

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

Case NO: 12745/18P

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

**FILING NOTICE
THIRD RESPONDENT'S ANSWERING & SUPPORTING AFFIDAVIT**

Filed herewith

- I. THIRD RESPONDENT'S ANSWERING AFFIDAVIT BY THE ACTING DIRECTOR-GENERAL OF THE DEPARTMENT OF RURAL DEVELOPMENT & LAND REFORM (RENDANI SADIKI);
- II. CONFIRMATORY AFFIDAVIT BY THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM (MAITE E NKOANA-MASHABANE);
- III. SUPPORTING AFFIDAVIT BY THE CHIEF DIRECTOR: LEGAL SERVICES (MASHUDU J TSATSAWANE); AND
- IV. CONFIRMATORY AFFIDAVIT BY THE OFFICE OF THE STATE ATTORNEY, PRETORIA (SIPHO MATHEBULA);

DATED AT PRETORIA THIS 14 DAY OF MARCH 2019



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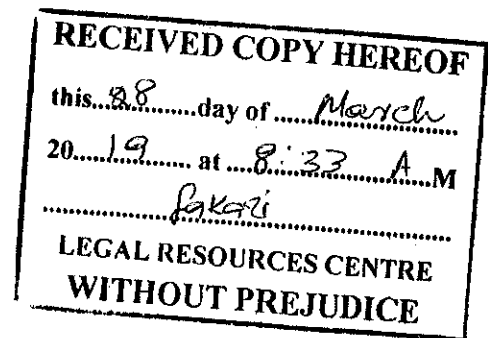
EQR: MRS MOODLEY

To:

THE REGISTRAR
HIGH COURT
DURBAN

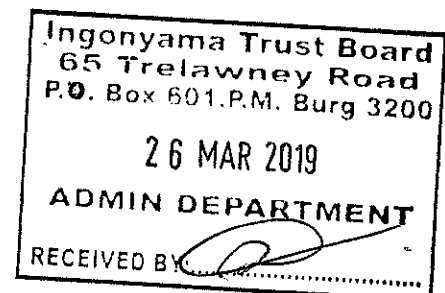
And to:

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AND TO:

THE INGONYAMA TRUST AND
THE INGONYAMA TRUST BOARD
First and Second Respondents
65 Trelawney Road
Southgate
PIETERMARITZBURG



AND TO:

THE MEC FOR CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS, KWAZULU-NATAL

Third Respondent

Care of The State Attorney
MetLife Building, 6th Floor
391 Anton Lembede Street
DURBAN

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Case NO: 12745/18P

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**COUNCIL FOR THE ADVANCEMENT OF THE
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First Applicant

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KN

Eighth Applicant

SM

Ninth Applicant

and

THE INGONYAMA TRUST

First Respondent

THE INGONYAMA TRUST BOARD

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**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

THIRD RESPONDENT'S ANSWERING AFFIDAVIT

LM R.S

I, the undersigned,

RENDANI SADIKI

do hereby make oath and say:

I. INTRODUCTION

1. I am an adult female of full legal capacity.
2. I am currently the acting Director-General and the accounting officer of the Department of Rural Development and Land Reform (***"the Department"***).
3. I depose to this Affidavit on behalf of:
 - 3.1. the Third Respondent, the Minister of Rural Development and Land Reform (***"the Minister"***) who is the Executive Authority and a member of Cabinet responsible for the administration of the Department; and
 - 3.2. the Department, in relation to the relief that the Applicants seek against the Department.
4. I am duly authorised by the Minister and Department to depose to this affidavit and to oppose this application.

5. On account of my official responsibilities in the Department, access to records of the Department in that capacity, my professional experience and personal knowledge, I confirm that the facts deposed to herein are, unless indicated by the context, true and correct.
6. I have read the Notice of Motion in this Application and the following affidavits in support thereof:
 - 6.1. the founding affidavit of Parmananda Lawson Naidoo;
 - 6.2. the expert affidavit of Professor Thandabantu Nhlapo;
 - 6.3. the supporting affidavit of Sizani Ngubane, the director of the Second Applicant;
 - 6.4. the supporting affidavit of Hletshelweni Linah Nkosi, the Third Applicant;
 - 6.5. the supporting affidavit of Bongani Zikhali, the Fourth Applicant;
 - 6.6. the supporting affidavit of Zakhele Malcom Nkwankwa, the Fifth Applicant;

6.7. the supporting affidavit of Hluphekile Bertina Mabuyakhulu, the Sixth Applicant;

6.8. the supporting affidavit of Mabongi Gumede, the Seventh Applicant; and

6.9. the supporting affidavit of the anonymous person described as "KN" in the said affidavit, the Eight Applicant.

7. The supporting affidavit of the anonymous person, who is described as "SM" and cited as the ninth applicant, is not attached to the papers served by the Applicants on the Minister.

8. I wish to state that the confirmatory affidavit deposed to by Mr Sithembiso Gumbi and which is referred to in para 124.3 of the Founding Affidavit is not attached to the papers served by the Applicants on the Minister.

II. STRUCTURE OF THIS AFFIDAVIT

9. This affidavit is presented as follows:

9.1. **First**, the relief in the Notice of Motion as it affects the Minister and the department is described;

- 9.2. **Second**, the powers and obligations of the Minister in terms of the Constitution and the relevant laws are discussed;
- 9.3. **Third**, I present the stance adopted by the Minister in respect of the relief that the Applicant seeks;
- 9.4. **Fourth**, I answer, to the extent deemed necessary, *ad seriatim*, to the Founding and supporting Affidavits; and
- 9.5. **Fifth**, concluding remarks are offered.

III. RELIEF AGAINST THE MINISTER

10. The Minister is the Third Respondent in this application, the main respondents being the Ingonyama Trust ("**the Trust**") as the First Respondent and the Ingonyama Trust Board ("**the Board**") as the Second Respondent.

11. As against the Minister, the Applicants seek, in the main, the following Order:

- 11.1. the Trust and the Board to consult with the Minister on the steps to receive applications for PTO rights, and to issue and register PTO rights, subject to and in accordance with chapter XI of the KwaZulu Land Affairs Act 11 of 1992 ("**the Land Affairs Act**") and the KwaZulu Land Affairs (Permission

to Occupy) Regulations (G.N. 32/94) (***the PTO Regulations***);

- 11.2. the Minister and the Department are directed to oversee and ensure compliance by the Trust and the Board with the orders to cancel residential leases on the Trust's land, to restore pre-leasehold statutory and/or customary law occupancy and use rights of rights-holders;
- 11.3. the Minister to report, through a Lease Cancellation Report detailed in prayer 7.1 of the Notice of Motion, every three (3) months from the date of the Order until its discharge;
- 11.4. declaration that the Minister is obliged to exercise the powers conferred by, and in breach of the obligations imposed in, chapter XI of the Land Affairs Act and the PTO Regulations to demarcate allotments, to issue and register Permissions to Occupy, to survey such allotments, and to obtain certificates of registered title in respect of such allotments in Trust-held land;
- 11.5. declaration that the Minister is in breach of the duty to respect, protect, promote and fulfil the constitutional right to property of the holders of "PTO rights" and "IPILRA rights"

("Trust land"). At the core of the Applicants' challenge is the contention that the Trust, as holder of the legal right (the trustee) to the Trust land is precluded from entering into leasehold with the beneficial owners.

