Discussion Paper

Resolution of Disputes on Swazi Nation Land (SNL)

"'We Swazis are not permitted to fight over land because it belongs to the King." This stated ideal of non-confrontational attitudes about land matters does not correspond with reality: […] research revealed that land disputes constitute a major and prolonged type of litigation coming before customary legal institutions." (Rose, 1997)

This discussion paper serves two purposes: to introduce the subject of land dispute resolution and to raise awareness about methods most applicable for resolving disputes on SNL.[1]

Introduction

The character and cohesion of the Swazi nation may be attributable in large part to values embodied in the 'the politics of harmony'[2]. Social relations, especially in rural areas, are built on the principle of 'good neighbourliness'[3]. Conflict is repugnant in Swazi tradition; dispute is best avoided; compromise is preferred over 'winners and losers'.

With land, there is often an inevitable incidence of conflict and disputes[4], about land access, rights and land use. This universal truism is particularly relevant locally due to development pressures, social change, and increasing land shortages.

When disputes arise, as they have done and increasingly still do[5], there are well-established means for resolving these, in either the 'western' courts or 'traditional' systems (figure 1).

Statutory law directs that the 'western' courts have no jurisdiction over dispute cases on Swazi Nation Land[6]. There are some limited exceptions to this, however, and a few precedents. Swazi law and custom is equally conclusive on jurisdiction, especially on the role of chiefs.

In the context of SNL, the types of disputes and appropriate means for resolving them are summarised in figure 2. A more

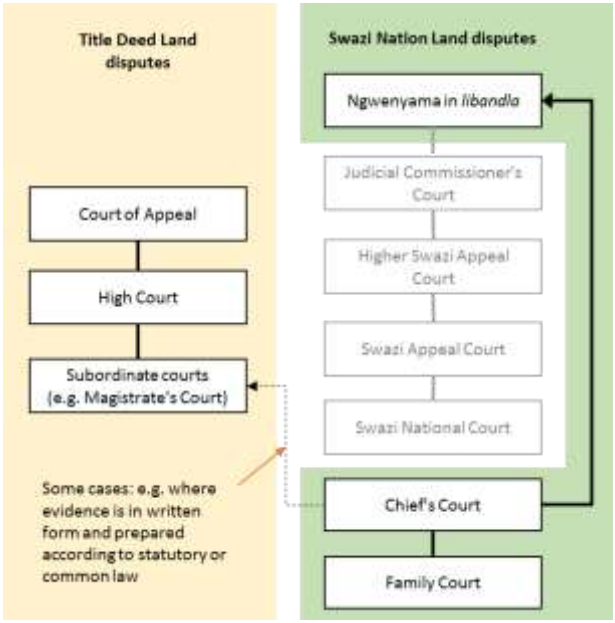

Figure 1: TDL and SNL dispute resolution hierarchy (based on: Rose, 1987)

[1] The terms of reference for SLAM requires a dispute resolution system to be set up and documented at Inkhundla level.
2 Rose, L., 1992. The Politics of Harmony: Land dispute strategies in Swaziland.
3 Hughes, A.J.B., 1972. Land Tenue, Rights and Communities on Swazi Nation Land.
4 Land-related conflict means active and incompatible claims to land typically made by groups. It implies tension and threat of violence. Land disputes are more limited in nature, more specific to a piece of land, usually involving two or more parties and may or may not be a reflection of broader conflict over land.
5 In the first six months of 2017, the Times of Swaziland newspaper reported more than 10 land disputes.
[6] Swazi Courts Act, 1950.

comprehensive account of dispute typologies and dyads is give in Rose (1987, 1992).

A typology of land disputes will usually include matters of allocation and acquisition of rights of use, occupation and exploitation, extent (areas and boundaries), inheritance, and restrictions and responsibilities limiting use. Disputants may include individuals, groups, and political authorities or any combination of these.

Swazi law and custom expects that land disputes between family members are dealt with at family / homestead level, disputes between chiefdom subjects at chiefdom level and disputes between chiefs at national or traditional 'central authority'[7] level.

A decision at any level is achieved by adjudication <u>in council;</u> i.e. the decision is reached by a council and ratified by a head of council, being either family/homestead head, chief, or the *Ingwenyama*. The council head may or may not participate in the deliberations.

At all levels there is an expectation that disputing parties first try to find a mutually acceptable solution by negotiation or by mediation.

