

# RESEARCH Report 43

## *Imithetho yomhlaba yaseMsinga: The living law of land in Msinga, KwaZulu-Natal*

*Ben Cousins*

*(with Rauri Alcock, Ngididi  
Dladla, Donna Hornby,  
Mphethethi Masondo, Gugu  
Mbatha, Makhosi Mveli  
and Creina Alcock)*



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*Mdukutshani Rural Development Programme, LEAP and  
the Institute for Poverty, Land and Agrarian Studies at the  
University of the Western Cape*



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*This report is dedicated to Tessa Cousins (1955-2011), co-ordinator of LEAP, who played a key role in initiating the Imithetho yomhlaba yaseMsinga project.*



# Introduction

This report describes the ‘living law’ of land in one part of Msinga, a deep rural area of KwaZulu-Natal. It presents research findings from the Mchunu and Mthembu tribal areas, where a three-year action-research project was carried out by staff of the Mdukutshani Rural Development Programme<sup>1</sup>. Launched in 2007, at a time when implementation of the Communal Land Rights Act of 2004 (CLRA) appeared imminent, the project aimed to gain a detailed understanding of land tenure in Msinga, facilitate local-level discussion of potential solutions to emerging problems around land rights, provide information on the CLRA to residents and authority structures and help generate ideas on how local people could engage with the new law.

Implementation of the CLRA was never initiated, in part because of a legal challenge to its constitutionality launched in 2005 by four rural communities. In May 2010 the CLRA was declared unconstitutional in its entirety by the Constitutional Court, on procedural rather than substantive grounds. Substantive arguments for and against the CLRA were not considered. In part, this was because the Minister of Rural Development and Land Reform, Gugile Nkwinti, conveyed to the court his intention to repeal the law, whatever the outcome of the court hearing, because it was no longer consistent with government policy. Legislation to secure the land tenure of people living in communal areas is required in section 25(6) of the Constitution, so a key question is what law will replace the CLRA. To date, neither the Minister nor senior officials have provided any indications of how they intend to answer this question.

Securing the rights of people living within land tenure systems informed by customary norms and values (so-called ‘communal tenure’) is a key issue within South African land reform policy. To be consistent with the Bill of Rights, decision-making around land must allow for democratic participation, and decision-makers must be accountable to ordinary people. In addition, given strong commitments to equality, the law must provide for gender inequality in the holding of land

rights. But are tradition and customary law compatible with the principles of democratic citizenship enshrined in the constitution, or are they fundamentally at odds? This is a controversial issue, and no consensus exists amongst scholars, policy analysts, land activists and South Africans at large. Recent Constitutional Court judgements suggest that the notion of ‘living customary law’, as distinct from the codified versions set out in statutes, legal precedents or academic texts, creates opportunities for custom and democracy to converge (Claassens and Mnisi 2010). Or is this a chimera, bedeviled by the difficulties of ascertaining the content of ‘living custom’ at any one moment in time (Bennett 2008)?

This report hopes to contribute to the debate on these important questions. It attempts to move beyond the static descriptions of land tenure found in much of the South African literature by analysing the changing reality of land relations in Msinga at present. It describes a normative ideal of land tenure that residents of Msinga readily articulate, compares this with the practices that people actually engage in and shows that there are subtle but significant differences in land holding, land use and administrative practice in different wards (*izigodi*) within these very large ‘tribal’ areas. Our research shows that ‘customary’ land tenure in this area is far from static, and that the terms on which land is claimed, held and used tend to shift over time — but also that change processes are uneven and sometimes contested.

To illustrate and to help set the scene for the detailed findings that follow, Box 1 provides details of two decisions taken by the Mchunu traditional council in 2009 and 2010 in relation to the land rights of women and the registration of customary marriages. Single women can now be allocated land and establish their own homesteads, and co-habitation with male partners will be viewed as ‘marriage’ for purposes of registration. Here, changing social realities are being accommodated by fundamental shifts in (local) rules on land allocation and in how customary marriages are viewed by traditional authorities.

<sup>1</sup> Formerly known as Church Agricultural Projects (CAP).

<sup>2</sup> The term ‘tribe’ has fallen out of favour with scholars in recent decades in part because of the use of the term by colonial and apartheid regimes, along with notions of race and ethnicity, to help construct and justify a range of oppressive policies, but also because of doubts over its usefulness as an analytical category (Skalnik 1988). The term *isizwe*, or nation, sometimes used in translation, is contentious because democratic South Africa is a unified nation state. The term ‘tribe’ continues to be used by many people, in Msinga as elsewhere in South Africa, to denote groups or ‘communities’ under the authority of traditional leaders, with the implication that it refers to a political rather than a cultural entity.



In contrast, the nearby Mthembu traditional council is resisting pressures for local land tenure rules to be brought in line with changing social realities. Here, traditional leaders portray themselves as bolstering 'traditional' norms and values around marriage and fam-

ily life, and express their unease with notions of gender equality. The issue of the compatibility of customary law and gender equality, a key issue in national debates but also at the local level, is thus being responded to in sharply contrasting ways in Msinga.

### **Box 1. Changing the customary law of land in the Mchunu tribe**

In July 2009 staff of the Mdukutshani Rural Development Programme met with the chief of the Mchunu, *Inkosi* Simakade Mchunu, to discuss some of the findings of the *Imithetho yomhlaba yaseMsinga* research project. Around 40 people were present, including all the headmen (*izinduna*) for the Mchunu area. The *Inkosi* said that the Mchunu traditional council (*isigungu*) had recently decided that the laws around land allocation should be changed.

The council had decided that anyone in need of land to establish a homestead (*umuzi*) could now apply for such land, including single men and women, whether or not they had children to support. However, applicants were not automatically entitled to land: people living in the area, i.e. their prospective neighbours, together with the *ibandla* (a council of local men who are 'old enough to be wise') and the headman (*Induna*) first had to approve the application.

According to the *Inkosi*, the *isigungu* had not yet informed members of the Mchunu 'tribe' of this decision, 'in case it encourages bad behaviour'. The way that the new law would be implemented was that if someone had a problem and approached traditional leaders to ask for land, they would be offered such land. This, he said, was an adaptation of the old laws of the Mchunu, and not something completely new.

At a project workshop held in Pietermaritzburg in October 2009, the vice-chairman of the traditional council, Vumeluyise Ximba, said that land allocated to unmarried women would generally be located near their father's homestead. This was to provide women with protection and security while allowing them some independence through the establishment of their own homesteads. He said that this practice was not unknown in the area, but it had never been a 'law' before. Other members of the council suggested that they were worried about the consequences of this decision, particularly in relation to the possibility that people would see this as condoning or encouraging 'immoral behaviour'. This concern informed the idea that land for a new *umuzi* should be located close-by to that of the *umuzi* of the woman's father or brother, so that the family could watch over the behavior of the young people establishing the *umuzi*.

In 2010, the traditional council decided that 'people who live together but are not yet married will be given a letter, so they can go to the Department of Home Affairs and be registered as married'. This decision was motivated in part by the requirement of the Recognition of Customary Marriages Act of 1998 that all customary marriages be registered, but also, and more importantly, by the need of rural women with male partners in urban employment to be able to claim death benefits or insurance payouts in the event of their partner's death. This they can do only if they have a marriage certificate.

# Foreword: If the hills moved, the boundaries would change

By Creina Alcock



A group of herd boys watched the first beacon being erected on Ngongolo Hill in 1920.

'They dug a hole and hit the iron,' said Petrus Majozi, who was the smallest herd boy there. "The first day the police called all the men to look, and discuss, and showed them: 'This is your boundary'<sup>3</sup>.

Three men were photographed next to the beacon, standing to attention on rocky ground, and the blurred photograph would be filed away with the 1919 report of the 'Board of Inquiry into the Abatembu-Amachunu Boundary Dispute'<sup>4</sup>.

The boys watched from a distance, and when the men had dispersed, went to examine the stake, which was eventually cemented in among rocks on the Weenen district boundary. A declaration of holy ground?

'It was exceptionally rough and broken country,' the Board reported. And it is still rough and broken country, little changed since the Board spent three days riding and tramping across the hills in the company of two chiefs and their followers. Somewhere underfoot was a boundary line that had tended to shift with the years. Up the hills? Down the hills? As far as the Tugela River?

The problem was one of amity. The tribes were allies, despite 'breaches of the peace', and were cautious of open confrontation.

The Board settled on a 'principle'. High land for the Mchunus. Low land for the Mthembus. 'We feel we have decided on a boundary which apart from being in every way equitable, is so clearly defined and understood that only an upheaval of nature can change it,' the Board reported.

If the hills moved, the boundary would change.

The hills stayed in place, but the boundary kept running, under the fence and across private farms. In 1928 the government made an attempt to recognize the tribal boundaries on Weenen farms, but although the undertaking had the backing of the chiefs, the proposals were turned down as 'detrimental' to the interests of the landowners<sup>5</sup>. The decision left questions that have never been resolved, and which continue to generate conflict.

In 1933 the Mthembu chief, Kufakezwe Mvelase, made an offer to buy the farm Lorraine on the Weenen-Msinga boundary, a move that would have given legitimacy to the Mthembu kraals that had climbed out of the stony valleys, over the crest of Ngongolo. The landowner, Heinrich Meyer, was well aware of the difficulties, and soon had second thoughts<sup>6</sup>.

'I have been very careful right from the start not to do something that might cause trouble among the two tribes,' he wrote. He owned a block of three farms on the location (tribal) boundary — Lorraine, Koornspruit and The Spring. If the Native Affairs Department would buy the land, 'then it will belong to the Government and they can arrange it to avoid trouble among the two tribes.'

For trouble was coming, and it would centre on his farms, where Mthembu people were steadily enlarging their fields onto what was considered Mchunu territory. At issue was the status of farm land. If you were a tenant living on a farm, could you ignore the invisible tribal boundaries?

Tensions came to a head in September 1944 when six Mchunu were killed at a wedding on a farm in the Mthembu area. Three weeks later 6 000 men clashed in what has been described as 'the biggest battle ever fought since the Anglo-Zulu war'<sup>7</sup>. Sixty six men were killed, and 279 were convicted of fighting after offering themselves for trial at Tugela Ferry<sup>8</sup>. (6)

When CAP arrived in the district in 1975, it purchased Lorraine, Koornspruit and The Spring, a block of three farms on the Weenen-Msinga boundary, with nothing to show there was a hidden battlefield lying under the grass. The farms were empty. They had been 'cleared' in September 1969 when the Weenen Farmers' Association asked for the abolition of the labour tenant (six months) system. Africans who refused to work full time were served with eviction notices, and eventually an estimated 10 000 to 20 000 people in the district were forcibly removed.

Many of the original residents of the farms (as well as veterans of the 1944 battle), became early members of the project and helped to plan a programme of work which was soon disrupted by realities. While the farms (subse-

3 Majozi fought in the battle of Ngongolo, and went on to become Chief Induna of the tribe. He was chairman of the CAP Farm Committee, and later a CAP director. He died in 2002.

4 CNC 1556/1913

5 CNC 1/5/13 Volume 83 A

6 1/WEN 3/3/1/3

7 Clegg, Jonathan, quoted in *The Star*, May 13, 1980, "80-year feud of the blood."

8 Inside the farms little changed. The encroaching Mthembu had been burnt out before the battle and after being burnt out twice more settled down to plough, this time within boundaries laid down by the landowner Heinrich Meyer. (Interview, Ndala Mbatha, 1981.)

quently known as Mdukatshani) were developed as a resource centre for people from the tribal areas, CAP became involved in efforts to prevent ongoing removals, as well as legal aid, drought relief, land rehabilitation and crafts.

Early in 1979 an inter-clan conflict broke out at Mashunka *isigodi*<sup>9</sup> on CAP's boundary, the first of twenty one conflicts that turned project areas into war zones which were out of bounds to staff for months at a time. Not one of the conflicts was inter-tribal. Mthembu fought Mthembu, or Mchunu fought Mchunu. If nothing else, the conflicts provided insights into the difficulties of farming in a period of war, when cattle and goats are raided to feed the *izimpi* (regiments), and men plough their fields with guns in their pockets — or just stop ploughing at all.

In 1991 CAP formally established a land claims programme, which became an effective lobby

for the district, and developed into MRDP/CAP's current work with emerging farmers. Although CAP long ago ceded most of Lorraine, and all of Koornspruit and The Spring, to current occupants and land claimants, the transfers have yet to be finalised due to delays at the Commission for the Restitution of Land Rights.

The farm section of the Mchunu-Mthembu boundary remains contentious, however. In 2005 Chief Simakade Mchunu and Chief Ngoza Mvelase visited the farm together to inspect an Mthembu kraal deliberately erected on the Mchunu side of the invisible tribal boundary. The owner of the kraal, Mnikinwa Dladla was ordered to move — and left the area.

While the collaboration between the chiefs is encouraging, the land reform process has brought no finality, and the boundary across the farms remains undefined.

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<sup>9</sup> An *isigodi* is a local ward within a larger 'tribal' community, and is under the authority of an *Induna*.



# Chapter 1: The Imithetho project and its contexts

A significant proportion of South Africans, perhaps one third of the population<sup>10</sup>, live in rural and peri-urban areas under systems of land tenure known variously as 'traditional', 'tribal', 'customary' or 'communal' land tenure. Post-apartheid South Africa is urbanising rapidly, but many people who move to towns and cities continue to maintain strong links with their rural families and places of origin. Livelihood strategies often combine activities and income flows from both rural and urban areas, and are underpinned by family and kinship relationships that span the rural-urban divide. Given high levels of unemployment and the insecure nature of much urban income, land-based livelihoods remain important for many rural (and some

peri-urban) households whose members engage in small-scale agriculture or gardening as well as using a variety of natural resources for food, shelter, and income. The significance of land varies greatly between individuals, households and communities, but the fact that it is a crucial component of the livelihood strategies of the poorest rural households, and of poor women in particular, means that access to land remains a key issue for rural poverty reduction (Trade and Industrial Policy Strategies (TIPS) 2009). Continued insecurity of tenure in relation to land and natural resources is thus a significant problem that must be confronted and addressed by policy makers.

<sup>10</sup> One estimate suggests that 16.5 million people live in communal areas (Budlender 2008)

Tenure reform is one of three key foci in government's land reform programme<sup>11</sup>. It aims to secure the rights of black South Africans whose rights to land are insecure as a result of racially discriminatory laws and practices in the past. This includes residents of communal areas whose land rights have weak legal status and are vulnerable to the decisions and actions of state officials, traditional leaders or other 'big men'. Land tenure security is addressed in the Bill of Rights in the Constitution, with sections 25(6) and (9) requiring government to pass a law to give effect to the right to secure land tenure.

Despite its potential impact on a large proportion of the population, however, communal tenure reform lags far behind other components of land reform. The CLRA was passed in 2004, but implementation had not yet begun by the time it was struck down in its entirety by the Constitutional Court in May 2010<sup>12</sup>. There is now a legal vacuum in relation to these sections of the Bill of Rights.

In considering the contents of a law to give effect to these constitutional commitments, it is vital that tenure reform policy be informed by sound understandings of the realities of existing land tenure systems and land administration regimes. Yet the contemporary literature on communal tenure is somewhat thin, and misleading stereotypes of communal tenure abound in the media and in public debates. This report hopes to make a contribution to improving understanding of the complexity and variability of communal tenure by presenting in-depth research findings from a three year project carried out in Msinga, a rural area in KwaZulu-Natal.

It is also important that the citizens whose rights are directly affected by policies and legislation should understand their content and their local implications, and be empowered to engage with officials when they are implemented. This project attempted to provide relevant information on the CLRA and on other relevant laws and policies to local residents and leadership structures, and thus had the character of an 'action-research' project.

## The project

*Imithetho yomhlaba yaseMsinga* was an action-research project on land tenure laws and

practices undertaken by the Mdukutshani Rural Development Programme (MRDP), formerly known as Church Agricultural Projects (CAP), in collaboration with LEAP, an action and learning project focused on land tenure. The project was initiated in January 2007, with funding provided by the Joseph Rowntree Charitable Trust of the UK, and ended in December 2009. The project was implemented in Msinga in the Mchunu and Mthembu areas where the MRDP has worked since 1975.

The objectives of the project were fourfold:

- a) to provide information on the Communal Land Rights Act (CLRA) of 2004 to local residents and traditional authority structures
- b) to gain a detailed and in-depth understanding of local land tenure 'laws'<sup>13</sup> and practices, as well as emerging problems or tensions in relation to these rules and practices, through field research in selected *izigodi* (wards) within the two tribal areas
- c) to assist local residents and authority structures to discuss and propose potential solutions to key problems
- d) to facilitate discussion of how local residents and authority structures might wish to engage with the CLRA when it was implemented in Msinga.

Msinga local municipality is located in the Midlands region of KwaZulu-Natal, and comprises communal land i.e. state land occupied by Africans and administered by traditional leadership structures. The adjoining municipality of Weenen is made up of white-owned farms, some commercially farmed and others held as 'labour farms' until recently (see Figure 1). Some of these farms are now being transferred to former labour tenants, land restitution claimants, or beneficiaries of the land redistribution programme. The CLRA would have applied to all the communal land in the district, but potentially also to all land transferred through land reform to a group or 'community' (Smith 2008: 44).

A linked piece of legislation, the Traditional Leadership and Governance Framework Act (the TLGFA) of 2003, is being implemented in KwaZulu-Natal through a provincial version

<sup>11</sup> The others are land restitution and land redistribution.

<sup>12</sup> See Chapter Two for summaries of the grounds for the legal challenge to the CLRA and of the final court judgement.

<sup>13</sup> *Imithetho* is the *isiZulu* word for laws, customs and statutes. In this project the term is used to refer to local 'laws' or rules around land, as distinct from statutory laws.

of the Act, passed in 2005<sup>14</sup>. Traditional councils, which in most places are transformed versions of the old Tribal Authorities established under the infamous Bantu Authorities Act of 1951, were established in the Mchunu and Mthembu areas in 2006<sup>15</sup>. The CLRA envisaged that such councils would become land administration committees, representing the communities taking private ownership of communal land and administering 'community rules' on land rights. This controversial provision was a core focus of the legal challenge to the Act mounted by four rural groupings in 2005 (Classens and Cousins 2008).

CAP was established in March 1965 at the Maria Ratschitz Mission farm near Wasbank in northern Natal, under the management of its founder, Neil Alcock. In 1975 CAP moved its operations to a degraded 2 500 ha farm (named Mdukutshani, 'the place of lost grasses' by staff) and composed of three smaller labour tenant farms located in the Weenen district. The farm's boundary adjoined the Msinga district of the then KwaZulu Bantustan. CAP's main farming project was origi-

nally planned as an environmentally friendly cattle production co-operative, which would also aim to rehabilitate the land. A strong emphasis was placed on building trust between CAP and local people in Msinga in order 'to grow grass, and to teach others to grow grass'. Many of the cattle died of heartwater or were stolen, however, and it became clear that a co-operative would be in competition with local cattle owners who had become dependent on the farm for grazing. CAP then abandoned plans to run its own herd and instead established a resource centre and set up agricultural projects within the Mchunu and Mthembu 'tribal' areas.

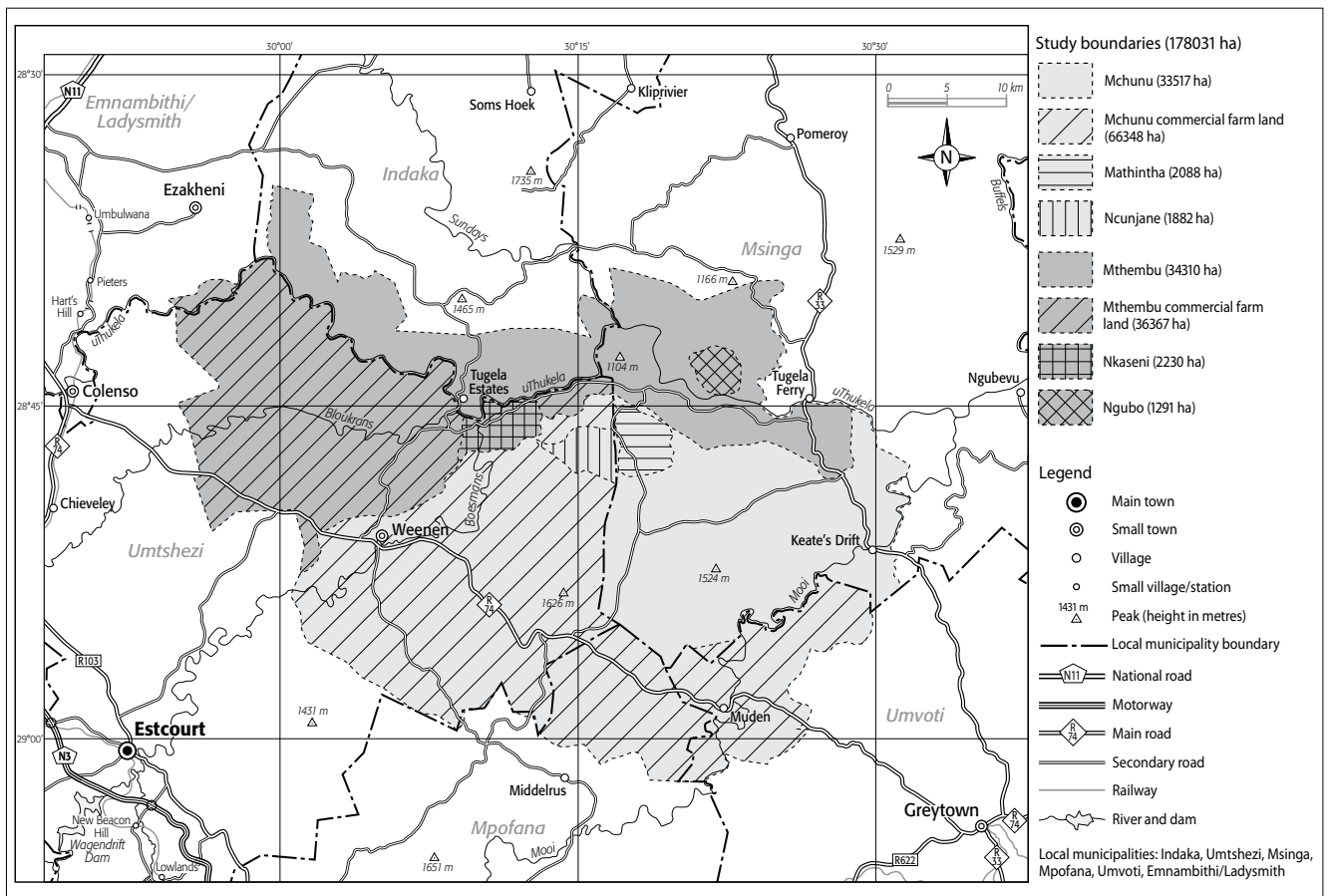
During 1979 CAP also became involved in assisting labour tenants who were being evicted from farms in the Weenen district. CAP became instrumental in enlisting wider support for evicted farm residents through its organising, lobbying and advocacy activities. The CAP case book was used to help establish the Legal Resources Centre in Natal.

Political change in 1994 ushered in new land reform laws, policies and programmes. CAP's

14 The TLGFA is 'framework' legislation only, and provinces are required to enact their own, provincially-specific legislation to give effect to the national law.

15 'Transformation' means that 40% of the members of the council must be elected and one third must be women.

Figure 1: Location of research sites



work in supporting labour tenants had put it in a strong position to assist local communities to benefit from these programmes. After facilitating successful land reform for several communities, CAP began to help address the challenge of appropriate land use on the transferred farms, and in 2001 it began to focus primarily on land management and 'post-land reform activities'. Now known as the Mdukutshani Rural Development Programme (MRDP), it is currently engaged in a variety of development projects in Msinga focused on cattle breeding, poultry production, livestock health, crop production, natural resource use, craftwork, youth groups and HIV/AIDS.

MRDP's motivation for initiating the *Imithetho* project was twofold in character. Firstly, staff members felt that they needed to enhance their understanding of land tenure and natural resource management in Msinga because these are key aspects of the local institutional environment that profoundly influence the success or failure of MRDP's rural development work. A key issue that arises again and again in this work is lack of clarity on the land and resource rights of women, and of unmarried women in particular. A deepened understanding of these would assist MRDP to develop appropriate and sustainable agricultural development and natural resource management programmes.

In addition, it was clear to staff members that local residents and traditional authority structures had little or no information and knowledge about the contents of land tenure laws such as the CLRA. Given the controversial nature of the Act and concerns that it had the potential to impact negatively on tenure security, staff members felt it would be useful to provide information on the new law and enhance the capacity of local people to respond to its implementation. Both considerations led to the formulation of a project which would try to link research to action - in this case, to discussion of potential solutions to emerging problems and tensions around land and natural resources.

The project team developed a short vision statement of the ideal outcome of the project:

*Community members meet independently at izigodi level and are able to clearly articulate which local rules or laws are negatively*

*affecting them, which of these they want to keep, and which they want to change. Women engage and actively participate in local structures and discussions about laws and issues affecting them and men listen to them. Traditional authorities acknowledge and support locally accepted and legitimate processes where people can discuss and suggest changes to laws and practices. Men, women and youth from the community voice their ideas and proposals in implementation of government laws and programmes, particularly the CLRA and the TLFGA. Government officials listen, understand people's realities and take people's views and proposals into account in implementation. NGO staff members better understand land tenure systems and processes of change and are more effective in supporting positive changes at local community level, and are advocating appropriate policy changes.*

The research team consisted of six people: four MRDP staff members (Rauri Alcock, Mphethethi Msondo, Gugu Mbatha and Ngididi Dladla), a team leader on contract to MRDP (Makhosi Mveli), and a research advisor (Ben Cousins of the Institute for Poverty, Land and Agrarian Studies (PLAAS) at the University of the Western Cape). Makhosi Mveli left the project in early 2009, and Donna Hornby was then contracted in to assist in fieldwork, analysis and writing up the project's findings.

This team undertook action-research in two *izigodi* of the Mchunu tribe in 2007 and in two *izigodi* of the neighbouring Mthembu tribe in 2008. In 2009 the project team carried out follow-up research on specific issues, organised training and information sessions, initiated the final analysis and write-up of research data and held a provincial research findings workshop. High levels of interest and co-operation with local residents, the Acting Chiefs of the Mchunu and Mthembu<sup>16</sup>, newly established traditional councils, and the *izinduna* of the four *izigodi* selected as field sites, were evident throughout.

## The field sites

In this part of KwaZulu-Natal, labour tenants living on privately-owned farms, on land which had originally formed part of tribal territory, have always been regarded

<sup>16</sup> The Mchunu and Mthembu traditional councils are currently chaired by the Acting Chiefs of the relevant tribe; in both cases the Acting Chief is the *Mntwana*, i.e. the son of the *Inkosi* who will succeed him when he dies.



as full members of their tribes. CAP/MRDP was originally based on three white-owned labour tenant farms immediately adjacent to the Mchunu and Mthembu tribal areas. Two *izigodi* in each of the two tribal areas were selected as field sites, in part because they are areas in which MRDP works and is well known. In both areas the field sites comprised one *izigodi* on a former labour tenant farm and one within the core tribal territory (see Table 1). This allowed for the investigation of possible differences in land tenure practices, perhaps because of contrasts in relative resource abundance.

In the Mchunu area, labour tenants located on the farms taken over by CAP in 1975 formed part of the Ncunjane *izigodi*. Most of the farms falling within the boundaries of Ncunjane are gradually being transferred to its occupants through land reform, are relatively well endowed with natural resources, and are relatively lightly settled. Ncunjane abuts KwaGuqa *izigodi* within the main Mchunu tribal area, and is immediately adjacent to the sub-ward or neighbourhood (*umhlati*) within Kwaguqa known as Mathintha. Mathintha was seen as representative of realities within the wider Mchunu tribal area: it is characterised by a high population density and severe shortages of arable land, grazing for livestock and natural woodlands to supply fuel wood. A key land issue that emerged from fieldwork in Mathintha was the high incidence of households without fields of their own, who borrow land for short periods of time from land-holding households, but cannot obtain secure use rights for longer periods of time.

In the Mthembu tribal area, Nkaseni is an *izigodi* populated by former labour tenants, and is also located on farms currently being transferred to their occupants through land reform. These farms are adjacent to the Thukela River, have irrigable soils and irrigation infrastructure and have been used for commercial

crop production in recent years. In contrast, Ngubo is a densely settled *izigodi* within the core tribal territory of the Mthembu. It was of interest to MRDP because of its reputation for operating an effective system of natural resource management within a large, fenced-off area that encloses both fields and communal grazing.

## Research design

The project aimed to collect qualitative, in-depth data and used a broadly ethnographic approach, seeking to understand the workings of land and natural resource tenure from the point of view of local residents. The project set out to explore the meanings of key concepts and terms and local understandings of changing cultural norms, values and practices. ‘Culture’ was understood as a diverse and dynamic set of meanings and resources, rather than a homogeneous and unchanging set of ideas that determine behaviour. The fact that the research team included both locals and outsiders, one of whom did not speak *isiZulu*, facilitated the constant interrogation of ideas and assumptions about ‘custom’ in relation to land, marriage practices, gender relations and social change, and intensive debate and discussion on these issues informed the formulation of specific questions to be addressed in field research.

The project employed a variety of research methods, some of them participatory in nature. These included meetings with traditional authority structures, individual interviews, focus group discussions, transect walks, timelines of significant events, mapping exercises and feedback workshops. Feedback workshops were designed as an opportunity to provoke discussion of potential solutions to problems around land and natural resources, which themselves could form the subject of research should they be implemented, i.e. as part of a cycle of research > action > further research.

A number of wide ranging discussions with a variety of participants took place over the course of the project, but no formal decisions were taken in these meetings. The ‘action’ component of the project was perhaps most evident in its seeming success in generating a wide-ranging ‘conversation’ about land tenure and related issues in the four field sites.

**Table 1: Location of field sites for the Imithetho project**

Tribal area	<i>Izigodi</i> in core tribal areas	<i>Izigodi</i> on former labour tenant farms
Mchunu	Mathintha (in KwaGuqa <i>izigodi</i> )	Ncunjane
Mthembu	Ngubo	Nkaseni

This conversation may well have contributed to the Mchunu traditional council making two momentous decisions in 2009 and 2010 (see Box 1), namely to allocate land to single women and men and to assist couples to register their relationship as a 'customary marriage'.

The project began in early 2007 with a research methods training session. A list of key research questions to be explored was developed in team discussions. Fieldwork commenced in June 2007. The research team held a first meeting with the Mchunu traditional council and its chairman, the *Mntwana*, at which team members outlined the project's objectives, methods and work plan and asked for approval to undertake research in the area. The main provisions of the CLRA were briefly summarised, and councillors shared their views on land rights and related issues in Msinga.

The next step in the process was to cascade fieldwork down to the level of the *isigodi*. Focus group discussions were held with the *Induna* and the *ibandla* (a group of older men who work with and advise the *Induna*), in both Ncunjane and Mathintha. Transect walks across the *izigodi* helped the research team to identify key issues and problems around land. Mapping exercises helped to answer questions about patterns of land use and the demarcation of internal and external boundaries. A number of focus group meetings were held with different groups of men and women in order to build an understanding of key features of the land tenure system and to help refine research questions.

The team then reflected on the key issues emerging from this first round of research, and modified and expanded the original set of research questions. The next step in the

process was to carry out a number of semi-structured interviews, targeting a range of key informants: older married women, younger married women, unmarried mothers with children, widows, divorced women or women whose marriages had broken down, older men and younger married men with land, and traditional councillors. Following these interviews, the team met to begin analysis of field material, developed a preliminary set of findings and discussed these with key informants, first at *isigodi* level and then with the Mchunu traditional council.

Similar processes were undertaken in the Mthembu area in 2008 and in both areas in 2009, when specific issues such as the registration of customary marriages and their implications for the land rights of women were explored in more depth. In total around 65 individual interviews were carried out over a three years period, and around twelve focus group discussions were held.

## Land and livelihoods in Msinga

### Socio-economic profile

Msinga Local Municipality lies within Umzinyathi District in the KwaZulu-Natal Midlands. The nearest urban centres include Greytown, Mgungundlovu (Pietermaritzburg), Weenen, Kranskop, Dundee, Ladysmith and Mooi River. The district consists of four local municipalities namely, Nquthu, Endumeni, Umvoti and Msinga. Of these, Msinga has the lowest levels of basic services in the district (see Table 2).

Households generally have multiple sources of income, comprising a mix of small-scale production of crops and livestock for consumption and sale, wage labour on large-

**Table 2: Percentage of people with access to basic services in Umzinyathi District, 2008**

District Council	Local Municipality	Electricity %	Water %	Sanitation %	Refuse %	Area km <sup>2</sup>	Population size	Population density (people/km <sup>2</sup> )
UMzinyathi	Nquthu	11–20	11–20	11–20	0–10	1454	150 000	103
	Endumeni	61–70	71–80	71–80	71–80	1612	50 000	31
	Msinga	0–10	0–10	0–10	0–10	2500	171 071	68
	Umvoti	31–40	31–40	31–40	21–30	2509	90 000	36

Source: Msinga Local Municipality IDP, 2008/09.

scale commercial farms, migrant labour in cities such as Johannesburg and Durban and some small-scale local enterprises, such as spaza shops or taxi services. Welfare grants from government, such as the child support grant and the old age pension, are an important source of income for most households. There is also much illegal activity, made possible by the relative inaccessibility of the district and ineffective policing; this includes car hijacking and gun running. The most common illegal income source is the growing and selling of marijuana (*cannabis sativa indica*).

