Project'. The Trust and the Board communicated to the public, through its official website,[26] that PTOs would be granted until April 2007, and would only be issued in future in exceptional circumstances as they afford limited security for funding and registrable interests.

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

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

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

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

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 on the basis that such permission may at any time be withdrawn .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

[47] The Board confirmed its decision to terminate the issuing of PTOs in its 2008/2009 Annual Report presented to the Portfolio Committee on 28 October 2009. The Board also revealed in its report that 'PTOs are not registrable and have not been issued since 2007'.

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

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

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

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

[51] On 20 November 2017 the Board published a series of media advertisements relating to the continued implementation of the PTO Conversion Project in which it invited all people, companies and other entities holding land rights on Trust-held land in terms of PTOs, to approach the Board with a view to upgrading the PTOs into long term leases in line with the Ingonyama Trust Board Tenure Policy. The notices also required the applicants to produce evidence that they have at all material times complied with the conditions attached to the PTOs, in particular the payment of levies.

The Portfolio Committee raised concerns about the Trust's advertisements for residential leases and asked the Trust for an explanation about the PTO Conversion Project. The Portfolio Committee also asked the Department of Rural Development and Land Reform (DRDLR) whether the DRDLR had approved the conversion of PTOs to leases which was by then underway, and whether replacing PTOs with leases was legal. It also asked as to what benefit would accrue to people who had previously been granted PTOs. The Board did not furnish the Portfolio Committee with the requested information. The only justification which the Chairperson of the Board gave for such conversion was to raise additional funds as the Board considered the budget provided by the State to the Trust and Board insufficient. Ultimately the Portfolio Committee instructed the Trust and the Board to stop issuing leases until the legality of the process was cleared up with the DRDLR. The Board did not take heed of this instruction.

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

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

[54] On 18 April 2018 the Board reported to the Portfolio Committee that it has met with the DRDLR but that no agreement was reached on the implementation of the PTO Conversion Project. At a subsequent meeting with the Board on 23 May 2018, the Chairperson of the Portfolio Committee complained that the Board's website continued to carry the advertisement that people should convert their PTOs to leases.

[55] It is against this background that the applicants have launched this application, contending that the actions of the Trust and the Board, in requiring or inducing the

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residents of Trust-held land to conclude lease agreements, and to 'convert' PTOs to leases, are unlawful and constitutionally invalid on the following grounds:

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

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

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

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

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

[56] In May 2018, in response to a parliamentary question from the Economic Freedom Fighters, the Minister furnished details of the extent of land leased out by the Trust for private use, the value of the leases, the location and size of the leased land. The Minister disclosed that the Trust leased out a total of 61 671 hectares of land. The Trust's lessee financial report confirmed that residential leases and leases for community schools, churches or crèches are widespread across the Trust-held land. The Trust also leases out land for agriculture, mining, telecommunications, infrastructure and commercial purposes.

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

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

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

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

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

Points in limine

Non-joinder

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

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

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

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

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

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

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[29] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657.
[30] *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) para 9.
[31] *Bekker v Meyring, Bekker's Executor* (1828 – 1849) 2 Menz 436 at 442.

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

[66] The court has to ascertain the real or true nature of the dispute between the parties. The characterisation of a dispute by a party is not necessarily conclusive. Ascertaining the true nature of the dispute would assist to establish whether third parties would be affected by the judgment.[33] There is nothing to show that the traditional councils or the local houses or the amakhosi or the Premier, would be affected by the relief which the applicants seek. I find that the traditional councils, the local houses, amakhosi and the Premier have no direct and substantial interest herein.

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[32] Amendment of the KwaZulu Land Affairs (Permission to Occupy) Regulations, 1994, GN R1238, *GG* 19300, 2 October 1998.

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

In the circumstances, the contention that these parties ought to have been joined in the proceedings is without any merit.

