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The Land Delivery Process in Namibia

A legal analysis of the different stages from possession to
freehold title

GIZ Support to Land Reform

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1. Introduction

In every society, the tenure of land has a high social significance. Occupants value their piece of land as a place to live, a place where they belong and to which they often are emotionally attached. Apart from that, for private individuals the property they live on is often the most valuable thing they own and thus one important key to capital.

Due to the colonial and apartheid history of Namibia, the distribution of land in the country is unequal. It thus stands to reason that providing access to land and tenure security has been and continues to be one of the most salient political issues since independence.

This paper examines the administrative processes to be observed by private persons in order to acquire title to immovable property, the so-called land delivery process. Chapter two provides an overview of the relevant legislation, also including the Urban and Regional Planning Bill, which is still in the process of legislation. In the third chapter, the single stages of this process are examined in detail. The changes brought about by the Urban and Regional Planning Bill are explained in a separate section of this Chapter. Eventually, in the last Chapter, the recent Flexible Land Tenure Act is briefly outlined, which introduced a parallel, faster process to obtain less formal titles.

2. Legislation relevant for the Land Delivery Process

The land delivery process in Namibia is not governed by one comprehensive piece of legislation, but by various acts and ordinances, which is likely to cause confusion, not only among laymen. Making changes to this process is complicated, for it often requires the amendment of fairly many acts.

Which laws apply to the delivery of a certain piece of land depends on various factors, mostly on its location and of the intended legal procedure, e.g. the establishment of a township, the subdivision of land, or the initiation of a sectional titles scheme.

2.1 Townships & Division of Land Ordinance, Ordinance 11 of 1963 as amended (hereafter “Townships Ordinance”)

The Townships Ordinance sets up rules for the establishment of townships and provides a legal framework for the regulation and control of the development and subdivision of township land.

The objective of the Ordinance is to ensure an orderly development and facilitate the peaceful co-existence of people living in townships. Before a township can be established, the applicant, i.e. the owner of the land in question, in most cases the municipality, requires permission from the MURD Minister who can grant it after consultation with the Namibian Planning and Advisory Board¹ (henceforth NamPAB) and the Townships Board.² Permission is also needed for the subdivision and consolidation of land³ and for the extension of approved townships.

Also, whenever agricultural land shall be divided in a way that either the subdivision or the remainder so created is less than twenty-five hectares in extent, the Townships Ordinance applies, as the subdivision then is regarded as the establishment of a new township.⁴

2.2 Town Planning Ordinance, Ordinance 18 of 1954 as amended (henceforward, “Town Planning Ordinance”)

The aim of the Ordinance 18 of 1954 is to introduce provisions for the preparation and the implementation of Town Planning Schemes (TPS). The ordinance also determines what can be prescribed in a TPS. The TPS is a comprehensive policy statement and it acts as a parameter for the future spatial development.

In the Ordinance, NamPAB was established to advise the MURD Minister in matters relating to the preparation and implementation of TPS and other related planning control and management functions.⁵ NamPAB consists of three to ten members, all of which are appointed by the MURD Minister.⁶

Addressees of the Ordinance are local authorities. They shall develop TPS in their territory to facilitate a coordinated and harmonious development of local authority areas. Once a TPS has come into effect all spatial use must be in accordance with it.

2.3 Urban and Regional Planning Bill (URPB)

The Urban and Regional Planning Bill is scheduled to be presented to Parliament in the second week of September. The Bill is supposed to repeal the Townships & Division of Land Ordinance as well as the Town Planning Ordinance. It renames “townships” to

¹ Established in Sec. 9 Town Planning Ordinance.

² Established in Sec. 2 Townships Ordinance.

³ Sec. 19 to 30 Townships Ordinance.

⁴ Sec. 20 Townships Ordinance.

⁵ Sec. 9 to 14 Town Planning Ordinance.

⁶ Sec. 9 (1A) Town Planning Ordinance.

“urban areas” with “approved townships” becoming “approved urban areas”. The Townships Board and NamPAB are replaced by the newly established Urban and Regional Planning Board.⁷ The board comprises of members representing – amongst others – MURD, MLR, MME, the National Planning Commission, Surveyor-General’s Office, Deeds Registry, Association of Local Authorities, and the Association of Regional Councils.

Apart from introducing strategic spatial plans for the national level (National Development Framework), and for the regional and urban levels (Regional or, respectively, Urban Structure Plans), the Bill strengthens the position of local authorities. According to the concept of decentralisation, more responsibility is shifted to the local level to better accommodate the needs of the people who are actually affected by the plan. Furthermore, the former Town Planning Schemes are renamed into Zoning Schemes.⁸ They *shall* be produced for every local authority for which an urban structure plan was prepared or in respect of whom the PS has prepared or caused an urban structure plan to be prepared.⁹ Zoning Schemes *may* also be prepared for such local authorities who do not have an urban structure plan.¹⁰ Here again, irrespective of whether or not a local authority is an authorized planning authority, the PS of MURD can instruct a local authority to have a zoning scheme for its area prepared.¹¹

Changes that will be introduced by the URPB are summarized in a separate paragraph of the next Chapter.¹²

2.4 Subdivision of Agricultural Land Act 70 of 1970, as amended (Subdivision of Agricultural Land Act)

The aim of the Subdivision of Agricultural Land Act is to exercise control over the spatial development of rural areas. According to the Act, it is principally prohibited to subdivide agricultural land unless the Minister of Agriculture has given his consent. In addition, the Act prescribes the statutory procedure and fees.

