Assessment of the Msikazi CPA

May 2002
Prepared by the KZN Provincial Team

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1.   Executive summary

The assessment of the Msikazi Communal Property Association in KwaZulu-Natal was undertaken for Department of Land Affairs' CPA Review process, which aims to assess whether communal property institutions (CPIs) set up under land reform are contributing to the achievement of land reform objectives. The criteria for assessment are tenure security for group and members of CPIs, achievement of the legal requirements of equity, democracy and due process and an improvement in the quality of life of members. Msikazi, as the first of a number of planned community assessments in the provinces, also offered opportunities to pilot a participatory assessment methodology.

The KZN Provincial Team developed field methods and concepts for assessing the tenure security of the individuals, households and the Msikazi group on the land acquired through land reform. Key to the field methods was the idea of critical incidents, which are events, issues or practice that have recently occurred and which highlight trends around tenure security. The concepts used included the notion of rights holders, where to look for tenure issues (land administration systems), what to look for to assess whether tenure security is improving or declining (indicators), institutional arrangements for securing tenure as a platform for improved livelihoods and external factors impacting on tenure.

The assessment showed that the tenure security of the group is improved particularly with respect to external factors given that the impetus for the land reform intervention was a threatened eviction. However, this tenure is threatened by the existence of a dual land administration system and authorities. One is the de jure, official system that is only known by a few community members and is not generally used and the other is the de facto system that people know and use widely. A joint venture with a neighbouring farmer also poses threats to the collective group right because the procedures are unclear and unknown and the tenure underlying this outsider's proposed rights have not been discussed.

The tenure security of households is threatened by two factors. The first is the lack of clarity in practice around situations in which households can lose rights and their recourse options when their rights are taken from them. The second is the abandonment of rights as a result of livestock theft and the absence of effective remedies, particularly in women headed households. However, there are also trends that could strengthen household rights. These include the new local registration processes and old practices around demarcation and witnessing, which need to be aligned and recognized officially.

The tenure security of individuals has not changed particularly that of women whose rights are still subject to family decision-making. An indication of social change, however, is the great number of women headed households, which may provide an opportunity for the DLA to work with women's rights to land.

In terms of institutional arrangements, the key concern is the duplication at local level. It is necessary that the community is supported to make conscious decisions on how to integrate the existing practices and structures with the official rules and committees. Failure to do this will result in competing authorities with serious risks for tenure security. The relationship between the group property and external institutions is also very vague with respect to development and the tenure arrangements that will

affect development. For instance, there is no discussion about who will hold rights to the land on which a proposed road will be built, with implications for who can assume responsibility for its maintenance. Likewise, the proposed joint venture has not been assessed from the perspective of tenure rights, which limits the information that members need to make proper choices.

It is recommended that DLA undertake capacity building that focuses on institutional hybridization and clarification of rules, procedures and records in order to create a single land administration system with a structure whose authority is recognized locally and externally.

2.   Introduction

The assessment of Msikazi communal property association (CPA) on the KwaZulu-Natal south coast is part of a national DLA objective to assess land reform legal entities, most of which are CPAs or trusts. The national objective emerges from a concern amongst land reform officials and practitioners about how successfully these legal entities are contributing to land reform goals. In order to understand the underlying problems better and to find solutions to them, a national task team made up of national and provincial DLA officials and NGOs was formed in April 2001 to drive a diagnostic audit of legal entities (amongst other things). Provincial teams were set up to carry out the audit, with KwaZulu-Natal undertaking the first assessment at Msikazi.

The national task team developed a framework for assessing legal entities. This framework argues that as owners of common property, legal entities are institutions that secure the tenure of groups and of members of groups in order to create a stable platform for development. Assessments of their performance need to measure the extent to which these institutions:
- Secure the tenure of the group and its members
- Meet legal requirements of equity, transparency, non-discrimination, inclusivity, democracy and accountability
- Improve the quality of life of members

The first task of the provincial teams was to undertake pilots. These pilots have two tasks:
- To develop and refine methodology for local level assessments on a larger scale.
- To assess whether common property institutions are achieving the desired outcomes of land reform in order to inform interventions to improve their viability. This would involve deepening our understanding of problems that people are facing and strategies they have developed to deal with these.

This report therefore makes both an assessment of tenure security at Msikazi and critically presents the methods used for the assessment. As the first CPA assessment nationally, Msikazi is "the pilot of a pilot". The effectiveness and replicability of the methods used can therefore only be assessed when pilots in other provinces are complete.

3.   The Methods used to assess Msikazi

3.1   The team

The assessment involved four aspects: field design, facilitation, analysis and report writing. The assessment team included the Legal Entity Assessment Project (Leap) and the DLA planner in KwaZulu-Natal responsible for Msikazi, who is also part of the provincial team. Leap tended to be more actively involved in all the phases than the official, whose time was constrained for various reasons. She was, however, actively involved in the initial design and facilitation processes.

The Msikazi experience raises the following issues for the CPA task team to consider in terms of the make-up of teams and roles of team members when planning assessments:

- The participation of the DLA official responsible for the project being assessed in design of field processes is important because they have critical insights into local dynamics and processes. Moreover undertaking remedial action following the assessment will depend on that official and her or his understanding of the current problems and strengths of the communal property institution.
- Field facilitation was difficult for the DLA official because it required her to shift her role from that of an official with authority responsible for implementing policy to that of a participatory researcher facilitating peoples' own critical reflection. These roles do not sit easily together and this raises questions about officials facilitating field processes in the areas in which they work.
- The action research approach used at Msikazi demands a high level of facilitation skill and understanding of tenure.

3.2 Action research methodology for the field assessment

A broad design for field processes at Msikazi was developed and then revised and modified following the implementation of each step as we learnt more about the local situation and issues.

