes to customary tenure practices or property rights system, allowing land rights holders to realize the economic value of tribal land acquired through qualifying rights related to birth right. In valuing the tribal land interest for transfer duty purposes, the land value component is assessed in order to determine market value, a necessary process, even though this is insensitive to the accepted institutions or traditions related to tribal land rights.

Transfer Tax on Tribal Land : Changing Property Relations ?

Arguably a tax on the transfer of tribal land, particularly on the unearned land value component is at odds with the conception or notion that tribal land is not granted in private ownership. Generally, transfer duty is wealth tax on private ownership of property, so it may not be far-fetched to opine that this provides fertile ground for the court of appeal to overturn its precedent in the case *Kweneng Land Board (KLB) v Mpofu & Another*, if a similar case is brought for adjudication on the basis that socio–economic conditions have changed. For example, tribal land zoned for industrial use in planning areas such as Mogoditshane is pricey and where added value of immovable improvements to comply with development covenant is marginal, the tax is raised on the land value component. In this respect, a transfer tax collected upon registration of the lease cession would capture much of the unearned land value, notwithstanding the legal 'appropriation' of land values.

Conclusion

Transfer tax, like all taxes, is necessary to raise revenue and redistribute wealth for community building and socio economic development. Expansion of the tax base to include tribal land is progressive, in consideration of investment on public goods made by government through successive national development plans in rural and urban settlements. Improvements in tribal land administration made over the years makes it feasible to capture some of the increases in land values due to public infrastructure works. The challenges , however, in terms of valuation of tribal land interests concern non – transparent and inefficient property markets and legal prohibition of sale of unimproved tribal land, which impact negatively on provision of credible valuations. Transfer duty on trib-

al land is not consistent with other accepted institutions and traditions relating to tribal land rights. Government has a deliberate policy of allocating tribal land *gratis* in line with customary tenure practices. However assessing transfer duty on the basis of market value, is entrenchment of liberalization of customary tenure to make it market friendly and an acknowledgment of the economic value of tribal land, which is incompatible with the value system of customary tenure espoused by land boards. Transfer tax on tribal land is part of the slow and gradual process of changing property relations in urban and peri – urban villages spurred by neo liberal tenure reforms.

References

Government of Botswana 1975 Tribal Grazing Land Policy, Government Printer, Gaborone, Botswana

Government of Botswana 1985 National Land on Land Tenure,Government Printer, Gaborone, Botswana

Government of Botswana 1989 Report on Review of Tribal Land Act, Land Policies and Related Issues Government Printer, Gaborone, Botswana

Government of Botswana 1992 Report of the Presidential Commission of Inquiry into Land Problems in Mogoditshane and other Peri – Urban Villages Government Printer, Gaborone, Botswana

Government of Botswana 2015 Botswana Land Policy, Government Printer, Gaborone, Botswana

Government of Botswana 2019 Revised National Land Policy, Government Printer, Gaborone, Botswana

International Valuation Standards Council 2021 "International Valuation Standards 2022" Available at https://www.appraisers.org/Disciplines/Gems-Jewelry/gj-newsandevents/2021/08/05/international-valuation-standards-updated-for-20222Accessed : 20/12/2021

Moore M and Monkam N 2015 How Property Tax Would Benefit Africa, Fair and Equitable, International Association of Assessing Officers

Scarrett D 1991 Property Valuation : The Five Methods, E & FN SPON, London and New York

Whipple R 1995 Property Valuation and Analysis (1st edition), Lawbook Company.

Legislation

Deeds Registry Act, 1960

Deeds Registry(Amendment) Act,2017

Real Estate Professionals Act, 2003

Tribal Land Act, 1968

Transfer Duty Act, 1891

Transfer Duty (Amendment) Act, 2019

Tribal Land (Amendment) Act, 1993

Tribal Land Act, 2018

Cases

Botswana

Kweneng Land Board v Mpofu & Another 2005 (1) BLR 3 (CA)

USE OF HYBRID ADJUSTMENT TECHNIQUES AND VALUATION OUTCOMES IN DEVELOPING REAL ESTATE MARKETS : LESSONS FOR BOTSWANA

By: Epraim Munshifwa, PhD, Registered Valuer (Zambia)

Abstract

The sales comparison is the most common and universally accepted method in valuation. Whereas the theoretical entry point is the same, its application in practice is varied and often determined by local circumstances. These often necessitate modification of the method. For instance, although most countries in Southern Africa (Botswana, Namibia, Zambia and Zimbabwe) uses this method in residential valuation, its application in most cases goes beyond the basic valuation model, incorporating a less known technique called the "reduced floor area (RFA)"technique. The RFA technique is a form of relative importance (weight) concept which assesses ancillary buildings on site relative to the main use; for residential properties this is the main dwelling house. Despite its obscurity in valuation literature, practitioners find its use acceptable within the dictates of local circumstances. Nonetheless, the lack of documentation means knowledge on the technique is transmitted verbally from senior Valuers to graduates while its application is not consistent across the profession, contributing to variances in assessed values. This necessitated detailed scrutiny of the technique. Data for the article was collected from the Valuation Surveyors Registration Board (VSRB), a statutory body responsible for licensing Valuers and regulating valuation practice, however finding from Zambia provide lessons for valuation practice in Botswana.

Keywords: sales comparison, reduced floor area technique, real estate, adjustment techniques, Zambia, Botswana

1. Introduction and background

The sales comparison is the most commonly used method in real estate valuation. This method, also known as the "comparable transactions method" (International Valuation Standards Council [IVSC] 2017, p.31) assesses value by comparing the property being valued to similar properties for which sales or transaction prices are available (Pagourtzi et al., 2003; Machmin, 2008; Lusht, 2012; Appraisal Institute, 2013; Whipple, 2013; IVSC 2017). Its application and accuracy is largely dependent on local circumstances and the level of development of the real estate market, with the valuers' role being interpretation and application. In other words, valuers work as a proxy for the market, interpreting information on both sides (for buyers and sellers) in fixing of a price; hence the assertion that "value" is a proxy for "price".

The real estate market, within which valuers operate, is however laden with challenges and often classified as opaque and illiquid (Holtermans, 2016); meaning that the form

the application of a method takes in practice is largely dependent on local circumstances and challenges encountered. So how do Valuers overcome challenges imposed by local settings in which they operate, vis-a-viz the application of the sales comparison method? In practice Valuers devise "hybrid" techniques to get to the end result, the assessment of value. For instance, while the basic application of the sales comparison method is by making adjustments directly on sale prices, Valuers in the global South make a number of modifications in its application. This paper examined the use of a technique commonly known as the "Reduced Floor Area" (RFA) technique, as an addition to the basic sales comparison model.

Botswana, like much of Africa, faces similar challenges in both the availability of information and application of the sales comparison method. Thus, despite examples in this paper being about Zambia, practicing Valuers in Botswana would still draw important lessons from this article.

The aim of this paper was to explore alternatives undertaken by Valuers in developing real estate markets when faced with challenges in the application of the sales comparison method in residential valuation practice. In a world of Automated Valuation Models (AVMs) and changing dynamics in real estate markets, the challenges of applying the basic valuation methods in developing markets is sometimes forgotten.

This article uses the application of a hybrid technique in the sales comparison method in Zambian valuation practice. The RFA technique works on the principle of summation of reduced areas of all buildings on site. This requires the weighting or adjustment in importance of each improvement on site in relation to the main use on site. The total RFA is then multiplied by the analyzed market prices per square meter to obtain the market value of the property. An actual valuation of a residential property in Riverside, Kitwe is presented in Table 2 for more details. Two interrelated questions guided this study: firstly, what is the theoretical basis of the sales comparison method? Secondly, what challenges do Valuers face in its application in developing real estate markets and how do they overcome them? This article is arranged as follows. After this introductory section, Section 2 reviews theoretical and empirical literature on the application of the sales comparison method. Section 3 discusses the methodology used in this study while Section 4 presents empirical findings. Section 5 is a discussion on findings while section 6 concludes the paper with a recommendation for valuation practice in Zambia with lesson for Botswana.

2. Literature review: application of sales comparison method in real estate markets

The direct sales comparison is the simplest and most direct method used in real estate valuation. It is based on the following model:

$$MV = Sc + ADJc$$

Where MV is the estimated market value, Sc is the sales price of a comparable property and ADJc is the adjustment (positive or negative) to the sale price of the comparable property (Appraisal Foundation, 2014). Based on the principle of market substitution, the method arrives at an estimate of market value by comparing the property being valued with prices achieved for similar properties, while making adjustments for any differences between the sold and the subject (Lusht, 2012; Shapiro et al.,2013). In order to adjust for these differences, a number of standard techniques are used by Valuers which include summative percentage, dollar percentage, add/subtract percentage, proper base adjustment,review and intuition and paired sales regression analysis (Lusht, 2012; Shapiro et al., 2013; Whipple, 2013). Up to this point, the basic theoretical grounding is acceptable to most scholars and practitioners around the world. Literature, though, abounds on challenges in valuation, particularly when using the sales comparison method. These studies cover a number of issues such as valuation accuracy (Aliyu et al., 2018), uncertainty in valuation (French and Gabrielli, 2004; Kucharska-Stasiak, 2013), information asymmetry (Garmaise and Moskowitz, 2004; Firoozi et al., 2006), valuation variances (Munshifwa et al., 2016) and others. So the reality is that, in practice, modifications are made to this basic model by practitioners as dictated by the type of property being valued, differences in the volume of market information available, technological advancements, increased client awareness, demands for more accuracy in assessed values and generally changed dynamics in real estate markets (Addae-Dapaah and Ho, 1996; Aluko et al., 2004; Appraisal Foundation, 2014; Bogin and Shui, 2020). For instance, the Appraisal Foundation (2014) show that sales comparison is the underpinning approaching AVMs through the direct market model or the comparable sales models.

Having said that, literature further points to the shortcomings of the basic model as a reason for advocating for further advancements. Bogin and Shui (2020), for instance, argued that property appraisals tend to be biased upwards. This upward biasness is more pronounced in rural areas where there are fewer comparables and more heterogeneity in homes (Bogin and Shui, 2020); a comparable situation to what is found in most real estate markets in the global South. Thus the study advocated for automated property value estimation using machine learning algorithms. Amidu and Aluko, (2007) attributed this biasness in valuations to clients' influence. This was broken down into three factors seen as being responsible for this influence, namely: integrity of valuer (or firm); client size; and importance of the valuation outcome to the client. Cupal (2014) also argued that adjusting for difference or het-

erogeneity is one of the key tasks for Valuers and a necessity for accurate assessments.

The type of property also has a bearing on the choice of the method and its application. For instance, Addae-Dapaah and Ho (1996) argued that the direct sales comparison method has methodological constraints when used for office valuations. In order to improve its effectiveness, the study suggested incorporation of appropriate details on the conditions of sale and the terms of financing in the associated adjustment process. In essence, the study was advocating for a re look at adjustment techniques used in Singapore when using the direct sales comparison for office valuations. This equally applies to residential valuation. However, the study acknowledged that the direct sales comparison is the most popular and universally used method in real estate valuations (Addae-Dapaah and Ho, 1996). Bello and Bello (2009) also argued for the inappropriateness of the direct sales comparison method when valuing properties in close proximity to waste damp sites; and yet it was the frequently used Technique. The study then advocated for the use of more modern techniques such as Contingent Valuation Analysis (CVA), Option Pricing Models and Hedonistic Pricing Models. It is however important to note that most modern techniques such as Hedonic Pricing Model (HPM) do not necessarily depart from the basic principle of direct sales comparison model discussed earlier but make modifications to suit the type of property being valued. For instance, HPM relies on comparable transaction prices to adjust for the effects of environmental factors (such as air, water and noise pollution) on the valuation outcome. Therefore at its base is the sales comparison model. Maliene et al (2010) refers to the comparison method as one of the traditional and classical methods. Applied directly or indirectly, it forms the base for statistical and multiple criteria analysis including AVMs. For countries such as Zambia, where obtaining of transaction data is a major challenge, the application of the direct sales comparison model poses its own challenges. For instance, Makurira and Juru (2019) argued that most Zimbabwean valuers depend on experience and their wide professional networks to accomplish valuation assignments. In such settings, the main adjustment technique available to Valuers is what Whipple (2013) calls "review and intuition". Makurira and Juru (2019) thus advocated for the establishment of a central database to overcome data challenges. An additional reason for impreciseness in valuation outcomes is due to imperfection of the market itself (Aluko et al., 2004). This makes uncertainty endemic in valuation assignments (By water, 2011;IVSC 2013). This uncertainty is related to the quality and volume of market data available, firms involvement in similar valuation assignments and reliance on unverified information given by clients/third party advisers (By water, 2011). A number of factors were identified as major sources of uncertainty in valuation, namely, economic, financial and political, legal and regulatory, physical, occupational, leasing and valuation (By water, 2011).

Interestingly, most of these methods depend on transaction data and some form of comparison to arrive at an estimate of Value.

Differences in these factors will also have implications on how the sales comparison model is applied in different settings. Literature reviewed helped to show that although the basic direct sales comparison model is commonly and universally accepted, its application in practice is largely dependent on a number of factors including type of property being valued, differences in the volume of market information available, technological advancements, increased client awareness, demand for more accuracy in assessed values and generally changes in dynamics in real estate markets. Due to the effect of these factors, the response from Valuers has been modifications to the basic model and calls for the use of more modern and advanced methods such as artificial neural networks(ANNs), hedonic pricing, fuzzy logic, spatial analysis, auto regressive integrated moving averages (ARIMA) and multiple criteria methods (Maliene et al., 2010). Interestingly, most of these methods depend on transaction data and some form of comparison to arrive at an estimate of value.

