IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no:12745/2018P

In the matter between:

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	**FIRST APPLICANT**
RURAL WOMEN'S MOVEMENT	**SECOND APPLICANT**
HLETSHELWENI LINA NKOSI	**THIRD APPLICANT**
BONGANI ZIKHALI	**FOURTH APPLICANT**
ZAKHELE MALCOLM NKWANKWA	**FIFTH APPLICANT**
HLUPHEKILE BHETINA MABUYAKHULU	**SIXTH APPLICANT**
BONGI GUMEDE	**SEVENTH APPLICANT**
KN	**EIGHTH APPLICANT**
SM	**NINTH APPLICANT**

and

THE INGONYAMA TRUST	**FIRST RESPONDENT**
THE INGONYAMA TRUST BOARD	**SECOND RESPONDENT**
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**THIRD RESPONDENT**
THE MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KWAZULU-NATAL	**FOURTH RESPONDENT**
KWAZULU-NATAL PROVINCIAL HOUSE OF TRADITIONAL LEADERSHIP	**FIFTH RESPONDENT**

ORDER

The following order is granted:

1. It is declared that the first respondent ('the Trust') and the second respondent ('the Board') acted unlawfully and in violation of the Constitution by –
    1.1 concluding residential lease agreements with persons living on the land held in trust by the Ingonyama ('Trust-held land') who are the true and beneficial owners of Trust-held land under Zulu customary law, by virtue of being members of the tribes and communities referred to in section 2(2) of the Ingonyama Trust Act 3KZ of 1994 ('Trust Act'), and
    1.2 concluding residential lease agreements with persons who held or were entitled to hold Permissions to Occupy or other informal rights to land protected under the Interim Protection of Land Rights Act 31 of 1996 ('IPILRA') in the land subject to the leases, without complying with the requirements of section 2 of IPILRA.
2. All the residential lease agreements concluded by the Trust and the Board, in respect of residential land or arable land or commonage on Trust-held land, with persons who –
    2.1 are the true and beneficial owners under Zulu customary law of Trust-held land, by virtue of being members of the tribes and communities referred to in section 2(2) of the Trust Act, or
    2.2 held or were entitled to hold Permissions to Occupy or any other informal rights to land protected under IPILRA in the land subject to the leases,

    are declared to be unlawful and invalid.
3. It is declared that the Trust is obliged forthwith to refund any and all money paid to the Trust or the Board under the lease agreements referred to in paragraph 2 to the persons who made such payments and any person who made payments under the lease agreement is entitled to a refund by the Trust to the extent of such payments.
4. It is declared that the third respondent ('the Minister') has breached her duty to respect, protect, promote and fulfil the constitutional right to property of the holders of IPILRA rights vested in respect of the Trust-held Land, by –
    4.1 failing to respect, protect, promote and fulfil the existing property rights and security of tenure of the residents of Trust-held land, as required

by sections 25(1) and 25(6) of the Constitution, read with section 7(2) of the Constitution;

4.2 failing to exercise, alternatively failing to ensure the exercise by her delegate, of the powers conferred by chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy) Regulations to demarcate allotments, issue and register Permissions to Occupy, survey such allotments, and obtain certificates of registered title in respect of such allotments in Trust-held land.

5. Until such time as the Minister may implement an alternative system of recording customary and other informal rights to land of persons and communities residing in Trust-held land:

5.1 the Minister is directed to ensure that the administrative capacity necessary to implement chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy) Regulations is reinstated forthwith; and

5.2 the Minister shall report to the court on the steps taken to comply with paragraph 5.1 of this order, within three months of the date of this order and every three months thereafter until the parties agree in writing that the steps envisaged in paragraph 5.1 have been implemented and that the reporting may be concluded, or the court, on application by any party, so orders.

6. The Trust and the Board and the Minister opposing this application are directed to pay the costs of this application, the one paying the other to be absolved, including the costs of the four counsel employed (with three counsel having been employed at any one time)

JUDGMENT

MADONDO DJP (MNGUNI and OLSEN JJ concurring)

Introduction

[1] In the main, the applicants seek a declaratory order declaring that the first and second respondents (the Ingonyama Trust – the 'Trust' and the Ingonyama Trust Board – the 'Board') acted unlawfully and unconstitutionally in cancelling Permission

to Occupy ('PTO') rights and concluding residential lease agreements with the holders of PTO rights and/or informal land rights in respect of residential land or arable land or commonage, which is owned and held in trust, for the beneficiaries and residents, by the Trust ('Trust-held land'), protected under the Interim Protection of Informal Land Rights Act ('IPILRA'),[1] without the genuine and informed consent of such rights holders. In the event of this order being granted, a range of ancillary orders are sought to give effect thereto.

[2] On the second point, the applicants seek various structural interdicts against the Trust and the Board in prayers 2 to 5, and against the Board and the third respondent (the Minister of Rural Development and Land Reform – the 'Minister') in prayers 6 and 7 of the notice of motion. They seek orders directing the Trust and the Board to publish and distribute a lease cancellation notice, in the specified manner and within certain time frames, and to report to this court on affidavit, on compliance with this publication order. They also seek orders directing the Trust and the Board to cancel any residential leases on request; to restore the residents' statutory and/or customary law land rights; to permit the issue and registration of PTO rights by the Minister and the fourth respondent (the MEC for Co-operative Governance and Traditional Affairs, KwaZulu-Natal – the 'MEC'), and to refund any moneys paid under cancelled lease agreements.

[3] The applicants seek an order directing the Minister and her Department to oversee and ensure compliance by the Trust and the Board with the court orders, and for the Board and the Minister to report to the court on affidavit on their compliance with the order, every three months from the date of the order until the order is discharged.

[4] The applicants contend that the orders sought in prayers 2 to 7 of the notice of motion are directed at remedying the harm that has already been caused by the Trust's and the Board's alleged unlawful actions. They contend that the structural interdicts, allied to reporting requirements, are just and equitable given the alleged scale and seriousness of the prejudice caused by the PTO Conversion Project, in the

[1] Interim Protection of Informal Land Rights Act 31 of 1996.

absence of any other effective means of remedying that prejudice. The structural interdicts are also submitted to be appropriate, just and equitable given the alleged dereliction of duty by the Minister in failing to exercise proper oversight, and to intervene to protect vulnerable residents and occupiers of Trust-held land.

[5] In prayer 8, the applicants seek an order interdicting the Trust and Board from taking any further steps and/or engaging in any conduct to persuade or induce any person who held or holds a PTO right or an IPILRA right in Trust-held land to conclude a lease agreement with the Trust, without furnishing such rights holders with complete and accurate information about their existing land rights and the nature and effect of the lease agreements. They contend that this order is necessary and appropriate given the Board's refusal to discontinue the PTO Conversion Project unless ordered to do so by a court order.

[6] In prayer 9, the applicants seek an order declaring that:

'The Minister, the MEC acting as the Minister's delegate, the Trust and the Board are obliged to exercise the powers conferred by Chapter XI of the Act and the Regulations to demarcate allotments, to issue and register Permissions To Occupy (PTOs), to survey such allotments, and to obtain certificates of registered title in respect of such allotments in Trust –held land.'

[7] The Minister and the MEC are assigned the function to exercise the powers conferred by Chapter XI of the KwaZulu Land Affairs Act ('Land Affairs Act'),[2] and the KwaZulu Land Affairs (Permission to Occupy) Regulations ('PTO Regulations').[3] The Minister is alleged to have either fundamentally misunderstood or chosen to ignore her powers and duties under Chapter XI of the Land Affairs Act, and persists in that position. It is against this backdrop that the applicants approach this court for the grant of declaratory relief obliging the Minister and the MEC (the MEC acting as the Minister's delegate) to exercise these powers.

[8] In prayers 10 to 14, the applicants seek declaratory and structural relief for the alleged breach of duties by the first four respondents. In prayer 11, the applicants seek an order declaring that the Minister:

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[2] KwaZulu Land Affairs Act 11 of 1992.
[3] KwaZulu Land Affairs (Permission to Occupy) Regulations, GN 32 of 1994.

'has breached her duty to respect, protect, promote and fulfil the constitutional rights to property of the holders of PTO rights and IPILRA rights vested in respect of the Trust – held land, by –

11.1 failing to exercise, alternatively failing to ensure the exercise by her delegate, of the statutory powers referred to in paragraph 9 above;

11.2 failing to exercise oversight of the conduct and affairs of the first and second respondents; and

11.3 failing to respect and protect the existing property rights and security of tenure of the residents of Trust-held land, as required by section 7(2), 25(1) and 25(2) of the Constitution.'

[9] In prayer 12, the applicants seek a structural order directing the first four respondents to 'develop and implement diligently and without delay, the administrative capacity' necessary to achieve the objectives set out in the prayer.

[10] In prayer 13, the applicants ask this court to direct the Minister or the MEC and the Board to report to this court, on affidavit, on the steps taken to comply with this order (what they term 'the administrative measures order'), within three months of the date of the order and until the order is discharged. According to the applicants, this declaratory and structural relief is appropriate and necessary in order to vindicate and remedy the violation of rights arising particularly from the Minister's sustained breach of duty. The applicants further seek a right to reply to the administrative measures report within two weeks of receipt of the report.

[11] In prayer 14, the applicants seek leave to re-enrol the matter on a date to be determined by the registrar, in consultation with the presiding judge, for such further relief as may be appropriate in respect of the implementation of this order.

[12] In prayer 15, the applicants ask for a costs order against the first, second and third respondents jointly and severally in the event of the applicants being substantially successful in the matter. In addition, the applicants ask for the costs of three counsel given the complexity, novelty and importance of the matter. However, the applicants ask that in the event of their application not succeeding, they should not be ordered to pay costs, given that they have brought this important constitutional matter in the public interest.

[13] However, after argument on 9 and 10 December 2020, the applicants elected to reduce the number of prayers sought in the notice of motion, and to confine themselves to the relief sought in a draft order, which was filed on Friday 11 December 2020. An account of the original relief sought is given as it obviously informed the answers made to the applicants' case.

[14] In the draft order, the applicants seek an order in the following terms:

'1. It is declared that the First Respondent ("the Trust") and the Second Respondent ("the Board") acted unlawfully and in violation of the Constitution by –

1.1. Concluding residential lease agreements with persons living on the land held in trust by the Ingonyama ("Trust-held land") who are the true and beneficial owners of Trust –held land under Zulu customary law, by virtue of being members of the tribes and communities referred to in section 2(2) of the Ingonyama Trust Act No. 3KZ of 1994 ("Trust Act"), and

1.2. Concluding residential lease agreements with persons who held or were entitled to hold Permissions to Occupy or other informal rights to land protected under the Interim Protection of Land Rights Act 31 of 1996 ("IPILRA") in the land subject to the leases, without complying with the requirements of section 2 of IPILRA.

2. All the residential lease agreements concluded by the Trust and the Board, in respect of residential land or arable land or commonage on Trust-held land, with persons who –

2.1 are the true and beneficial owners under Zulu customary law of Trust-held land, by virtue of being members of the tribes and communities referred to in section 2(2) of the Trust Act, or

2.2 held or were entitled to hold Permissions to Occupy or any other informal rights to land protected under IPILRA in the land subject to the leases, are declared to be unlawful and invalid.

3. It is declared that the Trust is obliged forthwith to refund any and all money paid to the Trust or the Board under the lease agreements referred to in paragraph 2, which refunds must be paid to the persons who made such payments and any person who made payment under the lease agreement is entitled to a refund by the trust to the extent of such payment.

4. It is declared that the Third Respondent ('the Minister') has breached her duty to respect, protect, promote and fulfil the constitutional right to property of the holders of IPILRA rights vested in respect of the Trust-held land, by –

4.1 failing to respect, protect, promote and fulfil the existing property rights and security of tenure of the residents of Trust-held land, as required by sections 25(1) and 25(6) of the Constitution, read with section 7(2) of the Constitution;

4.2 failing to exercise, alternatively failing to ensure the exercise by her delegate, of the powers conferred by Chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy) Regulations to demarcate allotments, issue and register Permissions to Occupy, survey such allotments, and obtain certificates of registered title in respect of such allotments in Trust-held land.

5. Until such time as the Minister may implement an alternative system of recording customary and other informal rights to land of persons and communities residing in Trust-held land:

5.1 the Minister is directed to ensure that the administrative capacity necessary to implement Chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy) Regulations is reinstated forthwith; and

5.2 the Minister shall report to the Court on the steps taken to comply with paragraph 5.1 of this order, within three months of the date of this order and every three months thereafter until the parties agree in writing that the steps envisaged in paragraph 5.1 have been implemented and that the reporting may be concluded, or the court. On application by any party, so orders.

(As an alternative to prayer 5:)

6. It is declared that the Minister and/or her delegate is obliged to implement Chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy) Regulations by ensuring that any person living on Trust-held land and qualifies to be issued with a Permission to Occupy is issued with one.

7. The Trust and the Board and the Minister opposing this application are directed to pay the costs of this application, the one paying the other to be absolved, including the costs of the four counsel employed (with three counsel having been employed at any one time).'

[15] The applicants ground their application on the fact that the Trust and the Board have over a period of time been undermining the security of tenure of the residents and occupiers of the Trust-held land in KwaZulu-Natal, and extracting money from them, by unlawfully compelling and inducing them to conclude lease agreements, and to pay rental to the Trust in order to continue living on the land. They contend that, in doing so, the Trust and the Board have violated the customary law and statutory PTO rights of the residents and occupiers of the Trust-held land, protected by the Constitution, and Acts of Parliament, namely IPILRA and the KwaZulu-Natal Ingonyama Trust Act ('Trust Act').[4] The applicants also aver that the

[4] KwaZulu-Natal Ingonyama Trust Act 3KZ of 1994.

Minister has failed in her constitutional and statutory duty to oversee the administration of the Trust-held land. They contend that they have assumed and exercised land administration powers which are vested in the Minister and the MEC.

[16] Not so, argued the Trust and the Board. They aver that the Trust Act permits them to let the property in question. They contend that by virtue of section 2(5) of the Trust Act, they have the statutory power to enter into lease agreements subject to obtaining the prior written consent of the traditional authority or community authority concerned and otherwise than in accordance with the provisions of any applicable law. The Trust and Board contend that until this provision of the Trust Act is impugned and struck out as inconsistent with the Constitution, their conduct is lawful and constitutional.

Parties

[17] The first applicant is the Council for the Advancement of the South African Constitution ('CASAC'), an initiative established in 2010 to advance the South African Constitution as a platform for democratic politics and the transformation of society. The sole object of CASAC is to promote, develop, and affirm the rights and principles set out in the Constitution in order to facilitate and advance progressive constitutionalism and deepening democracy in South Africa. CASAC avers that it is deeply concerned that the Trust and the Board are unlawfully depriving the residents and occupiers of Trust–held land of their constitutionally protected property rights. It contends that the Trust and the Board have acted with impunity as the Minister and the Portfolio Committee, tasked with overseeing the functions of the Trust and the Board have failed to protect these rights, despite having knowledge of the Trust's 'PTO Conversion Project'. CASAC contends that it has brought this application to affirm the constitutionally protected property of those living on the Trust-held land, and the foundational constitutional principles of the supremacy of the Constitution, the rule of law and accountability.

[18] The second applicant is the Rural Women's Movement ('RWM'), a non-profit grassroots organisation founded in 1998 which works to give a voice to rural women in KwaZulu-Natal, and to address the social problems that rural women face, including access to land and land ownership.

[19] The third to ninth applicants are residents and occupiers of Trust-held land in KwaZulu-Natal. Their contention is that they have been compelled by the Trust and traditional council(s) to sign lease agreements, in many cases which they cannot afford, on the basis of false or incomplete information.

[20] The Trust is a corporate body established under s 2(1) of the Trust Act. The sole trustee of the Trust is Ingonyama yamaZulu, (the late King Goodwill Zwelithini KaBhekuZulu at the time these proceedings were commenced). The Trust is the registered owner of some 2.8 million hectares of land (Trust-held land) in KwaZulu-Natal, which is the land previously vesting in the 'homeland' Government of KwaZulu. Under s 3(1) of the Trust Act, the Ingonyama holds such land in trust 'for and on behalf of the members of the tribes and communities and the residents' of the Zulu nation.

[21] The Board was established under s 2A of the Trust Act to administer the affairs of the Trust, and the Trust-held land. The establishment of the Board was one of the products of the amendment of the Trust Act by Act 9 of 1997.

[22] The Minister has already been introduced in para 2 above. She is cited in these proceedings in her capacity as the member of the executive responsible for administering the Trust Act pursuant to the KwaZulu-Natal Ingonyama Trust Amendment Act ('the Amendment Act'),[5] and the Rural Development and Land Reform General Amendment Act.[6] She is also the executive authority responsible for administering ss 24 to 26 of the Land Affairs Act, which governs the conferral of PTO rights with respect to Trust-held land.

[23] Likewise, the MEC has also been introduced in para 2 above. She is cited in these proceedings because she is responsible to oversee the administration and governance of traditional institutions and land use management in the Province of KwaZulu-Natal for the issuing and registration of PTO rights in Trust-held land by virtue of statutory and delegated powers and functions.

