

Assessment of the Thobelani CPA at Gwebu

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Prepared by the KZN Provincial Team of the Common
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1. Executive summary

The assessment of Thobelani CPA at Gwebu is the second of the originally planned pilot studies for the Department of Land Affairs' CPA review process. The reasons for and aims of the review are set out in the report on the first study: *Assessment of the Msikazi CPA, May 2002*. While these pilots will no longer proceed, the conclusions reached in this document will be included in an overall ("scoping") report on the current state of information on land reform communal property institutions.

The action research methodology designed to extract and share information for the analysis of tenure security issues, which was successfully used in Msikazi, could not be fully implemented at Gwebu. The reason for this is the dysfunctionality of the CPA and its management committee, exacerbated by having lasted for some years, and which has resulted in a lack of group interest in attending meetings. Such situations are unlikely to be rare and must be catered for in future planning. The review team, however, found that the people they met spoke openly of their difficulties and these were consistent enough to enable a general picture of facts to emerge sufficient for an analysis and assessment to be made.

It is clear that the land reform programme at Gwebu has resulted in a complex situation where settlement and transfer were not coordinated nor residence and CPA membership. This has led to the group's becoming divided into different categories of rightsholders who are themselves unsure of what their rights may be.

The poorly drafted and insufficient founding document of Thobelani CPA fails to clarify the substantive land rights of members whose claims to tenure security depend on it. The residence of some other 120 households who live under the nominal authority of the CPA is protected solely by IPILRA. There is a third category of residents who may or may not have legal rights under ESTA. The tenure situation is thus uneven and to the detriment of development aspirations.

The report focuses on specific manifestations of these basic confusions and divisions, measures them according to agreed indicators and evaluates their impact. Specific problems are stated and recommendations made for action at local, district and provincial levels.

2. Introduction

The assessment of Gwebu Communal Property Association (Thobelani CPA) is the second pilot study originally planned in the national review of land reform legal entities. The national review and the first pilot at Msikazi are described in *Assessment of the Msikazi CPA, May 2002, prepared by the KZN Provincial Team*. These pilots had two tasks:

- To develop and refine methodology for local level assessments of tenure security on a larger scale.
- To assess the extent to which common property institutions are achieving the desired outcomes of land reform in order to inform interventions to improve their viability.

Subsequent to the assessment of the Msikazi CPA, the DLA Framework document for this National Review was revised and redrafted as *An Assessment Framework for Communal Property Institutions, April 2002*. Significant areas of revision included:

- The decision to extend the scope of the review from communal property associations to common property institutions (cpis).
- Some revision of the indicators to be used for assessment.
- A shift in the concept of how the full review will look. It will include a first phase diagnostic audit with a full description of problems and opportunities that need further

investigation and a second phase widespread assessment of communal property institutions with recommendations, remedies and plans to undertake these. The pilot study idea falls away.

The assessment at Gwebu provided an opportunity to further test the conceptual framework and the methodology developed in the Msikazi enquiry, and its findings will inform future enquiry and enquiry methods into communal land ownership.

This report on tenure security in the Thobelani CPA at Gwebu, outlines the conceptual framework used in assessment and critically presents the methods used, noting where these were difficult to implement and why. It argues that ignoring established practices and legal incoherence were key factors which shaped the tenure security situation at Gwebu, examines the implications of the situation at Gwebu for the role of the state in establishing and working with cpis, and makes some recommendations for local level interventions.

3. The methods used for the Gwebu assessment

3.1 *The review team and how it worked*

The assessment involved four aspects: field design, field facilitation, analysis and report-writing. The assessment team included members of the Legal Entity Assessment Project (LEAP) and two planners from the Vryheid office of the Zululand region of Department of Land Affairs. One planner was newly responsible for the project and for the work on the CPA review and has taken on sole responsibility for redistribution projects in the region while the other was presently handing over these responsibilities. As the DLA planner at Msikazi would experience difficulty in playing the contradictory roles of official and facilitator, LEAP took responsibility for field facilitation. One or both of the DLA planners helped with broad design, attended every meeting at Gwebu and took part in analysis. Because of the time constraints faced by officials, and the distances between Pietermaritzburg and Vryheid, LEAP took responsibility for very detailed planning and for all detailed report writing, consulting the DLA planners before wider publication.

3.2 Methodology for the field assessment

The original design included the use of a timeline, mapping of land uses over the area as a whole, household mapping and semi-structured interviewing¹. This was not fully implemented, because the committee was dysfunctional and has lost much of the confidence of the broader group, leadership did not believe that household interviewing would work without a large preliminary meeting and attendance at meetings was poor, which made it hard to meet the larger group. The review team did not have the sense that people were trying to hide things – they spoke openly of their dilemmas and difficulties. However, going further with the assessment would have run in the face of people's preoccupations and expectations and taken unbudgeted resources of time and money. The review team decided to share what we could with people and wrap up.

The following activities were carried out:

| Activity | Original | Outcomes | Date |
|----------|----------|----------|------|
|----------|----------|----------|------|

¹ See *Assessment of the Msikazi CPA, May 2002, prepared by the KZN Provincial Team* for descriptions of these tools.

| | purpose | | |
|---|--|--|----------------|
| Noting baseline information with LEAP and the DLA Planner (SJK) and broad design of fieldwork. | Create a base to understand Gwebu issues | Review team has a shared basis for fieldwork, and contextual information for the assessment report | Jan - Apr 2002 |
| Ad hoc meeting with group of six people, a mix of CPA committee and non-committee members. | Meet with the CPA committee | The meeting with the committee failed to take place. The review team achieved a better understanding of some of the issues at Gwebu, and arranged a further meeting with the CPA committee. | 11 May 2002 |
| Meeting with five members of a fifteen member CPA committee and the CPA committee and water service provider secretaries. | Meet with the CPA committee | The review team ended with a clearer understanding of some of the confusions around rights and rights-holders at Gwebu and arranged a meeting with the broader community. | 7 June 2002 |
| Meeting with about 16 men and three women, including a few members of the committee and inkosi Mdlalose. | Hold a community meeting | Research wasn't carried out as planned because of confused expectations and small group but the review team added to their information about Gwebu, including that of understanding people's expectations. Joint decision to attempt one more broad community meeting for feedback on findings so far. | 8 July 2002 |
| Analysis of findings by the review team. | Analyse and consolidate findings from Gwebu. | The review team tested the conceptual framework on the Gwebu case and a clear group process for applying it. The report on analysis provided the basis for visual feedback at Gwebu. | 15 July 2002 |
| Feedback meeting with about 20 men and 14 women, including some members of the committee | Share feedback and discuss recommendations | Input on consolidated findings so far. Discussion with people ended in agreement that LEAP would simplify and translate the constitution and come back to present it to people. Decision on future work by DLA requires further consultation in the Department. | 28 July 2002 |
| Final meeting | Present information on simplified and translated constitution, wrap up work for CPA Review | People at Gwebu plan to consider simplified and translated constitution against their understanding and practice and consider amendments | 25 August 2002 |

An issue for phase 2 of the national assessment is the problem of entry into areas where the local common property institutions are so dysfunctional that it becomes difficult to hold meetings. These are likely to be the institutions most desperately in need of interventions. The Gwebu solution was to write up what the team had gathered and make recommendations on this limited basis.

