



**ENHANCING THE LEGAL STATUS
OF
COMMUNITY-BASED ORGANISATIONS
AS WATER SERVICES PROVIDERS**

**Research Report funded by the European Union / NGO Programme
May 2002**

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Acknowledgements

The Project Manager, Gemi Malau is grateful for generous contribution of time, energy and content input from a number of Mvula Trust staff, both at Head Office and Regional Offices, other sector role players particularly officials from the Department of Water Affairs and Forestry, Department of Provincial and Local Government and sector consultants in general. Much appreciation goes to Kerry Harris who helped to prepare the final draft of the report.

Acknowledgement is also made to communities and municipalities whose contribution and input has made this research study possible. It is most importantly the views of these stakeholders that form the hub of this study.

Also much appreciated is funding support from the European Union.

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Executive summary

The aim of this Research Study was to research the legal options, acceptable to local government and appropriate for rural communities, for constituting community-based organisations (CBO) as Water Services Providers (WSP) in terms of the Water Services Act [Act 108 of 1997]).

However, as the research shows, the most convenient and appropriate legal option for rural a community (that of having a formal Constitution) is not always acceptable to local government. While local government seems to prefer CBOs to formally register in terms of the Nonprofit Organisations Act (Act 71 of 1997), research has shown that this should not be a blanket requirement. Reasons for this preference by local government include the fact that local government is uncertain of the legal status of a CBO and the perceived risks (on their part) in appointing community-based organisations as WSPs for service delivery.

Work must therefore be done in ensuring that information regarding legal status is available and recognised by local government. Further, work must be done in ensuring that community-based organisations able and willing to take on service provision are legally constituted, and are able to put in place accountability checks and balances in order for local government to have confidence in the ability of community-based organisations to provide services.

The findings and recommendations of the Research Study are summarised within the following themes:

- Minimum legal requirement for a community-based organisation as a legal entity
- Other options for constituting a community-based organisation as a legal entity (and how to effect)

- Legislative environment for community-based organisations as Water Services Providers
- Lessons from the field
- Risk Management Strategy for Water Services Authorities

The main conclusion of the study is that CBO's are the most preferred viable WSP option in small rural remote communities. What is required is to put in place mechanisms for risk management, provide necessary support and ensure that they are legally constituted by simply having a Constitution. Registration as a requirement for an entity to be considered legal is not magic wand and does not reduce the risks involved.

Acronyms

CBO	community-based organisation
CBO WSP	community-based organisation as Water Services Provider
DPLG	Department of Provincial and Local Government
DWAF	Department of Water Affairs and Forestry
MSP	Municipal Service Partnership
NGO	non-governmental organisation
NPO	non-profit organisation
O&M	operations and maintenance
SSA	Support Services Agent
VWC	village water committee
WSA	Water Services Authority
WSP	Water Services Provider

Definitions of concepts and roles of selected water services institutions

Community-Based Organisation (as a municipal service provider)

A community-based organisation (CBO), as a municipal service provider, is a non-profit organisation within a specific community, providing a municipal service (with a municipal and community mandate) to that community. It acts in the overall interests of that community.¹

Water Services Authority

A Water Services Authority (WSA) means any municipality, including a district or local municipality as defined in the Local Government Transition Act No 209 of 1993, {repealed by Municipal Amendment Structures Act, 2000} responsible for ensuring access to water services.²

The role of the WSA³, within its area of jurisdiction, is to:

- Ensure access to provision of services
- Make by laws
- Prepare water services development plans
- Make decisions around Water Services Provider institutional arrangements

Water Services Provider

A Water Services Provider (WSP) means any legal person authorised by the WSA to provide water services to consumers or to another water services institution, but does not include a water services intermediary.⁴

¹ Definition developed by The Mvula Trust. It concurs with the definition in the Department of Water Affairs and Forestry's "Community-Based Organisations as Water Services Providers Guideline", Draft, March 2001, Version 1.

² As defined in the Water Services Act (Act 108 of 1997).

³ As defined in the Water Services Act (Act 108 of 1997).

⁴ As defined in the Water Services Act (Act 108 of 1997).

The primary role of the WSP⁵ is to ensure:

- Revenue collection (where applicable, in terms of the free basic water policy)
- Daily operations and the undertaking of minor repairs
- Good customer relations

A much broader range of tasks can be the responsibility of the WSP, including management of bulk supplies, upgrading of schemes, and development of new ones, as may be deemed appropriate by the WSA.

Support Services Agent

A Support Services Agent (SSA) is any legal person, organisation or company providing support to the CBO WSP and / or the WSA – although support to the WSA in this context will probably be limited to the setting up of institutional arrangements.⁶

Tasks of the SSA in this context include institutional and development mentoring and support, financial and technical support,(major maintenance) and supervision in dealing with contractors.

⁵ Defined as such in current literature.