Zambia, like a number of other neighboring countries, face similar challenges in the application of the direct sales comparison model, which has necessitated modifications in practice. For instance, Zambia has adopted the separation of values between the land and improvements, particularly in the assessment of property tax. This is clear for countries such as Botswana, Namibia, Lesotho and Swaziland (Franzsen, 2002). Thus a similar procedure,including the use of reduction factors, is used for assessment of market values in most Southern African countries, with concomitant challenges. The introduction of factor reduction beyond the analyzed market rate per square meter contributes to variances in the final value outcome.

Studies in the sub region (see Chirisa and Juru, 2019; Marongwe et al., 2011; Munshifwa et al., 2016) also support the challenges of applying the basic direct sales comparison method. For instance, Marongwe et al. (2011) noted that the Zimbabwean real estate sector is characterized by unavailability of information, such as volumes of trade, value of transactions and trends in property transactions, which should be publicly available. The absence of such information affects the functioning of the real estate market, thus impacting on the

application of the sales comparison method in valuation practice(Marongwe et al., 2011). This has contributed to wide variances in assessed values. In this regard, Chirisa and Juru (2019) noted that although internationally variances of 5% - 10% are accepted as normal, in the Zimbabwean case this can be as much as seven-fold. Similar wide variations, ranging between 10% and 25% were noted in the Zambian rating valuation practice by Munshifwa et al. (2016). In order to mitigate the problem of variances emanating beyond the analyzed and adjusted market price per square meter in the assessment process, Zimbabwean valuers collectively agreed to apply standard reduction factors as shown in Table 1 below. This is in an effort to minimize variances beyond the use of standard adjustment techniques when applying the sales comparison method.

Table 1: Reduction factor used in Zimbabwean valuation practice (Source: Real Estate Institute of Zimbabwe (n.d), unpublished circular)

Improvements	Reduction Factor
Main house	1
Verandah (enclosed under main roof)	0.80
Verandah (Open) under main roof	0.60
Porch	0.30
Pergola, no surfaced floor	0.07
Pergola, hard surfaced floors	017
Garage with doors	0.40
Garage without doors	0.40
Carport, no surfaced area	0.15
Carport with hard surface floor	0.20
Living Quarters, self contained	0.40
Living Quarters, compound type	0.30
Pool decks and Patios	0.10
Sheds/stores (detached)	0.20
Sheds, store (detached) hard surface	0.35
Pavillion hard floor surface/roof	0.20

It is important at this point to iterate the fact that application of the sales comparison method is challenged by different local realities forcing valuers to devise hybrid techniques (as additions to standard adjustment techniques) which rely more on individual experience and intuition (Whipple, 2013). However, this study asserts that valuation practice has over many years reduced knowledge through practice which require critical examination. This paper used the example of the reduced floor area technique in Zambian practice to demonstrate how collective knowledge is still useful in realities of the global South.

3. Research methodology

This study was based on data collected from documents submitted and stored by the Valuation Surveyors Registration Board (VSRB), a statutory body constituted under the Valuation Surveyors Act Cap 207 to license practicing valuers and regulate the valuation profession. These documents included Valuation Reports, Log Books, Diaries, Valuation Reports and the Critical Analysis Reports, submitted by candidates for the Assessment of Professional Competence (APC). All documents are countersigned by supervisors before submission. A total of 127 reports were scrutinized for this study, out of which 80 were residential valuations. The process of data collection focused on assessed market values, calculated floor areas, reduction factors and reduced floor areas. Data was first collected and stored in various Excel sheets and then relevant information extracted for the creation of the SPSS database. Where reduction factors were missing,market prices/m2 were used to calculate Reduction Factors as shown in Table 2. SPSS was used for analysis. The one Sample t-test was used to examine whether information on the choice of reduction factors can be related to firms within which valuers work. In other words is there a difference in the adoption of reduction rates between/within firms? Because Zimbabwe has already established reduction factors, unlike Botswana and Namibia in the sub region, this study further used the one-sample t-test to analyze if there were significant differences between reduction factors used in Zambia and Zimbabwe.

4. Empirical findings

As a starting point in this section, the paper sought to establish the most commonly used method in the valuation of residential properties and thereafter examined the application of the Reduced Floor Area technique.

4.1. Application of the sales comparison method

The study confirmed that the direct sales comparison was the main valuation method for residential real estate in Zambia; all 80 residential valuations examined used this method. However, the study also noted that its application is slightly different from that stated in theoretical literature. For instance, while the main application in literature is directly on sale price, adjustments in Zambian practice are mainly on the analyzed market price per square meter. At this level, various adjustment techniques such as the summative percentage, dollar percentage, add/subtract percentage, proper base adjustment, review and intuition and pair sales regression analysis (Lusht, 2012; Shapiro et al., 2013) are applicable. However in Zambian practice, market value is assessed as the summation of improvement and land values; similar to what Franzsen (2002) noted for Botswana, Namibia, Lesotho, and Swaziland in the assessment of property tax. Practice thus uses a procedure similar to the summation method within the cost approach(IVSC 2017) which separates values of the constituent parts

of an asset. In Zambia, this "split" is a creation of government legislation with a long history. For instance, the Land Act of 1975 which "abolished" value on land went further to recognize only value of "unexhausted improvements"; defined as any building resulting from capital expenditure or application of labour (GRZ1975). This separation of values was replicated in other Acts such as the Rating Act of 1979 which provided that entries in the Valuation Roll should be split between improvement value and land value. The result has been that adjustments in Zambian valuation practice are made on the analyzed and adjusted market price per square meter of the comparable.

After this point, the Reduced Floor Area(RFA) technique is then introduced in the assessment process. A further effect of the 1975 Land Act was that it introduced distortions in the real estate market through some form of price control. This meant that before any transfer of interest in property, the buyer needed to obtain consent from the State. For instance, Musole (2007, p.267) argued that regulations in the Land Act of 1975 presented a "real formidable problem that impacted negatively on valuation accuracy" through alteration of property rights and distortion in pricing. Furthermore, due to what was seen as speculative transactions on land, government banned all forms of facilitation of land sales and blamed real estate agents for the "vice" (Kaunda, 1975). In addition, the Land Act prohibited the sale or transfer of any undeveloped land. This result in the creation of an opague real estate market from 1975 to1991, where availability and quality of information, as an input in the valuation process, became a serious challenge for valuers. Despite the replacement of the 1975 Land Act with a 1995 revision, which recognizes value of undeveloped land (GRZ 1995), and the Estate Agents Act of 2000, which legalizes estate agency practice (GRZ 2000), the Zambian market still suffers from a number of short comings,impacting on the application of the sale comparison method.

4.2. Application of the Reduced Floor Area technique

Unlike the standard adjustment techniques, the RFA is not sufficiently documented in literature, and yet in the Zambian valuation practice it is used as an extension to these techniques. In other words, after the market rate per square meter is derived from sales information, its application to ancillary buildings on the same site has to be further adjusted. Thus this study both documents the RFA and also provides a basis for its critique and interrogation. As noted earlier, the RFA technique is partly a result of restrictions emanating from the Land Act of 1975 due to its effect on the flow of information. The technique works on the principle of summation of reduced areas of all buildings on site. For instance, if the permitted use on site is residential, the main building on site is then the dwelling house and living spaces in that house;therefore any other improvements on this site are ancillary to the main use.

Table 2 below shows an actual valuation of a residential property in Riverside, Kitwe using this technique. In this example, each improvement is reduced by a reduction factor (RF) which is a proportion in relation to 1, the factor assigned to the main use on site. The summation of the reduced areas (i.e. RF multiplied by floor areas)gives it the name Reduced Floor Area technique. Most residential valuations follow four basic steps (Machmin, 2008): (i) selecting sales comparable information, (ii) extracting, confirming and analyzing comparable sale prices, (iii) adjusting sales prices for noted differences and, (iv)formulating an opinion of market value for the subject property. A typical application of these four steps in the Zambian valuation practice is shown in Table 2 with a reported final market value of K1,991,000.00. A scrutiny of the "market rate/m2" column reveals that K4,600.00 is the analyzed and adjusted rate (Steps 2 and 3) applicable to this property. However, the applicationofK4,600.00 is only to the main dwelling house, therefore another step has to be used to "adjust"the main rate such that it can be applied to other improvements on the same site.

This requires that lower rates ofK1,840.00 per square meter for the servants quarter, K2,760.00 for the enclosed veranda and K3,680.00 for the guest wing/garage be used. The quantum at which the rate of K4,600.00 is reduced when applied to other improvements is known as the "Reduction Factor" and is shown in the "RF" column in Table 2. This paper asserts that this is an addition from practice with little or no scholarly documentation; however its use is wide spread, hence the need to examine its efficacy. Theoretically, the

As noted earlier, the RFA technique is partly a result of restrictions emanating from the Land Act of 1975 due to its effect on the flow of information. The technique works on the principle of summation of reduced areas of all buildings on site.

RFA could be said to be using some form of relative importance (weight) concept;similar to the procedure used for explanatory variables in regression analysis. Thus the value of all other buildings on site is determined in relation to the value of the main house through a reduction process on the analyzed market value per square meter.

Table 2 Valuation of residential property on Kaminda Drive, Kitwe (Source: Extracted from Critical Analysis Report submitted to VSRB by APC candidate)

Description	Floor Area (m2)	RF	Market Rate/m2	Value
Main dwelling house	276.45	1.00	K4,600.00	K 1,271,670.00
Enclosed veranda	8.89	0.60	K2,760.00	K24,536.40
Guest wing/Garage	86.17	0.80	K3,680.00	K317,105.60
Servants quarters	13.23	0.40	K1,840.00	K24,343.20
Land (in sqm)			1536.00	K276,480.00
Boundary Wall Fence				K32,000.00
Surrounding Paving				K45,000.00
MARKET VALUE				K1,991,135.20

a. Two clear observations need to be emphasized from workings in Table 2: a. The technique used a form of summation method, where values of individual improvements are added to obtain the final market value. Thus land and improvements are valued separately. This is different from the way it is applied in developed markets where adjustment is done directly at the sales price level and the end result is the final value estimate sought.

b. While standard adjustments techniques are applicable when deriving the market rate per square (in this instance, K4,600.00), this is further adjusted downwards when applied to any other improvements on site. This reduction is dependent on the reduction factor adopted for each improvement on site by the valuer. This constitutes a modification to the direct sales comparison model as discussed in Appraisal Foundation (2014).

The implication of these two findings is that valuers will in practice make modifications or additions to the basic sales comparison model to suit different realities or settings. However, as these modifications are made, it is vital that these are underpinned by a theoretical grounding in valuation literature, hence the need for their continuous interrogation.

4.3. Descriptive statistics

Despite many years of its application, the RFA technique is not applied uniformly amongst practicing valuers. The result is that this too contributes to variances in the final assessed market value, particularly in the global South with developing real estate markets. Valuers in practice use different reduction factors for similar improvements on site. In such cases, valuers depend more on their experience which is argued to be inadequate in a science-based profession (Rowland, 1991; Whipple, 2013). It is for this reason that the actual reduction factors used by Valuers needed to be examined. Out of the 80 residential valuations examined, 50 (62.5%) were used for this examination (see Table 3). The study found discrepancies in the adoption of reduction factors in some cases. For instance, although most valuers used 0.30 for verandas, further analysis revealed that in many cases there was a difference between what most valuers used and the mean.

For instance, this was observed for front veranda (Mode= 0.30; mean = 0.31; SD = 0.05390), carport (Mode = 0.50; mean = 0.33; SD = 0.08829), store room (Mode =0.40; mean = 0.31; SD = 0.10951) and garage (Mode: 0.40; Mean = 0.42; SD = .05991. This has implications on the final value outcome and contributes to variances. These results confirm the inconsistencies in the application of reduction factors due to differences in experience of valuers and available information. Admittedly, while valuers may not be forced to adopt the same reduction factors for all the improvements on site, such adoption should not lead to wide variances in the assessed value. Valuation outcomes should fall is a range which is statistically acceptable.

Table 3 Descriptive statistics

	N	Range	Mini	Maxi	Mean	Std. Deviation	Variance	Mode
MAIN HOUSE	50	0.00	1.00	1.00	1.00	0.00	0.00	1.00
FRONT VERANDA	42	0.45	0.15	0.60	0.31	0.05	0.00	0.30
SERVANTS QTRS	28	0.41	0.33	0.74	0.50	0.11	0.01	0.50
REAR VERANDA	15	0.05	0.30	0.35	0.31	0.02	0.00	0.30
CARPORT	15	0.30	0.10	0.40	0.33	0.09	0.00	0.50
STORE ROOM	14	0.35	0.15	0.50	0.31	0.11	0.01	0.40
GARAGE	13	0.20	0.40	0.60	0.42	0.06	0.00	0.40
GUARD HOUSE	6	0.60	0.20	0.80	0.41	0.22	0.05	0.20
SECOND HOUSE	4	0.00	1.00	1.00	1.00	0.00	0.00	1.00
PUMP HOUSE	4	0.41	0.10	0.51	0.29	0.18	0.03	0.10
WORKERS' QTRS	3	0.10	0.40	0.50	0.47	0.06	0.00	0.50
DOG KENNEL	3	0.20	0.10	0.30	0.21	0.10	0.01	0.10
BALCONY	2	0.02	0.28	0.30	0.29	0.01	0.00	

In practice, the application of the RFA by individual valuers contributes to differences in assessed values. In order to prove this assertion, the analyzed maximum and minimum floor areas from Table 3 were applied to details of an actual valuation presented in Table 2 earlier. Ancillary space, which needed reduction, included enclosed front veranda, guest wing/ garage and servants quarter. Results presented in Table 4 show that using the Mini-RF and Maxi-RF, the total reduced floor areas were 311.18m2 and 352.40m2, respectively.

