addition to the customary law of right to land, the third to the eighth applicants and other beneficiaries and residents of the Trust-held land have informal rights and interests which are inherent in the land on which they live. The actions of the Trust and the Board have the effect of depriving the holders of PTO rights, customary law rights to land and/or other informal land rights or interests in the Trust-held land, of their security of tenure and of infringing on property rights vested in them under statutory or customary law, and IPILRA.

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

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

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

Y.T

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

Leases versus PTOs

[106] By concluding lease agreements with the beneficiaries and occupiers of Trust-held land instead of PTOs, the Trust and the Board claimed to improve the security of tenure of the residents. However, instead, the effect of the conversion of PTOs into lease holding is averse to the purported objective of the Trust and the Board, in that it deprives the beneficiaries and residents of their customary or informal rights of ownership in Trust-held land, and places it fully in the hands of the Trust, to the exclusion of the beneficiaries and residents, being the true and ultimate owners of the Trust-held land. The Trust then becomes a lessor, and the beneficiaries and residents are reduced to mere tenants, having no rights beyond that of permissive occupation and use.

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

[108] The long term-residential lease concluded by the Trust expires after 40 years. On the expiration of the 40-year period, an application must be made for the extension

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

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

[110] The long-term residential lease agreements are also not consistent with the customary rights to land. The lessees are subject to dispossession by the Trust of the land on which they live for non-payment of rental, without consideration of their vested customary law interests and entitlements in the land in question, and without any involvement of the community or traditional authority. The beneficial and use rights are no longer vested perpetually, transferable and inherited, but are terminated after 40 years or earlier at the instance of the Trust for material breach of the lease agreement or by the traditional council concerned. The lease agreements ignore, and thereby

---

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

trump, the co-existing customary rights of all family members other than the lessees. The power to control land rights is vested entirely in the Trust and amakhosi (the senior traditional leaders). The lease agreements deprive families, neighbours and communities of their customary law entitlement to participate in decision making in respect of the matters relating to occupation and use of tribal land. The allotted land does not fall under the ownership of the traditional authority, but falls under the jurisdiction of an inkosi and induna only for administrative purposes.

[111] According to the seventh applicant, Ms Bongi Gumede, in terms of the lease agreement, all other persons who customarily have the right to reside or to remain on the plot or allotment, for instance the other members of the extended family and their children (siblings and their children), are excluded.

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

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

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

office of the Chief Commissioner. A certificate of right of leasehold was issued to the holder on registration.

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

(a) erect any building or make improvements on the leasehold site, and to alter or demolish such building or improvements;

(b) occupy any building on the site, subject to the regulations and any conditions imposed by the Minister;

(c) encumber the right by means of a mortgage;

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

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

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

[116] A leasehold tenure can approximate a form of ownership if a statutory provision is made for its conversion to freehold tenure or ownership. A notable example is the

[55] Regulation 3(1), Chapter 2A.
[56] Regulation 4, Chapter 2A.

Y.T

Townships Amendment Act (Transvaal),[57] which created the opportunity for leaseholders of lots situated in certain townships in the Transvaal to obtain freehold of those lots. In terms of this Act, leaseholders of lots situated on State land had the right to claim transfer to themselves of ownership in the lots on payment of a fixed sum determined by the Act. The leaseholders of lots situated on private land could acquire ownership in the lots by agreement with the owner of the land, and upon payment of a price agreed between the parties. In the present case, no such statutory provision is made through which the holders of leasehold rights may achieve ownership of the land they lease. The creation of an Erf capable of separate registration independently of a greater piece of land of which it originally formed a part involves the subdivision of land. It appears from clause 6.8.4 of the form of lease imposed by the Trust and the Board on lessees that the Trust took the view (ignoring Chapter XI of the Land Affairs Act) that the introduction of the KwaZulu-Natal Planning and Development Act[58] posed a risk as it put the subdivision of land in the hands of municipalities. The clause is somewhat remarkable not because of any legal sense which it makes or does not make, but because it illustrates that if the Trust and the Board had it in mind to render all occupational rights of its land in the form of leasehold, the leases were designed to ensure that their provisions obstructed subdivision and therefore obstructed the transfer of ownership of allotted portions of land from the Trust to an allottee. The clause reads as follows.