The following activities made up the assessment:

Activity	Purpose	Date
Noting baseline information with Leap and the DLA planner.	To create a base to understand community issues.	December
Meeting with the chairperson and secretary.	To explain the context and purpose of the CPA review and arrange meeting with the CPA committee.	29 January
Meeting with the committee	To understand some of the issues coming up for the CPA committee, to set up meetings with CPA members.	9 February
Two focus sessions with about 70 people at Msikazi, representing households, many of which are headed by women.	To check understanding of basic concepts, to build a picture of institutions people work with around land, to develop understanding of household land use and tenure issues.	25-6 February
Telephone interviews with business plan consultant, chairperson of CPA committee.	To explore whom is recognised as having authority and linkages to external institutions for recourse and development.	April
A final feedback meeting to which the whole community and the Municipal Councilor for the area were invited.	To feed back outcomes and recommendations, to check information and insights and enable people to plan future action	April

Participatory tools were used to create a basis from which to ask questions and discuss tenure and institutional issues. These tools included a timeline, a land use community map, pictures of institutions people work with, household mapping that was built into the community map and a feedback matrix in which critical incidents, assessments of tenure security and recommendations were related to the kinds of rights holders.

Key in the method of doing field assessments was the analysis of critical incidents around tenure security. Critical incidents are those actual changes or events or examples of practice at community level that highlight problems or good practice around tenure security and suggest whether tenure security is increasing or decreasing. This involved asking people to describe what has happened recently as the basis for probing specific issues and dynamics.

Household mapping

3.2.1   Assessment of methodology

Three important outcomes were achieved using action research methodology:
- The focus group discussions worked with issues of felt importance to people and helped create a more collective understanding of the confusion around who makes land allocation decisions.
- The design generally enabled in depth conversations around the abstract issues of tenure security.
- The design enabled information to be extracted for the national assessment and simultaneously enabled the community to assess their own situation.

3.3   Using the checklist

The national CPA task team created a checklist for local level assessments. This was to guide the information to be collected during local level assessments, as well as providing a format for comparing assessments undertaken nationally.

In practice we used most of the headings and some of the questions to guide the design, probing and capturing of information. However, many of the questions did not apply in this particular case. The checklist must be used as a reminder of what may be important and not as a set of questions that must be answered. Some questions cannot be asked in fieldwork in the same form in which they appear in the checklist.

The checklist does not provide indicators of tenure security and therefor cannot be used for analysis. It is useful to build a general picture of a land reform project and to construct a context in which to understand the tenure issues but it does not help in making an assessment of tenure security. This general picture provides the basis for analysis and some of it is useful for the report. However, the report is more usefully structured around the assessment itself otherwise reports would be very long descriptions rather than analytic and to the point.

In working with the checklist we have made some changes to it to make it a more useful working tool.

3.4 A framework for analysing tenure security

The fieldwork at Msikazi ran parallel to a process in which the CPA Task Team was developing a framework for assessing communal property institutions. By the time of the feedback at Msikazi, the analytical framework had already shifted somewhat. The following framework is the most up-to-date at May 2002.

The analytical framework to analyze the information from the CPA Review fieldwork has five conceptual "blocks":
- An understanding of who the rights holders are and what rights they hold.
- What issues matter in assessing tenure security, or **where to look**.
- Indicators for assessing the tenure of the rights holders, or **what to look for**.
- The institutional arrangements for securing tenure as a basis for improving the quality of life of groups and members of groups.
- Social and political issues that affect the tenure and therefore quality of life of groups and members or vice versa.

Key factors contributing to the improvement or decline of the tenure security of members and groups should be explained in detail as a basis for intervention and future monitoring in specific cases.

3.4.1 The rights holders

There are three primary rights holders to consider in common property; namely the group, households and individuals. Other rights holders may emerge. (In Msikazi the neighbouring farmer in the proposed joint venture would be one rights holder as would holders of servitudes.)

A quick scan asking whether the tenure of each of these rights holders is understood and secure is a useful base to begin a more rigorous process of analysis. It would also be useful to include here a preliminary assessment of whether the tenure arrangements constrain or enable future development.

3.4.2 Where to look - what matters

Tenure concepts tend to be complex and abstract. In order to concretize them we identified key events in tenure administration that are useful to look at when assessing the tenure status of a community. These are:

> **Application:**
> Definition: A formal request to get or to give land, to change land use or to get help in resolving a land dispute
>
> **Recording:**

Definition: Creating evidence about the extent of a right (demarcation), the owner of the right (such as registration) and the nature of the right as a basis for adjudication.

Adjudication
Definition: Resolving doubts about the rights held, which can involve dispute resolution.

Transfer [1]
Definition: The moment when rights or the physical occupation of land move from one land holder to another.

Land use regulation
Definition: The rules /practices about how members/individuals can use different portions of land and the mechanisms for enforcing this.

Distribution of benefits derived from ownership and rights to the property and the mechanisms for achieving this.

3.4.3   What to look for - indicators

The following indicators are presented as statements. They describe several important aspects of an ideal tenure situation and they give a picture of tenure security when used together. They were used in the assessment to describe trends in tenure security rather than to draw yes/no conclusions about the tenure security of individuals, households and the group. The indicators thus help to draw conclusions as to whether the tenure of the group and its members is improving or declining and what impact this has on people's quality of life.

- People have clear rights, they know what their rights are and they can defend these rights. *Differentiate for different land uses.*

- Processes of application, recording, adjudication, transfer, land use regulation and distributing benefits are clear, known and used.

- Authority in these processes is clear, known and used.

- These processes do not discriminate unfairly against any group or person.

- The actual practice and the legal requirements in terms of these processes are the same.

- There are places to go to for recourse in terms of these processes and these are known and used.

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[1] The term "transfer" is used here in its common sense definition of land rights moving from one person to another without specifying the technical process of how this happens. The legal definition of transfer refers specifically to the process in the Deeds Registry Office when <u>ownership</u> of land moves from one (legal) person to another.