Internal Remedy

[67] The Trust and the Board contend that the third to ninth applicants ought to have exhausted the internal remedy provided by s 49 of the KwaZulu-Natal Traditional Leadership and Governance Act ('KZNTLGA')[34] and s 21 of the Traditional Leadership and Governance Framework Act ('TLGFA').[35] This contention was understandably not persisted in during oral argument because the true nature of the dispute in these proceedings does not concern customary law or customs arising within a traditional

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[34] KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005. Section 49 provides as follows:
'**49. Dispute resolution.** (1) Whenever a dispute concerning customary law or customs arises within a traditional community or between traditional communities or other traditional institutions on a matter arising from the implementation of this Act or otherwise, members of such a community or institution and traditional leaders within the traditional community or traditional institution concerned must seek to resolve the dispute internally and in accordance with customary law and customs.
(2) Any dispute contemplated in subsection (1) that cannot be resolved must be referred to
(*a*) the Provincial House of Traditional Leaders, which must seek to resolve the dispute in accordance with its rules and procedures within 30 days;
(*b*) the responsible Member of the Executive Council, in the event that the Provincial House of Traditional Leaders is unable to or has failed to resolve the dispute, who may, subject to the provisions of21 (1) (*b*) and 25 of the Traditional Leadership and Governance Framework Act, 2003, refer the matter to the Commission for its recommendation within 30 days; and
(*c*) the Premier, in the event that the responsible Member of the Executive Council is unable to or has failed to resolve the dispute, who must resolve the dispute within 30 days after consultation with
(i) the responsible Member of the Executive Council;
(ii) the parties to the dispute; and
(iii) the Provincial House of Traditional Leaders.'

[35] Traditional Leadership and Governance Framework Act 41 of 2003. Section 21 provides as follows:
'**21. Dispute and claim resolution.**—(1) (*a*) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.
(*b*) If a dispute or claim cannot be resolved in terms of paragraph (*a*), subsection (2) applies.
(2) (*a*) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules and procedures.
(*b*) If a provincial house of traditional leaders is unable to resolve a dispute or claim as provided for in paragraph (a), the dispute or claim must be referred to the Premier of the province concerned, who must resolve the dispute or claim after having consulted—
(i) the parties to the dispute or claim; and
(ii) the provincial house of traditional leaders concerned.
(*c*) A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.
(3) Where a dispute or claim contemplated in subsection (1) has not been resolved as provided for in this section, the dispute or claim must be referred to the Commission.'
The TLGFA has in the meantime been repealed by the Traditional and Khoi-San Leadership Act 3 of 2019, which Act came into effect on 1 April 2021.

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community or between two traditional communities or traditional institutions as contemplated in sections 49 and 21. The application concerns the lawfulness of the actions of the Trust and the Board as well as the Minister.

Failure to Refer the Dispute to Arbitration

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

[69] It is not in dispute that the applicants have not made any attempt to have the dispute resolved either through negotiation or mediation. The matter pertains to the alleged unlawful and unconstitutional activities of the Trust and Board, as well as those of the Minister. The arbitrator has no power in law to declare the conduct or executive action unconstitutional and invalid. In terms of section 172(1)*(a)* of the Constitution, the power to declare law or conduct inconsistent with the Constitution and invalid is vested in the courts. In the circumstance, reg 25 does not apply to the conduct alleged by the applicants in this action because the conduct allegedly infringes or threatens a right in the Bill of Rights. Arbitration cannot therefore be competent as a substitute for judicial review and as a mechanism for the determination of the lawfulness of executive actions and a dispute concerning constitutional rights.[38]

Class action

[70] The Trust and the Board contend that the application is a class action, and that the applicants have failed to meet the requirements for the certification of a class action and representative standing. Consequently, so the contention goes, the interests of justice do not favour permitting the application to proceed. The applicants have lodged this application under s 38*(a)* to *(d)* of the Constitution to enforce and protect their constitutional rights to property against the Trust, the Board and the Minister. Section 38 of the Constitution provides that '[a]nyone listed in this section has the right to

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[36] KwaZulu-Natal Ingonyama Trust Administrative Regulations, 1998, GN R1237, *GG* 19300, 2 October 1998.
[37] Arbitration Act 42 of 1965.
[38] See also *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and another* 2011 (4) SA 642 (GSJ) para 68.

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approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. . .'. The applicants have launched this application, acting both in their own interest and in the interest of other beneficiaries and residents of Trust-held land falling under the Trust and the Board, for declaratory relief, interdictory relief and structural orders, relying on the standing provision in s 38 of the Constitution to do so.

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

'What is said in this judgment about certification that must be obtained before instituting a class action must not be construed to apply to class actions in which the enforcement of rights entrenched in the Bill of Rights is sought against the State. Proceedings against the State assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation. Class actions in those circumstances are regulated by s 38 which confers, as of right, the authority to institute a class action on certain persons, defined in the section. Moreover, claims for enforcing rights in the Bills of Rights may even be brought in the wider public interest without certification.'

