

**Failed Deeds:
The Masakhane CPAs and State Negligence Under Customary Land Reform Policies**

Christopher Morris
Department of Anthropology
University of Colorado at Boulder

Slide 1: Introduction

Across this panel of presentations, each of which provides a specific case study on the theme of false starts and empty promises, a central question concerns: How and for what purposes do communities of people constitute themselves as legal entities? Over the course of a year of research in South Africa, I came to know the people of Masakhane in the Eastern Cape, a group that in 2001, successfully constituted themselves as a Communal Property Associations. They did this as means to manage their environmental resources and live securely on their land for the long term. At that time, the Masakhane residents were convinced that this would be the final step in their eighteen-year effort to secure tenure to the farms their families have occupied as laborers since the 1850s. In this presentation, I describe the exhaustive legal efforts undertaken by the Masakhane people and land activists partnered with them to acquire rights to state land. I also situate their stagnation as nominal Communal Property Associations (that is, CPAs without title deeds, and thus CPAs in name only) within larger patterns of rural marginalization and dispossession in South Africa. Importantly, these patterns would appear to include the current, nation-wide foreclosure of options self-constitution in the former homelands for groups wishing to dissociate from traditional authorities and own their own land.

One advantage of presenting later in a conference is the opportunity and time to reflect upon how one's own presentation sits in relation to themes that percolate and recur through days of productive interactions. The story of the Masakhane, I feel, is deeply situated within many of the broader themes that have so animated discussion at this conference. Indeed, themes such as dualism and continuity with respect to land policy developments in South Africa over the past century have been unmistakable. To this point, one presenter's comments yesterday struck me as

particularly insightful. Ashley Westaway phrased this interwoven dualism and continuity this way: Strikingly “Segregationism survived 1994. Bantustan areas, post-1994, continue to be thought about, managed, and governed differently from former white South Africa.”

A theme that has also emerged concerns this complex matter of “being and becoming”—indeed the identity question with respect to land politics. Namely, presenters have asked: what, in fact, constitutes a community? And beyond this effort to estrange this category of sociality comes the question: Exactly which communities of people are legible to the state? Moreover, which communities does the state strategically disallow or attempt to disallow. Minister Nkwinti himself bared his opinion on this matter concerning Communal Property Associations Sunday evening, stating that he views them as superfluous entities— as communal areas within communal areas that are often unproductive.

I should add that the relevance of the Masakhane story I will share goes well beyond land politics. The group of people I describe here are involved in a transnational struggle for the rights to a resource that generates hundreds of millions of Euros in annual sales as a pharmaceutical product sold outside of South Africa. Namely, this group has been embroiled in contestation over the intellectual and cultural property rights over the southern Africa-endemic plant *Pelargonium sidoides*. As part of this contestation, the Masakhane leaders have sought to distinguish their community from the local Imingcangathelo chieftaincy and its power over the harvesting of the plant in this area. The Masakhane CPA’s land claim is a key element of this effort.

Slide 2: Orientation

Allow me to provide some geographic orientation. The Masakhane farms are located in the Victoria East magisterial district, stretching northward from Double Drift Game Reserve (or more prominently, the Great Fish River Reserve Complex) to approximately fifteen kilometers south of the town of Alice between the Fish/Kat and Keiskamma/Tyume Rivers.

Slide 3: History

The Masakhane area consists of seven villages with 180 families. The majority of the current residents are the descendents of laborers employed on the farms for three generations. The farms were white-owned from the early 1850s until 1982, at which time the parastatal South African Development Trust purchased them for incorporation into the Ciskei homeland. Upon the departure of the white farmers, the Ciskei government sought to commercialize the land by leasing farm units to black stockowners, the majority of whom never permanently settled in the area. With no one contesting their occupancy, the Masakhane families continued to reside on the farms and found employment as rangers for the Ciskei government or as skilled farm workers for the then lessees. Salaries from this labor enabled some Masakhane villagers to purchase livestock, which they continue to tend to, to this day.

