



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
RURAL WOMEN'S MOVEMENT
HLETSHELWENI LINA NKOSI
BONGANI ZIKHALI
ZAKHELE MALCOLM NKWANKWA
HLUPHEKILE BHETINA MABUYAKHULU
BONGI GUMEDE
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FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT
SIXTH APPLICANT
SEVENTH APPLICANT
EIGHTH APPLICANT
NINTH APPLICANT

and

THE INGONYAMA TRUST
THE INGONYAMA TRUST BOARD
THE MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM
THE MEC FOR CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS, KWAZULU-NATAL
KWAZULU-NATAL PROVINCIAL HOUSE OF
TRADITIONAL LEADERSHIP

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT

ORDER

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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;


4.1

- 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 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

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

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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:

² KwaZulu Land Affairs Act 11 of 1992.

³ KwaZulu Land Affairs (Permission to Occupy) Regulations, GN 32 of 1994.

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'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.

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[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;

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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 Minister has failed

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

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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.

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 Act⁷ 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 the executive secretary

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.

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 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.

¹² Section 239 of the interim Constitution.

¹³ Self-Governing Territories Constitution Act 21 of 1971.

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

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.

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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.

[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

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'.

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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 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

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.

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[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 Act²⁴ 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

[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

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.

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