13. Though the relief that the Applicants seek against the Minister is closely related to or/and predicated on the primary liability of the Trust and the Board in respect of rights on the Trust land as described in the founding papers, I however point out that:

13.1. in order to sustain certain of the prayers that the Applicants seek *against* the Minister those against the Trust and the Board must be established;

13.2. the Applicants are seeking relief which is not sourced from the primary relief relating to the alleged cancellation of the PTO rights or the conclusion of lease agreements between the Board and residents/occupiers of the Trust's land;

13.3. the relief seeking to compel the "*issuing and registration of PTOs, the granting of deeds or grants and certificates of registration in respect of such allotments*" in prayer 7.1.6 read with 9, 11, 12 and 13 appears to be stand-alone orders

that will impose considerable financial and administrative burdens on the state;

13.4. the issuance of "*PTOs, the granting of deeds or grants and certificates of registration in respect of such allotments*" on communal land vested in the Trust impermissibly implicates the functional independence of the executive branch of government. This is an issue more appropriately left to the non-judicial branches of government such as the legislature and the executive as it requires polycentric political decisions; and

13.5. I have therefore addressed the prayers sought against the Board and the Trust only in so far as it is necessary to place in perspective the entire nature of the Applicants' case.

IV. POWERS OF THE MINISTER

14. This application is built on the tenure rights of persons on communal land, rights which are guaranteed in terms of the Constitution and that the Minister swore to uphold.

15. Section 25(6) of the Constitution, which the Applicants allege that the Minister is in breach of, reads:

"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."

16. The affected tenure rights are contained in the following pieces of legislation and to the *"extent provided by an Act of Parliament"*:

16.1. IPILRA (Interim Protection of Informal Land Rights Act 31 of 1996);

16.2. The Land Affairs Act (KwaZulu Land Affairs Act 11 of 1992) in sections 24 to 26

16.3. The PTO Regulations (KwaZulu Land Affairs (Permission to Occupy) Regulations (G.N. 32/94)); and

16.4. KwaZulu-Natal Ingonyama Trust Act, No. 3KZ of 1994 (***the Trust Act***).

17. The tenure rights on the Trust land are further protected in terms of Customary law.

18. The White Paper on South African Land Policy, April 1997 captures the complexity of tenure reform. The White Paper will be referred

to at the hearing of the application and made available to the Court should it become necessary.

19. The State has enacted other pieces of legislation, though they do not all necessarily find equal application to the Trust land in this case, to protect the constitutional tenure rights of citizens. These include:

- 19.1. Communal Land Rights Act No. 11 of 2014 ("**CLARA**");
- 19.2. Upgrading of Land Tenure Rights Act No. 112 of 1991;
- 19.3. Land Titles Adjustment Act No. 111 of 1993;
- 19.4. Transformation of Certain Rural Areas Act No. 94 of 1998;
- 19.5. Extension of Security of Tenure Act No. 62 of 1997;
- 19.6. Communal Property Associations Act No. 28 of 1996;
- 19.7. Development Facilitation Act No. 67 of 1995;
- 19.8. Distribution and Transfer of Certain State Land Act No. 119 of 1993;
- 19.9. Spatial Planning and Land Use Management Act No. 16 of 2013;

- 19.10. Deeds Registries Act No. 47 of 1937; and
- 19.11. Traditional Leadership and Governance Framework Act No. 41 of 2003.
20. The Department has developed and submitted to Parliament the Draft Communal Land Tenure Bill, 2017 to address tenure rights of those who live on communal land including the Trust land.
21. The Draft Communal Land Tenure Bill, 2017 and the Explanatory Memorandum which were published for public comment in Government Gazette No. 40965, Notice 510 of 2017 of 7 July 2017 include the following as the long title of the draft Bill:

"To provide for the transfer of communal land to communities; to provide for conversion into ownership of land rights in communal land to communities that own or occupy such land; to provide for the transfer of ownership to communities and community members of land acquired by the State to enable access to land on an equitable basis; to provide for the right to use by community members of land owned by the State; to provide for registration of communal land; to provide for conditions of registration of communal land; to provide for general plans for communal

land; to provide for the award of comparable redress; to provide for land rights enquiries; to provide for acquisition of more land for use as communal land; to provide for the choice on the administration of communal land; to provide for the establishment of households forums by communities; to provide for community rules; to provide for the establishment of communal land boards; to provide for dispute resolution mechanisms; to provide for the provision of municipal services on communal land, to amend and repeal certain laws; and to provide for matters incidental thereto."

22. Clause 4(1) in the Draft Communal Land Tenure Bill reads:

"This Act applies to—

(a) communal land which is vested in the State, or which at any time vested in—

(i) a government contemplated in the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971);"

23. Trust land in this application is envisaged as communal land to which the Draft Communal Land Tenure Bill would apply once enacted.
24. I wish to note that the IPILRA is a temporary protection measure for insecure tenure rights in the former homelands and self-governing territories. As early as 1999, the Department produced a draft Land Rights Bill that was aimed at replacing IPILRA.
25. It is respectfully submitted that the powers of the Minister in respect of the tenure arrangements on Trust land, are as follows:
- 25.1. Section 3(1)(a) of the Trust Act, which divests the State of the "*land or real right therein*", vests in the Ingonyama Trust the ownership of the Trust land;
- 25.2. The Land Affairs Act is, in terms of the definition of "*Government land*" in its section 1, subject to the Trust Act;
- 25.3. The Land Affairs Act, in terms of the definition of "*owner*" in section 1 read with sections 5 and 6 thereof, does not define Trust land as vesting in the Minister;
- 25.4. As the Trust land is vested in the Trust, it is not "*Government land or land owned by a tribal authority*" in terms of section

24 of the Land Affairs Act, and consequently in respect of which the Minister may exercise authority in terms of Chapter XI of the Land Affairs Act.