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

No Legal and Factual Basis for Relief Sought

[72] The respondents contend that in the absence of an allegation that the third to eighth applicants were holders of PTO rights, which the Trust or the Board cancelled, there is no legal basis for the relief sought by the applicants. They contend that in order for the applicants to succeed, they have to set out the facts that the Trust and the Board had first of all cancelled their PTO rights, and secondly that the Trust and the Board then concluded the lease agreements with the holders of such rights without their genuine and informed consent. The Trust and the Board therefore argue that the

applicants have not satisfied the jurisdictional requirements of s 21 of the Superior Courts Act.[39]

[73] The question which arises is whether the Trust and the Board or the Minister have raised a genuine dispute in respect of the allegations by the applicants relating to the cancellation of PTO rights and the conclusion of lease agreements. The Trust and the Board conceded that they had ceased issuing PTOs and encouraged PTO rights holders to conclude leases, in order to improve their land tenure. The Trust and the Board state that in law they do not have the right to issue and withdraw PTO rights, but contend that they do have the legal authority to conclude leases. They contend that at the time they concluded such leases with the beneficiaries and residents, they were exercising their powers in terms of the Trust Act. It is not in dispute that the Minister has oversight over the Trust and the Board's execution of their functions and exercise of their powers under the Trust Act. As a consequence, the only legal issues left for determination are, namely (a) whether the Trust and Board had the right to interfere with PTO rights, (b) whether the Trust and the Board, when concluding the leases, were acting within the boundaries of the Trust Act, and (c) whether the Minister exercised the required oversight over the activities of the Trust and the Board. The Minister admits that she was aware of the PTO Conversion Project undertaken by the Trust and the Board. Neither the Trust nor the Board nor the Minister has raised any genuine dispute of fact in this matter. They have pleaded only bald denials, which do not suffice to raise a genuine dispute of fact.

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

[39] Superior Courts Act 10 of 2013.

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Issues for determination

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

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

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

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

The Right to Lease

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

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

These sections must be read with s 2(1) of the Trust Act which establishes the Trust as a 'corporate body', a concept quite inconsistent with our law of trusts. Be that as it

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may, that corporate body is established 'subject to the provisions of this Act, to do all such acts and things as bodies corporate may lawfully do.'

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

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

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

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

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

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

was land allocated to an individual. (I use the word 'individual' loosely merely to distinguish such tenure from that which obtained in the case of communal or other land.)

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

[82] Bearing that background in mind, one must examine the Trust Act in order to discern its purpose. One should perhaps start with the proposition that it was not the purpose of the establishment of the Trust to generate an income for the Trust (or the Ingonyama) from the letting of the property, or otherwise. In terms of s 3(1)*(a)* of the Trust Act the land was transferred to the Ingonyama as Trustee of the Trust 'for and on behalf of the members of the tribes and communities and the residents referred to in s 2(2) of the Act'. Section 2(2) of the Act is the principal statement of the duties of the Trust, and accordingly of the purpose of its establishment.

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

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

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

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

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

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

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

[85] There is much to be said for the proposition that the Ingonyama, the Trust and the Board have no power to let land or the buildings thereon for residential purposes, or for tillage; and probably also for the purposes of the exercise of communal grazing rights. To do so is not in accordance with Zulu Indigenous Law. It is more than arguable that, in context, the right to let land which is implicit in sections 2(5) and 2A(2) of the Trust Act must be read as being confined to circumstances where the right of occupation and use of land is not ordinarily governed by Zulu Indigenous Law or any other applicable law. It is the applicants' contention that the Land Affairs Act, and in particular the provisions relating to the grant of PTO rights, is such an other applicable law, but that is a subject to be dealt with hereunder.

PTO Conversion Project

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

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

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

[88] The Trust and the Board continued to implement the PTO Conversion Project by escalating its implementation through the publication of public notices, calling on residents to upgrade their PTOs into long term leases. In 2017 the Board published a series of media advertisements relating to the continued implementation of the PTO Conversion Project. The Trust insisted that all new applications for PTOs should cease. The Board referred to the leasehold as its 'preferred tenure option'. The third applicant testified on the measures that the Trust took to cancel the existing PTO rights and to prevent the issue and certification of any new PTO rights. This finds support in the Trust's and the Board's own statements and reports on their PTO Conversion Project and their public advertisements and notices, calling on PTO rights holders to upgrade their rights by concluding leases agreements with the Trust. According to the fifth applicant, when residents, including himself, applied for the issue of a new PTO or a certificate of an existing PTO right, they were urged and persuaded to enter into a lease agreement instead.