The clearest detail for the purposes of the assessment emerged when participatory tools were used with the CPA committee, namely the timeline and broad land use mapping. The rest of the information was caught as it flew past in discussion and was more difficult to check.

3.3 A framework for analysing tenure security

3.3.1 Indicators

The **indicators** used for analysis of tenure security were:

- Indicator 1 People have clear rights, they know what their rights are and they can defend these rights.

| | |
|-------------|---|
| Indicator 2 | Processes of application, recording, adjudication, transfer, land use regulation and distributing benefits are clear, known and used. |
| Indicator 3 | Authority in these processes is clear, known and used. |
| Indicator 4 | These processes do not discriminate unfairly against any group or person. |
| Indicator 5 | The actual practice and the legal requirements in terms of these processes are the same. |
| Indicator 6 | There are places to go to for recourse in terms of these processes and these are known and used. |

3.3.2 Deployment of indicators in tenure assessment

The following focus areas were used to evaluate information by applying the indicators:

- 1 **Rights and rightsholders:** indicator 1 is applied and also indicators 4 and 5 which deal with discrimination and the gap between law and practice.
- 2 **Land administration processes.** Making rights work in practice is the function of land administration processes listed under indicator 2. See also Figure 1: *Land administration processes in diagrams*.
- 3 **Institutional linkages,** applying indicators 3 and 6 to look at authority and recourse inside local structures, between local structures and between local and external structures.

Institutional linkages and functioning must be coherent for tenure security, i.e. everybody agrees on the WHAT of function or “doing” (functions or roles), the WHO of authority and WHERE these things happen (the notion of jurisdiction). Implicit in the idea of institutional coherence is the notion of broad acceptance as well as the sense that functions are performed at an appropriate “do-able” level. Also implicit in the idea of institutional coherence are a clear local understanding of land administration functions (see indicator 2) and clarity about where decision-making resides (see indicator 3). This decision-making relates to the determining of rules, the application of rules and appealing against decisions made (see indicator 6).
4. **Other factors** that impact on tenure security.

The assessments under each of these categories drew from multiple voices uncovered during the research process, including various voices from the ground, the official voice (e.g. what DLA officials say), and the voice of the law (i.e. the CPA constitution and laws such as IPILRA and ESTA).

4 Assessment of tenure

4.1 Contextual information

The Gwebu community represented by the Thobelani Communal Property Association is situated 50 km from Vryheid in the Zululand Region of the Department of Land Affairs in the Abaqulisi Local Municipality in the Zululand District Municipality in KZN. The Thobelani CPA was registered in November 1998.

The land reform programme at Gwebu has two phases and two sets of properties are involved:

- Gwebu Phase 1: Four farms were transferred to the Thobelani CPA in February 1999 under the Redistribution programme: Sub 3 of the farm Rooikop, Sub 1 of the farm Eerstepunt 46, portion 1 (of 1), portion 5 (of 1), Portion 6 (of 1), portion 7 (of 1), remainder of portion 4, all of the farm Brakvlei 331 and the farm Memorium 442. Only a few families have homes on these farms. (the “four farms”)
- Gwebu Phase 2: An application has been submitted to DLA for the transfer to the Thobelani CPA of the state land on which most people are settled. Two farms are involved, referred to as Kromellenboog and Eerstepunt.

The official number of beneficiaries in Gwebu Phase 1 was limited to 285 in order to meet DLA requirements, which discouraged redistribution projects involving large numbers of households. The actual number of households occupying state land is close to 400. The number of people at Gwebu in 1997 was recorded as 1853.

Female-headed households comprise 38% of the group. Most families survive on meager incomes sent by men who work in cities and from old age pensions. The men and women remaining on the farm are mostly unemployed and rely on casual jobs from projects that are occasionally undertaken on the farm.

4.2 Rights and rights-holders

4.2.1 Who owns what

According to the constitution, founding members are heads of households who received settlement grants from the Department of Land Affairs and whose names are reflected in the membership register. There were originally 285 such members. In terms of the CPA Act, therefore, the heads of households which were beneficiaries of DLA grants plus any new members admitted to the CPA in terms of the constitution are legally constituted as the Thobelani CPA. Thobelani CPA holds title to the “four farms”.

Processes are underway to transfer the state land to the Thobelani CPA. The state land is not mentioned in the constitution as properties owned by the Thobelani CPA (*clause 3.1.4*), although the management committee does have the power to acquire other property in the name of the Association (*clause 8.1.1*).

4.2.2 Substantive rights

(A) Residential sites

See *Figure 2*: Map of Gwebu drawn by five members of the Committee and *Figure 3*: Land uses and complex communal property at Gwebu

In practice, Gwebu appears to follow the pattern of exclusive rights of households to residential sites and adjacent plots. People have acquired rights to residential sites under authorities and land administration systems in gradual transition. Settlement on the state

farms Kromellenboog and Eerstepunt began in the late 1980s. People living under the leadership of Inkosi Jabulani Mdlalose, especially destitute families from neighbouring white farms, were allocated plots on state land by the tribal leadership in return for payment of khonza fees from the late 1980s. People thought they were buying sites on the state land. After the Thobelani CPA was established, people wanting sites on the state land continued to approach the tribal authorities, and the Inkosi's tribal councilor allocated residential sites to three households. A public meeting was held, probably as a result of action by residents, and allocation by the councilor was stopped, with the approval of the Inkosi. Authority for allocation of sites shifted to the CPA Committee, which approved a small number of applications for residential sites.

People have also acquired rights to residential sites by transfer from an existing household, sometimes without authorities being specifically informed. Many people (*abaphumayo*) have sold their rights to other people, and left the area, so that there are new people living on sites (*abafiki, imizi ethengile*). Incomers paid R600, which is not for buying the land or the structure. The person selling spent money on a khonza fee to get the site and this is what the incomer is paying for. In practice, only a few approached the Committee asking them "to sell their rights" and the committee handled this successfully in one case. "One site is vacant and the CPA owns it."

