

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

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

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

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

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

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

[162] However, the conduct of the Trust and the Board does not accord with the purpose to improve the land so that the owners of Trust-held land ultimately receive full ownership of the land. The conduct of the Trust and the Board, as outlined above, amounts to an arbitrary deprivation of the beneficiaries' and residents' PTO rights,

⁷⁸ *Maledu v Itereleng* above para 95.

⁷⁹ *Diakavu v Irfani Traders CC* 2018 JDR 1424 (ECM) para 9.

⁸⁰ *Daniels v Scribante and another (Trust for Community Outreach and Education as amicus curiae)* 2017 (8) BCLR 949 (CC) para 169.

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customary law rights, and informal rights to or interests in Trust-held land. Such deprivation is not only in violation of the provisions of the Trust Act, but also of IPILRA and the Constitution. The Trust and the Board may under s 2(5) of the Trust Act be entitled to let a portion of the Trust-held land, but there is no law which permits them to convert the whole scheme of trusteeship to a lease holding scheme. They are required to make decisions by applying known and general principles of law.⁸¹ There must be lawful authorisation for the exercise of public power. Exercise of public power is required to comply with the Constitution and therefore with the doctrine of legality.⁸²

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

[164] There is no rational relation between the lease holding scheme, which the Trust and the Board has adopted, and the achievement of a legitimate governmental purpose under the IPILRA and the Constitution.⁸³ The absence of a rational relation between the lease holding scheme and the achievement of a legitimate governmental purpose, justifies the conclusion that the implementation of the lease holding scheme is arbitrary, and accordingly inconsistent with the rule of law and the Constitution. The Trust and the Board have not demonstrated any lawful and constitutional basis for replacing PTO rights with residential leases, and for demanding the payment of rental by the beneficiaries and residents of Trust-held land, for the land on which they live, being the true and ultimate owners of the land in question.⁸⁴ The deprivation of the residents' property rights is also arbitrary within the meaning of s 25 of the Constitution, as the Trust and the Board have failed to provide sufficient reason for such deprivation.

⁸¹ B Beinart 'The Rule of Law' (1962) *Acta Juridica* 99 at 102.

⁸² See *Pharmaceutical Manufacturers Association of SA and another: In re Ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC).

⁸³ *New National Party of South Africa v Government of the Republic of South Africa and others* 1999 (3) SA 191 (CC) para 24.

⁸⁴ *Pharmaceutical Manufacturers Association* above.

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The evidence does not establish that the Trust and the Board aimed to strengthen insecure rights. The evidence, and an overall view of the scheme as a whole, suggests the aim of generating revenue for the Trust. And clause 6.8.4 of the leases before us suggests (and I put it no higher than that for present purposes) that the aim was to maintain such a revenue stream more or less in perpetuity.

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

Breach of statutory and constitutional duty

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

[167] The applicants' contention is that being fully aware of the Trust and the Board's conversion of PTOs to leaseholds, and the effect thereof, the Minister or the MEC took

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

no steps to intervene or to stop the Trust and the Board from doing so. Instead, the Minister and MEC, in derelict of their statutory and constitutional duties to PTO rights holders and beneficiaries or residents of Trust-held land, turned a blind eye to the unlawful activities of the Trust and the Board to the detriment of the applicants and all other beneficiaries and residents of Trust-held land.

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

[169] Such argument does not hold water, since s 1 of the Land Affairs Act, as amended, defines 'Government land' as, 'the land which was transferred to the Government of the former self-governing territory of KwaZulu in terms of Proclamation No. R. 232 of 1986 and includes any land acquired by the said Government thereafter and, subject to the provisions of the KwaZulu Ingonyama Trust Act, 1994 (Act No. 3 of 1994), land transferred to and held in trust by the Ingonyama as trustee of the Ingonyama Trust in terms of the said Act.'⁸⁶

[170] A similar definition is contained in Proclamation R63 of 1998, which amended the Land Affairs Act to include the land held by the Trust. Both the Supreme Court of Appeal⁸⁷ and the Constitutional Court⁸⁸ have held that the Trust is an organ of state as defined in s 239 of the Constitution. The Minister thus has the authority to demarcate allotments and grant PTO rights on Trust-held land under the Land Affairs Act.