### **Cropping**

Msinga is situated in a dry to semi-arid zone with 600-700 mm rainfall on average and very high summer temperatures of up to 44°C. The form of agriculture varies across the district: in some areas livestock production dominates, with little cropping taking place; in others production systems are agro-pastoral in character and extensive dryland cropping is practised; in yet others, cash crops are grown under irrigation. Dryland crops include maize, sorghum, pumpkins, beans and groundnuts. Some farmers have access to furrow irrigation systems fed from the Thukela or Mooi Rivers, and grow green maize, tomatoes, cabbage and other vegetables for sale. Marketing and support services for most farmers are extremely limited.

The farmers on the irrigated plots that CAP works with say that they are experiencing problems in that the soil no longer responds to high levels of artificial fertilizers and yields are decreasing. The costs of production are thus often higher than the income they receive from selling produce.

### **Livestock**

A study conducted in 2003 (Bayer et al 2003) shows that livestock in Msinga have multiple functions. Common species are cattle, goats, chicken and dogs, with sheep, pigs, donkeys,

geese and turkeys held by only very small numbers of households.

Cattle are regarded by most people as the most important livestock species, although not all people own cattle. They are used for meat, draught, *lobolo* (bride price), slaughtering at cultural ceremonies and occasional sales; hides are used to make traditional dress. There are clear-cut gender roles with respect to livestock management responsibilities. Cattle and goats are the responsibility of men, and household chickens are usually managed by women, although men may sometimes 'have their names' (i.e. own chickens), which they may get in return for making or fixing items such as an axe-handle. A distinction is made between indigenous chickens and so-called commercial chickens (broilers), which generally belong to men, although women may feed them. In Msinga a woman is not allowed to enter the cattle kraal, but older women may do so if a special status is conferred on them.

In the 2003 study, of a total of twelve cattle-owning households surveyed, two had less than 10 head of cattle, five had between 10 and 20 head and five had more than 30 head. The largest cattle herd comprised 73 animals. Livestock owners said that that 'you should have 20 head of cattle before you can sell and not deplete the herd'. Few of the farmers interviewed relied exclusively on their cattle as a source of income.

### **Land use**

Land is used predominantly for residential and grazing purposes, although some people grow dryland crops as well. Small garden plots are attached to many homesteads and are used to produce maize and vegetables for home consumption. Natural resources on the common lands (thatching grass, timber, fuel wood, brushwood for fencing, medicinal plants and wild fruits) make small but significant contributions to people's livelihoods.





# Chapter 2:

## The wider legal and policy context: Tenure reform in communal areas

As outlined above, the *Imithetho* project was undertaken at a time when government appeared to be preparing itself to implement the CLRA. What were the key elements of the CLRA, and why were they so controversial? How did the CLRA link to the TLGFA? This chapter briefly summarises the main provisions of these two laws, notes the controversies they have generated, and outlines the findings of the courts in response to the successful legal challenge. The final chapter of the report returns to these controversies and asks: what are the wider implications of our research findings for debates on tenure reform policy, and, in particular, on the question of what constitutes the 'living law' of land in contemporary South Africa?

The CLRA and the TLGFA were closely inter-related. The TLGFA allows provincial legislation to provide a role in land administration to traditional leaders. It requires the establishment of traditional councils, with minimum numbers of elected and female members, and allows existing Tribal Authorities to be deemed traditional councils. The CLRA recognised a traditional council (as established under the TLGFA) as a land administration committee. Both laws, individually and taken together, had major implications for the administration of customary law, and the links between them were a key focus in the legal challenge to the constitutionality of the CLRA.

## The Communal Land Rights Act 11 of 2004<sup>17</sup>

### Rationale

Tenure reform in South Africa's communal areas is a constitutional imperative. Section 25 (6) of the Bill of Rights in the 1996 Constitution states that '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. Section 25 (9) states that 'Parliament must enact the legislation referred to in Section 25 (6)'. In relation to farm workers and labour tenants living on privately owned land, two laws passed in the mid-1990s sought to secure their tenure<sup>18</sup>. The CLRA of 2004 was government's attempt to do fulfil its constitutional duty in relation to residents of communal areas.

The underlying problem that policy has to confront is the second class legal status of the land rights held by most black South Africans. In communal areas, these provide few robust protections from the arbitrary decisions of those with authority over land (whether government officials or traditional leaders). A linked problem is the overcrowding and forced overlapping of rights which resulted from forced removals and evictions from farms in the past, as well from as the operation of the pass laws. Another legacy of the apartheid past is the partial breakdown of group-based systems of land rights (communal tenure), one manifestation being abuse of authority by chiefs and traditional leadership structures. Discrimination against women is a fundamental problem, exacerbated by the exclusion of women from most decision-making structures.

Lack of clarity on land rights constrains infrastructure and service provision in rural areas, and contributes to tensions between local government bodies and traditional authorities over the allocation of land for development projects (for example, housing, irrigation schemes, business centres and tourism infrastructure). Tenure reform must aim to secure land tenure rights in ways that will promote economic development and enhance the livelihoods of rights-holders.

### Summary of the Act

The CLRA applied to state land in the former Bantustans, as well as land acquired by and for a community through processes of land reform and currently registered in the name of a Communal Property Association or Trust. The Minister of Land Affairs could transfer title of all such land from the state to 'communities', who would own the land as juristic personalities. They would have been governed by community rules that had to be registered with the Department of Land Affairs before the juristic personality of the 'community' could be recognised. Communities had to establish land administration committees, which would allocate land rights, maintain registers and records of rights and transactions, assist in dispute resolution and liaise with local government bodies in relation to planning and development and other land administration functions. Where they existed, traditional councils established under the TLGFA would have exercised the powers and functions of such committees<sup>19</sup>.

'Community' was defined in the CLRA as 'a group of people whose rights to land are derived from shared rules determining access to land held in common by such group'. Senior government officials stated that they viewed the population of areas under the jurisdiction of Tribal Authorities as such 'communities'<sup>20</sup>, and this interpretation is consistent with the provision that traditional councils established under the TLGFA would have become land administration committees.

Before a transfer of land to a 'community' could take place, the Minister had to institute a land rights enquiry. An official or consultant would have been appointed to investigate the nature and extent of existing rights and interests in land (including competing and conflicting rights), options for securing such rights, measures to ensure gender equality, spatial planning and land use and related matters. After receiving a report, the Minister would have determined the location and extent of the land to be transferred.

The Minister also had to make a determination on whether or not 'old order rights' (i.e. communal land rights derived from past laws and practices, including 'customary law and usage') should be confirmed and converted into 'new order rights', and determine the

<sup>17</sup> For a more detailed summary, see Smith 2008.

<sup>18</sup> The Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997.

<sup>19</sup> Section 21 (2) of the CLRA stated that 'If a community has a recognized traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council'. However, the word 'may' appears to have been permissive, enabling a traditional council to exercise the powers of a land administration committee, rather than creating any real choice for rights holders. No other provision of the Act allowed for such a choice or set out the procedures to be followed.

<sup>20</sup> Dr Sipho Sibanda of the Department of Land Affairs, Portfolio Committee on Agriculture and Land Affairs, 26th January 2004.

nature and extent of such rights. New order rights were capable of being registered in the name of a 'community' or a person, but where transfer of title to a 'community' as owner took place, the individual new order rights were not equivalent to title. Their content was not defined in the Act. The Minister could confer a new order right on a woman, even if old order rights such as Permission to Occupy certificates (PTOs) were vested only in men. New order rights were deemed to be held jointly by all spouses in a marriage, and had to be registered in all their names.

Community rules had to be drawn up by the 'community' taking transfer of land, and these would have to regulate the administration and use of communal land. Although not made explicit, it could be inferred that these rules would define the nature and content of new order rights. If consistent with the Constitution, and after considering the report of the relevant Land Rights Board, these rules had to be registered by the Director-General of the Department of Land Affairs. Prescribed, standard rules could be deemed by the Minister to be the rules of a 'community' should it fail to adopt and register its own community rules. The CLRA did not specify the process whereby such rules were to be drawn up and agreed to, nor on its timing (e.g. whether or not the drawing up of such rules should precede the establishment of a land administration committee).

## The Traditional Leadership and Governance Framework Act 41 of 2003

The TLGFA aims to provide for the establishment and recognition of 'traditional communities', traditional councils, houses of traditional leaders and the Commission on Traditional Leadership Disputes and Claims. This involves identifying the roles and functions of traditional leaders and councils, and specifying their relationship with elected municipalities. Its premise, as set out in the preamble of the Act, is that the Constitution recognises customary law and the institution of traditional leadership. As a consequence, the state must 'respect, protect and promote' the institution of traditional leadership, but the institution must also be 'transformed to be in harmony with the Bill of Rights', so

that democratic values and governance and gender equality may be promoted and advanced<sup>21</sup>. It must also promote the principles of co-operative governance and fair system for the administration of justice. The Act creates a framework for provincial legislation in the seven provinces where traditional leadership is present.

A community is recognized as a 'traditional community' if it observes a system of customary law and this system includes a system of traditional leadership. Such a community is required to 'transform and adapt customary law and customs' so that it prevents unfair discrimination, promotes equality and progressively advances gender representation in succession to tradition a leadership<sup>22</sup>. Once recognised, a 'traditional community' must establish a traditional council of at most 30 members, of which at least one third must be women. A minimum of 40% of members must be elected for a term of five years, and the remaining 60% must be selected by the senior traditional leader concerned 'in terms of that community's customs'<sup>23</sup>.

Most of the functions of traditional councils listed in the Act involve assisting municipalities in the planning and delivery of integrated and sustainable development and in the provision of services, and do not involve the exercise of significant independent statutory powers in relation to local government. Traditional councils may enter a service delivery agreement with a municipality. National government and provincial governments may pass laws to provide a role for traditional leaders and councils in relation to a range of functions, including land administration<sup>24</sup>, agriculture, the administration of justice, and the management of natural resources<sup>25</sup>. In this case, government must ensure that the allocation of a role or function is 'accompanied by resources and that appropriate measures for accounting for such resources' are in place<sup>26</sup>.

One of the functions of traditional councils is 'administering the affairs of the traditional community in accordance with customs and traditions', as well as performing functions 'conferred by customary law, customs and statutory law'<sup>27</sup>. The Act does not specify such functions, however, and neither do the various provincial acts which the national framework act has given rise to.

<sup>21</sup> Preamble to Act 41 of 2003

<sup>22</sup> Section 2 (3)

<sup>23</sup> Section 3 (2)

<sup>24</sup> A key role in the administration of land rights was provided for in the Communal Land Rights Act of 2004.

<sup>25</sup> Section 20 (1)

<sup>26</sup> Section 20 (2)

<sup>27</sup> Section 4 (1)

The Act establishes a Commission on Traditional Leadership Disputes and Claims, with responsibility for resolving disputes over contested traditional leadership positions, claims to be recognised as 'traditional communities', the legitimacy of the establishment or disestablishment of 'tribes', the merging or division of 'tribes' and the boundaries of traditional authorities<sup>28</sup>.

Transitional arrangements are provided for in the Act<sup>29</sup>. Traditional leaders, who are recognised as such immediately prior to commencement of the Act, are accorded recognition under the Act. Similar provisions are provided for 'tribes', which are deemed to be traditional communities, and for tribal authorities, which are deemed to be traditional councils. In the case of the latter, however, one year is allowed for tribal authorities to be restructured and transformed so that one third of its members are female and 40% are elected.

The Act provided that they had to meet the requirements within a year. However very few managed to meet this deadline, which was extended by the provincial laws (many of which were enacted in 2005) providing an additional year. However by 2008 many had not yet changed their composition and a 2008 TL-GFA amendment bill proposed an additional four years.

Community authorities were established under apartheid in rural communities without structures of traditional authority, and were elected bodies. The Act provides for their continued existence 'until .... disestablished in accordance with provincial legislation, which... must take place within two years of the commencement of this Act...'<sup>30</sup>. No rationale for such disestablishment or for treating community authorities differently to tribal authorities is provided.

The KwaZulu-Natal Traditional Leadership and Governance Framework Act 5 of 2005 follows the national framework act very closely, but a few provincial specificities are provided for, such as recognition of the *Isilo* (king) as Monarch of the province. The role of *izinduna* within traditional leadership structure and on traditional councils is explicitly provided for, and the Act specifies that the responsibilities of an *Induna* are to be performed on a voluntary basis<sup>31</sup>.

The list of functions of a traditional council are exactly the same as those in the Framework Act, with the addition of a few more that require it to uphold the values of a traditional community and promote peace, stability and social cohesion and reject and proscribe the sowing of divisions based on 'tribalism'. The KwaZulu-Natal provincial act, in common with those enacted in the Eastern Cape, the Northern Cape, Limpopo, Mpumalanga and North West province, makes no mention of land administration as a specific function of traditional councils.

## Controversies generated by the new laws

Government held that the CLRA gave practical effect to section 25 (6) of the constitution and was able to 'legally recognise and formalise the African traditional system of communally held land within the framework provided by the Constitution' (Department of Land Affairs (DLA) 2003: 19). Critics from civil society and research organisations asserted, in contrast, that the Act would 'entrench the autocratic version of 'traditional' customary law that dominated the colonial and apartheid era' (Love 2008: xii). At the core of the debate on the Act were competing views on the content of customary rights to land in rural South Africa and in whom powers of decision-making over land should vest. Linked to these were contrasting views on how best to secure land rights in communal areas.

## The transfer of title paradigm

The CLRA attempted to combine both land titling and recognition of customary land tenure, but critics suggested that it did so in an incoherent manner that rendered land rights less rather than more secure (Cousins 2008a): 15). Individual community members would hold only a secondary and poorly defined right to land, and ownership would vest in a large group or 'community' (the population living under the jurisdiction of a traditional council) represented by a structure (a land administration committee) that would exercise ownership on behalf of the group. Where that committee was coterminous with a traditional council, its legitimacy would supposedly be drawn from custom, but adequate mechanisms to ensure a council's accountability to community members were absent – neither

28 Section 25 (2)

29 Section 28

30 Section 28 (5)

31 Section 27 (4).



indigenous accountability mechanisms, nor those of a more democratic character (Claassens 2008a: 290).

### **The nature and content of customary rights to land**

Key controversies arose in relation to the nature and content of communal land tenure systems, with critics suggesting that the CLRA was based on a distorting and overly rule-bound interpretation. In particular, they argued, it did not adequately acknowledge the layered or nested character of land administration and focused instead on only one level of socio-political organisation, the chieftaincy. This would therefore reinforce the centralised powers over land conferred on chiefs by both colonial powers and the apartheid state, generate conflicts over boundaries and resource use, and undermine the downward accountability of land administrators (Okoth-Ogendo 2008: 106-07; Delius 2008: 234-35; Cousins 2008b: 131).

### **Gender equality**

Parliamentary debates led to a number of amendments to the CLRA before it was approved, and some provided for joint vesting of land rights in all spouses as a means to achieving gender equality in land holding. According to Claassens & Ngubane (2008: 165), however, the rights of single women and female members of households who are not spouses were not addressed. The CLRA failed to engage with family-based systems of land rights and the result was to formalise rights deriving from unequal power relations, discriminatory laws and distorted versions of custom. An alternative approach to that taken in the CLRA would involve defining and securing use rights exercised by women within family and kinship networks, and strengthening the position of women within social relationships and community structures (ibid: 179).

### **Land rights, authority and accountability**

Perhaps the single most controversial issue raised by the Communal Land Rights Act was the role of traditional leaders in relation to land. Together with the issue of women's land rights, this was the major focus of public debates when the draft law was discussed in

Parliament in late 2003 and early 2004, and many of the submissions to Parliament by civil society and community groups focused on this issue.

Delius (2008: 232) and Ntsebeza (2008: 257) argued that under the apartheid government, measures such as the Bantu Authorities Act 1951 swung the balance of power away from popular support for chiefs and towards bureaucratic control. This allowed tribal authorities to make increasing demands on their subjects for labour and cash levies. Tribal boundaries were demarcated, but groups who accepted the new system were often allocated land occupied by those resisting tribal authorities. Chiefs began to assert greater control over land, the powers of lower levels of political authority were diminished, and security of tenure was weakened.

Claassens (2008a: 289-90) argued that the CLRA, taken together with the TLGFA, centralised power at the level of traditional councils and made no provision for decision-making and control over land at the level of the family, the user group, the village or neighbourhood and the clan. The laws entrenched apartheid-era distortions and undercut the mediation of power between multi-layered levels of authority, which takes place, in part, through ongoing contestations over boundaries. This problem was compounded by the CLRA's provision that disputed tribal authority boundaries would become default community boundaries, and by the false assumption that these boundaries enclose discrete, homogenous 'tribes'.

### **Processual vs. rule-bound versions of 'customary' law**

Recent Constitutional Court judgments have emphasised that customary law derives its validity and legitimacy from the Constitution and must be interpreted to give effect to the Bill of Rights. These judgments reject official versions of customary law, which tend to distort the underlying values that inform the 'living law', which constantly adapts to changing social practice (Bennet 2008: 144). Claassens (2008b: 368) argued that there is a danger that distorted, rule-bound versions of customary law such as those found in the CLRA will close down processes of transformative social change that attempt to integrate traditional

and democratic values. Process-oriented approaches, however, are potentially a way of avoiding this danger, by allowing 'living customary law' to reflect the multiple voices engaged in making and contesting the content of custom.

## The court challenge to the CLRA

In 2005 representatives of four rural communities launched a challenge to the constitutionality of the CLRA. These were Kalkfontein and Dixie (both in Mpumalanga province), Makuleke (Limpopo) and Makgobistad (North West). The applicants argued that far from securing their rights in the land, the CLRA made them less, rather than more secure, mainly because, together with the TLGFA, it imposed apartheid-era boundaries and authority structures on them.

There were four main legal grounds for challenging the CLRA. Firstly, the applicants argued that their land tenure rights were undermined rather than secured by the Act. An intrinsic feature of systems of property rights is the ability to make decisions about the property. Under customary systems of property rights, decisions are taken at different levels of social organisation, including at the level of the family. By transferring ownership only at the level of the 'community', the CLRA would undermine decision making power and control at other levels. This is particularly serious when disputed tribal authority boundaries are imposed as the 'default' boundaries of communities. The end result would be that the CLRA would undermine security of tenure, in breach of section 25(6) of the Constitution.

In addition, there are many cases in which groups of people with strong property rights to the land they occupy are located within the boundaries of existing tribal authorities. Members of these groups would be deprived of their property rights if ownership of their land was vested in imposed traditional council structures, or other structures created by the CLRA.

Secondly, the applicants argued that the CLRA conflicted with the equality clause in the Constitution in relation both to gender and race. It did not provide substantive equality for

rural women because it entrenched the patriarchal power relations that render women vulnerable. The 33% quota for women in traditional councils was not sufficient to offset this problem because such women could be selected by the senior traditional leader. Moreover, 33% was too low a quota, given that women make up almost 60% of the rural population. In addition, while the Act sought to secure the tenure rights of married women, it undermined the tenure rights of single women, who are a particularly vulnerable category of people.

The CLRA also treated black owners of land differently from white owners of land, who were not subject to the regulatory regime imposed by the CLRA. Moreover, section 28(1)-(4) of the TLGFA entrenches the power of controversial apartheid-era institutions that were imposed only on black South Africans.

A third argument was made in relation to a fourth tier of government. The Constitution provides for only three levels of government, national, provincial and local. It was argued that the powers given to land administration committees, including traditional councils acting as land administration committees, effectively made them a fourth tier of government, in conflict with the Constitution.

Finally, the applicants argued that the CLRA was unconstitutional on procedural grounds. The Act had a major impact on customary law and the powers of traditional leaders, both of which, in terms of the Constitution, are functions of provincial government. Thus it should have followed the section 76 parliamentary procedure that enables discussion by and consultation within the provinces. The Constitution provides that laws that deal with provincial functions should follow the section 76 procedure and those that deal with national functions should follow the section 75 procedures. Instead it was rushed through parliament using the section 75 procedure. Because the wrong parliamentary procedure was followed, the Act was therefore invalid.

## Court judgements in 2009 and 2010

Two court judgements resulted from the legal challenge. In the first, on the 30 October 2009, Judge AP Ledwaba handed down

judgment in the North Gauteng High Court, Pretoria<sup>32</sup>. The judgment declared invalid and unconstitutional the key provisions of the Act which provided for the transfer and registration of communal land, the determination of rights by the Minister and the establishment and composition of land administration committees. The judgment did not find the parliamentary process to have been procedurally flawed and did not strike down the Act as a whole.

The judgment focused on the problems likely to be created should traditional councils be imposed on communities as land administration committees. It referred to key arguments made by the applicant communities in relation to the layered nature of land rights in customary systems, including those existing at family, clan, village and group levels, and the problems that are likely to arise when these rights are subjected to the control of traditional councils. According to the court, the definition of community used in the Act failed to protect the land rights of smaller or independent communities living within the boundaries of large traditional councils. The court focused on the example of communities, such as the Makuleke, which have won title to their land through land restitution, only

to find a nearby traditional leader claiming powers of land administration over them. It found that the tenure security of such groups is rendered vulnerable by the provisions of the Act that place them in a structural minority within a larger unit.

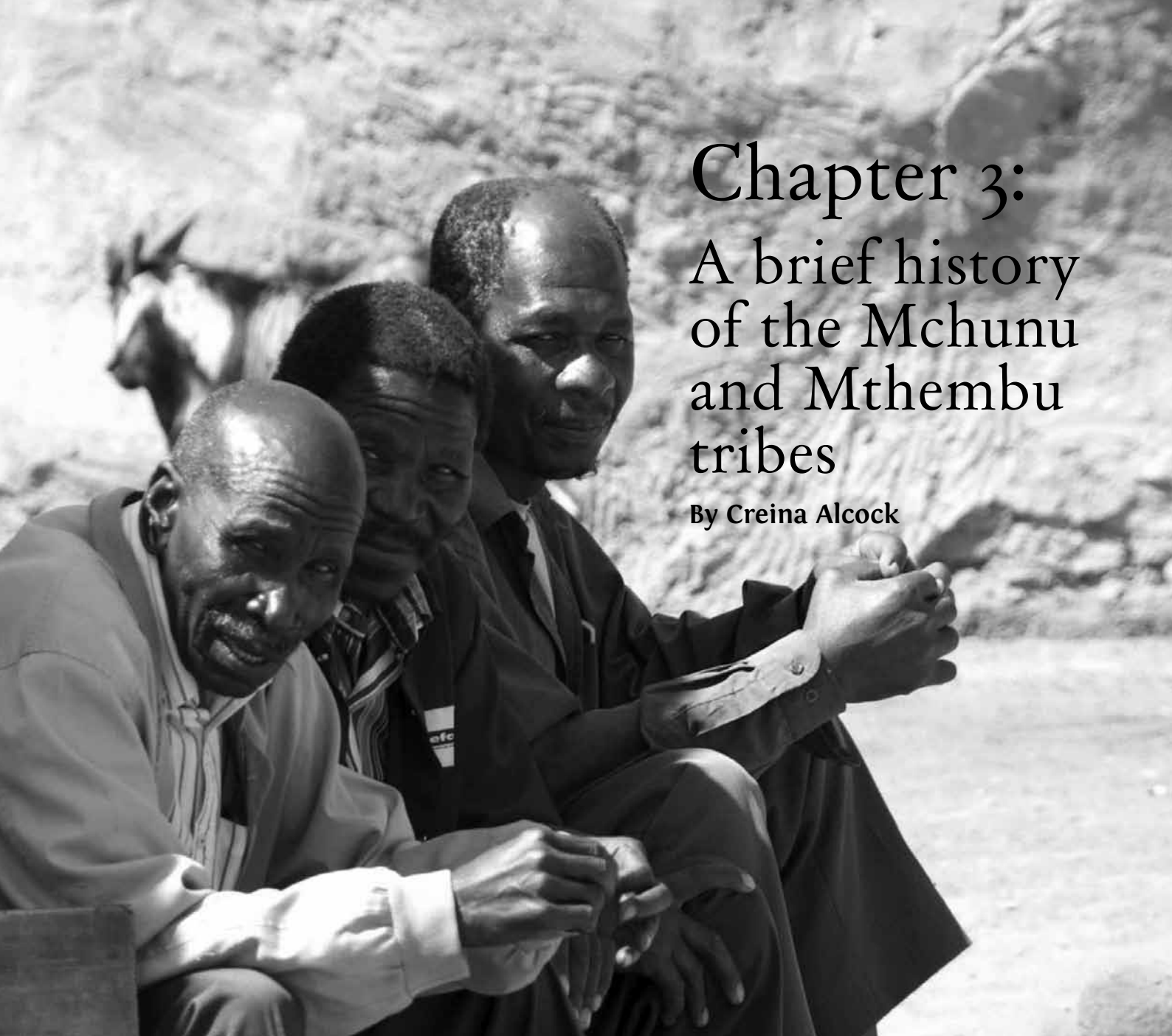
Government appealed the High Court judgment, and the matter then went to the Constitutional Court, which struck down the CLRA in its entirety in May 2010. The court accepted the applicants' arguments on the procedural issues, and therefore did not consider any of the substantive arguments made by the applicants or contained in the findings of the High Court. Prior to the hearing, the Minister of Rural Development and Land Reform, Gugile Nkwinti, declared that government would not defend the CLRA in court since it was no longer considered to be consistent with government policy. How government now intends to approach communal tenure reform remains unclear.

In handing down its judgement, the Court once again emphasized that 'living customary law' must be respected and supported. It said that 'the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated'.

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<sup>32</sup> *Tongoane and others v The Minister of Land Affairs and others* (TPD 11678/2006)





# Chapter 3: A brief history of the Mchunu and Mthembu tribes

By Creina Alcock

In about 1840 or 1841, the Mchunu and Mthembu tribes arrived in Natal seeking refuge from 'the constant menace of the Zulus'<sup>33</sup>. They had spent years in servitude as subjects of the Zulus, and with the kingdom in upheaval after Dingane's defeat at the battle of Blood River, took the chance of fleeing south.

They had been in Natal before, two independent tribes with powerful chiefs and a spirit of resistance. They had been allies since the rise of Tshaka, when they combined to defend themselves against a Zulu attack near present-day Pomeroy. In about 1822 Tshaka sent two divisions across the Mzinyathi (Buffalo) River to tackle the Mthembu tribe. Posted to guard the river drifts, the Mchunus scattered and retreated. Although the Mthembus stood

their ground, and defeated one division of Tshaka's army, the other came across the hiding place of the Mthembu cattle, women and children.

The Mthembu and the Mchunu began a long flight south which ended with the death of their chiefs. The Mthembu chief, Ngoza, was killed in Pondoland. The Mchunu chief, Macingwane, just disappeared. He was 'lost sight of by the tribe' and 'died from a wandering existence (from destitution)'<sup>34</sup>.

The survivors straggled back to Zululand, supplicants on their knees, dreaming of a chance to bolt for freedom. They might fight at Blood River, but they would never be Zulu, and they had no loyalty to the Zulu king. In

<sup>33</sup> Evidence of Lugubu Mbatha. Chief Induna, Mthembu Tribe, Board of Inquiry into Abatembu-Amachunu Boundary Dispute 1919. CNC 1556/1913.

<sup>34</sup> Evidence of Magidigidi ka Nobebe. James Stuart Archive, Volume 2.

fact they had their own kings, Pakade and Nodada, who would now be hailed with the royal salute 'Bayede!'

When Natal became a British colony in 1843, the tribes were living scattered in what would become the Msinga, Weenen and Klip River (Ladysmith) districts. It was hot, dry, broken country, with steep ridges and rocky ravines.

The Mchunus first settled on Msinga Mountain, a cool plateau with forest and streams, high above the heat haze of the valleys. 'But the proximity of the place to Zululand was a constant source of danger. We were followed by the Zulus, who were bent on seizing our cattle, and a fight took place below Tugela Ferry...'<sup>35</sup>. The tribe moved further inland, away from the frontier, and started again.

In 1849 the government gazetted the Mzinyathi and Impafana locations, which would one day become part of Msinga district. They were vaguely defined by river valleys, rugged tracts of country, impassable to wagons and 'exceedingly difficult' for a horse. The isolation suited Pakade, a shrewd man who was expanding his influence and building up the strength of his tribe. He had built his royal kraal on the summit of a hill high above the thornveld of Impafana.

'It is almost impossible for a military force to reach Pagade in a situation as this is', Bishop John Colenso wrote with feeling after toiling up the rocky paths on a visit to the royal kraal in 1854. Although he found Pakade a gracious host, 'he cannot at all recognize his position as a subject of the Crown of England'.<sup>36</sup>

He had 'extravagant and dangerous pretensions' complained the 1852-53 Native Affairs Commission. 'Pakade, and some other chiefs, lay personal claim to the land of the locations they occupy... and in fact have been allowed by degrees virtually to assume the position of independent powers'<sup>37</sup>.

Nodada had been less fortunate. He and his tribe had initially settled in the Bushman's River valley near Weenen. There was wood on the slopes, good land to plough — but the Boers were already in occupation. 'There the Boers compelled us to dig a water furrow. Our people found the work difficult, and frequently impossible, owing to the lack of implements etc...'<sup>38</sup>.

After Nodada had been flogged for the sins of his tribe, he moved north to Cancane, a hill near Ladysmith. 'Nodada and his people have never been located, but are squatting on government and private ground, from Bigger's Berg, till below Weenen', the Klip River magistrate, Captain H.M. Struben, told the 1852-53 Commission.

In May 1853 a surveyor arrived at Nodada's royal kraal. The land he occupied was needed for a farm. He was instructed to move to Mashunka, a hill on a loop of the Thukela River — which had already been promised to Pakade. Both tribes mobilised, ready for trouble, while runners were sent to the authorities. An apology came back from Theophilus Shepstone, the Diplomatic Agent of Native Tribes. He regretted the lack of consultation, the result of a need for haste. While Nodada should not be interfered with, he would only be occupying a narrow strip of land and 'would not be followed by many members of the Tembu tribe'<sup>39</sup>.

Mashunka became an outpost — with a location standing empty just across the river. 'Nodada's Location' was part of the Mzinyathi, assigned but 'never occupied', according to Struben's report in 1852. The Mthembu knew the area well. It was open country, with seeps and springs, but much too close to the frontier. They remained where they were, well inland, on higher ground near Ladysmith.

Land was getting scarce, however, and the locations were filling up. By 1863 the Mzinyathi was crowded with four different tribes, all bitterly contesting their boundaries. These were the conflicts that would be written up as history, not the lesser known troubles on the farms<sup>40</sup>.

There would never be a rush by white farmers to own the thornveld. Although the first farms were surveyed in 1853, forty years later surveyors were still at work, slowly defining the boundaries of farms that would never be occupied by their owners. The Africans had the hills to themselves, vast unfenced hinterlands that were 'practically small locations'<sup>41</sup>. They had a tribal identity, with allegiance to a chief, but none of the obligations usually owed.

*Faction fights in Native Locations hardly ever take place, but they do on farms where there is less power of the chiefs over the tenants than over Native on Native Locations or Crown Lands*

*Weenen Magistrate, 1883, Native Affairs Blue Book*

<sup>35</sup> Evidence of Nqulwana Sibiya, Chief Induna Mchunu Tribe. Board of Inquiry into Abatembu-Amachunu Boundary Dispute, 1919. CNC 1556/1913.

<sup>36</sup> Colenso J W (1855) *Ten Weeks in Natal. A journal of a first tour of Visitation among the colonists and Zulu Kafirs of Natal*, Cambridge

<sup>37</sup> Native Affairs Commission 1852-53.

<sup>38</sup> Evidence, Lughubu Mbatha, Chief Induna Mthembu Tribe Board of Inquiry into Abatembu-Amachunu Boundary Dispute, 1919 CNC 1556/1913.

<sup>39</sup> *ibid*

<sup>40</sup> Francis Becker, Assistant Resident Magistrate, May 14, 1864 Klip River Magistrate's Letters Books.

<sup>41</sup> R. Ernst Dunn, Magistrate, Weenen Division, Native Affairs Blue Book 1904.

In 1898 the Weenen magistrate, Maynard Mathews, commented: 'The majority of private lands are Native farms, that is to say, lands upon which natives are the only living creatures farmed by their European owners. Some of the landlords draw labour in lieu of rent, others rent exclusively, and yet others both. The statistical returns appended reflect the enormous number of natives enriching European investors in this way'<sup>42</sup>.

In 1913 the Weenen magistrate estimated the Mchunu had been occupying 40 farms in the Weenen District for more than 50 years, and the Mthembu had been occupying 35 farms for the same period<sup>43</sup>. By 1933 the Mchunu and the Mthembu were the largest tribes in Natal, with the majority of their people living on white owned farms. The Mchunu had 9 054 taxpayers — 3 980 living at Msinga, 5 074 on farms in the Weenen and Greytown districts. The Mthembu had 8 275 taxpayers — 6 141 on farms in the Dundee, Estcourt, Helpmekaar, Ladysmith and Weenen districts<sup>44</sup>.