3.4.4 Institutional arrangements for securing tenure

Institutional arrangements include structures and relationships. These can be internal structures with their respective areas of jurisdiction and how they relate to one another as well as external structures that the internal structures, the group and members are linked to or draw on and how they relate to these.

There are two primary issues here:
- The community constitution (or trust deed) and the law in terms of which it is drawn up will prescribe a set of institutional arrangements. The community practice may vary from this prescription, resulting in a tension between the de facto and de jure tenure arrangements and thus creates ambiguity in the tenure status of members.
- A key question is whether the institutional arrangements block or enable agreed land use objectives to be met. (Tenure security is both an end in itself <u>and</u> a means to improved livelihoods.)

3.4.5 Assessing the analytical framework

The analytical framework described here enables a rigorous process to assess tenure security and one that may be useful in the national assessment. However, the Msikazi assessment team noted some gaps:

- Broad social issues can impact on tenure security and yet are not themselves tenure issues and cannot therefore be explained in terms of the analytical framework above. This includes crime and violence, which may cause people to abandon land.
- The loss or abandonment of land rights is a powerful indicator of tenure insecurity. The analytical framework tends to assess tenure processes rather than focus on outcomes. The loss or abandonment of rights is an outcome of tenure insecurity.

At this stage we suggest that where these broad social, political or economic issues are impacting on tenure security and institutional functioning, they should be clearly noted as they may be important causal factors. These tend to be factors people themselves or DLA have little power over and so are not amenable to remedial action. However, their prevalence may be critical in understanding the performance of common property institutions.

4. Assessment of tenure security at Msikazi

4.1 Background

The Siyathemba CPA at Msikazi lies just inland from the KwaZulu-Natal South Coast, about 45 km by road from Hibberdene, the nearest town of any size. In terms of local government it falls into the Umzumbe Local Municipality and the Ugu District Municipality and into the Southern Coastal Regional Programme of the KZN Department of Land Affairs. The CPA was registered and the land transferred from Mr S. to the CPA in 2001.

The people of Msikazi understood that they were part of the Amadungeni tribe and that their land fell under the Dungeni Tribal Authority until 1996 when a farmer, Mr S, bought the land and attempted to evict them. The occupants appealed to DLA who set up a redistribution project for 125 households registered under the names of their household heads. Business planning under the project has subsequently resulted in proposals for a joint venture with Mr S to grow sugarcane commercially and the District Council is proposing a tourism venture on Msikazi Mountain. 125 households are registered for subsidies and this corresponds to the number of households on the ground.

People live in scattered homesteads on the sides and at the bottom of steep hillsides running down to the valley of the perennial Qhuha River. There is a clear settlement pattern consisting of homesteads each with buildings, cultivated fields and fruit trees. The remainder of the land is used communally for grazing. Apart from a recently upgraded school and a road, there are almost no services or infrastructure.

About 65% of the registered heads of households are older woman. Most people are on pension or unemployed.
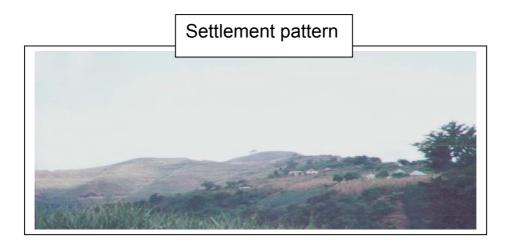
During pre-planning (1998-2000), issues about legal entity formulation were discussed and an interim committee was set up. The CPA constitution was developed in two one-day workshops over two consecutive weekends, and were attended by representatives from about 70% of households, drawing on work throughout the land reform process. A lawyer drafted the constitution in English. The DLA planner developed a simplified version of the constitution in Zulu, which was used in the official adoption process. This document organized according to headings in the Schedule of the CPA Act.

Consultants drew up a development concept plan (Msikazi Final Business Plan, August 2001) for residential development and income-generating activities:
- A sugarcane growing enterprise as a joint venture between the former landowner, Mr S, and "the community". .
- A communal vegetable production enterprise.
- Grazing livestock.
- The development of a road, which would be linked to proposed tourism development on Msikazi Mountain and would require "co-ordination" with the Municipal Council.

Implementation will require that the plan for Msikazi becomes part of the Integrated Development Plans of the local and district Municipalities, which are still being developed.   The DLA Planner has ensured that the Msikazi plans remain on the IDP "agenda".

Settlement pattern

4.2   Critical incidents around land tenure

Widow: How do I register as the household head
A widow approached the committee to ask who will be the household head now that her husband has died. The committee advised her to talk to other family members and reach a decision with them about whom the head should be. If there is a problem in the family, then the widow may report to the committee. It isn't clear what sort of problem the committee thinks it could intervene in.

Allocation of residential and arable land rights to Mr C
An outsider, Mr C, wanted to farm. He talked to a member of Msikazi community, approached the induna and chose a site near the road. The induna checked on him with the induna of the area where he came from. After he'd paid "a little" to the induna, the induna allocated the site and then informed the CPA committee. This decision was ratified and witnessed in a community meeting attended by men, women and young people, who accepted Mr C as a member of the community, after which his name was included on the list of registered members.

The joint venture with Mr S
The consultants responsible for drawing up the business plan and the DLA planner provided for economic development at Msikazi by developing a proposal with Mr S for a joint venture to grow sugarcane. The proposal was work shopped in a community meeting. Mr S has been working for several months on an agreement and plan (for example, outlining how sugarcane plantings and roads will affect residents).

The CPA treasurer understands the proposal as follows: "Mr S will plough for four years and pay R10 a ton into the 'community purse'. He will put in fertilizer and a tractor. After four years the land will come back to the community. Those who talk to the committee will take over. [i.e. Those who are keen to be part of a future commercial enterprise will apply to the committee and there will probably be a selection or negotiation process.] The whole community represented household by household will make a decision." Residents are much less clear about the proposal than the treasurer and the chairperson.

