

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

CASE NO.

In the matter between:

**COUNCIL FOR THE ADVANCEMENT OF
THE SOUTH AFRICAN CONSTITUTION**

First Applicant

RURAL WOMEN'S MOVEMENT

Second Applicant

HLETSHELWENI LINA NKOSI

Third Applicant

BONGANI ZIKHALI

Fourth Applicant

ZAKHELE MALCOM NKWANYANA

Fifth Applicant

HLUPHEKILE BERTINA MABUYAKHULU

Sixth Applicant

BONGI GUMEDE

Seventh Applicant

KN

Eighth Applicant

SM

Ninth Applicant

and

THE INGONYAMA TRUST

First Respondent

THE INGONYAMA TRUST BOARD

Second Respondent

**THE MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM**

Third Respondent

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

Fourth Respondent

**KWAZULU-NATAL PROVINCIAL HOUSE OF
TRADITIONAL LEADERS**

Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

PARMANANDA LAWSON NAIDOO

state under oath as follows:

- 1 I am the executive secretary of the Council for the Advancement of the South African Constitution (“**CASAC**”). CASAC’s offices are at 7 Olympia Court, 85 Durban Road, Mowbray, Cape Town.
- 2 I am duly authorised to make this application and depose to this affidavit on behalf of the Applicant. A resolution of the CASAC Executive Committee to this effect is annexed as **FA1**.
- 3 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct to the best of my knowledge and belief.
- 4 Where I make submissions on the law, I do so on the advice of the applicants’ legal representatives, which advice I believe to be correct.

INTRODUCTION

- 5 Since 2007, and possibly earlier, the Ingonyama Trust (“**the Trust**”) and the Ingonyama Trust Board (“**the Board**” or “**the ITB**”) have been undermining

the security of tenure of residents and occupiers of Trust-held land in KwaZulu-Natal, and extorting money from them, by unlawfully compelling them to conclude lease agreements and pay rental to the Trust to continue living on the land.

6 In compelling and inducing residents to conclude lease agreements, the Trust and the Board have –

6.1 violated the customary law and statutory “Permission To Occupy” (“**PTO**”) rights of residents and occupiers living on Trust-held land, which are protected by the Constitution and by Act of Parliament;

6.2 assumed and exercised land administration powers that they do not have, but which are vested in the third and fourth respondents, the Minister of Rural Development and Land Affairs (“**the Minister**”) and the MEC for Cooperative Governance and Traditional Affairs, KwaZulu-Natal (“**the MEC**”); and

6.3 induced and required residents and occupiers to sign lease agreements on the basis of false and incomplete information and without giving notice of the material terms of the lease agreements, including rental.

7 The personal accounts of the third to ninth applicants, and the records of the land leased out by the Trust for residential purposes, demonstrate that these violations are serious, widespread and systematic. The lease agreements impose serious burdens on the residents and occupiers of Trust-held land, many of whom are impoverished and cannot afford to pay the rental demanded

of them. Residents of Trust-held land are being threatened by letters of demand for rental unlawfully claimed by the Trust and the Board, and are vulnerable to eviction.

8 The steps taken by the Trust and the Board to “convert” residents’ customary and statutory PTO rights to less secure, lease rights have been reported on in the media and have been disclosed – year after year – in the Trust and Board’s annual reports to the Minister, which are tabled in the National Assembly. The dispossession of land rights by the Trust and the Board was also noted with concern in the High Level Panel’s Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change, released in November 2017. (I refer to the relevant parts of this report below.)

9 Yet neither the Executive nor the Legislature have taken effective steps to stop the unlawful conduct or to protect the rights of the residents and occupiers of the Trust-held land. As a result of this dereliction of duty, the applicants are compelled to approach the Court for relief.

10 The applicants seek orders –

10.1 declaring the conduct of the Trust and the Board to be unlawful and constitutionally invalid;

10.2 to establish a process for residents and occupiers of residential or arable land and commonage (eg. for grazing of cattle) to cancel their lease agreements and to recover any money they paid to the Trust and/or the Board pursuant to such lease agreements; and

- 10.3 directing the relevant authorities to issue and register officially recognised certificates of land rights, and if there are none other, then to register PTOs in accordance with the PTO Regulations; and
 - 10.4 declaring that the Minister has failed in her constitutional and statutory obligations to oversee the administration of Trust-held land and the activities of the Board, and ensure their compliance with the Constitution and the law.
- 11 Given the scale and seriousness of the problem, and the failure of the Executive and Legislative authorities to exercise proper oversight, the applicants have framed some of the orders as structural interdicts, with reporting requirements.
- 12 The structure of this affidavit is as follows:
- 12.1 First, I describe the parties and their interest in the application.
 - 12.2 Second, I describe the history of the Ingonyama Trust and the Board, and their statutory underpinning.
 - 12.3 Third, I describe the constitutional and statutory protection and regulation of residential occupancy and use rights in the Trust-held land.
 - 12.4 Fourth, I describe Zulu customary law rights governing residential occupancy and use in traditionally-administered land. I do so with reference to the expert affidavit of Professor Thandabantu Nhlapo, which accompanies this affidavit.

- 12.5 Fifth, I describe the so-called “PTO conversion project” implemented by the Trust and the Board, which is the subject of this application.
- 12.6 Sixth, I explain how the PTO conversion project undermines and infringes existing land rights and the security of tenure of those living on Trust-held land under both statutory law and Zulu customary law, and describe the impact of the PTO conversion project on the individual applicants.
- 12.7 Seventh, I set out how the National Assembly’s Portfolio Committee of Rural Development and Land Reform (“**the Portfolio Committee**”) has attempted to exercise oversight over the Board and persuade it not to infringe on the rights of the residents and occupiers, but to no avail.
- 12.8 Eighth, I set out the grounds on which the applicants contend the Trust and the Board have acted unlawfully.
- 12.9 Ninth, I explain why the Minister has failed in her constitutional and statutory duties in overseeing the administration of Trust-held land by the Board.
- 12.10 I conclude by explaining the relief the applicants seek.

I. THE PARTIES

The applicants

13 The applicant is CASAC, a voluntary association with separate legal personality and the power to sue and be sued. A copy of CASAC's constitution is annexed marked **FA2**.

13.1 CASAC was established in 2010 as an initiative to advance the South African Constitution as a platform for democratic politics and the transformation of society. The sole object of CASAC is to promote, develop, and affirm the rights and principles set out in the South African Constitution, in order to facilitate and advance progressive constitutionalism and deepen democracy in South Africa.

13.2 CASAC's membership is comprised of progressive people from a range of sectors, and its Advisory Council and Honorary Members include senior advocates, academics, activists, former Justices of the Constitutional Court, and current and former university vice-chancellors.

13.3 CASAC is deeply concerned that the residents and occupiers of Trust-held land are being unlawfully deprived by the Trust and its Board of their constitutionally-protected property rights. The Trust and its Board have acted with apparent impunity, as the Ministers and Portfolio Committee tasked with overseeing its functions have failed to act to protect these rights, despite having knowledge of the Trust's so-called "PTO-conversion project". CASAC accordingly institutes this application to

affirm the constitutionally-protected property rights of those living on Trust-held land, and the foundational constitutional principles of the supremacy of the Constitution, the rule of law and accountability.

14 The second applicant is the **RURAL WOMEN'S MOVEMENT** ("RWM"), a non-profit, grassroots organization founded in 1998. The RWM's head offices are at Greener Pastures Farm, District Road No.354, Lynnfield Park, Umlaas Road, KwaZulu-Natal.

14.1 The RWM works to give a voice to rural women in KwaZulu Natal, and to address the social problems that rural women face, including access to land and land ownership. I attach of copy of the RWM's Constitution marked **FA3**. As appears from that Constitution, the RWM has legal personality and the power to sue and be sued.

14.2 The supporting affidavit of Sizani Ngubani, the director of RWM will be filed together with this affidavit. Her affidavit describes RWM's interest in these proceedings and provides further factual and legal justification for the relief the applicants seek.

15 The third to ninth applicants are residents and occupiers of Trust-held land in KZN. All have been compelled or induced by the Trust and the Traditional Council to sign lease agreements, in many cases which they cannot afford, on the basis of false or incomplete information.

- 15.1 The third applicant is **HLETSHELWENI LINA NKOSI**, a 62 year-old female, residing at Portion 6 of the Farm Reserve No. 16, Maphanya Village, Jozini, KwaZulu-Natal.
- 15.2 The fourth applicant is **BONGANI ZIKHALI**, a 57 year-old male, residing at Portion 6 of the farm reserve no.16, Maphanya Village, Jozini, KwaZulu-Natal.
- 15.3 The fifth applicant is **ZAKHELE MALCOLM NKWANKWA**, a 52 year-old man, residing at Bhamshela, Umvoti, in the jurisdiction of the Mlumula Traditional Council.
- 15.4 The sixth applicant is **HLUPHEKILE BHETINA MABUYAKHULU**, a 76 year-old female, residing at portion 6 of the farm Reserve No.16 No. 15836 HV, Maphanya Village, Jozini, KwaZulu-Natal.
- 15.5 The seventh applicant is **MABONGI GUMEDE**, a 51 year-old female, residing at portion 6 of the farm Reserve No.16 No. 15836 HV, Maphaya Village, Jozini, KwaZulu-Natal.
- 15.6 The eighth and ninth applicants do not wish to be identified in this application for fear of reprisal. They are both adult male residents of Jozini, KwaZulu-Natal, and are designated as “**KN**” and “**SM**” respectively.
- 15.7 The third to ninth applicants have deposed to supporting affidavits which are filed herewith.

- 16 The applicants bring this application in their own interest, in the interests of their members, in the interest of the residents of land held by the Ingonyama Trust, and in the public interest. The applicants exercise standing to bring this application under section 38 (a), (b), (c) and (d) of the Constitution.

The respondents

- 17 The first respondent is the **INGONYAMA TRUST**, a corporate body established under section 2(1) of the KwaZulu-Natal Ingonyama Trust Act, No. 3KZ of 1994 (**“the Trust Act”**).

17.1 The sole trustee of the Ingonyama Trust is the Ingonyama (Zulu King), presently King Goodwill Zwelethini ka Bhekuzulu.

17.2 The Ingonyama Trust is the registered owner of approximately thirty per cent of the provincial land – some 2.8 million hectares – in KwaZulu-Natal, being the land previously vested in the “homeland” Government of KwaZulu. I attach a map marked **FA4**, which describes the land held by the Ingonyama Trust (herein **“Trust-held land”**).

17.3 Under section 3 of the Trust Act, the Ingonyama Trust holds the land it owns in trust *“for and on behalf of the members of the tribes and communities and the residents”* of the Zulu nation.

17.4 The Trust is administered by the Ingonyama Trust Board situated at 65 Trelawney Road, Southgate, Pietermaritzburg, 3201.