⁶ Definition as per Department of Water Affairs and Forestry (May 2002)

1. Introduction

Government is committed to deal with the enormous service backlog – most notably in rural areas – in South Africa. For the water services sector alone, it is estimated that there are seven million people in rural areas without access to basic water supply, and 18 million people without adequate sanitation.⁷

The provision of sustainable water services to rural communities is a major challenge for local government. Many municipalities in rural areas still have limited human and financial resources and infrastructure development experience, and lack capacity to facilitate and implement sustainable and integrated development programmes. Project sustainability is therefore often threatened by the lack of capacity within local government. Community-based organisations (CBOs) are potential partners of local government structures in facilitating sustainable development in rural areas. Owing to the fact that CBOs manage projects at the lowest level (i.e. closest to the community), CBOs are often the most appropriate vehicle for service delivery in these areas. This is particularly so in remote areas where access to the community is difficult for public and / or private sector entities. Here CBOs become the most financially viable and effective option.

The Mvula Trust is committed to promoting the CBO as Water Services Provider (CBO WSP) option in cases where the CBO is most likely to ensure a sustainable and affordable service to consumers and to the Water Services Authority (WSA), and effective in terms of quick response times to breakdowns, and in terms of ensuring payment by consumers. (This last factor, however, would be influenced by the free basic water policy). The mutual benefits to both the municipality and the community cannot be over-emphasised.

The Municipal Systems Act, 2000 (Act 32 of 2000) allows for the appointment of CBOs as WSPs. However, it subjects the appointment of CBOs to a competitive procurement process but provides for municipalities to determine a preference for

⁷ Statistics from the Department of Water Affairs and Forestry, (2002)

categories of service providers in order to advance the interest of persons disadvantaged by unfair discrimination.⁸

Currently, many CBOs acting as *de facto* WSPs on Mvula Trust and other projects are constituted as Voluntary Associations (i.e. they have a formal Constitution). As such, they are fully constituted legal entities. The pilot project implemented by The Mvula Trust for the Department of Water Affairs and Forestry (DWAF) / DANIDA in (1999), to develop legal instruments required for appointing CBOs as WSPs, produced a standard constitution for a Voluntary Association, as well as the legal agreement (contract) between the WSA and the CBO WSP. At the start of this research (2000) only three such agreements had been signed. One of the reasons for this was the scepticism displayed by many WSAs towards CBOs. Constitutions of CBOs were not perceived as providing sufficient legal status, and CBOs were therefore viewed as not sufficiently accountable.

Some of the legal options available for a CBO WSP have been a Section 21 Company and /or Trust. The Mvula Trust believed these were not appropriate for CBOs in the rural setting. This provided an important motivation for the Research Study.

This Research Study provides recommendations, which include matching what the law provides for with what communities want and can constitute themselves. The Mvula Trust believes this is important for sustainability, community empowerment, local economic development and enhancing the legitimacy of local government among rural communities.

It is important to note:

- The bulk of the research, and all of the interviews, took place before the demarcation of December 2000 – hence the municipalities involved in the research were all District Councils, and their areas of jurisdiction have altered. However, the impact on the nature of the findings is negligible.

⁸ Preferential Procurement Policy Framework Act, 5 of (2000)

- The Research Study began before DWAF commissioned the “Community-Based Organisations as Water Services Providers Guideline” (Draft, March 2001, Version 1). There is now a fair amount of overlap in terms of the focus of these two documents. Delays in funding caused delays in finalising this Report. However, this Report will feed into the strengthening of the current Draft DWAF document, and reliance on this DWAF document for information in this Report is acknowledged.
- The findings and recommendations of this Report are limited by the fact that the Research Study did not examine the obligations of Voluntary Associations in relation to the Basic Conditions of Employment Act, 1997 (Act 75 of 1997) of relevance where CBOs employ people in their WSP function, as well as issues such as taxation and taxation exemption status. Research is currently commissioned by DWAF in order to obtain clarity on these issues.
- The CBO as WSP was looked at in the context of water projects only. Sanitation issues will need to be the subject of further research.

2. Methodology

The research was conducted in the following way:

- Review of work already done by DWAF and others
- Interviews undertaken with key government departments and selected non-governmental organisations (NGOs)
- Interviews with (selected) WSAs, along with community-based structures within their areas of jurisdiction (including village water committees [VWCs])
- Analysis of lessons learnt on projects of The Mvula Trust
- Interactions with consultants working in the sector
- Analysis of data.

2.1 Review of work already done by DWAF and others

A number of documents were reviewed as secondary sources of data. These included:

- Legislation such as the Water Services Act, the Municipal Systems Act, the Municipal Structures Act 117 of 1998, the Municipal Structures Amendment Act 33 of 2000 and the Nonprofit Organisations Act (Act 71 of 1997);
- Reports from DWAF, the World Bank, the Department of Provincial and Local Government (DPLG) and the Legal Resources Centre;
- The Local Government Support Package Report (1999) which focuses on the development of tools such as a model constitution for CBOs as WSP and contracts for testing water services agreements between municipalities and CBOs; and
- The DWAF “Community-Based Organisations as Water Services Providers Guideline”, Draft, Version 1 (March 2001).

