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By Max Weylandt

THE LOCAL AUTHORITIES AMENDMENT BILL: A TIME TO PAUSE AND RETHINK?



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Namibians urgently need serviced land and affordable housing rather than short-sighted demand-side interventions that could be unconstitutional and damaging for the economy

Overview

The rapid rise of property prices is one of the biggest political issues of recent times. As an increasing number of Namibians have become priced out of the local housing market, pressure has grown on authorities, both on a local and national level, to take steps to alleviate the situation. While the Affirmative Repositioning movement is the best-known group unhappy with this state of affairs, discontent seems to run deep across the nation. A common complaint is that foreigners are in part to blame for the shortage of urban land and that they should be prevented from owning urban land. In addition, there is a perception that speculators are buying up land in poorer areas of cities and towns thereby pricing locals out of the market.

The ideas behind the proposed legal changes go back until at least mid-2012 when Swapo adopted recommendations on land reform at its Policy Conference. These recommendations were adopted by the Swapo Party Congress later in 2012. A Cabinet Committee on land took these recommendations, as well as the Swapo Manifesto, and drew up the government policies that now find themselves expressed in these amendments to the Local Authorities Act and the Regional Councils Act.¹

The Regional Councils Amendment Bill was passed by the National Assembly on October 7, 2015, while the Local Authorities Amendment Bill, as of writing, was still under discussion in Parliament.

¹ Motivation Speech by the Minister of Urban and Rural Development for the Regional Councils Amendment Bill

Thus, while it touches briefly on the Regional Councils Amendment Bill, this briefing paper will focus on changes regarding property ownership in the Local Authorities Amendment Bill, which introduces more extensive reforms.

Summary of Concerns about the Bill

- The provision restricting Namibians' ability to buy property may conflict with Articles 10 and 16 of the Constitution
- There are doubts about whether local authorities will be able to implement the changes, many of which will require significant expansions in administrative capacity
- The bill ostensibly seeks to ease pressure on housing prices, but some provisions might actually have the opposite effect
- Other provisions might discourage foreign investment in Namibia
- The large amounts of discretion the Minister is granted might create the impression that favouritism and shady dealings are taking place - even when the Minister acts with integrity
- Several parts of the bill lack clarity, ranging from the definitions of Namibian and foreign citizens, to various restrictions on property dealings in different zones.
- There is the possibility that, instead of curbing foreign influence, the bill could increase the incidence of middle men and shell companies
- Overall, the impression is that the bill is not an example of evidence-based policy- and law-making.

Property Law in International Comparison

There is no easily available, systematic data on property laws around the world, making an international comparison difficult. A preliminary search finds that many countries are very liberal with their land, placing few restrictions on foreigners' right to buy. A number of countries do have restrictions in place, however, though these vary widely. There does not appear to be a justification for claiming that bans on foreigners buying land are common practice, although some countries do submit foreigners' requests to purchase urban land and properties to foreign investment boards for review.²

Without a clear international standard, it is imperative that the laws we draw up are evidence-based. A Ministry official involved in drafting the bill informed the IPPR that laws from other countries were not consulted during the drafting stage and that the bill was solely based on local experience. However, there is little evidence that the bill is based on an in-depth study of its potential outcomes. Since the proposed law could have a major impact on the economy, it is of utmost importance that the effects of this legislation are carefully considered, tak-

ing into consideration the advice from both experts and other stakeholders. The current bill seems to have been produced in a rush, with even the Association of Local Authorities of Namibia stating that Local Authorities - the primary subjects of the bill - were not consulted about its contents.³

Proposed Changes

The Regional Councils Amendment bill states that "a foreigner may not acquire immovable property in a settlement area".⁴ Further, any properties in settlement areas must be sold to Namibian citizens.⁵ A settlement is an area designated by a Regional Council for development and provision of services, often as a precursor to the settlement being proclaimed as a local authority.

Local Authorities

Buying Land

Concerning urban land in Local Authority Areas matters are more complicated. Local authorities create two types of zones: those reserved for Namibians and "open" zones where Namibians and foreigners may both buy property.