- 18 The second respondent is the **INGONYAMA TRUST BOARD**, established under section 2A of the Trust Act to administer the affairs of the Trust and the Trust-held land. The Board is chaired by the Ingonyama or his nominee. The chairperson is presently former Judge Ngwenya. The Board has eight other members appointed by the Minister for Rural Development and Land Reform, after consultation with the Ingonyama, Premier and Chairperson of the House of Traditional Leaders of KwaZulu-Natal. The Ingonyama Trust Board's offices are at 65 Trelawney Road, Southgate, Pietermaritzburg, 3201.
- 19 The third respondent is the **MINISTER OF RURAL DEVELOPMENT AND LAND REFORM** (“**the Minister**”). The Minister is served care of State Attorney, 6th Floor, MetLife Building, 391 Anton Lembede Street, Durban, KwaZulu Natal. The Minister is cited in her official capacity as –
- 19.1 the member of the national executive responsible for administering the Trust Act (pursuant to the KwaZulu Ingonyama Trust Amendment Act No. 9 of 1997 and the Rural Development and Land Reform General Amendment Act No. 4 of 2011);
- 19.2 the executive authority responsible for administering sections 24 to 26 of the KwaZulu Land Affairs Act 11 of 1992 (“**Land Affairs Act**”), which governs the conferral of Permission to Occupy rights on Trust-held land; and
- 19.3 as the representative of the national Government.

- 20 The fourth respondent is the **MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KWAZULU-NATAL** (“the MEC”). She is served care of State Attorney, 6th Floor, MetLife Building, 391 Anton Lembede Street, Durban, KwaZulu Natal. She is cited in her official capacity. The provincial minister responsible, inter alia, for overseeing the administration and governance of traditional institutions and land use management in local and provincial government. As I explain further below, the MEC is also responsible for the issuing and registration of PTO rights in the Trust-held land, pursuant to a delegation of authority from the national Minister responsible for Land Affairs.
- 21 The MEC is cited as the member of the provincial executive responsible for the KwaZulu-Natal Department of Cooperative Governance and Traditional Affairs, and by virtue of statutory and delegated powers and functions. The MEC is also cited as the representative of the Provincial Government of KwaZulu-Natal.
- 22 The fifth respondent is the **KWAZULU NATAL PROVINCIAL HOUSE OF TRADITIONAL LEADERS** (“the Provincial House”), situated at 330, Langelibalele Street, Pietermaritzburg, KwaZulu Natal. The Provincial House is established under section 32 the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 and section 16(1)(a) of the Traditional Leadership and Governance Framework Act 41 of 2003.
- 22.1 The Provincial House is comprised of the *Isilo* (Provincial monarch or king) or his nominee and elected members of the Local Houses of Traditional Leaders.

22.2 The Provincial House is responsible for advising and making recommendations to the Provincial Government and the MEC with respect to matters affecting traditional leaders, traditional councils or communities, and matters pertaining to Zulu custom and tradition.

22.3 No relief is sought against the Provincial House; it is cited for such interest as it may have in the application.

23 The third to fifth respondents are cited care of the State Attorney, Durban at the MetLife Building, 6th Floor, 391 Anton Lembede Street, Durban.

II. THE INGONYAMA TRUST AND ITS BOARD

24 When South Africa attained democracy in April 1994, all homelands, including that of KwaZulu, were abolished. The homeland and self-governing areas were reincorporated into South Africa, and all land owned by the governments of those territories was to be vested in the new national government.

25 The land in the KwaZulu “homeland” was an exception however. During the dying days of apartheid, just before the interim Constitution came into force, the National Party and the Inkatha Freedom Party struck a deal to establish the Ingonyama Trust and to transfer all the land then held by the KwaZulu government to the Ingonyama Trust. This deal was effected through the KwaZulu Ingonyama Trust Act 3 of 1994 (enacted by the KwaZulu legislature, “**the Trust Act**”), which came into force on 24 April 1994.

26 The Trust Act –

- 26.1 established the Ingonyama Trust, with the Ingonyama as the sole trustee;
- 26.2 transferred any land or real right of ownership then vested in the Government of KwaZulu to the Ingonyama Trust; and
- 26.3 mandated the Trust to administer the transferred land “*for the benefit, material welfare and social well-being of the members of the tribes and communities*” contemplated in the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990.
- 27 The power of the Trust and the sole trustee, the Ingonyama, to manage the Trust-held land is subject to important constraints under the Trust Act. This includes the duty to act for the benefit of the members of the Zulu tribes and communities living on the land; the duty to respect Zulu customary law; and the duty not to infringe upon any existing land rights. In addition, the Trust cannot lease, alienate or otherwise dispose of any of the land or any interest or real rights in the land, unless it has obtained the prior written consent of the relevant traditional or community authority. These constraints are set out in section 2 of the Trust Act, which provides:
- 27.1 “*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 the KwaZulu Amakhosi and Iziphakanyiswa Act*” (section 2(2));

27.2 *“The Ingonyama may, subject to the provisions of this Act and any other law, deal with the land referred to in section 3(1) in accordance with Zulu indigenous law or any other applicable law”* (section 2(4));

27.3 *“The Ingonyama shall not encumber, pledge, lease, alienate or otherwise dispose of any of the said land or any interest or real right in the land, unless he has obtained the prior written consent of the traditional authority or community authority concerned”* (section 2(5));

27.4 *“Notwithstanding the provisions of this Act, any national land reform programme established and implemented in terms of any law shall apply to the land referred to in section 3(1): Provided that the implementation of any such programme on the land referred to in section 3(1) shall be undertaken after consultation with the Ingonyama”* (section 2(7)); and

27.5 *“In the execution of his or her functions in terms of this section the Ingonyama shall not infringe upon any existing rights or interests”* (section 2(8)).¹

28 I am advised and submit that the effect of these provisions is that, while the Ingonyama Trust is the nominal owner of all land that vests in it, it does not possess unfettered ownership rights. It must act as a trustee in the interest and for the benefit of the Zulu communities and residents living on the land, who are the true and ultimate (if not the registered) owners of the land.

¹ My emphasis.

29 The Trust Act was amended by national Parliament in 1997.² As a result of these amendments, the Trust Act acquired the status of a national Act. It is presently administered by the Minister for Rural Development and Land Reform (as the Minister designated by the President).

30 Under the 1997 amendments, a Board of Trustees was established to –

“administer the affairs of the Trust and the trust land and without detracting from the generality of the foregoing the Board may decide on and implement any encumbrance, pledge, lease, alienation or disposal of any trust land or of any interest or real right in such land.”

31 As I shall explain, the Trust, the Ingonyama, and the Board have breached their duties under the Trust Act, by –

31.1 failing to administer the Trust-held land *“for the benefit, material welfare and social well-being of the members of the tribes and communities”* living on the land;

31.2 failing to deal with the land referred to in section 3(1) in accordance with Zulu indigenous law or any other applicable law; and

31.3 infringing upon the existing rights and interests of the Zulu people living on the Trust land.

² Under the KwaZulu Ingonyama Trust Amendment Act No. 9 of 1997 (which came into operation on 2 October 1998) and the Rural Development and Land Reform General Amendment Act No. 4 of 2011.

III. THE CONSTITUTIONAL AND STATUTORY PROTECTION OF LAND RIGHTS HELD IN RESPECT OF THE INGONYAMA TRUST'S LAND

Statutory protection of "Permission to Occupy" rights

32 The primary form of residential tenure for persons living in the rural areas of former homelands or self-governing territories, including the KwaZulu homeland, remains the "Permission to Occupy" (PTO) right.

33 The Portfolio Committee has criticised the Department for the failure to put in place an alternative system to apartheid-era PTOs. That failure has resulted in PTOs remaining the primary mechanism used to record land rights in the former homelands.

34 The PTO right was recognised as a statutory form of tenure on unsurveyed land in designated "Black" rural areas under the Bantu Areas Land Regulations (Proclamation 188 of 11 July 1969).³ The Regulations authorised the Bantu Affairs Commissioner to issue written "permissions to occupy" allotments for residential or arable use. The PTO was recorded in an "allotment register", and afforded exclusive and perpetual occupancy and use rights to the rights-holder.

35 Proclamation 188 of 1969 was repealed by the KwaZulu Legislative Assembly under the KwaZulu Land Affairs Act 11 of 1992 ("**the Land Affairs Act**").

³ Promulgated in GG 2486 RG 1154 under section 25 (1) of the Black Administration Act 38 of 1927.

Before title was transferred to the homeland governments, rural land in black-designated areas vested in the South African State and was controlled by the Native Development Trust (under the Native Trust and Land Act 18 of 1936), later renamed the South African Development Trust. The 1969 Regulations thus referred to the land in respect of which PTOs were granted as "Trust land".

36 However the Land Affairs Act retained the institution of PTOs. Chapter XI of the Land Affairs Act (sections 24 to 26) continues to govern PTO rights over the Trust-held land.

36.1 Under section 24, the power to demarcate allotments on Government land or land owned by a tribal authority (which includes all the Trust-held land) for the purpose of granting PTOs is vested in the national Minister responsible for Land Affairs.

36.2 Section 25(1) provides that the Minister is also responsible for granting and recording PTOs, in the prescribed manner and after consultation with the tribal authority.

36.3 The remainder of section 25 defines the nature of the right to occupy, and how it may be terminated or withdrawn. It provides, in relevant part:

“25. Right to occupy allotments.

(1) The Minister may, in the manner prescribed and after consultation with the tribal authority concerned, grant and record permission to any person to occupy –

(a) an allotment;⁴ or

(b) ...

(2) Permission granted under subsection (1) shall –

(a) confer the rights to use and improve the allotments for the purpose specified by the Minister;

⁴ “Allotment” is defined in section 1 of the KwaZulu Land Affairs Act to mean: “a portion of Government land demarcated as contemplated in section 24”.

“Government land” is defined, in turn, to mean: “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”.

(b) subject to the provisions of subsection (3), endure for the life of the person to whom such right was granted;

(c) confer after the death of such person such rights on his widow as may be prescribed.

(3) The Minister may, in the prescribed manner and after consultation with the tribal authority concerned, withdraw permission granted under subsection (1).

(4) The rights held by virtue of permission granted under subsection (1) may, with the prior consent of the Minister given after consultation with the tribal authority, be ceded or otherwise disposed of to such extent and in such circumstances as may be prescribed.

(5) ...”

36.4 Section 26 defines the manner in which the PTO rights-holder may strengthen and formalise the right: by having the land surveyed and acquiring a deed of grant rights and a certificate of registered title. It provides:

“26. Acquisition of deed of grant rights by occupant.

(1) A person to whom permission to occupy land has been granted under section 25 (1) may, with the prior consent of the Minister given after consultation with the tribal authority –

(a) in the case of an allotment outside an approved township, cause such allotment to be surveyed and shown on a diagram;

(b) acquire deed of grant rights in respect of such land.

(2) The owner of the land contemplated in subsection (1) –

(a) may grant deed of grant rights in respect of such portion to the person concerned;

(b) shall, in the case of an allotment referred to in subsection (1) (a), thereafter obtain a certificate of registered title contemplated in section 43 (1) of the Deeds Registries Act, 1937, in respect of such allotment.”