26. In these circumstances, it is denied that:

26.1. the land administration powers over the Trust's land, including the power to cancel PTO rights, are vested in the Minister and the Fourth Respondent;

26.2. the Minister is responsible for, and empowered by, chapter XI of the Land Affairs Act and the PTO Regulations to:

26.2.1. demarcate allotments on the Trust's land for the purpose of granting PTOs over the Trust's land;

26.2.2. grant and record PTOs in respect of and over the Trust's land;

26.2.3. grant deed of grant rights and a certificate of registered title over the Trust's land;

26.2.4. develop and implement the administrative capacity necessary to demarcate allotments, issue and register PTOs for residential, church,

in terms of the Interim Protection of Informal Land Rights Act 31 of 1996 ("**IPILRA**") which are vested in respect of the Trust-held Land;

- 11.6. the Minister to develop and implement the administrative capacity necessary to demarcate allotments, issue and register PTOs for residential, church, crèche, school or public purpose; survey such allotments;
 - 11.7. the Minister to grant deed of grant rights and to obtain certificates of registered title in respect of such allotments in the Trust-held land in accordance with chapter XI of the Land Affairs Act and the PTO Regulations; issue and register officially recognised certificates of land rights, and if there are none other, then to register PTOs in accordance with the PTO Regulations; and
 - 11.8. the Minister to report, in accordance with an "**administrative measures order**" in compliance with prayer 12 of the Notice of Motion within three (3) months from the date of the Order until its discharge.
12. In the main, the Applicants challenge the authority of a land owner – *the Trust* and the *Board* to issue leases on its own land

crèche, school or public purpose; survey such allotments over Trust land.

26.3. the conclusion of lease agreements, without consent, in respect of Trust land that were held under PTO or Zulu customary law infringes the PTO rights or Zulu customary law rights of the holder (described as the "***PTO conversion project***");

26.4. the Minister has the power in respect of Trust land to:

26.4.1. issue and register "*officially recognised certificates of land rights*", and

26.4.2. alternatively, "*register PTOs in accordance with the PTO Regulations*".

27. Even if the above interpretation of the relevant legislative provisions may be found to be incorrect, any exercise by the Minister of any residual powers over Trust land would be subject to the concurrence of the Trust and the Board, as well as the processes for dealing with Trust land as prescribed by the provisions of the Trust Act.

28. This Application is Incompetent for the following reasons:

- 28.1. The Trust Act has divested the State of the ownership of and the real rights in the Trust land, as the ownership and the real rights were transferred to and held by the Trust in terms of section 3 of the Trust Act;
- 28.2. To the extent that Trust land may be "*Government land*" within the meaning ascribed to the term in the Land Affairs Act it must be read subject to the Trust Act;
- 28.3. The Minister may not issue PTO rights on Trust land in the manner contained in the notice of motion;
- 28.4. The Land Affairs Act and the PTO Regulations do not find application on the Trust land at all or in the manner suggested by the Applicants; and
- 28.5. The powers under sections 24 to 26 of the Land Affairs Act and the PTO Regulations which were delegated to the provincial MEC for Traditional and Environmental Affairs ("**the MEC**") on 19 September 1998 by the then Minister responsible for Land Affairs in the national Government and in terms of which the MEC became responsible for the issuing and registration of PTO rights in Trust land (attached as **FA8** to the Founding Affidavit) are subject to the Trust Act.

V. POSITION OF THE MINISTER IN RESPECT OF THE RELIEF SOUGHT

29. In view of the interconnectedness of the relief against the Minister with that sought against the Board and the Trust, it is imperative to state the following positions:

29.1. where lease agreements were concluded without informed and genuine consent of occupants/residents of Trust's land, the Court may find that they ought to be cancelled, which is an outcome that the Minister abides;

29.2. where rentals have been received by the Trust/Board as a result of leases that were concluded without informed and genuine consent of occupants/residents of Trust's land, the Court may find that such rentals should be refunded consequent upon the cancellation of such leases, which is also an outcome that the Minister abides;

29.3. unless such leases (that were concluded without informed and genuine consent) have been registered in terms of the Deeds Registry Act No. 47 of 1937 and as such require a court order directing the Registrar of deeds to effect such cancellation, the Board should furnish to the court a list of all leases concluded and addresses of all lessees to enable

that any order of cancellation is effected without the need for prayers 2, 3, 4.1, 4.2 and 5 in the Notice of Motion;

29.4. prayers 2, 3, 4.1 and 4.2 in the Notice of Motion are not required in their present form to give effect to the cancellation of such leases (that were concluded without informed and genuine consent)

30. Notwithstanding what is stated above, I point out that from the reading of the founding affidavit and supporting affidavits it does not appear that the Applicants have presented evidence to support a case that leases were concluded without consent. This is a matter over which I do not have personal knowledge as it falls within the knowledge of the Trust and the Board. My submission is based merely from a reading of the affidavits and annexures presented to this Court.

31. Prayer 4.3 is disconnected from prayers 4.1 and 4.2 to the extent that prayer 4 is, in the main, predicated upon *"the request of any person who held or holds PTO right or IPILRA right in Trust-held land"*. If a person (and it is denied that any of the applicants held PTO rights) held such rights:

- 31.1. the *status quo ante* is restored by any lease cancellation order of this court;
- 31.2. no documentary or official proof of restoration of such rights is required;
- 31.3. prayer 4.3 in such circumstances is superfluous;
- 31.4. prayer 7.1.6 is similarly objectionable for such reasons.
32. The underlying customary rights on Trust land do not appear to be extinguished as a consequence of the lease agreements. Customary rights, just as IPILRA rights, are constitutionally-protected, and a waiver of a constitutional right cannot be presumed as presented in the founding papers. I am advised that to waive a right, a party must intentionally and knowingly abandon such rights, which is not with the case with the residents/occupiers of Trust's land. The lease agreements attached to the affidavits before this Court do not appear to require such a waiver.
33. Admittedly, section 25 (6) of the Constitution imposes a positive and negative duty to protect security of tenure, a duty which is confirmed in terms of section 2(8) of the Trust Act that:

"In the execution of his or her functions in terms of this section the Ingonyama shall not infringe upon any existing rights or interests."

34. It is therefore the Minister's view that the centrepiece of the Applicants' case as captured at paragraph 5 of the Founding Affidavit, that is, the conclusion of lease agreements without consent and the payment of rental in respect of such, if proved, may be remedied by no more than an appropriate order for:

34.1. cancellation of affected lease agreements entered into between the Board and any resident/occupier of Trust's land without the genuine and informed consent of such person;

34.2. refund of funds paid to the Board pursuant of such lease agreements; and

34.3. declaration that no underlying customary rights on Trust land are extinguished as a consequence of the lease agreements.

35. Subject to the aforesaid, I humbly contend that the Applicants have not made out a case in the papers entitling them to the prayers that they seek in the Notice of Motion.

36. In the circumstances I deny that:

36.1. the Minister is in breach of the duty to respect, protect, promote and fulfil the constitutional right to property of the holders of "PTO rights" and "IPILRA rights" in respect of Trust land;

36.2. the Minister is obliged to exercise the powers conferred by, and in breach of the obligations imposed in, chapter XI of the Land Affairs Act and the PTO Regulations; and

36.3. the Minister is in breach of a duty imposed by the Constitution.