The joint venture and Mr T
One household lived inside the area proposed for sugarcane. Mr T described how he "was eaten by the map". During detailed planning his household was offered the choice of remaining on their current site and being surrounded by sugarcane, or moving closer to the road where services and infrastructure would be available to them. The household moved to a new site where they have smaller fields than before. He complained in a community meeting and was told to use what he has been given and only to ask for more when it is finished. He is not happy and sometimes feels he needs to keep quiet.

Households which have left the group because of livestock theft
There is a serious problem with the theft of livestock. Households with women living alone have been targeted. Two families have left the area because of this. In one of the cases, a woman's goats were stolen. She reported this to the induna but when she was unable to identify the thieves, he was unable to help her and suggested she approach the police station. In a second case, a woman left her "house and her food" (her growing crop) after her livestock were repeatedly stolen. Although the constitution requires that people leaving must inform the committee, this hasn't happened. The homes are still vacant. The chairperson sees the need for the committee to take the initiative and find out what these women want to do with their sites.

Mam' N.'s boundary
Someone ploughed over Mam' N.'s boundary. She went to the induna who solved the problem by pointing out the boundary.

4.3   Social context affecting tenure

The targeting of women headed households for stock theft and the absence of an effective recourse and intervention has resulted in two households abandoning their land rights at Msikazi. This is a general social issue about crime, the incapacity of structures to deal with it and its impact on people's lives, which in these cases has both a gender and tenure dimension. In terms of tenure, it suggests that criminal activity can be so destabilizing that households may sacrifice their tenure rights to escape it.

4.4   Rights holders and their tenure rights

The main holders of property and communal rights at Msikazi are the group or community, households and individuals. A partner in a joint venture will become a

rights holder, but the nature of his rights still need to be clarified because this proposal is still being finalized.

The group:

As a CPA, residents at Msikazi are legally constituted as an association with the right to own property and with the obligation to set up a committee to manage the internal rights of members and the property itself according to a locally developed constitution. The constitution defines membership of the group as households that are beneficiaries of grants, residents who buy immovable assets from a member who is leaving or outsiders who buy the rights and immovable assets of a vacating member after a community meeting has approved his or her membership. The physical division and allocation of property must be dealt with in accordance with the settlement and development plan.

However, very few residents at Msikazi have any understanding of the term communal property association, the work of the committee or of the constitution. The group understands itself in terms of a tribal identity where key land management functions are the responsibility of the tribal authority. Residents and the tribal authority had always thought the land was "theirs" and initially resisted the idea of buying something that they already owned. Membership is understood as people who were born on the property or who have applied to the headman (induna) and have been accepted in a community meeting.

The land reform intervention has resulted in some change to this tribal identity - "We are now more free" - but the new form is still emerging and is as yet unclear. One change is the general agreement that land decisions taken by the induna require ratification in a community meeting.

Households:

The constitution distinguishes between members of the association, which are households, and members of registered households. This broadly reflects practice in terms of land allocation to households rather than to individual members of the community.

The number of grant beneficiaries is the same as the number of households, although some households refused to apply for grants because they believed the community already owned the land. These households are in the process of being included in the membership list.

In the constitution all members are entitled to be allocated the exclusive use of a residential site and equitable rights of access to grazing and arable land. The extent of the residential and arable rights that each member is entitled to is determined by the majority of members in a general meeting. The rights of members to common property are described in the constitution as grazing only.

In practice, members' rights to the common property include natural resources such as water and wood. Households also hold the rights to residential plots and arable land although the household head makes decisions about these lots and about the family. Household head means "I manage the household and make decisions." Exactly what the family holding is depends on historical agreements and on luck:

some big families have small sites and some small families have large sites. At transfer the size of the sites was left as it was. There is no sense that people think this arrangement is unfair. It seems, however, that a perception of household entitlement is that sites that are big enough to build on and plots are big enough to give all household members who want them fields. This is because "there is enough land" and is not necessarily a permanent right of households.

Individuals:

The constitution uses the term "members of registered households" to distinguish individuals from members of the Association, which are households. Members of registered households who have reached the age of 18 years have the right to attend and speak at a general meeting and to exercise the one vote per household on behalf of their household. They have the right to inspect records including minutes, the membership register and copies of financial statements and records of the Association. They are eligible for election as committee members. Under the constitution, no resident can be evicted without a court order and informing the regional officer. In practice, the rights of individuals to residential and arable land are mediated through the household. Individuals do not hold independent rights to property. The field team did not work with the indicator "People are clear what rights they are eligible for" and therefore the criteria for approving applications from residents for sites and arable land are unclear.

Joint venture partner:

DLA has facilitated a joint venture between the previous owner and the CPA. This will involve the previous owner, Mr S, having access to a tract of the land for four years to plant sugar cane. The development concept plan proposal presents some elements of a possible agreement and deals with feasibility, costs and responsibility for carrying costs. Some income would come to "the community", presumably the Fund mentioned in the English constitution. Mr S has been working on the agreement but it has not yet been finalized.   There is no mention of tenure arrangements.

Development rights holders:

The tenure arrangements underlying proposed infrastructure development, namely, a road, and services are not mentioned in the business plan and have not yet been developed as part of the IDP process.

4.5   Tenure security at Msikazi

This is considered at three levels: that of the group as a whole, of the households that make up the group and of individuals who make up the households. The assessment is on whether the Msikazi community is moving towards or away from greater security of tenure since land reform in the area and the establishment of their CPA.

Group:

The tenure of the group as a whole is more secure from external forces. The group's legal ownership of the land means another landowner cannot evict them, which was the catalyst for the land reform intervention in the first place. The CPA secretary has copies of the title deed, the registration certificate for the CPA and a minute book. The original title deed is lodged in safe deposit. Members of the group also perceive themselves to be more secure - "we can now build block houses" and "we are now registered" which may be both in relation to the threat of eviction by a landowner or in relation to the tribal authority.

