

Is there an absolute right to private ownership of commercial land in Namibia?

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Since the SWAPO Congress of August 2002, the issue of commercial land reform and redistribution of land has once again occupied the headlines of the printed and other media. Recent eviction of farm-workers from the Farm Kaplan, within the district of Gobabis, Namibia has only fuelled the already tense situation. It would now appear that there is some urgency on the side of the Government of the Republic of Namibia to accelerate the process of redistribution of commercial land. In this article we are going to give a short overview of what the applicable laws say about commercial land reform in Namibia.

Article 16(1) of the Namibian Constitution guarantees all persons the right to acquire, own and dispose of all forms of property in any part of Namibia. Parliament is permitted, however, to prohibit or regulate the right of foreign nationals to own or buy property in Namibia.

Article 16(2) gives the power to Parliament to make laws that would allow the state or a lawfully established body or organ to expropriate property in the public interest, on the condition that state pays what is termed “just compensation” to those affected by such an expropriation. “Just compensation” means, in this context, a “fair price”. Article 16(2) therefore limits the right to own property in Namibia. The state has the power to expropriate the property in accordance with the procedures laid down by law, and therefore has the right to interfere with an individual’s right to own property. It will also appear from this exposition that the right to own property is limited by the rights that other people may have in respect of that property, or in respect of other property which may be affected.

The much talked about principle of willing seller/willing buyer, is contained in article 16(1), which states that all persons have a right to “acquire, own and dispose” of all forms of property. The right to acquire relates to the right to buy,

inherit, receive by way of a donation, et cetera. The right to own relates to keeping the property for oneself, for whichever purpose, including the right of use and enjoyment of the property. And the right to dispose of property would essentially be the right to sell, donate, or in any other form alienate the property. The willing buyer willing/seller principle that the Namibian government has adopted is therefore merely a recognition of the classical right of ownership, the right of use, enjoyment and disposal of property, in that a person is permitted to freely keep and use his property in the best manner that he/she thinks fit but always subject to the conditions imposed by the law. This is the right that is now entrenched by Article 16 (1) of the Namibian Constitution.

We have however seen that this right is not absolute, particularly when it comes to the right to freely dispose of one's property. The freedom to sell one's property can be taken away by the state by enacting laws that would allow it to expropriate property in the public interest.

The Agricultural (Commercial) Land Reform Act, Act 6 of 1995 was passed by parliament to make provision for amongst other things the acquisition of agricultural land by the state for purposes of land reform and compulsory acquisition of certain agricultural land.

In the first instance, and subject to certain limitations contained in section 17 (3) of the Agricultural Land Reform Act, the state is given the right of first refusal to purchase agricultural land. This means that any owner of agricultural land who wishes to sell it must first offer it to the state, and only if the state declines to purchase it, can it be offered for sale to any other person who is permitted by law to buy such land. When the state declines to purchase the agricultural land concerned, it will issue the prospective seller with a "certificate of waiver" in respect of the specific land on offer, and only then can that seller enter into a valid contract of sale with another person who wants to purchase such land. Should this procedure not be followed, and the seller enters into a contract with a

third party, without first having offered the land to the state, such contract is invalid and the transfer of such land may not be registered by the Registrar of Deeds.

The principle of willing seller/willing buyer would therefore seem to be applicable in instances where, for example, a farmer would want to sell his/her farm and therefore offers such land for sale to the state, and should the state decline, to any other person who may be willing to buy. The fact that the state has a pre-emptive right to buy also constitutes a limitation on the right to property, in that agricultural landowners are not free to sell to whoever they like, but first to the state, and only should the state decline, to other persons.

It is this aspect of the acquisition of agricultural land that seems to cause frustration with politicians and the Ministry of Lands, Resettlement and Rehabilitation. Over the past few years, the Ministry has been persistently under spending on the allocated budget for the acquisition for agricultural land for purposes of resettlement of the landless.

On 31 October 2002, during the news aired by the Namibia Broadcasting Corporation Minister Helmut Angula was heard saying that the reason that the Ministry under spent about N\$ 8 million for the financial year of 1998/1999 was because the land that was offered for sale was not suitable for resettlement purposes. However, the minister affirmed that the ministry would consider expropriating land, when money is made available for this purpose. However, the Minister reaffirmed its commitment to the willing seller/willing buyer principle. The basic question that that arises is this: "If the Ministry of Land Resettlement and Rehabilitation is returning millions of dollars to the state treasury, how can it be said that there is no money available for expropriation of agricultural land?" It raises the question as to whether there is commitment on the side of the government to expropriate agricultural land for the purposes of resettlement of the landless.