37 For convenience, I attach a copy of the relevant provisions of the Land Affairs Act marked **FA5**.

38 The administration of the KZ Land Affairs Act was assigned to the Province of Kwa-Zulu Natal under Proclamation No. R. 63 of 1998. However sections 24 to 26 (amongst others) were excluded from such assignment. The national Minister responsible for Land Affairs thus remained the authority responsible for implementing the provisions governing PTOs. I attach a copy of Proclamation R.63 of 1998 as annexure **FA6**.

The PTO Regulations

39 The administration of PTOs in the Trust-held land is also governed by the KwaZulu Land Affairs (Permission to Occupy) Regulations (G.N. 32/94) ("**PTO Regulations**"). These Regulations define the process of issuing and registering PTOs, and the respective roles of the tribal authority and the Minister. These Regulations remain in force.

40 A copy of the PTO Regulations is attached marked **FA7**. In summary, the PTO Regulations provide that:

40.1 The tribal authority shall resolve to recommend the allocation to any person or Government department of a portion of land in its area of jurisdiction (regulation 2);

40.2 If the allocation is for residential purposes, the person or department concerned must obtain a notice of the tribal authority's recommendation

of the allocation (which notice must be issued by the tribal authority on request), and approach the Minister for the issue of a PTO (regulation 2(b));

40.3 On receipt of a request for a PTO for residential purposes, the Minister must –

inspect the allocated land, in the presence of a representative of the tribal authority and the person concerned;

demarcate the land into an allotment (if it is not already demarcated) after consultation with the Minister for Agriculture and the tribal authority;

complete a site inspection certificate in respect of the allotment (which must be signed by the Minister and the representative of the tribal authority) and sketch of the allotment; and

issue a PTO (in the prescribed form) against payment of the prescribed fee prescribed, and hand to the person concerned the original PTO and a copy of the sketch of the allotment, while retaining a duplicate copy of the PTO signed by the occupier and the original site inspection certificate and sketch. The issue and retention of the documents constituted “registration” of the PTO (regulations 4 and 5).

41 Under the Regulations, PTO rights can be transferred to another person, but this requires the prior approval of the Minister given after consultation with the tribal authority (regulation 6).

- 42 PTO-rights can be withdrawn or cancelled by the Minister, after consultation with the tribal authority, and only by agreement with the holder of the right, or after expropriation or the granting of deed of grant rights in respect of the allotment concerned (regulation 8).
- 43 The conditions benefitting the holder of a PTO includes the use of commonage in the area concerned (regulation 9). “Commonage” is defined in the Regulations as *“any portion of government land which is not –*
- (a) an erf or allotment*
 - (b) specifically reserved for specific purposes other than grazing of livestock;*
 - (c) set aside as a public place; or*
 - (d) a street, road or other public thoroughfare”.*
- 44 The Regulations also expressly provide that, while the Minister is empowered to determine rental for PTOs, *“no rental shall be payable in respect of a permission to occupy an allotment used primarily for residential, church, crèche, school or public purposes”* (regulation 11, emphasis added).

The delegation under the Land Affairs Act and PTO Regulations

- 45 On 19 September 1998, the Minister responsible for Land Affairs in the national Government (then Minister Derek Hanekom) delegated his powers under sections 24 to 26 of the Land Affairs Act and the PTO Regulations to the provincial MEC for Traditional and Environmental Affairs (**“the MEC”**). Henceforth, the MEC became responsible for the issuing and registration of

PTO rights in the Trust-held land. I attach a copy of the delegation marked **FA8**.

46 As far as I am aware, this delegation has never been withdrawn. Thus, the position remains that the MEC is responsible for the exercise of the Minister's power to demarcate allotments, and to issue and register PTOs on the Trust-held land.

The protection of PTO rights under the Constitution

47 The property clause in section 25 of the Constitution recognises the need to protect the informal forms of tenure in the former homelands. It provides:

“(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”

48 Section 25(9) specifically enjoined Parliament to enact the legislation referred to in subsection (6). Parliament did so in 1996, by promulgating the Interim Protection of Informal Land Rights Act 31 of 1996 (“**IPILRA**”). This Act protects existing informal rights to land, which are broadly defined to mean:

“(a) the use of, occupation of, or access to land in terms of –

- (i) any tribal, customary or indigenous law or practice of a tribe;*
- (ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in –*

(aa) *the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act 18 of 1936);*

(bb) *the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act 21 of 1971); or*

(cc) *the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;*

(b) *the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;*

(c) *beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997;*

(d) *the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question,*

but does not include –

(e) *any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and*

(f) *any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier”.*

49 The definition in paragraph (d) must be read with Schedules 1 and 2 to the Upgrading of Land Tenure Rights Act, 1991. These include “*Any permission to occupy any allotment within the meaning of the Black Areas Land Regulations, 1969 (Proclamation R188 of 1969)*” (schedule 2, paragraph 2).

50 Section 2 of IPILRA thus provides over-arching protection against the deprivation of existing informal rights to land, including and specifically PTOs.

51 It requires that any deprivation of informal rights to land must –

51.1 be with the right-holder’s consent, or

51.2 if the land is held on a communal basis, accord with the community’s custom or usage; be subject to compensation; and approved by the majority of community members present at a specially-convened meeting where due process is followed.⁵

52 Under section 5, IPILRA “*binds all persons, including the State*”. While IPILRA was drafted as temporary protective legislation, the duration of the Act has been extended annually since its enactment (as provided for in section 5(2)).

53 IPILRA continues to apply, and protects PTO rights and other informal rights of occupation and use in the Trust-held land from deprivation without the right-holder’s consent. That consent must be genuine and informed consent. I am advised that consent is “informed” if it is based on substantial knowledge concerning the nature and the effect of the act or transaction consented to.

⁵ Section 2 of IPILRA provides:

“(1) *Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.*

(2) *Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.*

(3) *Where the deprivation of a right in land in terms of subsection (2) is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal.*

(4) *For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.”*

IV. THE CUSTOMARY RIGHTS OF RESIDENTS AND OCCUPIERS IN THE TRUST-HELD LAND

54 IsiZulu customary law provides strong and secure rights to residential and arable land and commonage (eg. grazing land and woodlands) to families and to individuals within the family, which are inherited over generations. As is described in the expert affidavit of Professor Thandabantu Nhlapo that accompanies this affidavit, these rights are exercised and must be understood within the inclusive nature of systems of customary land rights.

55 Professor Nhlapo explains that secure rights to land and natural resources derive largely from recognised and accepted membership of a local group or 'community'. Membership flows from birth in the first instance, but outsiders who apply for land can be accepted into the community through defined procedures (for example, approval of an application and payment of a *khonza* fee)⁶ or through transactions such as purchases of houses (or sometimes even land). Land rights are closely tied to social and cultural relationships, and tenure security derives in large part from locally-legitimate landholding. Generally, tenure of residential land is perpetual, transferable and inherited, unless an individual or family's occupation of the land is determined to be harmful to the community.

56 Professor Nhlapo also explains that, under Zulu customary law, there are varying or layered degrees of decision-making, depending on the type of land use. Land allocations of residential and arable land are often highly localized

⁶ See Alcock & Hornby (2004: 13).

processes within families, or at the level of the local neighbourhood, while grazing and woodland use is the concern of a wider segment of society. Members have the right to participate in decision-making processes at the appropriate level. “Headmen” and “sub-headmen” (as opposed to chiefs) often play a crucial role in convening meetings of neighbours at which the suitability of new applicants is discussed and the boundaries of the land are agreed and witnessed. Localised involvement in decision-making is critically important for social cohesion, stability and well-being.

57 While a once-off *khonza* fee is often paid by newcomers seeking to be allocated land, the payment of regular rental for land to traditional authorities is not part of Zulu customary law. Rental is sometimes paid to individuals or families who rent land to tenants but this is a bi-lateral arrangement between individuals rather than a feature of customary law. Such private rental arrangements between individuals are not regulated by traditional authority structures.

58 The customary rights of the residents and occupiers of the Trust-held land are specially protected under the Constitution and statute. This includes under the following provisions:

58.1 section 25(1) and (2) of the Constitution, which protect existing rights to property against unlawful expropriation;

58.2 section 25(6) of the Constitution, read with section 2 of IPILRA, which protects against any deprivation of informal land rights without the consent of the rights-holder;

58.3 sections 2(4) and 2(8) of the Trust Act, which obliges the Ingonyama to deal with the Trust-held land *“in accordance with Zulu indigenous law”* and provides that the Ingonyama *“shall not infringe upon any existing rights or interests”* in the exercise of his or her functions; and

58.4 sections 212 of the Constitution, which provides that *“A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs”*.

59 The existence of customary rights in the Trust-held land ought not to be contentious. The Board and its Chairperson, Mr Ngwenya have repeatedly recognised and emphasised the need to protect the customary rights of the residents and occupiers of the Trust-held land.

60 For example, in the ITB 2016/17 Annual Report, the Chairperson of the Board made the following introductory remarks:

“In my report in the 2010/11 annual report I made the following observations:

‘... the Constitution does not only protect the right to property, but also the indigenous legal system and the institution of Traditional Leadership... According to this system, land is an unalienable Godly resource to humanity. On it humans could live and sustain themselves.... Human beings can acquire rights over land which they can alienate and trade off.’

The observation I made then is the manner in which “land ownership” is viewed from an indigenous perspective. In short it is collectively held while individual rights are as strong as those of Roman Dutch law which are by their nature individualistic. Again here today I do not seek to dwell in any great length with this subject matter. What is important to emphasize here is that the land which ITB co-administers, is held in trust (Ingonyama Trust) for the specified beneficiaries (the ultimate and true owners) in accordance with customary law. Therefore the land in question has both a public and private character. It therefore enjoys all the legal protection accorded by law. Likewise its beneficiaries are entitled to all the benefits which the landowner as understood under the Roman Dutch law enjoys.” (My emphasis)

- 61 The Board’s Annual Reports contain a common description of the “Legal Context of the Ingonyama Trust”. In this section, the Board recognises that the Trust is no more than “*the nominal owner*” of the land it administers, and that under Zulu customary law, the land is collectively owned by the clans who live on it. Further, the Board recognises that, under Zulu customary law, each clan member owns his or her individual allotment, even if this right is not registered by title deed. The relevant extract from the ITB Annual Report reads:

“Firstly, the land which the Trust is the nominal owner of is administered mainly in terms of Zulu customary law. The land is divided according to clans under the leadership of Traditional Leaders (AMAKHOSI) who in turn are responsible to the King in terms of customary law. Hence the King is the only Trustee of Ingonyama

Trust...Communally the land is owned by the clans as a collective in respect of each demarcated area. In turn each member of each clan is entitled through the procedures under customary law to have ownership of his/her allotment. The land which Ingonyama Trust owns, is the property envisaged in Section 25(1) of the constitution. Thus while not each and every member of the beneficial clans has a registered title deed in respect of his/her allotment, such ownership is protected by the law.”