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[5] KwaZulu-Natal Ingonyama Trust Amendment Act 9 of 1997.
[6] Rural Development and Land Reform General Amendment Act 4 of 2011.

[24] The fifth respondent is the KwaZulu-Natal Provincial House of Traditional Leadership ('the Provincial House'), established under section 32 of the KwaZulu-Natal Traditional Leadership and Governance Act[7] and section 16(1)*(a)* of the Traditional Leadership and Governance Framework Act.[8] The Provincial House is cited herein as an interested party with no relief claimed against it. The Provincial House is responsible for advising and making recommendations to the provincial government and the MEC on matters affecting traditional leaders, traditional councils or communities, and on matters pertaining to Zulu custom and tradition. The Provincial House has taken no active part in these proceedings.

The Ingonyama Trust and its board

[25] Before getting into the factual background and the merits of this matter, I deem it appropriate to address disturbing aspects of the affidavit of the Chairperson of the Board, Mr Sipho Jerome Ngwenya ('Mr Ngwenya'), delivered in support of the Trust's and the Board's opposition to this application. It is unfortunate and saddening to note that Mr Ngwenya regards this application as an 'attack or affront to the institution of ubukhosi under the democratic order'[9] rather than as the exercise by the applicants of the right to seek protection of constitutional rights and protecting their property rights. Secondly, I would like to express our displeasure at Mr Ngwenya's scathing attack launched on Mr Parmananda Lawson Naidoo's ('Mr Naidoo') and Professor Thandabantu Nhlapho's integrity and person.[10] Mr Naidoo is

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[7] KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005.
[8] Traditional Leadership and Governance Framework Act 41 of 2003.
[9] Mr Ngwenya states as follow in paras 4.1 and 4.2 of his affidavit (page 584 of the indexed papers):
'4. I depose to this affidavit –
4.1 As Chairman of the second respondent and the Royal nominee of the King;
4.2 In order to contribute to the response in opposition to this application which is a direct attack against His Majesty, the King of the Zulu nation and others. . .'
[10] Mr Ngwenya states as follow in para 37 of his affidavit (page 600 of the indexed papers):
'37.3 Had Naidoo known anything about Zulu law, he would have been familiar with at least the following:
37.3.1 Customary law is not universal throughout South Africa because of different Nations and clans in each province.
37.3.2 Zulu Customary Law while it applies among the Zulus *inter se* regardless of their location is part of South African common law. Therefore it needs no expert opinion to be proven as if it was a foreign legal system, the very thought of relying on so-called expert evidence when coming to matters pertaining to Zulu law underscores Naidoo's patent ignorance and questions his own motive in bringing this application;
37.3.3. People who hold rights under Zulu Customary law do not necessarily have these documented but these are well known by the political authority which has allocated them.

the executive secretary of CASAC, and is the deponent to the applicants' founding affidavit. Mr Ngwenya went on to describe what Mr Naidoo has asserted in his founding affidavit as '[Mr] Naidoo's racist slant.'[11] Professor Nhlapho is an expert of African Customary Law and African Customary Law Systems of Governance. He deposed to an affidavit in support of the application. The attack is unwarranted, inappropriate and unacceptable.

IPILRA is not a positive right. Like estoppel it is a shield. Zulu Customary Law rights holders to land do not require IPILRA to be protected. These rights have existed for centuries without IPILRA.

37.3.4 By viewing Zulu Customary Law land rights through the prism of IPILRA, Naidoo exposes his prejudices to the very Constitution he purports to protect. This is so because IPILRA is there to protect the so called illegal squatters. So, in Naidoo's mind so it will appear the millions of Zulus who occupy land in terms of Customary Law are squatters.

37.3.5 That he, Naidoo has no authority to represent the Zulu Nation, as he purports to do from the relief he seeks, without its consent.

37.3.6 He would have known that as a prerequisite whether one wanted a Permission to Occupy (PTO) or a lease or any form of land tenure the starting point is to follow Customary Law and procedures must first be observed. That being so even a dispute on tenure would have to be first referred to the relevant Traditional Council.'

[11] Mr Ngwenya states as follow in para 40 of his affidavit (page 603 of the indexed papers):

'40. On a proper reading of this application Naidoo's racist slant, attitude and prejudice are evident. These are my reasons for this conclusion:

40.1 The other applicants in this matter are not English speaking and reside more than one thousand five hundred kilometres from where Naidoo is based. Apparently their schooling did not go beyond a primary education. On probability they could not have known about his organisation.

40.2 Evidently Naidoo is working with the organisations which spend their resources wishing to see the end of Ingonyama Trust/Board. These include the Legal Resources Centre and the Centre for Land Accountability Research among others.

40.3 It should be obvious from some of the attachments to his application that the Legal Resources Centre has been threatening Ingonyama Trust with a court action for some time when it had no client to represent except itself. To this day the people it claimed were its clients are as yet to give it instruction, more than one year since its letter of demand to the first and second respondents.

40.4 Mr Sithembiso Gumbi whose affidavit is referred to in this matter, but not attached has been actively canvassing for clients in the Province of KwaZulu-Natal for some time. His is a former employee of the third respondent. He is now an employee of the Centre for Land Accountability Research which, like Naidoo is based in Cape Town.

40.5 I have in my possession a text message dated 14 April 2017 by Mr Sithembiso Gumbi to one Ron Wilson a former lessee of the first respondent. In this text message Gumbi says to Wilson, among others "I would like to see you in connection with the lease agreement which you entered with the Ingonyama Trust as we're preparing to challenge the legality of this in the Concourt and wish to see all the affected people on a date to be confirmed, I'm working from a Durban office temporarily."

40.6 In my respectful view, just like Gumbi and his employer, Naidoo exploits the poor, ignorant and vulnerable by claiming that he is acting in their best interest for free. In truth he creates false disputes to justify his organisation's existence to the donors. The people he purports to act for are no better off.

40.7 In this case Naidoo has sensationalized the matter through the media and national television. Naidoo from his utterances and his assertions in his affidavit clearly expose his agenda. It is not about the Constitution. It is all about remaining employed and other hidden agendas.

40.8 It is not unusual for people like Naidoo, to profess to be looking after the interest of poor Blacks while in truth they are advancing their own agenda.'

[26] The rule of law is fundamental to our democracy. It serves as a standard against which all acts and conduct of individuals, institutions and organs of state, are measured. In a democratic constitutional state like ours, people have the right to assert and defend their rights. Courts are there to render justice to all people alike, without fear, favour or prejudice. I do not understand this application to be directed at the King in his person, but, in my view, it is brought against him in his capacity as the trustee of the Trust, in protection of the customary law rights and/or informal rights of people living on Trust-held land. Oddly enough, Mr Ngwenya has not provided any evidence in support of his assertion that the applicants' intention is 'to strip the Zulu Nation of its identity'. Contrary to his assertion, the papers reveal that the applicants seek to protect rights and interests in Trust-held land through judicial redress, and to address conduct inconsistent with the notions of fairness and justice which inform public policy.

[27] The applicants' case is not about the role and constitutional status of the sole trustee of the Trust, then King Zwelithini kaBhekuzulu, and the constitutionality of the Trust Act, but concerns the unlawful and systematic deprivation of property rights and security of tenure of the residents of land nominally owned by the Trust, and the manner in which the Trust and the Board exercise their powers and execute their duties and functions under the Trust Act. As a consequence, the applicants seek an order declaring the conduct of the Trust and the Board unlawful, unconstitutional and invalid. Allied to that, the applicants are raising the Minister's and MEC's failure to properly execute their statutory and constitutional duties. Importantly, it is the administrative and executive conduct which the applicants seek to declare unlawful, unconstitutional and invalid.

[28] The applicants' contention is that the Trust and the Board's conclusion of leases with beneficiaries and residents of Trust-held land, who are the true and ultimate owners of such land, has the effect of depriving the beneficiaries and residents of their customary law rights and/or informal rights and interests in the land in question, and their conduct (the Trust's and the Board's) is therefore unlawful and unconstitutional.

[29] When South Africa attained democracy in April 1994, all homelands, including that of KwaZulu, were abolished. The homelands and self-governing territories were incorporated into South Africa, and all land owned by the governments of those territories was to vest in the new national government.[12] However, the land in KwaZulu was an exception in that just before the interim Constitution came into force, the then Government of KwaZulu, under the leadership of the Inkatha Freedom Party ('the IFP'), struck a deal with the then Government of the Republic of South Africa under the leadership of the Nationalist Party ('the NP') to establish the Trust and to transfer all the land held by the then Government of KwaZulu to the Trust.

[30] The Trust Act was passed on 22 April 1994 by the Legislative Assembly of the former territory of KwaZulu. On 25 April 1994 the Trust Act was approved by the then State President, Mr FW de Klerk, in terms of s 31(2) of the Self-Governing Territories Constitution Act.[13]The Trust was to be the custodian of the Trust-held land that was previously administered by the defunct Government of KwaZulu. Trust-held land vested in the Trust, with the Zulu King as the sole trustee, on behalf of the communities resident on the Trust-held land.

[31] In terms of s 3(1)*(a)* of the Trust Act:

'any land or real right therein of which the ownership immediately prior to the date of commencement of this Act vested in or had been acquired by the Government of KwaZulu shall hereby vest in and be transferred to and shall be held in trust by the Ingonyama as trustee of the Ingonyama Trust referred to in section 2 (1) for and on behalf of the members of the tribes and communities and the residents referred to in section 2 (2).'

The title deed to the Trust-held land is endorsed as vesting in the Ingonyama, as the trustee for the Trust, for and on behalf of the members of the tribes, communities and residents. The Trust Act transferred approximately 2,8 million hectares of land, being 93% of the total area of the then Government of KwaZulu and one third of the total area of KwaZulu-Natal, to the control of the Ingonyama. The land transferred to the Trust was not only tribal land, but it also included all the urban townships within the jurisdiction of the Government of KwaZulu at the time, with the exception of land

[12] Section 239 of the interim Constitution.
[13] Self-Governing Territories Constitution Act 21 of 1971.

which were already privately owned. It is against that background that the Trust is presently the registered owner of approximately 30% of the land in KwaZulu–Natal.

[32] The Trust Act remained a provincial legislation, until 1997 when it was amended by the National Parliament.[14] As a result of these amendments, the Trust Act acquired the status of a national Act.

[33] Section 2A of the Amendment Act created the Ingonyama Trust Board to administer the affairs of the Trust and the Trust-held land. In practice, the Board provides strategic leadership in the management of land, while the day to day administration is done by the traditional councils acting under the leadership of the amakhosi, who are the actual leaders of the beneficiaries of the Trust-held land. Following the substitution of s 2(2) of the Trust Act by the Amendment Act, s 2(2) of the Trust Act requires the Trust to administer the Trust-held land '. . . for the benefit, material welfare and social well-being of the members of the tribes and communities as contemplated in the KwaZulu Amakhosi and Iziphakanyiswa Act, 1990 . . . referred to in the second column of the Schedule. . .'.

[34] Section 2(4) thereof enjoins the Ingonyama to deal with the Trust-held land '. . . in accordance with Zulu indigenous law or any other applicable law' and not to '. . . infringe upon any existing rights or interests' in the exercise of his or her functions. Section 2(5) of the Trust Act provides that the Ingonyama 'shall not encumber, pledge, lease, alienate or otherwise dispose of any of the said land or any interest or real right in the land, unless he has obtained the prior written consent of the traditional authority or community authority concerned. . .'. Importantly, section 2(8) provides that '[i]n the execution of his or her functions in terms of this section the Ingonyama shall not infringe upon any existing rights or interests'.

[35] Section 3 of the Trust Act in its original form placed the administration of the land which fell under the former KwaZulu Government firmly in the hands of the Trust. Section 3(1)*(b)*, introduced by the Amendment Act, restored State control over

[14] In terms of the KwaZulu-Natal Ingonyama Trust Amendment Act 9 of 1997 which came into operation on 2 October 1998 and the Rural Development and Land Reform General Amendment Act 4 of 2011 which came into operation on 16 May 2011.

functions which had been performed by the KwaZulu Government in respect of land prior to the commencement of the Trust Act.

Statutory protection of PTO Rights

[36] The primary form of residential tenure for persons living in the rural areas of the former homelands or self-governing territories, including the former KwaZulu homeland, remains a PTO right. However, Parliament is now obliged to transform the insecure forms of land tenure into a legally protected tenure. Land tenure reform is a major part of the government's land reform programme. The laws that perpetuated restrictions on the acquisition and occupation of land, based on a person's racial classification, needed to be repealed to foster conditions which enable citizens to gain access to land on an equitable basis.

[37] The PTO right was a recognised statutory form of tenure on unsurveyed land in the designated black rural areas under the Black Areas Land Regulations ('Proclamation 188 of 1969').[15] The regulations authorised the Black Affairs Commissioner to issue written PTO allotments for residential or arable use. The PTO was recorded in an allotment register,[16] and afforded exclusive and perpetual occupancy and use rights to the holders. Proclamation 188 of 1969 was repealed by the Land Affairs Act. The Land Affairs Act, an enactment of the KwaZulu Legislative Assembly, was assented to on 8 November 1993. Its objective was to provide for the disposal of government land; to provide for certain rights of tenure to land and for the registration of certain forms of title in respect of land; to provide for the development, use and subdivision of land; to provide for the removal of restrictive conditions; and to provide for incidental matters. However, the Land Affairs Act retained the institution of PTOs. Chapter XI of the Land Affairs Act (sections 24 to 26) continues to govern PTO rights over the Trust-held land. Under s 24 the power to demarcate allotments on government land or land owned by the traditional authority, including the Trust-held land, for the purposes of granting PTOs, is vested in the Minister of Land Affairs.

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[15] Black Areas Land Regulations, Proclamation R188, *GG* 2486, 11 July 1969.

[16] An allotment in terms of section 1 of the Land Affairs Act 'means a portion of Government land demarcated as contemplated in section 24'.

[38] Section 25(1) provides that the Minister is responsible for the granting and recording of PTOs in the prescribed manner after consultation with the tribal authority. In terms of s 25(2)*(a)*, a permission granted confers the right to use and improve the allotment for the purpose specified by the Minister. Section 25(2)*(b)* provides that subject to the provisions of sub-section 3, a PTO right endures for the life of the person to whom such right was granted; and in terms of section 25(2)*(c)*, after the death of the rights holder, such rights as may be prescribed are conferred on his widow. A PTO may only be withdrawn by the Minister in the prescribed manner after consultation with the tribal authority concerned.[17] Section 25(4) provides that PTO rights can be ceded or otherwise disposed of to such extent and in circumstances as may be prescribed, with the prior consent of the Minister, given after consultation with the tribal authority concerned. Section 26 makes provision for PTO rights holders to strengthen and formalise their rights by having the land surveyed and by acquiring deed of grant rights,[18] and a 'certificate of registered title contemplated in section 43(1) of the Deeds Registries Act, 1937, in respect of such allotment'.[19] The administration of PTOs in Trust-held land is also governed by the PTO Regulations.[20]

[39] It Is not necessary for the purposes of this judgment to deal in detail with the PTO Regulations, save to record that they define the process of issuing and registration of PTOs and the roles of the Minister and tribal authority, and that they remain in force to date.

[40] The administration of the Land Affairs Act was assigned to the Province of KwaZulu-Natal under Proclamation R63 of 1998.[21] However sections 24 to 26 (amongst others) were excluded from such assignment. Consequently the Minister remained the authority responsible for implementing the provisions governing PTOs. On 19 September 1998, the then Minister for Land Affairs (Mr Derek Hanekom) delegated his powers under ss 24 to 26 of the Land Affairs Act and PTO Regulations to the Provincial MEC for Traditional and Environmental Affairs. Thenceforth the

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[17] See s 25(3).
[18] Section 26(1).
[19] Section 26(2)*(b)*.
[20] KwaZulu Land Affairs (Permission to Occupy) Regulations, GN 32 of 1994.
[21] Proclamation R63 of 1998, *GG* 18978, 19 June 1998.

MEC became responsible for the issuing and registration of PTO rights on Trust-held land. The MEC is therefore responsible for the exercise of the Minister's powers to demarcate allotments and to issue and register PTOs on Trust-held land.

The protection of PTO rights under the Constitution

[41] Section 25 of the Constitution protects property rights. Section 25(1) provides that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'. In terms of section 25(6) of the Constitution

'[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) of the Constitution enjoins Parliament to enact legislation which provides legally secure land tenure or comparable redress to a person or a community whose tenure is legally insecure as a result of past discriminatory laws or practices. The principal statute through which this has been done is IPILRA which Parliament promulgated in 1996 as an interim law of application to informal rights to land, and it binds the State (section 5). As stated, it is a temporary law, which commenced on 26 June 1996 for 12 months but its duration has been extended since its enactment as provided for in section 5(2).

[42] Section 2 of IPILRA provides over-arching protection against the deprivation of existing informal rights to land, including and specifically PTOs. It requires that any deprivation of informal rights to land must be with the rights holders' consent; or, if the land is held on a communal basis, in accordance with the community's custom or usage, be subject to compensation, and approved by the majority of community members present at a specially convened meeting where due process is followed.