37. None of the Third to Ninth Applicants, in their supporting affidavits, makes the allegation that:

37.1. they are holders of PTO rights; or

37.2. they hold existing and valid PTOs that were:

37.2.1. cancelled;

37.2.2. in the process of being cancelled;

37.2.3. converted to leases at all or without consent; or

37.2.4. in the process of being converted to leases at all or without consent.

38. There is no factual basis laid in the papers to support the specific relief sought, or for this honourable Court to grant an order declaring that the Trust and the Board have acted unlawfully and in violation of the Constitution by cancelling PTO rights and concluding "long term" residential lease agreements with the holders of PTO rights. There is no credible evidence of cancellations of PTO or other informal rights.

39. The relief in prayer 4.2 of the Notice of motion is for the restoration of "*occupancy and use rights, held under statutory and/or customary law*". This relief is flawed on the premise that:

39.1. applicable occupancy or use rights under statute could conceivably only be held in terms of IPILRA or the Land Affairs Act and any preceding legislation which conferred rights or interests in land;

39.2. applicable occupancy or use rights under customary law, as well as IPILRA rights were/are neither registered nor documented;

39.3. the relief is based on allegations of lack of free consent to enter into leases on the land upon which they held PTO rights and/or of informal land rights which are protected under IPILRA;

39.4. yet none of the Applicants have pleaded:

39.4.1. a provision in the lease agreement in terms of which the PTO rights and/or informal land rights were abrogated;

39.4.2. any legal basis for the belief that PTO rights and/or informal land rights have been extinguished by the conclusion of a lease agreements;

39.4.3. the process embarked upon by the Trust or the board to terminate a right conferred by law;

39.4.4. how the termination of the PTO rights and/or of informal land manifests in reality, apart from their belief; and

39.4.5. how in practice, unregistered and undocumented occupancy or use rights under customary law, and IPILRA rights are to be restored.

39.5. the legal basis and status of such a "written record" which the applicant seeks under prayer 5.2. especially that previously unregistered and undocumented occupancy or use rights under customary law and IPILRA rights must now be documented and registered; and

39.6. these off-register customary and 'informal' rights will, in order to be registered or included in a "written record", require a defined property in relation to a legally identifiable property holder which may be juristic in nature. Multi-layered informal rights may exist on a single cadastral unit. Land parcels are often not surveyed or have identifiable cadastral units, thus imposing a severe and expensive administrative burden on the State. The process required may run for several years, making the enforcement of a structural interdict cumbersome if not impossible.

40. The relief for a "written record" under prayer 5.2 that previously unregistered and undocumented occupancy or use rights under customary law and IPILRA rights must now be documented and registered is no more than a policy-making relief that offends the separation of powers in an unconstitutional manner.

41. The Applicants have no legal basis to seek a relief that the Minister issue and register officially recognised certificates of land rights on the Trust land as the ownership thereof vests in the Trust and not the State. This relief is incompetent. Such an order of Court will amount to an impermissible judicial law-making.
42. To the extent that certain aspects of the relief sought by the Applicants, especially prayer 12, concern matters that are eminently within the domain of the executive branch of government and currently being considered within the Draft Communal Land Tenure Bill which is already approved by Cabinet for public consultation and processing by Parliament, it is not in the interest of justice that this matter be heard by the Court and the orders sought be granted.
43. The declaratory order, in particular in respect of prayers 1, 4, 5, 6, 9, 12 & 13 is impermissible in terms of section 21(1)(c) of the Superior Courts Act No. 10 of 2013. None of the Applicants has presented evidence that they hold or held PTOs or have a legally recognised interest in an existing, future or contingent right or obligation in relation to the relief sought in those prayers.

44. The premise advanced for the invocation of standing by the Applicants is denied, and on that basis deprive the Applicants of standing to institute this application in that:

44.1. there is no unlawful deprivation of constitutionally-protected property rights in the circumstances alleged;

44.2. the Minister has not failed to act in the manner advanced by the Applicants;

44.3. the fact, or law, or both, is/are not common to all members of the class purportedly represented by the Applicants;

44.4. the relief sought does not flow from the cause of action especially that:

44.4.1. prayer 1.1 alleges cancellation of PTO rights when none of the Applicants place the fact of such cancellation of PTOs before the Court;

44.4.2. prayer 1.2 is predicated on the rights of the "holders of PTO rights" when none of the Applicants place the fact of holding any PTO rights before the Court; and

44.4.3. prayer 1.2 is predicated alternatively on the rights of the holders of informal land rights where such rights, which are purportedly cancelled, are expressly preserved by the lease agreements or/and by operation of the law;

44.5. the members of the class are not objectively determinable, or the class is not defined with sufficient precision as to allow for a particular individual's membership to be objectively determined. It is impractical to objectively determine those who concluded lease agreements with the Trust without "*genuine and informed consent*" as pleaded;

44.6. the relief sought is not ascertainable and capable of determination in circumstances that:

44.6.1. the cornerstone of prayer 1, being the lack of "*genuine and informed consent of such rights-holders*" to the lease, is founded on the Third to Ninth Applicants' averments that they were given no alternative but to conclude the Trust's lease agreements by the Traditional Council or/and the local Induna or/and Traditional Council employees;

- 44.6.2. the affected Traditional Council or/and the local induna or/and Traditional Council employees have not been joined to this suit, which is impermissible and should result in the dismissal of the application for a material non-joinder;
- 44.6.3. where an applicant, such as the fifth applicant, is alleged to have approached the Traditional Council for a PTO certificate, based on the innocent but mistaken belief that a Traditional Council or the Trust or the Board has the power to receive or consider an application for PTO or issue a PTO;
- 44.6.4. there is no mechanism to determine others within the same class of those who did not offer "*genuine and informed consent of such rights-holders*" to the lease;
- 44.6.5. those who concluded lease agreements with the Trust with genuine and informed consent may now rely on the relief if granted to resile from the lease agreements when such a class

would not have been the intended beneficiary
of the relief sought.

45. It is denied that the First Applicant has the authority or mandate to seek to affirm the constitutionally-protected property rights of those living on Trust-held land as the views expressed may not be commonly shared by most of the residents and occupants of the Trust land.
46. It is important to point out that the Applicants do not say that they represent the majority of the occupants and residents of the Trust land especially those who have voluntarily applied for and concluded lease agreements on the Trust land. This category includes residents and occupants who held no PTO rights on the land but concluded lease agreements out of own volition with the Trust as recordal of the rights they hold on Trust land.
47. This application is in essence a "class action" on behalf of a class of persons. I wish to point out that:
- 47.1. the suit is based on the personal accounts of the Third to Ninth Applicants to ground the relief that is intended for the benefit of a class, which is described in the papers as "any

person who held or holds a PTO right or IPILRA right in Trust-held land”;

47.2. accordingly, the Applicants must establish that the relief claimed and the issues involved are substantially similar in respect of all members of the class (though it is contended on behalf of the Minister that the relief claimed and the issues involved are not substantially similar in respect of all members of the class, and in which case the application is not competent); and

47.3. it is in the interests of justice to require certification of this application as a class action.