⁷ Sec. 2 URPB.

⁸ Sec. 27 ff. URPB.

⁹ Sec. 27 (1) URPB.

¹⁰ Sec. 27 (2) URPB.

¹¹ Sec. 27 (3) URPB.

¹² The version of the Bill referred to includes the adjustments recommended by Harold Kisting and Peter Rutsch in their final report dated June 2015.

2.5 Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA)

The Agricultural Land Reform Act lies at the heart of the political ambition to redistribute agricultural land to formerly disadvantaged Namibians. This Act grants the State – represented by the MLR – the preferent right to purchase agricultural land. This right has to be exercised according to the “willing seller - willing buyer” principle and strictly only in the public interest. That means, every farmland owner planning to sell his farm has to offer it to the state first. The latter assesses the capacities of the land and determines whether the farmland is suitable for resettlement purposes. Only after the State has decided not to buy a certain piece of land and issues a so-called certificate of waiver,¹³ the farm can be sold on the free market. This constitutes a privilege to the State which limits private ownership of this plot. An amendment of the Act introduced a tax on agricultural land.

The Act also provides a comprehensive system of provisions dealing with the different aspects of land reform.¹⁴ Among these provisions it defines a procedure of valuation to determine a fair price for the land according to its market value,¹⁵ limits the acquisition of land from foreigners¹⁶ and empowers the State to expropriate farms in the public interest under certain conditions.¹⁷

2.6 Sectional Titles Act

The Sectional Titles Act was the first act which established titles other than full ownership freehold titles under the regular system. The original Sectional Titles Act dates to 1971 and was amended in 2009. The Sectional Titles Act allows the subdivision of buildings into sections; to each section belongs one sectional title. It is also possible to apply sectional titles schemes to more than one building. This is why it can be used for townhouse developments, which are similar to (small-scale) townships.¹⁸

The sectional titles scheme comprises areas of shared common property and the single sections of exclusive property. The Deeds Registry refers to an additional Sectional Title Register which contains all relevant information about the single sectional titles. The

¹³ Sec.17 ACLRA.

¹⁴ For a detailed overview, see Andre P. Resch, “Immovable Property Law in Namibia”, p. 5.

¹⁵ Sec. 25 ACLRA.

¹⁶ Sec. 58 ACLRA.

¹⁷ Sec. 19 ACLRA.

¹⁸ Sec. 6 (2) Sectional Titles Act.

owners of a section in a scheme form a body corporate which controls the management, administration and use of the common property of a scheme.¹⁹

2.7 Land Survey Act (LSA)

The LSA regulates the survey of land. The Surveyor-General is in charge of geodetic, topographical and cadastral surveying in Namibia.²⁰ This means that every result of a cadastral survey can only be lodged in the Deeds Registry with the Surveyor-General's approval.²¹

The actual survey is carried out by a professional land surveyor.²² A regulations board comprising the Surveyor General and three other persons appointed by the Minister is in charge to define the manner of surveying by means of methods stipulated in implementing Regulations.²³ Currently, surveying in Namibia is conceptualized as "field survey".²⁴ This means, to survey a piece of land the land surveyor has to go out in the field and use physical tools to determine the dimensions of the land concerned. All data so collected features in a diagram or general plan. A diagram refers to the position and dimension of one piece of land and a general plan refers to two or more pieces of land.²⁵ In addition, the regulations provide provisions for the required accuracy of a survey.

2.8 Deeds Registries Act²⁶

The Deeds Registries Act deals with the registration of deeds. The Deeds Office is located in Windhoek and headed by the Registrar of Deeds.

In general, the transfer of immovable property rights requires the registration of the deed of transfer in the Deeds Office in order to be valid.²⁷ The transfer of land and cessions of real rights have to follow the sequence of the successive transactions in pursuance of which they are made.²⁸ This means that only the owner of the land or real

¹⁹ Sec. 38, 39 Sectional Titles Act

²⁰ Sec. 3 (2) LSA.

²¹ Sec. 35 LSA.

²² Sec. 7 LSA.

²³ Sec. 4, 5 LSA.

²⁴ Part III, Regulations LSA.

²⁵ Statutory definitions, Sec. 1 LSA

²⁶ see Andre P. Resch, "Immovable Property Law in Namibia", p. 2. There is also a Deeds office in Rehoboth which runs its own system of deeds registration under the Registration of Deeds in Rehoboth Act 93 of 1976. The parallel system will be given up as soon as the Deeds Registries Bill (DRB) has been adopted.

²⁷ Sec. 16 DRA.

²⁸ Sec. 14 (1) DRA. The DRB is going to change this so that also the owner of the land himself can prepare the deed, cf. Sec. 9 DRB.

right can transfer his right. Before a transfer is registered, the ownership is determined by the Registrar of Deeds or his staff by means of the previously registered deeds.

Before a transfer can take place, the relevant deed has to be prepared by a conveyancer.²⁹ Only such deed can be attested, executed or registered by the Registrar of Deeds. All registered encumbrances (mortgages, servitudes, etc.) have to be cancelled.³⁰

The Deeds Registries Act imposes additional requirements for the subdivision of land. As the new piece of land has to be entered into the Deeds Registry, like every other piece of land it first has to be surveyed and the diagram has to be approved by the Surveyor-General.³¹

3. Different Stages of the regular Land Delivery Process

In general, the land tenure system of Namibia is divided into the freehold system in the urban and commercial areas and the customary tenure system in the communal areas. The communal areas are deemed to be owned by the State, who holds them in trust for the people. In contrast, the commercial and urban areas are mostly held in individual ownership. Sectional titles and flexible titles are other, compared with freehold titles more restricted types of immovable property, registered not in the Deeds Registry, but in their respective subordinate registers.