In 1994, the residents of what were then nine farms formalized their group as the Masakhane Resident Association and began making appeals to the Eastern Cape provincial government. The association grew concerned with the fact that land they occupied was increasingly being disposed by the state via the market, with black hobby farmers purchasing land, and other parts being consolidated into nearby game reserves. Additionally, the association complained that residents from neighboring quasi-township areas—areas with high cattle stocking rates—were encroaching with their livestock on the Masakhane farms and damaging the land. The Masakhane hoped that title deeds would offer them statutory power to keep these neighbors off of their high quality land, and that they could receive access to basic services and perhaps even institutional support for a farming scheme. Their efforts proved fruitless, however.

Eventually, two Grahamstown-based researchers learned of the Masakhane association's plight and subsequently submitted a formal application to the Eastern Cape Department of Land Affairs for land for tenured settlement, for commonage purposes, and additional farms for livestock farming on behalf of the Masakhane residents in 1998. They also hoped to secure basic services such as water and electricity. The Department of Land Affairs formally appointed the Institute of Social and Economic Research at Rhodes University, and researchers from this institute spent months collecting evidence from communities in the area regarding competing interests over the land, as well as livestock accumulation, land use and the demographic makeup of residents on the farms.

The researchers put forward a tenure reform case. Recognizing that the farm dwellers had strong interest by virtue of long residence, but that such interests were not acknowledged on state-owned land, the researchers feared that the short-term legal measures available to the Masakhane residents in the form of the Interim Protection of Informal Land Rights Act only conferred informal and ultimately uncertain rights. The researchers thus decided to make a test case out of the Masakhane members, arguing that the former farm workers, having had effective use and occupation of the farms since 1982, should receive title to portions of the now state-owned land on the basis of beneficial occupation. The then Eastern Cape Department of Land Affairs ultimately agreed, and on February 13, 2000, South African Minister of Land Affairs Didiza signed a Power of Attorney authorizing the transfer of nine portions of the Victoria East farms to the Masakhane residents.

After the beneficial occupation test case was won, the Masakhane residents elected to form two communal property associations—for the purpose of communally holding title to the farm portions. The CPAs were formally registered in Pretoria on December 15, 2001. The Registration Certificates for the two CPAs continue to be on file in the National Department of Rural Development and Land Reform in Pretoria. The certificates contain Didiza's complete Power of Attorney and a list of the farm portions intended for transfer.

Yet despite these developments, the CPAs never received their land. It is unclear why this happened, but a number of theories circulate, from administrative incompetence on the part of the Eastern Cape Province official handling the transfer, to interference by wealthy Alice farmers intent on continuing to graze their cattle on the fertile Masakhane farms.

Slide 4: The Present

In September of 2011, I began making inquiries about the botched transfer at the East London office of Rural Development and Land Reform. I met with the RDLR official currently in charge of the Masakhane case and he recollected to me that an incomplete Masakhane file landed on his desk sometime in the mid-2000s. He understood that the transfer had been mismanaged,

but argued that he had difficulty tracking down documents that would allow him to effect the transfer, including the complete Power of Attorney signed by Minister Didiza (despite the fact that these documents are available in Pretoria, as I mentioned above). The official continued that, while in the process of assembling documents, Minister Nkwinti came into office and issued a moratorium on the disposal of state assets to communities. The official was explicit that, regardless of his wishes and the documentation showing the state's approval of the transfer in 2000, the moratorium made the transfer of the land to the Masakhane CPAs impossible. The official is now attempting to establish a caretaker agreement for the Masakhane residents as a means of providing them with some rights to the farms, as well as recapitalization funds for a farming scheme.

In the meantime, questions have been raised as to whether the ongoing failure to transfer the title deeds reflects provincial inefficiencies, thus diminishing the Masakhane CPA story's potential as a public interest case... Or if the failure to transfer is more ominous, reflecting larger ideological motives within the national government.

Fortunately, recent events concerning a similar land claim case in Cata, in which a CPA waited upon the transfer of land, provide us with insight. In a June 2012 affidavit by a Chief Director in the Dept of Rural Development and Land Reform, this chief director states that discussions within the department concerning the implementation of the CLRA are still continuing, and no state land will be transferred to CPAs until they are resolved. The quotation is important enough that I read it to you verbatim:

“In the circumstances whilst it was felt that the order sought by the applicants in this matter should not be opposed, the Minister has issued an instruction that these matters be opposed on the grounds that discussions for the implementation of CLARA are still continuing and no state land has to be transferred until this process has been finalized. Thus a notice to oppose this matter has since been filed.”