See **Appendix 1** for the complete list of references for this Report.

2.2 Interviews undertaken with key stakeholders

Interviews were undertaken with the Department of Social Development and DWAF.

Further, interviews were undertaken with the following NGOs:

- Award
- Legal Resources Centre
- Planact
- South African National Epilepsy League
- Tihavama
- Tsogang

2.3 Interviews with WSAs and structures within their areas of jurisdiction

Consultations took place with four District Councils in four different provinces where the issue of the formal legal status of CBOs had been raised as a problem. In each District Council area a village was chosen, and most CBOs in that village were interviewed. (Owing to problems in setting up the interviews, only the VWC and Transitional Board in the Eastern Cape were interviewed.)

The table below shows the District Councils and CBOs (including VWCs and traditional leaders) who participated.

District Council	Community-based organisation
Bophirima (North West Province)	Thlakgameng VWC Thlakgameng RDP Committee Thlakgameng Tribal Authority
Lowveld Escarpment (Mpumalanga Province)	VWC Tribal Authority Reconstruction and Development Committees ANC Youth League ANC Women's league (Phosaville, Phiva and Vlakkult)
Stomberg (Eastern Cape Province)	Percy Transitional Board Percy VWC
Western Bushveld (Limpopo Province)	Harrismith ANC Women's League Harrismith Civic Association Harrismith Community Policing Forum Harrismith VWC

District Council	Community-based organisation
	Harrismith Health Committee Harrismith Traditional Authority

2.4 Analysis of lessons learnt on projects of The Mvula Trust

Input was provided by The Mvula Trust staff around South Africa on examples of community-based management of projects, including problems and best practice. This input is included in the Report.

2.5 Interactions with consultants working in the sector

Consultants gave informal input, and made formal comment on the final draft of the document to provide institutional and legal input.

2.6 Analysis of data

Data collected was mainly of a qualitative nature. To analyse the data, the views of the respondents and documentation were summarised into key themes.

3. Policy and legislative framework

The **Constitution of South Africa Act, 1998** (Act 108 of 1998), in the Bill of Rights guarantees all citizens the right of access to basic water services. It establishes the principle of cooperative governance among national, provincial and local spheres of government as distinctive, inter-dependent and inter-related organs of state. The Constitution places the responsibility for providing sustainable services to all citizens with the local sphere of government.

National government policy, as reflected in the **Water and Sanitation White Paper** (1994), the **White Paper on Local Government** (1998) and the **White Paper on Municipal Service Partnerships** (2000), recognises CBOs as viable option for the delivery of municipal services.

The **Water Services Act**⁷ states that:

A Water Services Authority –

- (a) may perform the functions of a water services provider itself; and
- (b) may –
 - (i) enter into a written contract with a water services provider; or
 - (ii) form a joint venture with another water services institution,to provide water services.

The **Municipal Systems Act** and the **White Paper on Municipal Service Partnerships** highlight the importance of Municipal Service Partnerships (MSPs) in alleviating service backlogs. It offers municipalities a range of options with regard to partnerships (CBOs, NGOs, public and private sector)⁸. However, as stated above, CBOs “may be” subjected to a competitive procurement process.

The White Paper on Municipal Service Partnerships states that “Municipal councils considering entering into an MSP with an NGO or CBO should require the NGO or

⁷ Section 19(1).

⁸ Sections 82 and 83 of the Municipal Systems Act, and Section 2.1 of the White Paper on Municipal Service Partnerships.

CBO to adopt a formal constitution and code of good practice consistent with those issued by the Minister”.⁹

The White Paper on MSP further states that “municipal councils should require NGOs and CBOs that wish to engage in the delivery of municipal services to be registered in terms of the Non-profit Organisations Act” (NPOA).¹⁰ (DPLG planning to review the White Paper)

The **Preferential Procurement Policy Framework Act** (Act 5 of 2000) states that a municipality may determine a preference for “persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability”.¹¹

⁹ Section 3.1.8 of the White Paper on Municipal Service Partnerships.

¹⁰ Ibid.

¹¹ Section 2(1)(d)(i).

4. Key findings

The findings are grouped into the following themes:

- Minimum legal requirements for a CBO as a legal entity
- Other options for constituting a CBO as a legal entity (and how to effect)
- Legislative environment for CBO WSPs
- Lessons from the field
- Risk Management Strategy for WSAs

4.1 Minimum legal requirement for a CBO as a legal entity

Two of the four District Councils interviewed indicated that they would prefer a CBO to form a Section 21 Company and / or register in terms of the NPOA. The other two said that they should be “registered with the appropriate Act”. All felt that the possession of a Constitution did not ensure sufficient legal status for a CBO. Registering in terms of the Act seemed to ensure less risk taking (dealt with in more detail below), and an understanding that this was the only way legal action could be taken against CBOs, if necessary.

