

The Ingonyama Trust was the outcome of a deal between the National Party and the Inkatha Freedom Party during the dying days of apartheid just before the transition in 1994. The Trust was established to manage land owned by the government of KwaZulu, and is currently responsible for managing some 2.8 million hectares of land in KwaZulu-Natal. The land vests in the Ingonyama (or king) as trustee, to be administered on behalf of members of specific communities.

While the Trust has wide powers to manage the land, the law also provides that the land rights of individuals and communities under the Trust must be respected by the Trust. This fact sheet seeks to examine the Ingonyama Trust Act, which created the Trust, to consider the nature of individual and community land rights under the Trust.

PROTECT YOUR RIGHTS

- While land rights over land administered by the Ingonyama Trust have strong protection, these rights are not well known.
- If you or anyone you know has their land rights threatened, please immediately contact AFRA at 033 345 7607 or afrakzn@gmail.com, or Michael Clark or Stha Yeni of the Centre for Law and Society at UCT, by phone at 021 650 3360 or by email at cls.uct@gmail.com.

THE INGONYAMA TRUST ACT

The Ingonyama Trust was established in 1994 to manage land owned by the government of KwaZulu immediately prior to the Act's commencement. The Trust was established by the KwaZulu-Natal Ingonyama Trust Act, which was enacted by the KwaZulu Legislative Assembly and came into effect on 24 April 1994.

The trust land vests in the Ingonyama, King Zwelithini, as trustee on behalf of members of communities defined in the Act. The Act was significantly amended in 1997 to create the KwaZulu-Natal Ingonyama Trust Board to administer the land in accordance with the Act. The current chairperson of the Board is former judge Jerome Ngwenya.

Key provisions of the Act

- *Section 2(2)* – “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(3)* – “The Ingonyama **shall** be the trustee of the Trust which shall be administered subject to the provisions of this Act by the Ingonyama and the board.”
- *Section 2(4)* – “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.” (Lawyers advise that “may” probably means “must” in this context)

- *Section 2(5)* – “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(7)* – 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(8)* – “In the execution of his or her functions in terms of this section the Ingonyama **shall not** infringe upon **any existing rights or interests**.”

UNDERSTANDING THE ACT

As seen in the map on the back page of this fact sheet, the Ingonyama Trust administers significant amounts of land across KwaZulu-Natal. The Trust estimates that it administers some 2.8 million hectares. Given the Trust’s wide powers and broad impact, it is important to understand the rights of people living on land administered by the Trust.

Recently, it has become clear that there are two ways in which the Trust is threatening the rights of rural communities:

- by authorising mining activities and other developments on the land, which is frequently done without proper community consultation and could lead to the deprivation of use rights and access to land; and
- by converting people’s land rights (over land occupied and inherited by families over generations) into lease agreements.

These actions affect the community rights and individual rights of people living on Trust land, and will be discussed in more detail below.

COMMUNITY RIGHTS ON INGONYAMA TRUST LAND

As stated above, the Act places a burden upon the Trust to administer the land for the material benefit and social well-being of communities listed in the Act. This places an obligation upon the Trust to not conclude agreements in relation to community land that would prejudice community members. This obligation is enforceable in the courts.

One of the specific protections in this regard is that the written consent of local traditional leaders must be obtained before any steps are taken in regard to land rights. This does not mean that the written consent of a traditional leader is enough to establish that the Trust is acting in the best interests of a community. If the Trust enters into an agreement about land rights that is harmful to the community, it can be challenged.

The problem is that it may be difficult to prove the harmfulness of the Trust’s decisions in some circumstances. While an agreement that is clearly negative for the community can be challenged, many agreements will come with both advantages and disadvantages. As courts will generally tend to leave decision-making to the trustees’ discretion, it seems likely that only decisions that seriously undermine community rights will succeed. Community objections and disapproval will not necessarily be enough to legally challenge a decision of the Trust.

Community consultation

While the content of an agreement may be difficult to challenge, a lack of community consultation may result in possibilities for challenging an agreement on procedural grounds.

Section 2(4) of the Act establishes that the Ingonyama may administer the land in accordance with Zulu customary law. Section 2(8) establishes that the Ingonyama **shall not** interfere with existing rights or interests to the land. According to a study of customary land law in Msinga conducted by the Institute for Poverty, Land and Agrarian Studies (PLAAS), when an outsider is seeking access to land it is not sufficient for them to merely receive the approval of an *Inkosi* or an *Induna*. The demarcation of the land must include the consultation of the *Ibandla* and the potential neighbours of the outsider applying for land. A similar study by the LEAP project found that the agreement of the potential neighbours is essential for an outsider to be allocated land. The *Ibandla* must also be consulted.

Customary land law clearly requires consultation with neighbours and the *Ibandla*. If an agreement is made to give rights to community land to an outsider without such consultation, communities may be able to challenge this agreement in a court. The Constitution upholds rights derived from customary law that are consistent with the Bill of Rights in sections 39(3) and 211(3).

The Promotion of Administrative Justice Act

Apart from the rights under the Trust Act, affected communities may also challenge decisions the Trust makes in regard to land under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). PAJA regulates **administrative action** (the exercise of government power or performance of a public function) to ensure that it is exercised in a just fashion.

PAJA defines administrative action as including action by non-state bodies exercising a government power or performing a public function in terms of law. There is no doubt that the Ingonyama Trust is subject to the PAJA and administrative law.

The PAJA provides for fair administrative action in two sections. Both require that the people affected by the decision participate in the process of making it.

