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Government Notice

OFFICE OF THE PRIME MINISTER

No. 353

2013

PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 13 of 2013: Communal Land Reform Amendment Act, 2013.

Act No. 13, 2013 COMMUNAL LAND REFORM AMENDMENT ACT, 2013**EXPLANATORY NOTE:**

_____ Words underlined with a solid line indicate insertions in existing provisions.

[] Words in bold type in square brackets indicate omissions from existing provisions.

ACT

To amend the Communal Land Reform Act, 2002, so as to insert certain definitions; to restrict foreign nationals from acquiring customary land rights in communal areas; to provide for the granting of occupational land rights in respect of portions of communal land to institutions providing public services; and to provide for incidental matters.

(Signed by the President on 24 December 2013)

BE IT ENACTED as passed by the Parliament, and assented to by the President of the Republic of Namibia, as follows:

Amendment of section 1 of Act No. 5 of 2002, as amended by section 1 of Act No. 11 of 2005

1. Section 1 of the Communal Land Reform Act, 2002 (in this Act referred to as the “principal Act”) is amended -

(a) by the insertion after the definition of “communal land” of the following definition:

“community based organisation’ means an organisation, group, trust, foundation or a body established by or for a community and having its aims and objectives to serve and benefit the community;”;

(b) by the insertion after the definition of “farming unit” of the following definition:

“lawful resident’ means a person who holds customary land rights in a particular traditional community as contemplated in section 29;”; and

(c) by the insertion after the definition of “Minister” of the following definition:

“occupational land right’ means a right to occupy a portion of communal land for the provision of public services granted under section 36A;”.

Insertion of section 17B in Act No. 5 of 2002

2. The following section is inserted after section 17 of the principal Act:

Act No. 13, 2013 COMMUNAL LAND REFORM AMENDMENT ACT, 2013**“Restriction on right of access of foreign national to customary land right or right to leasehold**

17B. (1) A foreign national who wishes to acquire customary land right or right of leasehold must first obtain a written authorisation of the Minister before he or she applies for such rights.

(2) An application for the written authorisation referred to in subsection (1) is made in the prescribed manner and form.

(3) Upon receipt of the application for the written authorisation referred to in subsection (2), the Minister may grant the application with or without conditions or refuse the application.

(4) The Minister may prescribe criteria and conditions upon which a foreign national may be granted customary land right or right of leasehold under this Act.

Amendment of section 23 of Act No. 23 of 2002

3. The following heading is substituted for the heading of section 23 of the principal Act:

“Limitation on size of land that may be [held] allocated by traditional authority under customary land rights”

Amendment of section 28 of Act No. 5 of 2002

4. Section 28 of the principal Act is amended by the substitution for paragraph (c) of subsection (6) of the following paragraph:

“(c) whether the area of the land conforms to the prescribed size referred to in section 23;”.

Amendment of section 31 of Act No. 5 of 2002

5. The following subsections are added after subsection (4) of section 31 of the principal Act:

“(5) A right of leasehold may be granted to a community based organisation and such organisation may sublease to an investor.

(6) A sublease agreement to be entered into between a community based organisation and an investor for the purpose of subsection (5) becomes valid after approval by the board.

(7) The board may refuse to approve a sublease agreement referred to in subsection (6), if the sublease does not conform to the conditions or activities specified in the lease.”.

Insertion of Part 3 in Act No. 5 of 2002

6. The following Part is inserted after Part 2 of Chapter IV of the principal Act:

“PART 3
OCCUPATIONAL LAND RIGHTS

Power to grant occupational land rights

36A. (1) Subject to subsections (3) and (4) and sections 36B and 38, a board, upon application, may grant to a ministry, agency, office, church or any other institution providing public services an occupational land right in respect of a portion of communal land, but an occupational land right for agricultural purposes may be granted only in respect of land which is situated within a designated area referred to in subsection (3).