Customary rights can – with the exception of registered leaseholds – not be entered into the Deeds Registry and can thus not be encumbered with mortgages or other real rights.

This analysis focuses on the procedure of acquiring freehold titles on every type of land. It is assumed that people living on the land approach the owner of the land to purchase the plot they are living on.

3.1 Overview

The statutory procedure of land delivery actions for *urban land* is prescribed in the **Townships and Division of Land Ordinance**, except for the subdivision of land in regard of which a TPS was adopted. The latter falls within the scope of the **Town**

²⁹ Sec. 15 DRA.

³⁰ Sec. 56 DRA.

³¹ Sec. 43 DRA.

Planning Ordinance instead. In addition, the **Sectional Titles Act** allows creating sectional titles schemes as another manner of subdividing land. The subdivision of *agricultural land* is prescribed by the **Subdivision of Agricultural Land Act**. All transfers of land have to be in accordance with the **Deeds Registries Act**.

3.2 Subdivision of urban land

There are three different categories of land referred to in the Townships Ordinance: erven, townlands and land outside of townships and townlands. Every category indicates a different legal status of the plot. The definitions stated in the Townships Ordinance do not correspond with the common parlance of these words in every case.

Township means any area of land registered as one or more pieces of land either contiguous or in close proximity to each other which is being or is intended to be laid out or divided into sites for residential, business or other urban uses or for urban settlement arranged in such a manner as to be intersected or connected by or to abut on public places. The definition of the Townships Ordinance only refers to spatial conditions and it is neutral towards the inhabitants of the area. Therefore it differs from the South African usage of the word “township”. Within the category of “township” a further distinction is made between approved townships and others. **An approved township** is a township which is established and proclaimed under the provisions of the Townships Ordinance. The difference between a township and an approved township is reflected in the different legal status of the plots within those areas.

Erf denotes every piece of land in an approved township. An erf is a piece of land which is surveyed in accordance with the provisions of the Land Survey Act and thus is registered in the Deeds Registry; and **Townland** signifies all land situated within the area of jurisdiction of a local authority except for land in approved townships.

Depending on the legal status of the plot, different sections of the Ordinance apply³². As shown in the definitions given, the legal status of a plot derives from the location of the respective plot.

The statutory procedure for all sections is similar.

3.2.1 Subdivision of a single erf

Subdivision of land generally denotes the division of an erf or a piece of land by means of a survey for the registration of a title. A single subdivision following Sec. 25

³² For “erven” applies Sec. 19 and for “townlands” Sec. 21, 20.

Townships Ordinance can only be conducted if the erf is subdivided in less than eleven erven; otherwise the provisions for the township establishment apply.³³ The Ordinance entitles the owner, be it a natural or legal person, to subdivide a piece of land.³⁴ Normally, however, he or she is supported by a professional town and regional planner,³⁵ although this is not legally required.³⁶

First, the owner of the land that is to be subdivided must seek approval from the local authority.³⁷ Legally there is no prescription concerning the required content and form of the request. The local authority examines if the intended subdivision is in harmony with the existing surrounding area. It also makes sure that infrastructure provisions are satisfying.³⁸ In a large municipality such as Windhoek, the application is assessed by the municipality's Town Planning Division. At the same time it is distributed to other offices for comments, like the water, electrical, roads and storm water division.³⁹ After roughly five months in total the approval of the local authority is issued.⁴⁰

As a second step, the application together with the letter of consent from the local authority has to be referred to the Townships Board for its approval.⁴¹ The Townships Board consists of officials from the MURD, the National Railways (TransNamib), the Deeds Office, the Surveyor-General's Office and a representative of the ALAN (Association of Local Authorities of Namibia), which is normally represented by the City of Windhoek.⁴² The Townships Board approval is sometimes referred to as Townships Board Certificate or subdivision certificate. In practice, this certificate substitutes the authorisation of the MURD Minister which is required by the Townships Ordinance.⁴³ It takes on average three months to obtain the Townships Board Certificate.⁴⁴

After that, the land is surveyed. In this respect, the order of planning steps is not prescribed by law but follows established practice. The Townships Board approval is not

³³ Sec. 19 (3), 28 (2) Townships Ordinance; cf. interpretation of Joe Lewis & Walter de Vries, "Are urban land tenure regulations in Namibia the solution or the problem?", p. 5.

³⁴ Explicitly only prescribed in Sec. 20 Townships Ordinance.

³⁵ According to the information given by Joe Lewis in "Are urban land tenure regulations in Namibia the solution or the problem?".

³⁶ Annexure B, Reg. to the Town and Regional Planners Act, Sec. 2 (h)(ii).

³⁷ Sec. 19 (3) Townships Ordinance.

³⁸ For a detailed listing see "Decentralization Performance: Functions – Rules – Procedures", Book 5, Ministry for Regional and Local Government and Housing (now: Ministry for Urban and Rural Development), 2000.

³⁹ Joe Lewis & Walter de Vries, "Are urban land tenure regulations in Namibia the solution or the problem?", p. 5.