*In 1927 the Industrial and Commercial Workers' Union (ICU) arrived in Greytown, attracting such support among farm workers that the Natal Agricultural Union called a special congress to discuss the threat. Soon after the ICU opened an office in Weenen, it was wrecked by angry whites, who were subsequently convicted of public violence (Native Disturbances, Weenen Area, Natal. CNC 2/11/3.)*

The farms made life difficult for the chiefs. They had limited jurisdiction — but were expected to keep control. They couldn't allocate fields, stop evictions, or summon a farm worker to a tribal court. They were instructed to appoint tribal headmen, the *izinduna*, who had all the duties of tribal police. In an 'excellent system... of legal obligation imposed on the native tribal officers'<sup>45</sup> they had to report all crimes, offences, accidents, sudden deaths or looming trouble — while their areas of authority remained undefined.

In 1928 the government recognized the difficulties when it considered dividing Weenen into tribal wards. The idea was 'in the nature of an experiment' which would 'greatly tend to the better government of the Natives'. With the backing of the chiefs, the Weenen Farmers' Association, and the approval in principle of the Minister of Native Affairs, the magistrate, J.P. Rawlinson, was given the task of testing the idea on the ground.

Accompanied by chiefs, headmen and their followers, he inspected every tribal boundary on every farm, discussing how best to lay out

the wards without moving existing kraals. He spent months on his recommendations, producing detailed maps and even more detailed notes, only to have the proposals turned down as 'detrimental' to the longstanding interests of the landowners<sup>46</sup>.

This decision didn't alter the fact that the tribal boundaries existed, as did the fights which were the reason the wards had been considered in the first place. The idea resurfaced in 1949 when a 'Commission of Inquiry into Disturbances in the Estcourt — Weenen Districts' recommended a ward system which would not only 'confer criminal jurisdiction on the chiefs...but it will no longer be possible for headmen (Indunas) to evade their responsibilities by pleading that the area under their control is not occupied by members of their tribe ...'<sup>47</sup>.

Many reasons have been put forward to explain the violence that has marked the history of the Msinga-Weenen-Klip River districts, and although pressure on resources is the most popular one,' the argument is not conclusive,' Professor W.J. Argyle told a 1987 conference. 'Poor environmental conditions may be a necessary, but not a sufficient condition for the incidence of feuds,' he said. 'What the sufficient conditions are could only be discovered through intensive comparative studies of several areas carefully selected for contrasting features'<sup>48</sup>. No such comparative studies have been undertaken to date.

If landscape is a key to understanding the conflicts, so is the character of the tribes: big refugee tribes, jittery about attack and ready to invest in guns. As early as 1851, the magistrate of the Mzinyathi Location, George Ringler Thompson, was asking "How am I to act with regard to Natives possessed of guns? I presume it had better be left alone just now"<sup>49</sup>.

The previous year, four location magistrates had been appointed with instructions to immediately design population and stock returns, news which had resulted in a 'general and very dangerous excitement,' Theophilus Shepstone reported in January 1851. Africans had 'slaughtered their cattle indiscriminately to avoid their being registered, and appeared as with one consent to have determined to purchase firearms, which I regret to say, have been furnished them in hundreds by unprincipled Europeans ...'<sup>50</sup>.

42 Maynard Mathews, Magistrate, Weenen Division, Native Affairs Blue Book 1898.

43 Report Regarding History of Tribal Occupation of Land Now Private-owned in the Weenen Division, CNC 370, Herbert M. Barker, Magistrate, 1913

44 Van Warmelo NJ (1935) A Preliminary Survey of the Bantu Tribes of South Africa, Government Printer

45 Maynard Mathews, Weenen Division, Magistrate's Report, 1900

46 CNC15/13 Volume 83 A

47 National Archives NTS 7678 13/1332

48 Argyle,WJ (1987) 'Faction Fights and Problems of Explanation in Social Anthropology', paper delivered at conference on Faction Fights in Modern Times, (April)

49 CSO Volume 28 Part 1 (February 3, 1851).

50 GH 336

In 1868 diamonds were discovered in Kimberley, and local men walked more than 600 km across country to work on the Diamond Fields in exchange for wages and guns.

The guns were accumulated against a background of rumours that the Zulus had thousands of guns in their possession. In 1879 Mchunu and Mthembu levies marched with the British to Isandlwana. While one man in ten was given a firearm, the majority fought with assegais and sticks. Both tribes suffered heavy casualties, and the Mchunu Acting Chief, Gabangaye, was among those killed.

'Our tribe is not what it used to be after losing our Chief Pagadi, and his son who was killed at Isandlwana,' Joko, the Mchunu *Indunankulu* (chief *Induna*), told the 1882-83 Native Affairs Commission.

The defeat at Isandlwana cast a shadow that would last for years as the tribes faced a period of increasing hardship. The disasters seemed continuous. Drought, drought, drought, locusts, famine, rinderpest and drought.

'The awful calamity entailed by the rinderspest plague proved so severe a shock as to pale all other occurrences into insignificance,' the Weenen magistrate, Maynard Mathews, reported in 1898. 'It has eclipsed all other calamities in the memories of the oldest Natives...'<sup>51</sup> In the Weenen and Msinga districts, Africans lost between 90% and 95% of their cattle, leaving them without animals to plough and disrupting a social system dependent on cattle for marriage contracts and spiritual communion with the ancestors.

When an infant son was born to the Mthembu chief, Mabizela, in about 1903, he was named Kufakezwe, 'the-dying-of-the-nation'. And there were difficult years ahead. Mabizela died suddenly in 1904, leaving two infant sons who would one day tussle for the chieftainship. Mabizela's brother, Ngqamuzana, was presented as regent, 'a mere lad' of about 20-22 who would soon be in trouble with the government.

'You Ngqamuzana, you are a boy,' the Minister of Native Affairs, H.D. Winter, warned him at a meeting in January 1906, just before payment of the Poll Tax was due<sup>52</sup>.

Exactly one month later martial law was declared to quell disturbances related to the

Poll Tax. Ngqamuzana had more than Poll Tax on his mind, however. He was dealing with the fall-out of raids by some of his people on the neighbouring Mabaso tribe in November 1905. Reluctant to hand over the men involved, he had collected money from the tribe to hire lawyers instead — an action that incensed the authorities. In March 1906 the Msinga magistrate, A.S. Harrington, formally recommended that the tribe be split into three, and that heavy fines be imposed on Ngqamuzana and his *izinduna*<sup>53</sup>.

By the end of March 1906, resistance to the Poll Tax had spread across the Colony. In April, Chief Bambatha of the Zondi tribe went into open rebellion. In May a Msinga chief, Kula of the Majosi, was detained in custody, and a week later the Minister was in Weenen to discuss the 'little uproar with Ngqamuzana and his Indunas'. With the threat of suspension hanging over his head, 'the boy' agreed to raise a levy of 1000 men to help the colonial authorities 'suppress disorder and rebellion'<sup>54</sup>. Only 200 men arrived, and not one came from a farming district<sup>55</sup>.

Were the Mthembus loyal or defiant? In an excess of zeal, Ngqamuzana fined the defaulters, and the repercussions of the call-up would split the tribe for years.

The split became apparent in 1923 when conflict flared over the succession. The location Mthembu wanted Kufakezwe as chief. The farm Mthembu wanted Zisulu. He had a mother of rank, and he'd been born at Nkaseni, a royal kraal built on a white man's farm. The dispute dragged on for twelve years, with two Boards of Inquiry, a 'family council', legal appeals and internal reviews. When Kufakezwe was installed in 1927, he faced strenuous opposition. In 1931 the Native Commissioner of Msinga, Weenen and Ladysmith recommended splitting the tribe — a solution they admitted had problems<sup>56</sup>.

The government was opposed to splitting up tribes, the Chief Native Commissioner, C.A. Wheelwright, told Kufakezwe in February 1928. There had been policy changes since the Bambatha Rebellion, when fourteen chiefs

*In 1891 the Msinga magistrate, Henry Francis Fynn, reported that in the 17 years he had been in the district only four years had produced good crops. (Native Affairs Blue Book)*

*'They get good crops in that area once in seven years.' R.M.K. Chadwick describing the Weenen area to the 1917 Lands Committee (UG 38-1918)*

51 Maynard Mathews, Magistrate, Weenen Division, Native Affairs Blue Book, 1896.

52 SNA 124/1906, 1/1/330.

53 Magistrate's Final Report on Tembu-Baso Disturbance, 1/3/1906, SNA 3214/1905, 1/1/330.

54 SNA 1609/1096.

55 Interview with Ngqamuzana, Acting Chief of the Abathembu Tribe, 30/08/1906 Magistrate C.G. Jackson.

56 CNC 2294/1904, 1/WEN 3/3/1/4, 1/MSG 3/1/1/12.



had been killed or deposed, and the government had cut up seven chiefdoms. The authorities had recently admitted their mistakes – at least in the case of the Mchunu.

The admission came too late for the Mchunu chief, Silwane, who had been deposed and exiled in 1909.

‘He is the most powerful chief in the colony,’ complained his old antagonist, Arthur Shepstone, the magistrate of Umvoti County in June 1909, and ‘a menace to the public peace.’ He estimated Silwane had a fighting strength of more than 10 500 men, and he wanted the tribe broken up and Silwane removed. ‘This would have a most salutary effect on other native chiefs who may be inclined to give trouble, and to the natives generally’<sup>57</sup>.

Although the Prime Minister, F.R. Moor, suggested mildly that a heavy fine should be sufficient, two months later Shepstone became Secretary of Native Affairs, and within days of taking office, was working for Silwane’s dismissal.

Silwane would be charged with misconduct, the main charge being that he had ‘permitted and encouraged his men to salute him as “Bayete”, and to dance (*gwiya*), and in this and other ways showed disrespect to the magistrate, and brought his authority into contempt’<sup>58</sup>.

At least 18 wives and 48 children would be put on a train to follow Silwane into exile at Harding — and they would return three years later when he died. By then the tribe had been split into four. ‘It was the best possible plan for putting the Cunu house in order,’ Shepstone told Mchunu headmen when he summoned them to an interview in December 1909<sup>59</sup>.

‘A blunder’, said H. von Gerard, the Weenen magistrate, 13 years later, commenting on the innumerable fights, many with fatal results, in the royal family, and in the mistake the Natal government made in splitting up the tribe. The deposition of Silwane was ‘a rash act... at a time when the Bambatha Rebellion (so-called) and following events obscured the political horizon and the sound judgements of many, in Native matters’<sup>60</sup>.

He was a little more diplomatic at the Mchunu ‘War Dance’ in September 1924 when the

tribe was re-united under Silwane’s heir, Muzocitwayo. More than 3 000 men attended the ceremony, hitting their shields and roaring a salute, while newsreel cameras recorded the event, which would be widely reported, locally and overseas.

Less than three years later the young chief was dead, leaving widening rifts in the Mchunu royal family among Silwane’s sons. There were at least twenty of these, full of grievances, divided by mothers, locality and rank.

In July 1927 the Mchunu *izinduna*, Silwane’s sons, and 500 members of the tribe went to Tugela Ferry to report that the chief wife was Matika Ngubane, and her three-year-old son, Simakade, was heir. The little boy had been sent away at birth, and was growing up with his mother’s people, the Bomvu royal family. For security reasons he was later moved to the home of Chief Langalakhe Ngcobo, in the Zwartkop Location near Pietermaritzburg.

His mother, a formidable woman, made sure of his succession, fighting off intrigues, hiring her own lawyers and rallying strong men around her. Her husband had taught her to use a firearm, which she used to shoot hawks preying on the chickens and for training her two daughters at target practice. She was allowed to visit her son occasionally, but her place was at home at the Mchunu royal kraal, where trouble was brewing over the appointment of the regent and control of the tribal estates.

By 1931 the Mchunus were making headlines, and the conflict over the regency had become ‘a state of civil war’. After senior government officials had been stoned at a meeting, special police squadrons were rushed into the area, while military aeroplanes flew in from Pretoria for ‘observation and demonstration patrols’ over the affected areas in both Msinga and Weenen<sup>61</sup>.

In August 1931 a Commission of Inquiry was appointed to look into the future control of the tribe, and recommended that 19-year-old Bulawayo be appointed regent, and that fines be imposed on the ‘rebel faction’, led by Giba Mchunu, who had the support of the farm section of the tribe (as well as many white farmers). Giba and two others were banished, and 1 371 of his followers were fined<sup>62</sup>.

57 SNA 1940/190.

58 Ibid

59 Ibid

60 1/WEN 3/3/1/4

61 Ibid. Also 1/MSG 2/1/2/1, 1/MSG 3/1/1/1, 1/MSG 3/1/1/2, and Deputy Commissioner of Police, 13 August 1931, File 1941/31, Native Unrest, Faction Fighting Cunu Tribal District, National Archives.

62 Native Unrest (Faction Fights) Cunu Tribal Disturbances Msinga – Weenen. File 1941/31 National Archives.

The Mchunu were not the only people giving the authorities headaches. Just across the district, not far from Mashunka, the Mthembu and Sithole tribes were preparing to fight. The trouble had started over the Sundays River Crown Lands, which had recently been granted to the Sithole, although the government admitted the Mthembu had occupied the area since at least the time of Nodada. The Mthembu were told to either move, or to *khonza* (pay a homage fee to) the Sithole Chief, Bande<sup>63</sup>.

'As in the case of the Mchunu regency a mistake appears to have been made by the Native Affairs Department in handing over to the Sithole tribe the 2 000 acres of land which had been the ancestral home of the Mthembus', the Deputy Commissioner of Police, Lieutenant Colonel Fulford, commented in September 1931. 'I am of the opinion that steps should be taken at once to cancel the award and the Mthembus be permitted to retain occupation'<sup>64</sup>.

His comments were ignored. In March 1932 another Commission of Inquiry was appointed to look into the disturbances, and again fines and deportations were recommended<sup>65</sup>. (31) 'The District is, undoubtedly, the most potential storm centre, politically, in the Union,' said B. W. Martin, the Msinga Native Commissioner in 1932<sup>66</sup>.

Guns were replacing spears in fights, and bullet wounds were becoming common. When the Native Commissioner of Ladysmith, Major C.L. Harries, raised the subject at a meeting in 1933, the Chief Native Commissioner, H.C. Lugg, replied reasonably: 'Even if it is known that firearms are in the possession of Natives, an army of police could not hope to find any trace of them in that wild country'.<sup>67</sup>

In 1957 Msinga's Acting Native Commissioner, J.H. Reibeling, reported that 'The increasing use of firearms is causing concern. Faction fighting is developing into gun battles. This is evident everywhere in the District'<sup>68</sup>.

Msinga had become the centre of the gun trade in South Africa, with the only fulltime Firearm Squad in the country. The Squad was moved into the area some time in 1957, and housed in tents on the river bank at Tugela Ferry; they ran a token operation for the next 45 years.

The Squad had little impact on the incidence of fights. In 1973, at the request of the KwaZulu Government, special legislation was passed to curb the fighting in the district. Proclamation 103 of 1973 provided for 90 days detention for anyone suspected of being connected with a crime of violence. While it was 'unusual' to have special legislation for an area, Judge Andrew Wilson commented that 'sometimes emergency measures are needed in an area, and Msinga is such an area'<sup>69</sup>.

The Mchunu heir, Simakade, was little prepared for turbulence when he returned to the district in 1944. He was just twenty, and glad to be home — despite the growing tensions on the Mchunu-Mthembu border that were about to flare into war. It was a difficult time for a homecoming, caught up in forces he couldn't control, when he was still unfamiliar with the countryside.

Three months after the battle of Ngongolo<sup>70</sup> he was officially installed as chief. He had a long reign ahead of him. For the next 57 years, he would be adjudicating conflicts and dealing with the pressures of change. He worked hard at inter-tribal unity, forging strong bonds with the Mthembu royal family, when he married Ntombizethu, Kufakezwe's daughter, and made her the chief wife of the tribe. (His sister, Kohlfile, had married Kufakezwe, just after the battle of Ngongolo.)

The tribes were now family, as well as allies, with useful channels of communication to deal with common problems or threatened rifts between the tribes.

When Kufakezwe died in 1957, his heir, Ngoza, was a youth of 17 and too young to take up the chieftainship. Khambilemfe Mvelase became a popular regent, acting as chief until Ngoza was installed in 1968. Almost immediately he was plunged into controversy. Openly critical of government decisions on land issues, he was suspended in 1973, banished in 1976 and re-instated in 1979.

There have been many changes in traditional leadership since Simakade was installed as *Inkosi* in 1944 and Ngoza in 1968. When they began their rule they lived in isolation, with little training or support, and were largely

*Few fines imposed by the 1931 Commission of Enquiry were paid. In 1937 the government announced, as 'an act of clemency' to mark the coronation of King George VI, all fines would be remitted and deportation orders suspended. (1MSG 3/1/12)*

63 CNC 1541/1920

64 *Native Unrest (Faction Fights) Cunu Tribal Disturbances Msinga- Weenen*. File 1941/31 national Archives

65 NTS 7667 60/332, National Archives

66 1MSG 3/1/12

67 *Record of Proceedings held on 28th October, 1933 in Pietermaritzburg. Chief Native Commissioner, chiefs and headmen.* 1MSG 3/1/13

68 NTS 9339, File 5/379, National Archives.

69 Conference on 'Faction Fights in Modern Times', April 1987. Reported in CAP Newsletter, A Murder Epidemic, June 1987.

70 The battle of Ngongolo is described in the foreword to this report.

unaware of the laws that governed them. Today their sons are better prepared for the mazes of transition, facing up to the changing role of leadership required by democratic government.

In 2002 Gangandlovu Elijah Mchunu was installed as Acting Chief of the Mchunus —

although his father remains head of the tribe, with a heavy workload for a man of 87.

More recently S'phamandla Wiseman Mvelase took over as Acting Chief of the Mthembus after his father retired following a long illness.



# Chapter 4:

## Land tenure in Msinga: The normative ideal



What are the land 'laws' of Msinga (*imithetho yomMhlaba yaseMsinga*)? This chapter describes the key features of the land tenure and natural resource management regime that residents and community leaders in the Mchunu and Mthembu tribal areas articulate to researchers in interviews and focus group discussions. These key features are underpinned by ideas, values and organising principles in relation to land-holding that are derived from pre-colonial forms of social, economic and political organisation. The organising principles and the 'rules' for allocating and using land together constitute a normative ideal of land tenure which most local residents can describe in some detail, and refer to as *imithetho yomhlaba* ('the laws of land')<sup>71</sup>.

However, our research also revealed many instances where the practices that people actually engage in, appear to contradict or diverge from this normative ideal, for example, where people do not pay a *khonza* fee to the *Inkosi* of the tribe when being allocated land, or residential land is allocated to unmarried mothers<sup>72</sup> or living trees are cut for firewood despite explicit prohibitions on this practice. The principles and values embodied in the normative model appear to inform a range of practices in relation to land and resource rights and their regulation, and to allow for very different interpretations of the 'laws'. Some of these variations emerge clearly in examples taken from individual interviews and set out in text boxes in this chapter.

<sup>71</sup> See Alcock and Hornby (2004) for a detailed description of land tenure and administration in tribal areas of KwaZulu-Natal more broadly. Their account suggests that the normative ideal has common features across the province.

<sup>72</sup> This is described and discussed in more detail in Chapter Seven.

Chapters Five and Six report research findings from the case study *izigodi* in the Mchunu area (Mathintha and Ncunjane), and in the Mthembu area (Ngubo and Nkaseni). They also describe significant variations from the normative ideal. Many of these reflect differences in interpretation and practice between densely settled tribal areas, on the one hand, and those located in areas that in the past were owned by white farmers as labour tenant farms (the ownership of which is now being transferred to local residents through processes of land reform), on the other. Contrasting local conditions and site-specific histories are key factors influencing interpretation and practice.

One view of these variations and differences might be that cultural norms and values are never a precise guide to human action, and that there is an inherent tension between 'rules' and 'practices', even in institutionalised settings such as a land tenure system. Another might be that such variability demonstrates how 'customary' land tenure institutions, in contrast to Western-legal systems of private property, are inherently much more processual and flexible in character, and are far from being rigid, rule-bound systems. This allows them to be adapted and re-framed in response to changing circumstances and conditions. They might therefore be seen as examples of the 'living customary law' in relation to land.

A third view might be that fundamental contradictions between the origins and bases of customary systems (in pre-capitalist agrarian economies) and contemporary socio-economic realities are leading to profound changes in social organisation, such as a shift away the extended patrilineage as a primary principle of social organisation. These are in turn leading to fundamental changes in the nature of land rights in practice, if not (yet) in the 'laws' of land.

## Social organisation and identity in Msinga

Msinga is reputed to be a stronghold of Zulu culture and tradition, and the Mchunu and Mthembu tribes in particular are said to be highly 'traditional' in character. Although these are problematic terms, it is clear that rights and obligations are defined primarily

through social relationships and membership of a variety of social units, including families, households, kinship groups, neighbourhoods and 'communities'. This means that social organisation is key to understanding land and natural resource tenure (Berry 1993; Okoth-Ogendo 2008).

The underlying principle of land allocation in Msinga is that married people with children should be allocated land so that they can: (a) gain access to the natural resources required to support their families, and (b) have a site on which to establish an *umuzi*. Single people cannot be allocated land, and must reside with either their parents or other family members. Land is allocated to a household, under the authority of the household head, rather than to individuals, and the household

### Box 2: A large, compound homestead in Nkaseni

Hlekisile Dubazane is a married woman of 57 years who lives in her husband's *umuzi* in Nkaseni. She was married in the 1970s. When she was still a virgin (*itshitshi*) she accepted her husband's marriage proposal (*ukuqoma*). She went to her husband's homestead for a period after damages had been paid (*ukugana*), and later returned home. Her husband's family then started negotiating *lobolo* with her family and started paying cattle while she was still living at her father's homestead. However, her mother in law died before she had a wedding celebration (*ukugida*), so she was 'abducted' (*ukushaqa*) by her husband's family and came to live in his homestead. However, her father refused to accept this. He requested that she come back home and that her husband's family honour their commitments. All the necessary arrangements were made, and there was a proper wedding.

Hlekisile's father-in-law died some time ago and her husband is now the person responsible for the *umuzi*, because he is the eldest son. She lives here together with her husband's other three wives and her husband's brother's wife, as well as five young wives (*omakoti*). Three *omakoti* are her sons' wives and two are the wives of the sons of her husband's two brothers. The older women cook separately from each other, and she cooks with her sons' *omakoti*. She has eleven children in total; two are married and live elsewhere, so nine of her children still live with her. Of her husband's other wives, one has five children, another has five, and a third has six. Her husband's brother's wife has seven children. The eldest of her sons' wives has five children, and the second eldest has one. She says that this *umuzi* is very large, but she does not know its physical boundaries - only the men know these.

head is understood to be a senior male (*um-numzane*). There is thus a strong association between land holding and the necessity of supporting a family from land-based livelihoods, which in the pre-colonial agrarian economy would have been the main source of livelihoods for most people (Guy 1980).

An *umuzi* is under the authority of a married man, who might have or more wives (see Box 2), although polygyny is clearly in decline. In polygynous marriages these wives live in separate residential structures within the homestead and each constitutes a 'house-property complex' (Preston-Whyte: 1974). As part of this complex, each wife is entitled to a site on which to build a home and hearth for herself and her children, a granary and a field or fields of her own, which she cultivates to provide food for herself, her children and her husband when he is eating with her. The property that belongs to each house, while under the tight control of a husband, is heavily 'encumbered' (Sansom: 1974) and a husband may not dispose of it without consultation with his wife.

Married men and their wives and their children may continue to live in their parents' homestead for many years before establishing their own homesteads, giving rise to large, three or four generation-strong 'compound' homesteads composed of several marital units (See Box 2). Central to the homestead is the cattle kraal, made up of live-

stock independently owned by husbands and fathers, as well as cattle from *lobola* that belongs to the house-property complex of each wife. The kraal, a specific geographical space from which women are generally excluded, is also the site on which ritual slaughter for the ancestors is performed, which thus binds a particular family to a particular site through the inter-generational bonds, both social and material, embodied in livestock, and cattle in particular (Hammond-Tooke 2003).

The family, meaning here an 'extended family' of patrilineally-linked relatives and not a 'nuclear' family of a man and his wife or wives and their children, is the most basic unit of social organisation. Marriage establishes important relationships between two families or descent groups, symbolized by payments of *lobola* that transfer the rights to women's reproductive capacity to her husband's family and by ancestral rituals that inform the *amadlozi* (the ancestors) that a new wife has joined the family.

Descent is traced through men. It is a patrilineal system, within which there is a central concern with preserving the 'surname' of the descent group, i.e. the identity of the male lineage and its connection to past generations:

*Surname is closely linked to the role of ancestors in mediating the past and the future and who ancestors are able to recognize. Land is integral to this mediation because ancestors are only able to recognize communication that takes place from a specific ritualized place on the homestead plot. A specific piece of land is thus integrally connected with a specific family whose name is carried in the male line, and is a critical link in the fortunes of that family because of the protection the ancestors give to the living*

Alcock and Hornby 2004: 14-15

Marriage is virilocal (i.e. wives move to the home area or homestead of the husband), and children 'belong' to the husband's family. Together with gender, family membership is a primary determinant of social identity; it forms the basis of a complex web of kinship relationships and associated obligations. Familial obligations, if not membership, can also be extended to the wife's natal family, including her mother's brothers and sisters,

### Box 3: Sharing fields within the Ngubane family

Mandla Ngubane is about 60 years old, and lives in an area with a severe shortage of arable land. He is the middle son of three. His eldest brother controlled and 'managed' the fields inherited from their parents, and allocated him one of these fields when he was married. The field is worked by his wife, who plants maize and sorghum. When one of his sisters was divorced a few years ago, she returned home and built houses for herself within the boundaries of the family *umuzi*. The eldest brother allocated her a small field (about 1300m<sup>2</sup> in extent) from within the arable lands inherited from their parents. She has fenced this field with wire to protect it from goats, which are a major problem in the area, and uses it to grow maize for domestic consumption, and sorghum, which she brews for beer. The eldest brother has moved away from the *umuzi*, in part because of tensions between the wives, to establish a new homestead in the mountains, where he is breeding goats.

grandmother's sisters and children from these relatives. Obligations arising from these familial connections can include 'temporary'<sup>73</sup> residential sites and garden space in times of need.

Family membership and familial relationships thus involve legitimate expectations of support from other members, but also obligations to provide similar support when requested. These principles and values continue to inform claims to land and practices of land holding (see Box 3).

## Who qualifies for land rights?

All members of the Mchunu and Mthembu tribes and their descendants are entitled to land. People from other areas or tribes can also be allocated land and settle in the area; if the correct procedures are followed, approval is granted and they become fully-fledged members of the tribe. Rights to land thus derive most fundamentally from accepted membership of the tribe<sup>74</sup>. Equally important, however, is the idea that that rights to land enable a family unit to produce a livelihood for themselves, and thus that only adults who have children to support are entitled to land. The family, in this case, an extended family that includes a wide network of kin-related individuals, is thus the immediate social context that influences the form and content of land rights.

Between the tribe as a whole and the family are other social units which influence how land is held and used, most notably the *isigodi* or ward, often comprising several hundred households. The *isigodi* is the key social unit for land administration purposes.

Land rights provide for three kinds of land use: land for residential purposes (where an *umuzi* or homestead can be built), land for crop production (arable fields or *amasimu*), and common property, with natural resources that support livelihoods (providing grazing and browse for livestock, trees for firewood and construction, thatching grass, wild fruits, medicinal plants, water for household use and agricultural purposes, clay and sand for building, and so on).

Many people acquire their land by inheriting it. The residential site and fields of deceased parents are taken over by the eldest son, but

### Box 4: Who qualifies for land? The flexibility of land tenure 'rules' in Msinga

Sisizwe Khumalo is a 37 year old woman who lives in a homestead in Mathintha with her two children. Her husband comes home on weekends. They are not fully married (*ugidile*)\*, but some cattle have been paid as damages and some goats have been slaughtered and she is *uganile*. Her husband's homestead is in the Mthembu tribal area, and she moved there as her husband's second wife after he had paid damages to her family.

Her husband owns livestock but grazing land is scarce in the Mthembu area, so he recently suggested that they move to Mathintha in the Mchunu tribal area, where grazing is more plentiful. They then approached a former neighbour of hers in Mathinta and went together to the *Induna* and asked for land to establish a homestead. The *Induna* told them that her husband would not be given land in the Mchunu area unless he was prepared to move there together with his whole family. Her husband did not want to do so, however, because he cultivates irrigated plots in the Mthatheni Irrigation Scheme in the Mthembu area and earns good money from the sale of cash crops. The *Induna* then asked them if they had a son, and on being told 'yes', said she could ask for land in the name of her son.

Sisizwe then went to the tribal court together with her former neighbor and asked for land in her son's name, without mentioning the fact that she had a husband. She was then allowed to establish a homestead. She does not regard herself as the holder of this land on behalf of her son, but believes that it is her husband's land, as it is registered in his surname. When the *Induna* and the *ibandla* came to settle them on this land, her husband was part of the process and the neighbors see the homestead as belonging to her husband, not to her.

\* The full number of cattle required for lobolo is being paid and all the required ceremonies have been performed.

if he has already established a separate homestead by the time they die, then another son can take over the land and associated property such as residential structures. Brothers who live within the same compound homestead might go on living there, if they and their wives are able to cooperate, but once they are married and have children to support, they can request separate land of their own. If there are no sons, the homestead and its land might be held by someone in the extended family (e.g. a brother of the deceased male head of the family) and inherited by someone else bearing the family surname. One informant said that a daughter can take over a family's land if there are no sons, but

73 'Temporary' can over time involve multi-generational occupation of homestead land, so is not necessarily short-term in nature.

74 In theory this means that one can be a member of only one tribe at a time. Box 4 nicely illustrates how this rule can be circumvented in practice.



only on condition that the surname of the family does not change as a result.

Orphans are looked after by family members, either on the father's or on the mother's side, until they reach adulthood. The residential land allocated to their parents (the *umuzi*) remains vacant and is care-taken by their father's father or by one of his brothers. This might involve them using the building materials on the site for their own purposes. The land remains within the father's descent group until it is inherited by one of the sons.

### Women's land rights

As indicated above, what rights to land women can claim, or should be able to claim, is currently a key issue in Msinga. Emerging practices of allocating land to unmarried women with children, together with the anxieties and tensions that local people experience and express in relation to the decline of traditional forms of marriage, are described in Chapter Seven. Some of the key features of the normative ideal of land tenure in relation to women's land rights are briefly summarised here.

*Married women:* a husband, acting as head of the household, allocates his wife or wives a site within the *umuzi* to build their residential structures, as well as fields for cultivation. Some young wives (*omakoti*) move into a large, compound homestead under their husband's father (or elder brother), rather than into new homesteads established together with their husbands.

*Divorced or abandoned women:* different outcomes in relation to land access are possible. If the wife runs away (*baleka*) from her husband, her brothers must ascertain the reason; if she has left as a result of abuse by the husband, they will demand an apology, but if the abuse continues she can return to her father's home and *lobolo* cattle do not have to be returned (unless she remarries). If the woman is 'chased away' and returns to her father's home (*uxoshiwe*), her brothers, who have benefited or will benefit from her *lobolo* cattle, have to visit the husband's family to ascertain the cause of the problems. If she has committed adultery, her family will pay a fine and she will return to her husband. If she has defied the authority of her husband then

she can be disciplined by her brothers. If she has been falsely accused then she cannot be sanctioned.

*Widows:* there are several possible options for women who are widowed. One option for a widow is to be taken as a wife by one of her deceased husband's brothers, a practice known as *ukungena*. Another is to return to her father's home. A third option is to continue to reside with her husband's family, with the risk that they might begin to make use of, or sell some of the household's property, including livestock. A fourth is to ask for land in her own right in her deceased husband's home area. A widow does not inherit the family's land, livestock and other forms of property in her own name, but holds these for her children and in particular for the male heir, often the eldest son, or another son if the eldest son has already established his own homestead.

## The nature of rights to land and natural resources

### Residential land for an *umuzi*

Residential sites are used to establish an *umuzi*, and are generally large enough to establish a garden or a small business enterprise, and to bury deceased family members. The *umuzi* is also where livestock are kraaled at night, and fruit trees are often planted. The size of these plots is variable, depending on when the plot was first allocated and the density of current settlement. Older plots tend to be larger than more recently allocated plots.

Land cannot be sold, but buildings (such as houses, but also shops or business premises) can be transacted for cash. If these are sold to an outsider, then the purchaser must seek approval for becoming a member of the tribe, using established procedures described below.

Residential land is usually inherited by a male family member so that the surname continues to be associated with the *umuzi*. It cannot be taken away from anyone unless a person is evicted from the tribe after committing a very serious crime. If a site is abandoned, and the extended family makes it clear that they no longer wish to use it, the site can be re-allocated to someone else, but only after the

performance of ceremonies to appease the ancestors.

### Arable fields (*amasimu*)

Once a family has been allocated arable land, it holds that land securely even if it is not cultivated. Fields not in use can be borrowed by others, usually without any cash being paid. A gift, such as a portion of the crop, may be given to the 'owner' of the field in thanks, or a portion of a field may be borrowed and the borrower may then arrange to have the rest of the lender's field ploughed. If a family leaves the area permanently, their fields may be re-allocated to another family. As with residential land, arable land can never be sold.

In many areas there is now a shortage of arable land and not everyone can be allocated fields for crop production. At the same time, not everyone cultivates their fields any more, as a result of various constraints on dryland cropping and the general decline of agriculture, and many fields are fallow or used mainly for grazing. This is creating tensions, and in the Mchunu tribe the *Mntwana* has initiated discussion on the re-allocation of uncultivated land (see Chapter Five for a more detailed discussion).