Most of the 400-odd households at Gwebu currently live on the state land. A few households are settled on the four farms.

The legal basis of rights to residential sites varies depending on whether the household head is a member of the Thobelani CPA or not, and whether the household lives on the state land or on the one of the four farms and is highly incoherent.

According to the constitution of the Thobelani CPA, each member shall have equal access to land for residential purposes, the right to security of tenure, use and occupation of the land through membership of the Association; under certain conditions, to erect improvements on land allocated to them and maintain those improvements, to sell the improvements or rights in land under certain conditions, and to bequeath them to his or her heirs. The land referred to in the constitution is made up of the properties forming the four farms. The constitution defines members as individual heads of households, who received settlement grants from the Department of Land Affairs, and whose names are reflected in the membership register, as well as newcomers who complete the right procedures for applying for membership, and who are accepted in a general meeting.

There are some large gaps between the constitution and the reality on the ground. For most of the members of Thobelani CPA, the substantive legal rights to land for residential purposes, to erect improvements, to sell improvements or rights in land and to bequeath, remain potential rights which are unlikely to be realized. It is on the state land where these rights, and the right to sell improvements, become real. A further confusion in the legal basis of the substantive rights of members of the Thobelani CPA is in *clause 6* of the Community By-laws attached to the constitution: "Participating members who are not permanently resident on the land do not have rights to any natural resources, including grazing. Furthermore, they may not allocate their rights to any other person unless this has been agreed to at a General Meeting of Members." Most of the members live on the state land.

In terms of the constitution only household heads have substantive and procedural rights, individuals within households have neither. The constitution includes no protections for individuals within households, including no protection from eviction because of the misdemeanors of a household head.

The land rights of the 120-odd households who are long-term or recent occupiers of the state land but who are not members of the Thobelani CPA are not protected by the constitution, even though they live under the nominal authority of structures set up in terms of this document. For them, the Interim Protection of Informal Land Rights Act (IPILRA) presents an alternative legal basis for assertion of rights, which DLA has applied in negotiating the

proposed transfer of state land to the Thobelani CPA. Under IPILRA, people who obtained land under a locally accepted practice can continue using that land. Broadly this protects everybody from being disturbed, i.e. gives them certain procedural rights, but doesn't define any substantive rights i.e. of who has what and what they can do with it.

Those who acquired residential rights on the state land by purchase have uncertain legal rights. The Extension of Security of Tenure Act (ESTA) requires the explicit consent of the owner of state land, which these people did not receive. It is possible, however, that IPILRA would apply to them as well since the local practice of land acquisition is in transition and it was agreed in a meeting that the committee would facilitate allocation to newcomers.

If the transfer of state land to the Thobelani CPA continues without amendment to the constitution, the constitution and IPILRA / ESTA will be in contradiction. The local concepts of membership and rights-holders are not agreed, are probably different from both the constitution and the legislation, and have the potential to move in different directions as different groups assert different bases for rights.

(B) Communal property

See *Figure 4*: Groups which seem to have different histories in relation to the property.

The common property at Gwebu includes the state land and the "four farms" which are being used for grazing. There is communal arable land on both the four farms and the state land. There is service infrastructure, the bulk of it on the state land - a road, a school, a bulk water supply with household connections, a community hall and the office used by the CPA secretary and the water service provider secretary. There is agricultural infrastructure including dipping tanks, fencing, and vegetable tunnels which are currently not in use. The CPA Committee also receives income from renting out a tractor and a truck bought with grant funding, from renting out the community hall for social events, and from people who pay for the use of grazing and grass cutting.

Communal property is complex, and there are signs that rights to this and holders of these rights are unclear to people on the ground. One resident, Mr B, wanted to plough, but does not know who to go to and how to apply. Some residents initiated a ministerial enquiry into the use of grant money and other finances by the CPA committee, in which it was discovered that the committee had made loans to some members, who then refused to pay these back because it was a means of getting some benefit from the property of the CPA.

4.2.3 Procedural rights

According to the constitution, members (household heads) also have certain procedural rights: voting rights in meetings (*clause 10.4*); to appoint a representative from the same household (*clause 10.4*); to stand for and be elected to the Committee (*clauses 10.4 and 6.1*); and to elect committee members (*clause 6.1*). Long-term occupiers who are not members of Thobelani CPA do not have procedural rights in terms of the constitution. IPILRA only grants them the right to prevent arbitrary eviction without compensation through appeal to the state. The procedural rights and the legal bases for them of different occupiers of the same piece of land are therefore different.

4.3 Land administration processes

The decision by the Inkosi to recognize the authority of Thobelani CPA in land allocation at Gwebu prevented a situation where applicants for rights had to deal with competing authorities. Application procedures have become clearer as people have used them.

Issues relating to transfer were causing some concern in the committee, where there is a gap between the constitution and practice, and practice varies between cases. According to the constitution, before such transfers become legal, the committee must first be notified in writing of intent to leave. Those selling must give first option to other members. If this is not successful they may sell to outsiders. The committee has to check on the suitability of newcomers who have to be approved as members by majority vote in a general meeting. In practice, many people have sold their rights to other people, left the area and moved away, so that there are new people living on sites. Only a few approached the committee asking them “to sell their rights” and the committee handled this successfully in one case. “One site is vacant and the CPA owns it.”

The lack of clarity on substantive land rights extends to processes for adjudication and recording. Approving applications involves an adjudication step to resolve doubts about the rights held, which in turn requires clear criteria for deciding who has rights and what these are. This is probably why the number of applications approved by the committee has been quite small. One example of unclarity regarding adjudication processes was a disagreement about the rights of sons and daughters of founding members of Thobelani CPA, i.e. about the basis on which sites might be allocated. In the early days of the CPA a place was identified in the new farms to give sites to children but “This was stopped in a community meeting where people said: ‘No more’”. Not all informants were clear about these shifts in attitude, and therefore disagreed on the current practice. Although written records are valued and looked after at Gwebu in a well-equipped office staffed by a paid Secretary, records are not being used to the full as rights administration tools: there was no copy of the constitution in the office; minutes of meetings are kept but there were complaints that they were not used.