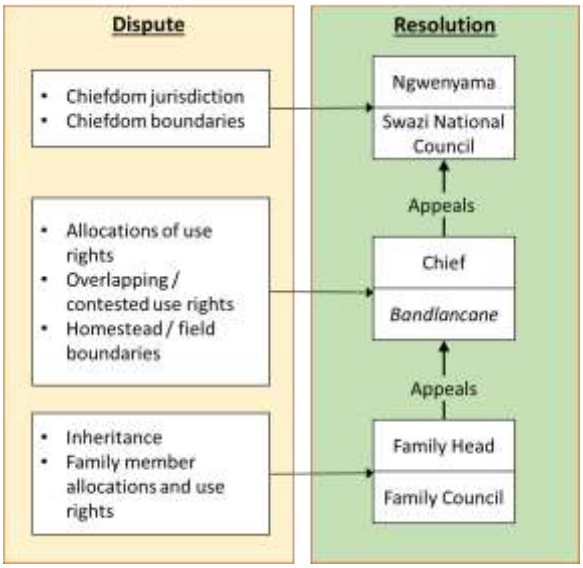

Figure 2: SNL dispute resolution typologies

At chiefdom level, most disputes are brought before the inner council (*bandlancane*) but some, depending on wider relevance, may be heard before the community (*bandlankhulu*).

Appeals are permissible up the hierarchy but not across into 'western' courts, although the courts will entertain a civil matter relating to an SNL dispute. Appeals are referred first to the Regional Administrator, who may refer a matter to the 'King's liaison officer' (*Ndabazabantu*[8]) who is the president of the regional Swazi Court.

Neither the RA nor *Ndabazabantu* may decide disputes; they act as resolution encouragers or facilitators (quasi mediators or arbiters), and as *lincusa* between the chiefdom and Swazi National Council.

Cases are heard by oral testimony; submission of written evidence is possible but not usual.

<u>Dispute Resolution Methods</u>

Customary forms of dispute resolution exhibit facets of modern 'alternative' dispute resolution methods. These modern forms comprise:

> Negotiation, where the disputing parties come together without any outside help and resolve their difference by compromise or conciliation.

[7] Hughes uses the term *Central Authority* to describe the Monarchy and associate councils.

[8] According to Hughes, *Ndabazabantu* is a role created by the colonial authorities to liaises with the Central Authority and to assist in the resolution of any disputes between Swazi and Europeans. The post remains, but has evolved into more a magisterial role within the Swazi National Courts.

- Mediation, where a neutral third party engages in the negotiation to improve communication between the parties to help them reach a mutually acceptable resolution or to reconcile their differences.
- Arbitration, where a qualified and neutral person or panel, acceptable to both parties, listens to the facts and arguments of the dispute and makes a decision that may or may not be binding.
- Adjudication, where evidence presented to a court, council or qualified person, is assessed, then weighed and used to reach a decision, usually favouring one party over the other.

Although there may be some variation and overlap in these methods, adjudication and arbitration are considered more formal or legal in approach whereas mediation and negotiation are less formal, alternative methods.[9] Sometimes more than one method may be used for the same dispute; for example, a court may require disputants to first attempt mediation, and only if this fails will a court adjudicate on the matter.

The Legal and Policy Contexts for Dispute Resolution

The principal law is the Constitution of 2005 that provides a framework for the application of statutory law to the resolution of disputes concerning title deed land (TDL) and of Swazi law and custom to the resolution of disputes on Swazi Nation land (SNL). The Constitution preserves the legal pluralism established by Swaziland Order in Council of 1903.[10] Later legislation, such as the Swazi Courts Act of 1950, introduced facets of western law and procedure for the administration of customary law, but not in respect of land matters.[11]

The Land Bill of 2013, at section 4(2)(g), states that people are encouraged "to settle land disputes through recognized local community structures and initiatives", which is presumed to mean the family and chief's councils. However, section 4(2)(h) of the Bill introduces "alternative dispute resolution mechanisms such as the Land Tribunal as the final arbiter in land disputes", section 41(2) states that "for avoidance of doubt disputes or complaints emanating from rights or interest in Swazi Nation Land are outside the jurisdiction of the Tribunal." Similarly, section 101 states that the judiciary shall not have jurisdiction to review or hear an appeal of a revocation (of land allocation)". Similarly, the SNL Commercial Agriculture Bill proposes at section 6(1)(e) that chiefs' committees "adjudicate over disputes relating to agri-business land-use rights."

The Tinkhundla Regional Administration Bill 2011 proposes establishing Tinkhundla Authorities with the power to "set up structures and systems for adjudication of minor local disputes and enforcement of bye laws"; however, the bill is quiet on whether or not 'local disputes' in this context include land disputes.