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

[117] According to the Board, the leases, among other things, provide the following benefits to the occupiers of Trust-held land: more security of land tenure; the ability to apply for finance using a lease as security; re-enforcement of the beneficiaries' customary rights; facilitation of proof of tenure in applications for liquor licences in

---

[57] Townships Amendment Act 34 of 1908 (Transvaal).
[58] KwaZulu-Natal Planning and Development Act 6 of 2008.

terms of the KwaZulu-Natal Liquor Licensing Act;[59] may be used as proof of residence for purposes of complying with the Regulation of Interception of Communications and Provision of Communication-related Information Act ('RICA')[60] and the Financial Intelligence Centre Act ('FICA);[61] the facilitation of access to cell phones, bank accounts and loans from institutions such as Ithala Development Finance Corporation (Ithala Bank), and the facilitation of voter registration.

[118] That the lease can serve as security for loans is not borne out by any evidence and the applicants' experiences. The fifth applicant was unable to obtain a loan from Ithala Bank on the strength of his lease. The third applicant went through a similar experience. It is common knowledge that the certified PTOs have been accepted by some banks including Ithala Bank as security for loans. For the purposes of RICA and FICA, leases serve as proof of residential address and nothing more. A PTO certificate will serve the same purpose. Also, a letter issued and stamped by the relevant municipal office can also serve such purpose. For voter registration purposes, a PTO certificate can serve to prove the voter's residential address in the same way a lease and a letter issued by the municipal officer does. Lease registration is onerous and costly. In addition, the registration of a lease requires attestation by a notary under s 77(1) of the Deeds Registries Act.[62]

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

[120] It is not true that only leases are registrable against title deeds. Arrangements are made that PTO rights holders eventually achieve full ownership of the property they occupy. There are no notarial agreements or bonds, which could afford such

---

[59] KwaZulu-Natal Liquor Licensing Act 6 of 2010.
[60] Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002.
[61] Financial Intelligence Centre Act 38 of 2001.
[62] Deeds Registries Act 47 of 1937.

Y.T

security, in the present case. By saying that only lease agreements are registrable against title deeds, the Trust and the Board give the beneficiaries and occupiers of Trust-held land a false sense of security under the lease holding scheme. It is not stated how the leases enable the beneficiaries and occupiers to achieve all of what is set out above, nor is there anything to suggest that PTOs cannot achieve these objectives, as outlined above. The evidence tendered before this court is that PTOs are better able to achieve these objectives. Leases are allegedly designed to uplift and empower the residents of Trust-held land rather than depriving them of their land. However, the Trust and the Board have not explained how leases uplift and empower the people concerned. The same can also be said about the statement by the Trust and the Board that the lease agreements have commercial value and afford lessees stronger rights than holders of PTO rights, which is not borne out by any evidence, or a consideration of the rights and obligations under each regime.

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

Leases versus customary law rights

---

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

Y.1

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

[123] The third to ninth applicants and other residents of Trust-held land have customary law rights and informal rights in respect of the land in question, which have in effect been extinguished by the conclusion of the leases in respect of the land the applicants and other residents informally own and live on. It cannot be disputed that the conclusion of leases has divested the beneficiaries and the residents of their customary law rights and/or informal rights, which provide a stronger security of tenure.

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

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

Y.T

agreements have been entered into, as being land which is either subject to PTO rights or IPILRA rights.

[126] Most of the properties which the third to ninth applicants own have descended from their parents upon them, and the applicants are entitled to be issued with or hold PTO rights in respect of such properties. However, the Trust and the Board urged and told them not to apply for the issue of PTOs but to enter into lease agreements with the Trust and the Board in respect of such properties instead, to their detriment. The Trust and the Board have thereby denied the applicants and other residents of Trust-held land an opportunity to apply for and to have PTOs issued to them. In my view, in order for the applicants and other residents of the Trust-held land to have been prejudiced as a result of the conduct of the Trust and the Board, they need not show that they were actually in possession of PTOs and that such PTOs were physically or actually cancelled by the Trust and the Board. It suffices for them to show that they were and are entitled to hold PTO rights (in other words, they were would-be PTO rights holders). While it is true that the evidence does not establish that any PTO was ever actually cancelled by the Trust and the Board, it is undeniable that the Trust and the Board discouraged residents of Trust-held land from applying for the issue of PTOs and urged them to enter into lease agreements with the Trust. By so doing, the Trust and the Board have effectively terminated applications for and the issuing of PTOs in respect of Trust-held land. As a result, the Trust and the Board have thereby finally extinguished PTO rights in favour of leases. The beneficiaries and residents of Trust-held land were not given any alternative but to enter into lease agreements with the Trust.