In areas where arable land is in scarce supply, sharing of fields between family members is common, but often the area of land involved can be very small. Older sons who inherit large areas may manage these on behalf of the wider family, and may allocate portions to those in need (see Box 3).

Crop residues in arable fields are considered to be common property in the dry season, and anyone's livestock can consume them after the crops have been harvested. However, owners of livestock that damage crops during the growing season can be charged in the Tribal Court and fined.

Thatching grass found on arable land (e.g. in the unploughed areas that mark the boundaries of the fields) belongs in the first instance to the person with rights to that field. Others must ask permission of that person before cutting grass, and anyone not doing so can be charged in the Tribal Court.

In the past, custom required that no-one worked in the fields on a funeral/burial day

and for some days thereafter. The extent to which people adhere to this custom today is highly variable, with many people ignoring it and others observing it only on the day that the burial takes place.

### Irrigation scheme plots

A large irrigation scheme of around 800 hectares is located on the floodplain of the Thukela River and falls within the Mthembu and Mabaso tribal areas. The scheme, first established in the early twentieth century, is known officially as the Tugela Ferry Irrigation Scheme and amongst locals as Mtateni. Between 500 and 1000 households<sup>75</sup> cultivate crops such as green maize, tomatoes, cabbage and sweet potatoes for sale in local markets and to itinerant traders, as well as for home consumption (Mkhabela 2005, Tapela and Alcock 2011). The scheme is laid out in irrigated beds which average 180m x 9m (0.162 ha) in size. The number of beds that each household cultivates at any one time varies between one and twelve, and a great deal of informal leasing or share-cropping takes place, with active farmers borrowing or leasing extra beds from those who are inactive. Some farmers clearly make substantial profits from green maize and tomatoes, but most complain of very high input costs that reduce their net income.

The scheme is laid in seven irrigation blocks, but one large block has been uncultivated for many years because of an unresolved boundary dispute between the Mthembu and Mabaso tribes. Each block has an elected 'block committee', which is responsible for maintaining the irrigation canals and fences, managing water use, collecting administrative fees from farmers and liaising with local officials of the Department of Agriculture around extension support.

The original allocations of irrigated beds were undertaken decades ago by the *Inkosi*, and many of the current holders have inherited their land through two or three generations. The chairpersons of the block committees also play a role in allocating any beds that become vacant. Izinduna are not involved in land administration within the scheme. According to one key informant from Ngubo:

*If a person wants a field in Mtateni, he requests from the Inkosi, who would then*

<sup>75</sup> According to Tapela and Alcock (2011: 134), it is difficult to determine the exact number of farming households at Mtateni because of 'the constantly changing pattern of plots and a co-existence of single and multiple plot users, sharing of plots and used plots'.

*tell that person to negotiate with people in Mtateni, who can place them (ukubeka), but there is no money that is paid for that.*

Both Mkhabela (2005: 188) and Tapela and Alcock (2011: 134) state that non-use of a bed for several consecutive years can lead to it being re-allocated to others. It may be that the informal rental market for beds is underpinned by their owners' need to have beds clearly in use, so that they do not lose their rights<sup>76</sup>.

### Common property resources

Natural resources found on the common lands can be seen as *common property* resources because rights to make use of them are dependent on accepted membership of the tribe and non-members are (in principle, if not always in practice) excluded unless permission has been granted. The degree to which resource use is regulated by agreed rules that are enforced by authority structures is highly variable, and regulation barely exists in some cases.

*Grazing for livestock:* Any tribal member who owns livestock can herd them on the communal grazing area, without any restrictions on numbers. The main resources found in the grazing areas are grass, shrubs and trees, the latter browsed mainly by goats but sometimes by cattle as well. Donkeys, used by many farmers to plough their fields, also make use of the grazing areas.

*Thatching grass:* Thatching grass found on the commons can be cut by anyone, without asking permission. Cutting usually begins in June because the grass is not dry enough before then. It is possible to go to another isigodi or another tribe's land and ask the *Induna's* permission to cut grass there, but also to talk to local residents to ensure they approve. Many women from the Mchunu and Mthembu tribes cut thatching grass outside their own areas, on commercial farms located at higher altitudes, where useful thatching grass species are found.

*Trees:* Trees found on the commons are a source of wood for fuel, building materials, fencing materials, cattle and goat kraals, traditional medicines, and wild fruit. Any tribal member can harvest wood for these purposes, but the cutting of living trees (green wood) is prohibited. Cutting trees outside the

tribe's own land requires the permission of the traditional leadership of that area; if such permission has not been granted, then both the wood and the axe used to cut it can be confiscated.

*Amabonda (bundles of wood):* Newly married women (*omakoti*) often cut large bundles of green wood from hardwood tree species, which are stored just behind their huts. This is common practice despite being frowned upon because an *ibonda* is seen as an important symbol of the status of a married woman. Poles from these bundles are never used for cooking, only for 'warming the hands' in cold weather, and are often not used at all. Given the current shortage of wood for fuel and building, cutting of trees for *amabonda* is a somewhat contentious issue at present, with men often blaming women for the general shortage of trees and women strongly denying their culpability. One woman said 'Men always blame women for the cutting of green trees for *amabonda*, but they don't question those men who cut large green trees to make boards for serving meat on'.

## Demarcation of boundaries

### Residential land

When a site for an *umuzi* is allocated, the boundaries are demarcated in the presence of neighbours and leadership figures (e.g. members of the *ibandla*, together with the *Induna*) and are generally not contentious. The site is not usually fenced, but a smaller area around the residential structures is often fenced. Small fields or gardens forming part of the *umuzi* are often fenced to protect them from livestock. Because of growing population density and overcrowding, disputes over boundaries of residential sites are said to be more common now than they were in the past.

### Arable land

The boundaries of fields (*amasimu*) are demarcated either by strips of unploughed land, which can have trees and grass growing on them, or by brushwood and thorn fences or by stones. A few individual fields are fenced with poles and wire. Some blocks of fields belonging to groups of homesteads are now beginning to be fenced, using materials do-

<sup>76</sup> These issues are currently being investigated in a separate research project on the socio-economic characteristics of agricultural production on the Tugela Ferry Irrigation Scheme.

nated by government or by the tribal office, and individual fields within the block are often separated and demarcated by strips of unploughed land.

One respondent from Ncunjane said that:

*I have six fields located in the same block of arable land where other people's fields are. We use branches from thorn trees to fence the fields so that livestock cannot come in and damage the crops, but people from the main tribal area have harvested many of the thorn trees and so now our fields are poorly fenced. One of my neighbours is claiming some of my fields and does not recognize the boundary stones which I used to mark them off. But most people here use stones to mark boundaries, and they are usually respected.*

### Common property resources

The most important boundaries within which common property resources are used are the external boundaries of the tribe. Within these, common property resources can be used by all the members of the tribe. Outsiders from other tribes are supposed to ask permission from the *Induna* of the relevant *isigodi* in order to make use of grazing, thatching grass or trees, and to dig river sand for building purposes. Some of the external tribal boundaries are deeply disputed (see Chapters Five and Six), and this can generate serious tensions over resource use. In the past, when population densities were lower than at present, there were acknowledged internal boundaries within the tribal territory as well. These separated the common property areas of each *isigodi* and people respected the boundaries between them, but this seems to have eroded over time and people from different *izigodi* often access the same communal grazing. However, tensions between *izigodi* over such resource use does persist in some areas (e.g. between Mathintha and Ncunjane in the Mchunu tribal areas).

A member of the Mchunu traditional council from the *isigodi* of Dungananzi said that there is a severe shortage of common property resources in his area, and that some use of resources across the boundary with the Mthembu tribe is tolerated. According to him:

*We can pick wild fruit in the Mthembu grazing areas without asking permission, but we are not supposed to cut firewood there... if an iphoyisa (policeman) catches us there, he can confiscate the wood and our axes. But that is the only source of firewood in our area. They don't mind us taking our livestock there for grazing, though. If sufficient rain falls, thatching grass can be found on top of the mountains around here. People from the Mthembu area can come here to cut it, but only after liaising with us and asking permission.*

### Land administration

Land administration here refers to established procedures for demarcating parcels of land, accepting outsiders into local residen-

#### Box 5: Applying for land in the Mchunu area

Jabulane Ntuli is from Mathintha, is about 50 years old and has two wives. One wife has four children and the other has none. He used to live in his father's homestead with his older brother, but after his parents died, he decided to move out and build his own homestead. He was on good terms with his neighbours in Mathintha and they had no problems with him establishing a homestead nearby. He went to *Inkosi* Mchunu to ask for land, and was asked if he was married or not. He said he was not fully married (*ugidile*) but had paid damages and slaughtered goats for two wives and was already living with them (i.e. he was *uganiwe*). He paid a *khonza* fee of R15 and was then given a letter of approval by the tribal secretary, which he took to the *Induna* of the Kwaguqa *isigodi*, who helped him find a suitable site for his homestead.

Jabulane knows that there is a R30 fine for living with a woman if you are not properly married. If ever he needs help from the tribal office, or has to take a case to the tribal court, he will have to pay this fine before being offered assistance or being allowed to put his case in the court. He would like to get properly married, but is struggling to pay the required amount of *lobola*. He used to own a few livestock, but they were all stolen. He is unemployed and has no source of income at present, and feels that *lobola* is too expensive. He thinks that this might be something that can be discussed with the *Inkosi*.

Jabulane does not have any fields for cropping, but during the planting season he borrows land from his neighbours, in return for which he pays for the ploughing of the rest of the neighbour's land. However, after the harvest the neighbours take their land back, so each year he has to borrow from someone else. His wives make mats from grass and sell these to get money to buy food, and the family also receives one child support grant.

tial areas and allocating them land, recording landholdings, resolving disputes over land and enforcing rules in relation to the use of common property resources. In Msinga these procedures are not formally described anywhere, but are widely understood and accepted, and are broadly similar in the Mchunu and Mthembu areas (see Box 5). Some key differences in procedure are found between the core tribal areas and the former labour tenant farms now being returned through land reform. Most land rights management in Msinga takes place at the level of the ward (*isigodi*), but groups of neighbours at an even more local level also play a key role in agreeing to the location of new plots and the acceptance of newcomers from outside the *isigodi*.

### Land allocation

'Allocation' here refers to the demarcation of land on which to establish an *umuzi* and of fields for crop production purposes. If a male member of the tribe is married, has children and wishes to establish a new *umuzi* for himself and his family, he must approach the people living in the area (his future neighbours), and seek their approval and agreement on the location of the residential site (and the fields, if arable land is available). Usually the *Induna* will be involved in this process as well, since he knows the history of land allocation in the *isigodi*, helps to resolve land disputes, and is likely to be aware of the potential for such disputes in particular places. The *ibandla* will often be involved in the process as well. The prospective homestead head must pay a *khonza* fee of R15 to the *Inkosi* at the tribal office, which issues a letter of approval (and may require outstanding debts to the tribal office for fees or fines to be paid before the letter is issued).

If a married man takes another wife, the homestead will need more land, both residential (for the huts of the new wife) and arable. If land is in plentiful supply then the homestead can expand without asking anyone's permission, but if land is scarce then the neighbours must be consulted, and possibly the *Induna* and *ibandla* as well. No *khonza* fee is paid in such cases.

Land allocation procedures are a little more elaborate in the case of an outsider (someone

from outside the tribe) applying for land. A local 'champion' who can vouch for the applicant is needed, who introduces the newcomer to the neighbours and assures them that he will be a law-abiding person. Then the *Induna* of the *isigodi* is approached and his assistance sought. Alternatively, the *Induna* can be approached first. The applicant must bring a 'letter of reference' from the *Inkosi* (i.e. the tribal office) of the area he is leaving stating that he is of good character and is not subject to criminal charges, and explaining his reasons for moving to the area. If this is accepted by the *Inkosi*, the *Induna* then calls a meeting of the *ibandla* and the neighbours, the applicant provides beer, and the land is demarcated in front of everyone present as witnesses. A *khonza* fee of R15 must be paid to the *Inkosi*. In some areas it is said that an additional fee of R15 must be paid to the *Induna* as well.

### Records of land rights

No documents recording land rights are issued. One respondent said that 'we don't need papers to show these are our fields — they have been in our family for four or five generations now. Our rights are undisputed by the rest of the community'.

However, the tribal offices do keep a register of all applications for land by outsiders, and of the *khonza* fees paid by them, and they issue receipts as well as a letter of approval to take to the *Induna* who will oversee the local land allocation process.

### Dispute resolution

Disputes over land (e.g. over the location of boundaries between *imizi* (homesteads) are resolved at the local level in the first instance, the *ibandla* and the *Induna* acting as mediators and adjudicators. If the dispute cannot be resolved at this level then it will be taken to the tribal court presided over by the *Inkosi*.

### Natural resources

In relation to the management of grazing, a key issue is the date in the dry season after which livestock are allowed into the arable fields to graze on crop wastes such as maize stalks — an important feed resource in agro-pastoral systems. Many informants said

that in the past there were established procedures for making a decision on this date, with most stating that the *Induna*, together with the *ibandla*, would consult crop farmers and those with livestock before announcing the date, and others stating that the *Inkosi* would make the decision, after consultations with farmers. However, this practice has fallen away in recent years, despite the conflicts and tensions that occur between some crop producers who plant and harvest crops later than the majority, and livestock herders eager to access crop residues as soon as possible after the end of the cropping season.

In relation to trees, some informants say that the *izinduna* of each *isigodi* are supposed to prevent people from cutting down living trees or green wood, but others say the *amaphoyisa* are supposed to police such resource use. Many people say that policing has broken down, in part because there is a shortage of wood, in part because the authority of the *izinduna* is no longer respected as much as it used to be.

## Conclusion

This chapter describes the core features of a normative ideal of land rights and land administration in two tribal areas in Msinga. Most adult residents are highly knowledgeable about land tenure and are able to explain and articulate these features and their rationales. Access to land and natural resources continues to be seen as a fundamental entitlement, despite the fact that arable land is now in short supply in many areas and not available to all who need it. It is clear that land

rights can only be understood by reference to key features of social organisation; for example, local respondents' strong emphasis on the importance of the surname to be established at a homestead indicates the continuing strength of patrilineal relationships. The homestead, the *umuzi*, continues to play a central role in social life as a site of production, reproduction and ritual.

Another significant feature of the normative model is the decentralised character of day-to-day land administration. Neighbours, *ibandla* and *izinduna* play key roles in accepting and validating requests for land, demarcating boundaries and resolving disputes, as well as in vetting and approving newcomers as acceptable future community members. These local processes are nested within a layered system of land administration, with only some functions being the responsibility of those institutions at the apex of the land administration system - the *Inkosi*, the tribal office and the tribal court.

Illustrative case study material shows that there is a great deal of flexibility and scope for local interpretation of the land tenure 'laws' of Msinga. However, even when understood as a flexible and variable system, or perhaps as a 'loosely constructed repertoire' (Comaroff and Roberts 1981: 18), the normative ideal obscures the range of local variations. The next three chapters describe in more detail the variations in land tenure apparent in different *izigodi* within the Mchunu and Mthembu tribes, and discuss the impact of wider processes of socio-economic change.



## Chapter 5: The living law of land in the Mchunu tribe

There are significant differences within the Mchunu tribe in relation to land tenure and land administration. Research in Mathintha (an *umhlati* within Kwaguqa *isigodi*), and in Ncunjane *isigodi*, immediately adjacent to Mathintha, revealed that key differences are the result of the contrasting histories of these two *isigodi*. Others arise because of differences in relative natural resource abundance, which is itself a product of these histories. Local histories are also key to understanding tensions, disputes and shifting balances of power at the local level, which strongly influence (and are in turn influenced by) how land is held, used, claimed and defended.

The key differences and contrasts between the two localities are summarized in Table 3. This

chapter describes these differences in more detail and compares them to the normative ideal outlined in Chapter Four.

### **Mathintha**

Mathintha is part of the KwaGuga *isigodi*. It lies at the intersection of district and tribal boundaries, a position that made it central to the battle of Ngongolo in 1944, and the tribal ceremonies which have taken place at the graves ever since<sup>77</sup>.

While its neighbor, Ncunjane, lies off the beaten track, Mathintha residents have always enjoyed the mobility afforded them by a main district road which bisects the area. In the early 1980's the government tried to

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77 See Foreword.

impose a betterment scheme<sup>78</sup> on Mathintha, using this road as a boundary between a planned hillside grazing area and an area of closer settlement. While some residents agreed to move across the road, others resisted and remained on the hill, and the different patterns of settlement remain visible today.

Less visible are the graves of the 1944 battle, which lie between the homesteads, high up on the hill, and which have been the scene of both Mchunu and Mthembu regimental ceremonies, as well as peace and prayer meetings.

For many decades Mathintha residents were dependent on the adjoining farms, Koornspruit and Loraine, for both firewood and grazing, with homesteads located right up against the fences<sup>79</sup>. This made control of the farms by their owners impossible, and in effect they were part of the main tribal area, something conceded by successive landowners.

Procedures for accessing land in Mathintha are generally consistent with the normative model described in Chapter Four. Processes

are overseen at the local level by neighbours, the *ibandla* and the *Induna*, and a *khonza* fee of R15 is paid to the Tribal Office. As is generally the case in Kwaguqa *isigodi*, Mathintha is densely settled, and a key problem faced by residents is the severe shortage of land for crop production, livestock grazing and natural resource harvesting. Land and resource scarcity leads to tensions and disputes over boundaries. Families who wish to plant crops but lack fields of their own have to borrow fields from others, but can do so for only a year or two at a time, which they find unsatisfactory.

### Boundary disputes, external and internal

Mathintha is located just to the south of the Ngongolo ridge. According to members of the Mchunu traditional council, the exact location of the tribal boundary between the Mchunu and the Mthembu is still contested, but neither side wants to resuscitate the dispute because of the possibility of sparking off another bloody battle. In addition, a peace treaty agreed to after the war was sealed by

**Table 3: Differences between Mathintha and Ncunjane in relation to land and related issues**

Mathintha	Ncunjane
Densely settled, hence a scarcity of arable land, leading to widespread borrowing of fields by relatives and neighbours	Former labour tenants and migrant workers taking ownership of farms through land reform
A shortage of grazing and fuel wood, leading to use of natural resources on land within adjacent Ncunjane	Relatively low population density, and natural resources relatively abundant
Shortage of water sources for livestock, so herd owners move their livestock across a tribal boundary with Mthembu tribe to access the Thukela River	Many large, multi-generational compound homesteads in evidence
Many informants express approval for idea of allocating to single women with children	Older men and women see themselves as 'traditionalists' who insist on marriage in compliance with custom
A <i>khonza</i> fee is paid to the <i>Inkosi</i> and the Mchunu tribal office	Many informants express resistance to idea of allocating land to single women with children (but it occurs in practice)
The <i>Induna</i> oversees all land allocation processes	No <i>khonza</i> fee was paid to the <i>Inkosi</i> and the Mchunu tribal office in the past
Represented on the traditional council	Until recently, local residents allocated themselves land, after discussions with neighbours but without oversight by the <i>ibandla</i> and <i>Induna</i>
	Not represented on the traditional council

78 Betterment was an approach to land use planning in black rural areas implemented in South Africa from the 1940s onwards. It involved demarcating blocks of arable and grazing land and relocating homesteads into densely settled 'villages', ostensibly to promote efficient land use and to facilitate service provision. Betterment has been widely condemned for both its authoritarian nature and for its negative impacts on land tenure security, social organisation and locally-adapted production systems (Yawitch 1981; McAlistler 1986).

79 These farms, as explained in Chapter One, fall within Ncunjane *isigodi*.



inter-marriage between members of the two tribes<sup>80</sup>. The disputed boundary falls within the communal grazing area located along the ridge, and this is used by livestock belonging to members of both tribes. Mchunu herdsmen are allowed to cross Mthembu land to take their animals to water, when in need, at the Thukela River. In practice then, the boundary is porous rather than exclusive in character.

Territorial boundaries between *izigodi* within the Mchunu tribal area, or between *imahlati*, have also been a source of tensions in the past and have led to violence on occasion, but the degree to which land scarcity or disputed boundaries has played a role in these remains unclear<sup>81</sup>.

The boundary between Mathintha and the eastern borders of Ncunjane *isigodi* seems to be relatively clear and not in dispute, perhaps because this part of Ncunjane was located on labour tenant farms for many decades. Many tenants lived on these farms until 1969, when massive forced removals of labour tenants took place throughout Weenen District (see Chapter Three). After 1985 the boundary was marked by a barbed wire fence erected by the provincial Department of Agriculture, but since 2000/01 the fencing has gradually disappeared.

Mathintha residents now make extensive use of Ncunjane grazing and wood resources. The reasons are clear: there is a severe shortage of grazing, browse and trees in Mathintha, and relative resource abundance in Ncunjane. Residents of Ncunjane are not happy about such usage, but appear to accept that there is not much they can do about it. They also talk about a recent history of co-operation between Ncunjane and Mathintha, for example around schooling, which suggests that co-operative relations between the two communities are seen as important<sup>82</sup>.

However, there is a somewhat buried and more complicated history of resource use on Ncunjane land by Mathintha residents, which helps explain the present 'flexibility' of this boundary. When CAP took possession of Koornspruit, Loraine and The Spring in 1975, the farms were unoccupied as a result of the 1969 forced removals of labour tenants from farms in Weenen District. After abandoning its original intention of operating a cattle co-operative, CAP intended the farms to be run

as a resource reserve for the wider tribal community on its borders, as well as to develop and demonstrate effective measures for land rehabilitation. CAP thus gave neighbours from Mathintha, Nqumantaba and Gujini the right of access to Koornspruit and Loraine farms from the boundary to the Sikehlenge River, a small tributary of the Thukela River which bisects the farms in a north-south direction. After the Department of Agriculture erected the boundary fence in 1985, CAP provided stiles to allow access and exit by women with head-loads of wood. It is clear that this boundary has been porous, rather than exclusive, for several decades.

Disputed territorial boundaries present complex challenges. Although porosity and flexibility allow some of the tensions that arise from the unevenness of resource distribution to be defused, the potential for conflict is clear. This means that social and political relationships across these boundaries have to be carefully managed.

### Lending and borrowing of arable land

Some key informants suggested that 70% of homesteads in Mathintha lack fields of their own, but it was not possible to verify this claim. Many homesteads cultivate smaller plots or gardens within their *umuzi*, on which they plant various crops (predominantly maize, but also sorghum, sweet potatoes and vegetables).

Those with fields do not always cultivate them, however, for a variety of reasons. These include the unreliability of summer rainfall, lack of access to oxen, donkeys or tractors for ploughing, lack of cash to purchase inputs and shortages of labour. In general, the significance of crop agriculture as a source of livelihood has declined over the past few decades. Some fields remain uncultivated for many years. But the owners of these fields often refuse to have them re-allocated, and many are reluctant to even lend land to those who do not have land of their own (see Box 6). The rule that fields which are not used for three years in a row can be re-allocated to those in need, has not been strictly enforced in recent years.

Re-allocation of unused land was discussed at a focus group session held with Mathintha community leaders in June 2007. According

80 Discussion on the history of the tribe with members of the Mchunu Traditional Council on 07/06/07.

81 Conflicts between Mathintha and Nqumantaba have been on-going for many decades. In 1981 their men went to war over guns, and nine died. In 1987 more such violence led to the South African Defence Force moving into Msinga, setting up roadblocks at Mathintha and Nqumantaba. A war between the two *amahlati* in 1989 saw twenty seven men dying.

82 Until relatively recently Ncunjane children were accommodated within primary schools in Mathintha.

### Box 6: Two experiences of borrowing of fields in Mathintha

I am experiencing many problems finding fields to plough for myself. When I ask to use a field, my neighbours say that they do intend to plough their fields at some point. It is even difficult to borrow the fields of a family which has left the area, because their relatives say that they are 'looking after the fields for them'. Most fields here are not ploughed, yet people do not want to give their fields away those who need them. Eventually I just made a small garden at my umuzi, to grow a little maize for home consumption. (Nyoni Zungu)

I do not have any fields so I borrow from my neighbours. I do not pay any cash but I help them in some way. For example, if I use part of somebody's fields, I make sure that their part gets ploughed using animals or a tractor. This is expensive for me. But after a year the neighbours want their land back, so each year I have to ask a new neighbor for land. (Jabulane Ntuli)

to the *Induna* for KwaGuqa, Majubane Mntungwa, all the *izinduna* of the Mchunu tribe had recently been asked by the *Mtnwana* to record the owners of unused fields in their areas. This was to provide the basis for a re-allocation of land to those in need. This would take place only after the *Inkosi* had received an assurance that the owners of the fields did not intend to use them, or alternatively, had left the area permanently. According to the *Induna* this implied that the *Inkosi* himself was going to oversee the allocation of land, rather than the *izinduna*, as is usually the case.

However, no such re-allocations were observed to have taken place in Mathintha subsequent to this discussion, and discussion of the issue at a report-back workshop with the Mchunu traditional council in September 2007 revealed that there was no clarity on how they intended to deal this issue in future.

#### Fencing of fields

Much of the arable land in Mathintha is located within a large block of fields with deep red soils, which is shared by three of the nine *imihlati* within Kwaguqa *isigodi* (Mathintha, Sulu-ki and Nqumantaba). The block was fenced a few years ago using materials supplied by the Department of Agriculture, and the *Mtnwana* played a key role in securing this assistance. Most fields not located within the block are fenced with branches from thorn trees, which are perceived as being less effective than wire fencing in keeping out livestock, leading to many disputes over crop damage by untended animals during the growing season. Subsequent attempts to raise funds for fencing through individual contributions by local residents yielded around R700, but this was insufficient to fence the whole area under crops.

### Ncunjane

#### History and context

Ncunjane is one of the twelve Mchunu *isigodi* located on farms in the Weenen District, under their own Chief Induna (*Indunankulu*), Dukuza Mkhize. It is an *isigodi* of former labour tenant families loosely clustered around five farms. One of those farms, The Spring, was formerly owned by CAP. When CAP arrived in the district in 1975 the farm was empty — 'cleared' of tenants in the forcible evictions that followed the abolition of the labour tenant system in 1969. Until recently, Ncunjane was only accessible along a rough, eroded track, which was useful to the labour tenant families who found shelter on The Spring after being evicted from farms elsewhere in the district.

None of the Ncunjane family heads was born on The Spring - an indication of the shifting nature of tenancy on farms. While tribal area (location) families may occupy the same ward for generations, farm people tended to move from to farm, following evictions or disagreements with the landowners.

Labour tenants in this part of the province have always seen themselves, and been seen by others, as full members of the different tribes found in the area. Disputes under customary law that could not be resolved within the family or at *isigodi* level, were always taken to tribal courts established for the use of farm residents. In the case of the Mchunu, this was located in Weenen under *Indunankulu* Mkhize.

Labour tenants were thus partially under the authority of white farm owners, and partially under the authority of the *amakhosi*, who

ruled through tribal offices and tribal courts located at places within reach of people on the farms. The history of a territorial and institutional separation between tribal members resident in the tribal areas and those on land acquired and held as privately owned farms by whites, has deeply influenced systems of land holding and use in the past. It continues to do so today in the wake of land reform.

Although some sections of Ncunjane have been claimed and approved by the Commission for the Restitution of Land Rights, others are still awaiting legal transfer. Some land claims are being dealt with under the Land Reform (Labour Tenants) Act of 1996. A substantial proportion of the previous occupants of the farms, evicted in 1969/70 and relocated to Mchunu tribal land in areas such as Keate's Drift, have never returned - but such people are recognised by government as legitimate claimants. Lack of clarity on which institutions are responsible for resolving claims to these farms is one reason, amongst others, for the slow pace of land reform in these areas.

Land reform beneficiaries generally take formal ownership of land through legal entities such as trusts or communal property associations (CPAs), which are registered as the holders of the title deeds. In Weenen District many of these new institutions appear to exist in only a nominal sense. Known locally as 'committees', they act as a communication channel between government and claimants while the claim is being resolved, and enable the transfer of the title to a legal entity, but once the claim has been resolved they often fail to function, and many appear to fall away completely.

### **Ambiguities around ownership of former labour tenant farms**

The issue of who owns the land on former labour tenant farms was raised by researchers in focus group discussions in Ncunjane and in meetings with the Mchunu traditional council, and generated heated discussion. Land reform has created a profound ambiguity.

On the one hand, it is clear that legal processes are taking place that transfer private ownership of these farms to beneficiary communities composed of both current occupants and those who have legitimate claims based on previous occupation. The farms are therefore

marked out as land of a different status to that of tribal land administered by traditional authorities. In Ncunjane this underpins the strong feeling by the current occupants that this land should not be allocated to outsiders, even if they are members of the Mchunu tribe, and that it must be reserved exclusively for those with strong legal rights to land, and in particular, by the current occupants. According to the *Induna* for Ncunjane, 'it is our land' (*'umhlaba wethu'*). This does not however, preclude allocation to an outsider who applies for land, if they are related to a community member, as explained in a focus group discussion:

*We don't want people from anywhere else in the Mchunu tribal area to come and live here. But if someone's relative applies for land, the ibandla will have to meet to discuss their application. If the ibandla says 'no' then it's 'no'. But if a married son moves out of his father's umuzi, he must tell the Induna and the ibandla, who will then meet and decide where to allocate some land for the umuzi and fields.*

On the other hand, the people of Ncunjane all acknowledge that it was, is and will continue to be an *isigodi* of the Mchunu tribe. This is also how a range of other actors see things, such as other members of the Mchunu tribe, the *Inkosi*, the traditional council, and indeed the state. It remains a segment of the larger social and political unit, under the jurisdictional authority of the chief and the traditional council. From this perspective, land tenure in Ncunjane cannot differ fundamentally from the system that obtains more generally in the Mchunu area. Yet the transfer of title to a 'community' of former labour tenants means that legally the underlying ownership status of the land is very different.

This ambiguity around the definition and meaning of underlying property rights on land reform farms is clearly a sensitive issue for traditional leaders in Msinga. In a report-back meeting, members of the Mchunu traditional council members raised a number of potential problems:

*The Mchunu people are one nation (isizwe), and the people on the farms are not a separate nation... if they become independent, the nation will be dissolved. (Vice-Chairman of the council)*

*If the people on the farms are separate, they will not be able to come to the Inkosi and the Tribal Court to resolve their disputes ... where will they go to get letters of residence, and apply for licences?*

*(Councillor)*

*The people on the farms must follow the same procedures as the rest of us, and they cannot have their own rules. If someone from another area applies for land, the same procedures must be applied. He must bring a letter from his area and go to the Inkosi, and then to the Induna and the ibandla.*

*(Councillor)*

It was also seen as a major problem that Ncunjane and other *izigodi* were not directly represented on the traditional council.

Solutions to the problem of ambiguous property rights following land reform, proposed by members of the traditional council, included the idea that the Inkosi should be the chair of any trusts or CPAs formed to take transfer of farmland, and a suggestion that the Inkosi should visit the farms, call meetings with the new owners and seek clarity on what they themselves want to do about the problem. One councillor said that government should clarify its policy position on the matter, and should listen carefully to the views of the people themselves.

At a project workshop held in October 2009, the Vice-Chairman of the Mchunu traditional council suggested that people on the farms would probably decide to remain part of the Mchunu nation for pragmatic reasons. These include the need to be issued with a proof of residence letter required when applying for an ID document or a social grant, for registration of customary marriages; and having access to dispute resolution forums, including traditional courts. In his view, customary law remains very important in attempts to address social ills such as the breakdown of marriage, children growing up without parents, and child abuse — and on this issue, many informants from Ncunjane expressed similar views.

### Land administration

The most significant difference between land administration practice in Ncunjane and in Mathintha is in relation to land allocation. In Ncunjane there was a widespread practice

### Box 7: Self-allocation of land in Ncunjane

Sipho Mlambo lives in Ncunjane with his two wives and thirteen children in an extended, multi-generational homestead. He has six sons who still live with him, some of whom have wives and children of their own. He used to live on the upper part of Ncunjane, but moved to lower Ncunjane after he was chased away from the 'top farm' by the white land owner. He asked for land in lower Ncunjane from CAP, which informed the *ibandla* that it had no objections. He first chose a site for his *umuzi* next to the homestead of Mdile Bhengu, who complained that this was located on his fields. He then found a new site, and subsequently asked for a second site nearby for his second wife. The *ibandla* was present when these sites were approved, but not the *Induna*.

Mlambo has arable land in lower Ncunjane, which he has fenced off and on which he is building a dam. He had spoken to CAP about needing cropping land, and he allocated to himself the portion that he wanted to use. His neighbor, Bhengu, again disputed the boundaries of these fields, but this was resolved. In addition, he now has six large fields in upper Ncunjane, which was recently transferred to Ncunjane people through land reform. These are located within a large block of fields, fenced with wire from government and locally harvested timber for posts.

Mlambo owns over 70 cattle, about 200 goats and sheep, and many chickens. He bought his livestock during the twenty years he worked for government as a cattle herder. Sometimes he was paid with livestock, such as a calf, as a bonus. He says that stock theft is a big problem in the area.

of self-allocation and demarcation of land by residents until very recently, with only loose oversight over such practices by the *Induna* and the *ibandla*, and without payment of a *khonza* fee to the *Inkosi* (see Box 7). In a focus group composed of older men, it was asserted that 'we used to decide on where our fields would be. This was because these were farms, and we were labour tenants under the chief *Induna* for the farm areas.'