In the policy context, the National Rural Resettlement Policy (NRRP) of 2003 includes the objective "to facilitate the resolution of land disputes"[12] and makes a proposal based on structures already in place (box 1).

The draft National Land Policy of 2009, which does not distinguish between the resolution of disputes on SNL and TDL, proposes the introduction of alternative dispute resolution (ADR)

[9] Often referred to as alternative dispute resolution or ADR.
[10] This Order declared that the colonial High Commissioner must respect native laws or customs.
[11] Although this is not expressly stated in the Swazi Courts Act. However, it is implied because the Swazi Administration Act 79 of 1950 clarifies and confirms that it is the *Ngwenyama* who has the power to issue orders for the control of the occupation and use of SNL.
[12] 1.7 B(g), page 12.

procedures, such as the use of arbitration, requiring the enacting of new legislation. The Land Management Board is delegated the responsibility for policy implementation.

In a review of land-related policies and legislation, a report prepared for the Lower Usuthu Sustainable Land Management (LUSLM) project, recommendations included the establishment of a land adjudication board, the integration of traditional and 'western' systems of land management and administration in a central body such as a ministry of lands, and for

At community level, structures for resolving community disputes are already in place and have to be used effectively. It is important that civic education be carried out for members of this important committee. The structure below is proposed for addressing the land disputes- at various levels.

- *His Majesty*
- *Regional Committees*
- *Bandlancane*

An independent Dispute Resolution Committee at regional level is being suggested. The committee should be chaired by the Regional Administrator and be composed of seven other members, as follows: a person with a legal background, Ndabazabantu, 2 tindvuna tetinkhundla from the same region, 2 chiefs also from the same region and the senior extension officer as the secretary of the board. Members of the committee should be entitled to sitting allowances. The mandate of the Dispute Resolution Committee shall be to: ♦ Provide a forum for the resolution of disputes related to land management and rural resettlement which are above the level of chiefs; ♦ Be an appeal committee on matters of compensation during resettlement; ♦ Be an appeal committee for cases related to land management and resettlement that have been tried by chiefdom structures; ♦ Solicit technical advice from competent institutions on technical issues that have to be decided upon.
The decision of the committee shall be final and binding on all, subject to a right to appeal to His Majesty.

Box: 1: Recommendation of the National Rural Resettlement Policy, 2003

establishment of a chiefdom boundaries commission for the resolution of chiefdom boundary disputes.

Options for Dispute Resolution on SNL

The legal and policy context suggests that measures for the resolution of disputes on SNL shall be built on structures that currently exist applying methods and rules based on traditional norms and rules. An alternative option would necessitate an amendment to the Constitution and other laws, plus reform of Swazi law and custom, and a revised policy framework. This is not considered a realistic option, and nor is the option of doing nothing. The SLAM project terms of reference suggests establishing an SNL dispute resolution mechanism at *inkhundla* level, where none currently exists.

Improving and clarifying traditional dispute resolution methods would have the added benefit of discouraging, perhaps even prohibiting (with necessary legislative clarity) the increasing use of the 'western' system (judicial courts) for SNL disputes. However, the use of the judiciary may be a response to perceived or actual inequity in the traditional system. If so, reinforcing the rules and procedures for customary dispute resolution should address this.

The seminal work on SNL dispute resolution (Rose, 1993) reaches similar conclusions on prospects for reform.

> *The major impediment to resolution of the "land dispute problem," in the present author's opinion, is the formal land dispute management process. In any effort to deal with problems in land dispute management, two basic assumptions must be considered: one, customary land tenure, as a hierarchical system of rights and privileges, cannot be structurally altered within the near future, and two, most drawbacks of technological developments and modernisation processes (e.g., urban growth and population redistribution) cannot be alleviated. In*

> *essence, improvements in current land dispute management processes must involve minor structural adjustments.*
>
> *Considered as a whole, the major structural changes which the government might promote toward the end of a more "efficient" (in terms of economic expenditures and manpower hours) customary land dispute management process are: standardisation of selected rules and procedures of land dispute management; improved communication to the public about these rules and procedures; and improved communication within and between responsible government agencies about land dispute management procedures.*
>
> *Although the ultimate goal of the government appears to be a reduction in the incidence of land disputes, a worthy interim goal would be to promote a policy which focuses upon improved land dispute management.*

Looking further at the options within the three areas suggested for incremental improvement of SNL dispute resolution…

1) *Standardisation of selected rules and procedures of land dispute management*.