4.4 Institutional linkages

The legal basis for the authority of Thobelani CPA over the “four farms” derives from the constitution and the fact that Thobelani CPA holds title to these four farms. The constitution provided for a management committee “to manage the affairs of the Association and implement its stated objectives” according to instructions given by the Members in a General Meeting, Special Meetings or Annual General Meetings of Members” (*clause 5.1*). Although the state land is not mentioned in the constitution and Thobelani CPA does not hold title to the state land, the state explicitly or tacitly left the authority for land administration on the state land in the hands of the tribal authorities from the late 1980’s. The authority for land allocation was explicitly transferred to the Thobelani CPA by the tribal authorities so that Thobelani CPA also has management rights over the state land. The authority of the CPA and of the Committee in land matters on both the four farms is widely recognized and understood as a principle by all informants, including the inkosi.

In practice, however, the Committee is only partly functional and feels powerless. Only a few members of the 15-person committee attend meetings regularly. Committee members talked openly to the Review Team of the divisions inside and beyond the committee – between the chairperson and the rest of the committee, between committee members who are resident and those who work elsewhere, between those who ask questions about their rights and the management of money and those who resent these questions. Factions in the committee have support beyond the committee. People who want to do something about theft of infrastructure have difficulty finding someone to report to, because it is unclear whose job it is to take action on the problem, for example, to report this to the police. The authority of the Committee is therefore difficult for residents to use in practice, and there are signs that this authority is being used less as people lose confidence in the committee.

Although most informants knew that there is a CPA and understood that it had authority in principle, the committee has great difficulty getting good attendance at community meetings. The general meeting as the highest decision-making structure of the Thobelani CPA seems to be non-functional.

In terms of the constitution the committee, the Tribal Authority and DLA have roles in dispute resolution (*clause 13*), and all these means of recourse have been used in practice, although the inkosi feels that the CPA only approached him when things were already serious and hard to fix. Mr D has used legal recourse beyond the constitution by employing a lawyer to open a court case against the CPA to deal with his dissatisfaction with the way his grant money was spent.

The differences in rights and rightsholders that emerge from trying to apply the constitution and legislation in the context of the complex property of the Thobelani CPA indicates a high degree of legal incoherence. Members of the Thobelani CPA Committee speak of procedures in the constitution of the Thobelani CPA as though they had a legal application on the state land, for example when they were speaking of their concern that some of the transfers by purchase might not be legal in terms of the constitution.

Access and language issues around the constitution add to this incoherence. Most of the people interviewed had no copy of the constitution, including the vice-chairperson of the current committee and the office, and it appears that there never has been a copy of the constitution in Zulu. In spite of the fact that few people have access to the constitution and some are unlikely to make use of it because it is written in English, people on different sides of the divides frequently referred to the constitution as an authority and as a source of direction, sometimes correctly, and were beginning to demand access to it. The document is difficult to read and refer to because of over-elaborate provisions, scattered and poorly sequenced information. It is silent on some of the issues that are contentious in Gwebu.

4.5 Factors affecting tenure security at Gwebu

This section asks some questions about factors that may have led to the confused tenure situation at Gwebu and to provide a basis for recommendations on improved practice.

How have land reform interventions dealt with the issue of group identity and functioning and what impact has this had?

The original settlement of the state land began under the leadership of Inkosi Jabulani Mdlalose, and it is clear that tribal affiliation was one basis for group identity at the start of land reform at Gwebu, even though this seems to be declining among younger people especially those that work outside the area. This notion of tribal affiliation as one of the bases for group identity is supported by the comment of the vice-chairperson of the current CPA committee that “Land was bought for the inkosi – the original agreement was that they were buying the four farms just to extend the state land, for all the families.”

A second factor in group identity in the early days of land reform seems to have been occupation of the land. The pre-feasibility beneficiary list included people living and working on commercial farms and people from far away. During detailed planning the Land Reform Steering Committee proposed a process of excluding people whose addresses showed that there were not members of the community – those from distant towns, for example. About 65 applications were removed. Only those living on the properties were registered.

It is likely that the original notion of membership was of individuals whose households had been accepted by the Mdlalose tribe and had been allocated sites. Under land reform this started to break down. During early negotiations some households refused to register for grants for the purpose of “buying” land, maintaining that they already “owned the land, it belongs to the inkosi”. To meet a land reform policy push towards smaller projects, only 285 of the original occupiers of the state land were registered as beneficiaries. Subsequently the constitution defined the founding members very technically as individual heads of households, who received settlement grants from the Department of Land Affairs, and whose names were reflected in the membership register, and then conflated this with the notion of holders of substantive and procedural rights. This seems to be playing out as confusion in people’s own minds as to what it means to be a member. There are fundamental differences

in the notion of member and therefore of group identity: the 285 original beneficiaries (abaxhasiwe) are also referred to as owners (abanikazi); “members are those on the list”; and the vice-chairperson’s comment quoted above.

In the paradigm of the CPA Act, membership means membership of a group of people and the properties held by the group must be specified. The original local notion of membership seems to have included the idea of group definition by tribal affiliation and by the land occupied. With the formation of the Thobelani CPA, the concepts of group identity and membership are undergoing transformation in different directions, as people assert different bases for group identity and rights to benefit. At the level of day-to-day working relationships, informants described a community divided into factions, not along lines of tribal allegiance versus lack of this, but as the result of bitter struggles within the CPA, fuelled by unclarity over rights to complex property, especially the distribution of income from use of grants and assets. If occupiers of State Land who are not members of the Thobelani CPA choose to assert their right under IPILRA to consent before transfer, the incoherence in the legal arrangements building on what has gone before carries in it the risk of destroying “togetherness”.

How have land reform interventions equipped the CPA Committee and membership for the tenure-related tasks facing them?

Information imparted to the review team can be categorised in relation to the central task of a communal property institution, namely to secure tenure. Gwebu faces the following difficulties:

- The structures which are legally responsible for running the CPA are functioning insufficiently or not at all. General meetings are very poorly attended and the Committee is only partly functioning: many committee members including the chairperson do not attend meetings regularly; it is divided into factions; there are questions as to whether it was elected according to the correct procedures and at the correct time.
- There is a whole cluster of unresolved questions about rights and day-to-day land administration: uncertainty about the rights of children of founding members, applications piling up in the office, uncertainty about how to get ploughing land, transfers of rights to outsiders without approval by the committee or the general meeting; the correct procedures in the constitution are not being followed.
- There are burning questions about management of the communal property including income derived from the use of assets: theft of infrastructure; lack of financial accountability.
- There are burning questions about the constitution that should give direction in dealing with these issues: it is generally unavailable; it is written in English legalese; it isn’t being used; its procedures are not being followed.