48. The Minister will in the circumstances, in the absence of certification, raise *in limine* that the Applicants have no right to proceed in a representative capacity. This is so as the interest of those who do not in truth fall within the class covered in the suit may be impacted upon by the relief sought.

49. The relief that the Applicants seek does not accord with the statutory positions of the Trust and the Board, including the institution of traditional leadership and customary law, as constitutionally recognised in sections 211 and 212 of the

Constitution, which is given effect to in respect of the Trust land, by amongst others:

- 49.1. customary law;
- 49.2. the Trust Act;
- 49.3. the Draft Communal Land Tenure Bill; and
- 49.4. the Traditional Leadership and Governance Framework Act No. 41 of 2003.

VI. ANSWERING TO THE FOUNDING PAPERS

50. I respectfully point out that the Minister and the Department are not in a position to respond to each and every issue raised or allegation in the affidavits filed especially in so far as those issues are within the knowledge of other parties and not the Minister or/and the Department.

51. To the extent that I fail to respond to any statement made in the Applicants' founding affidavit, or the expert affidavit and the supporting affidavits, it must be taken to be denied rather than admitted. The basis for the denial is as contained in the generality of this affidavit.

52. For the reasons set out below in this affidavit, it is my humble contention that the Applicants have not made out a case for the relief sought, and the application falls to be dismissed.

Ad paras 1 - 4

53. Save to reiterate that the Minister disputes the correctness of the legal basis that informs the application, the contents of these paragraphs are noted.

Ad paras 5 -11, and 118 - 125

54. I admit that the Minister and the Department are aware that the Trust and the Board conclude lease agreements with residents and occupiers of Trust land.
55. In view of the position that the Minister takes that the constitutionally-protected customary/IPILRA rights of the residents/occupiers of Trust land do not appear to be extinguished by the lease agreements (placed before the Court) nor waived in the circumstances of this matter, I deny knowledge of, and do not accept as true and correct, the Applicants' assertion that the Trust and the Board are:

- 55.1. undermining the security of tenure of the residents and occupiers of Trust land by such conclusion of lease agreements;
 - 55.2. extorting money from the residents and occupiers of Trust land by such conclusion of lease agreements;
 - 55.3. unlawfully compelling or inducing the residents and occupiers of Trust land to pay rental to the Trust in order to continue living on Trust land;
 - 55.4. inducing and requiring residents and occupiers to sign lease agreements on the basis of false and incomplete information and without giving notice of the material terms of the lease agreements, including rental; and
 - 55.5. violating the customary law and statutory PTO rights of residents and occupiers living on Trust land, or that the alleged violations are serious, widespread and systematic;
56. To the extent that the contents of paras 8 and 9 of the Founding Affidavit seek to support the allegation of the alleged "conversion" of PTO to lease agreements, I wish to respectfully state that:

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56.1. no such media report is presented or is evidence presented of a person whose PTO rights has been cancelled or converted in the manner alleged;

56.2. the Board's annual reports to the Minister did confirm the conclusion of lease agreements but not the "conversion" of "*customary and statutory PTO rights to less secure, lease rights*" or "*dispossession of land rights*" as alleged by the Applicants;

56.3. a fair reading of the High Level Panel's Report does not support the conclusion drawn by the Applicants; and

56.4. the Trust Act empowers the Board to conclude lease agreements on Trust land subject to pre-existing customary and statutory rights.

57. I deny the alleged dispossession of land rights by the Trust and the Board, and the allegations of dispossession of land rights by the Trust and the Board are not supported by any evidence on the papers filed, in circumstance where the Trust and the Board:

57.1. stated that the Project on the PTO Conversion is a voluntary process and those who prefer not to respond or participate are free to do so;

57.2. the leasehold is predicated on underlying customary rights of the residents and occupiers of the Trust land. The underlying customary rights are evident in the role of the traditional councils in the lease application process, which traditional councils have not been joined as parties to the application and should have been joined because they play an important statutory role under the Trust Act in respect of rights in Trust land, have allegedly played a role in the lease application process, and stand to be adversely affected by the outcome of the application.

58. The relief and the conclusions of law made at paras 5 – 11 are generally addressed elsewhere in this affidavit, and are especially matters that will be addressed *in limine* at the hearing in due course.

59. I wish to state that in the performance of its constitutional oversight role, Parliament through its Committees does invite Ministers, Departments and other public entities to address it on the public mandates granted to such authorities. In this connection, the Minister, officials of the Department and the Board members or/and representatives of the Board have appeared before parliamentary committees on the subject of this suit.

60. I admit that on 7 March 2018 and on other dates referred to in the founding affidavit the National Assembly Portfolio Committee on Land Reform and Rural Development met with the Minister, certain officials of the Department and members of the Board in respect of what is termed "the land conversion to leases".

61. I however wish to state that the Applicants' assertions, recordal and interpretation of the engagements of the Parliamentary Portfolio Committee with the Minister, the Department and members of the Board are not entirely accurate and correct: I state so because:

61.1. The Portfolio Committee meeting on 7 March 2018 was a briefing to the Committee as well as an information sharing session that included robust engagement on the issues discussed. Various questions were posed by members of the Portfolio Committee to all the participants;

61.2. I deny that there was a consensus reached or decision taken by the Portfolio Committee on the issue of the so-called the land conversion to leases as presented by the Applicants;

61.3. The incorrectness of the Applicants' position, borne out of distortion and exaggeration of the real events, in para 12.7 of the founding affidavit that *"I set out how the National Assembly's Portfolio Committee ... has attempted to exercise oversight over the Board and persuade it not to infringe on the rights of the residents and occupiers, but to no avail"* is exposed by its own annexure FA 26 (at page 321) where it is recorded that:

"The Chairperson addressed the Deputy Minister and asked the DRDLR to put its house in order because the Committee did not send two separate invitations – it was for the Department to communicate with the ITB. It would be a problem if everyone was not on the same page. The Committee was not pleased with the process – ITB and the Department needed to go back and look at the matter. If necessary, the process should be put on hold so that the comments of Members were looked at and how the conversion would affect communities. Thorough consultation was required. Before implementation was carried out, the Committee should be briefed again. The DRDLR and ITB must respect the Committee and not take it for

granted by responding to questions in any fashion. The Committee would like to see conversion of informal ownership to title deeds – this would give people the dignity of owning land on which they are residing instead of being tenants.”