The Namibian zones are subdivided by levels of income. Namibians are not allowed to buy property in a zone that is reserved for Namibians of a lower income than themselves (unless exempted by the Minister, or if the property is for business purposes).⁶ The Minister sets the levels of income into which the Namibian zone will be subdivided and how many properties/the maximum size of property Namibians may buy.⁷

In open zones, Namibians have "preferent right" to properties. Foreigners may only buy property if it is a dwelling or land reserved for a dwelling.⁸ The Minister sets the maximum size of land foreigners may buy.⁹

Who is a foreigner?

Under the new laws, a foreigner includes: persons who are not Namibian citizens, as well as companies or close corporations whose controlling interest is held by a foreign national. The controlling interest or benefit is also used to determine whether a "body corporate, trust, association, or any other legal entity" is foreign.¹⁰ Under the proposed definitions in the bill it states: "Namibian citizen" means a Namibian citizen as set out in Article 4 of the Namibian Constitution, and includes a Namibian legal entity and a person who is domiciled in Namibia or a permanent resident of Namibia as contemplated in section 22 and 26 of the Immigration Control Act, 1993 (Act No. of 1993)".

² More information about restrictions on foreigner ownership of property can be gleaned from the following websites - <http://internationalliving.com/global-property-ownership/> and <http://www.trans-africa-invest.com/eng/index.php?fidr=media&link=realestate-7>

³ Matthys, Donald. "Bill to suffocate decentralisation," *The Villager*, 5. Oct. 2015.

⁴ Regional Councils Amendment Bill, Section (30A), subsection (1)

⁵ Local Authorities Amendment Bill, Section (33A), subsection (2)

⁶ Local Authorities Amendment Bill, Section (33A), subsection (3)

⁷ Local Authorities Amendment Bill, Section (33A), subsection (2) (a), (b)

⁸ Local Authorities Amendment Bill, Section (33A), subsection (4) (b)

⁹ Local Authorities Amendment Bill, Section (33A), subsection (2) (b)

¹⁰ Local Authorities Amendment Bill, Section (1) (c)

At a Glance: Property Provisions in the Local Authorities Amendment Bill of 2015

Area	Namibian Zone	Open Zone
Purchase	<p>Foreigners may not buy Property.</p> <p>Namibians may buy property, but not in an area classified as lower income than themselves (unless approved by the Minister or if the property is used for business).</p> <p>Minister determines maximum size or number of properties Namibians may buy in these zones.</p>	<p>Foreigners may buy property, but only dwellings or land reserved for dwellings. The minister determines the maximum size.</p> <p>Namibians may buy land and are given “preferent right” to properties. No mention is made of limits on number or size of properties Namibians may buy.</p>
Alienation	<p>Property may only be alienated to Namibian citizens.</p> <p>Foreign missions may acquire property with permission from the minister.</p> <p>Foreign-owned property, if it is a business, may be leased to a foreign national for up to 30 years.</p> <p>No explicit provision for Namibian-held properties being leased to foreigners.</p>	Foreign-owned properties which are dwellings may (presumably) be alienated to a foreigner.
	Foreign-owned property which is not a dwelling or land reserved for a dwelling, may only be alienated to a Namibian Citizen	

Alienation

Any properties in Namibian zones and foreign-held properties that are not dwellings may only be alienated to Namibians. In other words: only dwellings in open zones may be alienated to foreigners (as would be expected, in line with the restrictions on what foreigners may buy in Section 33A, Subsection (4) above).¹¹ There are two exceptions: land may go to diplomatic missions of another state, and if foreigners already own a property in a Namibian zone, they can let it to foreign businesses for up to 30 years.¹² Both exceptions require permission from the Minister. (The law does not explicitly state whether Namibians who own land in Namibian zones may let it to foreigners, or whether they may alienate their dwellings in open zones to foreigners). A variety of other exemptions regarding alienation exist, but the crucial one states that restrictions on alienation may be waived “in such other circumstances as the Minister may prescribe”.¹³

Constitutionality

There are doubts about the constitutionality of some provisions contained in the Local Authorities Amendment Bill. Article 16 of the Namibian Constitution deals with property. Section (1) states that, “All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property”. This seems to contradict Section (33A), subsection (3) of the Local Authorities Amendment Bill,

which prohibits Namibians from buying property “in a zone reserved for Namibian citizens with lower level of income”.