Rights and land administration issues seem to have vanished from the intervention agenda after the constitution was drafted. They were “hot” during the preparation of the business plan, but the issues are now quite different. The legal entity establishment processes and the drafting of the constitution clearly did not prevent the emergence of dysfunctional structures, nor did capacity building by consultants equip the committee and the membership for the task of managing complex common property. If the provisions of the constitution are any indication, legal entity establishment failed to work with and adapt what existed at the time in terms of understanding of rights, authorities and individuals with skill in land administration and familiar practices.

Although the review team heard complaints about the lack of consultation in the constitution drafting process, which was done with a small group and only two broader meetings, the degree to which people quote it, sometimes correctly, suggests that some of the work that was done at the time of legal entity establishment is retained. Plain language drafting in Zulu and wider distribution of the constitution would obviously have made a difference in terms of its wider use.

As people at Gwebu have contended with land administration issues of land allocation and transfer, so the processes for dealing with them have become clearer. Gwebu has dealt successfully with attempted land invasions, and with the problem of competing authorities for land allocation, which are considerable achievements. This raises questions about whether outside interventions (“capacity building”) around land administration should be programmed into land reform. If yes, what the core content and timing of these interventions should be and whether “once-off capacity building” which does not deal with land administration has any great value in helping people to cope with pressing responsibilities that emerge straight after land transfer.

5. What can we learn from an “older” CPA?

At Msikazi the Siyathemba CPA was established about a year before the review was carried out. Thobelani CPA was established three and a half years before this review. By comparing these very different projects, and using the framework for analysis of tenure security as a set of lenses, what can we learn about stages of development, as a CPA gets “older”?

The longer there is unclarity about rights acquired on different legal bases, the more difficult an agreed resolution becomes. Gwebu already faces the spectre of rights adjustment, working through an increasingly incoherent legal framework, with its potential for destruction of a functioning group.

Land administration and rights issues emerged immediately after transfer at Msikazi and continue to present leadership at Gwebu with pressing questions three and a half years on. In both cases, land administration and rights issues disappeared from the land reform intervention agenda after legal entity establishment, as though they had been dealt with. How these are handled remains critical far into the future in determining whether people are able to make use of rights that are intended to expand as a result of land reform.

The issue of distribution of financial benefits from communal property had not emerged at Msikazi although it will arise in connection with the planned joint venture. At Gwebu this is a burning issue, where the committee has handled both grant money and income.

In both places leadership pinpointed the problem of competing authorities for land allocation (tribal and CPA). At Msikazi the chairperson and the induna were discussing the issue and at Gwebu the issue had been resolved. In other areas the issue has led to violent conflict

6. Recommendations

6.1 Work at Gwebu

Problem statement 1

An application has been made for the transfer of state land to the Thobelani CPA in its current form. The existing constitution of the Thobelani CPA defines the members of the Association as the heads of households whose applications for a settlement grant were approved by the Department of Land Affairs. It defines the property owned by the Association as the four farms, although the powers of the management committee cover the acquisition of land in future. The constitution is an old model and deals poorly or not at all with substantive rights to the common property, blurs the distinctions between membership of the group, rights-holders and beneficiaries and offers no protection for individuals within households. The assessment reveals a group divided by confusions over rights to complex property and who the rights-holders are, and who use legal tools to assert particular positions on these issues. If the transfer of state land to the Thobelani CPA goes ahead without further work with the group and on the constitution, the legal consequence will be the creation of two groups of people, one of includes members of the CPA, whose rights are defined by the constitution (although poorly) and the other of which include non-members whose rights are more limited and less specific and defined by ESTA. In a community into which land reform has already brought confusion and division this carries high risks.

Recommendation 1

Preferably before, but if necessary immediately after, transfer of the state land to the Thobelani CPA, it will **be essential to get more clarity on the issue of the two pieces of land and the different rights on them**. We propose a three-step process:

Step 1: Get broad agreement from local and DLA stakeholders to processes of clarifying rights and rights-holders before transfer of State Land to the Thobelani CPA.

Step 2: DLA initiates a short process to answer the questions Who on the state land are members of the CPA and who are not? and How is this playing out? (These are the questions that the review team would have answered had the process at Gwebu run smoothly). This should enable DLA and local stakeholders to make an assessment of whether Thobelani CPA in its current form should or should not take transfer of the land.

Step 3: DLA initiates a longer process of clarifying the details: the complex property; what rights operate over this property (e.g. ownership, management, use); where these rights are; who has them and how they are administered. This is essential not only for the purposes of transfer of the state land, but also to remove some of the root causes of endless disputes in the group. It is one of the pre-conditions for the CPA Committee to start functioning (there are probably others).

NOTES:

1. Steps 2 and 3 are rights enquiry processes. Unlike labour tenant or ESTA rights enquiry processes, the objective is not to assess the degree to which people line up with definitions in the law, but to find out what their existing understanding and practice is.
2. The local solutions to the problems are more adversarial, structural or legalistic than these recommendations: take the CPA to court; initiate ministerial enquiries; translate the constitution; elect a new Committee, have a Trust instead of a CPA.

Problem statement 2

On the whole, people do not know what their constitution says so that they can make an informed decision as to whether to amend it or not.

Recommendation 2 (already implemented)

LEAP prepares a simplification of the EXISTING constitution, translates this into Zulu, comments on its strengths and weaknesses especially in the light of the proposed transfer to the Thobelani CPA, and presents this at a meeting on 28th August 2002 so that people can understand what they have got.

Problem statement 3

Amendment of the constitution is probably inevitable. The existing constitution is out of line with IPILRA and ESTA. It is also profoundly out of line with people's original vision, and probably with their understanding of members, rights and rights-holders, which are different for different people, and out of line with practice.

Recommendation 3

Any processes of making amendments to the constitution should follow, not pre-empt the processes of clarifying rights and rights-holders, in order that the gap between current understanding and practice and the legal requirements in the constitution remains as small as possible.

The experience that the Gwebu group has already gained in land administration can provide the basis for clarification of the roles of the CPA committee.

NOTE: In terms of the constitution itself, amendment requires the approval of a high quorum of members to be legal. The very large group and the difficulty getting meetings will make this difficult. (No recommendation)

6.2 Work at the district level

Problem statement 4

The Review Team has not clarified existing tenure arrangements around public services like the road and the water supply.

Recommendation 4

Tenure arrangements around public services need to be discussed and decided on, recognizing that there are tenure and management implications of choices of institutional arrangements for services. Giving land to the Department of Transport or the municipality in the form of ownership would have the advantage of reducing the burden on the CPA.