In addition, for many years Ncunjane residents did not pay fees to the tribal office when an animal was slaughtered and a beer drink was held, as required by all other members of the Mchunu tribe. At the time of our field research, however, these practices were beginning to change. Unresolved disputes were being taken to the main tribal court presided over by the *Inkosi*, which is now more accessible than the *Indunankulu's* court in Weenen<sup>83</sup>. The *Inkosi*, in turn, was asking why the stipulated *khonza* and other fees were not being paid to the Mchunu tribal office, which needs

<sup>83</sup> Access to the main tribal court was constrained in the past by the political geography of apartheid.

such income to help meet the costs of providing its services to local residents.

In addition, the number of homesteads being established in Ncunjane was beginning to increase as a result of people returning to the farms and because married sons are leaving their father's homesteads to establish their own homesteads. This led residents to agree that the *Induna* and the *ibandla* should oversee land allocation in the same manner as elsewhere in the Mchunu tribe. The reason appeared to be that increasing population density was seen as likely to lead to higher levels of dispute over land, and this in turn would require more oversight of land allocation processes.

These changes may also be the result of the *Inkosi* and other *izinduna* insisting that the *Induna* for Ncunjane attend tribal court proceedings. As reported above, members of the traditional council expressed strong disapproval of the idea that different land administration procedures might be in place at Ncunjane or other ex-labour tenant farms. One Councillor said that:

*It is surprising to hear that people on the farms may allocate their own land. They have an Induna! They must follow the same procedures as the rest of the Mchunu people...*

### Access to land by single women

Ncunjane residents tend to see themselves as more 'traditional' than people living in densely settled tribal areas, and often assert that there is a high incidence of 'proper marriage' (*ugidile*) in their families. Former labour tenants at Nkaseni, in the Mthembu area, also identified themselves as socially conservative. As discussed in Chapter Seven, survey data reveal that there is indeed a higher incidence of such marriages in the former labour tenant farms (18 percent of adult women with children) than in the main tribal area (8 percent).

A member of the *ibandla* in Ncunjane asserted that the incidence of young women becoming pregnant outside of marriage was much lower here than elsewhere in the Mchunu area:

*We are very strict here. Very few girls have babies out of wedlock. We want to keep it*

*that way - that's why we don't want outsiders coming in here. If an unmarried brought the husband of her child here, there is no chance we would give him land for the family.*

In practice, however, single women with children are being allocated their own land, as was apparent in several interviews. For example, a niece of the *Induna* married a man in Mathintha, but after being abandoned by him she returned to her father's *umuzi* in Ncunjane. Anticipating tension with the wives of her brothers living at the homestead, she asked the *Induna* for land in her own right in order to construct her own *umuzi*. She is proud of her independence and asserts that:

*There is no way I will allow my husband to come and live here. I built this place myself! I went to a [commercial] farm and cut some firewood, and exchanged it for a goat, which gave birth to other goats. Some of these I exchanged for a cow. I now own 13 goats and 7 cattle. I would be ploughing crops by now as well if some people from outside Ncunjane had not stolen the thorn trees that I cut to fence my fields.*

For another example, of a widow establishing a new homestead of her own, see Box 8. Given the apparent social conservatism of labour tenants, these cases are perhaps a little surprising. Why are single women being allocated land in these contexts? The answer may lie in the tension between normative ideal and grounded practice, in this case in relation to women's land rights. It is further evidence of the pent-up demand for land for single women with children, as a result of changes in the wider society and economy, which the land tenure system is being asked to accommodate. As the two examples provided here illustrate, some of these women desire to hold their own arable land for cropping purposes, as well as residential land on which to establish a homestead.

### Conclusion

Field research revealed key differences between land tenure practices in Mathintha and Ncunjane, and in both there was evidence of significant divergence between practice and normative ideal. Here, land tenure does not involve the implementation and enforcement of inflexible rules by authority structures, but

### Box 8: Access to land by Sibongile Dlamini, a widow in Ncunjane

Before my husband's death in 1999 we lived with my husband's brother, at a homestead that was originally their father's homestead. After my husband's death my brother-in-law did not ask me to ngena (to marry her deceased husband's brother). He did not treat me well and I decided to leave the homestead with my three children and establish my own umuzi.

I was allocated my land after approaching the ibandla for Ncunjane together with the Induna. They sent me to CAP to get permission, but CAP referred me back to the ibandla. They asked me where I wanted to live, and I pointed out a site close to a source of water. It is near the Sikehlenge River. I made beer for the ibandla and was then approved. I did not have to pay a khonza fee to the Inkosi or the tribal office, because no-one at Ncunjane pays this fee – I am not sure why not.

At my brother-in-law's homestead I was not allowed to have a field to cultivate, but I don't know why. Now I have both fields and a small garden at the umuzi, where I grow maize and pumpkins. Both my garden and my fields are fenced with thorn trees.

rather the invocation by local actors of socially legitimate values and principles, which are drawn from normative ideals of land relations, but sometimes also from state land policy, to justify their claims, arguments and actions. This creates a necessary degree of flexibility and allows for the adaptation of general principles to local circumstances and changing conditions. It also creates the potential for tensions and contestations over conflicting claims, interpretations and actions — and thus often leads to processes of negotiation or dispute resolution.

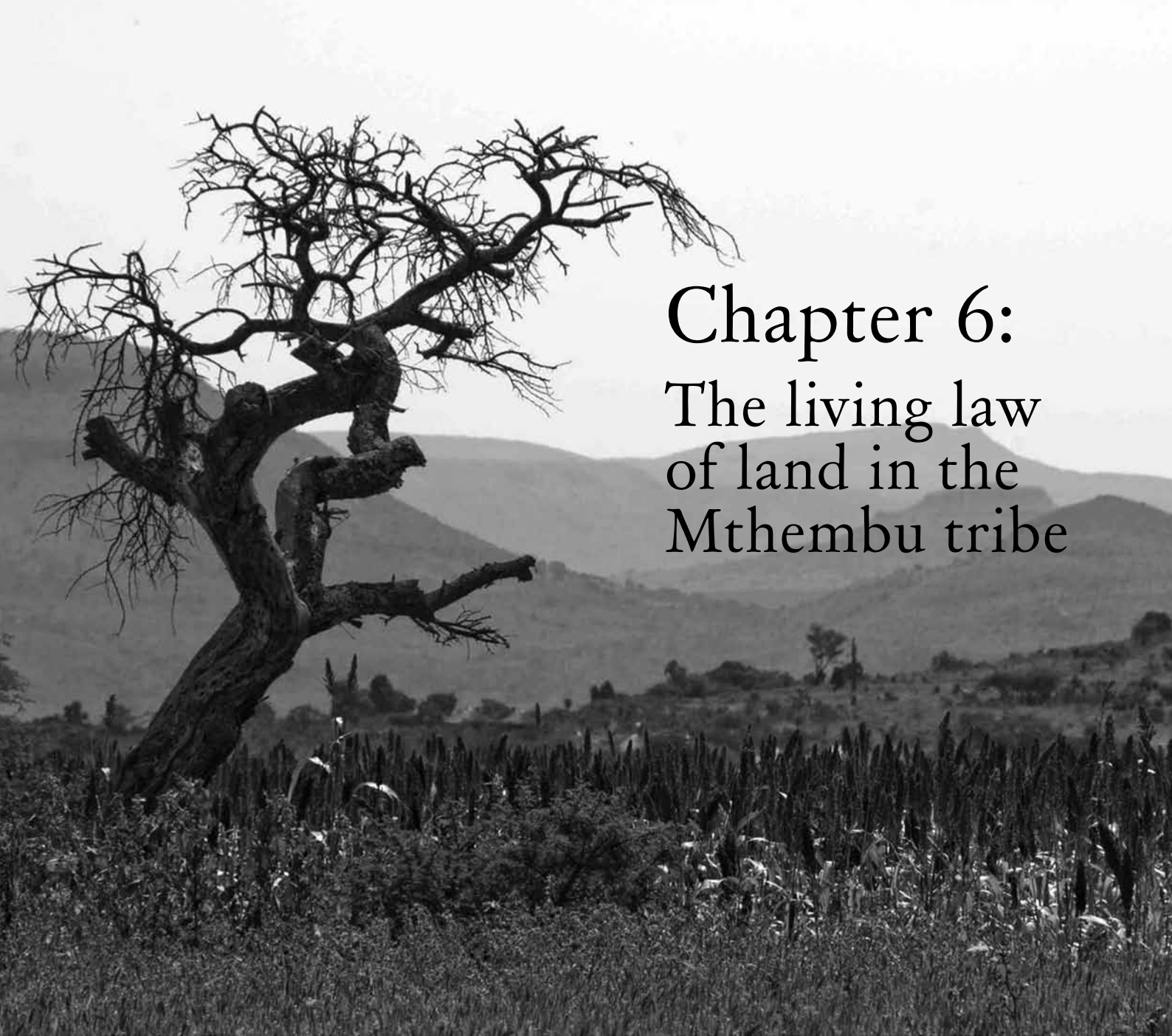
Authority structures and figures are key to managing these tensions and providing a context for such negotiations, but there are local variations in how their roles in relation to land are understood — for example, the role of the *Induna* in land allocation is not the same in Mathintha and Ncunjane. The 'living law' of land thus involves both relative stability and substantive uncertainty, in relation to both rights and authority.

The case studies reveal that in practice, land rights and land administration are indeed nested or layered in character, with most day-to-day land administration taking place at the local level, as suggested by the normative ideal. This may be one key reason for local variability. They also illustrate the flexibility of boundaries between *izigodi* within large tribes, and the need to manage the tensions

that can arise as a result. The intractability of disputes over tribal boundaries also became clear.

A history of labour tenancy on neighbouring white-owned farms, where labour tenants continued to see themselves as tribal members, is key to explaining differences between the two case study sites, Mathintha and Ncunjane. Forcible evictions of 'surplus' labour tenants from these farms in previous decades, and a locally specific history of subsequent re-settlement supported by MRDP/CAP, followed by land reform, has created a situation of relative resource abundance which current occupants wish to retain. They also want to continue to form part of the Mchunu tribe and not be seen as private property owners, and as a result the ownership status of these farms remains somewhat ambiguous.

Key problems that emerged in interviews and focus group discussions included the shortage of arable land in Mathintha and the limitations of current practices of 'borrowing' fields from households which are not making use of them. Re-allocation of unused fields has been discussed in recent years, but more formal regulation of land lending/borrowing/renting has not. The other major issue that emerged and was widely debated was that of the demand of single women with children for land in their own right (see Chapter Seven).



# Chapter 6: The living law of land in the Mthembu tribe

As in the case of the Mchunu tribe, there are significant differences between *izigodi* within the Mthembu tribe in relation to land tenure and land administration. Research in the two field sites, Ngubo and Nkaseni, explored the reasons for such differences, and once again, specific local histories and realities, as well as power relations, emerged clearly as key factors. The main differences and contrasts between the two localities are summarised in Table 4.

## Ngubo

Ngubo is a stronghold of the Mthembu royal family, and despite a lack of visible memorials, holds a special place in Mthembu history. In about 1822, Tshaka's army came across

Mthembu women, children and cattle hidden along the Sampofu stream in the area now known as Ngubo. 'They discovered where the cattle and women of the Tembu had been hidden: there were very many of them. They seized cattle and killed all the women and children'<sup>84</sup>.

Thirty years later the area became known as 'Nodada's Location', the Mthembu section of the Mzinyathi location, but it was an area the tribe hesitated to settle because of its proximity to the Zulu frontier. It has always been close to conflict, being the site of two royal kraals where the Mthembu regiments gathered to be doctored for war against their neighbours.

84 Lugubu ka Manga Liso: The James Stuart Archive, Volume I

**Table 4: Differences and contrasts between Ngubo and Nkasseni in relation to land and other issues**

Ngubo	Nkasseni
Densely settled, shortages of arable land and grazing	Former labour tenants taking ownership of farms through land reform
A few people have plots on <i>Mthatheni</i> irrigation scheme, but many more desire to have such plots	Relatively low population density; resources relatively abundant (e.g. irrigated fields alongside Thukela River)
Large fenced area for fields and winter grazing, shared with two other <i>izigodi</i>	No <i>khonza</i> fee paid to <i>Inkosi</i> and tribal office
Ngubo residents maintain fencing through contributing cash and labour	<i>Induna</i> plays no role in land allocation; used to be the Committee; now unclear
Heavy fines imposed for livestock found inside fenced area in cropping season	Cash was paid to Committee in early stages of land reform ('own contribution')
Lack of clarity around fines causing concern	Lack of clarity on role of traditional council in relation to land
Tensions with neighbouring <i>izigodi</i> arise over uneven commitment to maintenance of fencing	Strong opposition by men to idea of unmarried women with children being allocated their own land
Many residents open to idea of unmarried women with children being allocated their own land	

Internal wars have been more common, however. In 1982-83 Ngubo and Mashunka were involved in a conflict which was eventually ended by a settlement agreed upon the graves of the Ngongolo ridge, while a 1987-88 fight with a neighbouring ward, Ngcenceni, made TV news when nineteen Ngubo men were killed in a dawn raid - and cameras recorded bodies being carried off the hills by Ngubo women.

Despite these conflicts, Ngubo is noted for its internal cohesion, which has been used to the benefit of its agricultural activities. It was selected as a research site because its natural resource management regime has long been of interest to CAP<sup>85</sup>. In contrast to other areas where CAP works, it appears that natural resource use in parts of Ngubo is closely regulated. A wire fence that surrounds a large area of around 500 ha set aside for rain-fed cropping in individually-held fields in the summer months and communal grazing by livestock in the dry season is well maintained. Agreed rules governing when livestock can access the fenced grazing areas are strictly enforced (see Box 9). In addition to investigating land tenure, field research explored the origins and impacts of these rules and sanctions.

The normative ideal of land tenure in Msinga described in Chapter Four was clearly articulated by key informants in Ngubo. As elsewhere, the question of allocating land to unmarried women with children emerged as a key issue of great concern to many people. In Ngubo several focus group participants expressed the idea that custom should adapt to changing social realities, and that single women with children should be allocated land for their own *umuzi*.

As in Mathintha, a general shortage of arable land for cropping is a problem for many households, but in Ngubo the close proximity of the Tugela Ferry Irrigation Scheme (Mtateni) means that many people are more interested in obtaining rights to irrigated plots than in gaining access to fields for rainfed cropping (see Box 9). In contrast to Mathintha, it was asserted that some dryland fields that had not been utilized for around five years had been re-allocated to others in need of land.

### Natural resource management

The large fenced area enclosing arable fields and winter grazing is made use of by members of three neighbouring *izigodi* — Ngubo,

85 MRDP/CAP staff first explored natural resource management in Ngubo in early 2003, when it organised meetings with local leaders and invited researchers from LEAP and the Department of Agriculture (Minutes of meeting of 31/01/2003 by Donna Hornby and Thelma Trench).



### Box 9: Land administration in Ngubo

Magongo Mkhize is 61 years old and has two fields in the Ngubo cropping area, which he plants every year with maize, beans, sorghum and pumpkin. If there are good rains he gets a good harvest. He uses these crops for household consumption and does not sell any of the harvest.

Land allocation: Mkhize says that the usual procedure is that married or *uganile* couples can get land, but these days a woman with a son can also get land. The procedure is that a person wanting land consults the neighbours and the *Induna*, who then reports to the *Inkosi*. The person is then allocated land, with the neighbours as witnesses. An amount of R100 is paid to the *Induna* as a *khonza* fee, but he does not know what the *Induna* does with this money. He says in the old days people did not pay for land, they were just allocated it when they needed it.

He also has two plots or beds in the Tugela Ferry Irrigation Scheme, known as Mtateni. He acquired these by asking the *Inkosi*, who said he should simply look for some uncultivated beds and use those. He did not pay any *khonza* fee. He grows maize, tomatoes, and sweet potatoes on the irrigation scheme. Traders come to buy his produce and he makes good money, but the high cost of fertilizers is a problem. About 10 people from Ngubo have beds in the irrigation scheme.

Mkhize owns 22 cattle and 15 goats, which graze on the mountains and in the fields after harvest. His cattle were once impounded for being in the fenced area when crops were still growing, and the *Induna* fined him R300. But he only paid R200 and told the *Induna* that he could not afford the full amount. The fine laid down by the *Inkosi*, according to him, is a maximum of R50, regardless of the number of cattle involved, but the *Induna* is now imposing his own fine. He does not mind paying a fine, but he insists that it should be the one laid down by the *Inkosi*.

Ngcengeni and Sijozini, but Ngubo residents appear to take the lead in efforts to maintain the fence, which has wire mesh in its lower half to make it goat-proof and is thus costly to repair. According to the *Indunankulu* (Chief *Induna*) for the Mthembu, Bhekuyise Ntshaba, who until 2009 was also the *Induna* at Ngubo, the fence was first erected in the 1960s using funds from the KwaZulu 'homeland' government, with local residents contributing their labour. Further funds were received from government in the 1980s, and these were augmented by monies collected by local residents. Currently the fence is maintained using donations of cash and labour by residents.

Interviews and focus groups revealed that while the rules governing natural resource use in Ngubo are generally accepted, the manner of their enforcement is controversial. In particular, heavy fines imposed on livestock owners whose animals are found within the fenced area in the cropping season are highly

unpopular amongst livestock owners, and there is concern over where this money is going, and what it is used for. At issue are both the sanctions being imposed for rule-breaking and the manner in which the authority of the *Induna* and the *iphoyisa* is being exercised. Another source of tension is unevenness in the commitment of the three *izigodi* to the regime. Ngubo people feel strongly that residents of the other two *izigodi* do not contribute their fair share of cash and labour to maintenance of the fencing.

The natural resource management regime was described by the *Indunankulu* and one of the *iphoyisa* for Ngubo as follows: fields are ploughed at the beginning of the rainy season, and when complete, all livestock must be removed from the fenced area. A meeting is called by the *Induna* and the *ibandla* to decide on the exact date for their removal, after which livestock can be impounded in the kraal of the *Induna* and released only on payment of a fine. In discussions with CAP staff in

2003, the amount of the fine was said to be R50; in 2008, the fine was said to be R500 — a massive increase.

The area is patrolled by four policemen, or *iziphoyisa*, who also impound the livestock. After the crops have been harvested, a date is announced by the *Induna* after which livestock are allowed to enter the fenced area and feed on both the 'reserved' grazing and crop residues in the fields. Livestock found in the fenced area in the dry season, if from *isigodi* other than the three which share its use, also incur fines for their owners. A main road from Ngubo to the neighbouring area of Gujini runs through the middle of the fenced area, and gates are installed at both entrances. These are maintained by young boys, who collect a few cents as payment for opening and closing the gates for cars. If no boy is on duty, the driver is expected to open and close the gates.

Large trees located inside the fenced area that provide shade cannot be cut down - only thorn trees, or aloe plants used as a source of fuel when brewing beer, may be felled. Women may begin cutting grass for thatching after June, when the grass is properly dry. Cutting grass before this agreed date, for example, by women wanting to earn money from its sale, causes tensions. Burning of grass inside the fenced area will result in the loss of winter grazing, and anyone caught starting a fire can be fined. Children watch during the day for fires, and people are called to come and put out the fires if they are seen.

The *Indunankulu* described a 'war' between Ngubo and Ngcengeni, one of the neighbouring *izigodi* whose members also have fields within the fenced area and make use of its natural resources, which broke out in 1987 and led to the deaths of around 40 men from both sides (including some based in Johannesburg):

*The war broke out because some women from Ngcengeni came to cut grass in the fence area before the agreed time, in June. The iphoyisa then took some young men with him to arrest these women and make them pay a fine, but they refused to pay, and fighting broke out. We called other izigodi to help us sort out the dispute, but eventually we had to send these people to*

*the Inkosi. He imposed a fine of R600, which came to me because I had arrested them*

Households in Ngubo are currently expected to provide male labour and to pay R20 each per year to buy materials to repair the fence. Women brew beer for the men working on the fence, and this another form of contribution. Those who are too poor to pay can provide labour only.

According to participants of a focus group meeting composed of ten older men, many of whom owned relatively large herds of livestock, repair work on the fence was currently under way and a meeting to discuss the use of the R20 contributions was soon to take place. One man said that some Ngcengeni residents had also contributed monies and they had promised to send the amounts contributed, plus a list with the names of those contributing, to the organising group at Ngubo. Residents from Sijozini had not contributed as yet, and they seemed content to fence their fields with thorny brushwood: 'a meeting would have to be called to discuss this matter'. It was evident that the Ngubo focus group felt that this was evidence of an uneven commitment of their neighbours to maintenance of the fence.

The focus group participants said that fence repairs were the responsibility of the people themselves, and that the leadership of the *isigodi* was not really interested in repair of the fences. This, they said, was because the fines paid by livestock owners whose animals were found in the field, was kept by the *iphoyisa* concerned, and hence they are 'only concerned with benefitting themselves'. The group felt that it was a major problem that none of the fine money was used to compensate the owners of any crops which might have been damaged by livestock. A focus group of older women felt particularly strongly about this issue, and felt that the *Indunankulu* and the *iziphoyisa* should be called to a meeting to be told that no-one had been paid compensation, which was their right.

One man related how he had recently impounded some cattle found in his fields and he had forced the owner to pay the fine directly to himself as compensation — even though he knew that he was supposed to

have taken the animals to the kraal of the *Induna*, in order to avoid an accusation of stock theft. Participants also expressed the view that it would help if the new *Inkosi* clarified the rules and the amount of the fines, since the old rules had been made by the previous *Inkosi* some time ago. They also said that perhaps the *isigungu*, the traditional council, could sort out this matter and issue clear, written rules. These would be very helpful in resolving disputes at the local level.

The question of the fines was discussed at a report back meeting with the traditional council in August 2008. The *Indunankulu* expressed the view that livestock owners often claim they cannot afford the fines, despite having large herds, and that it is poor widows who rely on their crops who suffer the most from crop-damage by animals. He said that the *Inkosi* needs to help them solve this problem of people being unwilling to pay their fines, whereupon the acting *Inkosi*, the *Mtwana*, asked for clarity on who should receive the money paid as a fine. In the discussion that followed the *Indunankulu* suggested that two fines should be paid — R500 for the *Inkosi*, and R1 000 for the owner of the fields which were damaged i.e. a total of R1 500.

It is clear that the natural resource management regime in Ngubo is functioning to a degree. But it is also beset with tensions — over the issue of fines for wandering livestock and compensation for crop damage, as well as over the perceptions of uneven commitment to the regime by members of the three neighbouring *izigodi*. These tensions may reflect a larger problem — that of widespread tensions between layers of authority within the Mthembu tribe more generally. These may have been generated by recent attempts by ‘traditionalists’ within the tribe to re-impose what they see as ‘social order’ in a time of rapid social change (see Chapter Eight).

### Reallocation of fields

There is a shortage of arable land for younger families in densely settled Ngubo; all the fields located within the fenced area having already been allocated. The large fields that families were allocated in the past have subsequently been re-divided to allow new families to get fields, and as a result fields are now much smaller than they used to be.

Some borrowing of fields does take place. If fields have not been used for a long period like five years, the fields can be re-allocated to someone who is need of them. Use of fields is strongly encouraged by the *Inkosi*, who has said that unused fields should be allocated to others. According to the *Indunankulu*, the *Induna* at Ngubo should undertake the re-allocation, not the *Inkosi*, and the re-allocation need not be reported to the Tribal Office. During a transect walk undertaken by the research team, one of the *iziphoyisa* pointed out a field that had been re-allocated some time back, but was only partially cultivated.

A member of a focus group discussion gave an example of a field that had been re-allocated, which had caused ‘fighting’ to break out between the households concerned. Members of the Traditional Council agreed that this issue was a difficult one and often caused tensions. It was clear that while re-allocation was possible in principle, in practice it occurs quite rarely.

## Nkaseni

### History and context

Nkaseni is the *isigodi* located on the farm Bushman’s River Mouth, which lies in the Weenen district, about 20 km from the village of Weenen - and about 40 km from the Mthembu royal kraals at Ngubo. First surveyed in 1852, the farm has plentiful water and rich alluvial soils. It was subsequently divided into several different portions and sold to different owners.

Sometime in the 1880’s ‘there was a severe drought in the land’ and the Mthembu chief, Mganu, established a royal kraal at Nkaseni because ‘he wished to get good crops under an irrigation furrow there to supply food in famine years to his other kraals’<sup>86</sup>. The farm was in Mthembu territory, but its increasingly politicised community would over time become more concerned with fighting evictions from the farms than sharing the problems of the Mthembu royal house.

In 1906 the farm Mthembu were heavily fined for refusing to mobilise for the Bambatha Rebellion, and by 1910, growing tensions became open hostility as Nkaseni and Ngubo camps each claimed the chief wife (and the mother

86 SNA 2294-1904 Evidence of Silosini ka Mabila and Magupana ka Nzuzu.

of the heir) of the tribe. While the Nkaseni people did not deny their Mthembu identity, they distanced themselves from some of the Mthembu wars with neighbouring tribes, asserting a relative degree of independence that has continued until today.

In 1996 a group from within Nkaseni was responsible for the first negotiated land claims settlement in the area. They agreed on a settlement with Louis and Koos van Rooyen, who were owners of a portion of the Bushman's River Mouth farm.

The current situation at Nkaseni is similar to that at Ncunjane in many ways. Here too, land reform is resulting in the transfer of land ownership to a group of former labour tenants, who continue to see themselves as part of a larger tribal entity, and local residents characterise their land tenure system as broadly in accordance with the normative ideal. As in Ncunjane, the transfer of the land to the Nkaseni 'community' through a Trust, which is recognised in law as the legal owner, has created a fundamental ambiguity around the legal status of the land. However, Nkaseni contrasts with Ncunjane too: its history of occupation and land use is different, and its agricultural resources include fertile land and a functioning irrigation infrastructure. Partly as a result, there are significant contrasts in the way that land rights are defined and administered in the two former labour tenant farms.

### Labour tenancy at Nkaseni

People at Nkaseni say that they were occupants of the land long before whites came into the area and acquired farms<sup>87</sup>. They cannot remember exactly when they lost their land, since it took place long before their grandfathers were alive, but as children they were told stories of the time before people became 'slaves' to white farmers. They 'lived well' in those times, with large herds of livestock and big fields for cropping.

The farm on which Nkaseni was originally located, Bushman's River Mouth, was subdivided over time into a number of separate farm portions and by the 1970s these were owned by different white farmers. These farmers cultivated the irrigable land along the Thukela and Bushman's Rivers, growing a range of grain and vegetable crops, and grazed herds

of beef cattle, as well as operating dairy, poultry and pig enterprises. Labour tenants were allowed to reside on the farms on condition that their homesteads provided labour for the farmer, but they were also paid a very small cash stipend.

On one of the Nkaseni farm portions, owned by the van Rooyens, more than sixty families were living on the farm by the 1960s. After the large scale evictions of 1969/70, only twenty seven families were allowed to remain. Life was harsh according to older residents, who can clearly remember conditions at that time:

*No-one was allowed to establish a homestead (umuzi) without the farmer's permission, and our sons were not allowed to get married here. If they refused to work for the white farmer, they had to move to urban areas, or sometimes the farmer just removed the whole family. The farmers used to come and ask who were the owners of the huts in the homesteads, and checked up on who was living in the huts, which meant we could not have too many huts, and this led to many people having to share accommodation. Our fields were very small, and we were allowed only small gardens near the river. Our livestock were restricted in number — we were allowed only four cattle and fifteen goats for a homestead, and if you refused to sell the rest, you were thrown off the farm.<sup>88</sup>*

During the 1970s, labour tenancy gradually gave way to a system of wage labour, with wages of around R60 per month being paid in the late 1980s. After land reform began to be implemented in the 1990s, the issue of the return of former residents to the farms began to be discussed. It was agreed in principle that evictees were entitled to return to the farms, but very few have in fact done so.

### Land reform at Nkaseni<sup>89</sup>

The Provision of Certain Land for Settlement Act 126 of 1993 was a land reform law passed by the pre-democratic government in the 1990-1994 transition period to facilitate acquisition of land for transfer to blacks<sup>90</sup>. Transfers would take place on the recommendation of the Advisory Commission on Land Allocation (ACLA), set up by the government to address urgent land issues. Government required that the beneficiaries pay 20 percent of the pur-

87 This account is drawn from a focus group meeting of older men from different parts of Nkaseni held on 09/04/2008.

88 Focus group discussion, 09/04/2008.

89 For further background on land struggles in the Weenen area in the 1980s and 1990s, see Sato 2010.

90 Act 126 of 1993 was retained after 1994 as a mechanism for accessing government funds for land redistribution purposes.

chase price of land, with a minimum of 5 per cent being paid up-front. Government would supply the balance.

In the early 1990s, the MRDP (then CAP) assisted Nkaseni residents to apply to government for the acquisition of some of the farms in Nkaseni. It was decided that a contribution of R2 000 per family was to be charged, and some of these monies were collected. The minimum contribution was later changed to first R1 000, and then R500 per family. After 1994, when new land reform policies had been put in place and beneficiary contributions were no longer a requirement, it was decided to deposit all the monies that had been collected into a trust account for development purposes. Some of the funds were used to re-fence a farm boundary, and some to construct a shed to be used for the packing and marketing of farm produce<sup>91</sup>.

A negotiated agreement was eventually reached between Nkaseni residents and the van Rooyens for the transfer of half of the farm to the labour tenants. This was facilitated by CAP and was the first claim for land settled under the Land Reform (Labour Tenants) Act of 1996. A successful restitution claim for the other half of the farm was settled in 2003. Settlement of restitution claims to other farms at Nkaseni is proceeding slowly, and eventually all the land will be restored to former labour tenants. According to some informants, instead of re-settling the farms as separate units, the farm boundaries will then fall away completely, and Nkaseni will function as one *isigodi*, divided into different *imihlati*.

In 1996 a community meeting at Nkaseni elected seven residents onto a Committee to negotiate the land claim. The chairman of the committee was a member of an influential local family, who had also been elected a local government councillor. Four men and three women were elected, because they were seen as active community members who had participated in the discussions about the return of the land. The criterion of literacy was seen as important only in relation to the post of secretary, and this post is still occupied by a young woman from Nkaseni who works as a teacher in the town of Estcourt. The committee has a constitution, which is supposed to be kept by the chairman, along with the

title deeds for the farms which have been returned.

### Land rights and administration at Nkaseni

The overall character of the land tenure system at Nkaseni was described by key informants as being in accordance with the normative model outlined in Chapter Four, emphasising the importance of the homestead and its cattle kraal as places where the *amadlozi* can be consulted. Many people identified themselves as belonging to a conservative community who adhere much more strongly to customary norms in relation to marriage than people elsewhere. A focus group meeting of older men was of the view that around 70 percent of marriages in Nkaseni were still *ugidile*, i.e. involved full payment of *lobolo* and performance of all traditional rituals. One man said:

*We were just left behind on the farms, and we didn't have opportunities to earn money — we just had livestock. We still believe in the old cultural ways, unlike in the locations<sup>92</sup>, where people don't behave themselves.*

One key difference with Ncunjane, however, is in relation to the large *khonza* fee required to be paid by both returning ex-labour tenant families and outsiders, with the rationale that this is required for local development. Interestingly, as at Ncunjane until recently, no *khonza* fee is paid to the *Inkosi*, and the *Induna* does not play a central role in land allocation processes.

One respondent said that people who approach the *Induna* for land are simply referred to the committee. It was generally agreed by all respondents that there are cordial relations between the *Induna* and the committee. The *Induna's* main role in the community is in relation to dispute resolution, and the *iphoyisa* and *igosa* are seen as playing important roles in conflict prevention and resolution.

According to a number of key informants, the committee at Nkaseni has played the leading role in land administration ever since its formation. It is said that there is a list of those families who were evicted from the farms, and that the committee oversees all applications for their return to Nkaseni and allocates them homestead sites and arable land. Only seven

<sup>91</sup> The Department of Agriculture also contributed some funds for the building of the shed. According to one respondent, the shed was still incomplete in 2010, however, because of 'lack of sufficient funds'.

<sup>92</sup> 'Locations' is an older term for communal areas.

ex-labour tenant families have returned to the Nkaseni since 1996. One respondent said that there were a total of fifteen families on the list of claimants entitled to return to the land formerly owned by the van Rooyens, but they were still waiting for all of these people to apply to return.

The difficulties of returning to the farm were ascribed by some respondents as being due to the relative absence of services such as water supplies and electricity at Nkaseni. In theory returning families have to pay R1 000, but in the case of one returnee who was interviewed, a relative of the deceased chair of the committee, no such payment was required of her. Three families who were never residents of Nkaseni have been accepted as community members after paying a *khonza* fee of R2 000. This implies that the original contribution to acquiring the land has metamorphosed over time into a *khonza* fee.

In relation to irrigated fields, at first the committee worked closely together with Department of Agriculture officials to lay out equal sized plots for all families. Since then, however, they have simply estimated the size of the plots by eye, since they do not own a tape measure. More irrigation land became available after the final settlement of the van Rooyen land claim in 2003. This is gradually being allocated to both newcomers and to established residents needing more cropping land. No documents are issued for these plots, and demarcation of their boundaries is simply witnessed by neighbours. Land holdings are allocated to homesteads (some of them large and multi-generational in character) and agricultural production on irrigated plots is organised within these, homesteads (see Boxes 10 and 11).

Men organise monthly work parties to clean mud from the main irrigation furrow, a highly labour intensive task. It is not clear that the committee plays any role in this. The committee is said to also have some responsibility for ensuring sustainable use of natural resources and thus to prevent the chopping down of green trees. However, it is clear that the committee has not functioned properly since its chairman died in 2003, and in discussion, some respondents suggested that it was now time for the committee to have a new chair and to start meeting again.