⁸⁶ The definitions of 'Government' and 'Government land' were substituted by Proclamation 63 of 1998.

⁸⁷ *Ingonyama Trust v eThekweni Municipality* 2013 (1) SA 564 (SCA).

⁸⁸ *eThekweni Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC).

[171] In the main, the objectives of the Land Affairs Act are to make provision for tenure and the registration of certain forms of title in respect of land. Sections 24 to 26 of the Land Affairs Act and PTO Regulations vest certain powers in the Minister, to perform certain functions on Government land or land owned by a tribal authority, with regard to the granting of PTOs.

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

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

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

[175] At all times material hereto, the Minister has admittedly been fully aware of the fact that the Trust and the Board are engaged in the PTO Conversion Project and that

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as a replacement thereof, the Trust and the Board are concluding lease agreements with the beneficiaries and residents of Trust-held land. This is also confirmed by the fact that the Minister has over the years been furnished with reports by the Trust and the Board, detailing the implementation of the PTO Conversion Project and the rationale behind it.

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

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

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

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

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

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beneficiaries and residents of Trust-held land, and she thereby ultimately identified herself with their activities.

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

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

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

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

[183] The Trust and the Board contended that in the process of the conciliation of all provincial and self-governing homelands law, the Land Affairs Act was taken over by national government through Proclamation R63 of 1998. In so doing, Chapter XI

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

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thereof (which included ss 24 to 26) was effectively repealed. In the Trust and the Board's submission, the PTOs, as an instrument of land rights, ceased to exist in 1998. They argue that PTOs could therefore not be used under the Land Affairs Act and there is no provision in the Trust Act for PTOs to be issued. Accordingly, the Trust has no power to issue PTOs under the Trust Act, nor does the Minister have the power to issue PTOs under the Land Affairs Act or the Trust Act. The Trust and the Board also base their contention on the fact that the assignment of the Land Affairs Act to the Premier of KwaZulu-Natal excluded the provisions relating to PTOs in the Land Affairs Act. Furthermore, it was argued that the PTO Regulations were not assigned, nor could they be assigned since their statutory origin had disappeared.

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

[185] Item 14 of schedule 6 provides:

'Assignment of legislation to provinces

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

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

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

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

enacted. That must only be for those provisions to which the assignment applies or to the extent that the assignment applies to them.

[187] When the Land Affairs Act was assigned to KwaZulu-Natal in terms of Proclamation R63 of 1998, ss 11, 24, 25, 26, 29, 30 and 36 were excluded. Sections 24 to 26 are the provisions governing PTOs. The KwaZulu Land Affairs Amendment Act,⁹⁰ which came into operation on 11 September 1998, amended the Land Affairs Act so as to validate certain acts purporting to have been performed in terms of the Act. Proclamation R9 of 1997⁹¹ amended the Land Affairs Act by substituting and deleting certain definitions, amending s 9 and references; amending ss 11, 19, 30, 36, 37, and 39; repealing s 35, and inserting Schedule II. Once again, the PTO provisions were not affected. However, the Minister delegated powers under ss 24 to 26 of the Land Affairs Act and the PTO Regulations to the MEC on 19 September 1998. Henceforth, the MEC became responsible for the issuing and registration of PTO rights on Trust-held land.

[188] The general rule is that:⁹²

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

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

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

⁹⁰ KwaZulu Land Affairs Amendment Act 48 of 1998.

⁹¹ Proclamation R9 of 1997, GG 17753, 31 January 1997.

⁹² *Khumalo v Director-General of Co-Operation and Development and others* [1991] 1 All SA 297 (A) at 301.

⁹³ *In re Smith's Estate, Clements v Ward* (1887) 35 ChD 589 at 595.

[190] In the absence of an express repeal, there is a presumption that a later general enactment was not intended to effect a repeal of a conflicting earlier and special enactment. The presumption falls away, however, if there are clear indications that the Legislature nonetheless intended to repeal the earlier enactment.

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

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

[193] The contention by the Trust and the Board that the PTO provisions and regulations, as the statutory mechanism through which ownership of land can be transferred on unsurveyed land, were repealed or ceased to exist in 1998, is not borne

⁹⁴ Interpretation Act 33 of 1957.