6.3 Provincial level recommendations

Problem statement 5

The notions of beneficiaries of State grants, member, household head and rights-holder are blurred in the constitution. An interest group has picked up on this as the basis for assertion of rights, with long-term implications for the destruction of group identity. Legal entity establishment processes clearly did not start with people's existing understandings of

member, household head, rights and rights-holders and their existing practices around land administration, adapted in a series of conscious agreements about shifts for the future, and then reflected in the constitution. A constitution was created, but not institutional arrangements that work.

Recommendation 5

Terms of Reference for legal entity establishment need to reflect better the primary task of legal entity establishment: institutional arrangements that can work, as well as people's own existing understanding of member, households, rights and rights-holders as a starting point.

Problem statement 6

The existing Gwebu constitution could not be translated and read out to people as it stands but required a tedious process of simplification to enable translation and explanation, simply to inform people of what is there now. Writing plain language constitutions in the vernacular is essential if they are to be accessible to multiple users, and familiar and available for rapid amendment in situations like that at Gwebu.

Recommendation 6

Terms of reference for future legal entity documents should include plain language and translation into the vernacular as specific requirements.

NOTE: Guidelines are available in the document. *Some tips for drafting legal entities in simple language*, Legal Entity Assessment Project, August 2000.

Appendix: Figures 1-4

Figure 1: Land administration processes in diagrams

Figure 2. Map of Gwebu drawn by five members of the Committee

Figure 3: Land uses and complex communal property at Gwebu

Figure 4: Groups which seem to have different histories in relation to the property

Figure 1: Land administration processes in diagrams (used in feedback at Gwebu)

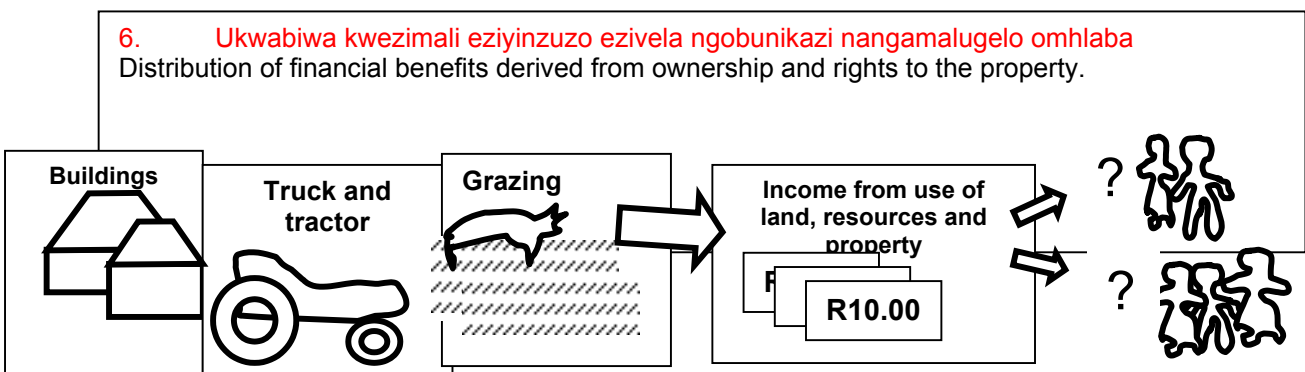
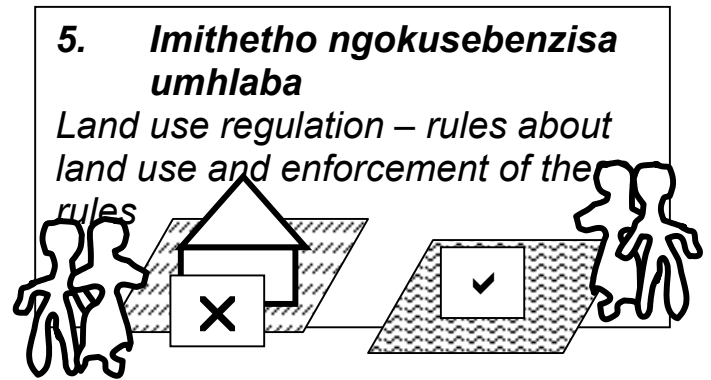
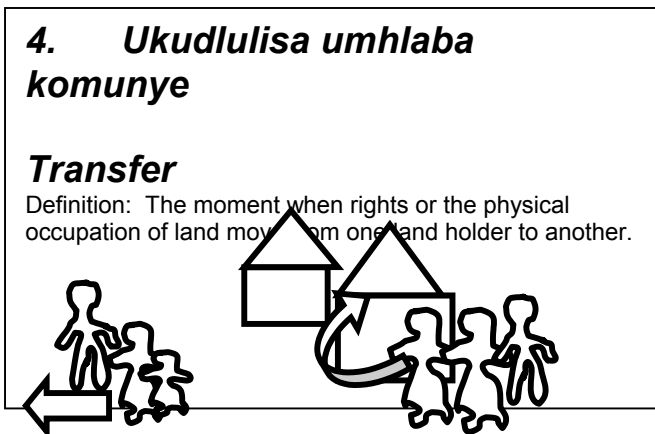
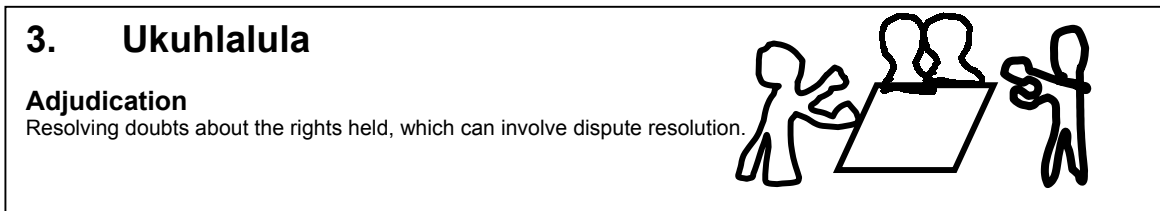
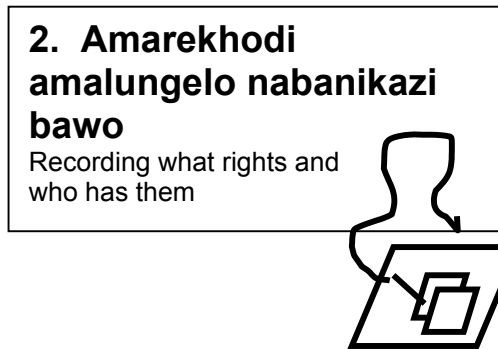
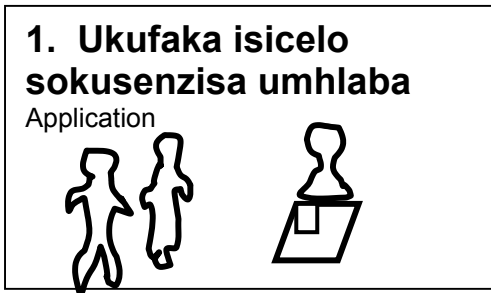