- 61.4. A more accurate and fair reading of Annexure FA 26 to the Founding Affidavit does not support the Applicants' statement in para 13.3 of the Founding Affidavit that:

“The Trust and its Board have acted with apparent impunity, as the Ministers and Portfolio Committee tasked with overseeing its functions have failed to act to protect these rights, despite having knowledge of the Trust's so-called “PTO-conversion project.”

- 61.5. It is incorrect that the Minister or the Department has “failed to act to protect these rights, despite having knowledge” in the circumstances that:

- 61.5.1. the Board clarified its position and justified why it embarked on the leasehold route;

- 61.5.2. the Board was urged by the Portfolio Committee to engage in further consultation on the issue of leasehold;
- 61.5.3. the Department was afforded the opportunity *"to go back and look at the matter"*;
- 61.5.4. the Portfolio Committee expressed a desire, and not an instruction, in that *"The Committee would like to see conversion of informal ownership to title deeds"*;
- 61.5.5. the expressed desire of the Committee *"to see conversion of informal ownership to title deeds"* in respect of rights and interests on Trust land require either the Trust voluntarily executing a transfer of the ownership rights or through a legislative amendment of the Trust Act to divest the Trust of its ownership in respect of specific parcels of the trust land; and
- 61.5.6. the Applicants' preferred position against leasehold does not establish the unlawfulness of the leasehold approach;

61.6. The records of the Parliamentary Monitoring Group which are attached to the Founding Affidavit are not the official records of the Portfolio Committee in respect of the meetings of the Committee; and

61.7. Annexures FA20, FA21, and FA26 to the Founding Affidavit do not support the premises advanced in the Founding Affidavit.

62. I wish to state with regard to para 120 of the Founding Affidavit that:

62.1. The discussion on, and reference to the lack of Departmental policies on conversion of PTOs to leases and upgrading of PTOs to ownership are broad statements applicable in general to the land reform programme of the Department. The statement was not made in consideration of the special status of the Trust land vis-à-vis State land;

62.2. I confirm that the acquisition of ownership rights in State land to which the Minister holds the title (this is colloquially referred to as "State land disposal") requires the approval of the Minister subject to compliance with applicable legal and policy framework;

- 62.3. Disposal of State land may include land upon which informal statutory or customary rights exist;
- 62.4. The conversion of informal statutory or customary rights or PTOs to full ownership will require the approval of the owner of the land or in compliance with specific legal framework;
- 62.5. I deny that "any" conversion of a PTO to ownership right requires the approval of the Minister;
- 62.6. Section 3(1) of the Upgrading of Land Tenure Rights Act No. 112 of 1991, read with Schedule 2, deals with conversion of land tenure rights into ownership. It, inter alia, provides that where the State is the owner of a piece of land situated outside a formalised township which piece of land is lawfully occupied by a tribe or community, a deed of transfer in respect of that land shall not be submitted unless the consent of the tribe or community has been obtained;
- 62.7. Section 3(1) (b) of Act No. 112 of 1991 specifically provides that where a tribe is the owner of the land, the decision to convert the relevant land tenure right into ownership shall be taken by way of a tribal resolution;

62.8. Act No. 112 of 1991 neither authorises the Minister nor does it provide a statutory or other basis for the Minister to convert informal or land tenure rights to ownership on land other than State land;

62.9. The approval of the Minister will not be required for the conversion of PTO to ownership in terms of Act No. 112 of 1991; and

62.10. Mr Sello Ramasala is an official of the Department with responsibility for legislation drafting, and he was and is not the head of the Department's (DRDLR) Legal Unit.

63. Save to state that the underlying customary rights on Trust land do not appear to be extinguished as a consequence of the lease agreements (presented to Court), I deny the contents of para 121 of the Founding Affidavit.

64. While not admitted that leases on Trust land may be upgraded to ownership due to the nature of the ownership by the Trust, it is noteworthy that a lease is a "*land tenure right*" within the meaning ascribed to such term in the Act No. 112 of 1991, and which may be upgraded to ownership.

Ad paras 13 - 30

65. Save to admit the Identity of the Applicants, it is denied, on the basis set out above, that the Applicants possess the requisite standing to institute this representative application on behalf of the class that they purport to represent.
66. Save to the extent that the relief may be competent and adapted to the Third to Ninth Applicants who may act in their own interests, it is denied that the applicants have rights under section 38 (b), (c) and (d) of the Constitution to institute this application on behalf of those who are not parties.
67. In particular:
- 67.1. no sufficient basis has been presented why anyone who is not a party cannot act in their own names;
- 67.2. for this application to proceed in the interest of the class of persons covered certification is required; and
- 67.3. there is overriding public interest that this Honourable Court not entertain and determine matters which the Constitution has allocated to other branches of the State.
68. The rest of the contents of these paragraphs are noted to the extent that they are consistent with the law.

Ad paras 31

69. I contend on the basis advanced in the generality of this affidavit that the Applicants have not made out a case for the Order that they seek, and this application falls to be dismissed.

Ad paras 32 - 46

70. Save to admit that the PTOs were issued as statutory recordal of an occupier's right to use land in the former homelands or self-governing territories including the former KwaZulu homeland, I deny that:

70.1. PTOs remain the primary residential tenure for persons living in the former KwaZulu;

70.2. the Portfolio Committee has criticised the Department for the failure to put in place an alternative to apartheid-era PTOs;

70.3. the Bantu Areas Land Regulations (Proclamation 188 of 11 July 1969) finds application on Trust land upon the enactment of the Trust Act;

70.4. Chapter XI of the Land Affairs Act (sections 24 to 26) continues to govern PTO rights over the Trust land; and

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70.5. The Minister remained the authority responsible for implementing the provisions of the Land Affairs Act governing PTOs on the Trust land.

Ad paras 47 - 65

71. Save to admit that the existing informal rights to land and customary rights of the residents and occupiers of the Trust land are protected under IPILRA, the Constitution and relevant and applicable laws, the Minister and the Department are of the respectful view that the conclusion of lease agreements on Trust land does not, by so doing, and on the evidence presented, extinguish existing informal rights to land and customary rights held on Trust land.

72. Customary rights, just as IPILRA Rights are constitutionally-protected, and a waiver of a constitutional right cannot be presumed as presented in the founding papers. I am advised that to waive a right, a party must intentionally and knowingly abandon such rights, which does not appear to be the case with the residents/occupiers of Trust's land on the evidence presented.