As we have seen before, Article 16(2) permits the enactment of laws that will allow the state or its organs to expropriate land subject to just compensation. Part IV of the Agricultural (Commercial) Land Reform Act deals with compulsory acquisition (in other words, expropriation) of agricultural land by the Minister of Lands, Resettlement and Rehabilitation. These are the provisions that the government has so far been reluctant to invoke. Only agricultural land that has been classified as being “underutilised” or “excessive” may be expropriated in terms of the provisions of the Agricultural (Commercial) Land Reform Act. If the land has not been so classified, the provisions of Part IV of the Agricultural Land Reform Act cannot be invoked. Therefore the envisaged compulsory acquisition of the 192 farms from the absentee landlords can only be lawfully done under the provisions of the Agricultural Land Reform Act, should such farms be classified as being excessive land or underutilised land. Should the farms not be classified as being underutilised or excessive land, it would seem that Parliament needs to enact a law, either as an amendment to the Agricultural (Commercial) Land Reform Act, or an independent statute that complies with the provisions of Article 16 of the Namibian Constitution in order to be able to expropriate the said 192 farms owned by absentee landlords. This follows from the provisions of Article 16(2) that the expropriation must be done “in accordance with the requirements and procedures to be determined by an Act of Parliament”.

Of course, when expropriating land, which has not been classified as underutilized or excessive, the relevant authority may invoke the provisions of Expropriation Ordinance No. 13 of 1978. It must however be kept in mind that this ordinance was enacted way before independence and some of its provisions may be contrary to the provisions of the Namibian Constitution. Since the enactment of the Agricultural Land Reform Act of 1995 and the adoption of the National Land Reform Policy, there is now a new paradigm for compulsory acquisition of Agricultural land in Namibia. The spirit of national reconciliation, constitutionality and nation building now underlie the program of acquisition of

agricultural land for purposes of land reform. Thus, invoking the provisions of an ordinance that was enacted before this paradigm shift, for purposes on land reform, would amount to negation of the work that was put in over the last ten years since the National Land Conference of 1992. In any event, when it comes to agricultural land reform in Namibia, the Agricultural (Commercial) Land Reform Act of 1995, may have superseded the provisions of the Expropriation Ordinance of 1978. The ordinance may still be applicable when land is expropriated for other public purposes, such as railways, or when a town is proclaimed or for purposes of expansion of residential areas in town and cities, *et cetera*.

The proviso to Article 16(1) of the Namibian Constitution empowers Parliament to prohibit or regulate the right to acquire property by foreign nationals, but it would seem that this power does not extend to the property that is already owned by foreign nationals when the legislation envisaged by this proviso is enacted. However, an argument can be made out that the state may lawfully expropriate property owned by foreign national in the public interest, provided that it enacts a law that will set out the requirements and procedures envisaged by Article 16 (2) of the Namibian Constitution.

As far as the standing other rights of the owner at the time when he/she owns the property are concerned, Article 16 of the Namibian Constitution appears to be silent. The owners of land appear to be free to put their property to any lawful usage without interference from the state. Subject to limitations imposed by law, in particular, limitations relating to the rights of others who may be adversely affected by such use, a farm owner is entitled to freely use his property in whichever manner he pleases. The recent eviction of farm workers from farm Kaplan should be seen in this light. It is in the discretion of the owner to decide whether the farm workers should be allowed to live on the farm, or whether they should be relocated, just as in the case where an employer/owner decides the

number of employees that he needs and decides to retrench or fire what he considers to be excessive labour.

However, the above also indicates that the right of the owner to put his land or property to any uses that he pleases is not absolute, but can be limited by the rights of others and by statutory enactments. Parliament may legally pass laws, just as it has done in case of the Labour Act, to protect the rights of farm workers against the type of evictions such as the one of the Farm Kaplan. All that would be required is that such laws must comply with the provisions of the Namibian Constitution, but an argument can be made out that farm-workers' rights to security of tenure, and/or appropriate compensation constitutes a legitimate limitation on the proprietary rights of the owners of agricultural land.

The answer to the question posed as the heading to this article is therefore an emphatic NO. There is no absolute right to private ownership of property in Namibia. The state has the power to expropriate the property in accordance with the procedures laid down by an act of parliament, and therefore has the right to interfere with the power of the individual to own commercial land.

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