⁹⁵ See also *Mbunduzi Municipality v MEC of KwaZulu-Natal Province for Housing and another* [2004] 2 All SA 11 (SCA).

by any evidence or recordings. Accordingly, I do not find any merit in such contention. If the PTO provisions were indeed repealed in 1998, as the Trust and the Board allege, there would be no need for the Board in 2007, at a meeting of the Portfolio Committee, to declare that it had terminated PTOs and to state the reason for so doing. What is noticeable is that the reasons the Board gave in its Annual Reports for the termination of PTOs are quite different from that which is contended now. At no stage had the Trust and the Board made any mention of the repeal or the ceasing to exist of the PTO provisions and the regulations in 1998 as the reason for their intended termination of PTOs. To the contrary, the evidence clearly establishes that PTOs and the regulations still remain the only statutory mechanisms for securing and formalising land tenure on unsurveyed land in the rural areas, including Trust-held land.

Court's Protection

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

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

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

⁹⁶ See also *Minister of the Interior and another v Harris and others* 1952 (4) SA 769 (A) at 794A.

⁹⁷ See *South African Diamond Producers Organisation v Minister of Minerals and Energy and others* 2017 (6) SA 331 (CC).

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, and
- (b) may make any order that is just and equitable. . .'

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

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

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

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

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

responsiveness and openness by all concerned, in a system of democratic governance'.¹⁰⁵

Costs

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

Order

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

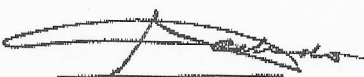
1. It is declared that the first respondent ('the Trust') and the second respondent ('the Board') acted unlawfully and in violation of the Constitution by –
 - 1.1 concluding residential lease agreements with persons living on the land held in trust by the Ingonyama ('Trust-held land') who are the true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

¹⁰⁵ Ibid.

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- 2.2 held or were entitled to hold Permissions to Occupy or any other informal rights to land protected under IPILRA in the land subject to the leases, are declared to be unlawful and invalid.
3. It is declared that the Trust is obliged forthwith to refund any and all money paid to the Trust or the Board under the lease agreements referred to in paragraph 2 to the persons who made such payments and any person who made payments under the lease agreement is entitled to a refund by the Trust to the extent of such payments.
4. It is declared that the third respondent ('the Minister') has breached her duty to respect, protect, promote and fulfil the constitutional right to property of the holders of IPILRA rights vested in respect of the Trust-held Land, by –
- 4.1 failing to respect, protect, promote and fulfil the existing property rights and security of tenure of the residents of Trust-held land, as required by sections 25(1) and 25(6) of the Constitution, read with section 7(2) of the Constitution;
- 4.2 failing to exercise, alternatively failing to ensure the exercise by her delegate, of the powers conferred by chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy) Regulations to demarcate allotments, issue and register Permissions to Occupy, survey such allotments, and obtain certificates of registered title in respect of such allotments in Trust-held land.
5. Until such time as the Minister may implement an alternative system of recording customary and other informal rights to land of persons and communities residing in Trust-held land:
- 5.1 the Minister is directed to ensure that the administrative capacity necessary to implement chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy) Regulations is reinstated forthwith; and
- 5.2 the Minister shall report to the court on the steps taken to comply with paragraph 5.1 of this order, within three months of the date of this order and every three months thereafter until the parties agree in writing that the steps envisaged in paragraph 5.1 have been implemented and that the reporting may be concluded, or the court, on application by any party, so orders.

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



MADONDO DJP



MIGUNI J



OLSEN J



Y.T

Judgement reserved: 9 December 2020

Judgment delivered: 11 June 2021

For the Applicants: Adv T Ngcukaitobi SC
Adv J Bleazard
Adv S Magardie

Instructed by: Legal Resources Centre
Sharita Samuel
Ref: T Mbhense

For 1st and 2nd Respondents: Adv Dickson SC
Adv Schaup

Instructed by: Mason Incorporated
Ref: Pk Coetzee/Nb/15/1001/058

For 3rd Respondent: Adv J Semanya SC
Adv S I Ogunronbi

Instructed by: State Attorney
Ref: Mrs Moodley 494/000355/18/C/P5

A handwritten signature, possibly 'J. J.', is located in the bottom right corner of the page.