However, **there is a potential for the group's security to decrease as a result of internal processes.** There are a number of indications of this, namely:
  o The processes for allocating communal land to the joint venture and the authorities and recording systems involved are unfamiliar. The application, adjudication, recording and transfer of the rights involved in the joint venture were not handled consciously as land administration processes in a new situation under a new set of rules, and therefore remain obscure to the new owners.
  o There is more than one authority and set of procedures through which people can come into the community and acquire land rights, the official ones of the constitution and the familiar de facto ones of the traditional practice. This is evidenced by Mr C's arrival and acquisition of land rights through the induna, which has resulted in a reduction in the rights of the group. However, everybody knows about Mr C and seems happy about his arrival although some committee members question how these allocations should happen in future.
  o The procedures in the constitution provide clarity about the moment of transfer and thereby strengthen subsequent processes to determine who has rights at a particular time. In practice, however, there is a lack of clarity about the status of the rights of the households that have abandoned their land. Transfer processes and adjudication can become fuzzy if this trend continues and start to eat into group rights. The concern of some members of the committee to find out what the households that have left want to do with their land could clarify this issue.
  o There is no clear collective vision of future land use and purpose. The official vision is of agricultural production while residents are most concerned about their own household rights to residential sites and fields and show little active interest in the joint venture. This suggests that the land acquisition is not viewed as an important agricultural asset for the group. Instead, some people express that "there is enough land" to accommodate outsiders settling, suggesting the possibility of increasing settlement densification rather than investment in agricultural production, unless a clear collective vision is developed. While these possible options around future purpose remain implicit rather than clearly chosen, there is the risk of diverging purposes operating in different land administration systems leading to increasing unclarity within the group.

Households:

There is some existing tenure insecurity for households, which are the primary holders of residential and arable land rights, as indicated by the loss and abandonment of household land rights.
  o In one case, a household has suffered the loss of some arable land in order to accommodate plans for the joint venture. Significantly, the head of the

household has attempted to oppose this loss of rights at a community meeting showing that he has not consented to it. His attempt failed and he has no effective recourse to take the matter further despite the violation of both legal rights to the arable land and de facto rights in terms of the traditional system of allocation. The English and Zulu constitutions have a future focus in terms of the rights of members and are silent on the issue of the rights of members to their land holdings at the time the CPA was set up. The loss of rights without consent or compensation and the absence of effective recourse mechanisms highlight a serious failure in the institutional arrangements for securing household tenure at Msikazi.

o In the second case, the abandonment of land because of stock theft means that general conditions for enabling secure tenure do not exist for more vulnerable households and that these households have no remedy. We do not know if this is increasing, decreasing or staying the same and note that crime is part of a larger social context that internal structures are unlikely to be able to manage by themselves.

There is a threat to future tenure security of households, which relates to the joint venture, and similar initiatives. The English constitution contains a standard principle of equity which requires that distribution of benefits should be equitable, or that adjustments be made to "equalize ostensible disparity" between members. The Zulu constitution handles this as equal rights to arable land and use of grazing. Because of the unfamiliarity of the rights and processes involved, households are currently poorly positioned to defend their rights to benefits from the joint venture.

There are, however, some processes in place that can strengthen the tenure security of households **if they are maintained and supported.**
o Although they are new, the processes for registration of household heads are widely known, supported and fairly well understood by the broader group. Residents are deeply pre-occupied with being registered. People who are not registered are not secure: "If you are not registered you can leave any time". The register consists of a DLA printout that the committee keeps of household heads and who is in the household. However, it is unclear what will happen when DLA is no longer available to retype the list after new households are added. Clarification of this and how officialdom will relate to the list in future is important.

o The constitution requires that the membership register reflect the exclusive rights, interests and benefits of each member household in relation to the property. People understand and use traditional processes for creating evidence to use in adjudication by pointing out boundaries in the presence of witnesses and placing boundary markers. These processes need to be aligned with the registration process and not undermined. They have worked for residents in the past in the familiar situations of resolving boundary disputes. However, in the allocation of land for the joint venture, an unfamiliar situation, the traditional recording process was not applied as evidence of a household right to counter-balance the power of the group.

Individuals within households:

The tenure security of individuals is the same as it was; it has not been affected either way by land reform. This is indicated by**:**
o The constitution grants members of registered households' procedural rights and protections and requires that the membership register reflect details of

household members. It is silent, however, on the issue of household decision-making, even on critical issues such as termination of membership and sale of immovable assets. In practice, individuals' rights continue to be subject to patriarchal household decision-making. These processes are not transparent to outsiders and individuals have no recourse to challenge household decisions about their land rights. For instance, when approached to clarify procedures for registering new household heads on the death of a spouse, the committee refused to take responsibility for determining a widow's status and instead referred the decision back to private household decision making processes.

Note: The social structure of households is changing. Many households in Msikazi are women-headed. Is there a role for land reform processes in engaging at this level?

4.6 Institutional arrangements for securing tenure

The picture of institutional arrangements for land management at Msikazi is not an unfamiliar one in KwaZulu-Natal land reform projects. Two sets of local institutions exist, the official one set up in terms of the CPA Act and guided by the community constitution and the traditional one that has always been used. The official one is largely unused except in situations that have emerged as a result of the land reform intervention, such as the joint venture and registration of household heads. The traditional one continues to be used and is well known to all residents. Some adaptations to these traditional institutions are emerging as a result of the land reform intervention but these adaptations are not guided by the constitution, which makes very little reference to the traditional institution except to give the induna a role in dispute resolution.

The committee was set up during the first elections and is still functioning, although members are at times unclear about what their precise role in land administration is. Only some members of the committee have any understanding of the constitution while other residents have no understanding at all. The chairperson believes there is a need for the committee and the broader community to internalize their new role and responsibilities in terms of the constitution and has reminded people in a general meeting of what they had agreed to in the constitution. He is also arranging for photocopies of the constitution to make it more broadly available.