Further, the Western Bushveld District Council stated that formalising CBOs would give them legitimacy in the eyes of the community, with local government, the business sector and other stakeholders.

Community members tended to equate formally registered organisations with inefficient bureaucracy, and they often viewed such organisations as part of government (made as a negative perception). Some community structures felt a legal entity would assist in avoiding corruption on the part of CBOs, and enable CBOs to be taken more seriously by government departments.

The traditional authorities interviewed in the Western Bushveld District Council recommended that CBOs register with the NPOA to strengthen their authority, and to become more sophisticated entities.

In the Lowveld Escarpment District Council the only CBO with a Constitution is the ANC Women's League. All community-based structures supported the idea of legalising CBOs. It was felt that this would protect them from abuse by stakeholders and government. Some felt that a Constitution was not sufficient.

CBOs and traditional leaders in Bophirima District Council confirmed that they all have Constitutions. Perceptions of these community structures are that they do not have much control or power to fulfil their roles owing to their "absence of legal standing", and should be formally appointed as WSPs by the WSAs.

NGOs interviewed expressed empathy with CBOs, and felt CBOs should not be subjected to registration in terms of the Nonprofit Organisations Act. Some NGOs also believed that CBOs, rather than operating as WSPs, should act as watchdogs to ensure local government delivers in terms of its mandate to progressively effect services.

While it is noted that any CBO must be a legal entity if it is to assume the function of a WSP, the fact is that ***a CBO is a legally constituted body if it possesses a formal Constitution approved and adopted by its members.*** Once it has a Constitution it becomes a Voluntary Association, with full legal status.

The Constitution of the CBO must outline the following:

- Name of the organisation
- Rules
- Objects
- Membership
- Powers and functions
- Structure(s)
- Procedures
- Duties and obligations
- Area of operation
- Dispute resolution mechanisms
- Rules governing financial matters

- Method of dissolution

Currently, not all CBOs acting as WSPs have Constitutions, and therefore are not legally constituted bodies.

There may be cases where municipalities are not convinced of the legal status of the Constitution of a CBO, and require CBOs to register in terms of the Nonprofit Organisations Act. This lack of information presents a problem.

DWAF has produced a Model Constitution which can be used and adjusted to suit WSA and CBO WSP needs. The Department of Social Development and Welfare has also produced model constitutions.

4.2 Other options for constituting a CBO as a legal entity (and how to effect)

4.2.1 Options in terms of legal status for a non-profit organisation

Options are:

- Voluntary Association (dealt with under 4.1)
- Trust
- Section 21 Company

4.2.1.1 Voluntary Association

This legal status option is considered appropriate for CBO WSPs. It is the simplest form of non-profit legal status.¹²¹²

A Voluntary Association is created by an agreement between three or more people to work together in a formalised manner to achieve a common non-profit objective, and is legally constituted by means of a formal Constitution. It does not require the involvement of an attorney, and is not required to produce audited financial statements. Financial accountability may be ensured through the services of an

¹² "Community Based Organisations as Water Services Providers Guideline", Draft, March 2001,

Accounting Officer – a cheaper and less complex option. It may choose to register in terms of the Nonprofit Organisations Act.

4.2.1.2 *Trust*

This legal status option is not considered appropriate for CBO WSPs. It has sophistication inappropriate for community-based structures, with relatively complex managing and reporting requirements.

A Trust is a non-profit entity registered in terms of the Property Control Act (Act 57 of 1988). It is usually designed as an entity that can fundraise, and thus reporting and accountability requirements tend to be complex. It must have both a Trust Deeds, prepared by an attorney, and a governing body (Board of Trustees). Assets and income are managed and utilised for the benefit of a third party. A Chartered Accountant must audit financial statements.¹³

4.2.1.3 *Section 21 Company*

This legal status option is not considered appropriate for CBO WSPs. As with a Trust, it has sophistication inappropriate for community-based structures and relatively complex managing and reporting requirements.

A Section 21 Company is a non-profit company registered in terms of the Companies Act (Act 61 of 1973). It must prepare a Memorandum of Association and Articles of Association – both to be submitted to the Registrar of Companies prior to registration. It is classified as a public company without share capital, and must submit audited financial statements to the Registrar of Companies. It must have between seven and 50 members, and appoint a Board of Directors with portfolios. It is subject to tax unless it receives an exemption under the Taxation Laws Amendment Act (Act 30 of 2000). It would require the services of a tax consultant.¹⁴

¹³ Ibid.

¹⁴ Ibid.