The same article of the Constitution does make room for Parliament to “by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens”. But it does not explicitly allow for restrictions on Namibians’ right to acquire land. Further, the Local Authorities Amendment Bill would prohibit Namibians from alienating land to foreign nationals. In this case, Namibians’ constitutional right to dispose of property may clash with the constitutional provision for regulating foreigners’ acquisitions. It also needs to be established whether the restrictions on foreigners are compatible with bilateral trade agreements drawn up in the context of the Foreign Investments Act of 1990.

Further, one could argue that income-based restrictions on where Namibians may buy land contravene Article 10 of the Constitution on Equality and Freedom from Discrimination (see below) which bars discrimination on the grounds of “economic status”. One could argue that Article 23 of the Constitution, which allows for Parliament to make laws to redress the inequalities of the past, allows for these measures. But the draft bill was not motivated with reference to Article 23, and – as explained below – the law might actually hurt the disadvantaged, rather than help them as intended.

At the very least, the constitutionality and legality of the amendments should be examined in detail before they are passed.

¹¹ Local Authorities Amendment Bill, Section (33A), subsection (2)

¹² Local Authorities Amendment Bill, Section (33B), subsection (2)

¹³ Local Authorities Amendment Bill, Section (33B), subsection (8) (d)

Protecting Low-Income Tenants or Mandating Segregation?

Constitutionality aside, the provision that Namibians may not buy land in lower-income areas is potentially problematic. The idea, it seems, is to prevent developers from speculating in land and pricing out poorer households. In theory, this could mean better tenure security for lower-income households, says a legal analyst who is an expert on land issues, while keeping housing affordable in those areas. All of this assumes a competent administration of these laws, of course. Given the government's mixed track record in dealing with the land issue, there are doubts as to how well this will be implemented.

The potential benefits of this provision regarding land tenure are dwarfed by its negative implications, however. Urban areas are already marked by a severe level of segregation according to economic status, largely a legacy of apartheid. This provision would enshrine class-based segregation in the law. It could legally "ghettoize" poorer areas of cities and condemn them to perpetual underdevelopment, denying them the chance to see the worth of the land they own appreciate, while property in affluent areas would only rise in value. This would make it even more difficult for lower-income citizens to buy into more affluent areas. As the property values in rich areas rise, the owners become wealthier, while people in lower-income areas see little growth. This sort of system would also mean that certain areas of the city, and people who live there, are stigmatised. This stigma will further undermine social mobility, and one could argue that this violates Article 10 of the Constitution, which forbids discrimination based on economic status. In other words, rather than aid poorer citizens, this bill may well create legally delineated areas of towns and cities that are more impoverished and neglected, and therefore exacerbate already high levels of inequality. Merely forbidding wealthier people from buying land in poor areas looks like a half-baked solution to a complex problem.

And what if housing prices do not rise in perpetuity? If a house value falls, the owner will have to offer it to citizens in lower income categories. This might then result in property prices falling even further, meaning homeowners lose a great deal of their investment. This is also not desirable.

Economic Implications

Housing Prices

Ostensibly, these regulations were introduced to alleviate the issue of rising house prices. The anecdotal theory goes that foreigners have inflated prices because they have more buying power than Namibians and have gone on a property shopping spree in recent years which has pushed many Namibians out of the market. Since there is no clear data on property ownership in Namibia, it is not possible to find out the extent to which this is true. While the deeds office may collect some data on

the nationality of owners, to the knowledge of the IPPR there has been no systematic analysis of such data. In addition, many properties are registered in the name of close corporations (CCs) which may have foreign shareholders. Again, it does not seem that changes in the ownership of such CCs is monitored making it difficult to know whether they are majority foreign-owned or not. Several experts involved in the property market maintain that foreigners do not represent a large proportion of the market and that their current impact on market is minimal.

In fact, the law might even have the effect of increasing house prices. Section (33A), subsection (4) of the Local Authorities Amendment Bill prescribes that foreigners may, in open zones, only buy dwellings or land reserved for dwellings. If foreigners want to invest in the local property market but cannot buy commercial property, more money might be funnelled toward the residential property market, increasing prices.

The problem of high real estate prices cannot be solved with regulations as to who can buy property because the prices reflect an underlying supply problem. There simply are not enough serviced plots and houses in urban areas, and even with foreigners out of the market (which this law does not achieve for residential properties) there will be more people looking to buy than people looking to sell. A far more effective way of reducing prices would be to service many more plots. As more properties become available, buyers no longer have to outbid each other. Average house costs - and with them, monthly rents - should come down.