EXPLAIN HERE BROADER CONTEXT – PERCEPTIONS OF PROVINCIAL AND NATIONAL GOVERNMENT OFFICIALS, their normative views about rural black South

Africans in the former homelands: rural blacks in Ciskei often viewed as natural subjects of traditional authority...

Scholars have long argued that the state is far from a unitary actor with a single voice. To be sure, South African Department of Rural Development and Land Reform is a case in point. Yet despite this contingency as a governing apparatus, indeed despite what appear to be clear differences of opinion, the end result of divergent policies may be the same for crippled Communal Property Associations. In December of 2011, I interviewed the current national CPA Registrar in his office in Pretoria. Upon hearing about the Masakhane CPAs, the registrar insisted that, because the transfer had been approved prior to moratorium issued by the national department, the CPAs should receive their title deeds with immediate effect. He never suggested that he would make this happen, however. Furthermore, he expressed concern for the Masakhane CPAs, given that a national task force had recently been formed to evaluate the viability of existing CPAs in the country. The registrar warned that all "non-functioning CPAs"—including those without title deeds—would be de-registered. Thus, the registrar added, without title deeds, he would dissolve the Masakhane CPAs.

When asked about their relationship with the local Imingcangathelo Chief, who claims the Masakhane as his subjects, the CPA leaders state that while they respect the ceremonial legitimacy and significance of the traditional leaders, they do not want them interfering with their livelihoods. Naturally, there is diversity of opinion on this matter among the Masakhane residents (moreover, agreement on the identity of the legitimate chief is somewhat elusive). But the CPA leadership is steadfast in its claims that the local chieftaincy is largely self-serving and has done nothing to materially improve the lives of its purported subjects. It is additionally likely that, after generations of living on private, white-held land, the Masakhane do not have strong, historically-rooted bonds with traditional authorities in the area. EXPLAIN: MASAKHANE DO NOT FIT THE MOLD, they have never known life under direct authority of chief (or at least until local chieftaincy was resuscitated after the consolidation of the Ciskei homeland).

Presently, a handful of Masakhane residents are hired to manage the livestock of farmers leasing land in the area. A greater number are employed by Alice-based, non-leasing or non-tenured farmers who informally graze their cattle on the Masakhane farms. The Masakhane CPAs have, for practical reasons, merged their governance structures and continue to meet regularly as an organized body. A recent review of the national deeds database revealed that the farm parcels in question continue to be state-owned.

Slide 5: The Future

In conclusion, what does the future hold for the Masakhane residents, as members of CPAs without land? Tensions between the Masakhane and their neighbors have subsided over the past ten years, but there is no guarantee this will last. Greater security, beyond the Interim Protection of Informal Land Rights Act, is required.

In terms of the Pelargonium industry, the Masakhane are likely only one example among other communities of Pelargonium harvesters that have, since 1994, viewed themselves as outside of the jurisdiction of chiefs. And presently, it is these chiefs who control the royalties associated with the medicinal plant. Indeed, the national government has elected to organize the governance and the sharing of benefits associated with the Pelargonium trade through the chiefly arms of the Rharhabe Kingdom, including Imingcangathelo, the chieftaincy under which the Masakhane allegedly fall.

The Masakhane are also likely not alone in their complaints of socioeconomic exclusion should they be able to break free from the traditional authority structure. Indeed, it is clear that they can only meaningfully participate in the Pelargonium industry by embracing an authority structure that exploits their labor. We see here that the liberal modern instrument of benefit-sharing, which is intended to be inclusive, is doing precisely the opposite. With the pharmaceutical companies signing benefit-sharing agreements with only chiefly structures, this means that any harvesting not conducted as subjects of chiefs, is illegal. Thus, if one does not want to be a chiefly subject, one cannot participate in the industry. Harvesters like those in the Masakhane area are thus forced into a precarious subject status.

I return to this important question of exactly which communities are legible to the South African state? In the former homelands, it would appear that only the construct of the chieftaincy is legible. And the second question: Which communities does the state strategically disallow or attempt to disallow? As the Masakhane case demonstrates, it is likely those communities that confront the just-so story, indeed the contrived foundation of centralized, traditional authority over land and subjects in contemporary South Africa.

Thank you.