[43] IPILRA defines 'informal right to land' to include –

'(*a*) the use of, occupation of, or access to land in terms of—

(i) any tribal, customary or indigenous law or practice of a tribe;

(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in—

(*aa*) . . .

(*bb*) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or

(*cc*) . . .

(*b*) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;

(*c*) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or

(*d*) . . .

but does not include—

(*e*) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and

(*f*) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier.'[22]

[44] The definition in paragraph *(d)* must be read with Schedules 1 and 2 of the Upgrading of Land Tenure Rights Act.[23] Land tenure rights in schedule 2 to the Upgrading of Land Tenure Rights Act[24] include '[a]ny permission to occupy any allotment within the meaning of the Black Areas Land Regulations, (Proclamation No. R.188 of 1969)', and '[a]ny right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question'. The preamble to the Upgrading of Land Tenure Rights Amendment Act states that it is 'the government's policy that the upgrading of land tenure rights should henceforth be demand driven and that security of tenure should be protected under a variety of forms of tenure.'[25] A land tenure right acquired under indigenous law or customs of the tribe concerned, also enjoy protection under s 1 of the Upgrading of Land Tenure Rights Act.

Changes to the PTO system by the Trust and the Board

[22] Section 1.
[23] Upgrading of Land Tenure Rights Act 112 of 1991, assented to on 27 June 1991.
[24] Paragraph 2 of Schedule 2 of the Upgrading of Land Tenure Rights Act.
[25] Upgrading of Land Tenure Rights Amendment Act 34 of 1996, assented to on 27 June 1996.

[45] In April 2007, the Board decided that PTOs should no longer be issued and that the then existing PTO rights in land should be converted to lease agreements for both business and residential purposes. Occupants would have to pay rental to remain entitled to live on the land. The Board designated this project 'the PTO Conversion Project'. The Trust and the Board communicated to the public, through its official website,[26] that PTOs would be granted until April 2007, and would only be issued in future in exceptional circumstances as they afford limited security for funding and registrable interests.

[46] On 13 November 2007, the Board presented its 2006/2007 Annual Report to the National Assembly's Portfolio Committee on Agriculture and Land Affairs ('the Portfolio Committee'). The Board advised the Portfolio Committee of its decision to terminate the issuing of PTOs and to issue leases instead. The Board also reported to the Portfolio Committee that:

'In anticipation of the coming into operation of the Communal Land Rights Act, 2004 it has been agreed that Permissions to Occupy will in future only be issued in exceptional circumstances and that in all other cases the Board will issue a lease. This avoids creating more old order rights.'

The Communal Land Rights Act[27] which has not yet been promulgated provides, insofar as individuals are concerned, a regime for the conversion of 'old order rights' into 'new order rights'. The latter are ownership, or a comparable right. Tenure under customary law or a PTO qualifies as an old order right. Conversion to ownership would deprive the Trust of its vested rights in the land concerned. But it is noteworthy in the light of the statement of the Board that excluded from the definition of 'old order rights' are:

'(i) any right or interest of a tenant . . . if such right or interest is purely of a contractual nature; and

(ii) any right or interest based purely on temporary permission granted by the owner . . . on the basis that such permission may at any time be withdrawn . . .'[28]

[47] The Board confirmed its decision to terminate the issuing of PTOs in its 2008/2009 Annual Report presented to the Portfolio Committee on 28 October 2009.

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[26] www.ingonyamatrust.org.za.
[27] Communal Land Rights Act 11 of 2004.
[28] Section 1 of the Communal Land Rights Act.

The Board also revealed in its report that ‘PTOs are not registrable and have not been issued since 2007’.

[48] In its Annual Report of 2011/2012, the Board stated that it was abolishing PTOs because PTOs are ‘racially based form of land tenure’ that is ‘weak in law’. In order to curb the weakness in the system of indigenous tenure allocations, the Board concluded that the system had to be upgraded to a system which supported the issues underpinning traditional practice, and that ‘the closest it could come to was the lease’. As from April 2007, the Trust insisted that ‘all new tenure applications should be leases’ and that the PTOs had to be upgraded to leases. The Board advanced three reasons for this decision. The first was that ‘a PTO remains the aberration from the racially based land tenure’. The second was that the PTO was vulnerable. The third was that PTOs are uneconomic and unsustainable in that a PTO holder is only liable to pay R48 per annum forever, irrespective of the size and the use of the land.

[49] In its Annual Report of 2013/14, the Board recorded that it was continuously encouraging land occupants through roadshows and workshop campaigns ‘to convert these rights to a new order being the lease’. The residents who applied for PTOs were discouraged from doing so, and told to enter into lease agreements instead. In November 2017, the Board published notices directed at persuading PTO holders to convert to lease agreements, representing this conversion as an upgrade. The Board gave a similar explanation to the Portfolio Committee in March 2018.

[50] The applicants assert that under the regime introduced by the Board the decision making power to conclude leases is vested entirely in the Trust and traditional councils. The process does not make provision for the involvement of the family and the local community. In this way, the lease agreements also deprive families, neighbours and communities of their customary law entitlement to participate in the decision making process in respect of the occupation and use of tribal land.

[51] On 20 November 2017 the Board published a series of media advertisements relating to the continued implementation of the PTO Conversion Project in which it

invited all people, companies and other entities holding land rights on Trust-held land in terms of PTOs, to approach the Board with a view to upgrading the PTOs into long term leases in line with the Ingonyama Trust Board Tenure Policy. The notices also required the applicants to produce evidence that they have at all material times complied with the conditions attached to the PTOs, in particular the payment of levies. The Portfolio Committee raised concerns about the Trust's advertisements for residential leases and asked the Trust for an explanation about the PTO Conversion Project. The Portfolio Committee also asked the Department of Rural Development and Land Reform (DRDLR) whether the DRDLR had approved the conversion of PTOs to leases which was by then underway, and whether replacing PTOs with leases was legal. It also asked as to what benefit would accrue to people who had previously been granted PTOs. The Board did not furnish the Portfolio Committee with the requested information. The only justification which the Chairperson of the Board gave for such conversion was to raise additional funds as the Board considered the budget provided by the State to the Trust and Board insufficient. Ultimately the Portfolio Committee instructed the Trust and the Board to stop issuing leases until the legality of the process was cleared up with the DRDLR. The Board did not take heed of this instruction.

[52] The decision to cease issuing PTOs negatively affected employees of the State, resulting in the Office of the Premier of KwaZulu-Natal addressing a letter to the Board raising the concern that the Government was no longer able to process housing allowance applications for its employees as the Board had ceased to issue PTOs. The Premier's intervention came to nought.

[53] On 11 December 2017, the applicants' attorneys addressed a letter to the Minister, the Director–General, the Deputy Director–General and the Trust, seeking a written undertaking from the Trust that it would withdraw the public notices it had issued on 20 November 2017, which called upon all PTO holders to conclude lease agreements by 15 January 2018.

[54] On 18 April 2018 the Board reported to the Portfolio Committee that it has met with the DRDLR but that no agreement was reached on the implementation of the PTO Conversion Project. At a subsequent meeting with the Board on 23 May 2018,

the Chairperson of the Portfolio Committee complained that the Board's website continued to carry the advertisement that people should convert their PTOs to leases.

[55] It is against this background that the applicants have launched this application, contending that the actions of the Trust and the Board, in requiring or inducing the residents of Trust-held land to conclude lease agreements, and to 'convert' PTOs to leases, are unlawful and constitutionally invalid on the following grounds:

(a) They have deprived the holders of PTOs and other informal land rights in Trust-held land of their security of tenure and property rights under the Constitution, statutory law and customary law. This violates the rights-holders' right to property and to security of tenure under section 25 of the Constitution, and their right under IPILRA not to be deprived of existing informal land rights without consent. In so acting, the Trust and the Board have thereby breached their duty under section 7(2) of the Constitution to respect, protect, promote and fulfil the section 25 rights of the residents.

(b) The Trust and Board have no authority under the Land Affairs Act and the PTO regulations to withdraw or dispose of the rights vested in PTO-holders.

(c) The Trust and the Board have acted in contravention of their duties under section 2 of the Trust Act to respect the existing land rights of the residents of Trust-held land.

(d) The Trust and the Board have breached the rights of residents and occupiers to procedural fairness by inducing or requiring them to conclude lease agreements without giving them full and proper notice of the nature of the agreement and its effect on their existing rights and interests.

(e) The Trust and the Board have acted unlawfully in that their actions were materially influenced by an error of law, and have been taken for reasons not authorised by the Trust Act or the Land Affairs Act; for an ulterior purpose or motive; and because irrelevant considerations were taken into account and relevant considerations not considered.

[56] In May 2018, in response to a parliamentary question from the Economic Freedom Fighters, the Minister furnished details of the extent of land leased out by

the Trust for private use, the value of the leases, the location and size of the leased land. The Minister disclosed that the Trust leased out a total of 61 671 hectares of land. The Trust's lessee financial report confirmed that residential leases and leases for community schools, churches or crèches are widespread across the Trust-held land. The Trust also leases out land for agriculture, mining, telecommunications, infrastructure and commercial purposes.

[57] As to the Minister, the applicants contend that the Minister failed, and persists in such failure, to ensure that the PTO regulations, or another system which provides at least an equivalent security of tenure, are implemented. It is further contended that the Minister is in breach of her statutory obligation, and or her section 7(2) constitutional obligation to respect, protect, promote and fulfil the section 25 rights of residents. The applicants contend further that the Minister and the MEC failed in their statutory duty to prevent the Trust and the Board from converting PTOs into leases, and to protect the customary law, statutory and constitutional rights of the beneficiaries and residents of the Trust-held land, to their detriment. As a result of such failure on the part of the Minister and the MEC, the beneficiaries and residents of the Trust-held land have suffered enormous damages.

[58] In her answering affidavit, the Minister concedes that she and the DRDLR were aware of the Trust's and the Board's PTO Conversion Project. Mr Sello Ramasala, the head of the DRDLR Unit, explained the DRDLR's oversight role in relation to the Trust. Mr Ramasala stated that there is no DRDLR policy authorizing the conversion of PTOs to leases. According to Mr Ramasala, the current DRDLR policy is that PTOs must be upgraded to full ownership. He unequivocally states that the conversion of a PTO to ownership requires the approval of the Minister.

[59] The applicants' contention is that the conduct of the Trust and the Board in converting PTOs to leases, as well as the conclusion of leases with the beneficiaries and residents of Trust-held land, has the effect of violating the beneficiaries' and the residents' customary law rights to land and/or informal rights, and the constitutional right to property. The effect of such infringement has also impinged negatively on State employees who sought proof of land ownership.

[60] The Trust, the Board and the Minister are opposing the application. In their answering affidavits, the Trust and the Board raised five points *in limine*, namely that the applicants were required to join the MEC for Agriculture, the Traditional Councils and the various amakhosi, the local houses of traditional leaders and the Premier; the failure of the third to ninth applicants to exhaust internal remedies; failure to refer the dispute to arbitration; the applicants' failure to meet the requirements for certification of a class action, and the absence of both a factual and legal basis for the relief sought.

[61] On the merits of the application, the Trust and the Board contend that leases are sanctioned by the Trust Act as amended. It therefore cannot be argued that the conclusion of leases is unconstitutional without impugning the relevant parts of the Trust Act. The effect of the Trust's and Board's contentions is that when they concluded leases with the beneficiaries and residents of the Trust-held land, they were acting within the dictates of the Trust Act, and with the informed consent of the lessees. They denied that any form of duress, coercion or undue influence is exercised by them.

Points in limine

Non-joinder

[62] As stated, the Trust and the Board contend that the MEC for Agriculture, the traditional councils, the various amakhosi who have jurisdiction over the Trust-held land, the local houses of traditional leaders and the Premier of the province ought to have been joined as interested parties in the application.

[63] In *Amalgamated Engineering Union v Minister of Labour*,[29] the Appellate Division held that the question of joinder should not depend on the nature of the subject-matter but on the manner and extent to which the court's order may affect the interests of a third party. In *Gordon v Department of Health, KwaZulu-Natal*,[30] the Supreme Court of Appeal held:

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[29] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657.
[30] *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) para 9.

'…The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.' (Footnote omitted)

[64] The situation must be that the order or judgment:

'…cannot be sustained and carried into execution without necessarily prejudicing the interests of parties who have not had an opportunity of protecting their interest by reason of their not having been made parties to the cause.' [31]

In such an instance, such parties have a legal interest in the matter and must be joined.

[65] In support of their contention that the MEC for Agriculture should have been joined, the Trust and the Board assert that in terms of the amendment to the PTO Regulations,[32] the responsible Minister for the purpose of the PTO Regulations is the MEC for Agriculture. The amendment notice amended the PTO Regulations to substitute in regulation 3 the words 'Minister for Agriculture' with 'Member of the Executive Council responsible for Agriculture', and also substituted the definition of 'Minister' in regulation 1 of the PTO Regulations with the 'Minster of Land Affairs'. The effect of these amendments is that the Minister of Land Affairs is the Minister responsible for the PTO Regulations. The Trust and the Board have not set out any factual basis for their objection to the non-joinder of the traditional councils and the amakhosi. They merely allege that each inkosi has a personal interest in the matter by virtue of being a head of the political/administrative structure of the traditional authority, ie the traditional council or local house of traditional leaders, but do not identify what that personal interest is, and how it will be affected by the relief which the applicants seek. In any event, no relief is sought against the 252 traditional councils, and/or the 300 amakhosi. As to the Premier, Proclamation R63 of 1998 makes it clear that only certain provisions of the Land Affairs Act were assigned to the Premier of the Province. In terms of item *(a)*(i) of the Proclamation, the assignment excluded ss 24 to 26 of the Land Affairs Act, which are the provisions governing PTOs. The Minister thus remains the responsible authority for the PTOs under the Land Affairs Act, and the Minister has delegated to the MEC for Co-

[31] *Bekker v Meyring, Bekker's Executor* (1828 – 1849) 2 Menz 436 at 442.
[32] Amendment of the KwaZulu Land Affairs (Permission to Occupy) Regulations, 1994, GN R1238, *GG* 19300, 2 October 1998.

Operative Governance and Traditional Affairs who has been joined as the fourth respondent in these proceedings.

[66] The court has to ascertain the real or true nature of the dispute between the parties. The characterisation of a dispute by a party is not necessarily conclusive. Ascertaining the true nature of the dispute would assist to establish whether third parties would be affected by the judgment.[33] There is nothing to show that the traditional councils or the local houses or the amakhosi or the Premier, would be affected by the relief which the applicants seek. I find that the traditional councils, the local houses, amakhosi and the Premier have no direct and substantial interest herein. In the circumstances, the contention that these parties ought to have been joined in the proceedings is without any merit.

Internal Remedy

[67] The Trust and the Board contend that the third to ninth applicants ought to have exhausted the internal remedy provided by s 49 of the KwaZulu-Natal Traditional Leadership and Governance Act ('KZNTLGA')[34] and s 21 of the Traditional Leadership and Governance Framework Act ('TLGFA').[35] This contention

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[33] See also *Tshivhulana Royal Family v Netshivhulana* 2017 (6) BCLR 800 (CC) para 39.

[34] KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005. Section 49 provides as follows:

'49. Dispute resolution. (1) Whenever a dispute concerning customary law or customs arises within a
traditional community or between traditional communities or other traditional institutions on a matter arising from the implementation of this Act or otherwise, members of such a community or institution and traditional leaders within the traditional community or traditional institution concerned must seek to resolve the dispute internally and in accordance with customary law and customs.
(2) Any dispute contemplated in subsection (1) that cannot be resolved must be referred to
(*a*) the Provincial House of Traditional Leaders, which must seek to resolve the dispute in accordance with its rules and procedures within 30 days;
(*b*) the responsible Member of the Executive Council, in the event that the Provincial House of Traditional Leaders is unable to or has failed to resolve the dispute, who may, subject to the provisions of21 (1) (*b*) and 25 of the Traditional Leadership and Governance Framework Act, 2003, refer the matter to the Commission for its recommendation within 30 days; and
(*c*) the Premier, in the event that the responsible Member of the Executive Council is unable to or has failed to resolve the dispute, who must resolve the dispute within 30 days after consultation with
(i) the responsible Member of the Executive Council;
(ii) the parties to the dispute; and
(iii) the Provincial House of Traditional Leaders.'

[35] Traditional Leadership and Governance Framework Act 41 of 2003. Section 21 provides as follows:

'21. Dispute and claim resolution.—(1) (*a*) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the

was understandably not persisted in during oral argument because the true nature of the dispute in these proceedings does not concern customary law or customs arising within a traditional community or between two traditional communities or traditional institutions as contemplated in sections 49 and 21. The application concerns the lawfulness of the actions of the Trust and the Board as well as the Minister.

Failure to Refer the Dispute to Arbitration

[68] The Trust and the Board contend that the applicants are, in terms of reg 25 of the KwaZulu-Natal Ingonyama Trust Administrative Regulations, 1998,[36] obliged to refer the dispute to arbitration in terms of the Arbitration Act,[37] in the event of the dispute not being resolved either through negotiation or mediation.