Broader Economic Implications

The prohibition against foreigners buying commercial properties has raised alarm in parts of the private sector. The reality is that many of the larger development projects - such as shopping malls, for example, but also the coming expansion of Walvis Bay - require foreign funding. There simply is not enough local capital to finance these undertakings.

Namibia's fourth National Development Plan sets the goal of Namibia becoming the most competitive economy in the SADC region by 2017 and "making Namibia the preferred investment location in Africa".¹⁴ The Ministry of Industrialisation, Trade and SME Development Namibia Investment Centre website lauds the "business friendly legal and regulatory framework", claims Namibia is an "ideal gateway to SADC regional market", and even offers help in locating land for foreign investors.¹⁵

The planned restrictions, however, could undermine the reputation the government is trying to build as a suitable destination for responsible and productive foreign investment. This is a problem, as an influx of foreign capital is needed to reach the growth targets set by government - especially given the renewed focus on poverty reduction under the new administration. Restrictive property legislation such as proposed might discourage foreign investors from coming to Namibia, and some areas of the private sector have raised concerns in

¹⁴ National Planning Commission, "Namibia's Fourth National Development Plan" page vi.

¹⁵ <http://www.mti.gov.na/nic.html>

that regard, stating that this will have a significant impact on Namibia's growth prospects. Other commentators have been more ambivalent, saying that foreign firms like to rent initially when coming into the country - but would still want to buy land when expanding. Namibia already has a reputation for a sometimes cumbersome legal framework that has to be negotiated by businesses. While it takes authorities in Namibia around three months to transfer a property, Cape Town does so in 14 days. The additional red tape is bound to increase that time frame and foreign investors may be scared off by a framework that is cumbersome and complicated, preferring to go where it is easier to do business. The long delays caused by bureaucracy have been identified by the National Planning Commission as a challenge to Namibia's growth, and this could make matters worse.

Implications for Transparency

The current administration has shown an admirable commitment to transparency. The President's voluntary asset declaration was a great example that was heralded across the continent. The National Assembly is also currently debating a code of conduct that would require members to declare their assets and conflicts of interests. Transparency is much needed in the realm of property, where news of shady dealings make headlines week in, week out. In fact, many other provisions of the Local Authorities Amendment Bill and Regional Councils Amendment Bill deal with disciplinary provisions for council members and other anti-corruption measures.

This law, however, could make matters even worse in some respects. Foreigners may not buy foreign land directly, but they could exploit a loophole: while Namibians may not sell property in certain areas to foreigners, they may do so "in such circumstances as the Minister may prescribe".¹⁶ This leaves room for inappropriate conduct: Namibian middlemen could buy properties, and then request special permission to alienate the property to the foreign citizens. The property would still end up in foreign hands. Of course no law is without loopholes. But the law leaves too much to the discretion of the Minister and could easily encourage middle-men and shell companies, already a problem in Namibia. If these practices become widespread, property prices are unlikely go down as the fees for the middle-men now have to be included in deals as well. Even if the behaviour of officials is perfectly legitimate, this law could lead to allegations of impropriety by disgruntled members of the public, which would undermine public faith in the system surrounding property administration - faith that has already been shaken.

Conclusion

In conclusion, it would seem that there are enough doubts about the possible negative implications of this proposed law for it to be put on hold - in much the same way that the Public

Procurement Bill was withdrawn from the National Assembly in 2013 - so that further research and consultations can take place. More immediately, government should focus its efforts on the most pressing problem regarding urban land and housing - that is the lack of supply of serviced land and properties - rather than attempting to control the demand side of the housing/urban land equation with possible deleterious consequences for hopes of expanding the housing market and for the economy of the country.

¹⁶ See Local Authorities Amendment Bill, Section (33B) Subsection (8) (c)

Notes

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About Democracy Report

Democracy Report is a project of the IPPR which analyses and disseminates information relating to the legislative agenda of Namibia's Parliament. The project aims to promote public participation in debates concerning the work of Parliament by publishing regular analyses of legislation and other issues before the National Assembly and the National Council. Democracy Report is funded by the Embassy of Finland.

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The Institute for Public Policy Research (IPPR) is a not-for-profit organisation with a mission to deliver independent, analytical, critical yet constructive research on social, political and economic issues that affect development in Namibia. The IPPR was established in the belief that development is best promoted through free and critical debate informed by quality research.



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