4.2.2 Registration in terms of the Nonprofit Organisations Act

The object of the Nonprofit Organisations Act is to encourage and support non-profit organisations (NPOs) by creating an enabling environment and an administrative and regulatory framework within which they can conduct their affairs. It encourages NPOs to maintain adequate standards of governance, transparency and accountability.

According to the Department of Social Development and Welfare, registration in terms of the Nonprofit Organisations Act should not be a blanket requirement for CBO as WSPs. CBOs need not be unnecessarily subjected to complex systems and procedures. CBOs managing schemes supplying water, for example to less than 1 000 households, should not be expected to register.

Registration should be considered in areas where management systems are complex, and it would be advantageous to have a more formalised legal entity. Registration is appropriate and relevant in the unlikely event that a CBO is expected to manage bulk water schemes or multi-village clusters, and handle large amounts of money.

Registration in terms of the Non-profit Organisations Act means that a CBO must register with the Department of Social Development and Welfare's Nonprofit Organisations Directorate. A registration form must be completed, and two copies of the constitution of the CBO submitted. The Department of Social Development and Welfare will determine whether the CBO meets the requirements for registration as a non-profit organisation.

Once a CBO is registered, it is issued with a certificate of registration and is required to send a written report concerning the organisation's activities, as well as a financial report, to the Department of Social Development and Welfare's Public Private Partnership Directorate on an annual basis. The Department of Social Development and Welfare has prepared a "Model Narrative Report for Nonprofit Organisations" which outlines the format of the written and financial reports.

Reporting requirements in terms of the Act are not unduly onerous – but are probably unnecessary for CBOs. In the unlikely event that a CBO handles large amounts of money and / or operates very large schemes, it should be possible to align reporting requirements in terms of the Act with the reporting requirements in terms of the CBO contract with the WSA.

4.3 Legislative environment for CBO WSPs

The **Water Services Act** creates a preference for “public sector Water Services Providers”. It may be argued that public sector WSPs include any organisation *orientated to public interest* (as opposed to for-profit motives). However, the Act does not define a public sector WSP, and thus it is not clear whether a CBO WSP qualifies as a public sector WSP.

The implications for this uncertainty relate to competitive procurement procedures. If a CBO does not qualify as a public sector WSP, the municipality must look to the Municipal Systems Act for guidance in terms of the processes and procedures that regulate the selection of a CBO partnership option.

The **Municipal Systems Act** offers municipalities a number of options with regard to partnerships with CBOs, NGOs, public and private sector.

This Act stipulates that local government may enter only into agreements for the provision of services with another municipality, or organ of state, without being obliged to go through a lengthy and costly competitive procurement process. All other agreements for the provision of services are subject to a competitive procurement process. As mentioned in the Introduction, this rigid adherence to a competitive procurement process does not facilitate the implementation of the CBO WSP option.

The Act contains certain provisions, however, that may apply to facilitate the empowerment and promote the interests of small and emerging enterprises, or persons previously disadvantaged by unfair discrimination. An important example is

the Alfred Nzo District Municipality (DM) who engaged in a competitive procurement process with CBOs only. This is an innovative application of competitive procurement based on the DM 's analysis of cost effectiveness of its rural context, taking into account the unlikely interest of other service providers to participate in those remote areas.

4.4 Lessons learnt from the field

4.4.1 Support required for CBOs as WSPs

The Mvula Trust is aware that CBOs do not always have the necessary management skills and capacity but, if well supported, are enabled to perform very effectively as WSPs. The White Paper on Municipal Service Partnerships is very clear that municipalities will need to “build the capacities of [CBOs] so that they can be vital and active participants in service delivery”, and notes that “this objective is also supported by the provisions of the Nonprofit Organisations Act”.¹⁵

4.4.2 Implementation of the free basic water policy and the equitable share

Management of free basic water at local level can ensure that communities can at least manage and operate and maintain their schemes at very low costs. Even where payment is not expected of communities, a sense of ownership is important in terms of ensuring people value the service. Where free basic water is implemented at project level, the CBO needs access to the equitable share in order to fund operations and maintenance (O&M) of the scheme.

4.4.3 Information about procurement procedures

The CBOs interviewed lacked information about procurement procedures. This further disadvantaged them in open competitive procurement processes.

4.4.4 CBO WSP as employer

¹⁵ Section 2. 1 of the Non Profit Organisation Act, (1997)

As mentioned in the Introduction, the findings of this Report are limited by the fact that the Research Study did not examine the obligations of Voluntary Associations in relation to the Basic Conditions of Employment Act (Act 75 of 1997), of relevance where CBOs employ people in their WSP function. Neither were issues of taxation and of taxation exemption status researched. Research is currently commissioned by DWAF in order to obtain clarity on these issues, and the findings will significantly enhance the ability of the sector to engage with CBO WSPs.