(2) The following occupational land rights for the provision of public services may be allocated in respect of communal land for -

- (a) Government projects;
- (b) projects of a State-owned enterprise as referred to in the State-owned Enterprises Governance Act, 2006 (Act No. 2 of 2006);
- (c) health facilities;
- (d) educational, social or sport facilities;
- (e) church facilities;
- (f) non-profit making organisation facilities; and
- (g) community projects.

(3) The Minister, after consultation with the Traditional Authority and the board concerned, must designate, by notice in the *Gazette*, in respect of the communal area of each traditional community, an area within which that board may grant occupational land rights for agricultural purposes.

(4) Despite subsection (1) an institution providing public services may apply to the Minister for an approval for the granting of an occupational land right in respect of a portion of land which is wholly or partly situated outside a designated area, and the Minister may grant the application if the Minister, after consultation with the Traditional Authority and the board concerned, is satisfied that -

- (a) the granting of the occupational land right will not unreasonably interfere with or curtail the use and enjoyment of the commonage by members of the traditional community; and
- (b) in the circumstances of the particular case, reasonable grounds exist for the granting of approval.

(5) An application for the allocation of any occupational land right in respect of communal land must -

- (a) be made in writing in the prescribed form; and

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(b) submitted to the board.

(6) Subject to subsection (5), a board may grant an occupational land right only if the Traditional Authority of the traditional community in whose communal area the land is situated consents to the grant of the right.

(7) If a Traditional Authority refuses to grant consent in terms of subsection (6) when in the opinion of the board consent ought to be given, the board may submit the matter to an arbitrator referred to in subsection (8) for decision, who may grant consent in the place of the Traditional Authority if he or she is satisfied that the Traditional Authority is withholding consent unreasonably.

(8) The Minister must appoint as arbitrator under subsection (7) a person approved by the board and by the Traditional Authority concerned and, if either the board or the Traditional Authority or both -

(a) fail to communicate its or their decision to the Minister with respect to a person proposed for appointment within 30 days of being notified by the Minister of the name, address and qualifications of the person; or

(b) on a third occasion communicate disapproval of a person proposed for the particular appointment, the Minister may disregard the requirement of approval stipulated by this subsection in so far as it concerns the board or the Traditional Authority or both.

(9) If an arbitrator refuses to grant consent in terms of subsection (7), the aggrieved institution providing public services has the right to appeal to the Lands Tribunal referred to in section 120.

(10) If the aggrieved institution providing public services is dissatisfied with the decision of the Lands Tribunal it may refer the matter to the High Court for review as provided for under section 131.

Application for occupational land rights

36B. (1) An application for an occupational land right in respect of communal land is made in the prescribed manner and form to the board in whose area the land in question is situated.

(2) An occupational land right may not be granted in respect of a portion of land which another person holds customary land right, unless such person agrees to relinquish his or her right in respect of the land, subject to -

(a) the payment of compensation as agreed to by such person; and

(b) suitable arrangements for his or her resettlement on alternative land.

(3) A board may not, without the prior written approval of the Minister, grant an occupational land right in respect of any land -

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- (a) which exceeds the maximum size prescribed for the particular use for which the right is required; or
- (b) if the applicant -
 - (i) is an existing occupational land right holder in respect of another portion of land granted under this Act; or
 - (ii) occupies any communal land under a right referred to in section 35(1), unless recognition of such right is refused in accordance with that section.

(4) Before granting an occupational land right in terms of subsection (1) in respect of land which is wholly or partly situated in an area which has been declared a conservancy in terms of section 24A of the Nature Conservation Ordinance, 1975 (Ordinance No. 4 of 1975), a board must have due regard to any management and utilization plan framed by the conservancy committee concerned in relation to that conservancy, and such board may not grant the occupational land right if the purpose for which the land in question is proposed to be used under such right would defeat the objects of such management and utilization plan.

(5) An applicant referred to in subsection (1) is required to pay an application fee for an occupational land right.