### Box 10: Women's land rights on irrigated land at Nkaseni: The Duma homestead

The families of the Duma brothers live in one large, shared *umuzi*. One brother, now deceased, had five *omakoti*, and the other, who is still alive, has two. The seven wives and their children live in separate clusters of huts, located on different levels of the sloping land on which the *umuzi* is built, but co-operate with each other in a number of ways. The oldest wives of each brother share space with their respective mothers-in-law, who have now passed their arable fields on to their daughters-in-law.

Three wives of the deceased brother share one large irrigated field, which was originally allocated to their mother-in-law, and the other two wives cultivate one smaller field each. The two wives of the living brother share a field, passed on to them by their mother-in-law. All of these fields are irrigated from the furrow which originates on the Bushman's River. In addition, a fifth field, located further way from the main block of irrigated land is shared by the five wives of the deceased brother. In the case of the husband who is still alive, the plots are said to be 'his', but in the case of the deceased brother, 'the wives are now in charge'.

### Box 11: Women's use of irrigated plots at Nkaseni: The Duma family

The average size of the irrigated plots used by women in the Duma homestead, as is generally the case in Nkaseni, is around 0.5 ha. They produce green maize for sale as well as dry maize for grinding, and also produce sweet potatoes. They have experimented with beans, groundnuts, tomatoes and cabbages, but have experienced problems with pests and diseases. Most labour on a field is supplied by the wife (or wives) who are its 'owners', together with their children, but the wives do help each other from time to time when requested. If the harvest is large, then some hired labour from outside the community is hired, and generally paid in kind with part of the harvest.

Nkaseni residents' aspirations to begin commercial crop production on their irrigated plots were discussed in a focus group. The question was asked: could the title deed for the farm be used as collateral for bank loans for agricultural production purposes? Several participants argued that it would prove difficult to reach agreement on such action within the community as a whole because of the strong possibility that not everyone would be able to re-pay their portion of the loan at the time required. According to some informants, it has proved difficult for Nkaseni people to co-operate with each other in projects such as

the purchase of fencing materials to enclose irrigated fields because 'so many people lack sufficient income, and we are not making enough from farming as yet'.

Some people were of the view that government post-settlement support grants were still due to them, and that these would enable investment in productive infrastructure such as goat-proof wire-mesh fencing for the irrigated fields, or possibly even a tractor.

### Relationship with the *Inkosi* and the tribal court

As at Ncunjane, there is a fundamental ambiguity around land ownership of land reform farms. Residents of Nkaseni feel strongly that the farms are their land, that they suffered deeply during the decades of labour tenancy and that they themselves should control who now settles on this land. Only one informant said that 'we may have a title deed but we don't own the land, the *Inkosi* does', expressing an old idea about the strong connections between overarching jurisdictional authority and land. Nevertheless, no-one at Nkaseni expressed the view that as a group they were independent of the tribe. The overall authority of the *Inkosi* was acknowledged by all. Some people, however, were critical of a perceived lack of support from the *Inkosi* in the past, when they lived under the control of powerful and exploitative white farmer owners; one person said that 'he didn't help us with we had problems with white farmers, when we needed assistance.'

Nkaseni residents knew very little about the Mthembu traditional council or its potential role in land administration. They were clearer about the dispute resolution functions of tribal institutions, given that the pre-1994 system of geographically-separate tribal court houses continues to function. Disputes within Nkaseni that cannot be resolved by families, neighbours, the *Induna* or in other forums, are taken to the nearby tribal courthouse, in the Tugeal Estates area, presided over by a chief *Induna*. The *Inkosi* can be called to handle the more difficult cases at that court if needs be.

### Conclusion

As in the Mchunu area, there are clear differences in relation to land tenure practices be-

tween different *izigodi* within the Mthembu tribe. These examples illustrate the nested or layered character of land rights and land administration in Msinga, but also the range of tensions that can emerge between rights holders and authority structures, or between different layers of authority.

In Ngubo *isigodi*, a unique natural resource management regime, based on a well-maintained fence around a large block of arable fields and winter grazing, has been in operation for some time. Locally-agreed rules and practices underpin this regime, and it appears to have the support of most local residents. It is, however, under stress; the key focus of discussion and debate at the time of field work is widespread controversy over the heavy fines being imposed on livestock owners for damage to crops within the fenced area. The *Indunankhulu* and *iziphoyisa* insisted that these fines were legitimate and necessary to protect crop farmers (some of them poor widows), but male herd owners in particular felt that the fines were exorbitant. In addition, it was unclear to them just what the monies were being used for. These controversial issues were discussed with the *Inkosi* and the traditional council in research findings report-back meetings, but there was little indication that they would intervene or attempt to impose a solution — rather, it appeared that a way forward would have to be found at the level of the *isigodi* itself.

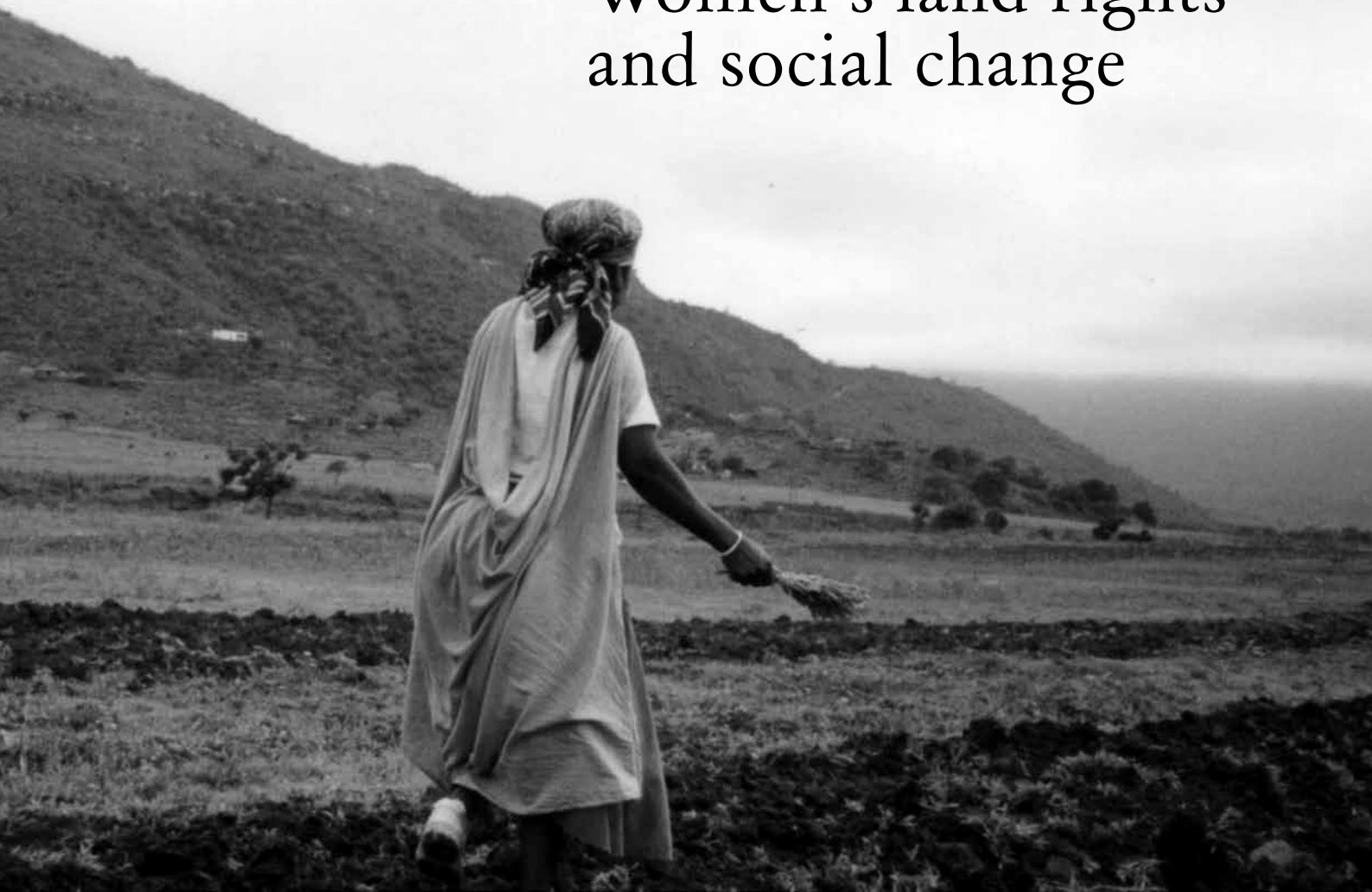
At Nkaseni, as in Ncunjane, the relationship between former labour tenants on land reform farms and structures of authority at the apex of the tribe is clearly complex. The history of labour tenancy on these farms, combined with relative resource abundance, means that members of this *isigodi* clearly want to retain a degree of autonomy in relation to land issues — but they also want to continue to be seen as part of the Mthembu tribe, and they continue to refer some disputes to the tribal court. Local variations in land tenure practice include the payment of a cash contribution by newcomers (now seen as equivalent to a *khonza* fee) to the committee, rather than the *Inkosi* — even though the committee has not actually met for some years. Irrigated plots, including those on which cash cropping is being practiced, are allocated to wives within homesteads, in line with the normative ideal. The land tenure sys-

tem in operation at Nkaseni is thus a hybrid of old and new practices, some emerging in response to the opportunities to increase income from agricultural production that land reform has afforded.



# Chapter 7:

## Women's land rights and social change



This chapter focuses on an issue that is hotly debated in both the Mchunu and Mthembu areas at present — the question of women's rights to land. As described in the introduction, in 2009 the Mchunu Traditional Council decided to allow land to be allocated to single people, including women. In 2010 the Council also decided to issue letters making it easier for couples to officially register their co-habitation as 'a customary marriage'. Both decisions were taken in response to practical problems facing community members that arise from changing social realities, and these decisions illustrate how 'customs' and 'customary law' are sometimes deliberately adjusted and adapted to fit new circumstances and conditions.

In the Mthembu area, however, these problems and conditions have not yet led to any changes in the way that the land tenure system is administered. Here the response of traditional leadership has been very different: in recent years the *Mntwana* (the acting *Inkosi*) and the Mthembu Traditional Council have begun to impose heavy fines for offences under customary law, justifying these in terms of the need to return to the 'proper behaviour' of the past<sup>93</sup>. Although these fines are controversial and unpopular with many people, they do appear to have the support of some residents. Here the traditional council is not yet ready to consider adjustments to the land tenure system. The contrast between the responses of the Mthembu and Mchunu

<sup>93</sup> See Chapter Eight for more detail.

traditional councils demonstrates that adaptation of the rules of 'living customary law' to take account of dynamic social realities, is uneven and contested, and is sometimes actively resisted.

Claassens and Ngubane (2008: 177) argue that across rural South Africa 'single mothers are challenging tribal authority structures to allocate them land so they can establish independent households. Gradual, uneven processes of change in land allocation practice are under way ... Women use a range of arguments to advance their claims. Many are couched in terms of 'customary' values... [but] often the principle of equality is asserted, and women refer to the Constitution and the new government'. They urge attention to 'the nature of rights and claims as they are asserted, used and contested in practice' when new laws are formulated (ibid: 176).

In Msinga many single mothers are indeed asking for land. This chapter explores why this is so, describing changing social realities in relation to women, land and marriage and contrasting responses to these processes. Adding to the complexity is local variability in the extent of such social change. There are differences, for example, between the densely-settled communal areas and the former labour tenant farms. Residents in the latter see themselves as adhering to customary norms and values much more strongly than people living elsewhere, and this influences their views on the land rights of women. Local variability thus contributes to the difficulties of identifying the content of the living law of land.

## Family and marriage in Msinga

Chapter Four describes the general character of the normative and idealised version of land tenure in the Msinga area. In summary, land is allocated to a household, under the authority of the male household head, rather than to individuals, because land provides the basic resources that support a family. The primary unit of social organisation is a household, headed by a man, who may have several wives. Marriage establishes a relationship between two families, symbolised by payments of *lobolo* that transfer a woman's reproductive capacities to her husband's family. De-

scendent is patrilineal i.e. is traced through the male line. Marriage is virilocal: wives move to the home area or homestead of the husband, and children belong to the husband's family. Family membership and gender are key determinants of social identity. Family obligation can also be extended to the wife's natal family, for example to her mother's brothers and sisters, grandmother's sisters and their children. Such obligations can include the provision of 'temporary'<sup>94</sup> residential sites and garden space in times of need.

Land tenure regimes are closely tied to social organisation, but this does not mean that they are static. In Msinga a wide range of variation in the composition and structure of social units is emerging and putting patrilineal and virilocal principles under severe strain. Changing economic realities (such as the decline of migrant job opportunities and the availability of child support grants) are contributing to profound shifts in social relationships and identities.

The two changes that are most commented on in Msinga are:

- the increasing number of women living within their father's (or brother's) homesteads who bear and raise children outside of a stable, co-residential relationship
- changes in marital practices that are resulting in increasing numbers of co-habiting couples being only 'partially' married in terms of custom, along with a shift to registration of marriage as a more important priority than completion of customary marital rituals and practices.

Along with these changes is a small but significant increase in the number of female relatives being accommodated within the homestead, outside of the patrilineal system. These include unmarried, divorced or separated sisters, aunts and great-aunts on either the husband or the wife's side, together with their descendents. Because the surnames of these women, and/or the names of their children, may differ from the household surname, they are usually not viewed as fully-fledged members of the family, but are provided with a site for building a home within the outer boundary of the homestead, and may sometimes be given fields or portions of fields to cultivate.

<sup>94</sup> 'Temporary' is not necessarily short-term, since it can extend over more than one generation of occupiers.

A member of the Mchunu traditional council said that according to custom, ‘a person who gets land is a person who is married (oganiwe). This is an expression of the normative ideal, but in tension with this is the increasingly visible need for land by growing numbers of women who have to feed themselves and their children.

In focus group discussions and interviews with women in all four research sites, the extent of the changes currently taking place were described by many respondents as follows: very few marriages are now completed with full payment of *lobolo* and performance of the full range of marriage ceremonies (this is known as *ugudile* marriage). Significant numbers of women now become pregnant, and move to the home of their husbands after damages have been paid, but full payment of *lobolo* does not take place; this is known as *uganile* (or *ukugana*) marriage. Increasing numbers of women in this category are beginning to register their marriages, since this makes it possible for them to claim pension or life insurance payouts should their husbands die. Most young girls today become pregnant outside of marriage, and remain at their father’s homestead, receiving child support grants. Table 5 summarises these perceptions.

Interviews and focus group discussions also discussed the situation of women who returned to their natal (i.e. their father’s) homesteads after becoming a widow or after divorce or separation. In addition, a small number of instances of women acquiring land of their own were identified and discussed. The social identities, practices and outcomes com-

monly associated with these variations were described as follows:

**‘Proper’ marriage according to Zulu custom (*ugidile*)**

- A virgin (*itshitshi*) is courted; she becomes a *qhikiza* when she is acknowledged to be in a relationship with a man; she becomes an *inkehli* when she is ready to marry and negotiations over *lobolo* have begun.
- 11 cattle are usually agreed as the *lobola* fee; the first payment can be five to six cattle, and the rest are paid off over many years<sup>95</sup>.
- Various ceremonies involving gifts and slaughtering of livestock (for the ancestors) must take place, including a final ceremony of dancing (*ukugida*) during which the new wife is introduced to the in-laws’ *amadlozi*.
- The *umakoti* is allocated a household site and a granary and, after a period of working in her mother-in-law’s fields, is eventually allocated her own fields.

**The most common form of marriage today (*uganile*)**

- A virgin is courted, and before or while she becomes *iqhikiza*, may fall pregnant or be abducted to her boyfriend’s homestead (*ukushaqwa*).
- If she gets pregnant, damages (*inhlawulo*) are paid.

**Table 5: Common perceptions of changes in marriage practice in the Mthembu and Mchunu areas of Msinga**

Type of arrangement	Number of women now doing this
Completed marriage after full payment of <i>lobolo</i> and performance of all ceremonies ( <i>ugidile</i> )	‘Hardly any’
Move to husband’s home after damages are paid ( <i>uganile</i> )	‘Fewer now than women having children outside marriage’
Girl becomes pregnant but remains in her father’s house, probably secures a child support grant when child is born	‘Most girls do this’

Source: Focus group discussions and individual interviews

95 ‘*Umfazi akaqedwa*’ is a saying that means it is very difficult to complete *lobolo* payments. In a focus group discussion with older women in Nkaseni in 2009, it emerged that in only one of the five *ugidile* marriages offered as examples was the full amount of *lobola* ever paid.

- The distinction between *iqhikiza* and *umakoti* becomes blurred.
- Goats are slaughtered and some cattle are paid; one cow per child is paid as damages (if *lobolo* is agreed, these cattle are then subtracted from the total to be paid).
- This form of incomplete marriage is now referred to by many as *ganile* (from *gana*, to ask for marriage, originally also the name of the first ceremony to be performed in the marriage process, to mark betrothal<sup>96</sup>).

#### ***Changing practices: Unmarried woman lives with man at his family's homestead***

- No cattle are paid and no goats are slaughtered.
- The woman has low status in the homestead; she cannot inherit property on behalf of her eldest son; she cannot call upon her father or brothers for protection; and she has to be buried at her father's homestead.
- If the man asks for land for his family, he will have to pay a fine at the Tribal Court for bringing the tribe into disrepute by not getting married.
- Women in these arrangements have less social standing than women who have been married *uganile*, but more status than women who have children at their father's homes.

#### ***Changing practices: Unmarried woman lives at her father's home***

- Many young women now have more than one child, sometimes with multiple partners.
- If the partner recognises the child as his and pays a fine for impregnating the girl, the child carries his surname and 'belongs' to his family.
- If the partner refuses to recognise the child, then the male child cannot inherit in his mother's homestead because he doesn't 'belong' to her family. He is, in effect, without family and must remedy

this by paying damages himself on behalf of his father. This will then allow him to approach his mother's father to allocate him a stand where he can build a homestead using his father's surname.

- For a female child, *lobolo* paid for her will go to her mother's family, although fathers will sometimes dispute this.
- If the woman builds her own hut or house away from the main cluster of residential structures, perhaps close to the outer boundary of the *umuzi*, she may be said to be '*enceleni*', living at the edge of the homestead.

#### ***Changing practices: Unmarried woman establishes her own homestead***

- Under some conditions, a woman may now ask for land to establish an *umuzi* of her own.
- If she has a son, his father's surname will become established at the homestead
- It is seen as problematic if she has sons by different men - 'whose surname is here?'

This change has not yet been accepted on the former labour tenant farms within these tribal authorities, where women are not allowed to hold land outside of marriage.

#### ***Woman returns to father's homestead when her marriage or partnership ends***

- A woman returns to her natal homestead after the death of her spouse or partner, divorce or the breakdown of the relationship. Widows will often choose this option in preference to *ukungena* (in which she is married to her deceased husband's brother (anthropologists term this arrangement 'the levirate')).
- She may or may not take her children with her, depending on whether or not damages were paid for them.
- She is allocated a residential plot within her father's homestead but she and her children are often not considered fully-fledged members of the family.
- Her residential structures may be *enceleni*, at the outer boundary of the *umuzi*.

<sup>96</sup> Vilikazi 1965.

In practice, however, the distinction between ‘married’ and ‘unmarried’ women is not always so clear cut. This is because of increasing number of *uganile* marriages that involve the payment of *some* livestock by the male partner’s family to the female partner’s family as damages or *inhlawulo* (i.e. for causing a pregnancy outside of marriage). This leads to a blurring of the distinctions between the categories of *iqhikiza* (an unmarried woman in a relationship with a man, possibly with a child) and *umakoti* (a young wife). There appears to be little shame attached to having children outside of marriage.

In addition to the changes described above, differences occur between *izigodi* located in the core communal areas of Msinga and those on former labour tenant farms, as shown in Table 6 below<sup>97</sup>. There are fewer unmarried women with children in the latter and higher rates of *ugidile* marriage, as respondents in all the field sites asserted. The proportion of *uganile* marriage in the two types of area, however, is very similar.

### Reasons for the decline in marriage

Mhongo and Budlender (2009) discuss the literature on declining rates of marriage amongst Africans in South Africa, and ar-

gue that there is no evidence of a greatly increased rate of decline since 1994 — in fact, declines were reported from at least the 1960s. They dispute census data which reports that decline was halted or reversed between 1996 and 2001, and argue that this probably reflects language problems in the framing of census questions. They also discuss the wide range of explanations offered in the literature for declining marriage rates. These include:

- growing female economic independence through increased employment opportunities, social grants and other forms of support from government
- men feeling increasingly that they are unable to act as family providers
- women feeling that men are irresponsible with money; men’s growing inability to pay *lobolo*, in part because their lineages are less able to assist in making such payments, and perhaps because payment of damages in case of pre-marital pregnancy represents a major financial setback
- payment of damages allowing men to claim children whilst avoiding the higher costs and obligations of marriage
- women valuing childbearing or control

**Table 6: Marriage status of women with children in Msinga, 2009**

Marriage status	Communal areas	Former labour tenant farms	Total
Never been married	146 (19%)	18 (13%)	164 (18%)
<i>Uganile</i> – husband alive	297 (38%)	56 (41%)	353 (38%)
<i>Ugidile</i> – husband alive	66 (8%)	24 (18%)	90 (10%)
Other form of marriage – husband alive	8 (1%)	0 (0%)	8 (1%)
Separated or deserted	14 (2%)	1 (1%)	15 (2%)
<i>Uganile</i> – husband deceased	130 (17%)	19 (14%)	149 (16%)
<i>Ugidile</i> – husband deceased	117 (17%)	18 (13%)	135 (16%)
Other form of marriage – husband deceased	6 (1%)	0 (0%)	6 (1%)
<b>Total</b>	<b>784 (100%)</b>	<b>136 (100%)</b>	<b>920 (100%)</b>

Source: Budlender et al (2011)

<sup>97</sup> These data are drawn from a survey of 1 000 Msinga households carried out recently by the Community Agency for Social Enquiry, or CASE (Budlender et al, 2011). Surveys were also carried out in sites in the Eastern Cape and North West provinces. Comparison of marriage data across sites shows the higher incidence of customary marriage in Msinga than in Keiskammahoek (Eastern Cape) and Ramatlabana (North West).

over their own fertility more than marriage.

Other arguments link declines in marriage to the negative impacts on family life of the migrant labour system of the past, or to demographic imbalances (i.e. more women than men). Mhongo and Budlender show that there is no consensus in the academic literature on the causal processes at work.

Reasons for shifts in marriage practice in Msinga were discussed with traditional councillors and local residents in a number of meetings, focus groups and interviews. This question often led to lively debate, and, as in the academic literature, no consensus was reached. A range of possible reasons was put forward by different people:

- From a male perspective, if a woman has already moved in with a man there is no need for him to marry her; his sons will bear his surname in any case, and there is no need for him to pay *lobolo*.
- Fewer people own cattle for *lobolo* payments these days, and cattle are very expensive.
- High levels of unemployment mean that there is a shortage of jobs to earn the cash required to buy cattle for *lobolo* payments.
- Child support grants now provide a guaranteed income for women with children, so they are less dependent on men as husbands.
- Norms and values are changing: 'children no longer respect their elders'; 'boys are not governed by their fathers'; 'mothers support their sons no matter what they do, even if they make a girl pregnant'.

Henderson (2009) explores courtship and *uganile* marriage in the Okahlamba region of KwaZulu-Natal. She suggests that poverty and death in a young girl's natal household often makes the option of moving into her boyfriend's father's household, without any *lobolo* being paid, a strategic decision that gives her the prospect of achieving at least some security and social status.

## Land rights: normative ideals vs emerging practices

Precisely what rights to land women in Msinga can currently claim was somewhat uncertain at the time of our fieldwork, with a range of views being expressed by different informants. The decline of customary marriage, and increasing numbers of unmarried women with children who reside at their father's homesteads, which is leading to strains and tensions within these homesteads, helps explain the uncertainty. Given the central importance of family structure and marriage in all property systems, this is not surprising. A concern and source of anxiety for many people in Msinga is the integrity of the principle of patrilineal descent that underpins social identities and cross-generational relationships. A clear expression of this was the constant reference within discussions of marriage and land to the issue of 'whose surname will be established at the homestead?'

Another reason for uncertainty might be that wider processes of social and political change have 'loosened up' older definitions of gender roles and associated status. An emerging normative ideal in South Africa's democracy is gender equality, which is a constitutional right. However, only a few female respondents in Msinga, most of them young, used the language of rights and equality in explaining the need for more secure land rights for women.

This section describes the land rights of women in the normative model of land tenure in Msinga, and contrasts these with emerging realities and practices in relation to married women, widows, women whose relationship or marriage has broken down and single women with children.

### Married women

The normative ideal of customary marriage in Msinga as expressed by respondents in this study is consistent for the most part with that described by authors such as Vilikazi (1965) and Preston Whyte (1974) in *isiZulu* speaking areas. The husband, seen as the manager of the household assets, allocates his wife or, in the case of polygyny, each of his wives, a site on which to build their residential structures, which include a living area, hearth and

granary. He also allocates fields for cropping purposes and in polygynous households these form part of the 'house-property complex'. While the husband undertakes some of the heavy labour involved in cultivation (e.g. ploughing), the wife is seen the primary food producer and undertakes most of the work involved in crop production. The crops produced to feed her family belong to her 'house' and cannot be used by her husband without her consent. Livestock are also be attached to the house, their ownership being clear and known to all through the individual markings of the cattle. Only one ear clip pattern is used by the homestead as a whole. The same applies to goats.

According to Preston-Whyte (1974: 180), 'It is the duty of a polygynist to treat each of his wives with utmost fairness and to allocate property to each of their houses equally. Once allocated, house property is inviolable and should be used for the benefit of the children born to that house: it can be inherited by them alone'.

Some young wives move into a large, compound homestead under their husband's father (or his elder brother, if the father has died), rather than into a new homestead established together with her husband. An *umakoti* will often work on her mother-in-law's fields, seen as house property, for some years before being allocated fields of her own. A newly married wife in a compound homestead thus has little direct control over land. Such women sometimes state that that they were 'given' their fields by their mothers-in-law when the latter became too old to engage in crop production (see Box 10), testifying to the continuing strength of the notion of house-property.

A woman who is fully married through customary processes has the most protection of her rights to land and property — in theory, if not always in practice. Today, a customary marriage that has been officially registered is seen as additionally secure, since registration will help secure a widow's access to pension and life insurance benefits.

However, very few marriages today conform to this normative ideal. Many women are not 'fully' married (i.e. are married *uganile*). Such wives are not allowed to enter the cattle

kraal, which can compromise livestock health management if her husband is away from home. To be incompletely married also leaves a woman more vulnerable to eviction by her spouse's family. One respondent explained:

*I was married uganile. When my husband died I came back home because my mother-in-law evicted me after accusing me of trying to finish off his left over possessions when I am not even properly married to him.*

In practice, even women who are seen as fully married may feel insecure after widowhood (see below). According to the Mthembu *Mntwana*, Ndaba Mthembu, widows whose control over her family possessions are threatened by their husband's relatives, often bring cases to the Tribal Court (implying that it has not been possible to resolve these disputes at the level of the families concerned or in processes convened by the *Induna* of the relevant *isigodi*).

### Divorced or abandoned women

Norms around the breakdown of a marriage derive from the cultural ideal of families entering into reciprocal relationships embodied in the payment of bride-wealth in the form of cattle. Since this ideal is less and less in evidence, there is currently some ambiguity as to what procedures should apply when a relationship can no longer be sustained.

Different outcomes are possible, in part dependent on the cause of the breakdown. When a woman who has completed a full customary marriage is 'chased away' (*uxoshiwe*) and returns to her father's home, her brothers, who have benefited or will benefit from the *lobolo* cattle paid to the family when she was married, have to ascertain from the husband's family the cause of the problems.

If the woman has committed adultery, her family will pay a fine and she will return to her husband; if she is alleged to have performed witchcraft, then she will often remain with her family of origin, but her *lobolo* cattle will have to be returned; if she has defied the authority of her husband, then she can be disciplined by her brothers. If she has been falsely accused of these misdemeanours, then she cannot be sanctioned. If her return to her father's home is permanent, she might be allocated land by the family (see Box 12),

or she can be allocated land for an *umuzi* of her own. She might also remain in her husband's *isigodi* and be allocated land there in the name of her son.

If the wife runs away (*wabaleka*) from her husband, her brothers must ascertain the reason; if she has left as a result of abuse by the husband, they will demand an apology, but if the abuse continues she can return to her father's home and the *lobolo* cattle do not have to be returned (unless she remarries). A third possibility is when the wife is 'rejected', for example, when her husband refuses to sleep with her. This is known as *ukwaliwa*. She may decide to stay, or she can leave her husband and return to her father's home. Such an outcome is legitimate, but a ceremony must be held to end the bond between the two families.

If no *lobolo* payments have been made, then the woman can leave the man's home and return to her family of origin at any point, and her brothers will not be involved at all.

A view expressed by some informants was that the question of which spouse leaves the homestead depends on who is to blame for the breakdown of the marriage; if the husband is deemed responsible, he might have to move and ask for more land elsewhere. There are cases where adult or older children take their mother's side in a dispute and put pressure on their father to leave.

The normative ideal is that the wronged party in a marital break-up is not punished. If a marriage begins to break up, the reasons for the problems are determined by the husband's relatives and the wife's father or brothers. Depending on who is the 'wrong-doer', *lobolo* may have to be repaid to the husband's family and a wife may or may not be supported by her brothers. In the normative ideal, it is possible for a woman whose husband has rejected her to remain in her husband's relatives household, while her husband is made to go and live elsewhere.

However, many interviewees suggested a different reality. One said:

*If conflicts occur within a marriage, it is always the wife who must leave, even if the husband is to blame, since he cannot leave his home. At best, she can be given a stand*

### Box 12: A divorcee in the Mthembu tribal area

Winnie Mvelase is a 59 year old woman, who was divorced in 1985. At that time she had one child, a daughter. Her husband divorced her because she did not bear any more children.

Winnie lives in her own house on land located within her own father's homestead. She was allocated this piece of land by her brothers after her divorce and return to the homestead. She did not approach the *Induna* to ask for land in her own right, so she did not pay a *khonza* fee. She works at a local store and gets paid R500 per month. She does not have any arable land or own any livestock. Her daughter is now 23 years old, is unmarried, has two children, and receives child support grants for them. The grants help support the family.

*on the land belonging to the family, but outside the fence of the umuzi, and in the surname of the family.*

### Widows

There are several options for widows:

- She can remain on her deceased husband's land and hold it for her oldest son.
- She can be taken as a wife by one of her husband's brothers (*ukungena*)
- She can return to her father's home (which might be now headed by one of her brothers).
- For women in compound homesteads, she can continue to reside with her husband's family.
- She can also ask for land in her own right in her husband's home area (see Box 13).

In the normative ideal, a widow does not inherit the house's land, livestock and other forms of property in her own name, but holds these for her children and in particular for the male heir, the eldest son. She is supposed to have decision-making powers over the house property while she is alive, but in many cases members of her deceased husband's family begin to use these resources for various purposes. These might include using cattle for rituals related to unveiling ceremonies, particularly where previously deceased relatives have not undertaken these ceremonies, or



### Box 13: The land rights of widows

Lindeni Masondo is a widow in her sixties. Her husband passed away a long time ago. She lives in Mathintha together with her son, who has a wife and one child, and her father-in-law's sister, who is now very old. Her husband's sister recently moved in with them and brought her daughter's children with her.

The family used to live on another plot, but a few years ago, Lindeni decided that the place where they were living was not good for them because people often became ill. She also wanted to live near the main road. She then approached the *Induna* to ask about moving to another plot. She did not have to speak to the neighbors because the new plot was nearby the old plot. The *Induna* agreed to her request. He did not mark the boundaries of the plot – they did this themselves, and then fenced off the portion where the houses are located. Her son owns a small shop, and did not have to get permission to build the shop from the tribal court or the *Induna* because it is located on the same plot as the *umuzi*.

Lindeni used to own two large fields, which are some distance away from the homestead. A few years ago one field was re-allocated to someone else who did not have cropping land, because she was starting to receive an old age pension and had stopped growing crops.

taking cattle to pay *lobolo* for a man getting married.

When a husband dies, he must be buried. Cattle and/or goats must be slaughtered. After the wife's mourning period, she must be cleansed and more livestock must be slaughtered. However, if her father-in-law or husband's older brother had died before her husband had died, and ceremonies for cleansing them had not been performed, these would now have to be carried out before her own cleansing ceremony could take place. In this situation, her husband's relatives might now use her livestock in order to perform these ceremonies.

A widow is particularly vulnerable to losing property during the period of mourning, often two or three years in duration. In this period male relatives make decisions on her behalf, since her behavior is expected to be subdued and submissive. This is a major cause of disputes in the Mchunu area, with many cases ending up in the tribal court. Widows who were not married with payment of *lobolo* are particularly vulnerable to loss of prop-

erty, since her brothers will not intervene to protect her.