4.4.5 Role of traditional leaders

Traditional leaders, by and large play a key role in community projects, and are usually at the forefront of community development. They are the most respected structures in communities and sometimes provide guidance on legal matters (for example, developing a Constitution), are often responsible for handling conflict among community members and structures, and usually have the authority to enforce discipline. A strong relationship between traditional leaders and CBOs will enhance good governance and a sense of accountability.

4.4.6 CBO accountability

It is also noted that CBOs do not operate in isolation in communities. Besides often being obliged by traditional culture to report to the *induna*, they also report to other structures on a regular basis. This creates greater possibilities for integrated development. CBOs are also accountable to WSAs who legally appoint them.

4.4.7 Factors influencing the ability of a CBO WSP

The ability of a CBO WSP to provide sustainable water services is dependent on a range of factors. These include:

- Size and cohesiveness of the community to be served
- Technology of the scheme
- Capacity or potential capacity of the CBO
- Access to support (technical and financial support, institutional advice and mentoring)

- Good communication between and relationships with all role players (including with ward councillors – who are becoming more involved in local development initiatives, and with traditional leadership)
- Stable and united VWC
- Cost recovery
- Strong sense of ownership by the community
- Accountability to the community
- A physical office from which to operate within the community

4.4.8 Benefits of CBOs as WSPs

These include:

- They are based in the community and thus there is a greater sense of community ownership and responsibility for the services. Consequently there tends to be increased cost recovery (where this applies), more effective O&M and decreased vandalism.
- The proximity of the CBO to the community facilitates increased accountability and responsiveness.
- Cost effectiveness in relation to O&M in remote rural areas
- Economic spin-offs are promoted where funds remain in the community, and community members develop entrepreneurial skills.
- They make use of community capacity and potential to manage local development processes.
- Opportunities for water provision to be a catalyst for other development projects is maximised.
- A well-functioning CBO WSP is more likely to deliver affordable, reliable and sustainable water services without compromising quality in less accessible communities than any other WSP option.

4.4.9 Functions that can be provided by a CBO WSP

These include:

- Daily operations of the scheme and minor repairs
- Customer relations and communication with the community

- Revenue collection (where applicable in terms of the free basic water policy)
- Basic financial management and reporting

4.5 Risk Management Strategy for WSAs

Contracting a CBO as a WSP was seen by three of the four District Councils in the Research Study, as well as others involved in Mvula Trust projects, as a high-risk option for the WSP function. CBOs were seen to sometimes lack the capacity and skills that other institutions have, and needed close monitoring. Although risks are experienced with any service provider, they are perceived to be higher with CBO's due to factors mentioned already.

The most common perceived risk factor is that of poor management of finances. Municipalities expressed the opinion that CBOs tend to mismanage funds, and therefore cannot be relied upon. CBOs are often perceived as lacking financial management skills (including needing assistance with the signing of cheques), and in terms of the ability to ensure financial audits.

It must be noted that The Mvula Trust has disbursed over R200 million to community bank accounts in order that CBOs manage project finances. In over seven years only 0.32 has been lost owing to mismanagement and fraud.

Other risks include:

- CBO WSPs are sometimes not perceived by the community as having sufficient authority to make decisions concerning the water services provided and / or power relations within a community may threaten the sustainability of the CBO WSP.
- CBO WSPs do not always have access to the necessary support required to ensure reliable and sustainable services, and support services may be costly.
- The members of a CBO WSP may change over a period of time, resulting in a loss of capacity.
- Lack of sufficient trust in the CBO WSP by the community could impact on revenue collection (where appropriate) and customer relations.
- Lack of convenient access to banking facilities may be a problem.

- Private contractors or suppliers may attempt to take advantage of a CBO WSP through either over-charging or through providing poor services.
- Inability to meet required performance standards

It is important to note that some District Councils indicated a willingness to provide capacity to the CBOs to enable them to fulfil the WSP functions. It is clear that a Risk Management Strategy should be put in place between WSAs and CBO WSPs. This point applies to any WSP contracted to a WSA, the content of which may differ depending on the size and capacity of the WSP.

5. Recommendations

The recommendations are grouped into the same themes as those of the findings:

- Minimum legal requirements for a CBO as a legal entity
- Other options for constituting a CBO as a legal entity (and how to effect)
- Legislative environment for CBO WSPs
- Lessons from the field
- Risk Management Strategy for WSAs

5.1 Minimum legal requirements for a CBO as a legal entity

It is recommended that management and reporting requirements for a CBO WSP be kept as simple as possible. Otherwise the tying up of CBOs into unnecessary bureaucratic and legal complexities may run the risk of rendering the CBO dysfunctional.

Municipalities need to be informed, through a national communication strategy, about the ***relative simplicity with which CBOs may be legally contracted as WSPs.*** This would involve informing them of, *inter alia*, the following:

- A formal Constitution (outlining the objectives, structure, powers and functions, *et cetera*) is sufficient for CBOs to operate legally as WSPs.
- A simple service agreement (contract) between the WSA and the CBO is sufficient for contractual obligations to be carefully spelt out. The agreement should define penalties for non-compliance.
- It is not necessary for CBOs to register in terms of the Nonprofit Organisations Act in order for them to be legal entities. However, in the unlikely event where CBOs manage complex schemes, it would be in both parties interests that they register to ensure maximum responsibility by the CBO.