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

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

[129] It thereby confirmed that the communities and residents living on Trust-held land are the true and ultimate owners of such land. It therefore follows that in divesting community members and residents of security of tenure, the Trust and the Board, could not be acting in the interests of and for the benefit, material welfare and social well-being of the communities and residents concerned, as s 2(2) of the Trust Act directs, and therefore not acting lawfully. Similarly, no countervailing evidence was provided by the Trust and the Board to demonstrate that the revenue generated by the leases is used for the benefit of the communities concerned or their material well-being.

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

Informal rights to land (in terms of IPILRA)

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

[132] *Mr Dickson SC*, for the Trust and the Board, has argued that IPILRA does not apply to Trust-held land in that the Minister has no role to play in Trust-held land but

[65] See 2012/13 Annual Report of the Board.
[66] See 2011/12 Annual Report of the Board.
[67] See s 2(2) and (3) of the IPILRA.

Ɏ.I

that only the Board has the sole power to administer and manage such land. The content of the rights in IPILRA do not apply to the regime of the Trust Act.

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

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

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

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

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

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

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

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

[136] Under customary law, each member of each class or community is entitled to an allotment through procedures under customary law. Once a portion of land has

---

[68] See s 1(1) of the IPILRA; *Dlakavu v Irfani Traders CC* 2018 JDR 1424 (ECM).
[69] Sections 2(2) and (3).

TK
Y.I

been allocated to a particular individual as residential or arable land, it is automatically taken out of the realm of communal ownership. It is demarcated and has fixed boundaries. The ownership thereof descends from generation to generation of such particular individual owner or family. However, unallotted and common land is communally owned by all members of a particular community, under the administration of an induna and inkosi (headmen and senior traditional leader). However, both communal and individually owned land is defended by all members of the community concerned against attack or interference by outsiders. It is only unallocated land which requires prior written consent of a traditional or community authority for it to be encumbered, pledged, leased or alienated by the trustee. The consent or approval and involvement of its allottee is required before anything can be done to allotted land. Mr *Dickson* for the Trust and the Board has argued that the Trust Act does not make any distinction between unallotted and allotted land with regard to the Trust and the Board leasing out Trust-held land. In my view, there must be a limitation, as what Mr *Dickson* proposes will violate the fundamental tenets of customary law, governing allotted and unallotted land, for allotted land under customary law cannot be interfered with without the consent of its owner. The distinction that exists in indigenous land ownership systems should be observed, lest the residents' ownership of residential and arable sites will be diminished.[70]

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

[138] The consent required for the deprivation of a right is a genuine and informed consent. The consent is informed if it is based on substantial knowledge concerning

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

PC
Y.I

the nature and effect of the transaction consented to. Consent must be given freely, without duress or deception, and with sufficient legal competence to give it. This court must through an analysis of the evidence tendered before it, determine whether the consent which the Trust and the Board allegedly obtained from the residents for the conclusion of the lease agreements, met the required standard.

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

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

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

[142] The requirement of consent means that the consent given to the lease, 'must be comprehensive, that is extend to the entire transaction, inclusive of its consequences.'[73] It must be shown that the effect and consequences of the lease agreement on the existing customary law rights to land and /or informal rights to and interests in the land in question, must have been realised and voluntarily consented to.[74] The evidence tendered by the third to eighth applicants establishes that the Trust

---

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

and the Board, being represented by the traditional councils and local indunas (izinduna) attached to and serving under various councils on Trust-held land, concluded residential lease agreements without their genuine and informed consent. All these applicants state that before entering into such lease agreements, neither the Trust nor the Board informed them what the lease agreements entailed and the benefits thereof, as opposed to PTOs.