Conditions applicable to occupational land rights

36C. (1) A board may only grant occupational land right -

- (a) if an amount in respect of that right and any improvements on the land in question is paid to that board;
- (b) if security is furnished to the satisfaction of the board for the payment of the full amount contemplated in paragraph (a) upon registration of the occupational land right; or
- (c) if the board allows the amount contemplated in paragraph (a) to be paid by way of instalments in a manner agreed upon between the board and the person to whom the right is granted.

(2) The amount referred to in subsection (1) must be determined in the prescribed manner.

(3) An occupational land right is subject to such further conditions as may be prescribed generally or as may be approved by the Minister in a particular case.

(4) The conditions referred to in subsection (3) may include conditions prescribing the circumstances in which the occupational land right holder may be required to cause the land in question to be surveyed, at the expense of the holder, before the registration of such right in name of the holder.

Registration of occupational land rights for public services

36D. (1) Subject to subsection (2), if an application for an occupational land right is granted by a board, the board must -

- (a) cause such right to be registered in the prescribed register in the name of the applicant; and
- (b) issue to the applicant a certificate of occupational land right in the prescribed form and manner.

(2) If a land in respect of which the occupational land right is granted is a surveyed land which is shown on a diagram as defined in section 1 of the Land Survey Act, 1993 (Act No. 33 of 1993) and the term of the occupational land right is for a period of 10 years or more, the occupational land right must be registered in accordance with the Deeds Registries Act, 1937 (Act No. 47 of 1937).

Duration of occupational land rights

36E. (1) Subject to subsection (2), an occupational land right may be granted for such period, as the Minister or the board and the holder of the right may agree.

(2) An occupational land right granted for a period exceeding 10 years is not valid unless it is approved by the Minister.

(3) An occupational land right may be renewed by agreement between the board and the holder of the right, but subject to the approval of the Minister in a case referred to in subsection (2).

Recognition of existing rights to occupy communal land as occupational land rights

36F. (1) Subject to subsection (2), an institution providing public services which immediately before the commencement of this Act held a right, not being a right under customary law, to occupy any communal land, whether by virtue of any authority granted under any law or otherwise, may continue to occupy such land under that right, subject to the same terms and conditions on which the land was occupied immediately before the commencement of this Act, until -

- (a) such right is recognised and an occupational land right is granted to such institution in respect of the land upon acceptance of an offer made in terms of subsection (7);
- (b) claim of such institution to the right to such land is rejected upon an application contemplated in subsection (2);
- (c) such institution declines or fails to accept an offer of an occupational land right made in terms of subsection (7); or

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- (d) such land reverts to the communal land concerned by virtue of subsection (8) or (13).

(2) With effect from a date determined by the Minister, by notice in the *Gazette*, either generally or with respect to an area specified in the notice, every institution providing public services which claims to hold a right referred to in subsection (1) in respect of land situated in the area to which the notice relates, is required to apply in the prescribed form and manner to the relevant board -

- (a) for the recognition of such right and the grant of an occupational land right under this Act; and

- (b) where applicable, for authorisation for the retention of any fence or fences existing on the land, if the applicant wishes to retain such fence or fences.

(3) Subject to section 44 an application in terms of subsection (2) is made within a period of three years of the date notified under that subsection, but the Minister may by similar notice extend that period by such further period or periods as the Minister may determine.

(4) A notice under subsection (2) or (3) may be communicated to the public in any other media as the Minister considers necessary or expedient.

- (5) An application in terms of subsection (2) is accompanied by -

- (a) any documentary evidence, if available, which the applicant can submit in support of his or her claim;

- (b) a letter from the Chief or Traditional Authority of the traditional community within whose communal area the land in question is situated, furnishing the prescribed information;

- (c) any further information or documents as the board may require.