Through active communication and awareness creation, communities need to understand the context within which services need to be provided. Communities need to furthermore understand why a legal structure is needed, and how they can

benefit from it. This should happen at project level between the Implementing Agent and / or Project Agent and the CBO.

With regard to possible tensions between local government and CBOs as a result of improved legal standing of CBOs, awareness needs to be created among communities to define the powers and functions of both local government (including ward councillors) and traditional leaders in relation to CBO WSPs. This should also be stipulated clearly in the contract between the WSAs and the CBOs in order to avoid confusion and disputes.

The Research Study recommends that only service and management contracts are suitable for CBO WSPs.

Where municipalities require a CBO to register in terms of the Nonprofit Organisations Act it is important to point out that, unless extraordinary circumstances prevail, this will not be necessary.

5.2 Other options for constituting a CBO as a legal entity (and how to effect)

5.2.1 Registration with the Non Profit Organisations Act (NPOA)

The Department of Social Development recommends that **CBOs do not need to register in terms of the NPOA**. It recommends that registration is appropriate for large CBOs and NGOs who engage mostly with government and donors at a high level. Registration should not be seen as a blanket requirement.

If there is a need for a CBO WSP to register in terms of the Nonprofit Organisations Act this should be done with immediate effect and organisations such as The Mvula Trust could provide assistance in this regard.

5.2.2 Registration as Trust and Section 21 Company

As indicated under 4.2.1 and 4.2.1.3, these options are not recommended for CBOs as they are legally complex and costly.

5.3 Legislative environment for CBO WSPs

CBOs may be subjected, in terms of the Municipal Systems Act, to competitive procurement processes. This may effectively marginalise the participation of most under-resourced CBOs. Even if CBOs are included in the definition of “public service providers” (Water Services Act), CBOs may still be disadvantaged since they will be required to compete with public service providers such as water boards or other municipalities. Even where CBOs are the most appropriate option in terms of cost effectiveness, affordability and sustainability, they may not have the skills or expertise to engage in formal tendering processes.

Advocacy needs to be undertaken to ensure that the policy review process currently being undertaken by DWAF, and other national government departments, ensures that changes to the Water Services Act, and other municipal legislation, recognise ***that CBOs act ‘in the public interest’, and should therefore receive a special status*** when being considered as a WSP and ensures that ***provisions applying to small and emerging enterprises, or persons previously disadvantaged by unfair discrimination, apply fully to CBOs***, and that municipalities are made aware of this. In this respect, The Mvula Trust supports the amendments proposed by DWAF to Section 80(1)(a) of the Municipal Systems Act. Further, the stipulation in the White Paper on Municipal Service Partnerships that “municipal councils should require NGOs and CBOs that wish to engage in the delivery of municipal services to be registered in terms of the Non-profit Organisations Act”¹⁶ should be reviewed.

The sector will need to assist local government to develop tender procedures for CBO WSPs, and CBOs may have to compete among themselves at community level for the WSP function.

5.4 Lessons from the field

The Mvula Trust has numerous documented case studies which show that CBO WSPs are best suited for remote rural villages, where they contribute greatly to cost

¹⁶ White Paper on MSP, 2000 (3.1.8)

effective and sustainable delivery. This is further borne out by international and national best practice in terms of service delivery. ***It is strongly recommended that municipalities performing the WSA function seriously consider CBO WSPs in MSPs involving remote, rural communities.***

CBOs need information about ***procurement procedures***. This is a WSA responsibility, but will probably fall to NGOs working with CBOs until such time as WSAs are more convinced of the benefits of contracting CBO WSPs.

Where free basic water is implemented at project level, CBOs needs ***access to the equitable share*** in order to fund O&M of schemes. This can be done.

Further, it is important that rapid payments are made to CBO WSPs in order that they are able to remain viable WSPs. It is recommended that the ***turnaround time for payments*** be reduced from the current 120 days to 30 days in the case of CBOs.

Relationship with ***traditional leaders*** must be clear and respected by all role players and stakeholders. A role for traditional authorities, where applicable, should also be recognised in setting up and maintaining CBO WSPs. A way to avert potential disharmony is for traditional leaders to play a leading role in the selection of the CBO as WSPs.

CBOs are ***accountable*** to WSAs who appointed them. This relationship must be regulated through contracts. (This is dealt with in detail under 5.5 below.)

5.5 Risk Management Strategy for WSAs

Municipalities and CBOs should jointly develop a Risk Management Strategy for CBOs as WSPs

Such a strategy should look at the following:

- Setting in place a formal, legal contract, which would give the CBO WSP the authority to deal with water services within the community, as well as clarity on the roles and responsibilities of all role players.