A frequently related story is of widows losing control of property to their husbands' relatives, as in this case:

*My husband passed away in 1990. I used to live at his homestead, but after he died, my in-laws abused me. They did not allow my relatives to visit and at some point they plotted to kill me because they wanted to inherit my husband's money as he was employed in Johannesburg. They seized my husband's livestock. I mourned for him for two years, and in the third year I was cleansed out of mourning. At this time my father and mother-in-law and brothers-in-law told me that I had move out of the homestead. I was told to give them my husband's pension money and leave the homestead and find myself another man to marry. I had two children, a boy and a girl. I was not fully married to my husband, but even if I had been, I don't feel it would have made any difference.*

Today, it would appear that many women, whether or not they were fully married, refuse the option of *ukungena*. Some informants speculate that this might be because of the risk of being infected with HIV. Other reasons for not remaining in her deceased husband's homestead include her brother-in-law refusing to *ngena* her, her husband's relatives accusing her of causing the husband's death, his relatives evicting her, or other *omakoti* in compound homestead making her life so miserable that she chooses to leave. One respondent said:

*After my husband's death my brother-in-law did not ask for ukungena. He did not treat me well and I decided to leave the homestead and establish my own umuzi in the area I come from.*

Widows with children are often able to access land in the names of their sons if they are not able to remain in their deceased husband's households. One woman said:

*At Ncunjane a widow can ask for her own land, and might need to if another wife is causing her problems and she needs her own place 'to have peace of mind'.*

If a widow has no children, or does not wish to access land in her own right, she will usually be able to access a residential site in her father's household, which may now be under the authority of a brother. Her position within this household is somewhat ambiguous, however. She is not a member of the household, since she 'belongs' to her husband's family, but her home is within the homestead's boundaries.

Women who have registered their marriages, whether or not the *lobolo* was completed, are now inheriting pension or life insurance benefits from their husband's estates, and as a result, registration of marriage is now seen as necessary by many.

### Unmarried women

A key underlying principle of the land tenure system in Msinga is that a married man is entitled to access land in the area where he has paid homage (*ukukhonza*) to the *Inkosi* in order to build a homestead and enable the production of food to support his family. With so many young women now having children outside of marriage, this principle is under severe stress. On the one hand, it is the *male* head of family that is supposed to ask for land, but on the other, the broader principle is that land is needed in order to provide for families. Single women with children are invoking the latter in asking for land so that they can support their children.

A common practice in Msinga today is that unmarried women with children are allocated building sites within their father's or brother's *umuzi*, and sometimes also a garden to cultivate crops, or part of a field. Some people were of the view that unmarried women with children could also apply for land in their own right, and be allocated residential plots and arable land through the usual procedures. Cases where this occurred were identified (see Box 14 for an example from Mathintha) but they appear to be relatively few in number at present.

Some respondents suggested that unmarried women can also ask for land at the home of the children's father. In most cases it was said that an unmarried woman asking for land must have sons (who carry the 'surname' of a family i.e. reproduce the patrilineage) before

### Box 14: A single woman with land of her own in Mathintha

Bawinile Mnisi is aged 49 and lives in her own homestead with her younger son. She used to live with her parents, but moved out because she wanted a homestead where the surname of the father of her children could be established. She works for two days a week on a road construction project and the rest of the time in her fields and hawking her vegetables. She owns three cattle that were paid as *lobolo* for her daughter, but her parents look after them for her. She can't speak to the *amadlozi* herself, so if she needs to slaughter an animal for the ancestors she will have to call a male relative to do so on her behalf.

*When I was looking for a stand of my own, I spoke to the neighbours in the area. After I was accepted by them, I went to the Induna and he allocated this stand for me; he was accompanied by the ibandla. I paid the Induna an allocation fee of R100. I'm not married (uganile) and it was important for me to have my own homestead since I have grown up children. In terms of decision making, I'm responsible for everything since I'm the head of the family. It doesn't bother me that I'm not uganile, because I don't see the difference. Whatever uganile women do, I can do.*

she can be allocated land, but some women said that even women with daughters should be allocated land, and indeed that even single women and men without children should, under some conditions, be allocated land.

In Ncunjane, one or two young women with children have been given residential land and fields, but these were given to her in her father's surname. Respondents said that if her children are sons from different fathers, and therefore do not share her surname, the sons can approach the *ibandla* and *Induna* in either their mother's or their father's *isigodi* if they want land.

Some unmarried mothers in Ncunjane remain in their father's homesteads, but are allocated a site on which to build a home where they can cook separately for themselves and their children. This is seen as a partial solution to the problem of sharing resources with other *omakoti*. This is the only solution available to unmarried mothers in Nkaseni, where the community holds the rule firmly that only married men with children are allowed to be allocated land. However, this is not always a happy solution (see Box 15).

There is clear evidence of a pent-up demand from unmarried women for residential and

small plots of adjacent arable land in their own names. While this appears to be inconsistent with key principles of the patrilineal system of descent, it seems such claims can be asserted in terms of another principle — that adults with dependents need to be provided with a material base for social reproduction.

### Traditional councillors' views on women's land rights

As part of the 'action-research' design of the project, the research team reported its findings on changing patterns of marriage and the demand for land by unmarried women with children to both the Mchunu and the

Mthembu traditional councils. Members of both councils expressed their concern over declining rates of marriage, and offered up a variety of explanations, including the availability of child support grants from government. Older councillors in particular focused on changing morality — in their view, members of the younger generation no longer respect their parents, the authority of fathers over sons has declined, and young men and women have become much more promiscuous than in the past.

The *Indunankulu* of the Mchunu tribe, Mfiveni Zakwe, linked changing morals to a decline of social solidarity in general:

*We used to stand together. When we worked on the mines, men stood together, even those from different tribes. We agreed on the laws that governed us and on the correct ways to behave. Today, you can get advice on family planning when you are only twelve years old!*

At a report back meeting with the Mthembu traditional council in 2008, the *Mntwana*, Ndaba Mthembu, suggested that perhaps an older law could be resurrected in which a fine of R150 is levied on couples who live together without getting married. According to one councillor, the main obstacle to such an intervention would be government, which 'protects people and gives them rights, in order to win their votes'. Another said:

*We were happier before these rights came — we worked together in our homes. People used to be respectful, because of the powers of the Inkosi and the izinduna. Now, even prisoners and prostitutes have protection from government, whereas the Inkosi does not. The new laws are confusing us, they come with corruption.*

Despite similar responses to declining rates of marriage and an increase in the number of unmarried mothers, the two councils have adopted starkly different stances towards the allocation of land to women. Members of the Mthembu council strongly opposed the allocation of land to unmarried women with children for the establishment of a separate *umuzi*. One argued that this would lead to boyfriends visiting such women at their own homesteads, and the inevitable result would be fighting between these boyfriends. 'Some

#### Box 15: Unmarried women and land in Nkaseni – Thandiwe Majola

Thandiwe Majola is 35 years old and lives at her father's homestead together with her father, her mother, three brothers, four young *omakoti* and fourteen children. She is not married, but has a boyfriend. She has two children herself, aged ten and two, the younger one by her current boyfriend, who paid three cattle as damages. At one point she moved to her boyfriend's homestead, but her father called her back home because her boyfriend was not paying *lobolo*.

A year ago she started cooking separately from the rest of the homestead because there was constant conflict between her and the *omakoti*, who complained that their husbands should buy food for them and their children but not for her and her children. When she started to earn income from selling chickens, she approached her father and said she wanted to cook separately from the other women. She then built two dwellings at her father's homestead, one with financial assistance from her mother.

Thandiwe wants her own land to build a house on because of this ongoing conflict with her brothers and their wives. She does not know if she will ever be properly married. She does not want to move in with the father of her child, because if she does, she fears he would never pay *lobolo* for her. She does not want fields of her own because she does not like agricultural work.

She approached her father, but he told her that single women in Nkaseni cannot have their own homestead, even if they have children.

She knows two other single women in the area who also want land, but the community does not allow a woman to get land on her own. When the committee is approached about this, they say they will think about it, but they never seriously discuss the issue. They have not approached the Induna because only the committee allocates land in Nkaseni.

of these boyfriends are also stock thieves', he said. The only solution supported by the council was to encourage families to allocate a place within the boundaries of the *umuzi* for single mothers to build their own houses on — already a widespread practice.

In contrast, the Mchunu traditional council has decided that land for the establishment of a separate homestead can be allocated even to single people who are genuinely in need. They have qualified this 'right' by requiring that neighbours approve of the allocation and that it be overseen by the *ibandla* and the *Induna* of the relevant *isigodi*, and have adopted a cautious approach to implementing the new 'law' by not broadcasting information about it. They have also suggested that it will be incumbent on neighbours to monitor the behavior of those who receive land in terms of the new dispensation.

What explains the difference between the two councils' responses to changing social realities? This issue is taken up and discussed in the following chapter. Here, one should note that all three women on the Mchunu traditional council who were interviewed, spoke of their intention to discuss women's specific problems and needs in council meetings, one woman justifying her intention with reference to the fact that 'women now have rights under the constitution'. This suggests that changes in the wider society are sometimes an important influence on local processes, but also that female representation on local bodies and the availability of institutional space for women's voices to be heard, might also be key factors.

## Conclusion

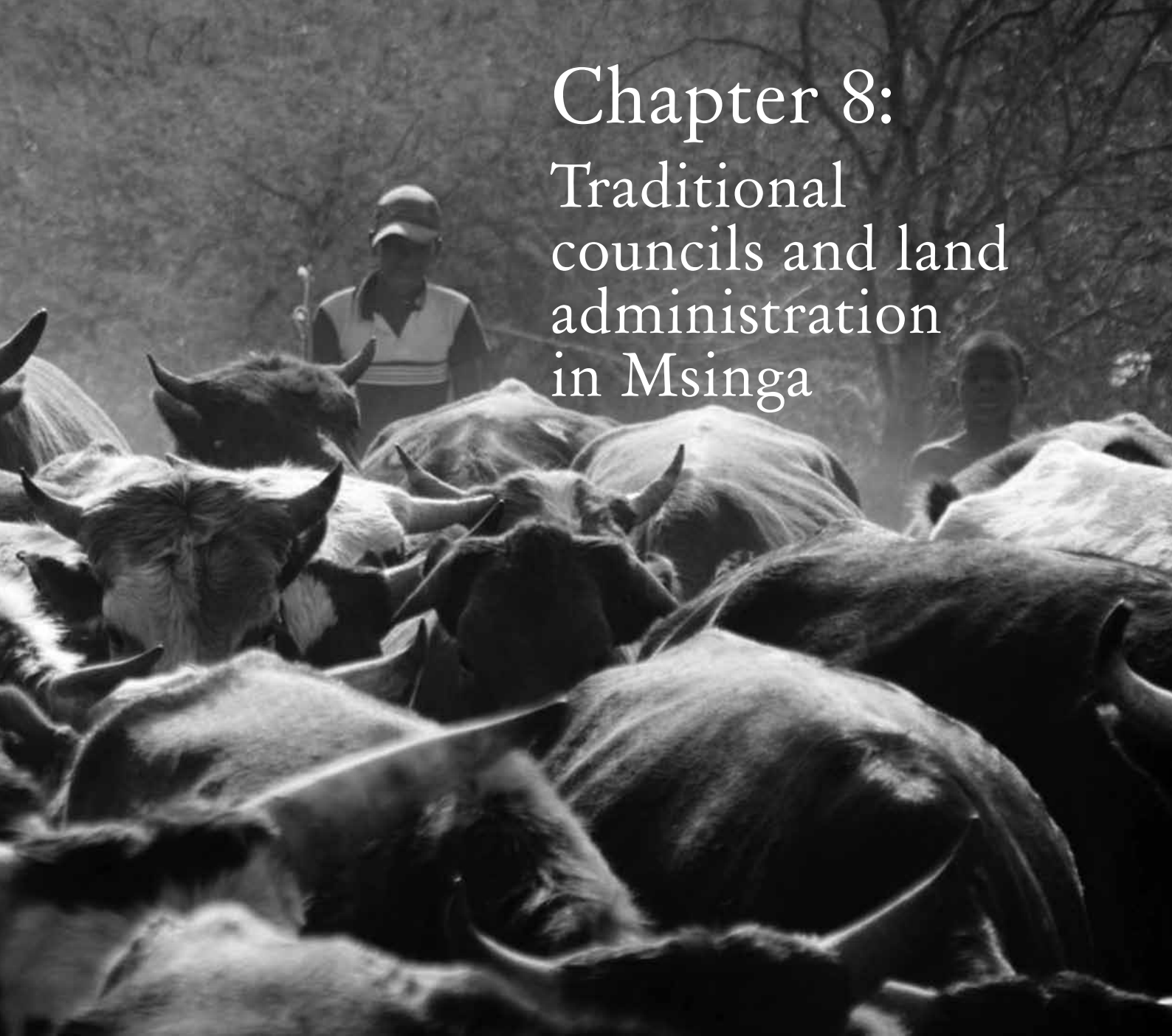
A major problem in Msinga is the tension produced when unmarried women with children live in their father's or brother's homesteads. There is an increasing demand by such wom-

en to be allocated their own land, mainly for residential purposes, particularly when their mothers and fathers are deceased and the homestead comes under the control of her brother and the influence of his wife or wives. To many people this demand for land by unmarried women is seen as both necessary and legitimate, in that it is consistent with an underlying value, or principle, that adults with children to support need to be provided with the material resources to do so.

However, such a move is hard to reconcile with another constitutive principle of social organisation, the patrilineal system of descent. The tension between these principles is manifested in animated discussions around these issues. The recent decision of the Mchunu traditional council to allow land allocation to single people represents a pragmatic adjustment of land tenure 'laws' to social realities, but it comes at a cost: the anxiety generated by what is perceived as a breakdown of social order and the morally dubious behavior that pragmatic adjustments of this kind may inadvertently encourage.

To help contain such anxieties, councillors emphasised that the moral worthiness of applicants who apply for land will be a key consideration, and that neighbours will keep a close eye on what happens in those new homesteads. Perhaps this can be seen as an expression of the social embeddedness of land rights — but if so, it is clearly not rooted as strongly in the patrilineal system and its associated kinship networks as in the past. This may be an example of the 'evolution of indigenous law', which 'evolves as the people who live by its norms change their patterns of life'" as the Constitutional Court asserted in a landmark judgement in 2003<sup>98</sup>, but in Msinga it appears to be fraught with anxieties and tensions over the direction of change, rather than a smooth and trouble-free adaptation of rules to new realities.

98 Alexcor Ltd & another v Richtersveld Community & others 2003 (12) BCLR 1301 (CC), para 52



# Chapter 8: Traditional councils and land administration in Msinga

This chapter describes institutional arrangements and processes for the administration of land in the Mchunu and Mthembu areas. The main focus here is on the traditional councils established under the KwaZulu-Natal Traditional Leadership and Governance Act of 2005, together with the 'tribal offices' that were originally set up to support tribal authorities and which continue to offer administrative support services to both councils and local residents. As in relation to land rights and natural resource use, a comparison of land administration in the Mchunu and Mthembu areas reveals both commonalities and significant differences. One key difference already discussed is in relation to the stance adopted by traditional leadership on the issue of whether or not to

allow allocation of land to unmarried women with children.

Some aspects of land administration have been described in earlier chapters, in particular those processes that occur at local and *isigodi* level, such as approval of applications for land by prospective neighbours, the oversight provided by the *ibandla* and the *Induna*, and the demarcation of residential sites and fields. This chapter focuses on processes that take place at the apex of the governance and administration structure, i.e. are centralized at the level of the 'tribe' as a whole. Relationships between these different levels, and the question of whether or not a nested system of governance provides effective checks and balances on the powers of these higher levels

of authority, are discussed towards the end of the chapter

The chapter also describes the manner in which traditional councils were first established, their composition, the types of issues discussed in council meetings and the role of tribal offices in land administration. As noted in Chapter One, both the Mchunu and Mthembu traditional councils are currently chaired by the *Mntwana* of the Inkosi, i.e. the son who will succeed the *Inkosi* when he dies and who is acting chief until such time. The new institutions have played little or no role in land administration thus far. Councillors have not received any training to date, and are often unclear on the precise roles, functions and powers of councils. They appear to have functioned in a largely advisory capacity to date.

Tribal authorities established in the apartheid era were housed in small office buildings, attached to which were meeting halls. These halls were used as courthouses for the hearing of cases brought in terms of customary law. A tribal office was run by a tribal secretary, who kept records and issued documents. Often these buildings were located close to the home of the chiefs, who presided over both tribal authorities and traditional courts. These structures have now been taken over by traditional councils.

## The Mchunu traditional council

### Establishment and composition

The Mchunu traditional council, or *isigungu*, as it is known locally, was established in September 2006. The process was initiated in March 2006, when *Inkosi* Simakade Mchunu called a community meeting outside the Mchunu tribal courthouse, to inform people of the new structure and the processes to be followed. The instruction from the *Inkosi* was that all of the 35 *izigodi* within the Mchunu tribe should be represented at the meeting, and according to several respondents, 'many people' attended. The *Inkosi* explained that a new law had been passed that would replace previous structures, including the tribal authority comprising all *izinduna*, as well as the *umazapathi*, the former regional authority representing *amakhosi* from all five of the

'tribes' located in Msinga District. He said that he was unsure of the traditional council's precise functions, powers and composition, but knew it would include both men and women, and a mix of nominated and elected members.

A few days later, two further meetings were held to elect the twelve members of the council required to make up the 40 percent required by the KwaZulu-Natal Traditional Leadership and Governance Act. Because of the large size of the area over which the tribal authority (and now the council) has jurisdiction, nomination meetings and subsequent elections were held in two different venues. One was held outside the tribal courthouse in the 'upper' section of the Mchunu area, and the other at Keate's Drift, a small centre located in the 'lower' section<sup>99</sup>. The nomination meetings and the elections took place less than a week apart.

Several respondents said that there was some confusion within the community over these processes, with not everyone fully aware that the first meetings, to nominate candidates, were preliminary to actual elections. As a result, many more people attended the nomination meetings than participated in the elections. The tribal secretary, Sibongile Mchunu, said that there was a great deal of confusion, and that officials of the provincial Department of Local Government and Traditional Affairs (DLGTA) did not provide clear instructions. She also referred to cases of some candidates providing transport for substantial numbers of their supporters from distant *izigodi* to the election venues, and being elected as a result.

All informants except the tribal secretary asserted that the Independent Electoral Commission (IEC), which maintains an office in the nearby town of Tugela Ferry, had overseen the elections. It is clear that IEC banners, ballot boxes and voting papers were used in the elections, but according to the tribal secretary these were simply borrowed by DLGTA officials for the day. She says that the IEC was willing to run the elections on behalf of DLGTA, but that the latter could not make available the funds required.

As required by law, 30 members sit on the traditional council. Of the twelve elected members, six are from 'upper' Mchunu and six from 'lower' Mchunu. Eight are men and four

<sup>99</sup> The two sections are separated by a mountainous area and are at different altitudes, hence the terms 'upper' and 'lower'.

are women, with a further eight women nominated by the chief. This means that the council has twelve women members, two more than the minimum required by law. There are only five *izinduna* nominated by the *Inkosi* to sit on the council, including the *Indunankulu* (Chief *Induna*), whereas there are a total of 35 *izigodi* in Mchunu as a whole. Residents from ten different *izigodi* are on the council, which is chaired by the *Mntwana*. The vice-chair is a local school principal.

In individual interviews and focus groups in the Mchunu area, many respondents were aware of the existence of the traditional council, and knew about the processes through which it had been established. This suggests that information on the meetings to nominate and elect councillors was widely disseminated. They were much less clear about its roles and powers, however.

What is the relationship between the traditional council and pre-existing structures of traditional leadership located at *isigodi* level (the *Induna*, *iphoyisa* and *igosa*, and bodies such as the *ibandla*)? There is a lack of clarity on this issue in current law and policy. Puzzlement was expressed by many respondents, including councillors themselves, when hearing that only *izinduna* who are members of the traditional council will be paid a small monthly sum by government so that they can afford to attend meetings.

### Functioning of the Mchunu traditional council in 2006 and 2007

Four councillors were interviewed on the functioning of the council in its first year, and the tribal secretary provided detailed information on the day to day functioning of the tribal office. As was the case with tribal authorities in the past, the traditional council is overseen and supported by the DLGTA, a provincial department. Once a year the department sends officials to inspect the receipt books and accounts kept in the office, and to 'audit' the council's finances. According to the tribal secretary, of the six traditional councils located in Msinga District, the Mchunu council was the only one that met regularly in 2007 and could be said to be performing its official functions as set out in law.

However, the tribal secretary also stated that insufficient government funds were made available to support the council's functioning. In 2007 it received some funds for catering at meetings from DLGTA, and officials of the department informed her that the tribal office could pay the travel costs of *izinduna* required to go to council meetings, but not of other *izinduna* who participate in meetings of the traditional court. She had also heard rumours that *izinduna* who were members of the council might be paid R1 200 per month. Her own salary was only R1 200 per month, which was insufficient for her to support herself, and she was thinking of resigning.

One elected male councillor, Mpenduli Mahlaba, had played an active role in community development (for example, in organising sporting activities for local youth) in the past and he speculated that this might have accounted for his election. In his view the relationship between the roles and functions of the traditional council and that of other traditional leadership positions was not very clear as yet. However, it did not seem that the council would have sub-structures at *isigodi* level, and since the roles and functions of the *Induna*, the *iphoyisa* and the *igosa* at local level were still very clear and accepted by all, it was possible that this would not present a problem.

According to an elected female councillor from Mathintha, the council had begun to meet every month from the beginning of 2007. She was not sure of the term of office of elected councillors, but she knew that after some time new elections would have to take place, and that nominated members of the council could be replaced at this time too. 'When we were told that the government required minutes of all our meetings, and that our food costs would be met by them, then we knew that this was serious', she said. Topics discussed in council meetings in 2007, included crime (such as stock theft, a major problem in the area), roads, social welfare issues (such as the problems faced by orphans, and the poor not being able to afford funerals), health (such as the shortage of staff at government clinics), water supplies, and agricultural development. Sub-committees to deal with these different issues were being established, but by mid-2007 these had yet to begin to meet.

In relation to problems relating to women in particular, she said that married women, unmarried women and widows were all represented on the council, and that she didn't see her role as being limited to raising women's issues. Both women and men from her areas were approaching her with issues and problems now they knew she was a member of the council, and at council meetings both women and men could speak about the problems facing women. She believed that the problems that unmarried women with children women faced in acquiring land for their own homesteads were important, but by mid-2007 she had not yet raised this as an issue, because it was 'still difficult' to do so (it was not clear why this might be so). She intended to raise the issues when the opportunity arose, however.

Another young female councillor, who was a nominated member, had originally been seen as a youth representative on the council, but recently her portfolio had changed to looking at welfare issues as well as sport. She had been chair of a youth committee under a ward development committee before the formation of the traditional council. She said that when the idea of a traditional council was first explained to the community by the *Inkosi* in early 2006, there was no opposition to the idea that women would be members of the structure, since 'even older men know that women are strong and hard working'. Required of council members, according to the *Inkosi*, was that they should be 'committed, active and able to report back to the community'.

According to this councillor, attendance at meetings in 2007 had been good, with only one or two councillors unable to attend on occasion. Topics discussed to date had included: providing land for businesses, the shortage of fields for cropping, un-roadworthy vehicles being used as taxis, the sale of alcohol at night by *spaza* shops, the need for regular visits to the area by a mobile office of the Department of Home Affairs and the need for another high school in the Mchunu area. These issues would be communicated to the local municipality with which the council needs to work. A meeting had recently been held with the mayor of the local municipality to discuss working relationships. In her view, problems faced by women that the council

should discuss in future included: domestic violence, husbands preventing their wives from taking a job and older women having to taking care of the children of unmarried mothers who live elsewhere. She knew that women now had rights under the new laws of the country. Unmarried mothers need to be allocated a stand of their own. She said:

*I do intend to raise the issue of women's land rights at council meetings — it affects me personally. Some of the older men may resist this, but I know I will get support from the older women on the council. However, we haven't discussed it amongst ourselves as yet.*

A third female councillor suggested that the existence of the council would make it easier to address issues that affect many women, such as the more effective provision of health care services. In her view, female councillors are likely to want to discuss issues around land and food production because they are the ones to notice when children are going hungry. It would also be possible to discuss the question of land allocation to unmarried mothers at the council, and 'with a good argument, it will be possible to review our practices'.

### **The Mchunu tribal office and the role of the tribal secretary**

The tribal office is the administrative arm of the traditional council, and plays a key role in managing the income generated by the imposition of fees and fines. These help to meet the costs of running the office and providing certain services to residents. Only one person is employed, the tribal secretary. The functions and responsibilities of the tribal office are as follows:

- a) The office issues letters required by local residents for official purposes, such as the proof of residence needed when applying to open a bank account or to be issued an identity document or the official letter of verification required when applying for a death certificate for a person who has died at home. The tribal office charges an administrative fee of R10 per document when issuing such letters.
- b) The office collects payments for customary fines and fees, including those in relation to land allocations, and pays these



into the traditional council's trust account, which is administered by government through the DLGTA and is used to meet the costs of maintaining the office. This income is also used to pay half of the salary of the tribal secretary, with the other half paid being paid by DLGTA. Receipts for all payments are provided, and a record of all transactions is maintained.

- c) The office keeps records of all applications by outsiders for a residential site within one of the *izigodi* in the Mchunu area, together with the name of the local 'champion' who must vouch for the character of the applicant. The applicant must pay a *khonza* fee in addition to the usual allocation fee, and the office issues a letter to be taken to the *Induna* of the *isigodi* to affirm that the applicant has paid these fees.
- d) The office approves applications for a PTO document if a business is to be established on tribal land, or when a bank loan is required for building a house. A 'Tribal Authority Consent Form' is filled in and sent to the Ingonyama Trust Board, which administers all PTOs on communal land in KwaZulu-Natal.
- e) The office offers a photocopying service for residents who need to copy personal documents such as birth or death certificates.
- f) The tribal secretary must compile an annual budget for the office and submit it to DLGTA. This typically includes the following costs: subsistence and transport, postage and telephone, stationary, water and electricity, cleaning materials and the salary of the tribal secretary.
- g) The tribal secretary keeps minutes at traditional council meetings.

Record keeping in the tribal office had been computerised and the tribal secretary had received some basic computer training. When visited in July 2007, however, the office computer was not functioning and was awaiting repair. Other problems listed by the tribal secretary included the lack of maternity leave and her perception that her job was not secure. The office was receiving less income than in the past because elected local govern-

ment councillors had begun to issue letters of proof of residence to local residents, without charging any fee. There some months in which her full salary could not be paid.

### Customary fees and fines paid to the tribal office

A number of customary fees and fines have to be paid to the Mchunu tribal office, only some of them related directly to land (see Table 7). Some are fines for a man and a woman living together without being properly married according to custom; some are fees due when a beast is slaughtered and a beer drink is held (requiring the *iphoyisa* of the *isigodi* to attend and help prevent fights occurring), and others are administrative fees due when bringing a case to the tribal court, or for issuing letters of proof of residence.

The homage fee of R15 is the main fee to be paid when land is allocated. However, it is often linked to a fine for living together without being properly married, which is R30 per annum, plus an additional R50 that a man must pay for living with a female who is from the Mchunu tribe. No letter approving a site allocation is issued by the tribal office until the total fine of R80 is paid. According to the tribal secretary, however, the annual fine of R30 is disregarded by many.

Will these fines for not being 'properly married' continue to be imposed, now that the traditional council has decided to issue letters to co-habiting couples to facilitate their registration of a customary marriage, as described in the introduction to this report? This is not yet clear.

If someone builds a modern house for which a bank loan is required, a (PTO) certificate must be issued by the Ingonyama Trust. This will require a Tribal Authority Consent form to be supplied by the tribal office, upon payment of a fee. A similar process is followed when a site is allocated for a business, a school or a church.

Unlike elsewhere in South Africa, no annual tribal levy is paid to the tribal office, but monies are sometimes collected when the *Inkosi* is in need, for example, when large medical fees have to be paid for one of his family members. If a violent conflict or 'war' breaks out, then the *Inkosi* may fine the person responsi-

ble for initiating such conflict and this money is paid directly to the *Inkosi*.

Other fines (e.g. for cutting down green trees) are collected by the *izinduna*, and then paid directly to the *Inkosi* at the end of each year. If these are substantial and exceed R1 000 in total per *izigodi*, then it is accepted practice that the *Induna* may keep a portion of this amount. There appears to be some ambiguity around monies collected by *izinduna*. Given the onerous nature of their duties and the lack of any other source of funds to support them, it appears to be accepted practice that they retain a portion of the money they collect as fines, but the amounts involved remain unclear.

## The Mthembu traditional council

### Establishment and composition

Details of the processes through which the Mthembu traditional council was constituted, and even its current composition, were difficult to ascertain. According to a document dated August 2005, the council is made up of twelve members who were 'nominated by community members', of whom seven are women, and eighteen members who were 'appointed by the traditional leader', of whom four are women. Whether or not this is accurate is unclear.

In two meetings of the research team with the council, only four councillors were present at the first meeting and twelve at the second. A number of 'friends' of the Mntwana also sat in on both meetings. This was often the case, according to the tribal secretary, who said she had kept minutes at only two full meetings of the council between September 2006 and April 2008. It appears that in its first two years of operation the traditional council did not hold regular monthly meetings.

Very few ordinary residents in Ngubo or Nkaseni *izigodi* had any detailed knowledge of the traditional council, including its purpose, roles or functions. None could offer information on the procedures through which the twelve elected members had been chosen. One traditional councillor who was interviewed said that as far as he knew no members had been elected by the commu-

**Table 7: Customary fees and fines paid at the Mchunu tribal office**

Fee or fine	Amount
<i>Khonza</i> fee when an outsider applies for land	R15
Fee for allocation of a site (both tribal members and outsiders)	R15
Fine if applying for residential land but not married	R80
Fine if living together without being married (annual)	R30
Fee for holding a social event where a beast is slaughtered and the <i>iphoyisa</i> or <i>igosa</i> attends to maintain the peace	R15
Fee for bringing a dispute to the <i>Inkosi's</i> traditional court	R15

nity, and that there were only five female members of the council. He remembered a meeting at the tribal office in 2005 or 2006 at which members representing each of the *izigodi* in the vicinity of Tugela Ferry were selected by *Inkosi* Ngoza Mthembu. According to this councillor, he has attended about four or five meetings since the formation of the council, but he hasn't been able to attend all the meetings, which are held on an irregular basis. *Mntwana* Ndaba Mthembu chairs all meetings at present.

### Functioning of the Mthembu traditional council, 2006–2008

It appears that few activities were undertaken by the council between 2006 and 2008. According to one councillor, topics for discussion in this period included: the purpose and functions of the council; the possible need for a separate bank account; the need for training of councillors; and the need for the council to be involved in the local municipality's development planning procedures.

Strained relations between the *Inkosi* and the local municipality were raised as a key problem in several meetings between the Mntwana, councillors and the research team. One problem had been the desire of the municipality to have local residents pay municipal rates, and another was the municipality's need to acquire land in order to allow businesses to be established or government

offices to be built (both being described as 'development').

One councillor saw the main function of the traditional council as facilitating co-operative relations between the *Inkosi* and the local municipality, which has its headquarters in Tugela Ferry. Part of the town is located on Mthembu land<sup>100</sup>, and this is also where the *umuzi* of the *Inkosi* and the main Mthembu tribal office and courthouse are located. Within the town, the overlapping jurisdiction of the local municipality, on the one hand, and the *Inkosi* and traditional council on the other, gives rise to many tensions and difficulties. For example, severe tensions arose in 2006 and 2007 over the municipality wanting to build a new library on the outskirts of the town, where the Tugela Ferry irrigation scheme is located. The dispute was eventually resolved and the library was completed only in 2009.

Apart from the dispute over the land required for the library, it was clear that no other land-related issues had been discussed by the council in its first two years of operation. No information on the Communal Land Rights Act and the role of the traditional council in land administration had been provided to the council by provincial or local government, and councillors' knowledge of the contents of the Act was limited.

In more than one meeting councillors repeated the saying: 'you can't have two bulls in one kraal', referring mainly to overlapping jurisdictions in relation to land, but perhaps also to the wider argument often made by the traditional leader lobby that they deserve recognition as tier of government. Affirmation of the need to 'respect' the powers of traditional leaders over land, were linked to concerns over government's intentions in passing the CLRA, and the possibility that the Act could be used to convert communal land into individual title. One councillor said that 'if people have individual title deeds they will no longer respect the *Inkosi* but only the municipality'.

Anxieties over the loss of control over land were also apparent in relation to the private ownership of land reform farms by former labour tenants who remain tribal members. Councillors expressed concern over approaches in recent years by development agencies proposing to undertake large scale agricul-

tural projects on the Tugela Ferry irrigation scheme. In one case, what was proposed was use of the entire scheme to establish a commercial farming venture, with local people being hired as labourers. The *Mntwana* and others said that they doubted that local people would benefit from these forms of 'development'.

### The Mthembu tribal office and the issue of fines

The roles, functions and procedures of the Mthembu tribal office are very similar to those of the office in the Mchunu area. One key difference is in relation to the amounts charged as fees or as fines in the traditional court, which tend to be higher in the Mthembu area. For example, a khonza fee of R100 is charged when land is allocated, as compared to the R15 fee levied by the Mchunu office, and R200 is the fee for slaughtering an animal and arranging a feast.

According to the *Indunankulu* for the Tugela Estates section of the Mthembu, Amos Gabuza, stock theft is a major problem in that area. If someone is convicted of such a crime, they must pay back to the owner the number of cattle stolen plus a fine of two cattle 'for insulting the tribe'. This fine is paid to the tribal office, either in livestock or in cash (which is much cheaper, given the difference between the accepted cash equivalent of R1 900 per beast and the actual cash value of cattle, which can be as much as R4 000 per animal).