⁴⁰ Joe Lewis & Walter de Vries, "Are urban land tenure regulations in Namibia the solution or the problem?", p. 5.

⁴¹ Sec. 19 (3), Sec. 21 Townships Ordinance.

⁴² Sec. 2 (2) Townships Ordinance.

⁴³ Sec. 19 (1), 20 (1), 21 Townships Ordinance.

⁴⁴ Joe Lewis & Walter de Vries, "Are urban land tenure regulations in Namibia the solution or the problem?", p. 6.

mandatory for the survey. Legally it is possible to survey the land already while the application for approval of the survey is still pending. This approval is only a prerequisite for the Surveyor-General's approval to lodge the result of this survey in the cadastre. However, the described order ensures an effective process. For the survey must possibly be redone in case the Townships Board refuses the approval or merely grants it under certain conditions. This would involve unnecessary additional costs.

All cadastral surveys must be conducted in accordance with the Land Surveyor Act (LSA) and its regulations.⁴⁵ The result of the survey, i.e. the diagram and the general plan, can only be registered in the Deeds Registry after it was approved by the Surveyor-General.⁴⁶ In 2009, the survey process took at least seven months in total, whereby the survey itself took about a month and the approval of the Surveyor-General six months at minimum.⁴⁷ These numbers are now superseded. According to the Surveyor-General's Office, the duration of the assessment of survey records depends on the complexity, completeness and correctness of the lodged survey records. For 95% of the survey records, the assessment process is completed within three months.⁴⁸ Thus, today the process can be concluded in four months.

The Registrar of Deeds has to approve the general plan of the subdivision.⁴⁹ Under current legislation, applications for registration have to be prepared by a conveyancer.⁵⁰ The Registrar of Deeds shall not register the transfer of any erf until a receipt of the payment of an "endowment" to the municipality has been submitted.⁵¹ The endowment shall be calculated as a percentage of the value of the portion of land.⁵²

The ownership can only be conveyed from one party to another when the deed of transfer is executed or attested by the registrar.⁵³ For this reason, the process of conveyance by the manner of subdivision of land is only complete once it has been

⁴⁵ Sec. 34 LSA.

⁴⁶ Sec. 35 LSA.

⁴⁷ Joe Lewis & Walter de Vries, "Are urban land tenure regulations in Namibia the solution or the problem?", p. 6.

⁴⁸ According to the Surveyor-General's Office, the remaining five per cent are mainly surveys that are initially rejected by the SG because of flaws and which are then not relodged timely by the responsible professional land surveyors.

⁴⁹ Sec. 46 (1), 46 B Deeds Registries Act.

⁵⁰ Sec. 15 Deeds Registries Act, to be changed by Deeds Registries Bill, cf. fn. 21.

⁵¹ Sec. 19 (5), (6) Townships Ordinance; note that this provision only applies for "erven", thus not for "townlands" and land outside the jurisdiction of a local authority.

⁵² Sec. 19 (4)(c) Townships Ordinance.

⁵³ Sec. 16 Deeds Registries Act.

registered in the Deeds Registry. The whole process for a single subdivision takes about 12 months.⁵⁴

3.2.2 Subdivision of urban land regulated by a TPS

According to Sec. 19 (14) Townships Ordinance, all areas for which TPS were developed and where the local authority is empowered to exercise control over the subdivision of land in terms of the provisions of the scheme, do not fall under the scope of the section. Because in the course of forging the TPS the Townships Board must already give its approval, it is not necessary to obtain an additional permission for administrative decisions that only implement the approved planning.

Sec. 31 Town Planning Ordinance prescribes that the Surveyor-General should not grant his approval of any general plan or diagram containing a sub-division of land if he/she finds it inconsistent with any of the provisions of the approved TPS.

3.2.3 Township establishment

Roughly speaking, the establishment of a township is a formalized large-scale subdivision of land for urban use. A subdivision is a township establishment, when the threshold of eleven erven is reached or exceeded.⁵⁵

The owner of the property is the person entitled to start this procedure by lodging an application with the Minister of Urban and Rural Development.⁵⁶ The definition “owner” refers to whoever is registered in the Deeds Registry.⁵⁷ This definition includes private persons as well as local authorities or municipalities. However, regularly the land of a future township is held by the local authority or municipality.

Upon receipt, the Minister refers the application to NamPAB which assesses the need and desirability of the proposed township establishment.⁵⁸ The application must contain a layout plan of the proposed township⁵⁹ that must be prepared and submitted by a town and regional planner.⁶⁰ To be desirable, the plan should balance out different land uses such as residential zones, parks and other recreational facilities and public

⁵⁴ Joe Lewis & Walter de Vries, “Are urban land tenure regulations in Namibia the solution or the problem?”, p. 6; see also fn. 48.

⁵⁵ Sec. 19 (3), 28 (2) Townships Ordinance. According to the interpretation of Joe Lewis & Walter de Vries, “Are urban land tenure regulations in Namibia the solution or the problem?”, p. 5.

⁵⁶ Sec. 5 (1) Townships Ordinance.

⁵⁷ Sec. 102 Deeds Registries Act.

⁵⁸ Sec. 5 (5)(a)(i) Townships Ordinance.

⁵⁹ E.A. Simon, Manual on town & regional planning practice in Namibia, Volume 1, p. 46.