Some members of the committee and most residents place responsibility for land allocation with the induna and recognize that this authority comes from the inkosi. The application, approval and demarcation procedures are all informed by the traditional practice and both insiders and outsiders still approach the induna when they want sites. The induna assesses whether an application is legitimate and decides whether or not to allocate. The chairperson and treasurer, however, understand that legally application should be made to the committee and should be accepted or rejected on the basis of agreements in the constitution. The constitution gives the committee the power to allocate rights to members to occupy and use the property, subject to the approval of the majority. The physical division and allocation of the property has to be dealt with in accordance with the settlement and development plan approved by the majority of members at a general meeting. The

chairperson and treasurer are concerned at the gap between what is prescribed legally and what actually happens.

However, elements of institutional hybridisation are emerging. There seems to be wide agreement that a community meeting is needed to ratify land allocation decisions by the induna, thus creating a mechanism for accountability to members. There also seems to be broad agreement that responsibility for services, infrastructure and registration is the work of the committee and members of the committee have had contact with a municipal councilor and officials around bridges. Furthermore, although there was a conscious decision that the induna should remain outside the committee, he works closely with it despite having been publicly disciplined for this by the traditional leaders. There also seems to be implicit broad agreement that the induna should continue to have a central role in land allocation and adjudication.

Anxieties around institutional coherence nevertheless remain. Members of the committee have asked: "Whose stamp is recognized as being responsible for development in our area? The stamp of the inkosi? The stamp of the committee?" As part of the leadership's attempt to resolve this dilemma, the induna and the committee have together examined the issue of tribal levies and plan to propose to the traditional authority that the committee should also be able to raise levies for a community fund.

There are two key issues of concern. The first is the gap between de jure and de facto procedures and rights and the second is the existence of multiple institutions with overlapping authority. The constitution provides that outsiders can only become members after insiders have refused the option to buy improvements from a resigning member and has been introduced to and accepted by members in a community meeting. Since transfer, an outsider has become a member and has accessed land rights without any of these provisions being met. Legally application should be made to the Committee, with the general meeting as decision-making authority, but in practice the induna authorized it. The constitution also provides for clear determination of the moment of transfer through the requirement that members who leave inform the committee in writing. The two households that abandoned their land did not do this.

5.   Conclusions

The tenure of the group and households is more secure overall while the tenure of individuals is the same as it was. A key threat is the non-alignment of old ways of managing rights with new ways introduced through land reform. Land reform at Msikazi has rapidly introduced new local institutions, rules and procedures into a set of existing institutions and practices, thus creating uncertainty in a context where the situation is changing and is unfamiliar. Integration of the old ways of managing rights with the new needs to be managed much more consciously.

The Msikazi constitution does not accommodate existing land administration practices and authorities and is silent on the issue of existing household rights. The confusions that result when recognition of what exists isn't granted have appeared

very quickly at Msikazi - the year after CPA establishment. This poses an immediate threat to tenure security. Integration needs to be deep rooted and conscious and include practices for recording rights and dealing with transfer issues, which are not as obvious as authorities and allocation of rights.

Development plans have no tenure component to them, which suggests that development is not seen as part of a land administration system. This poses future risks around Msikazi's access to development resources, responsibility for maintenance of services such as roads and to the tenure security of members when development plans such as the joint venture are implemented. There is a need to make clear the relationship between tenure and development in this community.

6.   Recommendations for Msikazi

6.1   Work at Msikazi

Build a functional hybrid institution, focusing on land administration processes
- o Members of the committee and the induna plan to meet with the ubukhosi family to clarify some practical aspects of the relationship and are hopeful of a good outcome. This attempt at local problem-solving around clarifying the relationship between the committee, the induna and the ubukhosi family should be monitored and supported with care not to undermine the process.
- o Committee members and the community valued the action research process that enabled them to name more clearly the confusion around institutional roles and procedures. Check whether the committee wants further support to take this process further, being realistic about what will happen and without the expectation that all that is necessary is that people "must be educated about the CPA rules". In other words, build a hybrid institution that will function.

Clarify and confirm household rights and mechanisms for their protection
- o Use Mr T's case as a test case for understanding household rights and developing procedures on recourse for households. Note that DLA needs to be active here as it has a role as a recourse authority. The process should also build on local practices around recording rights (boundary demarcation), thinking through how to align these with new registration processes and the future role of DLA in the maintenance of these records.

Build collective vision
- o Use the joint venture as a starting point for discussion and thinking about a collective vision around future land use. Raise awareness of the joint venture as one option for land use with implications for group and household tenure as well as for income-generation. It is possible that options will involve trade-offs between the objectives of household tenure security and the objective of setting up an income generating activity. The joint venture can also be used to assist people to understand how outsiders can become rights holders and how clarifying the nature of the rights they hold can contribute to securing the tenure of all parties.

<u>Individual rights</u>
- o Discuss the role of structures in internal household decisions around land rights and what recourse individuals have where decisions contradict agreements reflected in the constitution. Use the case of the widow and construct "what-if" situations.

<u>Protection of vulnerable people's livestock</u>
- o Discuss stock-theft as an issue of collective problem-solving for the community and the new institution. Identify what can be done within the community and what support is needed from outside and where realistically this might be obtained.

The maintenance of registration systems has the potential to become a hot issue in tenure security but does not feel as urgent as the above issues:
- o While people are committed to the principle of registration it is unclear how these systems will be maintained when DLA is no longer available to re-type the list.
- o The only current provision for recording the extent of a site is the traditional practice. At the local level, this is the basis for asserting historical rights and needs to be held more consciously and supported officially as people move into new situations. This discussion could draw on the experience of Mr T, who did not mention the principle of using witnesses and markers as evidence in asserting his right against the group and the joint venture.
- o Explore with people whether they want to extend their current recording systems into some kind of written record e.g. formal records of decisions and names of witnesses in the short term.

Implementing the above recommendations may result in the need to amend the constitution.