62 In the ITB 2012/2013 Annual Report, Mr Ngwenya states in the Chairperson’s statement:

“While at the end of the day, the preferred tenure issued by the Board is leasehold, this is a simplification of a complex process which in essence contains a myriad of rights. People who live according to indigenous law and custom know that their rights are not adequately described by leasehold as theirs is more than this. Hence, a leasehold agreement is a convenient description of part of the content of their rights ... Their association with the land of which they are beneficiaries, is permanent and perpetual. As such to them Ingonyama Trust Board is not a landlord. It could not be rationally explained how an entity which came into existence just the other day can be the owner of land when most of the beneficiaries predate its existence. The fact that they have no documents to prove their rights is not good enough to deny their existence.

...

In a way indigenous layers of rights in the absence of clear recordal are suppressed and hidden. The Board is like an outside world which is there to protect them in the language and manner that can be interpreted in the context of our common law. The Board must, moving forward, seek to document and clarify the entire content of these communal rights which each holder has on land. Hopefully once this is done a correct description of the nature of the instrument which encapsulates these rights will be properly described or given an appropriate term.”

- 63 Similarly, in the ITB 2011/2012 Annual Report, Mr Ngwenya states in the Chairperson’s statement:

“These people [the people occupying the land held by the Trust] while in a legal sense are the beneficial occupiers, in reality are the true owners. They derive their rights of occupation from historical rights of various clans (tribes). Some pre date the colonial era...

The allocation of land on the ground by these Traditional Councils is in terms of the Zulu indigenous law. It is mainly oral and the rights acquired as such are not documented. They are preserved through passage of time from generation to generation. While the content of these rights is not documented, it is safe to state that these are more than land rights. They contain religious and social rights as well....”

- 64 I attach a copy of all of the above extracts from the ITB Annual Reports in a consolidated bundle marked **FA9**.

65 I also attach an article by the renowned historian and emeritus professor, Mr Peter Delius, published in *City Press* on 24 June 2018, as annexure **FA10**. The article provides a useful explanation of the perversion of customary land rights under colonialism and apartheid. As Professor Delius writes, the notion that traditional leaders owned and controlled land in precolonial times and under customary law “*is a profound misrepresentation of history*”. Professor Delius explains:

“Traditional leaders were made chiefs by the people. Their power was based on the size of their followings, not on control of the land.

Chiefdoms rarely formed on virgin land. They were usually established over pre-existing populations who retained their land. New settlers who moved into the area with, or after, new ruling groups, approached chiefs to ask for a place to settle. The land they were allocated was distributed to households whose residents could not be dispossessed of their fields for any reason short of treason.

This land was then passed down to new generations within households and local settlements. The chiefs did not own the land. Instead, the strongest rights to land, which many argued amounted to ownership, were located at the level of the homestead or household.

The idea that chiefs were the owners of the land was a colonial invention. Colonial administrators saw themselves as taking over the role and powers of chiefs. It suited them to argue that the new colonial system had inherited control of the land from the pre-existing political leaders.

In the apartheid era, the system of traditional leadership was comprehensively reconstructed by the imposition of the Bantu Authorities Act, which drew chiefs into a tight colonial embrace. Traditional authorities were recognised and tribal boundaries were drawn with the intention to reward those who lent support to the system and to penalise groups who resisted.

Traditional leaders in varying degrees became chiefs selected by government and not the people. This new order expanded their power over the land and lives of their subjects. The genesis of the notion that chiefs owned the land is thus a product of colonial and apartheid ideology and invention.”

V. THE INGONYAMA TRUST'S "PTO CONVERSION PROJECT"

The nature and extent of the PTO conversion project

66 It appears that during or about 2007, the Ingonyama Trust Board decided that PTOs should no longer be issued and that existing PTO rights in land should be converted to lease agreements for both business and residential purposes.

67 The official website of the Ingonyama Trust and Board (www.ingonyamatrust.org.za) describes the "Services" provided by the Board in respect of "Trust Land Rights". It records that PTOs were granted "*until 1 April 2007*" and "*are no longer issued*". I attach, marked **FA11** a screenshot of the webpage. The relevant passage reads in full:

"Permission to Occupy

In addition to applications for commercial and agricultural purposes the Board processes many applications for residential sites. Many of these sites are the subject of Permissions to Occupy which were granted up until 1st April 2007.

Permissions to Occupy are no longer issued, except in exceptional circumstances as they afford limited security for funding and are not registrable interests."

68 In presenting its 2006/2007 Annual Report to the Portfolio Committee on Agriculture and Land Affairs, the Board advised Parliament of its decision to terminate the issuing of PTOs and to issue leases instead. It reported 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...”

This extract of the presentation is attached as annexure **FA12**.

69 The standard ITB residential lease agreement provides for a 40-year term, and a 10% annual increase on rental. It compels the lessee to fence the property within six months. The lessee must obtain written permission to build and must record all improvements, and submit this to the ITB. The ITB is entitled to cancel the lease agreement for failure to pay rent. All buildings and structures that have been built on the land will belong to the Ingonyama Trust when the lessee vacates the premises. These terms appear in the lease agreements that the ITB furnished to the third to ninth applicants, which are attached to their supporting affidavits.

70 The rental amounts under the lease agreements vary according to the size of the plot. Minutes of the Board's EXCO meeting of 7 January 2014 indicate the rental amounts that were then charged to residents, and is attached marked **FA13**. The third to ninth applicants attest that, presently, they are charged rental amounts ranging between R1500 and R7000 per annum.

71 The Trust's leasing process was reported to Parliament in the ITB 2011/2012 Annual Report. The Board described the process as follows:

“After the land has been allocated to the applicant by the Traditional Council, the applicant has to complete the ITB1 lease application form and the Traditional Council grants him/her consent through the completion of ITB2 consent forms. In some instances a letter from the Municipality is required to confirm that the Municipality does not object to the building of such structure / facility and that it complies with the relevant regulations and the IDP. ITB then sends surveyors to survey the site and plot it on maps. The application is then submitted to Exco (Leases) for approval. If approved the applicant is given a 2 year short term lease to secure finance, etc. After two years the applicant applies for a forty (40) years lease with an option of further extension of another forty (40) years. Rates are market related or 3% of turnover and subject to 10% escalation per annum.”

- 72 The process is also described on the Board’s website, under the heading “Applications for Tenure Rights”. It reads:

“Applications for Tenure Rights

*Applicants for tenure rights on Trust land are required to complete and return a Tenure Option Application Form. Form **ITB1** can be viewed or downloaded from this website. The Board attempts to process these applications as timeously as possible but delays may occur if the information requested has not been fully supplied or where a site survey is required.*

Traditional Council Consent

It is a requirement of the Ingonyama Trust legislation that the formal consent of the relevant Traditional Council be obtained before a tenure rights application can be processed.

*This should be in the form of the draft pro-form **ITB2** which can be viewed or downloaded from this website. It is important to note that this formal consent is only required where the subject site falls within a*

proclaimed Traditional Council area. Applicants should confirm this with the Board's Secretariat before approach is made to a Traditional Council."

- 73 The ITB1 and ITB2 forms are found under a link on the website: "*Ingonyama Trust Board Lease application forms*". The ITB1 form requires the applicant to specify "the type of tenure required" by selecting one of the following: "LEASE" (short term – 2 years, or long-term – 40 years); "SERVITUDE"; or "PURCHASE". No other options are available. A note is appended to the "Purchase" option, which reads: "*Note: The Board will only consider the sale of its property in exceptional circumstances*".
- 74 A screenshot of the webpage, as well as the ITB1 and ITB2 forms required to be completed are attached marked **FA14**, **FA15** and **FA16**.
- 75 The progressive implementation of the Board's resolution to convert PTOs and conclude lease agreements is evidenced in the Annual Reports of the Board. The extracts quoted hereunder are attached as a single bundle **FA17**.
- 75.1 In presenting its 2008/2009 Annual Report to the Portfolio Committee on Agriculture and Land Affairs, the Board reported that:

"As at 31 March 2009 the Board has granted 376 leases generating R8,492,090 per annum by way of income. There is an increased demand for tenure rights on our land, and lease applications are currently being processed at the rate of 80 per month. By the end of the 2009/2010 financial year the income

generated is estimated to rise to at least R9,708,987 per annum.”

75.2 The Board reported in its 2011/2012 Annual Report:

“The year 2011/12 again witnessed an increase in residential lease applications. This is an indication that the majority of the people living on the land under Ingonyama Trust Board are now having a better understanding of its role. The leases among others provide the following benefits to the occupiers; security of land tenure and an ability to apply for finance ... The Secretariat received in excess of 950 lease applications during the year under review of which over 64,85% were processed and approved by the Board. This resulted in an overall increase of 11.45% of the rental revenue stream for the Board”; and

“A total of 364 lease agreements were concluded during the 2011/2012 financial year. The total potential revenue generated for the concluded leases during this period was R 948 729.00. The breakdown of the leases concluded by the Board, according to districts is represented in the graph.”

75.3 The Board reported in its 2012/13 Annual Report that:

“The Financial year 2012/13 further witnessed an increase in residential applications for tenure rights. Again this being an encouragement that more and more people residing on land

under the jurisdiction of Ingonyama Trust Board are seeing the value of secure tenure rights in the form of leasehold. A total of 1611 applications for land tenure rights were received during the 2012/2013 financial year and 859 was approved. This amounts to an increase of 652 applications from the 2011/2012 financial year.”

“Rental revenue of R41,658,375 (in 2013), of which R9,696 was from Permissions to Occupy (Commercial) and R41,648,679 was for leases (includes straight lining income).”

75.4 The ITB 2013/2014 Annual Report recorded:

“The financial year 2013/14, was also marked by a further increase of lease applications received. In 2012/13 financial year there were 1611 applications received of which 856 applications were ultimately signed by both parties. In 2013/14 financial year, there were 2104 applications received of which 1157 applications were ultimately signed by both parties. The residential sector still leads in applications received and approved by the Board. This is an indication to a large extent that there is a growing need for security of tenure by the people residing in communal areas.”

“Rental revenue of R73,907,495 (in 2013/2014), of which R9,696 was from Permissions to Occupy (Commercial) and R73,897,799 was for leases (includes straight lining income).”

75.5 In presenting the 2013/2014 ITB Annual Report to the Portfolio Committee, the Board summed up the progress made in implementing “the leasing system”. The Board reported:

“Prior to 2007 the ITB received R 100,00 for general PTO income (residential income) per annum and R 48,00 for commercial PTO income per annum. PTO’s are no more issued and the ITB has adopted the leasing system as a medium of providing tenure rights. The introduction of the leasing system has increased revenue for the community beneficiaries. ... By issuing leases the ITB’s receivable income at an average rental of R 1000.00 per year is R 1 157 000.00. The increase is ten fold.” (Emphasis added.)

(This ten-fold increase is also depicted in two graphs in the report: A pie chart of the sources of income for the Trust shows that rental income is at 71%; and an accompanying bar graph shows a steep growth in rental income in 2014).