The current hierarchy and typology for SNL dispute resolution, as shown in Figure 1 and Figure 2, should provide the procedural framework. Resolution procedure should initiate at the appropriate dyad level; that is, a dispute between two family members is a family matter, and if for example, two neighbours are in dispute, it is a chiefdom matter.

Customary rules emphasise reconciliation; disputing parties are expected to first try and resolve their own differences. This is not always possible or realistic without the help of a third, neutral party – a mediator. The modern equivalent is *court-annexed mediation*. Modern rules of mediation and mediator training could be appropriate.

Family and chiefs' courts are decision-making councils. Decisions are reached on the basis of evidence submitted; this is largely verbal testimony but documentary evidence is permitted. After assessing and weighing the evidence, the council 'adjudicates' or decides. A family head or chief may or may not participate in the adjudication process but ultimately ratifies the decision. Rules on the admissibility of evidence, its weight, the role of council heads, could be usefully included.

Equity demands appeals to adjudication. A party who feels aggrieved by a court decision may appeal to a higher court. Both the traditional and western systems of justice embrace this principle. Just as there is a preliminary, conciliatory step in the traditional dispute resolution process, there may also be intermediary steps. For instance, before a chief's court hears an appeal from a family court it may be reviewed by an *indvuna.* This review is a further attempt at 'alternative dispute resolution'. Mediation may have been tried, and failed, and therefore a different alternative may be applicable, such as arbitration. An arbitrator, like an adjudicator, would hear, assess and weigh evidence, and then make a decision. The decision is advisory (unless it is binding arbitration) and may help the parties to 'settle out of court'. If not, and a court hears the appeal, the arbiter's decision may be considered by the court.

Appeals from a chief's court usually go directly to the 'Central Authority'. Here to it may be appropriate to place an intermediary, alternative dispute resolution, step. Again, arbitration could be used, and instead of a single arbiter, a tribunal of a similar composition to that proposed in the 2003 National Rural Resettlement Policy[13] or in the Land Bill[14] could be appropriate. The option

[13] Regional Administrator, as chairperson, a person with a legal background, *Ndabazabantu*, two *tindvuna tetinkhundla* from the same region, two chiefs also from the same region and a senior extension officer as the secretary of the board.

[14] s.19(2) Powers of the Land Management Board…"to hold inquiries…[and] establish a structure that will be responsible for the speedy disposal of disputes on Swazi Nation Land."

of binding arbitration could be offered to the disputing parties; there is no appeal to binding arbitration. Otherwise, if arbitration fails at this stage, the appeal is heard by the SNC who will take cognizance of the arbitration tribunal's decision.

Throughout this procedure, the traditional rule that disputants may re-state their case is appropriate, especially where documentary evidence is not submitted or transcriptions of hearings not taken.

Possible amendments to the Land Bill could 'institutionalise' the procedure and discourage 'court shopping'.

2) *Improved communication to the public about land dispute rules and procedures*.

Project funding will go some way to raising public awareness of SNL dispute resolution rules and procedures, but sustaining effective communication needs alternate and longer-term arrangements. The Land Management Board should have a role, but perhaps also a non-government organisations such as a professional body (law society), regulatory council (mediation) or advocacy group (land rights).

3) *Improved communication within and between responsible government agencies about land dispute management procedures*.

Clarity on institutional arrangements for land administration and management will contribute to greater awareness and understanding of agency roles. Project inputs and deliverables plus capacity building and support to the Land Management Board should help clarify institutional roles and responsibilities including communication between agencies.

Conclusion

The 'land issue', land pressures and the socio-economic significance of land for rural communities and livelihoods, all inevitability mean there will be contestation over land. Strengthening and communicating land dispute resolution means and methods will not eliminate disputes, perhaps not even reduce the incidence of them significantly, but an important outcome should be that dispute resolution is quicker, fairer and clearer for all.

Mediation that is more effective will result in quicker dispute resolution. Consistency through adherence to rules and procedures will make outcomes fairer. Better information, more education and effective communication will result in decisions that are conclusive and respected.

Extensive change to SNL dispute resolution arrangements are not contemplated, notwithstanding that the project's terms of reference suggests establishing a mechanism at inkhundla level where none currently exists.

Some questions and issues remain, however. For instance, the role of Regional Administrators in dispute resolution, which has emerged in recent times, and the role of *Ndabazabantu*, needs clarification, and the use of alternative dispute resolution methods such as arbitration needs further consideration.