> During feedback the DLA Planner suggested that the issue of clarifying the very local institutional arrangements (bringing the CPA and the tribal structures together) could be handled as part of a DLA-funded capacity-building process. Capacity building processes are common in KZN (although their emphasis has mainly been on bookkeeping or regulation of land use rather than institutional arrangements for tenure) and she was hopeful of raising the budget. Clarifying institutional arrangements would require clarification of principles guiding land administration and the procedures for this (the content of most of the local recommendations above). It would also involve clarifying the role of the community meeting as a significant structure. This would create the base from which training needs could be identified.

6.2 At the municipal level

The development concept plan is silent on tenure arrangements that underlie plans for the delivery and maintenance of infrastructure and services. The degree to which

municipal officials involved in IDP planning processes consciously work with tenure arrangements for delivery and maintenance of infrastructure and services, offer choices of tenure arrangements and are clear about the implications of these choices is unclear. The DLA planner has been monitoring the IDP processes and should raise these questions there. A servitude in favour of the municipality, for example, shifts the burden for road maintenance from the Association to the municipality but would involve the allocation of a group right to a new rights holder. There would also be implications for survey and registration costs.

The municipal councilor for Msikazi was unclear about the authority issues around land administration at Msikazi and needs to be kept informed about the issues and about developments.

6.3   Provincial level recommendations

Perspectives and criteria such as income-generation, policy requirements and regional plans currently take precedence in making choices during detailed land use planning. The focus on land administration events made us aware that land use plans need to be evaluated from the perspective of who is the most appropriate holder of the land rights, that there are choices to be made in this respect and that these choices carry different implications. These decisions should be handled procedurally as land administration decisions, which would go a long way towards helping groups to develop a much more critical understanding of their rights and responsibilities and the authorities and procedures involved in decisions around these.

Post-transfer capacity building processes are common in KZN, and have focused on financial management, committee skills and regulation of land use. The actual capacity needs vary from place to place. However, the confusion in transitional arrangements for securing tenure seen at Msikazi is typical of many land reform projects and needs to be considered as one possible priority area for capacity building.

Writing plain language constitutions is essential if they are to be accessible to multiple users, and these must be available in the language used by members of associations (see Appendix 1). Terms of reference for future legal entity documents should include plain language and translation into the vernacular as specific requirements. Guidelines are available in the document *Some tips for drafting legal entities in simple language*, Legal Entity Assessment Project, August 2000.

Feedback

With respect to tenure security the position of most people at Msikazi is still quite good. However the tenure security issues at Msikazi represent a threat for the future if action is not taken.

Appendix 1: Analysis of the Msikazi constitutions as tools for specific users

Msikazi CPA has two constitution documents: a long, complex document in English and a much shorter simpler document in Zulu. The Zulu version is not a direct translation from the English and its wording and arrangement are quite different. The Zulu constitution was intended only as a tool to capture the main points of the English constitution for the limited purpose of helping Msikazi people in the approval process. The English constitution was used for the post-approval registration processes and the last page has the chairperson's signature.

Possible users of the Msikazi constitutions include the people of Msikazi, who speak but do not always read Zulu, (i.e. a mix of people who can remind themselves of its provisions by reading it and those who remember by hearing it read) and outsiders who may read and speak English only, or both Zulu and English, and who may or may not have legal training.

These different users might use the constitutions for different purposes. Some people in the Msikazi CPA Committee quote the Zulu constitution in explaining their understanding of definitions and authorities and what their agreed procedures are. The English constitution has been used to enable the Association to take transfer of land and to authorize the Committee to act on behalf of the Association to negotiate this and other agreements involving outsiders.

In future, lay outsiders might use the constitutions to get information on definitions (e.g. of members and rights) and on procedures and authorities for decision-making. In cases of serious dispute, the document might be used in court for adjudication.

The Msikazi constitutions were assessed using the following criteria.

Constitution is available to members of the association in the vernacular.

Appropriate provisions: There are no provisions that are glaringly inappropriate for the people who have to use them. The document is tight and flexible in appropriate places.

Clarity: The document should not require considerable re-reading before its meaning becomes clear. It uses everyday language and clear technical terms instead of legalese.

Arrangement: Connected ideas are grouped together to aid users' understanding. More important ideas come before less important ideas. Subject headings are organized in a way that helps understanding.

Flow: There is little or no cross-referencing to other clauses or to legislation unavailable to the reader. Definitions are presented in the context in which they are used, not in a separate clause for definitions.

Economy: There is no unnecessary repetition and no irrelevant detail.

> **Consistency**: The document does not include internal contradictions. The same term is used for the same idea throughout. The document is not ambiguous.

Although its original purpose was quite limited, the Zulu constitution is a much more usable tool for the purposes of people on the ground. The degree to which the Committee is familiar with its provisions reflects this. The Zulu constitution is an attempt to move in a useful direction and in the following analysis some of the differences in treatment between the English and the Zulu are highlighted to bring out strengths and weaknesses of both.

Appropriate provisions
The fit of the English constitution with practice at Msikazi has been outlined in detail above. It is good in some areas and poor in others.

Clarity, arrangement, flow, economy
The Zulu constitution fills only 6 pages of large writing, uses short sentences and everyday language, contains only one cross reference and is a much easier document to use than the English. A reader whose third language is Zulu could follow its main provisions and find information much more easily than in the English, once she had the key to its arrangement.

The subject headings and numbering of clauses in the Zulu constitution follow the exact wording and numbering of the Schedule to the CPA Act. This arrangement scatters some information that should probably be linked. The subject heading is usually, but not always a good guide to the contents under that heading. This fault does not undermine the basic user-friendliness of the Zulu constitution for people on the ground and non-legal users.