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

[144] Mr Zakhele Malcolm Nkwankwa, the fifth applicant, states that when he signed his lease he did not know what it was. When he approached Ithala Bank for a loan to start a business on his premises, he was turned down, despite producing his lease. The evidence that the residents were not told that rental would be payable for the allotment, and about the 10% annual rental increase, finds support in the evidence of Mr Bongani Zikhali, the fourth applicant. He only became aware of all this after the conclusion of the lease agreement. Realising that he had to pay a monthly rental for the allotment, he approached the local traditional authority for clarity. He ended up at

Y.T

the Board's office in Ulundi, where he was assisted by the manager and two Board employees. The fourth applicant then told the officials that had the Board and his induna informed the people in his area of the implication of the leases, they would not have entered into them. The people in his area are poor and their only source of income is a government grant or old age pension grants.

[145] Most of the applicants have had the land devolved upon them from their parents. When they applied for the issue of a PTO or PTO certificate, the contracts of lease were concluded for them instead. They were simply asked to give their identity documents to the secretaries of the traditional councils or to the officials of the Trust and the Board, without them having been afforded an explanation as to the purpose and the nature of the agreement they were entering into. They were then asked to sign the documents after they had been completed by such secretaries or officials on their behalf.

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

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

[148] The eighth applicant states that at a meeting which was also attended by the officials of the Board, an induna told all the residents that were present that in order for their homes to be recognised, they had to conclude lease agreements. Those who

had vast tracts of land, were told to reduce them. The forms were completed by the clerks on behalf of the residents, and the residents were only asked to give the clerks their identity documents and to sign the completed documents. The induna went on to say that should a resident not sign a lease agreement, he or she would not be recognised as a resident and that he or she would be banished from the area. The eighth applicant also had to reduce the size of his land in order to afford the rental, as the size of the land concerned determined the amount of rental payable for it.

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

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

agreements would amount to turning against his Majesty, the King of the Zulus. As a consequence, they would be excluded from their relevant communities.

[151] It has been argued on behalf of the Trust and the Board that as this is a factual dispute, it should be decided in favour of the Trust and the Board. The proper approach, where a real dispute of fact is alleged, is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts succeed.[75] The first and second respondents have not set out any facts at all with regard to the disputed facts. On this basis, it is not possible, using the test referred to above, to determine that the alleged dispute of fact is real, genuine and bona fide.

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

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

[153] The Trust and the Board have failed on all fronts to meet the requirements set out in *Wightman t/a JW Construction*. In their answering affidavit, they have not seriously and unambiguously addressed the disputed facts. Nor have they stated the

---

[75] *See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I; *Pheko and others v Ekurhuleni Metropolitan Municipality and others (Socio-Economic Rights Institute of South Africa as amicus curiae)* 2016 (10) BCLR 1308 (CC).
[76] *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) para 13.

basis on which they dispute the facts averred by the applicants relating to the threats, intimidation and coercion. The first and second respondents might not have knowledge of the particular leases in question, but the leasehold scheme is different as this is their initiative. They must have known what was going on when the time came to implement their leasing scheme.

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

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

[156] In the circumstances, it would not be just and fair to exclude the evidence of the third to eighth applicants relating to how they came to enter into the purported lease agreements at the instance of the Trust and the Board, merely on the basis of a bare denial and the mere allegation that there is a dispute of fact. The Trust and the Board

have not tendered any evidence in this regard, notwithstanding that they have been able to do so. In the circumstances, it cannot be said that the residents freely and voluntarily participated in the conclusion of lease agreements with the Trust, with the appropriate and required understanding. The sixth, seventh and eighth applicants state that they were threatened with the taking away of their land if they did not sign the lease agreements. They were also threatened with banishment from their respective areas, and that they would thus be cut off from the Zulu nation. In the absence of any evidence gainsaying all this, the evidence by these applicants that the conclusion of the lease agreements, on their part, was coerced and induced by threats, misrepresentation and undue influence, must be accepted.

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

Constitutional Protection

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

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

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