This represents a difference of 13%. Applying the same rate of K4,600as in the actual valuation plus values for land, boundary wall fence and paving resulted in market values of K1,784,901.56 (minimum) and K1,974,521.38 (maximum); with the reported value of K1,991,000 falling in between. The difference between the maximum and minimum values was 13%, carried through from the differences in RFAs.

In some cases the difference in reduced areas of individual buildings was as high as 300% (see Table 4).

Table 4 Difference in application of RFs and value outcome

	Area (m2)	MiniRF	MaxiRF	MiniRFA	MaxiRFA	Diff
MAIN HOUSE	276.45	1	1	276.45	276.45	0%
ENCLOSED VERANDA	8.89	0.15	0.6	1.33	5.33	300%
GUEST WING/GARAGE	89.17	0.33	0.74	29.42	65.98	124%
SERVANTS QUARTER	13.23	0.3	0.35	3.96	4.63	17%
TOTAL RFA				311.18	352.40	13%
Market price/m2				4,600.00	4,600.00	
Value of improvements				K1,431,421.56	K1,621,041.38	13%
add Land value				276,480.00	276,480.00	
Add Boundary wall fence				32,000.00	32,000	
add Paving				45,000.00	45,000.00	
MARKET VALUE				K1,784,901.56	K1,974,521.38	13%

The study further questioned whether the choice of reduction factors could be ascribed to the subset of information in valuation firms. In other words, is there is common understanding within each firms as to what reduction factors should be applied on ancillary buildings?

ANOVA results showed that besides rear veranda (F = 3.467; p = 0.050) and servant's quarter (F = 3.034; p = 0.024), all other variables showed no relationship between valuation firms and use of reduction factors. That is to say, evidence does not support the hypothesis that valuers are cultured within firms on the adoption of reduction factors, leaving the choice to individuals.

4.4. Regional comparison on the application of reduction factors

As earlier noted, the use of the reduced floor area technique is common within the Southern African sub-region. Hence, this paper hypothesized that the relationship between the main dwelling house and other ancillary buildings should not be different whether in Botswana, Zambia, Zimbabwe or Namibia, if the logic of the technique is the same. Thus the study tested the hypothesis that there is no significant difference between reduction factors as used in valuation practice in Zambia and Zimbabwe. The one sample t-test was used for this purpose. Results in Table 6 below revealed that in some cases there were differences in the application.

For instance, there were significant differences in the application of reduction factors on front veranda (t = -35.127; p = 0.000), rear veranda (t = -61.107; p = 0.000), servant's quarters (t = 4.281; p = 0.000) and store rooms (t = 3.782; p = 0.002). These results indicate that since p<0.05, the study rejects the null hypothesis that there is no difference. This again points to the need for more discussion on the application of the technique not just within the country but also across the sub-region.

Table 6 One sample t-test of reduction factors in Zambia and Zimbabwe

	Zambian mean	Test value	t	df	Sig. (2-tailed)	Mean Diff.	95% Confidence Interval of the Diff.	
							Lower	Upper
FRONT VERANDA	0.31	0.60	-35.12	41	0.00	-0.29	-0.31	-0.28
REAR VERANDA	0.31	0.60	-61.10	14	0.00	-0.29	-0.30	-0.28
SERVANTS QTRS	0.50	0.40	4.28	27	0.00	0.08	0.04	0.13
GARAGE	0.42	0.40	1.38	12	0.19	0.02	-0.01	0.06
CARPORT	0.33	0.30	1.46	14	0.16	0.03	-0.02	0.08
STORE ROOM	0.31	0.20	3.78	13	0.00	0.11	0.05	0.17

5. Discussion

The entry point for this paper was that the direct sales comparison is the most common and universally accepted valuation model. However, its application is often challenged by varied local settings necessitating modification or adjustments in practice.

The reduced floor area technique was cited as an example. The RFA is introduced after the use of standard techniques such as the summative percentage, dollar percentage, add/subtract percentage, proper base adjustment, review and intuition and pair sales regression analysis. Furthermore, as opposed to the standard adjustment of the sales price in the direct sales comparison, adjustments are made on the market price per square meter. The RFA was explained as a form of relative importance (weight) concept which assesses ancillary buildings on site relative to the main use; for residential properties this is the main dwelling house.

However, findings further revealed that the use of the RFA does not totally eliminate incidences of variances because of their differential application amongst practicing valuers.

Using a number of ways, the paper proved that differential application of input data into the valuation equation, even at the level of calculating the reduced floor area, results in variances in the final assessed market values. For instance, the study used an actual valuation of a property in Riverside, Kitwe and descriptive statistics to show that the adoption of minimum and maximum reduction factors would result in a 13% difference in values. The paper recommends more detailed scrutiny of the application of this techniques by the Valuation Surveyors Registration Board (VSRB) and the Valuation Chapter of the Surveyors Institute of Zambia (SIZ).

6. Lessons for Botswana

This article presented the theoretical foundation of the sales comparison method and then went further to argue that it application is varied across countries depending on the availability of information and local conditions. The article then used valuation data from Zambia to show the predominance of the sales comparison method in residential valuations using the Reduced Floor Area technique. The study argued that this

same approach is used in Botswana, although it may not be called by the same name. Furthermore, the article made a comparison on the application of reduction factors between Zambia and Zimbabwe. So what lessons can Botswana Valuers draw from this article:

a. The sale comparison method will remain an important method for valuing residential property even in Botswana.

b. Botswana is not immune to the challenges of applying this method due to data limitations and market conditions; this will contribute to variances in the application of valuation methods. Wide differences difference between two valuers undertaking a valuation on the same property brings doubt in the minds of clients on the authenticity of the profession.

c. The major source of the difference when using the Reduced Floor Area technique is in the choice of reduction factors. One way to minimize this difference is by the Botswana Institute of Valuers coming up with standard rates while allowing for individual valuers discretions.

7. Conclusion

This paper concludes that while *prima facie* the application of the RFA technique may be defendable,the mental and internal process of deriving the reduction factors of ancillary buildings is unclear. The internal logic of the reduction process therefore needs further interrogation. One question that may be asked is: are valuers clear as to why 0.50 is used for servant's quarters instead of 0.40? There is need for more detailed interrogation of the internal workings of the logic including the theoretical underpinning. Since the technique is a derivative from practice, this should involve professional valuers in a robust and open discussion on these reduction factors and reach consensus on their application, in the process contributing to minimizing valuation variances when using the sales comparison model.

Reference

ADDAE-DAPAAH K., HO D., 1996, The effectiveness of the direct sale comparison approach to office appraisal in Singapore, Australian Land Economics Review, vol. 2, no. 2, pp. 35-43.

ALIYU B.A., SANI H., USMAN H., MUHAMMAD H., 2018, Ranking the Causative Factors of
Mortgage Valuation Inaccuracy in Kaduna Metroplois, Real Estate Management and Valuation, vol. 26, no.3, pp. 71-81.

ALUKO B.T., AJAYL C.A,. AMIDU A.R., 2004, The estate surveyors and valuers and the magicnumber: A point estimate or a range of value?, International Journal of Strategic Property Management, vol. 8,no.3, pp. 149-162.

APPRAISAL FOUNDATION, 2014, APB Valuation advisory No 5 – Identifying comparableproperties inAutomated Valuation Models for mass appraisal, Appraisal Foundation, Washington, D.C.

AMIDU A.R., ALUKO B.T., 2007, Client influence on valuation: Perceptual analysis of the drivingfactors, International Journal of Strategic Property Management, vol. 11, no. 2, pp. 77-89.

APPRAISAL INSTITUTE, 2013, The Appraisal of Real Estate (14th Ed.), Appraisal Institute, Chicago.

BELLO V.A., BELLO M.O., 2009, Valuation of properties in close proximity to waste dumps sites: TheNigeria experience, International Journal of Strategic Property Management, vol. 13, no. 4, pp. 309-317.

BOGINA.N., SHUI J., 2020, Appraisal Accuracy and Automated Valuation Models in Rural Areas,Journal of Real Estate Finance and Economics, vol. 60, pp. 40-52.

BYWATER N., 2011, Reflecting uncertainty in valuations for investment purposes: A brief guide tousers of valuations, June2011/VP/942RS, London, RICS.

CHIRISA I., JURU, M.,(Eds) 2019, Aspects of Real Estate Theory and Practice in Zimbabwe: An ExploratoryText, Langaa Research and Publishing, Mankon, Bamenda.

CUPAL M., 2014, The comparative approach theory for real estate valuation. Procedia - Social andBehavioural Sciences, vol. 109, pp. 19- 23.

FIROOZI F., HOLLAS D.R., RUTHERFORDR.C., THOMSON T.A., 2006, Property assessments and information asymmetry in residential real estate, Journal of Real Estate Research, vol. 28, no. 3, pp. 275-291.

FRANZSEN R.C.D., 2002, "Property assessment for rating purposes in Southern and East Africa:Present status and future prospects", paper presented at the 8th Annual Conference of the Pacific Rim Real Estate Society, 21-23 January, Christchurch New Zealand.

FRENCH N., GABRIELLI L., 2004, The uncertainty of valuation, Journal of Property Investment and Finance, vol. 22, no. 6, pp. 484-500.

GARMAISE M.J., MOSKOWITZ T.J., 2004, Confronting information asymmetries: Evidence from real estate markets, The Review of Financial Studies, vol. 17, no. (2), pp. 405-437.

GOVERNMENT OF THE REPUBLIC OF ZAMBIA, 1975, Land (Conversion of Titles) Act,Government Printers, Lusaka.

GOVERNMENT OF THE REPUBLIC OF ZAMBIA, 1995, Lands Act, Government Printers, Lusaka.

GOVERNMENT OF THE REPUBLIC OF ZAMBIA, 2000, Estate Agents Act, Government Printers,Lusaka.

HOLTERMANS R.,2016, "Information asymmetry and sustainability in real estate markets",
Unpublished PhD thesis, Maastricht University School of Business and Economics, Maastricht, the Netherlands.

INTERNATIONAL VALUATION STANDARDS COUNCIL, 2013, Valuation uncertainty, IVSC. London.

INTERNATIONAL VALUATION STANDARDS COUNCIL, 2017, International Valuation Standards2017, IVSC. London.

KAUNDA D.K., 1975, 'The Watershed Speech', Government Printers, Lusaka.

KUCHARSKA-STASIAK E., 2013, "Un-

certainty of property valuation as a subject of academic research", Real Estate Management and Valuation, vol. 20, no. 4, pp. 17-25.
LUSHT K.M.,2012, Real Estate Valuation: Principles and Applications, KML Publishing, State College, PA.
MACHMIN D., 2008,The Valuation and Sale of Residential Property (3rd. Ed.), Routledge, London.
MAKURIRA R., JURU M., 2019, Statutory valuation in Zimbabwe. In: CHIRISA I, JURU M (Ed),
Aspects of Real Estate Theory and Practice in Zimbabwe: An Exploratory Text, Langaa RPCIG.
MALIENE V., DEVEIKIS S., KIRSTEN L., MALYS L., 2010, Commercial leisure property valuation: A comparison of the case studies in UK and Lithuania, International Journal of Strategic Property Management, vol. 14, no. 1, pp. 35-48.
MARONGWE N., MUKOTO S., CHATIZA K., 2011, "Governance of urban land markets in
Zimbabwe", Scoping Study, Urban LandMark, available at: http://urbanlandmark.org/downloads/scoping_study_gov_ulm_zimbabwe.pdf (accessed 4October2019)
MUNSHIFWA E.K., JAIN N., KAUNDA B.S., MASIBA L., LUNGU J., CHUNDA-MWANGO N.,MUSHINGE, A., NGOMA W., 2016, Variances in rateable values in rating practice in Zambia: the role of mental models in value assessment, Pacific Rim Property Research Journal, vol. 22, no. 2, pp. 181-201.
MUSOLE M., 2007, "Land policy and the urban land market in Zambia: Property rights, transaction cost and institutional change", unpublished PhD thesis, University of Glasgow, Glasgow, UK.
PAGOURTZI E., ASSIMAKOPOULOS V., HATZICHRISTOS T., FRENCH, N., 2003, Real estate appraisal: A review of valuation methods, Journal of Property Investment and Finance, vol. 21, no. 4, pp. 383-401.
REAL ESTATE INSTITUTE OF ZIMBABWE (n.d), Reduction factors, unpublished circular, REIZ,Harare.
ROWLAND P., 1991, The use of comparable sales for market valuation, The Valuer, February, pp. 332-367.
SHAPIRO E., MACKMIN D., SAMS G., 2013, Modern Methods of Valuation (11th Ed.), Routledge,London.
WHIPPLE R.T.M., 2013, Property Valuation and Analysis (2nd Ed.), Lawbook Company, Pyrmont,N.S.W

JUST COMPENSATION FOR EXPROPRIATION OF TRIBAL LAND IN BOTSWANA? A CONTRIBUTION FOR REFORM

By: Donald Mengwe, Bsc (Hons) Estate management, Valuation Surveyor

Introduction

Public works and land distribution in for socio – economic development may demand expropriation of tribal land in the public interest. However, in exercising the powers of eminent domain, the state has to pay prompt and adequate compensation in terms of the constitutional property clause guaranteeing the right to property. Expropriation is a politically sensitive issue, mainly because it disrupts livelihoods causing social and economic upheavals. Compensation for expropriation of tribal land has thus attracted a barrage of criticism and controversy from affected persons and the public due to ubiquitous perceptions that it is unjust. Assessing compensations in terms of the applicable statutory rules requires ascertaining the nature of the tribal land interest held by affected people and the forms of land tenure existing in tribal territories.