⁶⁰ Sec. 13 Town and Regional Planners Act (TRPA); Annexure B Sec. 2 (f) Reg. TRPA.

places.⁶¹ The approval of NamPAB serves as a recommendation for the MURD Minister.⁶²

Once the Minister has given his consent, he refers the application to the Townships Board. The Board has to lay open the application to public inspection at the office of the Director of Local Government and/or other places, giving the public the opportunity to raise objections.⁶³ The Board shall announce the public display in the Government Gazette and in another selected newspaper.⁶⁴ Taking into account all objections raised the Townships Board can recommend to the Minister whether to grant or refuse the application or can impose conditions.⁶⁵

Upon the granting of permission, the Minister notifies the applicant, the Townships Board, the Surveyor-General, the Registrar of Deeds, and the local authority concerned.⁶⁶ The applicant then has to submit a finalized version of the layout plan with exactly laid out boundaries for all erven which then can be surveyed and registered. All plots must have street access and must be connected to utility services linked to the town.⁶⁷ The plan must meet all conditions imposed by the Minister. If the plan is in accordance with the Minister's permission and with the TPS, if applicable, as advised by the local authority, the Townships Board approves it.⁶⁸

Thereafter the owner must initiate a survey in accordance with the approved layout plan. On completion of the survey, the owner shall submit the general plan of the proposed township and the diagram of the respective land to the Surveyor-General for his approval. Once the Surveyor-General has approved the survey records, he will notify the Minister, the owner and the Registrar of Deeds.⁶⁹

Within one year after receiving the Surveyor-Generals approval, the township owner must lodge the aforementioned plan and diagram with the Registrar of Deeds for endorsement. The endorsement indicates that the land concerned has been laid out as a township. The Registrar of Deeds will open a register for the approved township, the so called township register.⁷⁰

Upon the approval of the Registrar of Deeds the Minister declares the concerned land an approved township. The proclamation has to be announced in the Government

⁶¹ E.A. Simon, Manual on town & regional planning practice in Namibia, Volume 1, p. 46.

⁶² Sec. 5 (5)(ii) Townships Ordinance.

⁶³ Sec. 5 (5)(iii) Townships Ordinance.

⁶⁴ Ibid.

⁶⁵ Sec. 6 (1) Townships Ordinance.

⁶⁶ Sec. 9 (1) Townships Ordinance.

⁶⁷ see Schedule to Townships Ordinance, Sec. 10 Townships Ordinance.

⁶⁸ Sec. 10 (1) Townships Ordinance.

⁶⁹ Sec. 11 Townships Ordinance.

⁷⁰ Sec. 12 Townships Ordinance.

Gazette. It shall include all the conditions – if there are any – under which the approval of the township has been granted.⁷¹

The applicant has to cover all the expenses arising from the establishment process.⁷² The town planning process takes on average about one year in total.⁷³ In addition to that, the survey and proclamation process approximately takes another year. To sum up, the whole township establishment process typically takes about two years.⁷⁴

After the township has been proclaimed, the erven located in there can be transferred.⁷⁵

3.3 Subdivision of Agricultural Land

The term “agricultural land” denotes any land outside the jurisdiction of a municipality, city, town, or village council not earmarked for the establishment of a township/urban area.⁷⁶ This definition includes every type of farm or rural area; the land must not necessarily be used for agricultural purposes.

Principally, the subdivision of agricultural land is prohibited.⁷⁷ The owner⁷⁸ of that land can apply for approval of subdivision by the Minister of Agriculture, Water and Forestry (MAWF).⁷⁹

He/she needs to complete a standard form and attach a sketch plan to indicate the proposed subdivision. The approval is often obtained within two weeks.⁸⁰ No costs arise from the application procedure.⁸¹ Only if the subdivision creates pieces of land that are less than twenty-five hectares in size, according to Sec. 20 Townships Ordinance, in addition the approval of the MURD minister has to be obtained, as the subdivision is regarded as a township establishment.⁸² As applies to every township, the minister has to consult with NamPAB before he can grant his approval.⁸³

As a second step the land can be surveyed in accordance with the LSA as described above. The Surveyor-General has to approve the result of the survey before it can be

⁷¹ Sec. 13 Townships Ordinance.

⁷² Sec. 5 (4) Townships Ordinance.

⁷³ According to Joe Lewis, the chairman of SURCON.

⁷⁴ Joe Lewis & Walter de Vries, “Are urban land tenure regulations in Namibia the solution or the problem?”.

⁷⁵ Sec. 16 Townships Ordinance.

⁷⁶ Statutory definition (a) given in the Subdivision of Agricultural Land Act.

⁷⁷ Sec. 3 (a) Agricultural Land Act.

⁷⁸ Referring to Sec. 102 Deeds Registries Act.

⁷⁹ Sec. 4 (1) (a) Subdivision of Agricultural Land Act.

⁸⁰ Joe Lewis & Walter de Vries, “Are urban land tenure regulations in Namibia the solution or the problem?”, p. 6.

⁸¹ Sec. 9 Subdivision of Agricultural Land Act.

⁸² Sec. 20 (1) Townships Ordinance.

⁸³ Sec. 20 (4) + (5) Townships Ordinance.

registered.⁸⁴ This second stage takes at least four months, whereof the survey takes about one month and the approval of the Surveyor-General about three months at least.⁸⁵

However, before a subdivision can be registered in the Deeds Registry⁸⁶, the land has to be offered to the MLR according to the Agricultural (Commercial) Land Reform Act.⁸⁷ This Ministry has the privilege to buy agricultural land before the seller is allowed to offer it on the free market or in any manner convey the ownership. Only if the Ministry issues a “certificate of waiver” the procedure of the subdivision can be finalized with the registration in the Deeds Registry.

3.4 Procedures under the Urban and Regional Planning Bill

The Bill contains provisions for the subdivision of land in Part IV. No distinction between urban and agricultural land is made, this part of the Bill is equally applicable to all land. The establishment of new urban areas (the former townships) is set out in Part V of the Bill. The Bill does not define the threshold where a subdivision of land becomes the establishment of an urban area. This is left to be determined in the accompanying regulations.

3.4.1 Subdivision of Land

The most important change in the procedure in comparison to the current process of single subdivision is that no board is included in the decision making process anymore. The decision can be taken by the authority in charge alone. This can be the Permanent Secretary responsible for regional and local government matters (currently the PS of MURD) or an authorised planning authority, which can be a local authority, a regional council or a joint committee consisting of regional councils and local authorities that are governing the land situated within the planning area as determined by the MURD Minister.⁸⁸

According to Sec. 42 of the Bill, land may not be subdivided without the approval of the relevant authority. The person who wants to subdivide land, which can be the owner, a regional council, or local authority, has to file a written application with the respective authority in charge of the area in which the land is situated.⁸⁹ To accelerate the process,

⁸⁴ Sec. 35 LSA.

⁸⁵ According to the Surveyor-General's Office.

⁸⁶ This is necessary to make it legally valid, Sec. 16 Deeds Registries Act.

⁸⁷ Sec. 17 Agricultural Land Reform Act.

⁸⁸ Sec. 42 (1), 44 URPB.

⁸⁹ Sec. 43 (1) URPB.

the applicant should notify any adjacent owner or neighbouring owners of the application to subdivide beforehand and advertise the application in a manner still to be prescribed by regulation.

With that, the neighbours and the general public are invited to bring their objections to the awareness of the authority. These objections and the comments e.g. of the local authority (in case it does not take the decision about the subdivision itself), are then brought to the attention of the applicant who is free to react to these remarks,⁹⁰ i.e., for instance, amend his application or provide additional justifications for his proposal.

After the application was filed, the responsible authority decides whether it is granted or refused and whether conditions are imposed⁹¹ and notifies the owner, the Surveyor-General and the Permanent Secretary (if he/she is not him-/herself the responsible authority) of the decision.⁹² One possible condition can be the obligation to pay an endowment to the local authority in question.⁹³

After this procedure is concluded, the applicant shall lodge the plans, diagrams or other documents with the Surveyor-General for approval. After the plans were so approved, the Surveyor-General notifies the Deeds Registrar thereof who makes an endorsement to the title deed.⁹⁴

3.4.2 Establishment of Urban Areas

Under the Urban and Regional Planning Bill, no private person can apply for the establishment or extension of an urban area; only an authorised planning authority or the Permanent Secretary can do so.⁹⁵

Before the application is lodged with the Urban and Regional Planning Board, the intention to apply for permission has to be advertised. Objections from the general public are invited. These objections and comments with proof of sufficient advertisement have to be attached to the initial application.

It is the Board's duty to gather all the information it deems necessary to eventually formulate a recommendation to the Minister. The latter shall not make changes to these recommendations without consultation with the Board. When the Minister has approved the application, the Board notifies the applicant, the Surveyor-General and the Deeds Registrar of this decision.

⁹⁰ Sec. 43 (3)(b); (6)(a)(ii) URPB

⁹¹ Sec. 44 URPB.

⁹² Sec. 43 (4)(b), (6)(b) URPB.

⁹³ Sec. 44 (3)(j), (4) URPB.

⁹⁴ Sec. 51 URPB.

⁹⁵ Sec. 55 (2) URPB.

The applicant shall then initiate that the new urban area is surveyed in accordance with the approved layout plan.⁹⁶ He/she shall lodge such plans, diagrams or other documents as required for approval by the Surveyor-General within a period of 36 months from the date of which he/she was notified.⁹⁷ Within six months after the Surveyor-General's approval, the plans and diagrams shall be given to the Registrar of Deeds for endorsement or registration.⁹⁸ As a final step, the Minister declares, by notice in the Gazette, the new urban area to be an approved urban area, together with the name thereof.⁹⁹

3.4.3 Summary of Changes

In summary, the Bill will accelerate the land delivery process. Although the Bill cannot change the lengthy procedures of surveying and registration in the Deeds Registry, for the single subdivision an approval by the Townships Board or a similar board is no longer needed. Under the Bill it is sufficient that the responsible authority agrees with the proposed plans. The fact, that the participation of neighbours and other stakeholders concerned already has to take place before the actual application is filed also contributes to streamlining the application process.

The same can be said about the establishment of urban areas under the Bill. While under current law NamPAB as well as the Townships Board must be consulted, the Bill shifts all responsibilities to the newly founded Urban and Regional Planning Board. This reduces the process by one administrative step. As in the procedure regarding the subdivision of land without the establishment of an urban area, the participation of stakeholders should already take place before filing the application.

4. Subdivision of a Sectional Titles Scheme

Ownership rights granted through sectional titles differ from the aforementioned regular land tenure system. A sectional title is a personalized title which assigns the right of ownership of a section of land to its holder. The single sections are linked within a scheme. This entails that ownership is to a certain extent limited: On the one hand, the sectional title can be transferred like a freehold title, because the "unit", i.e. a section together with its undivided share in the common property, is deemed to be land.¹⁰⁰ But,

⁹⁶ Sec. 55 (6)(b) URPB for the establishment; Sec. 55 (12)(b) URPB for the extension of an urban area.

⁹⁷ Sec. 58 (1) URPB.

⁹⁸ Sec. 60 (1) URPB.

⁹⁹ Sec. 61 (1) URPB.

¹⁰⁰ Sec. 5, Statutory Definitions Sectional Titles Act.

on the other hand, any other transaction, like a subdivision or consolidation of the title or an extension of land, is only possible with the consent of the trustees of the body corporate.¹⁰¹ If the section is encumbered with a mortgage, the mortgagee must consent to registration.¹⁰²

The structural difference of this construct also influences the land delivery process. In contrast to the regular process, which includes the survey of every single piece of registered land, only the outer boundaries of the sectional titles scheme are registered in the Deeds Registry. The single sections are only listed in the additional subordinate Sectional Title Register.

A sectional titles scheme can only be established on urban land falling under the jurisdiction of a local authority.¹⁰³ The registered owner of land can develop the scheme. Again, the definition includes private persons as well as public bodies. However, in most cases it is the Municipality which establishes a sectional titles scheme.

As a first step the developer of a sectional titles scheme has to commission the draft of a sectional layout plan comprising the area and the single buildings. This plan can be drawn by an architect or professional land surveyor.¹⁰⁴ Then the plan has to be submitted to the Surveyor-General. He examines whether the draft sectional plan complies with the Land Survey Act.¹⁰⁵ Afterwards the local authority has to approve it within 60 days.¹⁰⁶ The authority's approval is only given when the draft sectional plan complies with the operative town planning schemes or current planning/development initiatives.

Finally, the applicant applies to the Registrar of Deeds for the registration of the scheme.¹⁰⁷ The Registrar makes the necessary endorsement on the title deed.¹⁰⁸ Following registration in the Deeds Registry the single units can be sold.

The land delivery process under the Sectional Title Act shortens the town planning process as neither NamPAB nor the Townships Board is involved in the procedure. Depending on the size of the scheme the process can be completed within a period from three months to one year.¹⁰⁹

¹⁰¹ Sec. 22 (1) Sectional Titles Act.

¹⁰² Sec. 23 (2c), 24 (2c) Sectional Titles Act.

¹⁰³ Def. of "developer", Sec. 1 Sectional Titles Act, Statutory Definitions.

¹⁰⁴ Sec. 7 Sectional Titles Act.

¹⁰⁵ Sec. 6 (1a) Sectional Titles Act.

¹⁰⁶ Sec. 6 (1b), 9 Sectional Titles Act.

¹⁰⁷ Sec. 11 Sectional Titles Act.

¹⁰⁸ Sec. 12 Sectional Titles Act

¹⁰⁹ Joe Lewis & Walter de Vries, "Are urban land tenure regulations in Namibia the solution or the problem?", p. 9.

5. The Flexible Land Tenure System (FLTS)

The Flexible Land Tenure Act was enacted in 2012. Together with its Implementing Regulations that are currently finalized, the Act aims at improving tenure security for low income households in informal settlements on urban land by establishing a new and less formal system of land tenure titles. Due to its simplicity it is supposed to be faster and more affordable.

The desired improvement concerns different aspects: Firstly, land tenure security for the inhabitants of informal settlements shall be provided. Whilst they were formerly considered illegal occupants, the new titles under the FLTS shall protect them against eviction. At the same time the titles shall secure the additional financial value of the plot as there is a higher incentive for the occupants to develop a plot they actually own. In a broader perspective, this less formal system of titles is meant to spread economic growth to the low income households by legally enabling them to use their (land hold) titles as collateral for a bank loan.¹¹⁰

5.1 Flexible Titles

The FLTS establishes two new titles that are gradually upgradable to freehold. Each of these new titles guarantees different rights to their holders. Both types of titles constitute group rights. It is required that a group of people of any size founds an association which constitutes the base of each scheme. The titles are personalized, but in the categories of the regular system refer to an ideal part of the group property. The right is guaranteed to the association, not to the individual members of the scheme.

The starter title implies two rights¹¹¹:

- The right to perpetual occupation of a site within the concerned block.
- The right to transfer or otherwise dispose of the starter title, subject to local custom or the group constitution.

The starter title does not refer to a clearly defined piece of land within the scheme. Only the whole block, the so-called blockerf, is registered in the Deeds Registry. Starter titles are only listed in a starter title register, maintained in a Land Rights Office (LRO) to be established.¹¹²

¹¹⁰ Sec. 10 (5)(b) FLTA.

¹¹¹ Joe Lewis & Walter de Vries, "Are urban land tenure regulations in Namibia the solution or the problem?", p. 11; Sec. 9 FLTA.

¹¹² Sec. 4 FLTA.

In contrast to the starter title, the land hold title pertains to a specific parcel within that block. The land hold title comprises most of the elements of ownership, namely:

- The right to occupy a geographically defined plot in perpetuity.
- The right to transfer or otherwise dispose over the property.
- In addition to the provisions of the Deeds Registries Act concerning real rights, the land hold title can be used as collateral for a bank loan.

The individual plots allotted within a land hold title scheme are not registered in the Deeds Registry, but in a separate register for land hold titles which will be administered by the LRO. This register also requires submission of a layout plan that demarcates the single plots. Since this plan is not lodged in the Deeds Registry, it must not comply with the provisions of the Land Survey Act. That is why the boundaries within a land hold title scheme may be determined by a “land measurer” instead of having to be surveyed by a professional land surveyor. In Namibia’s institutions of tertiary education, courses leading to the title “land measurer” are no longer offered. Consequently, it is unclear what qualifications a land measurer actually needs. The current version of the draft Regulations to the FLTA mandates the Public Service Commission with the task to find a definition for the term.¹¹³

In principle, the FLTA intends that the land delivery process begins with the establishment of starter title schemes. Subsequently, these schemes are to transform into land hold title schemes and can eventually be upgraded to freehold title. But this order is not mandatory. It is also possible to establish a land hold title scheme without a preceding starter title scheme.¹¹⁴ As a group tenure system, only the entire scheme can upgrade, not just parts of that scheme. When a majority of 75 % votes in the positive, the upgrade can be commenced.¹¹⁵ Scheme members who voted against the scheme will, in case of an upgrade to a land hold title scheme, be granted starter title rights in another, similar scheme.¹¹⁶ In case of an upgrade to freehold, they will lose their title, but receive fair compensation for it.¹¹⁷ In both cases, the respective land falls back to the relevant authority, which is free to sell it to other interested parties.¹¹⁸

5.2 Link to the regular Land Delivery Process

Although the FLTA creates a somewhat parallel system for the establishment of new titles, elements of the regular land delivery process do apply.

¹¹³ Sec. 5 Reg. FLTA.

¹¹⁴ Cf. Sec. 11 (4), 13 FLTA.

¹¹⁵ Sec. 14 (1), 15(1) FLTA.

¹¹⁶ Sec. 14 (2) FLTA.

¹¹⁷ Sec. 15 (4) FLTA.

¹¹⁸ Sec. 14 (3), Sec. 15 (5) FLTA.

Before any title scheme can be established, the land concerned must be subdivided or consolidated in such manner that the scheme is situated on one portion of land registered as such in the Deeds Registry.¹¹⁹ To meet this prerequisite the procedures prescribed in the Townships Ordinance must be adhered to. Within Flexible Land Tenure, the procedure for a single subdivision should apply. As explained above the distinction between the procedure to establish townships and the one for single subdivision is the number of erven registered in the Deeds Registry. Since only the blockerf is registered in the Deeds Registry, the threshold for a township establishment is not reached. Also, in comparison to the survey required for township establishment, the FLTS-survey is less formal and therefore less costly. Nevertheless, in addition to the provisions of the FLTA, should a subdivision be necessary beforehand, the Townships Board needs to approve it. Only then can the blockerf be entered into the Deeds Registry.

As a result it can be stated, that the newly established FLTS does not completely substitute the town planning part of the land delivery process. It applies only after this stage. It accelerates land delivery because the time consuming township establishment process can be avoided.

FLTS makes surveying and registration easier than in the regular procedure. The less formal starter title and land hold registers, which are subordinate to the Deeds Registry, do not require that registration is done by a conveyancer, nor that the surveying rules of the LSA apply.

Nevertheless, the FLTA cannot be considered as a fast track way towards a freehold title.¹²⁰ The group tenure construct makes the FLTS somewhat inflexible. This creates difficulties for the intended upgrading process. Especially when the size of the group is relatively large, coordination between its members becomes increasingly lengthy and cumbersome. In addition, FLTS-titles are transferable and membership is fluent. Some inhabitants will leave the scheme and newcomers will bring different interests in. It seems not very likely that a majority of 75 % has the money and the will to upgrade to freehold titles at the same time.

On the contrary, economic rationale requires the blockerf to be as big as possible. If the blockerf is too small and only consists of a few erven, the pro rata surveying costs for every erf becomes very high. Surveying fees are prescribed by regulation. The calculation of the fees is based on the size of the land and the number of plots to be surveyed. There is a degression of costs for large surveys. That means the more plots

¹¹⁹ Sec. 11 (2) FLTA.

¹²⁰ Cf. Joe Lewis & Walter de Vries, "Are urban land tenure regulations in Namibia the solution or the problem?", p. 13.

are surveyed at once, the cheaper surveying becomes for each single plot. A best practice approach to this dilemma still has to be developed.

It is also doubtful, whether banks would be willing to accept land hold titles as collateral. Flexible titles are momentarily regarded as highly insecure. Without the financial aspect to them, the new titles are not likely to encourage economic growth.

Such uncertainties notwithstanding, compared to the existing regular land tenure system the FLTS might currently be a favourable way to at least provide some kind of tenure security to the inhabitants of informal settlements. The importance of that can't be underestimated. In fact, as it must also be essential for the peaceful development of this country, bettering the living conditions of the poor quickly must be regarded as the primary objective the government pursues with the FLTA.

6. Conclusion

The land delivery process in Namibia is governed by multiple Acts and Ordinances and thus appears to be very complex. If the new Urban and Regional Planning Bill is accepted by Parliament, the Townships Ordinance and the Town Planning Ordinance will be repealed and replaced with one comprehensive Act. The abundance of Boards involved in the planning process will be abolished and procedures thus be streamlined. The objective of the Bill is desirable and will help to accelerate the land delivery process.

This text gave an overview of the current and future legal framework and the administrative procedures that have to be observed in order to acquire ownership titles. It explains the different procedural stages, introduces the reader to the actors involved in the process and gives an idea of how long which steps take. The text shall enhance understanding of this complicated process. It may be the basis for informed discussions and enable the readers to identify underperformances and propose useful changes.