- Approval of the Constitution by the WSA.
- Reporting to the WSA on the implementation and / or compliance of the contract. Penalties for non-compliance should be spelt out in the contract.
- Relationship with role players (including the WSA, ward councillors and traditional leadership). An oversight / “watchdog” role could be developed for some role players.
- Strong relationship with other structures in communities as a supportive mechanism to the CBO WSP.
- How the CBO will be monitored and regulated by the WSA. This is particularly important in terms of financial records in order to promote accountability, transparency, and trust between the CBO WSP, the community and the WSP; and in terms of compliance with municipal by laws.
- Access to communication systems to enable flow of communication.
- Access to and nature of support (see Support Services Agent below) and other structures, if required.
- Setting in place dispute resolution mechanisms.
- Capacity building and training (including the changing of membership, and transference of capacity through training and other initiatives).
- Access to banking facilities.
- Ensuring a co-signatory on the books of the CBO (if deemed necessary).
- Access to financial services support, in the form of an Accounting Officer, to ensure annual financial statements are consistent with Generally Accepted Accounting Practice (GAAP) (Set of rules by which you set your accounts), including statements of income and expenditure and a balance sheet of assets and liabilities.
- Ensuring fair labour practice.
- Compliance with by laws

Model contracts are available from DWAF, and can be adjusted to suit the needs of both WSAs and CBOs.

CBO WSPs need to be effective and efficient, and should be *supported through services of a Support Services Agent (SSA)*, if necessary. An SSA could be set up

with the knowledge and approval of the WSA, or an existing support agency could be used. Either the WSA or the WSP (or both) would formalise the agreement in terms of a service contract with the SSA.

Ensuring that the accounts of **CBOs are in line with GAAP** (quarterly or bi-annually) would strengthen financial management of CBOs. This will enforce measures of accountability on the part of the CBOs. They do not need a Chartered Accountant to assess their books, but could utilise qualified Accounting Officers (provided for by an SSA or the municipality – as mentioned above).

An 'official' and accessible **WSP office** within the community, and with the necessary resources greatly enhances the legitimacy, authority and the efficient operation of CBO WSPs.

It is strongly recommended that any CBO WSP, which does not already have a formal Constitution, be assisted with drawing up and adopting one with immediate effect. (The Mvula Trust and others have the experience to assist in this regard.)

6 Conclusion

The CBO WSP is a very cost-effective option, and is particularly suited to providing services in remote, rural areas. It should be a serious consideration for municipalities wanting to enter into MSPs in these areas.

CBOs have participated in the delivery of services in one way or another, and continue to do so even though most of them are currently still not legal entities. Where this is the case, they must develop formal Constitutions, thereby formalising themselves as legal entities, in order to participate in formal processes such as tendering and entering into MSPs.

A shift in approach and attitude will be necessary in order for both WSAs and CBOs to recognise the strengths of each other. Further, government needs to make important changes to existing legislation in order to give greater effect to its commitment to empowering local communities and ensuring development maximises local economic benefits.

Much work must be done in advocating CBO WSPs as a viable option. It is up to the sector and stakeholders to take this process further. The Mvula Trust believes both it and other NGOs in the sector are competent to share their experiences, and to assist municipalities to structure appropriate partnerships with community-based structures.

Appendix 1 – References

Constitution of South Africa Act (Act 108 of 1998)

Davids P: (1999) Local Government Support Pack Programme, Report for DWAF/
DANIDA

Department of Land Affairs, (1997) Rural Development Framework Report

Department of Provincial and Local Government, (1998) White Paper on Local
Government

Department of Provincial and Local Government, (2000) White Paper on Municipal
Service Partnerships

Department of Water Affairs and Forestry (2001) Community Based Organisations
as Water Services Providers Guideline, Draft.

Department of Water Affairs and Forestry, 1994, Water Supply and Sanitation White
Paper

Honey M: 2000) Development Organisation in Legal Context, Legal Resources
Centre

Legal Resources Centre, (2002) Legal Support Centre Project: Guide to the Non
Profit Organisation Act

Local Government Municipal Structures Amendment Act, 2000 (Act 33 of 2000)

Local Government: Municipal Structures Act, 1998 (Act 117 of 1998)

Local Government: Municipal Systems Act, 2000 (Act 32 of 2000)

Non Profit Organisations Act, 1997 (Act 71 of 1997)

Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000)

Rall, M: (1999) Paper on Demand-Responsive Approach, The Mvula Trust

Venter-Hildebrand, M: (1999) Building Public-Community (NGO / CBO Partnerships
The Mvula Trust (Paper prepared for the National Labour and Economic
Development Institute)

Water Services Act, 1997 (Act 108 of 1997)

World Bank, (1997) A Report on User Organisations for Sustainable Water Services