75.6 The ITB 2014/2015 Annual Report recorded that: *“Rental revenue of R70,785,638 (in 2014/2015), of which R9,696 was from Permissions to Occupy (Commercial) and R70,775,942 was for leases (includes straight lining income).”*

75.7 The ITB 2015/2016 Annual Report recorded that the Trust’s income from leases had increased to R96,13m.

75.8 In the ITB 2016/2017 Annual Report, the Board's CEO reported that: *"the ITB achieved the approval of 1058 tenure rights [i.e. leases] which represents 78% of the annual target as compared to 46% achievement for the 2015/16 financial year. This represents 31% increase in performance."* The rental income the Trust earned from lease agreements increased in 2016/2017 to R106,829,817.

76 In May 2018, in response to a Parliamentary question from the Economic Freedom Fighters, the Minister of Rural Development and Land Reform furnished details of the extent of land leased out by the Ingonyama Trust for private use, the value of the leases, and the location and size of the leased land. The Minister disclosed that the Ingonyama Trust leased out a total of 61 671 hectares of land. I attach a copy of the parliamentary question and written reply marked **FA 18** together with the relevant extracts from the lists of leases – "Annexure C" and "Annexure D" – that the Minister furnished in the reply.

76.1 "Annexure C" details the Rand value of each lease held with the Ingonyama Trust Board.

76.2 "Annexure D" details the location and size of the land held under each lease.

76.3 From their heading, Annexure C and D appear to be from the Ingonyama Trust Board's Lessee Financial Report of 2018/2019, generated from the Board's Lease Web Portal on 14 May 2018.

76.4 The nature of the leases is not clearly indicated on Annexures C and D. However, from the description of the lessees, the value of the leases and size of the land held under the leases, it appears that many of the leases are for residential purposes and for community schools, churches or creches. The annexures reflect that the Trust also leases out land for agriculture, mining, telecommunications infrastructure and commercial purposes (hotels, business premises, shops etc.).

77 It is clear from the relevant extracts from the above that residential leases are widespread across Trust-held land. It is also evident that, over the last ten years or so, the Trust has derived significant income and built up substantial reserves from these lease agreements.

The Trust's revenue from rental income is not benefiting the communities and residents

78 There is little evidence that the revenue generated by leases is being used for the benefit of communities or their material well-being (as is required by the Trust Act). This was noted by the High Level Panel (chaired by former President Mr Kgalema Motlanthe) in its Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change, released in November 2017.

79 The Panel observed the "dispossession of customary rights" by the Trust and the Board, through the replacement of customary rights and PTO certificates with residential leases, and noted that:

“Significant income is generated for the Ingonyama Trust by such lease agreements. In the 2015/2016 period rental income was R96 130 563. There is little evidence that the revenue generated by leases is used for the benefit of communities or their material well-being.”

80 The High Level Panel made the following recommendation to Parliament:

“The Panel motivates for the repeal of the Ingonyama Trust Act to bring KwaZulu-Natal in line with national land policy, and to secure land tenure for the communities and residents concerned. If repeal is not immediately possible, substantial amendments must be made. They must secure the land rights of the people affected, and ensure that the land vests in a person or body with proper democratic accountability. There is also a pressing need to create mechanisms to investigate and resolve complaints by people whose rights have been infringed by the Trust, or whose rights may be infringed in the future.”

81 I attach the relevant passages from the High Level Panel’s report, marked **FA19**.

82 That the revenue is not being used for the benefit and material well-being of the communities and residents is certainly the experience of the RWM and its members. It is also the experience of the third to ninth applicants, who attest to seeing no benefits to the community or themselves whatsoever.

- 83 The Board's recent report on its expenditure at the Portfolio Committee meeting of 30 May 2018 confirms the position. The Board reported on its third and fourth quarter performance that 95.85% of its budget had been spent on "administration", while 0.16% and 0.11% went to rural development and land management respectively. I attach an extract of the minutes of the Portfolio Committee meeting, marked **FA 20**.
- 84 The Portfolio Committee has repeatedly expressed concern about the lack of evidence that the Board is using its funds for the benefit of the beneficiaries of the Trust. Indeed, this has been a recurrent theme in Portfolio Committee meetings over a number of years. For example, at the Portfolio Committee meeting of 3 October 2017, members of the Committee stated they "were concerned about security of tenure, rental expected from people that had been granted permission to occupy (PTO) in previous years and benefits that should accrue to people that had been granted PTO previously". I attach a copy of the extract of the minutes, marked **FA 21**. The Auditor General has expressed a similar concern.
- 85 However, even if the rental income that the Board received is used for the benefit of the community, the practice of cancelling vested PTO rights and requiring residents and occupiers to conclude lease agreements, is unlawful for the reasons set out below.

The continued implementation of the PTO conversion project

86 The Trust and the Board are continuing to implement the “PTO conversion project”.

87 On 20 November 2017, the Board published “Notices to All Permission to Occupy (PTO) Holders on Ingonyama Trust Land” in local newspapers, on the homepage of the Trust’s website, on the Trust’s Facebook page and via Twitter. The notice reads as follows:

“All people, companies and other entities holding land rights on Ingonyama Trust land in terms of the Permission to Occupy (PTO) are hereby invited to approach the Ingonyama Trust Board (ITB) with a view of upgrading these PTO’s into long term leases in line with Ingonyama Trust Board Tenure Policy.

The process involves resurvey of each site, preparation of a long term lease and the registration thereof. As such there are costs associated with this exercise. These can be quantified on case by case basis and upon enquiry from the ITB.

Applicants are further reminded that there are certain conditions attached to the PTO’s. Applicants in making their applications for upgrade must also produce evidence to show that they have at all material times complied with those conditions in particular the levy payment. If they have not complied, they must ensure that they so comply simultaneously with the upgrade application.

Further information can be obtained from Ms Zama Mkhize contactable by telephone on ... or per email to ... alternatively Mr Simpiwe Mxakaza on ... or per email to ...

ISSUED BY ORDER OF THE INGONYAMA TRUST BOARD

20 NOVEMBER 2017”.

- 88 This notice remains posted on the homepage of the Trust’s website and Facebook page. I attach copies of the notice as published in the *Witness* and *Mercury* newspapers on 20 November 2017 marked **FA22**. I also attach screenshots of the notice posted on the homepage of the Trust’s website and Facebook page, and on Twitter (accessed on 25 April 2018) marked **FA23**.
- 89 In March 2018, the ITB was called upon by the Portfolio Committee to respond to questions the Committee had sent it in respect of the advertisement that been widely disseminated during November 2017. The Board responded on 7 March 2018. I attach marked **FA24** the relevant parts of its presentation, which was very lengthy. As appears from the presentation, the Board confirms that it is still pursuing what it terms the “Project on PTO conversion”.
- 90 In his presentation to the Committee, Mr Ngwenya also disclosed correspondence that the Board had received from the Premier’s office in November 2017, concerning the impact of the Trust’s decision not to issue PTOs on government employees’ ability to access housing allowances in the Province. Under Resolution 7 of the Public Services Co-ordinating Bargaining Council (which was part of FA24), government employees are entitled to

housing allowances only if they can produce valid PTOs. When the Trust ceased issuing PTOs, many people could not obtain their housing allowances. The letter from the Premier's office to the Trust dated 13 November 2017 (in FA24) addressed this problem, and states:

“The government’s view is that a valid PTO is the one that is issued by the Ingonyama Trust Board. We have since learned that the Ingonyama Trust itself no longer issues PTOs.

We therefore request the Ingonyama Trust Board to clarify this matter as lot of applications are sitting in government offices unprocessed, and these employees continue to suffer and being prejudiced. We as the Office of the Premier have been approached by unions in this province to intervene on the matter and alleviate the plight these employees are facing. In responding to unions, we issued a circular to all government departments on 06 October 2017 (copy is attached). However, it appears our circular will not achieve much in the absence of clarity from the Ingonyama Trust Board regarding the valid PTO.”

- 91 It is clear from the above that the Trust's failure to issue PTOs has impacted on the rights not just of those forced to take out leases, but also on the rights of government employees living in rural areas, who have been unable to obtain the housing subsidies that are due to them.

VI. THE “PTO CONVERSION PROJECT” INFRINGES EXISTING RIGHTS AND UNDERMINES SECURITY OF TENURE

The Board’s statement of the legal position

92 According to the Board, it is abolishing PTOs because these are “a racially based form of land tenure” that is “weak in law”. This is the explanation that the Board gave to the Portfolio Committee in March 2018 (annexure FA24).

93 The Board has also sought to justify the lease tenure scheme in its Annual Reports. In these reports, the Board contends that the lease is an “upgrade” of the PTO rights; that a lease is more consistent with the customary law rights in land; and that lease-based tenure is more economically sustainable. Thus –

93.1 The Chairperson states in the ITB 2011/2012 Annual Report:

“Simply put, although the Trust is the owner of big tracts of land, it has limited scope to generate revenue off the size of the land, but instead it could be generated by the occupation of the land. In curbing the weakness in the system of indigenous tenure allocation, the Trust concluded that the system remains vulnerable and has to be upgraded to a system which talk to the issues underpinning the traditional practice. The closest it could come to was the lease. Hence from April 2007, the Trust has insisted that all new tenure applications should be leases. Likewise a Permission To Occupy (PTO) had to be upgraded to leases as well. The reason behind this decision is that in the first

instance, a PTO remains the aberration from the racially based land tenure. Secondly it is vulnerable. Thirdly it is economically unsustainable. For instance a holder of a PTO, is only liable to pay R48.00 per annum for ever, and nothing more. This is irrespective of the size or use of the land.”

93.2 In the Board’s presentation of its 2013/14 Annual Report to the Portfolio Committee, it stated:

“The role of the Trust is to manage land that is occupied by the Tribes in the Province of KZN mainly for residential purposes and subsistence farming. In doing that it recognises old order tenureship rights that are still in place. These old order rights are the Indigenous Rights and the Permission to Occupy. The Indigenous right is the primary right that is directly managed by the Traditional Councils and the Permission to Occupy is a personal right that was managed by the Department of Co-operative Governance and Traditional Affairs. However the granting of the latter right has since been disbanded due to its unsecured nature.

Land occupants are therefore continuously encouraged through road shows and workshop campaigns to convert these rights to a new order right being the lease. The rolling out of the planning and development schemes by the Municipalities into rural areas has also highlighted the need to provide secure tenure instrument to the inhabitants. On the other hand, the rolling out

of these planning and development schemes has facilitated development which has attracted commercial developments ventures and formalised housing.

The effectiveness of secure tenure right is that it facilitates stability in the community and for an individual occupant as he/she knows the extent and permitted land use of his/her site. It also helps both the Traditional Council and the Local Municipality in planning the area for future settlement and commercial use, thus unlocking development on Trust land.”