Recently there has been controversy over the heaviness of the fines being imposed by the *Mntwana* on people found guilty in the traditional court. According to several respondents, there is a widespread feeling that these are unjust, given the poverty of many of the people concerned. Examples include:

- A fine of R5 700 was imposed on a family who buried their daughter in the Mchunu area and not on Mthembu land, as required by custom. The family had not been able to afford the costs of the funeral, and had asked their relatives in the Mchunu area to help.
- A fine of R1 900 was imposed on a single woman whose son was accused of stealing a tent. The fine had to be paid, even

<sup>100</sup> Part of the town, across the river from the Mthembu area, is located on Mabaso tribal land.

after doubt was cast on whether or not he was in fact guilty of the theft.

- A woman was fined R3 800 because her son stole a TV set. Because she could not pay, she was told she had to leave the Mthembu area.

It became clear, however, that the *Indunankulu* and other members of the traditional council, as well as some community members, are in support of the *Mntwana*. They feel that the heavy fines reflect his determination to re-assert the traditional values of the Mthembu nation, after a long period when his father, the *Inkosi*, was unwell and unable to exert authority and leadership. They say that the leadership of the tribe needs to take strong measures to encourage parents to exert control over their children, who are committing many crimes, and ensure that they 'behave properly.

This is consistent with the overall stance of the current Mthembu leadership towards changing attitudes and practices, which are seen to be undermining customary social norms and values and contributing to social problems such as crime. Laws and policies of the post-apartheid government are also criticised for contributing to declining rates of marriage and the breakdown of the family. This stance informs the views of councillors on the vexed question of whether or not unmarried women with children should be allocated land of their own. As described in Chapter Seven, the Mthembu leadership is strongly opposed to giving such women independent land rights, and the notion of 'rights' was heavily criticised in discussions with them.

It appears that the Mthembu traditional council is playing a key political role in the succession to the chieftaincy, and that this is

seen as a higher priority at present than the administrative or developmental functions of the council.

## Conclusion

A key problem in relation to traditional councils raised by most key informants, including many councillors themselves, was lack of clarity on their functions and responsibilities. This is the case, in particular, in comparison to the functions of both local government and existing structures of traditional authority, such as *izinduna*. Another perceived problem was inadequate financial support for tribal offices and councils by government.

What role do traditional councils play in relation to land matters? It was clear that much of the day-to-day administration of land in Msinga takes place at the local level. Key roles are played by prospective neighbours and traditional leadership figures such as the *Induna*, as well as the *ibandla*. The key unit for land administration is the *isigodi*. Disputes over land or natural resources are resolved at local level first, and it is only when they cannot be resolved there that they are referred to the tribal court under the *Inkosi*.

Higher-level institutions such as the *Inkosi* and the traditional council, supported by the tribal office, lend support to these local structures and processes. The layered or nested character of land administration in Msinga emerges very clearly from a description of how the land tenure system is supposed to work, the normative ideal, but also how it works in practice — in the 'living law of land'. Does this system provide sufficient accountability of authority structures to individual rights-holders? This question is addressed in the final chapter.



# Chapter 9: Key research findings and their wider implications

This chapter draws together the main findings of the *Imithetho* project and discusses their wider implications. The first question it addresses is the character of local-level responses to emerging problems, tensions and challenges within the land tenure regime in Msinga. A key issue here is: whose voices speak up and make themselves heard within processes that determine the content of the 'living law' of land? The second question addressed here is that of the policy implications of these research findings, with a particular emphasis on the limitations of the approach embodied in the CLRA. Now that the CLRA has been declared unconstitutional, a new round of law-making is presumably set to begin, and a better understanding of these limitations needs to inform the policy process.

## **Key land tenure problems and local responses**

As preceding chapters have described, interviews, focus group discussions and report back meetings undertaken by the research team identified an array of problems, tensions and low-level contestations over land and natural resources in the Mchunu and Mthembu tribal areas. Some issues, such as women's land rights, were seen as of major importance by our key informants, provoking animated discussion and debate. Other issues were clearly seen as being of lesser significance, or as not very easily resolved, and therefore not worth discussing at great length, as in the decline in the ability of headmen (*izinduna*) to enforce rules over natural resource use. A wide range

of responses to these problems was evident, and proposed 'solutions' sometimes sparked heated debates.

### Women's land rights

In the case of declining rates of marriage and an associated increase in the demand for residential plots by single women with children, these are clearly being generated by social and economic changes that involve profound shifts in the nature of social relationships and identities. Yet the normative ideal of land tenure presumes customary marriage, patrilineal descent and virilocal residence. This disjuncture is generating confusion and anxiety, but to varying degrees; it is seen as a major problem by many older people, as well as traditional leadership figures, but as less problematic by younger men and women — who, nevertheless, see a need for adjustments in the rules around land allocation.

Changing marriage practices and the demand for land by single women provoked heated, and mostly good humoured, debate in all the research sites. Some older people insisted that a return to the 'proper behaviour' of the past, including adherence to customary marriage in its fully-fledged form, is required. Many people saw this as unrealistic, however, and said that they accept that the majority of marriages today are more likely to be *uganile* in character, rather than *ugidile*. Many young couples simply cannot afford even the truncated form of customary marriage that *uganile* represents. Co-habitation outside of marriage in any form was also seen by many as acceptable, if not desirable.

Traditional leadership in the Mchunu tribe appears to be somewhat ambivalent on this issue. Until recently the *Inkosi*, through the tribal office, imposed fines on tribal members who asked for land but were unmarried. In what seemed to constitute an about-face, in 2010 the traditional council decided to issue letters to cohabiting couples to allow them to register their relationship as a customary marriage, and it was unclear whether or not the tribal office would continue to impose the stipulated fines.

The councils' decision in relation to registration of customary marriages was motivated by concern for the plight of widows unable to

claim death benefits. In general, traditional leadership in the Mchunu area has expressed sympathy for the problems faced by widows, and asserts that they often find in widows' favour in the many cases centred on accusations of abuse by the ex-husband's family, which they hear in the tribal court. They see these rulings as consistent with customary ideas about the establishment of separate 'houses', each with their own property, within polygynous marriages.

More significantly, the Mchunu traditional council has responded to the pent-up demand for residential land by single women with children by deciding that they will allow unmarried women and men to apply for land. Such allocations will not be automatically approved, being subject to approval by the *ibandla* of an *isigodi* and prospective neighbours, and will often be located close by to natal homesteads i.e. they will continue to be socially embedded. In contrast, the Mthembu council continues to resist the demand for land rights by unmarried women with children, asserting that authority structures need to support traditional norms and values through an active assertion of the importance of marriage, and customary marriage in particular.

Did the Mchunu council come to its decision in part because female councillors were prepared to speak up on this issue, and were given the opportunity to do so? It is possible; further research on this question might yield an answer. In the case of the Mthembu council, which is resisting such changes, there appears to have been fewer opportunities for female voices to be heard on this issue. This may be because the council, from the time of its establishment in 2006, seems to have been pre-occupied with the uncertain process of succession to the chieftainship, rather than on other issues and problems. A conservative 'politics of tradition', centred on support for the acting *Inkosi*, has emerged within the council, and there appears to have been little sympathy to date for the idea that single women should be allocated land.

### Variability in land tenure 'rules' and practices

A key finding of our research is that there are subtle but significant variations in land

holding and land administration practice within and between the Mchunu and Mthembu tribes. Differences between former labour tenant farms and core tribal areas include a history of self-allocation of plots and non-payment of *khonza* fees to the *Inkosi* in the former (although in the case of Ncunjane this has changed in recent years as a result of pressure from the *Inkosi*). Another difference is that large, compound homesteads appear to be more common on the former labour tenant farms, along with higher rates of marriage, and concomitantly fewer single women with children pressing for land of their own. Most new land allocations occur as a result of fission of these large homesteads. In the case of Nkaseni, the *Induna* does not play a key role in the land allocation process, and instead, approval of allocations is sought from members of the committee first established when pressing their land claim in the 1990s (even though this committee has not met for some time).

Most differences between, and perhaps within *izigodi*, reflect the degree to which local circumstances and conditions require different aspects of the normative ideal of land tenure to be invoked, interpreted and brought to bear on emerging problems. Re-allocation of unused fields, for example, is a key issue in Mathintha, but not in the other three case study *izigodi*, and sanctions for straying livestock is a major focus for discussion in Ngubo but not elsewhere. Such differences are mainly the result of contrasting histories or relative natural resource abundance, often itself a product of localised histories (such as whether or not the *isigodi* includes former labour tenant farms).

In meetings to discuss the project's research findings, traditional leaders and traditional council members in both tribes responded to evidence of local variability in two contrasting ways: (a) disapproval of practices which might imply the weakening of their authority (e.g. non-payment of *khonza* fees), combined with attempts to restore such practices; and (b) pragmatic acceptance of variability in relation to local practices of land allocation, land use, and sanctions such as fines.

It became clear in such discussions that traditional authorities would lack the capacity to impose a common set of rules or centralised

solutions to local problems, should they desire to do so. In practice they usually discuss or negotiate potential solutions to problems with key actors within *izigodi*, processes which can take place over lengthy periods of time. In such processes there are often opportunities for a range of voices to be heard, as was clearly the case with the *ibandla* at Ncunjane. In the case of the heavy fines for crop damage by livestock being imposed by the *Induna* and *iphoyisa* in Ngubo, inadequate opportunities to debate the issues was clearly arousing resentment amongst male livestock owners, who questioned the legitimacy of rules that they had not had the opportunity to discuss. In all the case study sites, a range of local actors expressed their views and feelings about which 'rules' were appropriate in their circumstances and conditions, perhaps because rights, voice and decision-making are seen as bound up with each other.

### **Ambiguities in relation to ownership and authority on land reform farms**

Government's land reform programme has resulted in new challenges for the land tenure regime in Msinga, in particular in relation to the land rights of former labour tenants upon whom ownership of commercial farm land (via a legal entity such as a trust or communal property association, often referred to as 'the committee') is being conferred. However, these land-owning entities barely exist in practice. They have often ceased to hold meetings, and few, if any residents have any knowledge of their founding constitutions. Land rights on the farms are characterised as being generally in accordance with the normative ideal of traditional land tenure (although with local variations), and residents see themselves as fully-fledged members of their respective tribes. This allows them to take disputes that cannot be resolved in local forums to the traditional courts presided over the *amakhosi*.

The outcome is a profound ambiguity over the underlying ownership status of such land. This creates anxiety amongst traditional leaders and members of traditional councils, who feel that the unity of the 'nation' is at risk, and that their jurisdictional authority over former labour tenants is in question. On the other hand, former labour tenants at Ncunjane and Nkaseni feel strongly that decisions

over who should be allowed to return to the farms, in the wake of land reform, should be *theirs* to make, rather than being the prerogative of others, including the *Inkosi*. They express concern over the possibility that the *Inkosi* or the traditional council might begin to allocate land to numbers of people from other parts of the (generally overcrowded) tribal territory.

Solutions proposed by members of the Mchunu Traditional Council included the idea that the *Inkosi* should be the chair of any trust or communal property association formed to take transfer of farm land. Another suggestion was that the *Inkosi* should consider visiting such farms to discuss and clarify key issues with local *izinduna* and residents. At the time when this research was under way, however, it was clear that no-one was pushing for the underlying ambiguity over ownership to be quickly resolved, and that in practice land applications and allocations within Ncunjane and Nkaseni were being administered at the local level without interference from their respective *amakhosi* or tribal offices. There was little evidence of government officials seeking clarity on these matters either; they appeared to be prepared to let the situation on the ground evolve without outside interference, in response to local dynamics.

### Boundary disputes

As described in earlier chapters, the origins of the many tribal boundary disputes in this area go back to the 19<sup>th</sup> or early 20<sup>th</sup> centuries, one example being the disputed boundary between the Mchunu and the Mthembu. Other disputes, such as that between Ncunjane and Mathintha, are primarily over use of common grazing, fuel wood and other natural resources, and are not focused on the demarcation of the boundary as such. A third category of dispute involves overlapping or ambiguous jurisdictional boundaries, as in the case of land within Tugela Ferry town, where both the local municipality and *Inkosi* Mthembu, together with the Mthembu traditional council, exert authority. Anxiety over the ambiguous status of property rights on the land reform farms is also in large part focused on the boundaries of tribal jurisdictional authority.

Given a local history of violent conflict over boundaries, it is unsurprising perhaps that the

predominant response to these disputes is a cautious acceptance of continuing ambiguity and flexibility in relation to resource use across these boundaries, leading to a degree of porosity rather than exclusivity. This does not preclude the build-up over time of dissatisfaction and tension, however, and 'flexibility' and ambiguity should perhaps be seen as ways of containing and managing the potential for conflict, rather than as a permanent solution. It was only in relation to the overlapping jurisdictions of the local municipality and *Inkosi* Mthembu on land at Tugela Ferry that some people, in this case traditional councillors, called for an urgent resolution of the ambiguities and uncertainty.

The key role of traditional authorities in processes of dispute resolution, at a range of levels of social organisation, both within and between different social and political units (such as tribes, wards and neighbourhoods), may help to explain why many people, including former labour tenants on land reform farms, continue to recognise and support traditional authority. Appealing to traditional authorities to help resolve or manage the kinds of boundary disputes described here, is probably more likely to yield a solution than asking government or the courts to intervene.

On the other hand, former labour tenants would clearly reject the imposition of newcomers on them through allocations of land by *amakhosi* or traditional councils. They emphasise the importance of local-level processes of land administration and mechanisms for social inclusion, while continuing to refer particularly difficult and unresolved disputes to the *Inkosi* and the tribal court. This means that layered or nested systems of land holding, authority and dispute resolution seem to serve the interests of everyone at present, in part because they allow the underlying ambiguity of ownership of the farms to remain unresolved within a framework of agreed *jurisdictional* boundaries.

### Land, agricultural production and natural resource use

Despite the decline of agricultural production in Msinga in recent decades, and a generalised acceptance that other sources of livelihood are now more significant than farming for many people, secure access to land for



cropping and livestock production continues to be important for some households. For example:

- The shortage of fields in densely-settled areas such as Mathintha means that a substantial demand exists for either the re-allocation of unused land or support for more secure forms of land borrowing or rental.
- Maintaining the fencing around the fields at Ngubo is seen as important by those with fields and also by livestock owners (in practice these are often, but not always, the same households).
- Maintaining the relative resource abundance at Ncunjane is a key consideration for many local residents.
- Residents of Nkaseni see cash cropping of vegetables on newly acquired irrigated fields as a key source of income, and work parties to maintain the irrigation furrow are well attended.
- Members of the Mthembu traditional council acknowledge that the Tugela Ferry irrigation scheme is a major source of income for plot holders, and are critical of proposals for large scale commercial ventures that would undermine such access.

Solutions to problems of agricultural production proposed by focus group participants generally focused on the provision of fencing for blocks of arable land or improved water supplies, rather than land tenure. No informants expressed interest in any form of individual land titling — in fact, when the provisions of the CLRA that allowed for such titling to occur were explained to members of the Mchunu and Mthembu traditional councils, they expressed a great deal of hostility to this notion. Nor was there any discussion of measures to enable the operation of a local land rental market — the solution to land shortages in Mathintha was generally seen as re-allocation of unused fields. This is a little surprising, given that an active, informal land rental market is clearly in operation within the nearby Tugela Ferry irrigation scheme, which enables people without plots to access them from those who are not using them.

In relation to use of natural resources, the key problem that many informants focused on was the erosion of the regulatory authority of *izinduna*. Examples included the lapse of the practice whereby the *Induna* of each *isigodi* announces the date when livestock are allowed into fields to feed on crop residues, and non-enforcement of the rule that green trees should never be cut. One common reason offered for the waning authority of the *Induna* in relation to these rules is that many men now own firearms and threaten the *Induna* if he tries to enforce the rules. No solutions to this problem were proposed, and most informants appeared to accept that unregulated natural resource use was now a problem they would just have to learn to live with.

### Traditional councils

The key problem in relation to traditional councils raised by most key informants, including councillors, was a lack of clarity on their functions and responsibilities, in particular in comparison to those of both local government and existing structures of traditional authority such as *izinduna*. Lack of clarity on the relationship between traditional authorities and elected local government is a problem of long standing (Ntsebeza 2006, 2008), and one that continues to be seen as an impediment to effective local governance in Msinga. The TLGFA has clearly not resolved this problem.

In relation to *izinduna*, many informants saw it as quite problematic that only some *izinduna* can act as councillors (because of the numbers and proportions of appointed, elected and female councillors required by law). In large tribes such as these, many *izinduna* are not members of the council, and thus cannot be paid a stipend to help cover their travel and subsistence costs to attend meetings and court hearings. Yet all *izinduna* continue to play a key role in dispute resolution, land administration and other governance roles within the *izigodi*, to attend hearings of the tribal court and to advise the *Inkosi* on tribal affairs. Most informants saw this problem as one that the acting *amakhosi* for the Mchunu and Mthembu would have to take up and resolve with government.

Another issue raised by some informants, notably councillors and the tribal secretaries,

was inadequate financial support by government. The Mchunu tribal secretary was particularly critical of the manner in which her job and the functioning of her office is funded at present, relying in part on income from fines imposed on tribal members and payments for services, and in part on a government grant. Not only is her job poorly paid, insecure and without benefits such as maternity leave, but the income from local payments is sometimes insufficient to meet the running costs of the office. In her view this state of affairs is not sustainable. Again, this problem is seen by informants as one that the *Inkosi* will have to resolve through engaging with government officials.

## Policy implications

What are the policy implications of the project's research findings, and what light do they throw on the debates and controversies provoked by the promulgation of the CLRA in 2003/04? As described above, the approach to tenure reform adopted by the CLRA involved the transfer of ownership of land from the state to 'communities' represented by traditional councils, which would administer registered 'community rules' and oversee a process of recording and registering individual rights in a community land register.

The CLRA generated major controversies in relation to: the particular conceptions of customary land rights embodied in the CLRA, and linked to this the powers of traditional authorities over land; mechanisms for ensuring the accountability of traditional councils; the assumption that tribal boundaries demarcated under the apartheid-era Bantu Authorities Act would define the relevant 'communities'; the nature of women's rights to land in family-based systems; and how to enable land tenure systems derived from customary norms and values to evolve and adapt to changing social conditions, values and aspirations.

### The nature of 'customary' land rights

The CLRA provided for centralised control of large areas of land by traditional councils under chiefs, within apartheid-era boundaries, and through the administration of a 'community rules'. Critics of the Act argued that centralised control within fixed territories constitutes a colonial and apartheid-era

distortion of land relations, and that in pre-colonial systems 'the interplay of power between different layered levels of authority ... mediate(d) potential abuse of authority by tribal authorities', boundaries between groups were often 'in flux and overlapping', and land rights were therefore 'layered and relative' (Claassens 2008a: 281, 282). In this view, the CLRA would build on and cement into law a version of customary land tenure and authority that suited the authoritarian regimes of the past, as well as the interests of elite interests at local level, at the expense of the interest of ordinary group members. Key questions that arise are thus: whose voices and interests count in the evolution and adaptation of the living customary law of land? What institutional arrangements will allow for the voices and interests of the majority to be decisive? Should boundaries between groups be allowed to be flexible and defined from below rather than above, as a key means to mediate power from above? Should the emphasis be on enabling effective and appropriate processes of discussion and negotiation, rather than rule-making?

Our Msinga material suggests that so-called communal land tenure regimes in rural South Africa are best understood as systems of *living law*, which have the potential to adapt and evolve over time and are sometimes deliberately and consciously adjusted to meet changing circumstances. The term 'customary' is a misnomer, since this seems to imply that the system is handed down relatively unchanged from the past, and that its content is derived primarily from a discrete and unique set of cultural norms and values. Even in Msinga district, often seen as a prime example of a culturally conservative, deep-rural area, there is much evidence of the influence of normative change in the wider society — e.g. in relation to notions of gender equality. Barbara Oomen's (2005: 200-204) conception of living law is thus highly relevant (see Box 16).

Living law, in Oomen's view, 'draws on a variety of sources ranging from the "loosely constructed repertoire" of custom to constitutional and developmental values'<sup>101</sup> (ibid: 203) — but also important are political alliances and force. One key aspect of Oomen's conception is thus her emphasis on 'the degree to which law is crucially shaped by political relations' (ibid: 203). Because land relations

<sup>101</sup> Oomen quotes Comaroff and Roberts (1981: 18) in describing custom as a 'loosely constructed repertoire'.

### **Box 16: Barbara Oomen on 'living law'**

... living law is negotiated within ever-fluctuating social and political settings, which it simultaneously reflects and shapes... Even if ideal norms can be stated, and do have an importance in that they reflect worldviews and moral claims, they more often than not turn out to be exceptions rather than rules. What is more useful then, is an investigation of the forces that determine which rules are invoked, why and by whom at a specific moment, and on which sources they draw...

The fact that the political and social landscape is in a constant state of flux – caused by wider national trends, local shifts of power which can even be caused by affirmation of certain positions in law – creates the need for rules and rights to be permanently renegotiated and adapted. This leads to a legal culture that is much more processual than the common law with its reliance on absolutes and legal certainty (Oomen 2005: 203)

are politically as well as socially embedded (Cousins 2007), downward accountability of authority structures to rights holders is vital, as a check on the potential abuse of authority, but also to ensure that the content of land rights is consistent with the needs and desires of the majority of rights holders (Claassens 2008a). Where accountability is absent, corruption and abuse become real possibilities. Control over land can be the lynchpin in struggles over the relative balance of power at local level — but so perhaps can be control of dispute resolution and judicial processes, underlining the significance of current struggles over the provisions of the Traditional Courts Bill of 2008 (LRGU 2010).

Our findings suggest that codified versions of customary law are indeed problematic. Processes of social change mean that 'customs' tend to be flexible and adaptable in response to change. But they also suggest that a focus on the 'customary' dimensions of local law is too narrow, and that as, Oomen proposes, a more inclusive notion of 'living law' is required. Residents in Msinga do not see their South African citizenship, and the rights that flow from this identity, as contradicting their membership of the Mchunu or Mthembu tribe, and they draw on constitutional values (such as gender equality) and other normative frameworks (such as the state's commitment to rural development and land reform) in making claims on resources. Some people, however, such as key members of the Mthem-

bu traditional council, use appeals to custom to legitimate conservative reactions to social change, or as a cloak for narrower agendas, which is another reason to be wary of the term 'customary'. The question of whose voices are heard in the making of living law becomes critically important (Claassens and Mnisi 2010).

A key policy issue is thus the nature of the institutions and processes within which conversations, negotiations and decisions over the content of living law in relation to land take place, and in particular on how participatory such processes are. As illustrated by the example of the Mchunu traditional council's decision to allocate land to single women, institutional contexts which are characterised by strong leadership, an openness to debate, and the space for a range of voices to speak and be heard, are more likely to be able to engage with processes of social change than those open to only a narrow range of voices and interests. A key objective of policy and law should therefore be to establish and support land tenure institutions and decision-making processes which are legitimate, open to popular participation, and accountable to rights holders.

The Msinga case also shows how misleading a narrow focus on land tenure 'rules' can be, given the highly normative character of rule-making. A description of the living law of land in Msinga would be highly inaccurate if it included only the normative ideal that most informants are able to articulate so clearly. Subtle but important variations in how this 'loosely constructed repertoire' of norms and ideas is used in practice, by diverse actors in different locales, and the reasons for such variability, would be rendered invisible. Again, the policy implication is that appropriate processes, overseen by accountable institutions, are at least as important as good rules, but probably more so.

### **Boundaries**

The model of land rights embodied in the CLRA was private and exclusive group ownership of land by so-called 'traditional communities'. The surveyed boundaries of such land would coincide with those of apartheid-era tribal authorities. These 'communities' would be represented by traditional councils, and

agree on a common set of land tenure rules, to be registered by government as a precursor to having juristic personality conferred on them (Smith 2008: 46). As outlined above, critics argued that these features would enable the control of land by unaccountable authority structures, and, as illustrated by the examples of the four applicants in the CLRA constitutional challenge, facilitate the effective dispossession of subordinate groups placed under the authority of chiefs against their will.

The Msinga case does not include examples of groups or communities placed under the jurisdiction of tribal authorities by the apartheid regime. However, the somewhat uneasy relationship between former labour tenants on land reform farms and traditional authority structures is relevant to the argument that territorial (jurisdictional) boundaries between groups should remain flexible as a key means to mediate power relations. In a very real sense, the former labour tenants are choosing to remain tribal members and under the authority of the relevant *amakhosi*, not because their land rights are dependent on such affiliation, but because of the perceived benefits of tribal membership (which no doubt includes a sense of belonging to the tribe, in addition to more instrumental reasoning around, for example, the provision of dispute resolution 'services'). The possibility of non-affiliation flows (in part) from their legally recognized ownership of the farms, which thus appears to constrain the power of the *amakhosi* and other traditional authority structures.

The power dynamics are different in relation to *izigodi* located within the core tribal areas. Here, another key feature of the land tenure system serves to mediate the centralised power of the *Inkosi* and the traditional council — the nested and decentralised character of administration and day-to-day decision-making on land matters. This is discussed in more detail below. Internal boundaries, between *izigodi* (wards) *imihlati* (neighbourhoods) or *imizi* (homesteads), define other 'levels' of social and political organisation and forms of 'community'. Local conditions and histories give rise to local variability in the way that the normative ideal of land tenure is drawn on to legitimate particular claims and practices, and these are for the most part accepted and tolerated by the Msinga *amakhosi* and tra-

ditional councils. This is a different form of 'flexibility' in relation to boundaries.

'Flexibility' is also in evidence in resource use across boundaries, as in use of grazing, fuel wood and other common property resources found on the former farms on which Ncunjane is located, by both its own members and people from neighbouring Mathintha. As is also the case with shared resource use across the Mchunu — Mthembu boundary, these arrangements recognise that unequal distributions of key resources are likely to lead to resource poaching and hence conflict and that non-exclusive boundaries are a potential solution. This does not, however, preclude the emergence of tensions and the need for mechanisms to manage these and to periodically negotiate the peace. It is thus important that tenure reform policy and law provide for strong local institutions and dispute-resolution capacities at all these different layers of 'community', which was not provided by the CLRA.

Finally, the long-standing Mchunu - Mthembu boundary dispute provides a powerful example of the dangers inherent in the private group ownership model that the CLRA embodies. In discussions with both of these *amakhosi* and traditional councils, it became clear that a renewed attempt by government to survey and demarcate the tribal boundary once and for all, as a prelude to the transfer of private ownership, would run the risk of igniting another inter-tribal war. The stakes are extremely high when private ownership is on offer to competing groups (Claassens 2000, 2001). The implication is that the 'transfer of ownership' model may be inappropriate in such situations, and other approaches to securing land rights are required as additional options within an array of tenure reform models.

### **Nested systems of governance: Do they provide accountability?**

The CLRA recognised only one level of land administration, the traditional council, which would act as the land administration committee for a 'traditional community'. Yet the literature on communal land tenure in South Africa reveals that decision-making in relation to land, including the allocation of plots, occurs mainly at the local level. These

decisions are often only approved or ratified at higher levels such as the chieftaincy (Cousins 2008b: 123-126). This is clearly not true in all cases, largely because the centralisation of power in the office of the chief in the colonial and apartheid eras, which created the 'decentralised despotism' of indirect rule (Mamdani 1996), has created many opportunities for opportunists.

As described in many parts of this report, most day-to-day land administration in Msinga takes place at the local level. Prospective neighbours and traditional leadership figures such as the *Induna*, as well as the *ibandla*, play significant roles, and the key unit of social and political organisation is the *isigodi*. The layered or nested character of land administration in Msinga emerges very clearly from a description of how the land tenure system works in practice.

Nestedness, however, does not preclude the emergence of tensions between different levels of governance, for example between the *Inkosi* and an *Induna*, or between an *Induna* and residents of the *isigodi*. Chapter Six, for example, describes rising tensions over the imposition of heavy fines for crop damage by livestock in Ngubo, and Chapter Eight discusses widespread controversy over the heaviness of the fines imposed for a variety of offences in the Mthembu tribal court in 2008 and 2009. A key policy question is thus the degree to which the nested character of land administration and governance in general creates a system of checks and balances on the overarching authority of an *Inkosi* and a traditional council. Does tension between levels indicate that accountability mechanisms are at work?

In Msinga, the very large populations of these tribes, together with the extensive land area that their members reside on, also constrains the exercise of power from above — the *Inkosi*, the tribal office and the traditional council lack sufficient material resources to control decision-making on land at the local level. On the other hand, centralisation of customary dispute resolution procedures, as envisaged in first drafts of the Traditional Courts Bill, may offer fresh opportunities for chiefs and traditional councils to attempt to exert centralised control over land and other matters. The version of the Bill tabled in parliament in

2008 enabled the traditional court to deprive people of 'any benefits that accrue in terms of customary law or custom', and both community membership and land rights may be seen as such benefits (Law, Race and Gender Unit (LRGU) 2010: 6). The imposition of onerous tribal levies, and the imposition of fines or even expulsion as a sanction for non-payment of such levies, offers another potential strategy for leaders attempting to shift the balance of power decisively in their own favour. This suggests that the nested character of land administration in these tenure regimes is not sufficient to keep centralised authority in check, and legal recognition of the substantive and procedural rights of community members as rights holders is also required.

### Women's land rights

A key criticism of the CLRA was that it failed to adequately recognize and secure the land rights of women who are not spouses within a marriage, of whom there are many — as many as 41 percent according to one analysis of official data<sup>102</sup>. According to Claassens & Ngubane (2008: 164-165) the Act failed to engage with the reality that land tenure systems informed by customary norms and values are family-based systems. The CLRA thus formalised rights deriving from discriminatory laws and distorted versions of custom. In addition, unequal power relations within decision-making forums also reinforce the tenure insecurity of women, and these were not adequately addressed in the Act. An alternative approach would involve defining and securing use rights, often exercised by women within family and kinship networks, and thus strengthening the position of women within social relationships and community structures. This would require oversight and support from the state.

Our research shows that in Msinga many women who are neither married, nor heads of households, do access land through their membership of a household or homestead. As discussed in Chapter Seven, a pent-up demand for residential land by unmarried women with children exists, which in the case of the Mchunu tribe has seen the traditional council decide recently that such women can be allocated land in their own right. This lends support to Claassens and Ngubane's (2008: 181) argument that law and policy should seek

<sup>102</sup> See Claassens and Ngubane (2008: 164) and footnote 10.

to engage with uneven processes of social change under way in rural South Africa.

Contested processes of change and adaptation are a key theme in the wider literature on women's land rights in Africa. Whitehead & Tsikata (2003: 78-79) argue that women's rights within socially embedded, customary systems are often weakened as a result of economic and political transformation, because men are able to manipulate change processes to their own advantage. Similarly, Cotula & Toulmin (2007) describe how women have been rendered vulnerable by demographic shifts, urbanisation and the commodification of land, which have led to land management decisions shifting away from extended family groups towards households and individuals. Where there is increased pressure for land, men sometimes reinterpret customary rules in ways that weaken women's land rights. Mackenzie (1993: 213) describes how in the context of individual land titling in Kenya, men have generally won out in contests over claims to land through both customary and statutory law. According to Walker (2003: 143), it is not clear that giving women their own independent land rights, or providing them with joint title are effective solutions on their own, if social roles and power relations remain unchanged. In this literature, unequal power relations emerge as a key variable in determining whether or not social change is beneficial for women.

A 'living law' perspective on legal reform suggests the importance of opening up local institutional space for a variety of voices on what should constitute the content of land tenure rights in specific contexts. As discussed above, it is possible that the presence of vocal women on the Mchunu traditional council was a key factor in the decision to allocate land to single women (although this was clearly not a sufficient condition). The policy implications are that unequal and gendered power relations must be addressed not only through legal recognition of rights, but also by creating institutional frameworks that will support women's claims for the realisation of such rights. Ensuring equal female representation in local institutions such as traditional councils or elected committees is a minimum

requirement, but support from external actors and institution such as land rights officers (ibid: 180) will also be key.

## Conclusion

Ascertaining the changing content of the living law of land is a challenging task. In 2009 the Constitutional Court upheld the appointment of a woman, Tinyiko Shilubana, as *hosi* (chief) of the Valoyi community in Limpopo province. The constitutional court noted that:

*Living' customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.*<sup>103</sup>

The *Imithetho yomhlaba yaseMsinga* project attempted to ascertain the content of the living law of land in one corner of rural South Africa. Meetings, interviews and focus groups convened by the project between 2007 and 2009 generated lively discussions and debates on a range of issues and problems related to land tenure in Msinga. Few decisions resulted directly from these debates, but the wide-ranging 'conversation' about land, initiated by the project, may possibly have influenced the Mchunu traditional council to some degree when it made its momentous decisions in 2009 and 2010 in relation to women's land rights and the registration of customary marriages.

Policy makers need to consider how to convene conversations of this kind, on a large scale, before they launch a new round of tenure reform policy formulation and law-making. Our experience suggests that well-designed processes are critically important to ensure informed discussion, but also that ordinary rural people, not just their leaders, are more than ready to engage in debates about policies that could have major impacts on their lives.

<sup>103</sup> Shilubane and others vs Nwamittra 2009 (2) SA 66 (CC), para 46

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