Figure 2. Map of Gwebu drawn by five members of the Committee

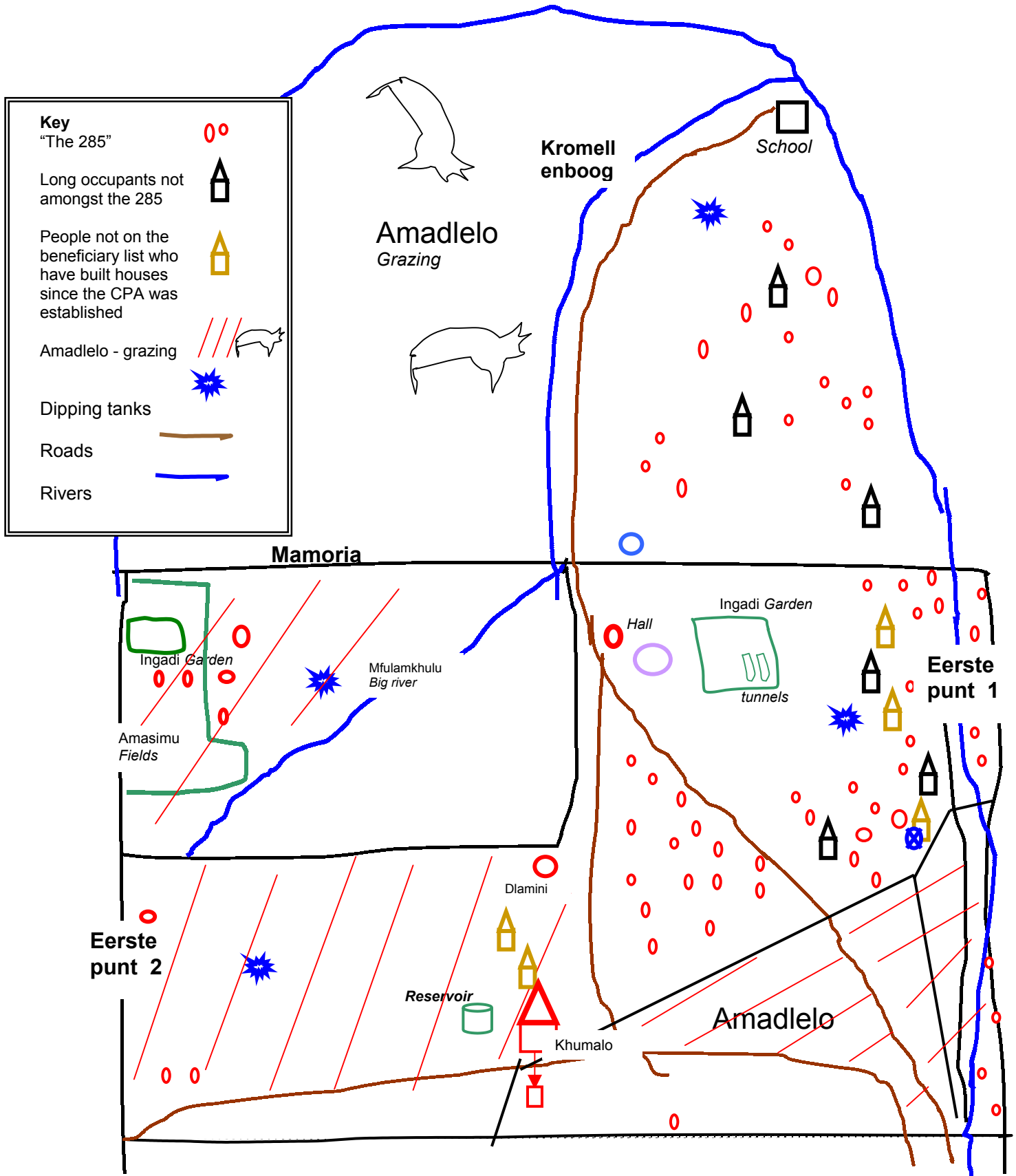
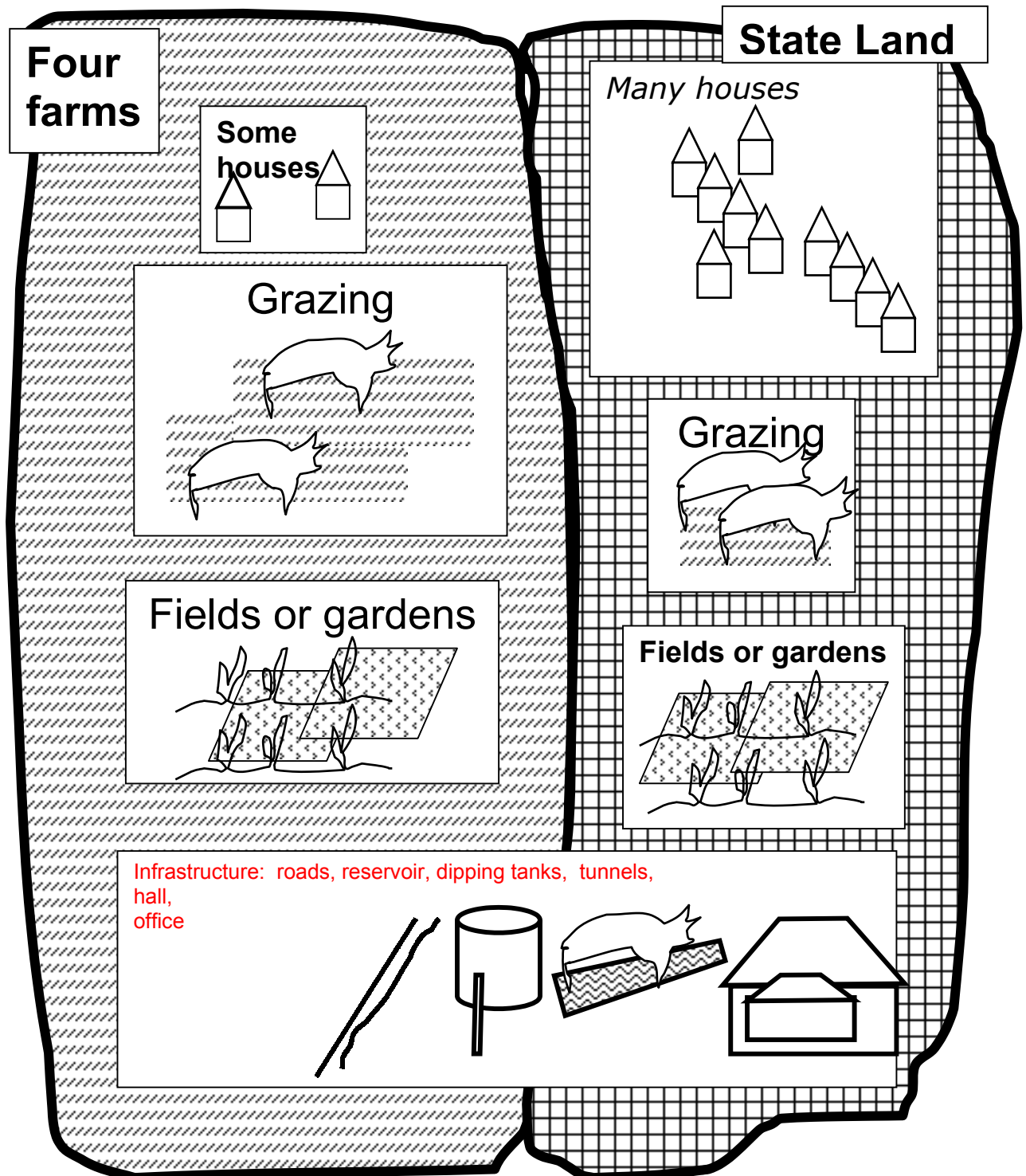
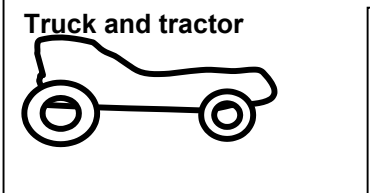