93.3 In the latest ITB Annual Report (2016/17), the Board Chairperson, Mr Ngwenya described the lease as the Board’s “preferred tenure option”. In doing so, the Chairperson suggests that the lease-based tenure is “consistent” with customary law rights:

“The Ingonyama Trust owns land in Trust. In practice it is a nominal owner since the land in question belongs to the beneficial clans and the members thereof. Access to the Trust land is primarily in terms of indigenous law. The preferred tenure option by the Board is the lease which to a greater extent is consistent with customary law approach to land ownership. With the changing times and socio economic development in the country the Board is encouraging every land rights holder on Trust land to acquire formal tenure and in return make some financial contribution towards the sustainability of this land.”

94 The Notices published by the Board in November 2017, to persuade PTO holders to convert to lease agreements, also represented this conversion as an “upgrade”.

95 Whatever the pedigree of the PTO, both the statutory PTOs and the customary rights of the residents and occupiers of Trust-held land are considerably stronger in law and less burdensome on residents than lease-based tenure. I proceed to explain the differences below.

PTO rights compared to the lessee’s rights

96 I set out below a simple comparison between the PTO rights (as defined in sections 24 to 26 of the Land Affairs Act and the PTO Regulations) and the rights of the lessees under the standard terms of the “long term” residential lease agreement concluded by the Trust. I refer to the copy of the lease agreement attached as annexure **FA25**.

97 The first fundamental difference is the manner in which the rights are conferred. The PTO rights are conferred, under statutory authority, by the Minister (or his delegatee – presently, the MEC) after consultation with the tribal authority. The statutory scheme does not require the consent of the tribal authority (now, the Traditional Council), but it does require consultation.

98 In contrast, under the lease:

- 98.1 The lease agreement is concluded by agreement with the Trust as the Lessor. This renders the lessee's occupancy and use rights subject to the Trust's consent.
- 98.2 The Trust's residential lease provides (in clause 5.1) that the conclusion of the lease is "*subject to the suspensive condition that the Traditional council ... grants its consent to the lease of the premises to the Lessee in accordance with the provisions of this lease, which consent shall be obtained within 60 days of the signing of this lease by the Lessee, failing which the lease shall lapse*".
- 98.3 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*".
- 98.4 As a result of these provisions, obtaining and retaining tenure under the lease is dependant on the Traditional Council's consent.
- 99 Second, a PTO for residential purposes is not subject to any rental. This is expressly stipulated in regulation 11(2) of the PTO Regulations, and extends to a PTO in respect of any allotment used primarily for a church, crèche, school or public purpose.
- 100 In contrast, the Trust's standard long-term residential lease stipulates a rental amount (determined by the Board) which must be paid annually and in advance, and is subject to a 10% annual escalation. Failure to pay the

stipulated rental is a material breach of the lease agreement, and ground for termination of the agreement and dispossession of the property.

101 Further, the lease provides (in clause 4.3) that: *“Notwithstanding the provisions of Clause 4.2, the Lessor shall be entitled, in its discretion, to require the Lessee to pay a fair market rental in respect of the premises”* This provision allows the Trust to, at any time, charge more than the agreed rental. If the “fair market” rental amount is disputed by the lessee, the determination must be referred to *“a suitably qualified valuer based in KwaZulu-Natal agreed on by the parties, but falling written agreement within 7 days of request by either party, shall be a person nominated by the Chairman or his Deputy for the time being of the S A Institute of Valuers, KwaZulu-Natal branch”*.

102 Third, the PTO grants exclusive occupancy and use rights that are perpetual (they do not expire) and are transferable to any person or body with the prior approval of the Minister given after consultation with the tribal authority.⁷

103 In contrast, the “long term” residential lease concluded by the Trust expires after 40 years, after which an application must be made to the Trust for an extension of the lease. The standard terms of the lease (in clause 3.3) require that the Traditional Council must consent to the extension of the lease, and that the Trust (as lessor) may refuse to extend the lease or may vary the terms and conditions of the lease in granting an extension (clauses 3.4 to 3.7).

⁷ The Minister’s approval is not required for a cession to secure a debt or a lease to occupy for industrial purposes. Regulation 6 of the PTO Regulations.

104 Fourth, the PTO may only be cancelled by the Minister (or his delegatee), after consultation with the tribal authority concerned. In contrast, the lease agreement provides for the termination of the lease by the Trust on expiry or at any time for material breach or if the Traditional Council withdraws its consent to the lease.

105 Fifth, 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. Lease tenure has no such potential.

106 Sixth, under the lease agreement, the lessee is burdened with a host of obligations and restrictions (in addition to the obligation to pay rental). These include the following:

106.1 The lessee is liable to maintain the premises, and to repair or replace any part of the premises that may be damaged, destroyed or lost during the currency of the lease (fair wear and tear excepted) (clause 6.3);

106.2 The lessee is restricted in his or her use of the premises (clause 6.4);

106.3 The lessee may only make any improvements, development or structural alterations or additions to the premises with the consent of the Lessor (on submission of plans) (clause 6.10);

106.4 The lessee is required to fence the premises and maintain the fence (clause 6.12).

106.5 The lessee is obliged to pay to the local and relevant authorities all rates, taxes and any other similar outgoings which may be levied on the leased premises, even if the lessor is exempted from making such payments (clause 7.5);

106.6 The lessee is obliged to use the premises only for the purposes set out in the lease (clause 6.4), and may not cede or assign the lease, nor sublet the premises without the lessor's consent (clause 11);

106.7 The lessor (the Trust) or its employees are entitled to enter and inspect the premises at any reasonable time (clause 7.6);

106.8 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 (clause 14).

107 In light of the above, the contention by the Board that the conclusion of a residential lease agreement is an "upgrade" from the PTO, and affords more secure tenure to occupiers, is palpably false.

Customary land rights compared to the lessee's rights

108 The Board also contends that the rights extended under the long-term residential lease agreements are by-and-large consistent with the customary rights to land. But this too is false.

109 I refer to the expert affidavit of Professor Thandabantu Nhlapo that accompanies this affidavit, and highlight the following:

- 109.1 The lease agreements downgrade the lessee's customary ownership of land to that of a tenant whose continued occupation of the land is conditional on the payment of rent. This is a foreign concept in Zulu customary law.
- 109.2 As lessees, community members are subject to dispossession by the Trust of the land they live on for non-payment of rental, without consideration of their vested customary law interests and entitlements and without any involvement of the community or traditional authority.
- 109.3 Beneficial occupation and use rights are no longer vested perpetually, and transferable and inherited (subject to continued community consent). They are terminated after 40 years, or earlier at the instance of the Trust.
- 109.4 The lease agreements ignore, and thereby trump, the co-existing customary rights of all family members other than the lessee. In this way, they undermine the customary law land rights and security of tenure of the family and other community-members who may occupy the land.
- 109.5 The decision-making power to conclude leases (and authorise subletting) is vested entirely in the Trust and the traditional council. No provision is made for the involvement of the family and local

community or neighbourhood (and the local headmen) concerned, as one would expect under a customary law system. The power to control land rights is vested entirely in the Trust and the chiefs. In this way, the lease agreements also deprive families, neighbours and communities of their customary law entitlement to participate in decision-making in respect of the occupation and use of tribal land.

109.6 Moreover the procedures set out in the lease agreement, including the conflict resolution provisions, are fundamentally at odds with customary law.

The applicants' experience of the "PTO conversion project"

110 The affidavits of the third to ninth applicants describe the impact of the PTO conversion project on people living on Trust-held land, and the unlawful manner in which lease agreements are being concluded by the the Board. These applicants attest that they were given no alternative but to conclude the Trust's lease agreement. They were simply instructed by the local *induna* and Traditional Council employees to complete and sign the lease documents.

111 In some cases, these instructions were given when the applicant approached the Traditional Council for a PTO certificate. This was the case for Mr Zakhele Malcolm Nkwankwa. In other cases communities were called to attend a meeting by the *induna*, where they were instructed by the induna and representatives of the Board, to conclude the lease agreements. This was the

case for Ms Hletshwenli Lina Nkosi, Mr Bongani Zikhali, Ms Hluphekile Bhetina Mabuyakhulu, Mr Mabongi Gumede, KN and SM.

112 The applicants were not informed properly, and in some cases not at all, of the nature of the document they were required to sign. They were not advised of the material terms and conditions of the lease – including the requirement to pay rental and the amount thereof – before or after they were made to sign the lease agreement.

113 Some applicants were not aware that the document they were told to sign (which was only in English) was a lease agreement.

113.1 Mr Nkwankwa describes what happened when he approached the Traditional Council offices to obtain a PTO certificate for his land:

“Around 2005, I visited the offices of the Traditional Council and spoke to the secretary there, telling her I wanted to get a PTO... The Council instructed the secretary to fill out a form for me. I do not know what the form was for but it needed my personal details. The secretary filled out the form for me and added the Traditional Council’s stamp to it. They gave me another form that I was told had to be filled out by the municipality. I was instructed to take the form that was filled out and get it stamped along with the uncompleted form at the municipality offices in Ndwedwe.

I went to the municipality and they took the forms from me and told me that someone would come and inspect the land I lived on to make sure the boundaries were correct and I was not blocking any roads. A few months passed and people from Ndwedwe Municipality came and inspected the land....

After about a year, I got a call from Pietermaritzburg telling me I had to immediately go to the offices of the Ingonyama Trust to sign the agreement. I was told I had to pay a deposit before being allowed to sign the agreement....

I remember at some point the person at the Trust's offices saying that the agreement was called a lease, that it would be for 40 years, and my children could carry it on. But in the entire process there is no opportunity to ask questions or ask for clarity. They just gave me the papers to sign. The officials never took a moment to explain what it was that I was signing. It was not explained to me what it meant to be signing a lease. I was not told that this agreement differed from a PTO. All they said after I signed the document was that I could now use it to go to the bank to obtain a loan with it.

In the entire process there is no real opportunity to ask questions or ask for clarity. They just gave me the papers to sign. The officials never took a moment to explain what it was that I was signing. It was not explained to me what it meant to be signing a lease, and I was not told that this agreement

differed from a PTO. All they said after I signed the document was that I could now use it to go to the bank to obtain a loan with it.

The lease document is entirely in English. It was only after I went home and sat down to decipher what was written, with the little English I know how to read, that I saw the provisions saying that I would have to make the payment that was demanded of me every year and that it would increase by 10% every year. I had been under the impression that the payment I had made was once-off. The fact that this was rent that was due every year was never explained to me. “

114 Other applicants describe being instructed by the Traditional Council to complete and sign the lease agreement, without being given the opportunity to read the form or having its contents explained at all.

114.1 Ms Hletshwenli Lina Nkosi states:

“...Before the lease was concluded none of the important provisions were explained to me. Nothing was explained to me about the 10% increase or that if payment is not made I could lose my land. When I went to the office of the Traditional Council and later to the municipality, I was made to sit there while an official filled out the forms and I signed where I was told to sign. I have heard numerous accounts from other members of the

community that this was their experience of concluding the lease as well.

I signed the lease because they said if you do not sign a lease your land will be taken, and I did not want to lose my land. I also wanted to be able to borrow money and they said I needed a lease to be able to borrow money so I could start my business.”