[89] As a result of the decision that PTOs would no longer be issued on Trust-held land, the employees in the rural areas who were members of the Public Service Coordinating Bargaining Council ('PSCBC') with valid PTOs, and who would in terms of such PTOs be deemed homeowners for the purposes of accessing a housing allowance, were denied access to such housing allowance. In the absence of an alternative to prove tenure over their homes for the purposes of accessing housing allowances, the government employees had no choice but to conclude lease agreements with the Trust. The Trust contends that PTOs are racially discriminating

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instruments, and that their 'reintroduction will offend the Constitution and the Abolition of Racially Based Land Measures Act 108 of 1991.' The condition for conversion from PTOs to ownership is that the Minister and the community must first approve the intended conversion. There is nothing to show that such permission had been obtained when the Trust and the Board implemented their purported PTO Conversion Project.

Leases

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

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

[92] Ownership of land includes, firstly, the right to possess the land. Possession consists of physical control of a thing, coupled with the intention to hold and control

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[43] G Glover *Kerr's Law of Sale and Lease* 4 ed (2014) at 329; 14(2) *Lawsa* 2 ed para 1.
[44] *Johannesburg Municipal Council v Rand Townships Registrar and others* 1910 TPD 1314; *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530 at 537; *Visser, NO v Die Sekretaris van Binnelandse Inkomste* 1968 (2) SA 78 (O) at 83C.

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the thing for one's own benefit.[45] Secondly, it includes the right to use and to enjoy the thing, confers on the land owner the capacity to use the land for any ordinary and natural purpose, and entitles the owner to the enjoyment of the property and its fruits. Ordinary and natural use of land includes planting and sowing on the land, building on the land, and using and enjoying water on and beneath the surface of the land.

[93] The third incident of ownership of land is the right to alienate the property. By alienation it is meant the transfer of complete ownership to another, but also includes the right to dispose of the property in other ways.[46] The Chairperson of the Board in its 2016/17 Annual Report, referring to the beneficiaries of Trust-held land, stated that they 'are entitled to all the benefits which the land owner as understood under the Roman Dutch Law enjoys'. As the trustee, the Trust has a fiduciary duty to hold and use the land for the benefit of the beneficiaries of the Trust, ie for the members of Zulu communities and residents living on Trust-held land. It follows that the Trust does not hold the land in its personal interest or for its personal benefit.

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

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

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

Customary law rights

[95] As the nominal owner of Trust-held land, the Ingonyama does not have exclusive rights to own, control and regulate Trust-held land, nor does it have an unfettered right to deal with such land. It is common cause that the Trust and the Board in the execution of their functions and exercise of their powers in terms of the Trust

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[45] *Groenewald v Van der Merwe* 1917 AD 233; *Rubin v Botha* 1911 AD 568; *Zandberg v Van Zyl* 1910 AD 302.
[46] Van der Linden *Koopmans Handbook* 1 7 2; *Grotius* 2 10-1.
[47] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-178.

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Act, must act within the parameters of such Act, indigenous law, any other applicable law and the Constitution. The Trust and the Board may therefore exercise no power and perform no function beyond that conferred upon them by law.

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

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

[98] The concept that land under Zulu customary law is 'indivisible and inalienable' means that an owner of a particular portion of land cannot take his or her portion and secede from the rest of that particular tribe or community of which he or she is a member, and that the land cannot become a subject of a private sale, as with freehold. It does not follow that an owner or allottee cannot exercise the incidents of ownership in respect of the allotted portion of land to the exclusion of all other members of the community, save the members of his or her family. He or she can transfer land to any other person who is willing and prepared to reside in, become party of the community

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[48] The Board has a similar obligation under s 2A(2) of the Trust Act.
[49] *Ingonyama Trust v Radebe and others* [2012] 2 All SA 212 (KZP) para 40; *Kweneng Land Board v Matlho and another* [1992] BLR 292 (CA).

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in which the land is situated, and to owe allegiance to the inkosi of that area concerned. A person who takes occupation of a built up plot or allotment reimburses the owner for the buildings erected thereon.

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

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

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

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

[101] The rights of persons to occupy or use Trust-held land are acquired through Zulu customary law, customs and usages, and such rights entitle the owner to occupy and use the land, to dispose of such land to another person, to erect a building or let it, and transfer it to another person, including bequeathing it to his or her children. In

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