73. The remainder of the contents of these paragraphs are noted.

Ad paras 66 - 77

74. Save to admit knowledge that the Board has the conversion to leases project, it is denied that:

74.1. the Trust or/and the Board has the power to issue new PTOs on Trust land;

74.2. the Trust or/and the Board lack the power to enter into lease agreements with holders of PTO rights on Trust land;

74.3. the Trust or/and the Board lack the power to charge reasonable rentals in respect of lease agreements concluded with holders of PTO rights on Trust land; and

74.4. the Minister and/or the Department are aware of *"progressive implementation of the Board's resolution to convert PTOs and conclude lease agreements"* to the extent that it is suggested that such "conversion" involves the absence of genuine and informed consent by holders of statutory or informal rights to land on Trust land.

Ad paras 78 - 85

75. The primary objective of the *"Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change"* (***High Level Panel Report***) is stated, at

page 26, as being an *"initiative to review post-apartheid legislation"*. A copy of the High Level Report will be made available in a separate bundle to be prepared for the hearing of this matter.

76. The High Level Panel Report declared in its "Foreword" that:

"We offer three kinds of recommendations as summarised in the Executive Summary: priority proposals to alter, fundamentally, the trajectory of our society's development, a set of recommendations to deepen the progressive realisation of socioeconomic rights enshrined in the Constitution, and finally some urgent measures to limit the unintended consequences of legislation." (page 26)

77. The following was reported at pages 74 and 75 of the High Level Panel Report:

"Land reform, restitution and security of tenure

This Working Group was tasked with producing a report on the following focus areas:

Land tenure reform: in communal areas, on privately owned farms (the Extension of Security of Tenure Act of

1997), in areas with a recent history of labour tenancy (the Land Reform (Labour Tenants) Act of 1996), in the former 'coloured' rural areas (the Transformation of Certain Rural Areas Act of 1998), and in urban and peri-urban areas (the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998, and other relevant legislation).

In relation to communal tenure, the review will include the Ingonyama Trust Act of 1994, the Interim Protection of Informal Land Rights Act of 1996, and the Communal Land Rights Act of 2004.

In relation to communal areas in particular, the review will include the links between tenure reform legislation and related legislation and policy such as the Traditional Leadership and Governance Framework Act of 2003 and its provincial equivalents, as well as mining law, and in particular the Mineral and Petroleum Resources Development Act of 2002, as amended.

Land restitution, including the Restitution of Land Rights Act of 1994, the Restitution of Land Rights Amendment Act of

2014, and the Communal Property Associations Act of 1996.

Land redistribution, including the Provision of Land and Assistance Act of 1993, as amended in 2008, the Subdivision of Agricultural Land Act of 1970, the Expropriation Bill of 2016 and proposed laws and policies regulating landownership and farm size, including the Preservation and Development of Agricultural Landholding Bill and Regulation of Land Holdings Policy Framework.

Also to be reviewed are relevant policies and programmes such as the State Land Lease and Disposal Policy of 2013, the Recapitalisation and Development Programme and their operations and beneficiary targeting. Post-settlement support and co-ordination among government departments (e.g. between the Department of Rural Development and Land Reform and the Department of Agriculture, Forestry and Fisheries) will also be considered."

78. The recommendations in the High Level Panel Report are inputs into policy developments that are yet to be considered by the Government. The report is not required or mandated by law.

Weighty an opinion as it may be, it has no status higher than what it purports to be.

79. It is denied that the High Level Panel conducted an enquiry into what constitutes the *"benefit, material welfare and social wellbeing of the members of the tribes and communities"* including the basis of how the rental incomes from leases on the Trust land were expended by the Trust. The High Level Panel Report did not make a definite finding of fact in the statement that:

"Significant income is generated for the Ingonyama Trust by such lease agreements. In the 2015/2016 period rental income was R96 130 563. There is little evidence that the revenue generated by leases is used for the benefit of communities or their material well-being. The Trust has built up very substantial reserves." (page 275 of the Report, and Annexure FA 19 to the Founding Affidavit)

80. I deny the correctness of the Applicants' reliance, in para 83 of the Founding Affidavit that the Board's 4th Quarter Performance and Financial Report for 2017 – 2018 Financial Year to the Portfolio Committee *"confirms the position"* that the revenue is not being used for the benefit and material well-being of the communities

and residents. A copy of the Board's 4th Quarter Performance and Financial Report for 2017 - 2018 Financial Year to the Portfolio Committee will similarly be made available at the hearing of this matter.

81. In particular, the Applicants' position in para 83 of the Founding Affidavit is based on a grossly inadequate and incorrect reading of the reported statement in Annexure FA 20 to the Founding Affidavit that:

"The board reported to have spent 95.85% of its budget on administration while 0.16% and 0.11% went to rural development and land management, respectively";

82. The assertion in para 83 of the Founding Affidavit regarding the 95.85% of its budget spent on "administration", which is presented to justify the Applicants' views on the focus of the Board's expenditure, does not adequately capture what is reported by the Board as its "Strategic objective" under Programme 1: "Administration".

83. The Applicants do not appear to have adequately interrogated, in relation to the relationship between the Board's expenditure

and benefits to the communities, the Board's strategic objective under Programme 1: "Administration" reads:

"1.1. Provide effective self monitoring and evaluation systems to the Ingonyama Trust Board

1.2. Ensure effective stakeholder engagement and communication

1.3. Provide IT support to improve efficiency

1.4. To ensure that efficient internal resource management is aligned to legislative requirements

1.5. To ensure reduction of vacancies

1.6. To ensure performance management in ITB

1.7. Provision of skills development to improve service delivery

1.8. To improve customer relationship."

84. Annexure FA 21 to the Founding Affidavit does not support the Applicants' position in para 84 of the Founding Affidavit that:

"The Portfolio Committee has repeatedly expressed concern about the lack of evidence that the Board is using its funds for the benefit of the beneficiaries of the Trust"

85. It does not appear to be correct that the *"Auditor General has expressed a similar concern"* on the allegation made by the Applicants in para 84 of the Founding Affidavit. The attempts to draw the Auditor General in support of the Applicants' views, about the relationship between the Board's expenditure and benefits to the communities, are unfounded. Annexure FA 21 shows that the Auditor General questioned entitlement of the Trust to receive contractual royalty income, and not the subject of security of tenure or rental benefits.

86. Against the tenor of the Applicants' contention, Annexure FA 21 confirmed that the Board got a "clean audit" in that:

"It was noted that Ingonyama Trust Board and Ingonyama Trust were two separate entities and while ITB received a clean audit, Ingonyama Trust received a qualified audit due to revenue collection and land valuation challenges."

87. In the circumstances I deny the Applicants' assertion that the Trust's revenue from rental income is not benefiting the

communities and residents might not be correct. It is, in any event, a matter to be addressed by the Trust and the Board.