(6) In considering an application in terms of subsection (2), and despite a report by an investigating committee in terms of section 44 in a particular case, a board may make such investigations or inquiries and consult such persons as it may consider necessary or expedient to establish any fact relevant to the claim of the applicant, including -

- (a) the date when and manner in which the applicant acquired the right in question;

- (b) whether any other person or institution claims to possess any right in relation to the land in question;

- (c) whether the land to which the claim relates conforms to the prescribed size for the particular use for which the land is held;

- (d) the position of the boundaries or any beacons on the land; and

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(e) whether the land is fenced-off and the nature, extent and date of erection of the fence.

(7) If the board is satisfied as to the validity of the claim of the applicant, the board must in writing -

(a) offer to grant to the applicant an occupational land right in respect of the land;

(b) state the conditions subject to which the occupational land right is offered;

(c) specify the time, not being less than 90 days after the date on which the offer is made, within which the offer may be accepted; and

(d) inform such institution that if it declines the offer or fails to accept it within the specified time, it ceases to have any claim to the land in question.

(8) An institution which refuses or fails to accept an offer made in accordance with subsection (7) ceases to have any claim to the land in question, in which event the land reverts to the communal land concerned for the allocation of any right under this Act.

(9) If the applicant has, in terms of subsection (2)(b), applied for authorisation to retain any fence or fences which exist on the land in question and the board is satisfied that -

(a) the fence or fences were erected in accordance with the provisions of any law or with the consent of a competent authority;

(b) the fence will not unreasonably interfere with or curtail the use and enjoyment of the commonage by members of the traditional community; and

(c) in the circumstances of the particular case reasonable grounds exist for allowing the applicant to retain the fence or fences concerned, the board must grant to the applicant authorisation for the retention thereof, subject to such conditions as it may consider necessary or expedient to impose.

(10) If, in respect of any application in terms of subsection (2), the board is of the opinion -

(a) that there are conflicting claims in relation to the land; or

(b) that reasonable grounds exist to doubt the validity of the claim of the applicant,

it must cause a hearing to be conducted in the prescribed manner to resolve the matter, and may make such decision in relation to the claim as it thinks just.

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(11) Without prejudice to the generality of the power conferred by subsection (10), a board may -

- (a) confirm the claim;
- (b) subject to subsection (12), reject the claim; or
- (c) confirm the claim subject to any variations as determined by the board, including variation in respect of the area or the position of the boundaries of the land if the board determines that the area of the land exceeds the prescribed size or that the position of the boundaries are not valid.

(12) Where a board is not satisfied as to the validity of the claim of the applicant to the right in question, it is not obliged to reject such claim but may instead offer to the claimant the grant of an occupational land right under this Act, either in respect of the piece of land to which the claim of the applicant relates or a portion thereof or in respect of any other piece of land as the board may determine.

(13) Except if the Minister on good cause shown directs otherwise, no institution providing public services is, on expiry of the period allowed for applications in terms of subsection (3), entitled to apply for the recognition of any right referred to in subsection (1) and the grant of an occupational land right under this Act, in which event -

- (a) the institution holding the land is deemed to have relinquished its claim to that land; and
- (b) such land reverts to the communal land concerned and become available for the allocation of a right under this Act.

Cancellation of occupational land rights

36G. An occupational land right may be cancelled by the board if the occupational land right holder fails to comply with the requirements or to adhere to any restrictions imposed by or under any other law pertaining to the utilisation of the land to which the right relates.”.

Amendment of section 44 of Act No. 5 of 2002

7. The following subsection is substituted for subsection (3) of section 44 of the principal Act:

“(3) If any fence is found to be on any communal land in contravention of subsection (1), the [**Chief or Traditional Authority or**] board concerned may, in accordance with the prescribed procedure, cause such fence to be removed and may dispose of the material used for the erection of the fence in such manner as may be prescribed.”.

Act No. 13, 2013**COMMUNAL LAND REFORM AMENDMENT ACT, 2013****Short title and commencement**

8. This Act is called the Communal Land Reform Amendment Act, 2013 and comes into operation on a date determined by the Minister by notice in the *Gazette*.