114.2 Mr Bongani Zikhali describes a similar experience:

“In 2012 sometime, I heard that the community members were urgently needed with our ID books at Thusong Centre. We found that buses were already organised and we just went like cattle going to a slaughter house, because we had no idea where we were being taken and why we were going there. There were initially about 50 people from the community at the meeting, and more people came in throughout the meeting.

When we arrived at Thusong Centre we found the induna there with some representatives from the Ingonyama Trust. There was never really any opportunity to ask questions, the induna was the only person speaking and he did not know much about what it meant for us to sign the leases. The officials from the Trust sat behind and did not participate in explaining what was happening, they were there only to fill out forms.

We were given forms from two women who work at the Trust. We were told to pay money which was an initial joining fee. They

took our IDs and started filling out our documents, but I do not remember them asking us questions or explaining anything about what they were filling out and what the forms said. They just filled in the documents and told us where to sign. I do not remember receiving a copy of the documents that were filled out for me.

...

During the process of concluding the lease, I was not made aware that there would be a rental amount and that this amount would increase by 10% each year. It is only when I received the lease, I saw the amount and that it would increase annually by 10%, this had not been mentioned.”

114.3 Ms Hluphekile Bhetina Mabuyakhulu describes being called to community meeting from where she was taken, with many others, to the Traditional Council’s offices to apply for a lease. She says:

“They told us that if we did not conclude leases then we would not be recognised by the King as being part of this community. They told us that our land would be taken away and we would be left on the streets to fend for ourselves.

I remember that at the Traditional Council’s office, I walked in with the other members of the community and it was announced that we were there to conclude leases. The people at the office filled in the forms for me and the other people that were present.

I do not remember the forms being explained to me, I was just told to sign after it was filled out. I was only told that the forms will be processed by the Ingonyama Trust and that I will get the lease in the mail and then I would have a right over my land and no one could take it away.

When I signed the forms to apply for a lease at the Traditional Council's office no one explained to me that I would have to pay rent, that the rent increased every year by 10%, or that if I do not pay the rent that my land and everything on it could be taken away. They just said I must sign all these documents, many of which were in English, if I did not want to be removed from the land. It was said that a lease was not a title to the land, but they did not explain what the difference was between a lease, a title, and what we were living like now."

- 114.4 KN says that, on the induna's instructions, he attended the offices of the Traditional Council, where he was made to conclude a lease: *"[A]n official there filled out the form for me... I was instructed to sign the forms – nothing was explained to me about what the forms said and what they meant."* Some time later –

"The lease eventually arrived in my post box. The lease is in English, so I had a lot of trouble figuring out what it said. I remember noticing that there was a sum of money that it said I was required to pay every year – it was R3000. I had not been

*told that there would be rent or how much the rent would be.
There is no way I can afford to pay that amount of money.”*

115 The applicants were misinformed or given no explanation at all for why they were required to conclude the lease agreement. In some instances, community members were threatened into concluding leases. For instance:

115.1 Mabongi Gumede describes how his community was threatened into getting leases. He says:

“...an announcement went around the community informing us that a community meeting would be held in the school and we were told to bring our identity documents. At the meeting we were told that everyone must have a lease. They said that if you do not have a lease then you cannot be part of the community and you will be thrown out. They said that all people living under chiefs had to sign leases in order to be in line with what is now required by the law and for the King to know who you are, and to be recognised as a member of the community. The induna was present in the meeting.

After the meeting, the induna’s ‘police’ went around saying that everyone must have a lease, or else there would be trouble and we would be thrown off the land to fend for ourselves somewhere else. They said that every household would be checked in on to make sure they had a lease. I did not want to

get in trouble and I wanted to make sure that I was recognised as being part of this community.”

115.2 KN says that the community was called to a meeting by the *induna*, where the following transpired:

“The Nduna and those at the meeting said that in order for homes to be legally recognised, we would all need to conclude leases. He said that there was a new law that required that everyone have the same size land and that everyone must reduce the number of their cattle, and the everyone would have their land surveyed. They said if your land was too big it would have to be reduced.”

...

“I signed the lease because I believed that it would give me secure rights to the land and the land would be seen as mine and my family’s. I was told that if you do not have a lease, then you are not a person that is part of this community. If you do not sign a lease then you will be exiled from the community.”

115.3 SM explains that, at a meeting convened by the *induna* –

“it was announced that in this day and age a person could not be on this land without a lease. We were told that this was essentially a new government policy....The people at the meeting were told that the lease agreement was a shield that

would defend community members from dispossession of their land, as something that should be in your Zulu household artillery. I did not hear that we would pay rent.

The ndunas were the only people speaking at the meeting, and even they did not fully understand what was going on. It was pointless to even ask questions because they kept on repeating what they had been told by the Trust to say, which did not amount to explaining what these leases meant.”

115.4 Mr Zakhele Malcolm Nkwankwa expresses his confusion, and says:

“From the beginning I made it clear I wanted a PTO, I never wanted a lease. The documents initially said PTO and said nothing about the Ingonyama Trust or leases but at some point I was made to sign a lease. I do not understand how and when this change happened.”

115.5 Ms Hletshwenli Lina Nkosi remains entirely in the dark about the process. She says, simply: *“I do not understand why the Ingonyama Trust is coming into our communities and requiring these things of us”.*

116 Some of the applicants have tried, but without any success, to get an explanation for the lease agreements. For instance Mr Bongani Zikhali explains that, after receiving a copy of the lease showing the amount due for rental, he took the following steps to obtain clarity:

“I went to the traditional authority to speak to the induna, but he was not able to give me any clarity.

I then went to the Trust offices in Ulundi and asked to speak to the person in charge. Two employees and the manager assisted me. The person in charge called my induna. I spoke to the Trust official and my induna and told them what I wanted was for them to go to the community to properly explain who the Trust was, what these leases meant, and what the Trust does. I explained that many of the people that have signed leases likely do not understand what they signed because on the day of the meeting nothing was explained about what was being done and what people were signing. I believed that, like me, many people just signed with no protest because they saw the induna was there and were told the chief approved so they trusted that this was in their best interest. I do not believe that the people understood the type of obligations they were being placed under.

I told both of them that all of this should be explained again, and once it was clear to people they should have the option to cancel their leases if they wanted to do so. Some of the people that had been at the meeting I know are struggling and barely have enough to survive. There is no way they would have concluded the lease if they knew what they were getting themselves into.

I suggested that Ingonyama Trust officials come back to our community and properly explain to community members what had happened at the meeting in Thusong Centre.

Some time later, when I was back in Ulundi, I approached the induna again about holding a session to educate the community about the leases. As far as I know, my pleas were not heeded. Instead another event at the stadium was organised and people were persuaded to conclude leases with the Trust. I believe the Trust knows that if they properly explain what these leases are people will refuse to conclude them.”

117 The applicants’ accounts evidence that the Trust and the Board, aided by the Traditional Council and local *induna*, have been inducing and compelling residents to conclude residential lease agreements without their genuine and informed consent. The Trust and the Board are demanding that rental be paid that residents cannot afford, and without a lawful basis. What is more, the Trust and the Board have actively misled residents into believing that the conclusion of the lease agreement is in their best interests, and that it will provide them with more secure tenure, when in fact the opposite is true.

VII. UNSUCCESSFUL ATTEMPTS BY THE PORTFOLIO COMMITTEE TO RESOLVE THE MATTER

118 Both the Portfolio Committee and the AG have expressed concerns about the Board’s failure adequately to account for its revenue and its expenditure over several years. The Portfolio Committee’s concerns were brought to a head when the Trust issued the November 2017 advertisements for residential leases. The Committee asked the Trust to explain and to provide details about the number of leases issued, and the revenue accrued from them. It also

asked the Department to say whether it had approved the conversion processes underway, and whether replacing PTOs with leases was legal. The Committee called upon the Board to furnish it with the following information at its next attendance: “Mr Nchabeleng was concerned about people paying rent on land that their family had lived on for years. He asked for the benefit that would accrue to people that had been granted a PTO previously....”. He asked also “if the ITB owned land” and later “The Acting Chairperson remarked that the Committee could resort to stringent measures to get information from the ITB on the specific issues referred to by Mr Nchabeleng.” See the PMG Minutes of the meeting which are attached at FA21.

119 At the next committee meeting of 7 March 2018, the Board did not provide the Committee with the requested information. The Board’s response was “that the ITB was not aware that the Committee had invited it to respond to complaints.” . I refer to the extract of the Board’s presentation already attached as annexure FA24.

120 The PMG minutes of that meeting which I attach marked **FA26** record that Adv Sello Ramasala, the head of the DRDLR Legal Unit, explained the Department’s oversight role in relation to the Trust. He said that:

120.1 There is no DRDLR policy authorizing the conversion of PTOs to leases;

120.2 The Upgrading of Land Tenure Rights to Ownership Act provides for the upgrading of PTOs to ownership;

- 120.3 The current DRDLR policy is that PTOs must be upgraded to ownership;
- 120.4 He said any conversion of a PTO to ownership requires the approval of the Minister.
- 121 He further advised that *“It would be a violation of existing rights for people to forgo existing rights and opt for a new arrangement through a lease.... There is also the matter of compensation for the loss of formal rights.”*
- 122 Mr Ngwenya is recorded as saying that the funds received from the state were too little for the Board’s budget, thereby implicitly saying that the Trust and Board need the income from leases in order to be able to function effectively.
- 123 The chair (Ms Ngwenya-Mabila) stated:
- 123.1 She had asked the Board and Department to report on the number of residential and business leases issued, new residential and business leases issued, and a financial report on fees collected. This had not been provided.
- 123.2 The only justification that Mr Ngwenya was really putting forward for the leases, was to raise additional funds as he considered the budget provided by the state to be insufficient.
- 124 Ultimately, the Chair of the Portfolio Committee instructed the Board, on behalf of the Committee, to stop issuing leases until the legality of the process was

cleared up with the DRDLR. It is evident that the Board has not heeded this instruction.

124.1 At the next meeting of the Committee with the Board on 18 April 2018, the Board reported that it had met with the DRDLR, but that they had failed to reach any agreement on the implementation of the PTO conversion project.

124.2 At a subsequent meeting with the Board, on 23 May 2018 a copy of the minutes of which are attached as **FA 27**, the Chair of the Committee complained that the ITB website continued to carry the advertisement that people should convert their PTOs to leases. Mr Ngwenya's response was that there was no ruling in place prohibiting the Trust from issuing leases.

124.3 I attach the relevant extracts from the minutes of these meetings, marked FA26 and FA27. I also attach a confirmatory affidavit deposed to by Mr Sithembiso Gumbi, who attended the meeting and attests to the accuracy of the minutes.

125 I have set out above why, I submit, the Trust and Board's conduct is unlawful. The fact that the Board refuses to take down the advertisement and to stop issuing residential leases demonstrates that a court order is necessary.