What is the nature of the tribal land interest and character of customary land tenure in Botswana? What are the statutory rules for assessing compensation for expropriation of tribal land and challenges in enforcing them? What changes have been made to the compensation code to address contentious issues? What are other possible alternatives for measuring loss? What is the relation between the constitutional property clause and statutory rules for assessing compensation? How can this relationship be changed in the interest of just and equitable compensation, considering current public disquiet about the current compensation system?

This paper attempts to address these questions in seeking for a balanced and inclusive normative approach is determining just compensation. It contributes to the debate on expropriation of tribal land, by identifying the challenges and problems of the current compensation system and makes proposals for improvement.

Evolution of Customary Land Tenure System

Botswana has three systems of land tenure *viz*, Tribal Land, State Land and Freehold. Tribal Land constitutes over 70% of the surface area. Under pre-colonial Botswana all the land mass was administered in accordance with custom by traditional leadership of different ethnic groups in trust for tribesmen. Egalitarian and communal norms were some of the prescriptions forming the basis of customary tenure in pre-colonial Botswana, then a primarily agricultural society, where land was considered sacred and bequeathed from ancestors .Rights to use and access land were allocated on a needs basis. The main plank of customary land tenure was the 'right to avail' meaning every member of the community had a birth right to be allocated residential, arable and grazing land. Exclusive use rights were accorded in terms of residential and arable land and land was not freely disposable especially to outsiders. Security of tenure derived from kinship and being a member of tribal grouping. The concept of private ownership was alien and contrary to the belief that land is sacred and collectively owned by community members, ancestors and future generations.

In the colonial era (1885 - 1966), the British establishment excised crown land and freehold land out of tribal land respectively, to allow township development along a market oriented economic system and for allocation to white settlers for commercial cattle ranching. The concept of private property was introduced and considered pivotal for civil liberties , and an essential feature of market economy thus crucial for socio-economic development. The native reserves were preserved in order not to disrupt the socio – economic organization of indigenous people. Generally, although the colonial regime introduced among others market institutions and promoted land titling, monetary system and land expropriation, customary land tenure remained intact.

After independence, the post- colonial state retained and recognized customary tenure through promulgation of the Tribal Land Act, 1968 (TLA,1968).The subject Act, however, transformed customary land tenure practices, with authority of land devolved to land boards, which replaced Chiefs and introduced certification

and documentation of tribal land rights. Changing political, economic, social and cultural circumstances in part mainly due to neo – liberalism, which ushered in a post war global capitalist order, have led to a re-configuration to social relations concerning tribal land. In this respect, the Tribal Grazing Land Policy (TGLP) of 1975 is an adaptation to the globalization tide , to design a " market friendly" innovation to improve beef production, then the mainstay of the economy and transform the rural economy. The changes introduced are exclusive lease rights to commercialize the cattle industry, addressing land degradation and overgrazing, necessary interventions to deal with land grabbing by elites and reserving communal grazing areas for smaller farmers to be used along traditional practices. A major milestone was the Report of the Presidential Commission on Land Tenure (1983) given the mandate to review the land tenure system and advice on requisite improvements and scrapping of obstacles detrimental to development. The Commission recommended the granting of tribal land leases for residential, commercial and industrial uses to provide for security of tenure and allow land transactions for efficient and productive use, effectively ensuring that there are no considerable barriers to leasing transactions or marketisation. Other transformative instruments were manifestation of illegal tribal land transactions, land squatting and informal tribal land markets particularly in peri – urban areas as a result of increased demand and competition for land due to population growth, urbanization, social transformation and land boards incapacity to deal decisively with tribal land applications and land use planning. These instruments were the Report on the Review of the Tribal Land Act, Land Policies and related Issues (1989), the Report of the Presidential Commission of Inquiry into Land Problems in Mogoditshane and Other Peri – Urban Villages (1991) and the White Paper on land problems in Mogoditshane and Other Peri – Urban Villages (1992). These reports signaled changing attitudes to tribal land in particular an appreciation of its economic value in the midst of scarcity and competition. In this respect section 10 (2) of the TLA,1968 was subsequently repealed through the Tribal Land Amendment Act, 1993(TLAA,1993), thus imposing restrictions on transfers and land markets, because it was considered that it spurred tribal land rights trading and commodification. Section 10 (2) of the TLA,1968, was crafted presumably to preserve prior existing private land rights and provides that

' Nothing in this section shall have the effect of vesting, in landboard any land or right to water held by any person in his personal and private capacity".

Section 24 (1) of TLA,1968 , which made a reference to granting land in ownership to individuals was also deleted, to emphasize that tribal land is not granted in ownership . Section 24 (1) provides ;

' Subject to the provision of this section, land board may grant to any person land, either by way of lease on terms and conditions other than those imposed by or under section 23, or in ownership on such terms and conditions as it may determine.'

It was must be emphasized further that the amendment of the TLA,1968 occurred against the backdrop of the Court of Appeal decision in the case of *Kweneng Land Board (KLB) v Kabo Matlho and Another (1992)*,a watershed moment, as it established private ownership of tribal land on the basis that customary law, evolves with changing conditions in society.
The White paper on Botswana Land Policy, 2015 is significant intervention in the reformation process by virtue of its substantive content. Arguably, therein is a clear conviction to the fact that commercial dealings in tribal land are indispensable for credit market linkages and social and economic development. It provides for retention of customary land tenure and enhancement of tribal land administration to improve tenure security, tribal land registration and incremental or graduated facilitation of land markets in rural areas. It further acknowledges that land squatting, informal land markets, illegal land transactions are the effects of inefficient customary land administration under pressure from increased competition for tribal land rights caused by urbanization and population growth. The policy makes a pronouncement that tribal land would be planned, surveyed and registered. The Government paper no. 1 of 2019 on Revised Land Policy states that the current land tenure system will be retained as it has been beneficial to the country, save for some lapses in land administration. It acknowledges that cultural, economic and social values relating to land have evolved over the years and thus the need for careful land policy response to current issues such as environmental sustainability, economic diversification and global economic competitiveness. Strategic responses to eminent challenges require a gradual and cautious approach because land has spiritual, cultural, physical and social connotations, and in this respect land tenure is of crucial significance. The Revised Policy states that access to land should balance both the social and economic needs and calls for the amendment of the TLA, 1968 and Deeds Registry Act, 1960 (DRA,1960) to ensure that certificate of customary land grant will be registrable without the need to convert to common law land rights and compel all tribal land rights holders to register their land rights. There is an predisposition of facilitate land market and improve property tax base Tribal Land Act, 2018 (TLA,2018) (not in operation at the time of writing) compels all tribal land allotees, occupants, holders of certificate of customary land grant or lease to register their interests with the Registrar of Deeds. Under Part V thereof there is a provision that landboard make a grant by way of lease on terms and conditions it may determine or prescribed subject to such grant be in 'ownership to the State.' Part VII imposes re-

strictions on tribal land transactions, disposal and sub-lettings over five years duration and share transfers in ' private company owning land'. However the following do not require the land board consent ;

1) Sale in execution to a citizen or citizen owned companies
2) A hypothecation bond by citizen or citizen owned companies
3) Devolution of such land on inheritance

There are onerous restrictions with respect to dealings with non – citizens requiring amongst others 'right of first refusal' to citizens and prescribed matters the land board should regard in determination of refusal or consent in respect of transaction to non – citizens.

Kabo Matlho and Mpofu Cases : Is tribal land private property ?

The Court of Appeal cases KLB vs Kabo Matlho & Another (1992) and KLB vs Mpofu & Another (2005) dealt with the substantive issue of whether tribal land can be held in personal and private capacity or it is collectively owned by the community. The main subject matter of the cases derive from sale agreements in respect of tribal land in Mogoditshane without sanction by KLB and subsequent erection of residential buildings thereon.

In *KLB vs Matlho & Another* the High Court held that the 'ownership of the land fell fairly and squarely within the exception to the vesting of the land in the appellant; and that the land was private property of the second respondent.' It relied on its interpretation of section 10(2) of the TLB, 1968. KLB appealed and this was dismissed as the majority of the court held that ;

Customary law is not static but has developed, and has continued to develop to meet the needs of modern society. Whatever the customary law might have been in the past in the area concerned in this case, the law has apparently developed to permit private ownership of tribal land...

KLB vs Mpofu & Another (2005) is an appeal against the decision of the High Court which expressed that it observed the doctrine of legal precedent or *stare decisis*, in particular the *KLB vs Matlho & Another* (1992) on interpretation of section 10 (2) of the Tribal Land Act. Judge Tebbut JP of the Court of Appeal in this case stated that ;

Whatever lay behind the object of the legislature in enacting section 10 (2), I cannot accept that it is intended to create a class of private ownership within customary law. It would fly in the face of the tenets of customary law, which from all authoritative text writers specifically excluded it.

He further stated the TLAA, 1993, in his view, does not suggest that Parliament intended to create a class of private ownership in land that was previously allocated under customary law before the commencement of the Tribal Land Act in 1970. The Court of Appeal also observed that the government White Paper No. 1 of 1992 titled " Land Problems in Mogoditshane and other Peri – Urban Villages " discusses the issue of sale of tribal land and that it is not cultural recognized and further proposes legislative interventions to curb this .

Mpofu case and Section 38 of TLAA, 1993 : A juxtaposition

Section 38 on transfer of rights provides :

(1) The rights conferred upon any person in respect of any grant or lease of any tribal land, whether made under or in accordance with Part III or Part IV, made prior to the coming into operation of this Act, shall not be transferred, whether by sale or otherwise, to any other person without the consent of the land board concerned :
Provided that the provision of this subsection shall not apply in the case of :
i) land which has been developed to the satisfaction of the land board concerned ;
ii) a sale in execution to citizen of Botswana
iii) a hypothecation by a citizen of Botswana; or
iv) the devolution of such land on inheritance

(2) The Registrar of Deeds shall not register any conveyance of tribal land or rights to such land unless supported by a certificate issued by the appropriate land board or by written lease, and where relevant, he is satisfied that one of the conditions set out in the proviso to subsection (1) applies.

(3) For the avoidance of doubt, it is hereby declared that the provisions of section 17 of the Deeds Registry Act have effect in relation to the transfer of real rights of land under the provisions of this section as it has in relation to the transfer of any other real rights in land.

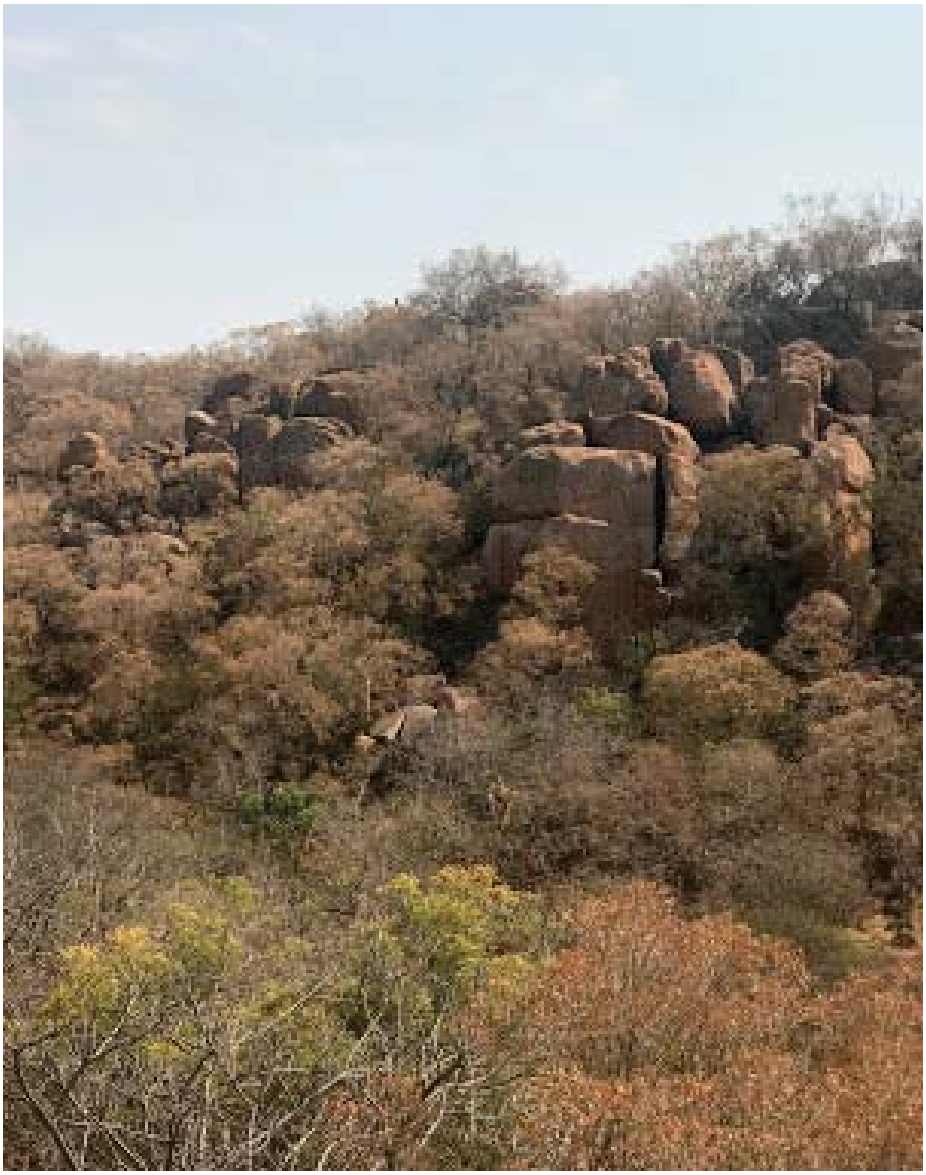
This replaced section 26 of the TLA, 1968 which subsection 26(1) provides that ;

(1) The rights conferred upon any person under any grant made under section 24 shall not be transferred to any other person by any voluntary act of such person or his agent, trustee, curator, guardian,liquidator, judicial manager,executor or administrator or other person acting on his behalf or who has control of his estate, without the consent in writing of the land board ;

Provided that the land board's consent shall not be required in the case of a sale in execution to a person who is citizen of Botswana.

The *Mpofu* case is an affirmation by the Court of Appeal that tribal land is not private property and that is not a commodity that can be freely exchanged at will. Section 38 is an

acknowledgment of the reality of the substitution effects of exorbitant property values in the formal sector, which is the development of informal tribal land markets and illegal sales. The main motive of the provision is to allow commercial transfer dealings or tribal land transfers provided the land has been put to productive



use, pledged as collateral, is subject of foreclosure and inheritance and is not for speculative gain. The aforementioned set of rules has the effect of creating a formal property market in the tribal territories particularly in peri urban areas, provided the state has capacity to enforce rules and process transfers expeditiously. As the property market deals with rights which run with the land, this requires some form of privatization and well defined property rights to facilitate credit market linkages. This is the innovative intervention which has been introduced because it is in consonance with liberal democratic values adopted by the post – colonial state which promotes protection of private property and upholds the primacy of the individual.

However, it is doubtful that Mpofu case can be used as an authority regarding the nature of the tribal land interest. Ownership rights are not absolute and are subject to the limitations as formally sanctioned by law or custom reflecting prevailing judgments on fairness and society's value system. These limitations are imposed in the interest of the community and the 'bundle of sticks' have been expanded over the years since independence, to a complex 'new' customary tenure which incorporates attributes from customary and statutory systems to address current different realities in peri urban and remote areas. In the rural space, the government has allowed traditional practices associated with robust customary claims and use to prevail, as in communal grazing areas and communal land for forage, as social relations have undergone relatively little change over years in such areas compared to peri urban areas. In order to accommodate social transformation in urban villages, the bundle of sticks has been formally expanded to include the right to lease, hypothecate, subdivide, donate e.t.c, which rights are " private " or " individualized" and are tradeable,allowing a functioning property market and credit market linkages. Within this transformation, there is predisposition though to 'appropriate' the economic value of land so that in case of 'eminent domain' the government compensate for 'user' rights as per section 33(2) (d) of TLA, 1968 as amended.

Revised National Land Policy (2019) & TLA, 2018: Contradictions or complexity?

The 'sons of the soil' concept is retained in the Revised Land Policy (2019) as land is allocated gratis to those eligible, in terms of arable fields, residential plots and communal natural resources in the interest of equity, to sustain traditional livelihoods. Further, there is another dimension of deliberate intent to extend real estate markets, purportedly through secure tenure and title, to rural areas, by mandatory registration of customary land grants and

common law land rights. It is envisaged that this would create bankable interests, to enable title holders to access financial markets and improve land use efficiency and investment , in support of new perceptions regarding ownership and usage of land. The institution of private property is recognized as instrumental to market – oriented economy and facilitates voluntary exchange, leading to development of the price mechanism. This reformation is to all intents and purposes an entrenchment of market institutions in land administration. The use of the expression 'land transaction' in the TLA, 2018 bears testimony to resignation to market supremacy or neo liberalism, although there are clear restrictions on alienation to non – citizens, land speculation and emphasis of vesting of 'ultimate' ownership of tribal land to the state. The previous disincentives for land and property market development are acknowledged as having denied government to benefit from increasing economic values through *ad valorem* land taxes and land allocation based on price mechanism and cost recovery principle to defray land servicing expenditure.

Without highlighting the short - comings of the aforementioned policy instrument, it is safe to say a binary view of land tenure as either legal or illegal, *de facto* or *de jure* is not upheld as there are many tenure systems within different areas of tribal territories that are being supported and have been designed or formalized and upgraded, considering prevailing local social, economic, political and cultural circumstances . Again it cannot be simplistically concluded that the tenure system has evolved from the simple communal or customary tenure to that reflecting individual tribal land rights. There are intermediate forms of tenure regimes across the spectrum of customary tenure and registered common law leases to ensure access to communal natural resources such as water, firewood, wildlife, grazing areas , and to ensure efficient land use and investment, food production and promotion of tourism activities to earn foreign exchange. This is in realization that tenure is essentially a political issue and has a bearing on other fundamental human rights such as civil, cultural and social rights, which are determined by the relationship between the individual and society which has been in constant flux throughout history. Furthermore, tenure is dynamic and can be transformed in the light of population growth, land scarcity and increased competition for land rights, growing urbanization, environmental concerns, civil conflicts, monetization of the economy and technology in agricultural production. No single tenure regime can meet the needs of all social groups (UN- Habitat, 2008)

Evolution of Legal Framework for Compensation due to Expropriation of Tribal Land

The constitutional property clause section 8, protects land or property rights against arbitrary forcible takings, subject to the limitations of public interest and order. It also guarantees the right to prompt and adequate compensation as a result of expropriation for public utility, albeit without defining and stating the framework for determining the amount of adequate compensation. In terms of land held under customary land tenure, compensation is dealt with in accordance with the legislative framework and interpretations of the Courts. The property clause also secures the right to access to the High Court either directly or on appeal from any other authority for determination of quantum of compensation due and for the purpose of prompt payment.

The legislative framework dealing with compensation for expropriation of tribal land has evolved due to land tenure reforms in the post- colonial state. Compensation under the TLA, 1968 was dealt with in terms of section 33 which provides ;

33 (1) Where land is granted to the State under section 32 and there subsist over such land a right to use such land under customary land tenure, the land board shall grant under the provisions of Part III the occupier of such land a right to use land elsewhere of equivalent value to the land so granted or leased to the State and upon making such grant to the occupier, the land board shall require the occupier to vacate the land so granted to the State and , on such vacation subsection (2) shall have effect.

(2) Any person who vacates land in accordance with subsection (1) shall be entitled to compensation from the State for –

(a) The value of any standing crops taken over by the State
(b) The value of any improvements effected to such land the benefits of which enure to the State including the value of clearing or preparation of land for agricultural or other purposes
(3) In the event of the State and any person who alleges he is entitled to compensation under the provisions of this section being unable to agree as to the amount of compensation, such person may make application to the High Court or to magistrate's court of competent jurisdiction for the purpose of

(a) the determination of his interest or right
(b) ascertaining the legality of the taking of possession or acquisition of the property, interest or right; or
(c) ascertaining the amount of compensation to which he is entitled and whether or not such compensation is adequate in the circumstances of the case and, if not, what is adequate compensation, and the court may make such order in the matter as it thinks fit.

The Report of the Presidential Commission of Inquiry in Land Problems in Mogoditshane and Other Peri – Urban Villages (1991) led to the enactment of the TLAA, 1993. Section 18 of the TLAA, 1993 amends section 33, *supra*, of the TLA, 1968 and states ;

18 (1) Where land is granted to the State under section 32, and there subsists over such land a right to use such land under customary form of tenure, the land board shall require the occupier to vacate the land and on such vacation the provision of subsection (2) shall have effect

(2) Any person who is required to vacate land under provisions of subsection (1) may be granted the right to use other land if available, and shall be entitled to adequate compensation from the State for the following ,if applicable –

(a) the value of any standing crops taken over by the State;
(b) the value of any improvements effected to such land, including the value of any clearing or preparation of land for agricultural or other purposes
(c) the costs of resettlement;
(d) loss of right to user of such land

The requirement for the land board to grant the occupier the right to use alternative land of ' equivalent value' has been deleted, a forced concession because of the impracticality of implementing this provision in the light of tribal land scarcity and increased competition of land due to urbanization and population growth as reflected by bloated waiting lists for plots held by land boards. The amendment also sought to consolidate customary values in tribal land administration in view of changing attitudes to land and this respect section 10 (2) was deleted. It was emphasized that common law lease does not change tenure and therefore that a common law lease exists under customary land tenure system.

The TLA. 2018 incorporates some of the pronouncement in Botswana Land Policy (2015) which includes *inter alia*, liberalization of customary land tenure or transformation of it to make it 'market friendly'. Section 32 of the TLA, 2018 is in fact an exact replica of section 16 of the Acquisition of Property Act, 1955 (APA,1955) which deals with state and freehold land,and provides that :

32 (1) Where land is granted to the State under section 29, land board shall by notice in writing require the occupier to vacate the land.

2) Any person who is required to vacate land under the provisions of subsection (1) may be granted the right to use other land, if available, and shall be entitled to adequate compensation from the State.
3) In determining the amount of the compensation referred to in subsection (2) the State shall have regard to –

a) the fact that the person claiming compensation has been granted the right to use other land;
b) the market value of the property at the date of service of the notice to vacate the land;
c) any increase in the value of any other property of any person interested is likely to accrue from the use to which the property acquired will be put;
d) the damage, if any, sustained by any person interested, by reason of the severing of any land from any other land of such person;
e) the damage, if any, sustained by any person interested, by reason of the acquisition injuriously affecting any other property of such person; and
f) the reasonable expenses, if any, incidental to any change of residence or place of business of any person interested which is necessary in consequence of the acquisition:

Provided that the land board shall not have regard to –

i) the fact that the acquisition is compulsory,
ii) the degree of urgency which has led to the acquisition,
iii) any disinclination of any person to part with the property acquired,
iv) any damage sustained by any person interested which, if caused by a private person, would not be a good cause of action
v) any increase in the value of the property to be acquired which is likely to accrue from the use to which it will be put when acquired, or
vi) any outlay on additions or improvements to the property to be acquired, which has be incurred after the date of service of notice to vacate the land unless such additions or improvements were in the opinion of the State necessary.

4) If the market value of the property has been increased by means of any improvements made within one year immediately preceding the service of the notice to vacate the land, such increase shall be disregarded unless it is proved that the improvement was made bona fide and not in contemplation of such property being required for public purposes.

5) Where the President has in pursuance of a notice under section 29 entered into possession of any property, the land board may award compensation to the owner of such property and to all parties entitled to any title or interest therein for loss of rentals for the period between the time the President so entered into possession, and the time when consideration due under an agreement has been paid to the person entitled thereto, or compensation has been paid under the provisions of this Act.
6) Where the State and any per-

son who alleges that he or she is entitled to compensation under the provisions of this section are unable to agree as to amount of such compensation, such person may make application to the Land Tribunal for the purpose of –

a) *the determination of his or her interest or right;*
b) *ascertaining the legality of the taking of possession or acquisition of the property, interest or right, or*
c) *ascertaining the amount of any compensation to which he or she is entitled and whether or not such compensation is adequate in the circumstances of the case and if not, what is adequate compensation, and the Land Tribunal may make such order in the matter as it deems fit.*

Compensation Theories

Compensation is paid to indemnify the individual from harmful government interference and to distribute the burden of government interference. Where compensation is not paid, the individual bears the full cost of government interference of public interest works, which is not only in monetary terms but also infringement of liberty and ability to participate in the political community. There is a dichotomy of views in the scholarly debate regarding the notion that the individual is protected from harmful government interference. One is based on the liberal conception of property, as private property, which promotes individual freedom and limited role of government and the other hinged on a societal perspective which views property rights as manifestations of social relations underpinned by society's value judgements. The liberal conception of property propagates the view that any government interference must be accompanied by compensation, that is, the taking of one of the sticks in the bundle of rights lead to reciprocal full indemnification of the owner, which makes government regulations expensive and severely limits its powers. Under this rationale, expensive compensation restricts government powers, impelling government to gravitate towards market rather political solutions to prevent inefficient outcomes. The societal perspective posits that individualization of property is an affront to the democratic process, as it does not take into account the social origins of property and can only serve to frustrate government's redistributive actions in mediation between the rights of the individual and rights of the community or government powers. Thus, the assertion that compensation prevents harmful social inefficient expropriation is inadmissible. This rationale does not hold water, also in cases where the land is not efficiently being used, or where the expropriation is plainly economically or socially preferable to the current use (Ngcukaitobi T& Bishop M 2018)

Mengwe (2017) provides an exposition of the erudite works of Michelman(1981), Alexander (2003), du Plessis (2009), Radin (1982); Wyman (2007) and fee (2006) on the purpose and level of compensation. These elucidations provide interesting different insights on the degree of protection of property and level of compensation. As an illustration, the proposition that business and property held solely for speculative purposes does not require the same level of protection as a home; that considering the sanctity of the home, compensation should be higher than market value; and the suggestion that principle of proportionality can be applied for assessing compensation as in when dealing with correction of racialised dispossession under apartheid South Africa through land reform..

Compensation Standards

International experiences, no doubt, can serve as a useful guide in attempting to answer the question of which compensation standards government should apply in exercising the powers of eminent domain. The constitutional property clauses of most countries guarantee the right to compensation for expropriated property without explicitly stating the criterion for determining the quantum of compensation. Various adjectives abound in terms of the nature of compensation; that is , compensation must be "adequate", "fair","just", "full" and "just and equitable". In the United States of America(USA), the compensation standard must be " just" and this is normally accepted as market value (Wyman (2007). Under German Basic Law, assessment of compensation must " reflect a fair balance between the public interest and the interests of those affected". The basic law also requires the application of the proportionality principle, meaning every case be judged on its own merit. Market value in most cases has achieved the balance (du Plessis 2009).

The European Convention on Human Rights (ECtHR), Article 1 of the first Protocol states that

" Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of International law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Karasek – Wojciechowicz and Jan Brzeski (2019) state that three principles have been established related to Protocol 1 to the Convention, by ECtHR case law, *viz* in verbation;

i) the principle of peaceful enjoyment;
ii) just compensation for compulsory takings;
iii) national regulation on property use which complies with the general interest.

Of cardinal importance is the application of the 'balancing test' or 'just balance' in the evaluation whether expropriation strikes a fair balance between the public interest and expropriatee's property rights. The concept of public interest is broadly construed to cover issues of political, economic and social nature (Karasek – Wojciechowicz and Jan Brzeski 2019). Compensation is one of the factors to be taken into consideration, as means for ensuring a fair balance (Allen 2004). In this respect, there are circumstances where the nature of the public interest may lead to where the expropriatee receives less compensation than market value or where compensation is denied. In general, although notably, there is no express provision for compensation in Article 1, expropriation of property without the payment of compensation reasonably related to its value is normally considered disproportionate interference, which is violation of Article 1 (Slysmans and de Graaf 2013).

Section 25(3) of the South African Constitution requires "just and equitable" compensation and in its computation does not give market value a central role, but calls for an 'equitable balance" considering the social and political history of the country. It bears similarities to the proportionality test by the ECtHR.

In his repository *The Right to Property in Commonwealth Constitutions*, Allen (2004) posits that in the Commonwealth, the general trend suggests that the understanding of constitutional guarantee of compensation as guarantee of full compensation. This is in line with the Ricket Principle established in the English judicial precedent *Ricket v Metropolitan Rail Co. (1867)* where it was determined that *"compensation is the amount required, so far as money can do so, to put the owner in the same position as if his property has not be acquired"*, which means full indemnification for the loss suffered by the expropriatee (Baum and Sams 1997). Allen (2004) asserts that there is a strong proclivity to the individual and this is given pre-eminence over the protection of public funds, leading the courts to assume that the award of compensation should not be less that market value. Allen (2004) also observes that although commonwealth courts continue to hold on the notion that 'compensation' means 'full compensation' within this perspective, there is room for Parliament to opt either for the subjective valuation, which takes into account market value or other claims such as disturbances or sentimental values, or objective valuation which is strictly confined to market value. He further asserts that modern statutes show proclivity for objective valuation, which the courts regard as constitutional minimum, with Botswana being an exception in light of *Attorney General v Western Trust (Pty) Ltd (1981)* , where the High Court relied on the older statutory principle of full indemnification for loss, although under questionable basis.

Allen (2004) also unravels the potential for judicial activism or inflexibility in allowing the judiciary to assess compensation. In buttressing this view, he draws on the Supreme Court of India's interpretation of Article 31 (2) of the Constitution, which provides that no law should authorize expropriation unless it provided for compensation or specifies the principles on which compensation is to be assessed and awarded. He states that ;

The Constitutional Assembly was informed that the courts would not 'question the adequacy of compensation from the standard of market value; they will not question the judgment of Parliament unless the inadequacy is so gross as to be tantamount to a fraud on the fundamental right to own property' Allen : 2004 : 224.

Despite the aforementioned assurances that the Supreme Court will not challenge the legislature to acquire property below market value, the court in State of *West Bengal v Bela Banerjee (1953)*, interpreted Article 31(2) as giving the legislature a narrow discretion and required that compensation be assessed such that there is full indemnification of the expropriated owner. Allen (2004) states that thereafter there were several amendments and shifts in approach reflecting the power play between government and courts. He proposes that this serves as a warning to Commonwealth governments intent on comprehensive economic reform.

Ng'ong'ola (1989), on the case *Attorney General v Western Trust (Pty) Ltd (1981)* casts doubt whether it can be taken as absolute authority in determining the quantum of compensation because no effort was made to dispel the common law authorities that compensation standard is strictly market value. In this case it was stated that

"...Valuation on the basis of market value is first of all too narrow, secondly, it ignores the subjective element of loss that might be suffered by the expropriatee..."

Generally Allen's (2004) analysis is that courts typically focus on the loss suffered by the expropriatee, which reflects the dominance of the liberal conception of property or the constitution which stress a limited role for government. Courts have not examined whether current emphasis on full compensation is the best means of protecting private property. According Allen (2004) there are alternatives of denoting and measuring loss that might be regarded as fair and adequate, even when focusing on the individual. In this vein, Allen (2004) presents Frank Michelman's approach as articulated in his article *"Property, Utility and Fairness : Comments on the Ethical Foundation of ' Just Compensation' Law",* which does not suggest that compensation should be set at an equivalent of market value nor full indemnification for property owners. In terms of Michelman's approach a rational government would exercise powers of eminent domain if benefits outweigh the

costs, that is, compensation would only be awarded when 'settlement costs' of compensation are less than the 'demoralization costs' of denying compensation. Allen (2004) state that demoralization costs arise as investors reduce or divest investment from a jurisdiction where assets are at a greater risks of an uncompensated expropriation and that settlement costs is the monetary value of the "time, effort and resources which would be required to reach compensation settlement adequate to avoid demoralization costs.

Michelman (1967) posits that the question of compensation as a normative issue based on value judgment subject to political decision making is ideally placed within the political arena and that it is inappropriate to rely on the judiciary for the assessment of compensation. For Michelman(1967), the assumption is that parliament bases its view on objective information about the system of compensation and distribution, when deciding on fair compensation, while judicial decisions are made on subjective formulation of 'fairness' to the affected individuals in court. This assertion finds support in Singer and Beerman(2009) (as cited by du Plessis (2009), that the realm of public policy making is best suited for Parliament, and that the Judiciary should decline to rule when regulation of takings requires just compensation.

Constitutional Property Clause : Protection of Private Property or Social Rights ?

The "property clause question", that of including the property clause in the supreme law is not the same as the " property question" (Michelman, 2012). In this pronouncement Michelman (2012) suggest that the constitutional property clause can support both market libertarian and social democratic system. To elucidate, he states that property as a fundamental right is supportive of other basic rights such as liberty, dignity and equality, therefore there is no basic individual right against state engineered impairments of asset holdings. Based on this perspective, even under the same circumstances of contested property clause application, left and right leaning adjudicators' rulings, often will not be in consonance, and again, it can be asserted that the best judicial answers to property clauses application vary with circumstances. Michelman (2012) buttresses this view by presenting the Hungarian case, where Parliament, in the process of liberal economic reforms, scrapped entitlement programs, and when this was brought for judicial review, the Constitutional Court relied on the property clause and the rule of law doctrine. The Court based its decision on the liberal style guarantee of property rights and rule of law, rather than social rights guarantee in the Constitution. This means the right to property is subject to different interpretations, is the most controversial and complex and also has major implications for several important socio –economic rights such as right to work, rights to education and housing.

It follows , that in the context of Botswana the constitutional property clause can serve to protect both private rights and tribal land rights held under customary tenure. In cases where property is conceptualized as socially bound and subject to limitations essential for public order as demanded by a democratic society, will require a shift from an individual to society and view customary land rights essentially as " social rights". Under this perspective, the moral purpose of the constitutional property clause is to uphold human dignity, thus tribal land rights would be recognized as basis of livelihood rather than just an asset and also, the outcome of social relations, recognized both by informal rules of society and government. Thus the notion that compensation is payable where the

customary grant is " paperised" will be untenable, paving the way for just compensation even for expropriation of shared resources such common pastures. The reality is that involuntary resettlement or displacement of people without adequate compensation or social support for rehabilitation is a violation of human rights and can lead to impoverishment especially to vulnerable members of the community whose economy is land based. The liberal notion of property is 'Lockean' and property is conceptualized as exclusive and promoting individual freedom and any government interference requires full indemnification considering, *inter alia*, market value for the acquired property interest. If this interpretation is applied to customary tenure , what will protected will be " private ownership" this would tie compensation to improvements and disregard 'social and cultural values' as per section 32 of TLA, 2018.

Current challenges and issues in enforcing Section 33 of TLA, 1968 as amended

Section 33 of Tribal Land Act, 1968 as amended introduced cost of resettlement and loss of right of user in case alternative land is not available, deleting the requirement for the land board to grant land elsewhere, of equivalent value. Cost of resettlement were introduced because displacement is involuntary and includes disturbance and reasonable expenses incidental to any change of residence and place of business which are indirectly based on value of land. The involuntary resettlement costs address physical displacement where affected people lose their homes and land rights and economic displacement where they lose their assets, source of income or livelihoods. It is clear that physical displacement is compensated through relocation expenses .Economic displacement requires that compensation encompasses replacement costs of improvements *viz* buildings, plant and machinery, crops, irrigation; loss of access to common natural resources such as pastures, medicines, firewood, wild fruit; loss of net income or profit; adaption works on alternative premises; removal costs and permanent loss of profit where the claimant cannot find alternative land or premises. Therefore, resettlement costs in terms of subsection 33(2) (b) in Tribal Land Act, 1968 as amended, is confined to disturbance, incidental expenses for relocation, and solatium in case of home loss. In case of loss of livelihood, assets or income, disturbance may cover (permanent) loss of profit, loss of profit during relocation, transportation and adaptation works in alternative premises. The other heads of claim under subsection 33 (2)(a)(b) and (d) are directly related to the value of land and improvements. Improvement value for building structures is assessed using the Depreciated Replacement Cost (DRC) with allowance for salvage value and for standing crops, value is market derived . Loss of right to user is standard value which disregards location, arguably based on conjecture, as economic value has been legally appropriated. This compensation approach does not take into account the social, cultural, religious, spiritual and environmental values (e.g graves as evidence of land rights, way of life of nomadic indigenous people).

It is, thus apparent that although government recognizes customary tenure, the compensation code dealing with expropriation in the public interest is influenced by the historically prevailing liberal market economic system or liberal conception of property where the purpose of the constitutional property clause is to protect private property or 'ownership of possessions'. Although customary tenure derives out of a different value system which does not recognize customary land as commodity, the compensation standard or guidelines suggest what is protected is 'ownership' of improvements and loss of user rights, which leads to gross undervaluation.
Controversies arise in peri – urban areas where real estate market and informal land markets are developing, when assessing compensation on the basis of DRC in view of subsection 38 (1)(i) of TLAA, 1993 which facilitates trading of tribal land rights for non – speculative purpose and development of credit markets. This is further complicated by the conundrum that arises where common law lease is registered in respect of parcel of tribal land. In this respect, there are two possible approaches depending on the perception of the nature of tribal land interest. If considered a private property in a revisionary interest, market value is given a central role and where it is opined that common law lease does not change tenure therefore section 33 of the Tribal Land Act, 1968 as amended applies.

Specialized properties such as hotels and petrol filling stations on tribal land present certain peculiarities because their valuation depends on trading potential of the site in terms of location and goodwill, making it difficult to isolate the 'business' from the land and building structures, which are the main assets in the going concern This makes application of section 33 highly contestable and liable to 'double counting'. Owners of such business properties, though they are seldom compulsorily acquired, including shopping complexes are in an advantageous position as the valuation of their properties is in line with the market value concept and include other claims such as loss of profit and goodwill. Determination of adequate compensation in respect of sectional titles will even be problematic using the DRC approach necessitating a theoretical rather than practical approach. This analysis suggest that the crafting of section 33 envisioned a predominantly agrarian and subsistence society and did not envisage future transformation of the socio –economic structure of rural communities due to urbanization and globalization, in particular in peri-urban areas forming part of agglomeration economies of major cities such as Gaborone and Francistown.

In terms of valuation for compensa-

tion regarding common pastures or shared natural resources, this also presents complexities in terms of application of statutory valuation rules and negative reactions from affected persons. The practice is to compensate for kraals, boreholes, temporary and semi-permanent building structures, such as huts built of locally harvested mud and grass, in the midst of insufficient credible information on reproduction or replacement costs and depreciation rates of such improvements. Common pastures and forage are the bedrock of the livelihoods of rural communities but these rights are not acknowledged as compensable, yet displacement can lead to disruption of social and economic lives and even impoverishment. There is no community engagement to decipher the social value of shared natural resources and how deprivation will impact on livelihoods. However, there has been significant government isolated redress mechanisms not undertaken strictly on the basis of the compensation legal framework, though without controversies on human rights grounds. The case of the Basarwa in Central Kalahari Game Reserve (CKGR) signifies these interventions, where affected people despite their resistance, were relocated to a new settlement , New Xade, with housing and social infrastructure due to governmental land use and management policies, and as a deliberate intervention to change their livelihoods from hunting and gathering, to main socio-economic mainstream.

Lekgori et al (2020) in their paper titled " *Nuances of Compulsory Land Acquisition and Compensation in Botswana : The Pitsane – Tlhareesele Road Project*" revealed contrasting views on adequacy of compensation between affected people and government officials. They discovered that government officials were adamant that compensation offered was adequate because it was assessed in accordance with the prevailing legal framework,whereas the affected people considered it to be unsatisfactory even though it is based on relevant statutory provisions. Affected people decried the fact that they were not compensated adequately for disturbances e.g relating to disruptions to irrigation and drainage systems.

Section 32 of Tribal Land Act, 2018: Regressive ?

Section 32, TLA, 2018 is an exact replica of section 16 of the APA, 1955 which applies to property interests created in terms of the State Land Act, 1966 and freehold tenure, and is a curious attempt to put compensation for expropriation of tribal land on the same pedestal with that of private land. Section 16, APA, 1955 is based on the liberal conception of property, which conceptualizes it as exclusive private property which promotes individual freedom and primacy or serves other liberal values such as liberty and self - governance. In this respect, the constitutional property clause protects private property or possessions by limiting government intervention by requiring full indemnification using impersonal market value as a yardstick, reflecting the western value system. The judicial precedent *Attorney General v Western Trust (Pty) Ltd* confirms this attestation.

Applying the same rules of assessment of compensation as under section 16, APA, 1955 in relation to tribal land, suggests this has been influenced by the prevailing liberal market economic system or liberal conception of property , which protects "exclusive ownership'. Section 33 of TLA, 1968 was influenced by this liberal values that protect 'ownership of improvements" and section 32 of TLA,2018 entrenches this conception by complete disregard of 'social rights dimension" of land rights, which incorporate , *inter alia*, cultural identities and social values.

Section 22 of TLA,2018 provides;

" The provisions of this Part shall apply in relation to the granting, variation and determination of customary forms of tenure."

And under the same Act, section 27 provides ;

" Subject to the provisions of this section, a land board may grant to any person land by way of lease on terms and conditions as it may determine or which may be prescribed but may only grant land in ownership to the State."

Under Part VII of TLA,2018 the word 'transactions' is used which for all intents and purpose relates to commodification of land rights and privatization. The conservatism to retain customary land tenure is conspicuous yet socio-economic transformation or pressures of population growth, market forces and environmentalism demand that the customary land tenure system and administration adapt , particularly in peri-urban areas. The response from government is an entrenchment of market libertarian principles and individualization of land rights to improve economic efficiency. The Government Paper No. 1 on 2019 Revised Botswana Land Policy, acknowledges the symbiotic link between private land and market institutions, and in this respect affirms mandatory registration of certificate of customary land rights and common law leases under TLA, 2018 and Deeds Registry(Amendment) Act, 2017, in an attempt to create bankable interests. By its nature land registration system addresses information asymmetry and in this respect ,facilitates the development of land and property markets and may also improve access to credit, because the holder of the tribal land rights can produce documentary evidence in pledging such rights as security for loan. One of the pre requisites for establishing land registration system is that a developed system of property rights must exist (Hanstad, 1998). As the land registration system registers existing defined legal rights, a question arises, as to what is that nature of the customary land interest or rights? Further, is the nature of the customary land rights the same in a remote rural village and peri – urban area? These questions are no doubt, of primary importance in the valuation process or assessment of compensation.

Formalized customary tenure through registration is being recognized as 'property' in a neo liberal perspective, though with emphasis that the sovereignty of tribal land lies in the hands of the State under TLA, 2018. The TLA, 2018 is however silent in terms of compensation approach for communal land rights in terms of shared natural resources, such as common pastures, which are unregistered and are critical for sustenance of basic livelihood, possibly because under such circumstances, the compensation issue does not particularly lend itself to proper analysis on the basis of neo – liberal perspective on account of the non- exclusivity nature of the land rights. Under the scenario of communal natural resources use, prescriptive impersonal market solutions for government interference will not allay public outcry of unjust compensation. The reality is that tenure is a complex issue, and should not be understood in binary terms such as legal/extra legal or *de facto/de jure*, as on the ground there may be a broad spectrum of legitimate tenure arrangements existing within these polarities (UN Habitat, 2018). The TLA, 2018 in terms of entitlement to compensation does not formally recognize unregistered or undocumented land rights such existing shared natural resources use, but the 2019 Revised Botswana Land Policy explicitly acknowledges the importance of protection of communal grazing land rights and communal natural resources use rights. This contradiction may reflect that statutory tenure systems and simplified solutions of land registration procedures may not apply in certain areas because of lack of state capacity or recognition of the limitation of state institutions to deal with aplethora of land tenure issues in remote areas.

Complications will arise in remote rural areas in assessing compensation on the basis of market value, where the 'old' customary tenure dominates, because there is more likelihood of deferment to traditional authorities and respect for customary arrangements. In such settings, real estate markets are non – existent and thus producing a credible market valuation is untenable because of lack of supportive transactional evidence. For example assessing compensation on market approach, in terms of section 32 of TLA, 2018, for a home built to modern standards in remote area, may lead to an outcome where the market value is less than the reproduction cost of the improvements, defeating the principle of equivalence and equity. The market approach suggests that there cannot be market value for property components which are not separately marketable, therefore improvements cannot be assigned market value because they are unproductive without the site on which they may sit, thus are unmarketable (Whipple,1995). The concept will apply in case of agricultural property for immovable farm house and water points. Section 32 is overly biased towards market solution compared to section 33 of TLA,1968 further complicating the assessment of adequate compensation.

A note from *Sesana & Others v Attorney General*

Kirby (2017) asserts in his article "*Conditional on Bill of Rights : Race and Human Rights in the Constitution of Botswana*" that the constitutional foundation of modern Botswana reflects western liberal democratic values influenced by the dictates of white settlers who insisted on the preservation of their property rights. Dinokopila (2013) observes that first generation human rights, *viz,* civil and political rights are enshrined in Botswana Constitution, whereas socio-economic rights are not consti-

tutionally protected. In this respect the High Court case *Sesana & Others v Attorney General(2002)* is presented for elucidation. However, this is a classic case which demonstrates that relocation of people from their ancestral lands even where they do not hold title to land can have serious economic, political, social and cultural ramifications, if handled insensitively. The case pertains to relocation of Basarwa from CKGR , which is state land , yet the court ruled that the Basarwa had native rights to the land they occupied and used, as recognized by the British colonial government and passively approved by the post-colonial State. The Government had relocated the claimants to new settlements with social amenities, and promised them title to demarcated plots for security of tenure, provided them with livestock and paid compensation for rudimentary improvements built from locally harvested materials without their input in the process, all in the interest of land use management. Justice Dow, condemning this action on the part of government stated ;

" The Respondent says those who relocate will get title to land. The question becomes to do what with it? What is the value of a piece of paper giving one right to a defined piece of land, typically 40m X 25m when one has access to much larger area. This is not to say there is no value, but is to question whether such possible value was discussed with the residents."

Although Justice Dow acknowledged the fact that government has the interests of the applicants at heart in terms of welfare programs designed to change their way of life, this was prioritized over the consequential cultural and social upheavals. On this connection, giving as an example, she noted that one of the applicants giving evidence made it unequivocally clear " that she did not wish to relocate, because she wished to be near the graves of her ancestors."

The Sesana & Others v Attorney General is an authority that economic,social and cultural rights (ESCRs) are not constitutionally guaranteed. The High Court had to consider, *inter alia*, whether the termination by government of the provision of basic and essential services to applicants in CKGR was unlawful and unconstitutional. The applicants had no recourse to the Constitution in this regard but relied on the doctrine of legitimate expectation, which insists on fairness in the exercise of public authority, that service would not be terminated without first being consulted on the matter. The majority of the court decided that termination of basic and essential services was neither unlawful nor unconstitutional. The ruling established the principle that socio economic rights can be withdrawn at the whim of government and a marginalized and disorganized community will have no constitutional redress. Notwithstanding, for Dinokopila (2013) one positive that can be drawn from this ruling, is the approach by Justice Dow in her dissenting view, that services were essential to the applicants' survival and their termination endangered life, forcing them to relocate, thus termination breached the constitutional right to life. This progressive rights based approach rather than legitimate expectation basis, Dinokopila(2013) argues , suggests that human rights are indivisible and interdependent. This is indeed in sync with the practice in other jurisdictions, without constitutionally guaranteed ESCRs of using civil and political rights to achieve judicial enforcement of socio economic rights, through an expansive and purposive interpretation of the right to life like Indian Supreme Court. In totoshe argues, even though explicit protection of socio economic rights by the Constitution of Botswana is preferable,it clearly does not mean that courts do not have judicial capacity to enforce such rights. In the Sesana case, the majority of the court invoked the legitimate expectation basis, to avoid court to be perceived to be undermining democratic choices on resource allocation or budgetary issues and legitimacy of judiciary, by adjudicating on socio-economic rights. Judge Phumaphi opened

"It seems to me that, if this court were to decide that the services should be restored, in the face of admitted evidence to the effect that the provisions of services in the reserve is unsustainable on account of costs, the import of the court's decisions would be to direct the Respondent to re-prioritize the allocation of national resources. In my view, the court should loathe to enter the arena of allocation of national resources unless, it can be shown that the Respondent has in the course of its business transgressed against the Supreme Law of the land or some other law."

This resonates with commentaries that decisions on public policy making or allocation of resources, primarily concerns value judgments and are best dealt with by parliament as the judiciary does not have expertise and is ill equipped to oversee large scale bureaucracy (Michelman (1967); Allen (2004); Singer and Beerman (2009) ;Sustein (2001). Sustein (2001) posits that in *Grootboom* housing case, in the matter between *Governent of Republic of South Africa V Grootboom, 11 BCLR 1169 (CC) (2000)*, the South Africa Constitutional Court's approach gives an insight on providing the protection of socio economic rights in a manner that does not compromise democratic prerogatives or impair legislative efforts to set reasonable priorities. The court has demonstrated that courts can decide on ESCRs without strong emphasis on resources allocation details by the State. Although Sustein (2001) admits that the approach by South Africa Constitutional Court has limitations he hails it a providing invaluable lessons, that

"... a constitutional right to shelter, or to food, can strengthen the hand of those who might be unable to make much progress in the political arena, perhaps because they are unsympathetic figures, perhaps because they are disorganized and lack political power. A socio – economic guaran-

teed can have an enduring function. It can do so in part by promoting a certain kind of deliberation, not by preempting it, as a result of directing political attention to interests that would otherwise be disregarded in ordinary political life."

This exhortation is plausible for marginalized minorities such as Basarwa and remote area dwellers who might find themselves dispossessed because of pressure from multi- nationals companies due to large scale land based investments. In this respect, they may face disruptions to social networks and to access natural resources, their identity and cultural survival may be adversely impacted. For marginalized groups relocation may result in stricter requirements for involuntary resettlement such as land based resettlement, recognition of their customary rights and meaningful consultations . These interventions are in fact demanded by international financial institutions in their development funding initiatives.

The Court in *Sesana* case also had to deal with the question of whether forceful, wrongful removal of Basarwa, without their consent from the land they occupied in their settlements in the CKGR, deprived them of their possession of the land. The significance of this issue before the Court is its interconnectedness with termination of essential services, that is, their withdrawal was orchestrated to force them to relocate from their ancestral land. Although compensation was used, its served as a peripheral issue of incitement for extinguishment of their land rights in CKGR, rather than being on just and equitable basis in order to cause minimal disruptions to livelihoods. The computation of compensation was not explained to the affected people and not subject to negotiations. Justice Phumaphi observed that the applicants "minds were not *ad idem* with those of the agents of the respondent, with regard to compensation and right to go back into the CKGR" and noted that one "witness called 'Speed' said he thought he was being compensated, because he relocated against his wishes". Parker (2019) has observed that dealing with matters of compensation for indigenous groups such the Aborigines, as to the extent to which money may be equivalent to native land dispossessed , will remain contentious, because of the spiritual significance of the land, to require reflection on the principle of just compensation.

Towards an inclusive and balancing normative human rights based approach

The tension between liberalization of customary tenure and conservatism in retaining the old customary tenure is evident, and suggests that it is not pragmatic to have a single tenure system or form that caters for all social groups. Adoption of neo liberal conception of property, as private property which supports other fundamental rights such as civil liberties, demands full indemnification for the government interference. In this respect, as stated earlier, what will be protected is essentially 'private ownership', thus disregarding socio – cultural rights as reflected by section 33 of TLA, 1968 and section 32, TLA, 2018. Under this compensation approach, tribal land rights held by indigenous people which are the basis of their economy and communal land rights in terms of shared natural resources critical for livelihoods attract little, if any, compensation mainly because they are undocumented and are not supported by land administration system. What is then required is a normative approach, that is human rights centered, to ensure that the assessment of just compensation or valuation methods are adapted to prevailing local circumstances and are acceptable to the community. In this way, every case will be weighed on its own particulars or merits.

There are various international human rights standards and global agenda frameworks that can be used to inform a just and equitable compensation system. The Universal Declaration of Human Rights (UDHR) Article 14 states that " *every one has the right to own property as well as in association with others" and further that " no one should be arbitrarily deprived of his property."* The United Nations Human Rights Council (UNHRC) general comments on international human rights laws proclaims the right to adequate housing as integral to right to adequate standard of living and also insists on lawfully evictions in terms of existing international human rights standards(UN Habitat (2018). Regarding compensation assessment the comments are

1) " when eviction is unavoidable, and necessary for the promotion of the general welfare, the state must provide or ensure fair and just compensation for any losses of personal, real or other property or goods, including rights or interests in property... where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better." " All those evicted , irrespective of whether they hold title to their property, should be entitled to compensation. Consideration of the circumstances of each case shall allow for the provision for losses related to informal property, such as slum dwellings."

2) To the extent not covered by assistance for relocation, the assessment of economic damage should take into account consideration losses and costs,

for example, of land plots and house structures; contents; infrastructure; mortgage or other debt penalties; interim housing; bureaucratic and legal fess; alternative housing; lost wages and incomes; resettlement and transportation costs (especially in the case of relocation from source of livelihood). Where the home and land also provide sources of livelihood for the evicted inhabitants, impact and loss assessment must account for the value of business losses, equipment/ inventory, livestock, land trees/ crops and lost/decreased wages/ income.

3) On business enterprises "states must protect against human rights abuse within their territory and/or jurisdictions by third parties, including business enterprises.

Article 14 of the African Charter on Human and Peoples' Rights protects the right to property subject to the limitation that it can only be infringed upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws. Article 21 of the Charter states ;

"21.1. All persons shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a person be deprived of it."

"21.2. In case of spoliation, the disposed people shall have the right to lawful recovery of its property as well as adequate compensation".

The United Nations Economic Commission for Africa (UNECA), African Development Bank (AfDB) and African Union (AU) have developed a technical guide on large scale land-based investments (LSLBI), which requires such investments to respect human rights of communities; incorporate proper valuation of land to disincitivise excessive land acquisition and appropriate compensation for land rights holders beyond the land compulsorily acquired and inclusive of compensation taking into consideration the rights and benefits which would have accumulated to land rights holders on account of their land holding or customary use, whether individual or customary, inclusive of secondary rights over land (UN- Habitat, 2018).

The Voluntary Guidelines on the Governance of Tenure (VGGT) of the Food and Agriculture Organization of the United Nations (FAO), focusing on rural land implores upon all states to recognize and respect all legitimate tenure right holders and their rights, irrespective of whether they are registered or not. In terms of compensation, VGGT points out that member states should provide for prompt, just compensation in case of takings of tenure rights; that legitimate tenure rights, particularly of vulnerable and marginalized groups, should be respected by acquiring minimal resources and promptly paying just compensation and to ensure fair valuation and prompt compensation in accordance with national laws. In terms of valuation of legitimate tenures, VGGT provided specific guidance that valuation laws and policies by member states, should ensure that valuation systems take into consideration non – market values, such as social, cultural, religious, spiritual and environmental values where applicable and also develop policies and laws that promote and require transparency in valuing tenure rights.

Most International financial institutions have adopted policies and guidelines to protect people or mitigate social and economic disruptions due to national projects or land use changes. The rational is to ensure that affected people will be put is the same equitable position, if not better as they were before the project.

International Valuation Standards (IVS) 2022 are relevant in valuing customary land rights and IVS – compliant valuations, which take into account non – market values, ensure just compensation and avoid human rights abuses.

The Sustainable Development Goals (SDGs) integrate economic growth, social equality and environmental protection and this covers cross cutting issues amongst them poverty eradication, reducing social inequality, promoting peaceful and inclusive society, saving the planet, protection of human rights, promotion of gender equality and women empowerment. Implementation of 2030 Agenda for Sustainable Development has to take cognisance of human rights and " leave no one behind" and pivotal to its execution is national ownership, citizen engagement and innovative partnership between government, business and civil society. Valuations or rules for assessing compensation should not undermine the achievement of the SDGs by reducing tenure security and investment in the economy and threatening livelihoods.

The New Urban Agenda (NUA) adopted during Habitat III, supports the detached goal SDG 11 of making cities and human settlements inclusive, safe, resilient and sustainable. Its shortcomings aside, it can be applied in addressing valuation related matters dealing with just compensation, more so that it emphasizes strengthening of security of tenure rights and recognizing the plurality of tenure types.

In seeking for just and equitable compensation approach that is in tandem with the global agenda and international human rights law, it is apparent that an equitable balancing approach that considers each case on its merit is both pragmatic and preferable. This approach should be able to deal with a range of possible tenure forms within the continuum of land rights. The concept of continuum of land rights gives expression to the fact that no single form of tenure can address the needs of all social groups and it is vital for administering and understanding the various forms of tenure or complex land rights on the ground (UN

Habitat ,2008). The constitutional property clause at its core should uphold human dignity and in terms of dominant customary tenure or tribal land rights in the rural space, this should be conceptualisedas "social rights" in line with Michelman (2012) .

A balancing approach applies the principle of proportionality to prevent unreasonable impact on affected persons or violation of tribal land rights. The principle of proportionality requires a fair balance to be struck between the interests of the community and fundamental rights of the individuals where the state interferes with tribal land rights. Just compensation need not be explicitly provided for in the constitutional property clause, but, normally it is a necessary ingredient to ensure a fair balance between protection of right to property and requirement of public interest, otherwise the proportionality test will not be met. Compensation plays an equalization effect of relieving the individual from undue or excessive burden where there is disproportionate interference. By extension, there may be exceptional circumstances in applying the proportionality test, where lawful expropriation without compensation may be justified.

If the moral purpose of the constitutional property clause is to uphold human dignity, conceptualizing customary land tenure as "social rights" then what is protected is socio political right to prevent political marginalization,homelessness,starvation and landlessness, in consonance with human welfare conceptions enshrined in the Universal Declaration of Human Rights. This is the full belly analysis that people can only assert civil and political rights or be able to act as citizens if their socio economic rights are guaranteed. Under the proportionality test, there are cases where tribal land rights may not be subject to expropriation as the takings will lead to political marginalization, adversely affecting self - governance or autonomy, liberty and deep and meaningful relationships.

The principles for assessment of compensation, as they are primarily based on value judgments, are better placed in the political arena or at parliamentary level, subject to judicial review to avoid undermining democratic resource allocation choices. Courts should not question parliamentary award on the basis of adequacy and the *Grootboom* case and Justice Dow rights based approach in the *Sesana* Case provides invaluable lessons. The legislature or executive, when setting procedure or guidelines for compensation, should be specific and also allow for flexibility for determination of compensation for exceptional cases as it is impossible to foresee all possible scenarios on the grounds. Detailed legal provisions and one size fits all directives may result in situations where people are not compensated for losses not identified in legislation. Under the human rights approach, applying the proportionality test, compensation should address both *de facto or de jure* land rights in a fair manner on the basis of equivalence.

Conclusion

The statutory rules for assessing compensation for expropriation have evolved in consideration of gradual and incremental land tenure reforms by government. The current and previous compensation codes have been influenced by the liberal conception of property, which suggests that the constitutional property clause protects private property. This leads to gross underestimation of loss in expropriation of customary land rights because the compensation system does not take into consideration non-market values, besides challenges in applying section 33 of TLA,1968 and section 32 of TLA,2018. The constitutional property clause can used to protect both socio-economic rights and private property. Although it is preferable to have explicit provision guaranteeing socio-economic rights, it is possible to enforce socio – economic rights by using civil and political rights such as the right to life. A compensation code based on a human rights approach, which conceptualizes customary land rights as socio- economic rights, will lead to just and equitable compensation that does not disregard social, cultural and spiritual values relating to expropriated tribal land rights. The human rights approach should be flexible, be based on the proportionality principle balancing public and protection of fundamental rights, and should avoid detailed statutory rules for assessing compensation as all possible scenarios on the ground cannot be envisioned. Tribal land sustains the livelihoods of a considerable number of the population living in rural areas, particularly the vulnerable and indigenous groups,and a constitutional review that will ensure judicial protection or enforcement of socio economic rights without placing courts in an undesirable position of undermining democratic choices is advisable. A constitutional property clause which does not guarantee compensation for any interference with property rights, but that seeks a fair balance between the interests of those affected and public interest, will guarantee protection of customary land rights, whether registered or not.

References

African Union, African Development Bank & United Nations Economic Commission for Africa 2014 " Guiding Principles on Large – Scale Land – Based Investments in Africa Available at https://repository.uneca.org/handle/10855/22829 Accessed 20/12/2021"

Allen, T 2004 The Right to Property in Commonwealth Constitutions. Cambridge. University Press

Baum, A and Sams G 1997 Statutory Valuations. International Thomson Business Press. London

De Graaff, R and Slusmans, J 2013 Land Reform in the Case Law of the European Court of Human Rights, Lessons for South Africa?, Paper presented at the Conference on ' Land Divided: Land and South African Society, in Comparative Perspective', University of Cape Town, 24 -27

March 2013
duPlessis, E 2009. Compensation for Expropriation Under the Constitution. Unpublished Dissertation for Degree of Doctor of Law, Stellenbosch University
Donokopila, B 2013 The Justiciability of Socio – Economic Rights in Botswana, Journal of African Law, Vol 57, Issue 1, 108-125
Food and Agriculture Organisation of the United Nations 2008. " Compulsory Acquisition of Land and Compensation" Land Tenure Studies, 10, Rome, FAO
Food and Agriculture Organisation of the United Nations 2012"Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security". Rome : FAO
Government of Botswana 1975 Tribal Grazing Land Policy, Government Printer, Gaborone, Botswana
Government of Botswana 1985 National Policy on Land Tenure. Government Printer, Gaborone, Botswana
Government of Botswana 1989 Report on Review of Tribal Land Act, Land Policies and Related Issues Government Printer, Gaborone, Botswana
Government of Botswana 1992 Report of the Presidential Commission of Inquiry into Land Problems in Mogoditshane and other Peri– Urban Villages Government Printer, Gaborone, Botswana
Government of Botswana 2015 Botswana Land Policy, Government Printer, Gaborone, Botswana
Government of Botswana 2019 Revised National Land Policy, Government Printer, Gaborone, Botswana
Hanstad, T 1998 " Designing Land Registration Systems for Developing Countries" American University International Law Review 13, no. 3, 647-703
International Valuation Standards Council 2021 "International Valuation Standards 2022" Available at https://www.appraisers.org/Disciplines/Gems-Jewelry/gj-newsandevents/2021/08/05/international-valuation-standards-updated-for-20222Accessed : 20/12/2021
Karasek – Wojciechowicz I and Brzeski Jan W. 2019 Regulatory framework for expropriation of real property in Poland, In Routledge Handbook of Contemporary Issues in Expropriation, Plimmer F and McCluskeyW,Routledge, New York
Kirby, J 2017 'Conditional on a bill of rights' : Race and human rights in the constitution of Botswana,1960-1966, Law and History, 4(1),30-61
Lekgori, D, Paradza, D and Chirisa, I 2020 Nuances of Compulsory Land Acquisition and Compensation in Botswana: The Case of the Pitsane – Tlhareseleele Road Project, Journal of African Real Estate Research, 5(1). 1-15
Mengwe, D 2019 "Compensation for expropriation in Botswana : Issues and transformative suggestions" In Routledge Handbook of Contemporary Issues in Expropriation, Plimmer F and McCluskeyW,Routledge, New York
Michelman, F 2012 " The Property Clause Question". Public Law and Legal Theory Working Paper series, paper No.12 -07. Harvard Law School.
Ngcukaitobi T & Bishop M 2018 The Constitutionality of Expropriation without Compensation,research paper
Ng'ong'ola, C. 1989. Compulsory acquisition of private land in Botswana : The Bonnington farm case. Comparative and International Law Journal of Southern Africa, 22(3). 298-319
Parker 2019 "Compulsory acquisition compensation issues in Australia" In Routledge Handbook of Contemporary Issues in Expropriation, Plimmer F and McCluskeyW,Routledge, New York
UN Habitat. 2008. Secure Land Rights for all. Global Tool Land Network. Nairobi. Kenya
UN Habitat. 2016 New Urban Agenda, Nairobi, Kenya
UN Habitat 2018 Valuation of Unregistered Lands : A Policy Guide, Nairobi, Kenya
Sustein, C 2001 "Social and Economic Rights? Lessons from South Africa" John M. Olin Program in Law and Economics Working Paper No. 124.
United Nations General Assembly 2015. Transforming Our World : The 2030 Agenda for sustainable development (70/1).

Legislation

Acquisition of Property Act,1955
Constitution of Botswana,1966
Constitution of South Africa,1996
Deeds Registry Act, 1960
Deeds Registry(Amendment) Act,2017
Tribal Land Act, 1968
Tribal Land (Amendment) Act, 1993
Tribal Land Act, 2018

Cases

Botswana

Attorney General v Western Trust (Pty) Ltd (1981)BLR 1 (HC)
Kweneng Land Board v Matlho& Another 1992 BLR 292 (CA)
Attorney General v Sesana& Other 2002 (1) BLR 452 (HC)
Kweneng Land Board v Mpofu& Another 2005 (1) BLR 3 (CA)

India

State of West Bengal v Bela Banerjee A.I.R 1954 S.C 170

South Africa

Government of Republic South Africa v Grootboom, 11 BCLR 1169 (CC) (2000)

United Kingdom

Ricket v Metropolitan Rail Co. (1867) LR 2 HL 175 192-3,202,2014

INTEGRITY
est 2018
BOTSWANA INSTITUTE OF VALUERS

ARE YOU IN THE VALUATION PROFESSION?

THEN YOU NEED TO BE A MEMBER OF BOTSWANA INSTITUTE OF VALUERS

www.biv.org.bw

BIV OFFERS

- CONTINUING PROFESSIONAL DEVELOPMENT
- NETWORKING OPPORTUNITIES
- MEMBERSHIP BENEFITS
- INDUSTRY UPDATES
- ETHICS TRAINING
- ANNUAL CONFERENCE
- PROFESSIONAL SUPPORT
- PROFESSIONAL COMMUNITIES
- PROFESSIONAL REGISTRATION


COVID-19
INDUSTRY
SUPPORT FUND
APPLY & RE-IGNITE YOUR BUSINESS!
P100
MILLION
TOURISM
P200
MILLION
P300
MILLION
0%
INTEREST
0%
INTEREST
INTEREST
APPLY
NOW

Western

Rethink Insurance

BUILDING INSURANCE-RETHINK INSURANCE.NOW THINK AGAIN

COVER INCLUDES THE FOLLOWING

- LOSS OF RENTAL/ALTERNATIVE ACCOMODATION
- ACCIDENTAL DAMAGE TO THE BUILDING, INCLUDING GYSERS
- DAMAGES CAUSED BY ANIMALS
- FIRE DAMAGES
- WEATHER RELATED DAMAGES EG STORM,FLOODING,HAIL ETC

CONTACT US
T 00 267 371 0617
F 00 267 371 0619
E info@westnat.co.bw