- **Section 3** sets out the requirements for fair administrative action when a person's rights or expectations of fairness are involved. Unless there are clear reasons for not doing so, a person whose rights would be affected is entitled to be informed about the proposed action, to request reasons for the action, and to be consulted regarding the action.
- **Section 4** sets out the requirements for procedurally fair administrative action where a proposed administrative action affects the rights of the public in ways that cause them **significant harm**. If the rights of the public are affected, the trustee must either hold an open public inquiry or give people the opportunity to comment on the action, or both.

Where individual rights are affected, or public rights are adversely affected, the Ingonyama Trust must comply with the public consultation requirements set out above. If it does not, the decisions it makes **may** be set aside if the Trust is not able to justify why it acted as it did.

INDIVIDUAL RIGHTS ON INGONYAMA TRUST LAND

While the claim of community interests may prove difficult, individual rights are easier to protect. Section 2(8) clearly provides a guarantee against the Trust undermining existing rights and interests. This means that if a person currently has a right to occupy land, this right cannot be interfered with by the Trust except as permitted by law, including customary law.

Strong rights in customary law

In reviewing land tenure security under customary law, Professor Kerr notes that in customary law an individual's right to land are very strong in relation to inheritance and law. While traditional leaders played a role in administering land, Professor Delius finds that "once land was allocated to households it was very unusual for it to be reclaimed by a chief or a local leader." In surveying current land rights under customary law in KwaZulu-Natal, the LEAP project found that land tenure security traditionally was very strong and could only be interfered with if occupants committed very serious crimes.

The Trust also recognises that people have very strong rights over the land. The Trust's chairperson, Jerome Ngwenya, has said that "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**". He has even acknowledged that "in reality are **the true owners**. They derive their rights of occupation from historical rights of various clans (tribes)."

It is therefore clear that individuals have strong rights to land that they occupy. If the Ingonyama Trust were to attempt to dispose of occupied land contrary to customary law or other law, it would clearly infringe section 2(8)'s protection against the loss of rights.

Converting land rights into lease agreements

Despite these statements the Trust has increasingly been converting people's customary or informal rights over the Trust land into lease agreements – which is generally a weaker type of right. In fact, since 2007 the Trust has largely stopped providing other forms of tenure security to people living on the land. The Trust has also claimed that lease agreements strengthen the rights of the people living on Trust land rather than diminishing them.

In reality, lease agreements mean that the people on Trust land are paying rental to live on land that they effectively 'own'. This problem is worsened by the fact that there are no clear limitations on the amounts of rental the Trust can claim in relation to the land.

The Trust's reasons for converting people's rights into leases

The Trust has given a number of reasons for converting people's rights into leases. These reasons are will be discussed below.

Previously, permission to occupy certificates (PTOs) were an important form of tenure which people living on the Trust land were provided. Historically, the former homelands had the power to issue PTOs to black people living on Trust land. However, these powers were jeopardised by the repeal of Bantustan legislation after

South Africa became a democratic country in 1994. The only exception was KwaZulu-Natal, where the Minister of Land Affairs delegated this power to the provincial MEC for Traditional and Local Government in September 1998. PTO certificates could therefore be issued by the provincial government in KwaZulu-Natal.

The Trust claims that this created an unusual situation in terms of which someone other than the Trust (the provincial MEC) could issue tenure rights over Trust land, while the Trust had the power to provide all other forms of tenure (provided that the Trust could obtain the consent of the relevant traditional council). The Trust considered this problematic. In response, the Trust concluded an agreement (presumably with the MEC) that no new PTO certificates would be issued over Trust land after 1 April 2007. It thus seems that issuing leases over the Trust land was one of the ways in which the Trust sought to strengthen its own power in relation to holding and administering the Trust land. The Trust has also tried to convert existing PTOs (which remain legally valid) into leases.

Another main reason the Trust is converting people's rights into leases is that rental income is the main income of the Trust. The Trust expects that in 2015, it will receive R15.3 million in rental income. The Trust has often stated that the rental it receives in terms of leases is significantly more than it would receive in terms of PTOs. For example, the Trust received R100 annually in terms of residential PTOs but receives, on average, R1000 annually in terms of lease agreements. The Trust argues that signing lease agreements has therefore increased the revenue of the Trust which is advantageous to the beneficiaries of the Trust, but this loses sight of the fact that it is the beneficiaries of the Trust who have to pay the rental in the first place.

The Trust argues that it encourages people living on the land to conclude lease agreements because lease agreements are formal documents that "can be interpreted in the context of the common law". The Trust thus argues that the customary rights that people have over the land are not registered or documented and that leases would provide more protection to people. This argument is clearly incorrect as leases give people *weaker rights* over the land than they had before as they can be evicted from the land if they do not pay the rental amounts consistently.

Tenure security through IPILRA

Section 2(7) of the Act establishes that any national land reform programme shall apply to the land of the Ingonyama Trust. Section 25(6) of the Constitution provides for an Act of Parliament to ensure tenure security for those who lack it due to past racially discriminatory laws or practices. While it was meant to be temporary, the **Interim Protection of Informal Land Rights Act (IPILRA) has been renewed every year to fulfil** section 25(6) of the Constitution. IPILRA protects "informal rights to land". These informal rights are defined to include rights to use, occupy or access land in terms of customary law in the former KwaZulu and other former homeland areas. It therefore applies to people who use, occupy or access land administered by the Ingonyama Trust.

Section 2(1) provides that people who have such informal rights to land **may not** be deprived of these rights without their consent. They may only be deprived of land without their consent if the disposal of the land is approved by the majority of those who hold such rights within an affected community. If they are deprived of the land based on a community decision, they are entitled to compensation.

It is therefore clear that occupants of land under the Ingonyama Trust have very strong protections in terms of IPILRA.