It is very difficult for any reader to find key information in the English constitution.
- It is written in legalese. Long sentences with many unnecessary words and unnecessary qualifications are the norm. There are a few cases where the language is simpler and clearer: for example Clause 23.3, which deals with use of the property: "*The physical division and allocation of land shall be dealt with by the Association in accordance with the settlement and development plan approved by the majority of members at their general meeting.*"
- There are many examples of cross-referencing; both internal cross referencing and cross-referencing to different pieces of legislation.
- It is twenty pages long and includes three pages of definitions.
- Subject headings are sometimes, but not always a reliable indicator of contents. For example, "No person under the age of EIGHTEEN (18) years may be allowed to represent a household at the meetings of the association" appears under the heading "Membership".
- There has been an attempt to put important things first: membership appears in clause 8, before the description of how the Committee and general meetings of members are set up and what their powers are. However, the key clause 23 "Use of the Property" is lost at the back of the document amongst pages of information on statutory offences, monitoring and inspection, indemnity and requirements of the commissioner.
- Information on some key issues such as membership is scattered.

Consistency

The English constitution gets confused between households and individuals as members in the rights clauses. This is an internal contradiction.

Comparing the English and the Zulu for consistency is tedious because of the different arrangement of clauses and the length of the English. In a spot check, the provisions in the Zulu could mostly be traced to clauses in the English.

How do the language issues play out in provisions likely to be important at Msikazi?

Founding members

The English constitution does not provide very clear answers to the question "Who is a member?", but in the clauses which might answer this question, manages to hold fairly clearly the idea of a household as a member. Clause 5.1.1 defines members as households that received state subsidies. Clause 8.1 refers to Clause 8.3 and speaks of the names of household heads on the Schedule A to this constitution. Schedule A was not attached, possibly because it was incomplete. Clause 8.3 defines "individual members of the Membership of the association as households resident on {list of properties} at the time of adoption of the constitution." At Msikazi resident households and households receiving grants are the same thing. This is not true of many other land reform projects, where the size of households for the purpose of receiving subsidies swells and shrinks with changes in policy and may bear no relation to how people organize themselves on the ground.

Note that in the English constitution the idea of members as households breaks down in some of the clauses dealing with rights (see below).

In a few lines, the Zulu constitution defines the members and deals with the practical reality of the incomplete list. It defines the members as those households which received grants, notes that the list (Schedule A) of household heads who stand for these households hasn't been finalized, gives the committee the responsibility of finalizing the list and notes that it must be approved by the community first.

Entry of new members

The qualifications and procedures for entry of new members are fairly clear in the English, although unnecessarily wordy: they can only enter by purchasing improvements from an outgoing member; they apply to the committee and must be approved in a community meeting.

Rights and obligations

The English and Zulu constitutions make no reference to existing rights. Both make attempts to define land use rights of households and limit the right to alienate land. The English constitution gets confused between households and individuals as members in placing limitations on "personal rights. - "Rights accrue only as a consequence of his or her status as a member..." (Clause 10.3); "attachable by any creditor of such a member or vest in his or her trustees on insolvency" (Clause 10.3.2); and in dealing with inheritance "Membership of the association.... can be terminated by the death of a member" (Clause 11.1). The Zulu constitution falls into the trap of talking about termination of membership through the death of a member (Clause 9) but makes it quite clear in clause 12 that the "inheritance issue" is who will

represent the household and that the family needs to notify the committee of this. There seems to be no equivalent clause in the English constitution.

Decision-making and authority
By wading through pages and pages of detail and flapping to and fro in the English constitution, it is possible to work out what decision-making structures are being established, and what their areas of authority are:
- o **The general meeting of members** which makes the final decisions in key areas such as new membership, the approval of the settlement and development plan in terms of which physical division and allocation takes place and rules regarding management and administration of land;
- o **The annual general meeting of the association**, which deals with both a narrative and a financial report by the committee and is the forum in which election of the Committee can take place;
- o **The special meeting of members** which deals with matters such as termination of membership, eviction of a resident and amendment of a constitution;
- o **The Committee** has pages of powers as the agent of the association, subject to the constitution, direction from the General Meeting and the CPA Act.

The Zulu constitution deals with all these very briefly, giving subject headings to all except the special meeting of members which is referred to only when it comes up, as the urgent meeting (*umhlangano ophuthumayo*). It does not explicitly state that the powers of the Committee are limited.

The role and powers of the tribal authority are an issue for the Committee and for broader membership. In the Zulu constitution, the community identity is described as *Umphakathi okukhulunywa ngawo ongaphakathi kwesigceme saseQhuha ngaphansi kweNduna uChiliza, kamaziphathe waseMadungeni* (The community being talked about is inside Qhuha ward under Induna Chiliza managed by Dungeni Tribal Authority). Similar phrasing is used to describe the property that will be owned by the Association. The phrasing might fuel some confusions and could be used to assert some political position of "underness", although the subject headings make the application clear enough.

Disputes and discipline
The Msikazi constitutions use very local recourse that reflects local practice – the Induna lives on the property owned by the CPA. In the Zulu constitution the sense is simply that moral crookedness and offences are to be reported first to the Committee in order that they take necessary steps. Failing this they are to be reported to the Induna of the Qhuha ward within the Dungeni Tribal Authority. Unresolved matters are to be referred to the Director General (Mqondisi Jikelele). The Zulu constitution clause on disputes simply refers back to the clause on discipline. The broad sense of the English is the same. The English clause on disputes has its own subject heading; the corresponding clause on discipline may exist but is difficult to find amongst all the words.

Conclusion
The Zulu constitution was prepared in an attempt to take up the issue of language in constitution documents in a limited way by preparing main points in written form for helping people through the approval process. It was not intended to create "two legal entity documents for one project" and the analysis therefore does not deal with the larger issue of whether two documents for one project contributes to tenure

insecurity. Intended or not, the Zulu constitution is much more feasible as a tool for people on the ground and for non-legal outsiders, although future constitutions using it as a model would need to work with some of the arrangement and content issues. The English constitution is an unfriendly tool for all non-legal users and might give problems to lawyers and courts trying to work with the relationship between membership and rights.