Figure 3: Land uses and complex communal property at Gwebu (used in feedback at Gwebu)

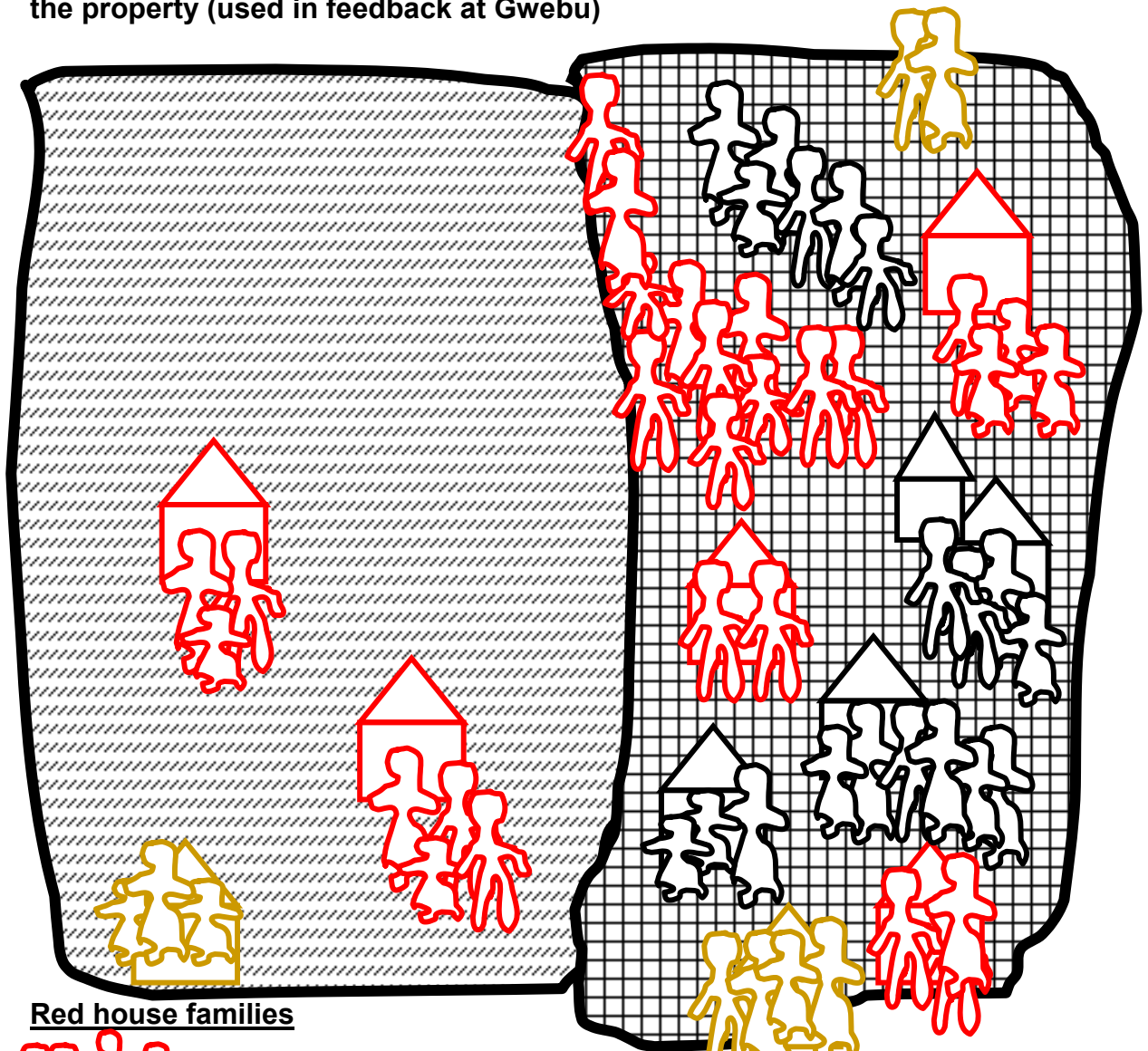


Note: Houses, cattle and crops are individually owned but the land on which these things happen is legally communal property



Income from use of land, resources and property

Figure 4: Groups which seem to have different histories in relation to the property (used in feedback at Gwebu)



Red house families



The families which got grants from government and are registered as part of the Thobelani CPA

Black house families



The families which are long term occupants of state land but didn't register with Thobelani CPA

Brown house families



Families which have got sites since the CPA was established
Most of these families originally allocated land by the tribal authority. A few allocated land by the CPA Committee.