VIII. THE TRUST AND THE BOARD HAVE ACTED UNLAWFULLY

126 The actions of the Trust and the Board to persuade and induce or require the residents and occupiers of Trust-held land to conclude lease agreements, and to “convert” their PTOs to leases, are unlawful and constitutionally invalid on at least the following grounds:

127 First, the Trust and Board have no authority to withdraw or dispose of the rights vested in PTO-holders. Under the Land Affairs Act and the PTO regulations, this power is vested in the Minister or his delegatee (presently, the MEC). In refusing to issue or register PTOs or to furnish rights-holders with PTO certificates, and requiring PTO-holders to conclude lease agreements to obtain formal proof of their tenure on Trust-held land, the Trust and the Board have effectively assumed the power to withdraw and dispose of PTOs, in contravention of the statutory protection of these rights.

128 Second, the actions of the Trust and the Board have deprived the holders of PTOs and other informal land rights in Trust-held land of their security of tenure and property rights vested under statutory law and customary law. This violates the rights-holders’ right to property under section 25 of the Constitution and their right under IPILRA not to be deprived without consent of existing land rights.

129 Third, the Trust and the Board have acted in contravention of their duties under section 2 of the Trust Act, namely –

129.1 to administer the Trust “for the the benefit, material welfare and social well-being of the members of the tribes and communities” in its jurisdiction (section 2(2));

129.2 to deal with the land under its jurisdiction “in accordance with Zulu indigenous law or any other applicable law” (section 2(4));

129.3 not to encumber, pledge, lease, alienate or otherwise dispose of any of the said land or any interest or real right in the land without the prior written consent of the traditional authority or community authority concerned (section 2(5)); and

129.4 not to infringe upon any existing rights or interests (section 2(8)).

130 Fourth, the Trust and the Board have breached the rights of residents and occupiers to procedural fairness by persuading and 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. I am advised and submit that such a breach constitutes a violation of both the principle of legality (offending as it does the fundamental requirements of natural justice) and section 3 of the Promotion of Administrative Justice Act 3 of 2000.

131 Fifth, the Trust and the Board have acted unlawfully in that their actions were materially influenced by an error of law, and have been taken –

131.1 for reasons not authorised by the Trust Act or the Land Affairs Act;

131.2 for an ulterior purpose or motive; and

131.3 because irrelevant considerations were taken into account or relevant considerations were not considered.

132 On 11 December 2017, the applicants' attorneys at the Legal Resources Centre ("**LRC**") addressed a letter to the Minister, the Director-General, the Deputy Director-General and the Ingonyama Trust, in which it detailed the unlawful actions of the Trust and the Board. The applicants sought a written undertaking from the Trust that it would withdraw the public notices it issued on 20 November 2017 (calling on all PTO-holders to conclude lease agreements) by 15 January 2018. I attach a copy of this letter marked **FA28**. The applicants and their attorneys received no response to this letter – not from the Minister, the Department, the Trust or the Board.

133 The LRC also sent reminders of its letter of demand to the Trust, calling for a response thereto, on the 30 January 2018. I attach this correspondence marked **FA29**. Despite the LRC's efforts, the Trust and the Board simply ignored the letter of demand. They have not denied the conduct alleged, or offered any basis on which they contend that it is lawful.

134 For all these reasons, I am advised and submit that the actions of the Trust and the Board are unlawful and constitutionally invalid, and must be declared to be so. I address the additional consequential relief further below.

IX. BREACH OF THE MINISTER'S CONSTITUTIONAL AND STATUTORY DUTIES

135 The Minister is the authority responsible for administering the grant and issue of PTOs under the Land Affairs Act and the PTO Regulations. While the Minister has delegated these functions to the MEC, I am advised and submit that the Minister remains accountable for the performance of the MEC's exercise of the Minister's powers and functions under the Land Affairs Act and PTO Regulations.

136 The Minister has failed to perform these functions at all. The Minister has failed to ensure that residents and occupiers that require PTOs are able to obtain them, as they entitled to do under the Land Affairs Act and its Regulations, and that all PTOs that have been granted are registered and protected.

137 The Minister's duty to protect PTO rights is further confirmed by IPILRA. The Minister is empowered, under section 4 of IPILRA to "*make regulations regarding all matters which are necessary or expedient to be prescribed in order to achieve the objects of this Act.*"

138 The Minister is also responsible for overseeing the conduct and affairs of the Ingonyama Trust and Board under the Trust Act. Specifically, the Minister and her (national) Department of Rural Development and Land Affairs are vested with the following oversight powers and responsibilities:

- 138.1 The Minister appoints the eight members of the Board who assist the chairperson;
- 138.2 The Department bears the cost of administration of the Ingonyama Trust Board;
- 138.3 The Secretariat of Board is established in consultation with the Director General of the Department;
- 138.4 The Minister is responsible for promulgating regulations on, amongst others: the procedures for land allocations; rental, levies, and other charges for right to use land; and the distribution of income received by the Board.
- 138.5 The accounts of Board must be open for inspection by the Director-General of the Department; and
- 138.6 The Board must submit its annual report on the Trust's activities to the Minister.

139 The Minister has demonstrably failed to exercise this oversight adequately, or at all. As I have detailed above, since 2007, the ITB's Annual Reports have recorded the Trust's implementation of the "PTO conversion" and leasing scheme. The Minister ought to have taken note of these reports, and acted to protect the existing property rights of the residents and occupiers of Trust-held land. This duty is not only imposed by IPILRA – which the Minister is specifically responsible for administering – but is a duty imposed under s 25(1) and (2) of the Constitution, read with section 7(2) of the Constitution. Together,

these provisions impose a constitutional duty on the Minister to take steps to protect the vested property rights and tenure of the residents and occupiers of Trust-held land.

140 As a result of the failure by the Minister to perform her statutory and constitutional functions, the residents and occupiers of the Trust-held land have been deprived of their existing property and land rights by the Trust and the Board, without any intervention by the Department.

141 The fact that neither the Minister nor the Department responded to the LRC's letter of demand of 5 December 2017 (referred to above) in which the unlawful actions of the Trust and the Board were detailed, is further evidence of the dereliction of duty on the part of the Minister. This dereliction of duty continues to compromise the rights of the applicants and other residents living on the Trust-held land.

X. APPROPRIATE RELIEF

142 The applicants seek, in the first instance, an order declaring that the Trust and the Board have acted unlawfully and in violation of the Constitution by cancelling PTO rights and concluding "long term" residential lease agreements with the holders of PTO rights and/or IPILRA rights unless such rights-holder freely gave his or her genuine and informed consent to the lease agreement.

143 As the application demonstrates, many if not all such lease agreements were not concluded freely and with genuine and informed consent. Depending on

the circumstances of the particular case, these lease agreements will either be

–

143.1 invalid and void *ab initio* for material mistake and lack of consensus (as to the nature of the agreement, the subject matter of the agreement and/or its material terms), or

143.2 voidable at the instance of the lessee, because the lessee's consent was improperly obtained by misrepresentation, duress and/or undue influence – by the Trust, the Board, the Traditional Council and/or the *iinduna*.

144 The applicants seek a structural order that allows lessees to cancel the lease agreements, at their own instance; to be refunded any payments made under the lease agreements; and to have any cancelled PTO right reissued.

145 To ensure that this is an effective process, the applicants seek an order directing the Trust and the Board to publish and distribute the notice attached to the Notice of Motion (marked “**A**”) – what the applicants term “the lease cancellation notice”. This notice will advise all residents and occupiers of Trust-held land of the court's order and of their right to cancel the lease agreements, and the process they must follow to do so.

146 Since the Board only has one head office in Pietermaritzburg and one satellite office in Ulundi, the applicants consider it necessary for the order to provide that requests for cancellation of lease agreements may be made, and must be received, not only at any of the Board's offices, but also at any offices of the

local Traditional Council and Co-Operative Governance and Traditional Affairs. Failing such an order, the provision for cancellation will be ineffective for many affected residents. Many affected residents are poor, aged and live in remote areas, and will be unable to travel distance to attend at the Board's offices to cancel their lease agreements. Effective relief therefore requires that the localised administrative capacity of the Traditional Council or Co-operative Governance and Traditional Affairs or Board's offices is utilised.

147 The applicants also seek an order directing the Trust and the Board to report under oath on:

147.1 the steps taken to publish the lease cancellation notice,

147.2 their progress in processing the cancellation of leases and reimbursement of lessees, and

147.3 the steps taken, including with the Minister and/or the MEC, to facilitate the issuing and registration of PTOs, the surveying of allotments for PTOs, the granting of deed of grants and certificates of registration in respect of such allotments, in accordance with the Land Affairs Act and the PTO Regulations.

148 The above orders are directed at remedying the harm that has already been caused by the Trust and the Board's unlawful actions.

149 To ensure that the land rights of residents and occupiers living under the Trust's jurisdiction are respected and protected in future, the applicants seek the following further declaratory and structural interdictory relief:

149.1 An order interdicting the Trust and the Board from –

“taking any further steps and/or engaging in any conduct, to persuade or induce any person who held or holds a PTO right or IPILRA right over residential or arable land in Ingonyama Trust land to conclude a lease agreement with the Trust, without furnishing such rights-holders with complete and accurate information about their existing land rights and the nature and effect of the lease agreement.”

149.2 A declarator that all the relevant authorities – the Minister, the MEC (acting as the Minister's delegatee), the Trust and the Board – are obliged to exercise their powers under the Land Affairs Act and the PTO Regulations to demarcate allotments, to issue and register Permissions to Occupy, to survey such allotments, and to obtain certificates of registered title in respect of such allotments in the Ingonyama Trust land; and

149.3 A declarator that the Minister, the MEC, the Trust and the Board are in breach of their duties to exercise the powers referred to above.

149.4 A structural order requiring all the relevant authorities to develop and implement, diligently and without delay, the administrative capacity necessary to demarcate allotments, issue and register Permissions to

Occupy, to survey such allotments, to grant deed of grant rights and to obtain certificates of registered title in respect of such allotments in the Ingonyama Trust land in accordance with the Land Affairs Act and the PTO Regulations. The applicants term this the “administrative measures order”.

150 To ensure compliance with the administrative measures order, the applicants seek an order directing the Minister or the MEC and the Board to report to the Court, under oath, on the steps taken to comply with the order, every three months until the order is discharged.

151 To address the Minister’s breach of constitutional duty, the applicants seek an order declaring that *“the Minister has breached her duty to respect, protect, promote and fulfil the constitutional right to property of the holders of PTO rights and IPILRA rights held in respect of the Ingonyama Trust Land, by failing to exercise, alternatively failing to ensure the exercise by her delegatee, of the statutory powers referred to in paragraph 8 above, and failing to exercise oversight of the conduct and affairs of the Ingonyama Trust and the Ingonyama Trust Board.”*

152 Given the scale and serious of the rights-violations, and the failure by the Minister to act to prevent these violations as detailed above, I respectfully submit that the above order is necessary and appropriate.

PARMANANDA LAWSON NAIDOO

The Deponent has acknowledged to me that he knows and understands the contents of this affidavit, which affidavit was signed and sworn to or before me at _____ on this ____ day of _____ 2018 the regulations contained in Government Notice No. R1258 of 21 July 1972, having been complied with.

COMMISSIONER OF OATHS