[69] It is not in dispute that the applicants have not made any attempt to have the dispute resolved either through negotiation or mediation. The matter pertains to the alleged unlawful and unconstitutional activities of the Trust and Board, as well as those of the Minister. The arbitrator has no power in law to declare the conduct or executive action unconstitutional and invalid. In terms of section 172(1)*(a)* of the Constitution, the power to declare law or conduct inconsistent with the Constitution and invalid is vested in the courts. In the circumstance, reg 25 does not apply to the conduct alleged by the applicants in this action because the conduct allegedly infringes or threatens a right in the Bill of Rights. Arbitration cannot therefore be competent as a substitute for judicial review and as a mechanism for the

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dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.
(*b*) If a dispute or claim cannot be resolved in terms of paragraph (a), subsection (2) applies.
(2) (*a*) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules and procedures.
(*b*) If a provincial house of traditional leaders is unable to resolve a dispute or claim as provided for in paragraph (a), the dispute or claim must be referred to the Premier of the province concerned, who must resolve the dispute or claim after having consulted—
(i) the parties to the dispute or claim; and
(ii) the provincial house of traditional leaders concerned.
(*c*) A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.
(3) Where a dispute or claim contemplated in subsection (1) has not been resolved as provided for in this section, the dispute or claim must be referred to the Commission.'
The TLGFA has in the meantime been repealed by the Traditional and Khoi-San Leadership Act 3 of 2019, which Act came into effect on 1 April 2021.

[36] KwaZulu-Natal Ingonyama Trust Administrative Regulations, 1998, GN R1237, *GG* 19300, 2 October 1998.

[37] Arbitration Act 42 of 1965.

determination of the lawfulness of executive actions and a dispute concerning constitutional rights.[38]

Class action

[70] The Trust and the Board contend that the application is a class action, and that the applicants have failed to meet the requirements for the certification of a class action and representative standing. Consequently, so the contention goes, the interests of justice do not favour permitting the application to proceed. The applicants have lodged this application under s 38*(a)* to *(d)* of the Constitution to enforce and protect their constitutional rights to property against the Trust, the Board and the Minister. Section 38 of the Constitution provides that '[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. . .'. The applicants have launched this application, acting both in their own interest and in the interest of other beneficiaries and residents of Trust-held land falling under the Trust and the Board, for declaratory relief, interdictory relief and structural orders, relying on the standing provision in s 38 of the Constitution to do so.

[71] In my view the applicants are correct in arguing that the judgment in *Mukaddam v Pioneer Foods (Pty) Limited and Others* 2013 (5) SA 89 (CC) provides a complete answer to the contention that the present proceedings are a class action in the first place. In the main the majority of Jafta J dealt with the issue of the correct approach to the certification of class actions, properly so-called. Paragraph 40 of the judgment reads as follows.

'What is said in this judgment about certification that must be obtained before instituting a class action must not be construed to apply to class actions in which the enforcement of rights entrenched in the Bill of Rights is sought against the State. Proceedings against the State assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation. Class actions in those circumstances are regulated by s 38 which confers, as of right, the authority to institute a

[38] See also *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and another* 2011 (4) SA 642 (GSJ) para 68.

class action on certain persons, defined in the section. Moreover, claims for enforcing rights in the Bills of Rights may even be brought in the wider public interest without certification.'

In the circumstances, I am satisfied that the case before us, to the extent that it may be called a 'class action', is one of those which are regulated by s 38 of the Constitution.

No Legal and Factual Basis for Relief Sought

[72] The respondents contend that in the absence of an allegation that the third to eighth applicants were holders of PTO rights, which the Trust or the Board cancelled, there is no legal basis for the relief sought by the applicants. They contend that in order for the applicants to succeed, they have to set out the facts that the Trust and the Board had first of all cancelled their PTO rights, and secondly that the Trust and the Board then concluded the lease agreements with the holders of such rights without their genuine and informed consent. The Trust and the Board therefore argue that the applicants have not satisfied the jurisdictional requirements of s 21 of the Superior Courts Act.[39]

[73] The question which arises is whether the Trust and the Board or the Minister have raised a genuine dispute in respect of the allegations by the applicants relating to the cancellation of PTO rights and the conclusion of lease agreements. The Trust and the Board conceded that they had ceased issuing PTOs and encouraged PTO rights holders to conclude leases, in order to improve their land tenure. The Trust and the Board state that in law they do not have the right to issue and withdraw PTO rights, but contend that they do have the legal authority to conclude leases. They contend that at the time they concluded such leases with the beneficiaries and residents, they were exercising their powers in terms of the Trust Act. It is not in dispute that the Minister has oversight over the Trust and the Board's execution of their functions and exercise of their powers under the Trust Act. As a consequence, the only legal issues left for determination are, namely (a) whether the Trust and Board had the right to interfere with PTO rights, (b) whether the Trust and the Board, when concluding the leases, were acting within the boundaries of the Trust Act, and (c) whether the Minister exercised the required oversight over the activities of the Trust and the Board. The Minister admits that she was aware of the PTO Conversion

[39] Superior Courts Act 10 of 2013.

Project undertaken by the Trust and the Board. Neither the Trust nor the Board nor the Minister has raised any genuine dispute of fact in this matter. They have pleaded only bald denials, which do not suffice to raise a genuine dispute of fact.

[74] Given its publicity campaigns proclaiming the policy of substituting leases for PTO rights, the Trust and the Board only have themselves to blame for the contention by the applicants that the Trust and the Board are about the business of 'cancelling' PTO rights. The policy of no longer sanctioning PTO rights had to bring about that consultation by the Minister 'with the tribal authority concerned' (as required by s 25 of the Land Affairs Act in the case of an application for PTO rights) would be fruitless. It is undeniable that the aim of the Trust and the Board was the termination of PTO rights.

Issues for determination

[75] The primary issue to be addressed in this matter is whether the conduct of the Trust and the Board with regard to PTO rights, and in concluding residential lease agreements with persons living on Trust-held land who were PTO rights holders, or who were entitled to hold PTO rights or any other informal rights to land protected under IPILRA, was lawful and constitutional.

[76] If the conduct of the Trust and the Board is found to be unlawful and unconstitutional, the following secondary issues arise for determination:

(a) Whether the Minister, as the functionary responsible for the administration of both the Land Affairs Act and the Trust Act, failed to exercise effective oversight of the Trust and the Board to ensure that they act within their powers and to respect and protect the property rights and security of tenure of the residents of Trust-held land, and whether she has thereby violated her statutory and constitutional duty in this regard; and

(b) Whether the Minister and the MEC are under a duty to exercise the powers conferred by Chapter XI of the Land Affairs Act and PTO Regulations – viz, to demarcate allotments, issue and register PTOs, to survey such allotments, and to obtain certificates of registered title in respect of the allotments on Trust-held land.

The Right to Lease

[77] Simply put, the case of the Trust and the Board concerning the challenge to the

validity of the leases in question in this matter is that in terms of the Trust Act they have the power to conclude leases, and that the exercise of that power must accordingly be regarded as unassailable. Sections 2(5) and 2A(2) of the Trust Act are identified as the source of the power. I have already recorded the provisions of section 2(5) in para 34 above. Section 2A(2) of the Trust Act reads as follows.

'The Board shall administer the affairs of the Trust and the Trust land and without detracting from the generality of the aforegoing the Board may decide on and implement any encumbrance, pledge, lease, alienation or other disposal of any Trust land, or of any interest or real right in such land.'

These sections must be read with s 2(1) of the Trust Act which establishes the Trust as a 'corporate body', a concept quite inconsistent with our law of trusts. Be that as it may, that corporate body is established 'subject to the provisions of this Act, to do all such acts and things as bodies corporate may lawfully do.'

[78] No authority is at this time required for the proposition that a purely literal interpretation of these provisions cannot prevail without more. On the contrary, they must be read and understood in context. The interpretative process is an objective exercise:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.'[40]

In particular, words should not lightly be interpreted in a fashion which undermines the apparent purpose of the legislation.

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[40] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 para 18.

[79] In the case of the Trust Act one has to be careful not to be overwhelmed by knowledge or beliefs concerning the origins of the enactment. It is common knowledge that the Trust Act was conceived on the eve of the creation of the new democratic South Africa. It was the product of the exercise of legislative and executive power by two pre-democratic structures, namely the KwaZulu Legislative Assembly and the then National Government of South Africa. Their motives for acting as they did need not concern us and should not disturb the interpretative process. Whether the outcome is constitutional or democratic are not issues before us.

[80] Putting aside these matters which are perhaps best described as 'political', an important element of the context of the legislation is the fact that the overwhelmingly major part of the land in question was being administered and occupied, as it had since time immemorial and prior to 1994 been administered and occupied, in accordance with the tenets of customary or indigenous law. Some of the land was not allocated to individuals. (Some of such land would be grazing land which would be regarded as a communal allocation.) Land used for residential purposes and for the purpose of tillage was land allocated to an individual. (I use the word 'individual' loosely merely to distinguish such tenure from that which obtained in the case of communal or other land.)

[81] The crucial point about an allocation of residential and arable land, from the perspective of the present enquiry, is that in terms of indigenous law no rental was paid for the right of occupation; that is to say, no rental was payable by the beneficiary of the allocation (a) prior to the advent of the Trust Act, to the KwaZulu Government or its predecessors in title; and (b) after the advent of the Trust Act, to the Ingonyama, the Trust or the Board. In that context the concept of a lease or lease-hold was unknown to Zulu customary law. The distinction between customary or indigenous title to land, and leasehold rights, was not in dispute between the parties in the present matter. Nor, as I understand the position, could it have been.

[82] Bearing that background in mind, one must examine the Trust Act in order to discern its purpose. One should perhaps start with the proposition that it was not the purpose of the establishment of the Trust to generate an income for the Trust (or the

Ingonyama) from the letting of the property, or otherwise. In terms of s 3(1)*(a)* of the Trust Act the land was transferred to the Ingonyama as Trustee of the Trust 'for and on behalf of the members of the tribes and communities and the residents referred to in s 2(2) of the Act'. Section 2(2) of the Act is the principal statement of the duties of the Trust, and accordingly of the purpose of its establishment.

'The Trust shall, in a manner not inconsistent with the provisions of this Act, be administered for the benefit, material welfare and social well-being of the members of the tribes and communities as contemplated in …'

In terms of s 4 the costs of the administration of the Board (and according the Trust, as far as can be discerned from the legislation) are to be borne by the Department of Land Affairs. Using the land to generate income to finance the principal object of the Trust, namely the administration of the land, is not contemplated by the Trust Act.

[83] Subsection 3(3) of the Trust Act repeats the identification of the beneficiaries of the land.

'All land and real rights referred to in subsection (1) shall be transferred to the Ingonyama as Trustee of the Ingonyama Trust referred to in s 2(1) for and on behalf of the members of the said tribes and communities and the said residents, …, but subject to any existing right or obligation on or over such land and subject also to the provisions of this Act.'

[84] Finally, and most importantly, s 2(4) of the Trust Act reads as follows.

'The Ingonyama may, subject to the provisions of this Act and any other law, deal with the land referred to in s 3(1) in accordance with Zulu indigenous law or any other applicable law.'

Insofar as the leasing activities of the Board and the Trust with respect to residential and arable land are concerned, there is no claim that they are acting in accordance with the provisions of any other law, let alone one which in the present context may be taken to be in accordance with Zulu indigenous law.

[85] There is much to be said for the proposition that the Ingonyama, the Trust and the Board have no power to let land or the buildings thereon for residential purposes, or for tillage; and probably also for the purposes of the exercise of communal grazing rights. To do so is not in accordance with Zulu Indigenous Law. It is more than arguable that, in context, the right to let land which is implicit in sections 2(5) and 2A(2) of the Trust Act must be read as being confined to circumstances where the

right of occupation and use of land is not ordinarily governed by Zulu Indigenous Law or any other applicable law. It is the applicants' contention that the Land Affairs Act, and in particular the provisions relating to the grant of PTO rights, is such an other applicable law, but that is a subject to be dealt with hereunder.

PTO Conversion Project

[86] It is common cause that the Trust and the Board have no authority to issue and withdraw or dispose of the rights vested in PTO holders. In terms of the Land Affairs Act and PTO Regulations, this power is vested in the Minister or the MEC.[41] A PTO is a registrable and transferable real right. The Land Affairs Act provides for land allotted for a PTO to be surveyed and for a certificate of registered title thereafter to be obtained in respect of such allotment.[42] Full common-law ownership is thereby achieved.

[87] As already stated, on its own frolic, the Board decided in April 2007 that the issuing of PTOs should cease, and that the then existing PTO rights should be converted to lease agreements on the pretext that PTOs afforded limited security for funding and that they are not registrable interests. In the place of PTOs, the Board recommended leases as its own 'preferred tenure right' in the place of the PTOs. In the same year in November, the Board informed the Portfolio Committee of its decision to abolish the issue of PTOs and replace them with leases. The Trust and the Board then proceeded to establish new administrative processes for persons applying for tenure rights on Trust-held land through leasehold, and they called the process the 'PTO Conversion Project'.

[88] The Trust and the Board continued to implement the PTO Conversion Project by escalating its implementation through the publication of public notices, calling on residents to upgrade their PTOs into long term leases. In 2017 the Board published a series of media advertisements relating to the continued implementation of the PTO Conversion Project. The Trust insisted that all new applications for PTOs should cease. The Board referred to the leasehold as its 'preferred tenure option'. The third applicant testified on the measures that the Trust took to cancel the existing PTO

[41] See ss 25(1), (3) and (4) of the Land Affairs Act; and the PTO Regulations.
[42] See s 26.

rights and to prevent the issue and certification of any new PTO rights. This finds support in the Trust's and the Board's own statements and reports on their PTO Conversion Project and their public advertisements and notices, calling on PTO rights holders to upgrade their rights by concluding leases agreements with the Trust. According to the fifth applicant, when residents, including himself, applied for the issue of a new PTO or a certificate of an existing PTO right, they were urged and persuaded to enter into a lease agreement instead.

[89] As a result of the decision that PTOs would no longer be issued on Trust-held land, the employees in the rural areas who were members of the Public Service Coordinating Bargaining Council ('PSCBC') with valid PTOs, and who would in terms of such PTOs be deemed homeowners for the purposes of accessing a housing allowance, were denied access to such housing allowance. In the absence of an alternative to prove tenure over their homes for the purposes of accessing housing allowances, the government employees had no choice but to conclude lease agreements with the Trust. The Trust contends that PTOs are racially discriminating instruments, and that their 'reintroduction will offend the Constitution and the Abolition of Racially Based Land Measures Act 108 of 1991.' The condition for conversion from PTOs to ownership is that the Minister and the community must first approve the intended conversion. There is nothing to show that such permission had been obtained when the Trust and the Board implemented their purported PTO Conversion Project.

Leases

[90] Under common law, a contract of lease is entered into by two parties, who with 'the requisite intention agree that the one party, called the lessor, shall give the temporary use and enjoyment of property to the other, called the lessee, in return for the payment of rent'.[43] There are two essentials of a lease, namely the use and enjoyment of the property, and the rental to be paid in return for it. The lessee does not have any right beyond the use and enjoyment of the property in question.

[43] G Glover *Kerr's Law of Sale and Lease* 4 ed (2014) at 329; 14(2) *Lawsa* 2 ed para 1.

[91] The Trust claims that when it introduced leases instead of PTOs, it was exercising its statutory powers, "reinforcing" customary rights by giving residents security in the form of leasehold rights. As a consequence, the Trust and the Board discouraged all residents who were and have been applying for PTOs, and told them to enter into lease agreements. The Board encouraged the occupants of Trust-held land through roadshows and workshops campaigns to 'convert PTO rights' to 'a new order right', being the lease holding. As stated earlier, the Trust holds land in trust for the specified beneficiaries, who are the true ultimate owners of it, in accordance with customary law. Ownership consists primarily of the relationship between a legal subject and a thing or legal object. This relationship comprises complete and absolute control over the thing – the sum total of all possible rights and capacities over the thing. The content of ownership is summarized as the capacity to possess, use, enjoy, alienate and destroy the thing.[44]

[92] Ownership of land includes, firstly, the right to possess the land. Possession consists of physical control of a thing, coupled with the intention to hold and control the thing for one's own benefit.[45] Secondly, it includes the right to use and to enjoy the thing, confers on the land owner the capacity to use the land for any ordinary and natural purpose, and entitles the owner to the enjoyment of the property and its fruits. Ordinary and natural use of land includes planting and sowing on the land, building on the land, and using and enjoying water on and beneath the surface of the land.

[93] The third incident of ownership of land is the right to alienate the property. By alienation it is meant the transfer of complete ownership to another, but also includes the right to dispose of the property in other ways.[46] The Chairperson of the Board in its 2016/17 Annual Report, referring to the beneficiaries of Trust-held land, stated that they 'are entitled to all the benefits which the land owner as understood under the Roman Dutch Law enjoys'. As the trustee, the Trust has a fiduciary duty to hold and use the land for the benefit of the beneficiaries of the Trust, ie for the members

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[44] *Johannesburg Municipal Council v Rand Townships Registrar and others* 1910 TPD 1314; *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530 at 537; *Visser, NO v Die Sekretaris van Binnelandse Inkomste* 1968 (2) SA 78 (O) at 83C.
[45] *Groenewald v Van der Merwe* 1917 AD 233; *Rubin v Botha* 1911 AD 568; *Zandberg v Van Zyl* 1910 AD 302.
[46] Van der Linden *Koopmans Handbook* 1 7 2; *Grotius* 2 10-1.

of Zulu communities and residents living on Trust-held land. It follows that the Trust does not hold the land in its personal interest or for its personal benefit.

[94] Innes CJ in *Robinson v Randfontein Estates Gold Mining Co Ltd*,[47] stated the following about fiduciary relationships between the trustee and beneficiaries of a trust:

'Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position - where his interests conflict with his duty . . . There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent.'

Section 2(2) of the Trust Act can be said to be the statutory entrenchment of this fiduciary duty.

Customary law rights

[95] As the nominal owner of Trust-held land, the Ingonyama does not have exclusive rights to own, control and regulate Trust-held land, nor does it have an unfettered right to deal with such land. It is common cause that the Trust and the Board in the execution of their functions and exercise of their powers in terms of the Trust Act, must act within the parameters of such Act, indigenous law, any other applicable law and the Constitution. The Trust and the Board may therefore exercise no power and perform no function beyond that conferred upon them by law.

[96] In terms of s 2(4) of the Trust Act, the Trust must deal with the land referred to in s 3(1), in accordance with Zulu indigenous law or any applicable law.[48] Under customary law, each family head has the right to be allotted a family home site, arable land and a right to graze his livestock on pasture lands. The land is allotted to an individual without requiring anything in return in the nature of a purchase price or rental. The individual's holding of a portion of the land allotted to him or her is sacrosanct in that it is inviolable and passes from generation to generation (inheritable). It becomes the property of the individual's family.[49] Nothing can be

[47] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-178.
[48] The Board has a similar obligation under s 2A(2) of the Trust Act.
[49] *Ingonyama Trust v Radebe and others* [2012] 2 All SA 212 (KZP) para 40; *Kweneng Land Board v Matlho and another* [1992] BLR 292 (CA).

done with it without the involvement and consent of such individual or his or her family members. The owner of residential or arable land acquires an exclusive right to its use.

[97] It has been argued on behalf of the Trust and the Board that according to Zulu customary law land is ‘indivisible’ and ‘inalienable’. Consequently, so the contention goes, the effect of this is that no individual Zulu under the tribal system can claim individual ownership from any tribal communal land. The Trust and the Board contend further that ‘allotment to an individual family is exclusive to that family with all the safeguards but does [not] lead to land being alienated’.

[98] The concept that land under Zulu customary law is ‘indivisible and inalienable’ means that an owner of a particular portion of land cannot take his or her portion and secede from the rest of that particular tribe or community of which he or she is a member, and that the land cannot become a subject of a private sale, as with freehold. It does not follow that an owner or allottee cannot exercise the incidents of ownership in respect of the allotted portion of land to the exclusion of all other members of the community, save the members of his or her family. He or she can transfer land to any other person who is willing and prepared to reside in, become party of the community in which the land is situated, and to owe allegiance to the inkosi of that area concerned. A person who takes occupation of a built up plot or allotment reimburses the owner for the buildings erected thereon.

[99] I agree with Professor Nhlapo’s statement that payment of regular rental for land to traditional authorities is an unknown phenomenon under Zulu customary law. I also agree with his further statement that in modern times rental is sometimes paid to individuals or families who rent land to tenants and that this is a bilateral arrangement between individuals rather than a feature of customary law. Such private rental arrangements between individuals are not regulated by traditional authority structures. Conversion of indigenous ownership of homesteads and fields into common law leases is completely unknown under an indigenous system, and it seriously violates the system.

[100] In terms of s 2(2) of the Trust Act, the Trust must be administered and managed in a manner that is not inconsistent with the provisions of the Trust Act, and must be managed for the interests, benefit, material welfare and social-wellbeing of the members of the tribes and communities, which are beneficiaries and residents of the Trust-held land. The United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP')[50] provides as follows:

'1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. '

This Declaration supports the statement that indigenous people derive their rights of occupation from historical rights of various clans (tribes), some predating the colonial era. Membership flows from birth, but outsiders who apply for land can be accepted into the community through defined procedures.

[101] The rights of persons to occupy or use Trust-held land are acquired through Zulu customary law, customs and usages, and such rights entitle the owner to occupy and use the land, to dispose of such land to another person, to erect a building or let it, and transfer it to another person, including bequeathing it to his or her children. In addition to the customary law of right to land, the third to the eighth applicants and other beneficiaries and residents of the Trust-held land have informal rights and interests which are inherent in the land on which they live. The actions of the Trust and the Board have the effect of depriving the holders of PTO rights, customary law rights to land and/or other informal land rights or interests in the Trust-held land, of their security of tenure and of infringing on property rights vested in them under statutory or customary law, and IPILRA.

[102] The indigenous legal system, statutory law and the Constitution protect the beneficiaries' rights to the land in question. IPILRA protects an individual's or community's rights to secure the tenure of those living on communal land, and to prevent the State and private parties from undermining those rights. Land rights are closely tied to social and cultural relationships, and tenure security is derived in large

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[50] Article 26(1). See also *Gongqose and others v Minister of Agriculture, Forestry and Fisheries and others; Gongqose and others v State and others* [2018] 3 All SA 307 (SCA) paras 57 -58; Article 14.1 of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), adopted by the International Labour Organisation at its 76th session on 27 June 1989, which has not yet been ratified by South Africa.

part from locally-legitimate landholding. Tenure of residential land is perpetual, transferable and inherited.

[103] The evidence establishes that in refusing to issue or register PTOs or to furnish rights holders with PTOs certificates, and in requiring PTO rights holders to conclude lease agreements in order to obtain formal proof of their tenure on Trust-held land, the Trust and the Board have unilaterally assumed the powers which the Minister has delegated under sections 24 to 26 of the Land Affairs Act to the MEC with effect from 19 September 1998. The actions of the Trust and the Board have the effect of depriving holders of PTOs and would-be PTO rights holders of their security of tenure and property rights, vested under the Constitution, statutory law and customary law.

[104] The Trust and the Board have acted in contravention of the provisions of ss 2(2) and 2(4) of the Trust Act, in terms of which they are required to administer the Trust for the benefit, material welfare and social well-being of the beneficiaries and residents of the Trust-held land, and requires the Ingonyama to deal with the land, under its jurisdiction, 'in accordance with Zulu indigenous law or any other applicable law'. The conduct of both the Trust and the Board also constitutes a violation of the beneficiaries' and residents' rights under IPILRA, which should not be taken away without the informed consent of the holders, and the rights holders' rights to property under s 25 of the Constitution.

[105] Finally, the conduct of the Trust and the Board in persuading and inducing or requiring the residents and occupiers to conclude lease agreements without giving them full and proper notice of the nature of the agreements, and their effect on the existing rights and interests, has violated the rights of the residents and occupiers to procedural fairness. All of these will become more evident and apparent below.

Leases versus PTOs

[106] By concluding lease agreements with the beneficiaries and occupiers of Trust-held land instead of PTOs, the Trust and the Board claimed to improve the security of tenure of the residents. However, instead, the effect of the conversion of PTOs into lease holding is averse to the purported objective of the Trust and the Board, in

that it deprives the beneficiaries and residents of their customary or informal rights of ownership in Trust-held land, and places it fully in the hands of the Trust, to the exclusion of the beneficiaries and residents, being the true and ultimate owners of the Trust-held land. The Trust then becomes a lessor, and the beneficiaries and residents are reduced to mere tenants, having no rights beyond that of permissive occupation and use.

[107] Under lease agreements, the lessees' rights to the land in question are not perpetually inherited and transferable. Instead, the lessees' continued occupation of the land is conditional upon payment of rent, and the failure to pay rental can result in them being ejected from the Trust-held land in terms of their respective lease agreements. On the contrary, PTOs grant exclusive occupancy and use rights that are transferable subject to administrative conditions. In terms of reg 11(2) of the PTO Regulations, a PTO for residential purposes is not subject to any rental. The Trust's standard long-term residential lease stipulates a rental amount which must be paid annually, in advance, and is subject to a 10% annual escalation. Failure to pay the stipulated rental constitutes a material breach of the lease agreement, and constitutes grounds for the termination of the lease agreement, and ultimate dispossession of the property.

[108] The long term-residential lease concluded by the Trust expires after 40 years. On the expiration of the 40-year period, an application must be made for the extension of the lease. The traditional council must consent to the contemplated extension of the lease. However, the Trust may refuse to extend the lease, or may vary the terms and conditions of the lease in granting the lease.[51] Whereas a PTO may only be cancelled by the Minister or his delegate, after consultation with the tribal (traditional) authority concerned. This is in contrast to the lease agreement which provides for the termination of the lease agreement by the Trust on expiry thereof, or at any time for material breach, or if the traditional council withdraws its consent to the lease. The traditional council is also empowered under the lease agreement to 'withdraw its consent to the lease of the premises prior to the termination of this lease. . . for good, reasonable and objectively determined cause'.

[51] See clauses 3.3, 3.4 to 3.7 of the lease agreement.

[109] Section 26 of the Land Affairs Act provides for land allotted for a PTO to be surveyed and for a certificate of registered title thereafter to be obtained in respect of such allotment. Upon the land being surveyed, the PTO can be secured through the granting of deed of grant rights by the owner, and by registration of title in the Deeds Registry, whereas a lease agreement does not contain such provision. The Upgrading of Land Tenure Rights Act also provides for the upgrading of PTOs to registered titles, at the expense of the State. Under the lease agreement, the lessee is burdened with a host of obligations and restrictions. Upon termination of the lease for whatever reason, all buildings and other permanent structures on the premises remain the property of the lessor, without compensation of any sort payable to the lessee. To say that the conclusion of a residential lease agreement is an 'upgrade' from a PTO, and that it affords more secure tenure to occupiers, as the Board alleges, is palpably false.

[110] The long-term residential lease agreements are also not consistent with the customary rights to land. The lessees are subject to dispossession by the Trust of the land on which they live for non-payment of rental, without consideration of their vested customary law interests and entitlements in the land in question, and without any involvement of the community or traditional authority. The beneficial and use rights are no longer vested perpetually, transferable and inherited, but are terminated after 40 years or earlier at the instance of the Trust for material breach of the lease agreement or by the traditional council concerned. The lease agreements ignore, and thereby trump, the co-existing customary rights of all family members other than the lessees. The power to control land rights is vested entirely in the Trust and amakhosi (the senior traditional leaders). The lease agreements deprive families, neighbours and communities of their customary law entitlement to participate in decision making in respect of the matters relating to occupation and use of tribal land. The allotted land does not fall under the ownership of the traditional authority, but falls under the jurisdiction of an inkosi and induna only for administrative purposes.

[111] According to the seventh applicant, Ms Bongi Gumede, in terms of the lease agreement, all other persons who customarily have the right to reside or to remain

on the plot or allotment, for instance the other members of the extended family and their children (siblings and their children), are excluded.

[112] Leasehold as a form of land tenure in respect of Trust-held land was first introduced by an amendment of the regulations framed under Proclamation R293 of 1962[52] by Proclamation R153 of 1983[53] which added a new Chapter 2A to the regulations. Regulation 1(1)*(a)* of Chapter 2A provided that the Director-General of Co-Operation and Development could, in respect of the land of which the SA Development Trust was the registered owner or which land vested in it, 'grant to a competent person in respect of any leasehold site situated on such land, a right of leasehold for a period of 99 years.. .'. A leasehold site was defined to mean 'an ownership unit . . . in the township indicated on a diagram or general plan of a township. . .'. Incidentally, Proclamation R153 of 1983 substituted a new definition for 'ownership unit' defining it as any 'site in a township the ownership of which is with a Black person or which is held by virtue of a deed of grant or under a right of leasehold, and includes and building upon such site.'

[113] A right of leasehold was '. . . granted against payment to the Trust of an amount in respect of such right and any improvements on the leasehold site in question'.[54] The grant of a right of leasehold was subject to registration in the deeds registry in the office of the Chief Commissioner. A certificate of right of leasehold was issued to the holder on registration.

[114] Registration of the right of leasehold vested in the holder thereof, and gave the holder the right to:[55]

(a) erect any building or make improvements on the leasehold site, and to alter or demolish such building or improvements;
(b) occupy any building on the site, subject to the regulations and any conditions imposed by the Minister;
(c) encumber the right by means of a mortgage;

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[52] Proclamation R293 of 1962, *GG* 373, 16 November 1962, published under the Black Administration Act 38 of 1927.
[53] Proclamation R153 of 1983, *GG* 8933, 14 October 1983.
[54] Regulation 1(3), Chapter 2A.
[55] Regulation 3(1), Chapter 2A.

(d) dispose of such right of leasehold to any other competent person, which included the right to let or bequeath the right of leasehold; and

(e) the right of leasehold could be alienated and transferred to another competent person provided there was no charge, fee or other amount due owing in respect of the site by the holder of the right to the Trust.[56]

[115] The lease agreements before this court have a different hue altogether. A 99-year lease approximates ownership. A 40-year lease, even one on less onerous terms on the tenant than the one employed by the Trust and the Board, may qualify for registration as a long lease, but in no way approximates ownership. As far as registration is concerned, the production of the diagram suitable for registration purposes (contemplated by clause 19.1.1 of the leases employed by the Trust) presumably requires the same accuracy of survey as would the production of the diagram necessary to convert a PTO right into a registered deed of grant and certificate of registered title as contemplated by s 26 of the Land Affairs Act. It is legitimate to ask why a duty informed potential PTO right holder or lessee, intent on securing registration of rights in land, would ever choose the leasehold rights offered by the Trust in preference to a PTO granted under the Land Affairs Act.

[116] A leasehold tenure can approximate a form of ownership if a statutory provision is made for its conversion to freehold tenure or ownership. A notable example is the Townships Amendment Act (Transvaal),[57] which created the opportunity for leaseholders of lots situated in certain townships in the Transvaal to obtain freehold of those lots. In terms of this Act, leaseholders of lots situated on State land had the right to claim transfer to themselves of ownership in the lots on payment of a fixed sum determined by the Act. The leaseholders of lots situated on private land could acquire ownership in the lots by agreement with the owner of the land, and upon payment of a price agreed between the parties. In the present case, no such statutory provision is made through which the holders of leasehold rights may achieve ownership of the land they lease. The creation of an Erf capable of separate registration independently of a greater piece of land of which it originally formed a part involves the subdivision of land. It appears from clause 6.8.4 of the

[56] Regulation 4, Chapter 2A.
[57] Townships Amendment Act 34 of 1908 (Transvaal).

form of lease imposed by the Trust and the Board on lessees that the Trust took the view (ignoring Chapter XI of the Land Affairs Act) that the introduction of the KwaZulu-Natal Planning and Development Act[58] posed a risk as it put the subdivision of land in the hands of municipalities. The clause is somewhat remarkable not because of any legal sense which it makes or does not make, but because it illustrates that if the Trust and the Board had it in mind to render all occupational rights of its land in the form of leasehold, the leases were designed to ensure that their provisions obstructed subdivision and therefore obstructed the transfer of ownership of allotted portions of land from the Trust to an allottee. The clause reads as follows.

'Notwithstanding anything to the contrary in this lease contained, no provision of this lease shall be interpreted as constituting the consent of the Lessor to the subdivision [or] consolidation of the land hereby leased as described in section 21(1) of the KwaZulu-Natal Planning and Development Act No. 6 of 2008 and any application by any person or municipality, including the lessee, for the approval of any such subdivision or consolidation under section 26(3) of that Act is specifically prohibited.'

[117] According to the Board, the leases, among other things, provide the following benefits to the occupiers of Trust-held land: more security of land tenure; the ability to apply for finance using a lease as security; re-enforcement of the beneficiaries' customary rights; facilitation of proof of tenure in applications for liquor licences in terms of the KwaZulu-Natal Liquor Licensing Act;[59] may be used as proof of residence for purposes of complying with the Regulation of Interception of Communications and Provision of Communication-related Information Act ('RICA')[60] and the Financial Intelligence Centre Act ('FICA);[61] the facilitation of access to cell phones, bank accounts and loans from institutions such as Ithala Development Finance Corporation (Ithala Bank), and the facilitation of voter registration.

[118] That the lease can serve as security for loans is not borne out by any evidence and the applicants' experiences. The fifth applicant was unable to obtain a loan from Ithala Bank on the strength of his lease. The third applicant went through a

[58] KwaZulu-Natal Planning and Development Act 6 of 2008.
[59] KwaZulu-Natal Liquor Licensing Act 6 of 2010.
[60] Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002.
[61] Financial Intelligence Centre Act 38 of 2001.

similar experience. It is common knowledge that the certified PTOs have been accepted by some banks including Ithala Bank as security for loans. For the purposes of RICA and FICA, leases serve as proof of residential address and nothing more. A PTO certificate will serve the same purpose. Also, a letter issued and stamped by the relevant municipal office can also serve such purpose. For voter registration purposes, a PTO certificate can serve to prove the voter's residential address in the same way a lease and a letter issued by the municipal officer does. Lease registration is onerous and costly. In addition, the registration of a lease requires attestation by a notary under s 77(1) of the Deeds Registries Act.[62]

[119] Leases concluded by the Trust with beneficiaries and residents are not compatible with the customary law rights of residents living on Trust-held land. A comparison between the rights and obligations the residents have under customary law, on the one hand, and as lessees, on the other hand, reveals that the leases undermine rather than reinforce customary law rights and security of tenure, as the Trust and the Board allege.

[120] It is not true that only leases are registrable against title deeds. Arrangements are made that PTO rights holders eventually achieve full ownership of the property they occupy. There are no notarial agreements or bonds, which could afford such security, in the present case. By saying that only lease agreements are registrable against title deeds, the Trust and the Board give the beneficiaries and occupiers of Trust-held land a false sense of security under the lease holding scheme. It is not stated how the leases enable the beneficiaries and occupiers to achieve all of what is set out above, nor is there anything to suggest that PTOs cannot achieve these objectives, as outlined above. The evidence tendered before this court is that PTOs are better able to achieve these objectives. Leases are allegedly designed to uplift and empower the residents of Trust-held land rather than depriving them of their land. However, the Trust and the Board have not explained how leases uplift and empower the people concerned. The same can also be said about the statement by the Trust and the Board that the lease agreements have commercial value and

[62] Deeds Registries Act 47 of 1937.

afford lessees stronger rights than holders of PTO rights, which is not borne out by any evidence, or a consideration of the rights and obligations under each regime.

[121] Further, the validity of the lease agreements under common law is subject to doubt. Where the lessee already has the right of use and the enjoyment of the property to which the lease refers, there is no contract.[63] This raises a question whether the lease agreements purported to have been entered into between the Trust and beneficiaries and residents of Trust-held land could produce any lawful and valid leases. The general principle is that no one may lease property in which one has full ownership right.[64] In terms of PTOs, customary law rights and IPILRA, the beneficiaries and residents of Trust-held land already have occupation, use and enjoyment of the land which is the subject of the lease agreements. As a consequence, the purported leases could not transfer any such rights to the beneficiaries and residents on Trust-held land. Following the rule that a lease of one's own thing is a nullity, the leases entered into between the Trust and the beneficiaries and residents of Trust-held land could not be said to be valid as they are contrary to the rule *rei suae conductio nulla est*. The lessor's obligation is to make available the use and the enjoyment of the property which is not the case in the present matter.

Leases versus customary law rights

[122] The Trust and the Board are adamant that they have statutory powers to conclude lease agreements. However it seems to me that the Zulu customary law right to land, as compared to leases, provides strong and secure rights to residential, arable land and commonage (grazing land and woodlands) to families and to individuals within the family, which are inherited from generation to generation.

[123] The third to ninth applicants and other residents of Trust-held land have customary law rights and informal rights in respect of the land in question, which have in effect been extinguished by the conclusion of the leases in respect of the land the applicants and other residents informally own and live on. It cannot be

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[63] *Whittaker v Dabee* (1908) 29 NLR 682.
[64] W E Cooper *Landlord and Tenant* 2ed (1994) at 30-32; *Grootchwaing Salt Works Ltd v Van Tonder* 1920 AD 492 at 498; *Whittaker* above at 685.

disputed that the conclusion of leases has divested the beneficiaries and the residents of their customary law rights and/or informal rights, which provide a stronger security of tenure.

[124] The Portfolio Committee tried in vain to put an end to the conversion of PTOs to leases and the Board's campaign to urge and persuade the beneficiaries and the residents of Trust-held land to conclude leases instead of applying for the grant and issue of PTOs. The Portfolio Committee would like to see the conversion of informal ownership to title deeds. This, in my view, would give the beneficiaries and residents the dignity of owning the land on which they reside rather than being tenants. The Trust and the Board should have striven to have the informal ownership upgraded to title deeds or deeds of grant which would give the beneficiaries and residents of Trust-held land the dignity of owning the land on which they are living, as opposed to entering into leases.

[125] The Trust and the Board have argued that the third to ninth applicants are not holders of PTO rights or holders of valid PTOs that were cancelled. Further, the Trust and the Board have contended that absent an allegation that the third to ninth applicants were holders of PTO rights, and which rights the Trust and the Board have cancelled, there is no legal basis for the relief sought by the applicants. Nor have the applicants set out any facts in support of their allegation that the Trust and the Board concluded lease agreements with anyone who was the holder of PTO rights. Further, the applicants have also allegedly failed to identify the land in respect of which lease agreements have been entered into, as being land which is either subject to PTO rights or IPILRA rights.

[126] Most of the properties which the third to ninth applicants own have descended from their parents upon them, and the applicants are entitled to be issued with or hold PTO rights in respect of such properties. However, the Trust and the Board urged and told them not to apply for the issue of PTOs but to enter into lease agreements with the Trust and the Board in respect of such properties instead, to their detriment. The Trust and the Board have thereby denied the applicants and other residents of Trust-held land an opportunity to apply for and to have PTOs issued to them. In my view, in order for the applicants and other residents of the

Trust-held land to have been prejudiced as a result of the conduct of the Trust and the Board, they need not show that they were actually in possession of PTOs and that such PTOs were physically or actually cancelled by the Trust and the Board. It suffices for them to show that they were and are entitled to hold PTO rights (in other words, they were would-be PTO rights holders). While it is true that the evidence does not establish that any PTO was ever actually cancelled by the Trust and the Board, it is undeniable that the Trust and the Board discouraged residents of Trust-held land from applying for the issue of PTOs and urged them to enter into lease agreements with the Trust. By so doing, the Trust and the Board have effectively terminated applications for and the issuing of PTOs in respect of Trust-held land. As a result, the Trust and the Board have thereby finally extinguished PTO rights in favour of leases. The beneficiaries and residents of Trust-held land were not given any alternative but to enter into lease agreements with the Trust.

[127] The traditional councils, their employees and izinduna acting as the agents of the Trust and the Board, spread the word to beneficiaries and residents of Trust-held land that PTOs were no longer required and valid. In ensuring that no PTOs were issued, even upon request, meetings were held by various traditional councils and residents at which izinduna in the presence of the officials of the Board told the residents that those who did not want to enter into lease agreements would have their land taken away from them. The officials of the Trust and the Board did not intervene and stop the said izinduna from intimidating the community.

[128] This also finds support in the statements of the Chairperson of the Board that the beneficiaries' association with the land in question is permanent and perpetual, and that the Ingonyama Trust Board is not a landlord,[65] and that they derive their rights of occupation from historical rights of various clan tribes.[66]

[129] It thereby confirmed that the communities and residents living on Trust-held land are the true and ultimate owners of such land. It therefore follows that in divesting community members and residents of security of tenure, the Trust and the Board, could not be acting in the interests of and for the benefit, material welfare and

[65] See 2012/13 Annual Report of the Board.
[66] See 2011/12 Annual Report of the Board.

social well-being of the communities and residents concerned, as s 2(2) of the Trust Act directs, and therefore not acting lawfully. Similarly, no countervailing evidence was provided by the Trust and the Board to demonstrate that the revenue generated by the leases is used for the benefit of the communities concerned or their material well-being.

[130] Conversion of trusteeship into lease holding with the resultant loss of the beneficiaries' and residents' PTO rights, customary law ownership rights to land and/or informal rights or interests in the land on which they live, also constitutes a violation of the provisions of IPILRA, as well as the infringement of the right to property, protected under ss 25(1), (2) and (6) of the Constitution.

Informal rights to land (in terms of IPILRA)

[131] In terms of IPILRA, any deprivation of informal rights to land must be with the rights holder's consent, or if the land is held on a communal basis, it must be in accordance with the community's custom or usage, subject to the payment of compensation as approved by the majority of community members present at a specially convened meeting where due process is followed.[67]

[132] *Mr Dickson SC*, for the Trust and the Board, has argued that IPILRA does not apply to Trust-held land in that the Minister has no role to play in Trust-held land but that only the Board has the sole power to administer and manage such land. The content of the rights in IPILRA do not apply to the regime of the Trust Act.

[133] The 'informal right to land' includes:

'. . . the use of, occupation of, or access to land in terms of –

(i) any tribal, customary or indigenous law of a tribe . . .'[68]

In the present case, the beneficiaries of Trust-held land have customary law rights to Trust-held land, on which they live, acquired from time immemorial. They also have the rights and interests in the land in terms of the Trust Act and they, therefore, fall squarely within the ambit of the protection provided for by IPILRA. (It appears that paragraphs *(a)*(ii)*(bb)* and *(b)* of the definition of 'informal right to land' also apply.)

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[67] See s 2(2) and (3) of the IPILRA.

[68] See s 1(1) of the IPILRA; *Dlakavu v Irfani Traders CC* 2018 JDR 1424 (ECM).

[134] Under the Upgrading of Land Tenure Rights Act, 'tribal land' also means land 'which is held in trust on behalf of a tribe'. The land in question is held by the Trust on behalf of the beneficiaries and residents living on that land. On that basis, IPIRLA also applies in respect of the Trust-held land in the present matter. The IPILRA protects informal or unregistered rights in land against deprivation without:

(a) the individual rights holder's consent; and

(b) appropriate compensation and the support of the majority of the communal land rights holders.[69]

[135] Section 2(5) of the Trust Act requires prior written consent of the traditional authority or community authority concerned for any lease or alienation of land by the Trust as trustee. The Trust there acts for and on behalf of the members of the tribes, communities and residents. However, the lease referred to in s 2(5) should not be construed as referring to allocated or allotted residential and arable land, since that will fly directly in the face of customary law, as dealing with such land requires the consent or approval of the allottee, as its owner. This is a right which may be defended against the whole world.

[136] Under customary law, each member of each class or community is entitled to an allotment through procedures under customary law. Once a portion of land has been allocated to a particular individual as residential or arable land, it is automatically taken out of the realm of communal ownership. It is demarcated and has fixed boundaries. The ownership thereof descends from generation to generation of such particular individual owner or family. However, unallotted and common land is communally owned by all members of a particular community, under the administration of an induna and inkosi (headmen and senior traditional leader). However, both communal and individually owned land is defended by all members of the community concerned against attack or interference by outsiders. It is only unallocated land which requires prior written consent of a traditional or community authority for it to be encumbered, pledged, leased or alienated by the trustee. The consent or approval and involvement of its allottee is required before anything can

[69] Sections 2(2) and (3).

be done to allotted land. Mr *Dickson* for the Trust and the Board has argued that the Trust Act does not make any distinction between unallotted and allotted land with regard to the Trust and the Board leasing out Trust-held land. In my view, there must be a limitation, as what Mr *Dickson* proposes will violate the fundamental tenets of customary law, governing allotted and unallotted land, for allotted land under customary law cannot be interfered with without the consent of its owner. The distinction that exists in indigenous land ownership systems should be observed, lest the residents' ownership of residential and arable sites will be diminished.[70]

[137] The Trust and the Board deny that they concluded leases with residents of Trust-held land without their genuine and informed consent. According to the Trust and the Board, lease agreements were and are concluded on a voluntary basis with residents of Trust-held land. The Trust and the Board claim to have received the required consent. However, it is not clear from the evidence of the Trust and the Board whether the individuals they allege have consented to the conclusion of the lease agreements were properly informed of the effect of their entering into and signing of such lease agreements. The minds of the contracting parties should meet (ad idem) which means that there must be a common understanding between the parties.

[138] The consent required for the deprivation of a right is a genuine and informed consent. The consent is informed if it is based on substantial knowledge concerning the nature and effect of the transaction consented to. Consent must be given freely, without duress or deception, and with sufficient legal competence to give it. This court must through an analysis of the evidence tendered before it, determine whether the consent which the Trust and the Board allegedly obtained from the residents for the conclusion of the lease agreements, met the required standard.

[139] Consent must have been properly sought and freely given, and the person whose consent is required must have full and reliable information relating to the scope and impact of the subject matter, and must have the choice to give or withhold his or her consent.

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[70] *Tongoane and others v Minister for Agriculture and Land Affairs and others* 2010 (8) BCLR 741 (CC).

[140] The court in *Christian Lawyers' Association v Minister of Health and others*,[71] held that it is now settled law that 'the informed consent requirement rests on three independent legs of knowledge, appreciation and consent'. A valid consent must be given by a person with intellectual and emotional capacity for the required knowledge, appreciation and consent. As consent is a manifestation of will, 'capacity to consent depends on the ability to form an intelligent will on the basis of appreciation of the nature and consequences of the act consented to'.[72]

[141] The requirement of knowledge in the present case means that a beneficiary and resident consenting to a lease agreement must have full knowledge of the nature, extent and effect of the lease on his or her existing customary law rights to land and/or informal rights to and interests in the Trust-held land.

[142] The requirement of consent means that the consent given to the lease, 'must be comprehensive, that is extend to the entire transaction, inclusive of its consequences.'[73] It must be shown that the effect and consequences of the lease agreement on the existing customary law rights to land and /or informal rights to and interests in the land in question, must have been realised and voluntarily consented to.[74] The evidence tendered by the third to eighth applicants establishes that the Trust and the Board, being represented by the traditional councils and local indunas (izinduna) attached to and serving under various councils on Trust-held land, concluded residential lease agreements without their genuine and informed consent. All these applicants state that before entering into such lease agreements, neither the Trust nor the Board informed them what the lease agreements entailed and the benefits thereof, as opposed to PTOs.

[143] The third to eighth applicants explain how the residents (including themselves) were instructed by izinduna to attend meetings, and to bring their identity documents with them, and how they were eventually caused to enter into

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[71] *Christian Lawyers' Association v National Minister of Health and others* [2004] 4 All SA 31 (T) at 36i.
[72] Van Heerden et al *Boberg's Law of Persons and the Family* 2ed (1999) at 849.
[73] *Castell v De Greef* 1994 (4) SA 408 (C) at 425I.
[74] See *Waring and Gillow Ltd v Sherborne* 1904 TS 340 at 344.

lease agreements. Prior to these meetings, neither the Trust, nor the Board nor the traditional councils and izinduna had explained to them the material difference between PTO rights and the leases, and the impact lease holding would have on their existing customary law rights to the land they occupy. Instead, they were told that the leasehold rights were and are an upgrade of PTO rights, and that this would enable them to secure financial loans from financial institutions, without an explanation as to how all this would be achieved. Ms Hletshelweni Lina Nkosi, the third applicant, states that when entering into the lease agreement, nothing was said to her about the payment of monthly rent and the 10% annual increase, and that if she would fail to pay the rental, she might lose her land. She was told that she would be able to secure a financial loan through a lease and be able to show proof of ownership of her house. The PTO would no longer be accepted. The Trust and Board officials insisted that everybody had to enter into a lease in order to be able to show proof of ownership of their houses. The residents were told by the Trust and the Board through izinduna that it was then a requirement to conclude a lease as PTOs were no longer valid.

[144] Mr Zakhele Malcolm Nkwankwa, the fifth applicant, states that when he signed his lease he did not know what it was. When he approached Ithala Bank for a loan to start a business on his premises, he was turned down, despite producing his lease. The evidence that the residents were not told that rental would be payable for the allotment, and about the 10% annual rental increase, finds support in the evidence of Mr Bongani Zikhali, the fourth applicant. He only became aware of all this after the conclusion of the lease agreement. Realising that he had to pay a monthly rental for the allotment, he approached the local traditional authority for clarity. He ended up at the Board's office in Ulundi, where he was assisted by the manager and two Board employees. The fourth applicant then told the officials that had the Board and his induna informed the people in his area of the implication of the leases, they would not have entered into them. The people in his area are poor and their only source of income is a government grant or old age pension grants.

[145] Most of the applicants have had the land devolved upon them from their parents. When they applied for the issue of a PTO or PTO certificate, the contracts of lease were concluded for them instead. They were simply asked to give their

identity documents to the secretaries of the traditional councils or to the officials of the Trust and the Board, without them having been afforded an explanation as to the purpose and the nature of the agreement they were entering into. They were then asked to sign the documents after they had been completed by such secretaries or officials on their behalf.

[146] Ms Hluphekile Bhetina Mabuyakhulu, the sixth applicant, states that she was allotted land, and that at some stage she and other residents were called to a community meeting, and told that if they failed to conclude lease agreements, they would not be recognised by the King as part of his subjects or community. Their land would be taken away from them, and they would then be left on the street to fend for themselves. Nothing was said to her about the effect the intended lease agreements would have on their existing customary law land rights. The fifth, sixth and seventh applicants entered into the lease agreements.

[147] With regard to the seventh applicant, the plot had been allotted to her mother by an induna, and she wanted to have it transferred to her name. The official of the Board, Mr Russell Mkhwanazi, completed a lease form for the seventh applicant. Mr Mkhawanzi only asked her for an identity document and told her to sign the completed document. The contents of the lease agreement were not explained to her, nor were any terms or conditions of the lease agreement read out, let alone explained, to her.

[148] The eighth applicant states that at a meeting which was also attended by the officials of the Board, an induna told all the residents that were present that in order for their homes to be recognised, they had to conclude lease agreements. Those who had vast tracts of land, were told to reduce them. The forms were completed by the clerks on behalf of the residents, and the residents were only asked to give the clerks their identity documents and to sign the completed documents. The induna went on to say that should a resident not sign a lease agreement, he or she would not be recognised as a resident and that he or she would be banished from the area. The eighth applicant also had to reduce the size of his land in order to afford the rental, as the size of the land concerned determined the amount of rental payable for it.

[149] The parties to the contract of lease must intend to contract and perform a true lease. The lessees, when they purportedly entered into lease agreements, did not know what such agreements entailed, let alone what their terms and conditions were, except they were informed that the conclusion of such agreements would enable them to secure financial loans. They were however not told how such objectives would be achieved. The nature and import of the documents were not explained to them, nor were the community members advised of the material terms of the lease, including the rental amount. The Trust and the Board persuaded the residents to conclude leases under the pretext that the leases have more advantages compared to PTOs, which alleged advantages were not explained to the beneficiaries and residents. The residents also did not know what the differences between PTOs and leases were. It is not in dispute that the conclusion of lease agreements between the Trust and residents of Trust-held resulted in the loss of the customary law rights and/or informal rights of the residents to the land in question. Under the circumstances, it cannot be said that such residents could give a genuine and informed consent to the taking away of their land rights.

[150] The Trust and the Board have contended that the category which the applicants represent, includes residents and occupants who held no PTO rights on the land but concluded lease agreements out of their own volition with the Trust. However, the Trust and the Board have not tendered any such evidence in support of their contention. On the contrary, on the evidence of the third to eighth applicants, members of the community were threatened by their traditional councils and izinduna, the agents of the Trust and the Board on the ground, that if they were not to enter into lease agreements, they would lose their land, and that their refusal to enter into such lease agreements would amount to turning against his Majesty, the King of the Zulus. As a consequence, they would be excluded from their relevant communities.

[151] It has been argued on behalf of the Trust and the Board that as this is a factual dispute, it should be decided in favour of the Trust and the Board. The proper approach, where a real dispute of fact is alleged, is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant

cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts succeed.[75] The first and second respondents have not set out any facts at all with regard to the disputed facts. On this basis, it is not possible, using the test referred to above, to determine that the alleged dispute of fact is real, genuine and bona fide**.**

[152] With regard to what would constitute a bona fide dispute of fact, the Supreme Court of Appeal in *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* said:[76]

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

[153] The Trust and the Board have failed on all fronts to meet the requirements set out in *Wightman t/a JW Construction*. In their answering affidavit, they have not seriously and unambiguously addressed the disputed facts. Nor have they stated the basis on which they dispute the facts averred by the applicants relating to the threats, intimidation and coercion. The first and second respondents might not have knowledge of the particular leases in question, but the leasehold scheme is different as this is their initiative. They must have known what was going on when the time came to implement their leasing scheme.

[154] It was reasonably expected of the Trust and the Board to meaningfully engage the residents in the Trust-held land before proceeding with the

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[75] *See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I*; Pheko and others v Ekurhuleni Metropolitan Municipality and others (Socio-Economic Rights Institute of South Africa as amicus curiae)* 2016 (10) BCLR 1308 (CC).

[76] *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) para 13.

implementation of the PTO Conversion Project and the conclusion of the lease agreements. They should also have stated what steps they took prior to the implementation of the PTO Conversion Project, to ascertain and understand its impact on the residents' existing customary law rights to land, and what process they followed in doing all this. That would assist to demonstrate, on their version, whether the lease holding scheme was appropriately and adequately explained to the beneficiaries and residents and the effect the lease holding scheme would have on their then existing customary law rights and informal rights to the land in question. However, considering the lease agreements before this court, I fear that it would require the very best efforts of a trained lawyer, well versed in all of commercial, customary and land law, and with a developed ability to render complex legal speak accessible to lay clients, in order properly to impart a full and proper understanding of the lease to community members. Neither the lease nor its legal context are simple.

[155] The Trust and the Board have failed to tender any evidence to the effect that their envisaged land tenure improvement plan (the PTO Conversion Project) had at any stage been unpacked to the beneficiaries and residents of Trust-held land for them to know and understand what such plan entailed, and to assess for themselves whether or not the project would impact negatively on their existing customary law rights to the land in question. Instead, the Trust and the Board have raised a bare denial in respect thereof, as indicated above.

[156] In the circumstances, it would not be just and fair to exclude the evidence of the third to eighth applicants relating to how they came to enter into the purported lease agreements at the instance of the Trust and the Board, merely on the basis of a bare denial and the mere allegation that there is a dispute of fact. The Trust and the Board have not tendered any evidence in this regard, notwithstanding that they have been able to do so. In the circumstances, it cannot be said that the residents freely and voluntarily participated in the conclusion of lease agreements with the Trust, with the appropriate and required understanding. The sixth, seventh and eighth applicants state that they were threatened with the taking away of their land if they did not sign the lease agreements. They were also threatened with banishment from their respective areas, and that they would thus be cut off from the Zulu nation.

In the absence of any evidence gainsaying all this, the evidence by these applicants that the conclusion of the lease agreements, on their part, was coerced and induced by threats, misrepresentation and undue influence, must be accepted.

[157] In the circumstances, I am satisfied that the conclusion of the lease agreements has severely and adversely affected PTO rights, and the customary law rights to land, as well as the informal rights to and interests of the residents in Trust-held land on which they live. The contingency of the residents being ejected from the land upon their failure to pay rental, perpetually ruins their rights to the land in question.

Constitutional Protection

[158] As stated in para 41 above PTO rights, customary law rights to land, and informal rights to, and interests in land are also constitutionally protected. As a result of discriminatory laws, PTOs are not fully legally secure and laws governing PTO rights only apply to black persons. PTO rights therefore fall squarely within the protection provided for by s 25(6) of the Constitution, read with s 2 of IPILRA. Sections 25(1) and (2) of the Constitution protect existing property rights and prohibit arbitrary deprivation of property and unlawful expropriation. In *Mkontwana v Nelson Mandela Metropolitan Municipality*,[77] it was held that:

'…[w]hether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation . . . No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation'.

[159] The conduct of the Trust and the Board has been subversive of the objects of the Trust Act, in that the residents of Trust-held land have been reduced to mere tenants, having no rights beyond that of permissive occupation and use, and the Trust has effectively become a landlord rather than a trustee. This situation has resulted in the loss of the residents' PTO rights and customary law rights to land, including their informal rights to and interests in the land in question.

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[77] *Mkontwana v Nelson Mandela Metropolitan Municipality* above para 32.

[160] As I see it, the conduct of the Trust and the Board in this matter does not show that they intended to address the injustices of the shameful past, as they profess to have been, which was characterised '. . . by oppression, deprivation of a significant segment of our society and deep-rooted inequalities. . .'.[78] It seems to me, on the evidence before me, that the Trust and the Board are dedicated to upholding and pursuing the system devised through the decades which, according to Kunju AJ in *Dlakavu v Irfani Traders CC*,[79] ensured:

'. . . that the degree of tenure security that black people were entitled to was more precarious than the tenure security to which white people were entitled. At its core, the approach to black people was that they would be perpetual tenants on their own land they occupied and used.'

[161] Jafta J, writing a minority judgment, in *Daniels v Scribante and another (Trust for Community Outreach and Education as amicus curiae),*[80] stated that:

'…[t]he purpose of entrenching the rights of access to land and secure tenure was to ensure that the State, through reasonable measures within its budget, progressively makes the realisation of those rights achievable to the millions who did not enjoy them'.

The objective of the democratic government is that the residents who have insecure tenure of land achieve full ownership of such land. It is apparent from the papers that the Trust and the Board have also fully been aware of this government purpose.

[162] However, the conduct of the Trust and the Board does not accord with the purpose to improve the land so that the owners of Trust-held land ultimately receive full ownership of the land. The conduct of the Trust and the Board, as outlined above, amounts to an arbitrary deprivation of the beneficiaries' and residents' PTO rights, customary law rights, and informal rights to or interests in Trust-held land. Such deprivation is not only in violation of the provisions of the Trust Act, but also of IPILRA and the Constitution. The Trust and the Board may under s 2(5) of the Trust Act be entitled to let a portion of the Trust-held land, but there is no law which permits them to convert the whole scheme of trusteeship to a lease holding scheme. They are required to make decisions by applying known and general principles of

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[78] *Maledu v Itereleng* above para 95.
[79] *Dlakavu v Irfani Traders CC* 2018 JDR 1424 (ECM) para 9.
[80] *Daniels v Scribante and another (Trust for Community Outreach and Education as amicus curiae)* 2017 (8) BCLR 949 (CC) para 169.

law.[81] There must be lawful authorisation for the exercise of public power. Exercise of public power is required to comply with the Constitution and therefore with the doctrine of legality.[82]

[163] The conduct of the Trust and the Board in replacing PTOs with residential leases, and in persuading or inducing, coercing and compelling beneficiaries and residents of Trust–held land, who held and were entitled to hold PTO rights and customary law or IPILRA rights in Trust-held land, to conclude lease agreements with the Trust, without furnishing such rights holders with complete and accurate information on the nature and effect of the lease agreements on their existing land rights, is unlawful and unconstitutional.

[164] There is no rational relation between the lease holding scheme, which the Trust and the Board has adopted, and the achievement of a legitimate governmental purpose under the IPILRA and the Constitution.[83] The absence of a rational relation between the lease holding scheme and the achievement of a legitimate governmental purpose, justifies the conclusion that the implementation of the lease holding scheme is arbitrary, and accordingly inconsistent with the rule of law and the Constitution. The Trust and the Board have not demonstrated any lawful and constitutional basis for replacing PTO rights with residential leases, and for demanding the payment of rental by the beneficiaries and residents of Trust-held land, for the land on which they live, being the true and ultimate owners of the land in question.[84] The deprivation of the residents' property rights is also arbitrary within the meaning of s 25 of the Constitution, as the Trust and the Board have failed to provide sufficient reason for such deprivation. The evidence does not establish that the Trust and the Board aimed to strengthen insecure rights. The evidence, and an overall view of the scheme as a whole, suggests the aim of generating revenue for the Trust. And clause 6.8.4 of the leases before us suggests (and I put it no higher than that for present purposes) that the aim was to maintain such a revenue stream more or less in perpetuity.

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[81] B Beinart 'The Rule of Law' (1962) *Acta Juridica* 99 at 102.
[82] See *Pharmaceutical Manufacturers Association of SA and another: In re Ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC).
[83] *New National Party of South Africa v Government of the Republic of South Africa and others* 1999 (3) SA 191 (CC) para 24.
[84] *Pharmaceutical Manufacturers Association* above.

[165] Furthermore, if the Trust and the Board genuinely aimed to strengthen insecure land rights, one would have expected them to have regard to the provisions of the Upgrading of Land Tenure Rights Act. Section 3 of that Act makes provision for a relatively easy route to conversion of customary ownership to registered title in respect of land mentioned in Schedule 2 to the Act, which includes 'any right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question'. If the Trust and the Board were in any doubt as whether that Act applied to KwaZulu when it was enacted, they could have approached the government to take steps to render it applicable. And if they were of the view that the Act did not apply to KwaZulu when it was enacted, and that the exclusion of rights under s 3 of the Act from the ambit of s 25A of the Act prevented the enjoyment of rights in terms of s 3 with regard to the land to which the government of KwaZulu formerly had title, they could likewise have asked the government to rectify that situation; and if that failed, could have pursued the relief ultimately granted by the Constitutional Court in *Herbert N.O. and Others v Senqu Municipality and Others,*[85] which had the effect of extending the rights under s 3 to the whole of South Africa. None of that was done.

Breach of statutory and constitutional duty

[166] The applicants aver that the Minister as well as the MEC, being the functionaries responsible for the administration of both the Land Affairs Act and the Trust Act, have failed to exercise effective oversight of the Trust and the Board to ensure that they act within their powers, and to protect the property rights and security of tenure of beneficiaries and residents of Trust-held land.

[167] The applicants' contention is that being fully aware of the Trust and the Board's conversion of PTOs to leaseholds, and the effect thereof, the Minister or the MEC took no steps to intervene or to stop the Trust and the Board from doing so. Instead, the Minister and MEC, in derelict of their statutory and constitutional duties to PTO rights holders and beneficiaries or residents of Trust-held land, turned a blind eye to the unlawful activities of the Trust and the Board to the detriment of the applicants and all other beneficiaries and residents of Trust-held land.

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[85] *Herbert NO and others v Senqu Municipality and others* 2019 (6) SA 231 (CC).

[168] For the Minister to be said to have an obligation to intervene or to stop the Trust and the Board at the time when they converted the trusteeship to lease holding, an Act of Parliament or the Constitution must require or authorise her to fulfil a particular duty or to perform a certain function. For the legality of the executive action is measured against the Bill of Rights, other provisions of the Constitution and an Act of Parliament. Mr *Semenya SC* for the Minister and the MEC has argued that the Minister lacked competency to intervene or to stop the Trust and the Board from replacing PTOs with leases. He based his argument on the fact that the Trust-held land vests in the Trust, and it is not government land in terms of the Land Affairs Act. The Minister therefore has no legal authority to grant PTOs on land which is not owned by the State.

[169] Such argument does not hold water, since s 1 of the Land Affairs Act, as amended, defines 'Government land' as,

'the land which was transferred to the Government of the former self-governing territory of KwaZulu in terms of Proclamation No. R. 232 of 1986 and includes any land acquired by the said Government thereafter and, subject to the provisions of the KwaZulu Ingonyama Trust Act, 1994 (Act No. 3 of 1994), land transferred to and held in trust by the Ingonyama as trustee of the Ingonyama Trust in terms of the said Act.'[86]

[170] A similar definition is contained in Proclamation R63 of 1998, which amended the Land Affairs Act to include the land held by the Trust. Both the Supreme Court of Appeal[87] and the Constitutional Court[88] have held that the Trust is an organ of state as defined in s 239 of the Constitution. The Minister thus has the authority to demarcate allotments and grant PTO rights on Trust-held land under the Land Affairs Act.

[171] In the main, the objectives of the Land Affairs Act are to make provision for tenure and the registration of certain forms of title in respect of land. Sections 24 to 26 of the Land Affairs Act and PTO Regulations vest certain powers in the Minister,

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[86] The definitions of 'Government' and 'Government land' were substituted by Proclamation 63 of 1998.
[87] *Ingonyama Trust v eThekwini Municipality* 2013 (1) SA 564 (SCA).
[88] *eThekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC).

to perform certain functions on Government land or land owned by a tribal authority, with regard to the granting of PTOs.

[172] In terms of s 24, the Minister demarcates allotments of Government land or land owned by a tribal authority, for the purpose of granting PTOs. Section 25 grants the Minister the power to issue, grant, record, and withdraw or otherwise dispose of a PTO. Section 26 defines the manner in which a PTO right holder may strengthen and formalise the right, by having the land concerned surveyed and acquiring a deed of grant rights and a certificate of registered title.

[173] With regard to Trust-held land, the administration of PTOs is governed by the PTO Regulations. Such regulations define the process of issuing and registering PTOs, and the respective roles of the tribal authority and the Minister. The Minister has an oversight over the Trust and Board's execution of their functions and exercise of their powers under the Trust Act, which must be read with s 7(2) of the Constitution. The section provides that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights'. Upon proper construction of the section, the Minister, as the relevant representative of the executive, is enjoined to respect and protect the existing property rights and security of tenure of the residents and occupiers of Trust-held land. Section 2 of the Constitution makes it mandatory to fulfil the obligations imposed by the Constitution.

[174] It is evident from the above that the Minister is assigned the function to exercise the powers granted by Chapter XI of the Land Affairs Act and the PTO Regulations. In terms of these, the Minister is empowered to issue, grant and withdraw or otherwise dispose of a PTO right, as indicated above. Conversion of a PTO to ownership requires the approval of the Minister in terms of s 26(1).

[175] At all times material hereto, the Minister has admittedly been fully aware of the fact that the Trust and the Board are engaged in the PTO Conversion Project and that as a replacement thereof, the Trust and the Board are concluding lease agreements with the beneficiaries and residents of Trust-held land. This is also confirmed by the fact that the Minister has over the years been furnished with reports

by the Trust and the Board, detailing the implementation of the PTO Conversion Project and the rationale behind it.

[176] The Minister, as the authority responsible for administering the grant and issue of PTOs under the Land Affairs Act and PTO Regulations, is duty bound to prevent interference with the exercise of such powers and performance of the duties under the Act and Regulations.

[177] The evidence establishes that the Minister has failed to perform the required functions and to ensure that the residents and the occupiers of Trust-held land, who require PTOs, are able to obtain them, and that all the granted PTOs are registered and protected. Her dereliction of duty is also evident from her failure to respond to the correspondence from the Legal Resources Centre in this regard.

[178] Summarised, the Minister has, firstly, failed to exercise oversight over the conduct of the affairs of the Trust and the Board, the exercise of their powers and the execution of their duties under the Trust Act. Secondly, the Minister has failed to respect and protect the existing property rights and security of tenure of the residents of Trust-held land, as required by s 7(2) read with s 25(1) of the Constitution which provides that:

'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

[179] In the absence of any law authorising the Trust and the Board to replace PTOs with leases, the Minister was then conscious of the arbitrariness and unlawfulness of their conduct. The Minister, having been properly apprised of the precarious situation created by the Trust and the Board, knowing and understanding its implications and the effect thereof, did not take any steps to intervene and restrain the Trust and the Board from carrying out their unlawful activities. Instead, she allowed them to assume the power and to use it untrammelled, to the detriment of the property rights of the beneficiaries and residents of Trust-held land, and she thereby ultimately identified herself with their activities.

Powers conferred by Chapter XI of the Land Affairs Act and PTO Regulations

[180] The applicants aver that save for transferring full ownership rights, PTOs and PTO Regulations remain the only statutory mechanism available to secure and formalise land rights on unsurveyed land. Chapter XI of the Land Affairs Act (ss 24 to 26) together with its regulations thus continues to give PTO rights over Trust–held land. In total disregard of the existing statutory framework, the Board decided that PTOs should no longer be issued, and that the residents of Trust-held land must conclude long-term lease agreements with the Trust instead. The PTO Conversion Project has fundamentally undermined the security of tenure of the residents of the Trust-held land.

[181] In their submission the applicants are adamant that the Land Affairs Act and the PTO Regulations are still the only existing statutory mechanism through which transfer of land ownership in the rural areas falling under the Trust can be achieved. They have not been declared unconstitutional and invalid. The applicants, therefore, in the event of the absence of a readily available means of securing and formalising land tenure for the residents of Trust-held land, seek the implementation of the PTO allocation and registration scheme under the Land Affairs Act and PTO Regulations.

[182] The Trust and the Board object to this on two grounds. Firstly, on the fact that PTOs are racially discriminatory in that their reintroduction will offend against the Constitution and the provisions of the Abolition of Racially Based Land Measures Act.[89] Secondly, ss 24 to 26 of the Land Affairs Act, governing the PTOs, were repealed by Proclamation R63 of 1998, which was issued in terms of item 14 of schedule 6 to and s 99 of the Constitution.

[183] The Trust and the Board contended that in the process of the conciliation of all provincial and self-governing homelands law, the Land Affairs Act was taken over by national government through Proclamation R63 of 1998. In so doing, Chapter XI thereof (which included ss 24 to 26) was effectively repealed. In the Trust and the Board's submission, the PTOs, as an instrument of land rights, ceased to exist in 1998. They argue that PTOs could therefore not be used under the Land Affairs Act and there is no provision in the Trust Act for PTOs to be issued. Accordingly, the

[89] Abolition of Racially Based Land Measures Act 108 of 1991.

Trust has no power to issue PTOs under the Trust Act, nor does the Minister have the power to issue PTOs under the Land Affairs Act or the Trust Act. The Trust and the Board also base their contention on the fact that the assignment of the Land Affairs Act to the Premier of KwaZulu-Natal excluded the provisions relating to PTOs in the Land Affairs Act. Furthermore, it was argued that the PTO Regulations were not assigned, nor could they be assigned since their statutory origin had disappeared.

[184] Under item 2(1) of schedule 6 of the Constitution '[a]ll law that was in force when the new Constitution took effect, continues in force' until amended, repealed and is found to be inconsistent with the Constitution.

[185] Item 14 of schedule 6 provides:

'Assignment of legislation to provinces

'14. (1) Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation, to an authority within a provincial executive designated by the Executive Council of the province.

(2) To the extent that it is necessary for an assignment of legislation under subitem (1) to be effectively carried out, the President, by proclamation, may—

(*a*) amend or adapt the legislation to regulate its interpretation or application;

(*b*) where the assignment does not apply to the whole of any piece of legislation, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph (*a*), those provisions to which the assignment applies or to the extent that the assignment applies to them; or. . .'

[186] Item 14 of schedule 6 of the Constitution makes provision for the assignment of old order legislation, by proclamation to the provinces, by the President of the Republic of South Africa. That was how Proclamation R63 of 1998 came into existence. In terms of item 14(2)*(b),* where only part of a statute is assigned to the province, only those parts of the statute that are assigned must be repealed or re-enacted. That must only be for those provisions to which the assignment applies or to the extent that the assignment applies to them.

[187] When the Land Affairs Act was assigned to KwaZulu-Natal in terms of Proclamation R63 of 1998, ss 11, 24, 25, 26, 29, 30 and 36 were excluded. Sections 24 to 26 are the provisions governing PTOs. The KwaZulu Land Affairs Amendment Act,[90] which came into operation on 11 September 1998, amended the Land Affairs Act so as to validate certain acts purporting to have been performed in terms of the Act. Proclamation R9 of 1997[91] amended the Land Affairs Act by substituting and deleting certain definitions, amending s 9 and references; amending ss 11, 19, 30, 36, 37, and 39; repealing s 35, and inserting Schedule II. Once again, the PTO provisions were not affected. However, the Minister delegated powers under ss 24 to 26 of the Land Affairs Act and the PTO Regulations to the MEC on 19 September 1998. Henceforth, the MEC became responsible for the issuing and registration of PTO rights on Trust-held land.

[188] The general rule is that: [92]

'…an earlier enactment is to be regarded as impliedly repealed by a later one if there is an irreconcilable conflict between the provisions of the two enactments . . . the exception applies when the earlier enactment is a special one, because it should not be presumed that the Legislature intended to repeal the special enactment if it did not make it clear that such was indeed its intention.'

[189] In *re Smith's Estate*,[93] it was said that:

'. . . where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the Court ought not to hold that general words in such a general Act of Parliament effect a repeal of the prior and special legislation unless it can find some reference in the general Act to the prior and special legislation, or unless effect cannot be given to the provisions of the general Act without holding that there was such a repeal.'

[190] In the absence of an express repeal, there is a presumption that a later general enactment was not intended to effect a repeal of a conflicting earlier and

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[90] KwaZulu Land Affairs Amendment Act 48 of 1998.
[91] Proclamation R9 of 1997, *GG* 17753, 31 January 1997.
[92] *Khumalo v Director-General of Co-Operation and Development and others* [1991] 1 All SA 297 (A) at 301.
[93] *In re Smith's Estate, Clements v Ward* (1887) 35 ChD 589 at 595.

special enactment. The presumption falls away, however, if there are clear indications that the Legislature nonetheless intended to repeal the earlier enactment.

[191] Section 12(2)*(c)* of the Interpretation Act,[94] provides that when a law is repealed, any right, privilege, obligation or liability acquired, accrued or incurred under the law is not affected unless the contrary intention appears.[95]

[192] When only part of the Land Affairs Act was assigned to KwaZulu-Natal under Proclamation R63 of 1998, the effect thereof was that the unassigned portions of the Act continued to be in force under the administration of national government. This is evident from the fact that the unassigned portions, together with the PTO Regulations, were later delegated to the MEC by the Minister on 19 September 1998. The assignment excluded ss 24 to 26 and no reference has been made to them in the legislation, which could justify the presumption that they were repealed. When the Land Affairs Amendment Act amended the Land Affairs Act through Proclamation R9 of 1997, none of the PTO provisions were repealed. As a consequence, there is no conflict, let alone an irreconcilable one, between the provisions of ss 24 to 26 and the assigned portions of the Land Affairs Act which could justify the conclusion that the PTO provisions were repealed. Further, in terms of the Land Affairs Act, the Minister has an obligation to dispose of Government land to the residents of Trust-held land, who are entitled to secure security of tenure over the land on which they live. In terms of s 12(2)*(c)* of the Interpretation Act, such an obligation of the Minister, and the right or privilege of the residents of Trust-held land, ie to acquire security of tenure, would remain intact even if the provisions in question were to be repealed.

[193] The contention by the Trust and the Board that the PTO provisions and regulations, as the statutory mechanism through which ownership of land can be transferred on unsurveyed land, were repealed or ceased to exist in 1998, is not borne by any evidence or recordings. Accordingly, I do not find any merit in such contention. If the PTO provisions were indeed repealed in 1998, as the Trust and the

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[94] Interpretation Act 33 of 1957.
[95] See also *Msunduzi Municipality v MEC of KwaZulu-Natal Province for Housing and another* [2004] 2 All SA 11 (SCA).

Board allege, there would be no need for the Board in 2007, at a meeting of the Portfolio Committee, to declare that it had terminated PTOs and to state the reason for so doing. What is noticeable is that the reasons the Board gave in its Annual Reports for the termination of PTOs are quite different from that which is contended now. At no stage had the Trust and the Board made any mention of the repeal or the ceasing to exist of the PTO provisions and the regulations in 1998 as the reason for their intended termination of PTOs. To the contrary, the evidence clearly establishes that PTOs and the regulations still remain the only statutory mechanisms for securing and formalising land tenure on unsurveyed land in the rural areas, including Trust-held land.

Court's Protection

[194] This court has a duty to protect PTO rights, customary law rights and informal rights or interests (collectively referred to as 'property rights') of the true and ultimate owners of Trust-held land against the conduct of the Trust and the Board, which purports, in excess of their powers and authority, to deprive the beneficiaries and residents of the land in question of such rights.[96] Further, this court has a duty to redress the resultant infringement and deprivation of the beneficiaries' and residents' property rights from the unlawful conduct of the Trust and the Board and inaction of the Minister.

[195] For deprivation to take place, there must be a legally protectable interest or an entitlement removed, and the impact of interference must be of sufficient magnitude to warrant constitutional engagement. In the present case, the property rights referred to above, are worthy of protection and are sufficiently substantial that their removal constitutes deprivation.[97]

[196] The land that is vested in the Trust is held on behalf of and for the exclusive use and benefit of its residents. The Trust's conduct constitutes a substantial interference with and limitation of customary and PTO land rights, that goes beyond

[96] See also *Minister of the Interior and another v Harris and others* 1952 (4) SA 769 (A) at 794A.
[97] See *South African Diamond Producers Organisation v Minister of Minerals and Energy and others* 2017 (6) SA 331 (CC).

any normal restriction on the occupation, use and enjoyment of land found in an open and democratic society, which amounts to deprivation.

[197] Rendering the occupation of the home tenuous dislocates the way of life of an occupier. In *Daniels v Scribante*,[98] Madlanga J, quoting from Rolsman,[99] said:

'Security of tenure is fundamentally important because it is the basis upon which residents build their lives. It enables people to make financial, psychological, and emotional investments in their homes and neighbourhoods. It provides depth and continuity for children's school attendance and for the religious, social, and employment experiences of children and adults. Security of tenure enables tenants "to fully participate in social and political life".'

In fact, security of tenure forms a link between the occupier's past, present and future.

[198] It is open for this court to order the Minister to devise a programme or scheme, including taking reasonable measures to provide relief to the beneficiaries and residents who have been subjected to an unlawful lease holding scheme, and to assist the beneficiaries and residents of Trust-held land to achieve full ownership of the land allotted to them as individuals where the law gives such members of the community the right to pursue that course.

[199] As indicated above, the applicants amended the prayers they sought in the notice of motion and replaced the notice of motion with a draft order. In this regard, in *President of the Republic of South Africa and another v Modderklip Boerdery (Agri SA and others, amici curiae)*,[100] the Constitutional Court, endorsing the decision of the Supreme Court of Appeal,[101] agreed with the observation of the SCA that:

'If a constitutional breach is established, this Court is . . . mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued.'

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[98] *Daniels v Scribante* 2017 (8) BCLR 949 (CC) para 33.

[99] Rolsman 'The Right to Remain: Common Law Protections for Security of Tenure' (2008) 86 *North Carolina Law Review* 817 at 820.

[100] *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, amici curiae)* 2005 (5) SA 3 (CC) para 53.

[101] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA) para 18.

As the evidence in this case has established the unlawfulness and unconstitutionality of the conduct of the Trust and the Board, as well as that of the Minister, the applicants are entitled to appropriate relief. Section 172(1) of the Constitution provides that:

'When deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, and

(b) may make any order that is just and equitable. . .'

The conduct of the Trust and the Board as well as that of the Minister is held to be unconstitutional to the extent that it violates the right to property, as enshrined in s 25 of the Constitution, of the residents of Trust-held land.

[200] The evidence establishes that the unlawful activities of the Trust and the Board when replacing PTOs with residential leases, together with the dereliction of statutory and constitutional duties by the Minister or her delegate, the MEC, have seriously prejudiced the third to ninth applicants in terms of their existing customary law rights and/or informal rights to and interests in the Trust–held land. In order to redress the situation, and to protect the beneficiaries and the residents from further harm, I agree with the applicants that the structural and interdictory relief sought in the draft order is an essential, necessary and appropriate remedy in the circumstances.

[201] Supervisory structural interdicts serve to '. . . ensure that courts play an active monitoring role in the enforcement of orders'.[102] The requirement that the respondents should report to court, on affidavit on the steps taken, ensures that the administrative measures ordered are complied with within a specific time period. Furthermore, '. . . the court's role continues until the remedy it has ordered in a matter has been fulfilled'.[103] By granting the structural interdict, a court receives '. . . a response in the form of reports and thereby prevents a failure to comply with the positive obligations imposed by its order'.[104] The enrolment of the matter before this court is essential for the court to determine the progress made in the implementation

[102] *Pheko and others v Ekurhuleni Metropolitan Municipality and others (Socio-Economic Rights Institute of South Africa as amicus curiae)* 2016 (10) BCLR 1308 (CC) para 1.
[103] Ibid.
[104] Ibid.

of the orders sought, which '. . . guarantees commitment to the constitutional values of accountability, responsiveness and openness by all concerned, in a system of democratic governance'.[105]

Costs

[202] The complexity, novelty and importance of this matter, more particularly to the parties, is not in dispute. The applicants have been compelled by the unlawful activities of the Trust and the Board, together with the Minister's dereliction of duty, to approach this court for relief. Because of the nature and the circumstances of this case, the applicants have hired the services of four counsel. In my view, the services of such counsel has been essential and necessary. It is therefore appropriate and just to award applicants costs of this application.

Order

[203] In the result, I grant the following order:

1. It is declared that the first respondent ('the Trust') and the second respondent ('the Board') acted unlawfully and in violation of the Constitution by –
    1.1 concluding residential lease agreements with persons living on the land held in trust by the Ingonyama ('Trust-held land') who are the true and beneficial owners of Trust-held land under Zulu customary law, by virtue of being members of the tribes and communities referred to in section 2(2) of the Ingonyama Trust Act 3KZ of 1994 ('Trust Act'), and
    1.2 concluding residential lease agreements with persons who held or were entitled to hold Permissions to Occupy or other informal rights to land protected under the Interim Protection of Land Rights Act 31 of 1996 ('IPILRA') in the land subject to the leases, without complying with the requirements of section 2 of IPILRA.
2. All the residential lease agreements concluded by the Trust and the Board, in respect of residential land or arable land or commonage on Trust-held land, with persons who –

[105] Ibid.

2.1 are the true and beneficial owners under Zulu customary law of Trust-held land, by virtue of being members of the tribes and communities referred to in section 2(2) of the Trust Act, or

2.2 held or were entitled to hold Permissions to Occupy or any other informal rights to land protected under IPILRA in the land subject to the leases,

are declared to be unlawful and invalid.

3. It is declared that the Trust is obliged forthwith to refund any and all money paid to the Trust or the Board under the lease agreements referred to in paragraph 2 to the persons who made such payments and any person who made payments under the lease agreement is entitled to a refund by the Trust to the extent of such payments.

4. It is declared that the third respondent ('the Minister') has breached her duty to respect, protect, promote and fulfil the constitutional right to property of the holders of IPILRA rights vested in respect of the Trust-held Land, by –

4.1 failing to respect, protect, promote and fulfil the existing property rights and security of tenure of the residents of Trust-held land, as required by sections 25(1) and 25(6) of the Constitution, read with section 7(2) of the Constitution;

4.2 failing to exercise, alternatively failing to ensure the exercise by her delegate, of the powers conferred by chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy) Regulations to demarcate allotments, issue and register Permissions to Occupy, survey such allotments, and obtain certificates of registered title in respect of such allotments in Trust-held land.

5. Until such time as the Minister may implement an alternative system of recording customary and other informal rights to land of persons and communities residing in Trust-held land:

5.1 the Minister is directed to ensure that the administrative capacity necessary to implement chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy) Regulations is reinstated forthwith; and

5.2 the Minister shall report to the court on the steps taken to comply with paragraph 5.1 of this order, within three months of the date of this order and

every three months thereafter until the parties agree in writing that the steps envisaged in paragraph 5.1 have been implemented and that the reporting may be concluded, or the court, on application by any party, so orders.

6. The Trust and the Board and the Minister opposing this application are directed to pay the costs of this application, the one paying the other to be absolved, including the costs of the four counsel employed (with three counsel having been employed at any one time)

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MADONDO DJP

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MNGUNI J

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OLSEN J

Judgement reserved:	9 December 2020
Judgment delivered:	11 June 2021
For the Applicants:	Adv T Ngcukaitobi SC Adv J Bleazard Adv S Magardie
Instructed by:	Legal Resources Centre Sharita Samuel Ref: T Mbhense
For 1st and 2nd Respondents:	Adv Dickson SC Adv Schaup
Instructed by:	Mason Incorporated Ref: Pk Coetzee/Nb/15/l001/058
For 3rd Respondent:	Adv J Semenya SC Adv S I Ogunronbi
Instructed by:	State Attorney Ref: Mrs Moodley 494/000355/18/C/P5