Ad paras 86 - 117

88. In opposition to the prayers 1 and 3 of the notice of motion, I wish to further highlight the following:

88.1. Annexures FA22 to 24 to the Founding Affidavit read that the residents and occupiers of Trust land "*are hereby invited to approach the Ingonyama Trust Board (ITB)*" or "*advised and invited to contact their respective Traditional Council Courts or Ingonyama Trust Board*" with a view of upgrading these PTO's into long term leases;

88.2. Annexure FA 24 (at page 293) includes a statement on the "Project on the PTO Conversion" that:

"This is a voluntary process and those who prefer not to respond or participate are free to do so";

88.3. Paragraphs 90 and 91 of the Founding Affidavit refers to the negative impact of not issuing PTOs on government employees' ability to access housing allowances in the Province;

88.4. In contrast to paragraphs 90 and 91 of the founding affidavit, Annexure FA 24 (at pages 292 and 293) confirms the Board's views that:

88.4.1. Trust land is "*accessed through customary law and any other law*";

88.4.2. Customary law must be consistent with the Constitution;

88.4.3. PTOs are "*a racially based form of land tenure*" that is "*weak in law*"; and,

88.4.4. There is need for "*an authentic document confirming the rural tenure*" of government employees.

88.5. As referred to at paragraph 93 of the Founding Affidavit, the position of the Trust and the Board is that:

88.5.1. the indigenous tenure system remains vulnerable;

88.5.2. the modern leasehold is proximate to traditional practice;

88.5.3. all new tenure applications should be leases;
and

88.5.4. existing PTOs had to be upgraded to leases;

88.6. The Applicants allege that:

88.6.1. Both the statutory PTOs and the customary rights of the residents and occupiers of Trust land are considerably stronger in law and less burdensome on residents than lease-based tenure (para 95 of the Founding Affidavit);

88.6.2. *"(t)he applicants' accounts evidence that the Trust and the Board, aided by the Traditional Council and local induna, have been inducing and compelling residents to conclude residential lease agreements without their genuine and informed consent."* (para 117 of the Founding Affidavit);

88.6.3. The Trust and the Board are demanding that rental be paid that residents cannot afford, and without a lawful basis. (para 117 of the Founding Affidavit); and

88.6.4. The Trust and the Board have actively misled residents into believing that the conclusion of the lease agreements is in their best interests, and that the leases will provide them with more secure tenure, when in fact the opposite is true (para 117 of the Founding Affidavit).

89. The Minister did not form the view that this approach by the Trust and the Board is unlawful or unreasonable and required any lawful intervention by the Minister or the Department.

90. Save as aforesaid, the contents of paras 110 – 117 of the Founding Affidavit as well as the supporting affidavits of the third to eighth applicants in relation to the impact of the PTO conversion project on people living on Trust-held land are noted.

Ad paras 126 - 134

91. Save to state that the requested undertaking was not provided as there is no admission of unlawfulness, I admit receipt of the correspondence sent by the Applicants' attorneys to the Minister and the Department.

Ad paras 135 - 141

92. I persist in the view that the Applicants misconstrue the nature and effect of the Land Affairs Act and the PTO Regulations in relation to the Trust land, and in so doing, the relief against the Minister is not competent in law.

93. I wish to specifically state that:

93.1. in terms of Regulation 23 of the Ingonyama Trust Administrative Regulations, 1995 (in GNR.1237 of 2 October 1998, Government Gazette No. 19300) policy matters in relation to the Trust vest in the Board.

93.2. the Minister's power to appoint certain members of the Board does not authorise the Minister to directly manage the affairs of the Board, or to give directions or instructions to Board members to act in a specific manner except under the enabling law;

93.3. the expenditure of funds allocated from the Department is required to be in accordance with the law; the Department is not by such fact authorised to impose responsibilities or obligations on the Board beyond what is specifically mandated by the law; and

93.4. save to admit that the Minister is responsible for promulgating regulations on matters within the limits imposed by the Trust Act or any other law, it is denied that the procedures for land allocations; rental, levies, and other charges for the right to use land; and the distribution of income received by the Board are the responsibilities of the Minister.

94. It is denied that the Minister failed to exercise oversight adequately, or at all, or to perform her statutory and constitutional functions in the manner described by the Applicants.

95. I refer to a confirmatory affidavit of the Minister that accompanies this affidavit to the extent that I have in this affidavit represented the views of the Minister on the matters raised by the Applicants.

Ad paras 142 - 152

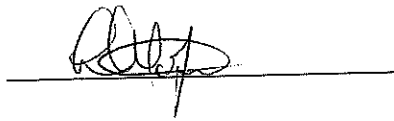
96. I have addressed in the preceding paragraphs above the basis of the opposition to the relief sought by the Applicants.

97. In the circumstances of the foregoing the relief are particularly not competent against the Minister. The Application falls to be dismissed.



DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at PRETORIA on the 12th day of March 2019, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

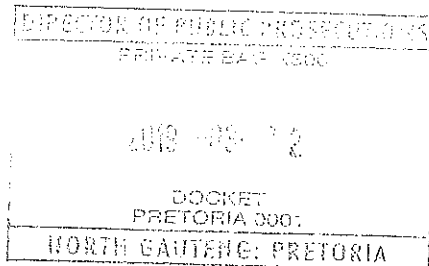


COMMISSIONER OF OATHS

Full Names: Lerogo Molefe

Business Address: Prudential Building
28 Church Square

Office: Pretoria



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

Case NO: 12745/18P

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

**CONFIRMATORY AFIDAVIT
IN SUPPORT OF THE THIRD RESPONDENT'S ANSWERING AFFIDAVIT**





I, the undersigned,

MAITE EMILY NKOANA-MASHABANE

A handwritten signature in black ink, appearing to be 'MAITE' followed by a stylized surname.

do hereby make oath and state that:

1. I am an adult female, duly appointed as the Minister of Rural Development and Land Reform, with my office at 184 Jeff Masemola Street, Pretoria, Gauteng.
2. The facts contained in this affidavit are, unless otherwise stated or the context indicates to the contrary, within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.
3. I am assigned by the President, consistent with section 91(2) of the Constitution of the Republic of South Africa, 1996, with the responsibility for the administration of the laws involved in this application and to which the Applicants refer to as being under my responsibilities.
4. In my capacity as the Minister I am assisted by the Department of Rural Development and Land Reform. Rendani Sadiki is currently the acting Director-General of Department of Rural Development and Land Reform.
5. I have read the Answering Affidavit of Rendani Sadiki, and I hereby confirm the veracity thereof insofar as same pertains to me.

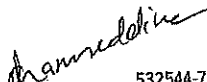


6. I am opposed to the prayers contained in the notice of motion as they are particularly not competent against me in the circumstances described more fully in the Answering Affidavit of Rendani Sadiki.



DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at CAPE TOWN on the 12 day of March 2019, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.


.....532544-7
S. CHAMSEDDINE

COMMISSIONER OF OATHS

Full Names:

Business Address:

Office:

