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RESEARCH REPORT

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# The Ingonyama Trust

## Financial Reporting – Implications For Accountability

By Janet Bellamy



# LAND & ACCOUNTABILITY RESEARCH CENTRE

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A publication of the  
**Land and Accountability Research Centre (LARC)**  
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# EXECUTIVE SUMMARY

The Ingonyama Trust was created by the Ingonyama Trust Act of 1994 just as South Africa headed to its first democratic elections, to hold in trust under the trusteeship of the Zulu monarch, the Ingonyama, all land that previously was vested in the former KwaZulu ‘homeland’ government. Since its inception, and since the establishment of a Board to administer the affairs of the Trust in 1997, one of the consequences of removing this public land from State ownership into a trusteeship arrangement has been that the rules of financial reporting of the affairs of the Trust became contested and uncertain – and ultimately changed substantively.

For more than twenty years, the financial statements for the Trust were prepared in accordance with the Public Finance Management Act (PFMA) which was enacted in 1999 to regulate financial management of public entities in South Africa and to secure their transparency and accountability. However, from 2015/2016 onwards, the Board and its then chairperson, Mr Sipho Jerome Ngwenya, developed a narrative arguing that the Trust did not fall within the ambit of the PFMA and was therefore, instead, obliged only to comply with a Treasury regulation relating to trusts. This discourse began with a submission that the Trust and the Board were separate legal entities, and it was pursued with a subsequent reliance on the fact that the Board, and not the Trust itself, was listed on the PFMA schedule of national public entities. From 2019/2020, the Board no longer prepared the financial statements for the Trust in accordance with the PFMA, and the Auditor General no longer requires it to do so.

Over at least the past decade, the Trust has accumulated significant resources and cash, mainly from commercial activities on the land it holds, and also from a residential lease policy. There has been a disproportionately low ratio of distribution to the beneficiaries, and distributions, where there have been any, have been vaguely reported and given little relevance in annual reports. There is also little mention of how these are put to use. Since compliance with the PFMA was discontinued in 2019/2020, there have also been changes in the Trust’s financial reporting such that up until the 2021/2022 annual report there was no longer any reference to funds available for beneficiaries in the Trust’s financial statements. Other significant changes in reporting practice include that Trust land is now categorised in a manner which implies that some portions are privately owned; predetermined performance objectives for the Trust are no longer presented; and the Trust has formed an investment company, Ingonyama Holdings (Pty) Ltd, which has failed to present financial statements to the parliamentary portfolio committee.

This Research Report does not provide a detailed analysis of the income and expenditure reflected in the financial statements of the Ingonyama Trust or the Ingonyama Trust Board. Rather it sets out to explore how shifts in the criteria and categories used by the Trust in its financial reporting to Parliament over the past nine years have had far-reaching consequences for beneficiaries of the Trust and how changes have negatively impacted the extent to which the Trust and its Board have been held accountable. Some of these changes have been queried by the Parliamentary Portfolio Committee on Agriculture, Land Reform and Rural Development, but others appear to have gone unremarked. This report examines the record of changes in financial reporting, the Board's arguments for these changes and the difficulty that those in legally mandated structures have had in obtaining the information necessary for proper oversight.

The report argues that only by examining the premises for the changes that have been made, and by reviewing, understanding, and addressing the cumulative impact of these incremental changes, can the operation of the Ingonyama Trust and the Ingonyama Trust Board, be properly assessed and monitored, and any problems identified be corrected. It concludes with significant and far-reaching recommendations for action that should be taken by key actors who have a part to play in ensuring that the interests of the Ingonyama Trust beneficiaries are properly served.

**NOTE:** This Research Report includes discussion of the 2022/2023 Annual Report of the Ingonyama Trust Board in a Postscript which can be found the end of this document. The report was released only in February 2024 and, at the time of writing, had not yet been made available on the Ingonyama Trust Board website or on the website of Parliament.



# ACKNOWLEDGEMENTS

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# ACRONYMS, ABBREVIATIONS

<b>AFS</b>	Annual Financial Statements
<b>AGSA</b>	Auditor General of South Africa
<b>APP</b>	Annual Performance Plan
<b>Board/ ITB</b>	The Ingonyama Trust Board
<b>CC</b>	The Constitutional Court
<b>Chairperson of PPC</b>	Chairperson of the Parliamentary Portfolio Committee: Department of Agriculture, Land Reform and Rural Development
<b>Department</b>	Department of Agriculture, Land Reform and Rural Development
<b>DMR</b>	Department of Mineral Resources (now Department of Mineral Resources and Energy (DMRE))
<b>ITB</b>	The Ingonyama Trust Board
<b>KZN</b>	The province of KwaZulu Natal
<b>Land Affairs Act</b>	KwaZulu Land Affairs Act (Act 11 of 1992)
<b>Minister</b>	The Minister of Agriculture, Land Reform and Rural Development
<b>MTSF</b>	Medium Term Strategic Framework Plan for South Africa 2014-2019
<b>PAA</b>	The Public Audit Act of South Africa, 2004 (Act 25 of 2004)
<b>PFMA</b>	The Public Finance Management Act, 1999 (Act 1 of 1999)
<b>PPC</b>	Parliamentary Portfolio Committee: Department of Agriculture, Land Reform and Rural Development
<b>PPE</b>	Property, plant and equipment
<b>SCA</b>	The Supreme Court of Appeal
<b>TPCA</b>	The Trust Property Control Act (Act no 5 of 1988)
<b>TMPA</b>	The Trust Monies Protection Act (Act no 34 of 1934)
<b>Trust</b>	The Ingonyama Trust
<b>Trust Act</b>	The KwaZulu-Natal Ingonyama Trust Act, 1994 (Act 3KZ of 1994), as amended by the KwaZulu-Natal Ingonyama Trust Act, 1997 (Act 9 of 1997)

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# 1. INTRODUCTION

1. The Ingonyama Trust was established by the Ingonyama Trust Act<sup>1</sup> shortly before South Africa's first democratic elections in 1994. In terms of this act, some 2.8 million hectares of land, which had previously been held by the former homeland government of KwaZulu, was placed in a trust, the Ingonyama Trust. This arrangement is entirely unique to KZN; the land in all other former homelands in South Africa vested in the democratic State after 1994. The sole trustee of the Ingonyama Trust is the Ingonyama, the reigning king of the Zulu nation, who holds the land for and on behalf of the members of tribes and communities and residents referred to in the Ingonyama Trust Act. The Act was significantly amended in 1997<sup>2</sup>, amongst other things to establish a board, the Ingonyama Trust Board, to manage the affairs of the Trust. The Board was tasked with managing the Trust's finances, preparing the Trust's annual financial statements to be audited by the Auditor General of South Africa, and submitting an annual report to the Minister of Agriculture, Rural Development and Land Reform, the Premier of KwaZulu-Natal and other institutions.
2. In 1999, the financial administration of the Trust became subject to statutory oversight under the provisions of the newly promulgated Public Finance Management Act<sup>3</sup>, the provisions of which were adhered to by the Ingonyama Trust Board as the accounting authority on behalf of the Ingonyama Trust for over twenty years. However, in 2016, the Board's narrative surrounding the financial reporting obligations of the Trust shifted materially, to the extent that the Board contended that save for a Treasury regulation relating to money and property held in trust, the Ingonyama Trust is not subject to the provisions of the PFMA. As a result, the manner in which the Board has presented the financial statements of the Trust has altered, and information in relation to Trust income and the disbursement of funds to the beneficiaries of the Trust is vaguely reported, with no mention made of how distributions, if any, are put to use.
3. Notwithstanding the narrative of the Board in relation to the PFMA, the Ingonyama Trust, an organ of state, is demonstrably bound by the basic values and principles governing public administration set out in the Constitution. Failure to openly present the financial affairs of the Ingonyama Trust needs urgent resolution. Legislation requires amendment and steps need to be taken to ensure that the financial affairs of the Trust are transparent so that the beneficiaries are assured that the revenue, expenditure, assets and liabilities of the Trust are soundly managed for their benefit.

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1 The KwaZulu-Natal Ingonyama Trust Act, 1994 (Act 3KZ of 1994) (The Trust Act).

2 By the KwaZulu-Natal Ingonyama Trust Act, 1997 (Act 9 of 1997) (The Trust Act – amended).

3 The Public Finance Management Act, 1999 (Act 1 of 1999) (The PFMA).

## 2. THE INGONYAMA TRUST

4. The Ingonyama Trust (the Trust) was established in 1994 under the KwaZulu-Natal Ingonyama Trust Act of 1994 as a result of a deal entered into between the National Party and the Inkatha Freedom Party just prior to the first democratic elections in South Africa, to ensure the participation of the Inkatha Freedom Party in the poll. The hurriedly drawn up founding Act has since been criticised as being fundamentally flawed by the High Level Panel<sup>4</sup> that was established in 2017 to review key South African legislation. The Trust Act was passed by the KwaZulu Legislative Assembly on 22 April 1994<sup>5</sup> without debate or adherence to Rules of Procedure<sup>6</sup> and was signed into law on 25 April 1994,<sup>7</sup> with voting in the elections commencing the following day.
5. In terms of the Ingonyama Trust Act, about 2.8 million hectares of non-contiguous land spread throughout KwaZulu-Natal (KZN) which was previously held by the former Government of KwaZulu<sup>8</sup> vests in, was transferred to and is held in trust by the Ingonyama<sup>9</sup> as Trustee for and on behalf of members of the tribes and communities referred to in a schedule to the Act.<sup>10</sup> The Ingonyama is the sole trustee of the Trust.
6. The 1994 Act, initially adopted by the Kwa-Zulu Natal Provincial Legislature, was subsequently amended in 1997 by the KwaZulu-Natal Ingonyama Trust Amendment Act (Act 9 of 1997) in terms of which the Trust Act acquired the status of national legislation. The 1997 amendments included the establishment of a board, the Ingonyama Trust Board (the Board), to assist the Ingonyama in administering the affairs of the Trust and the Trust land. The Ingonyama or his nominee is the chairperson of the Ingonyama Trust Board.<sup>11</sup> The Trust and the Board are often confused and referenced interchangeably. However, the Trust is a corporate body

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4 [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Report/HLP\\_report.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf)  
5 Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others (12745/2018P) 2022 (1) SA 251 (KZP) paras [29-30].

6 Hilary Lynd (2021), The Peace Deal: The Formation of the Ingonyama Trust and the IFP decision to Join South Africa's 1994 Elections, South African Historical Journal, 73:2. p 349.

7 The Self-Governing Territories Constitution Act (Act 21 of 1971), Section 31(2).

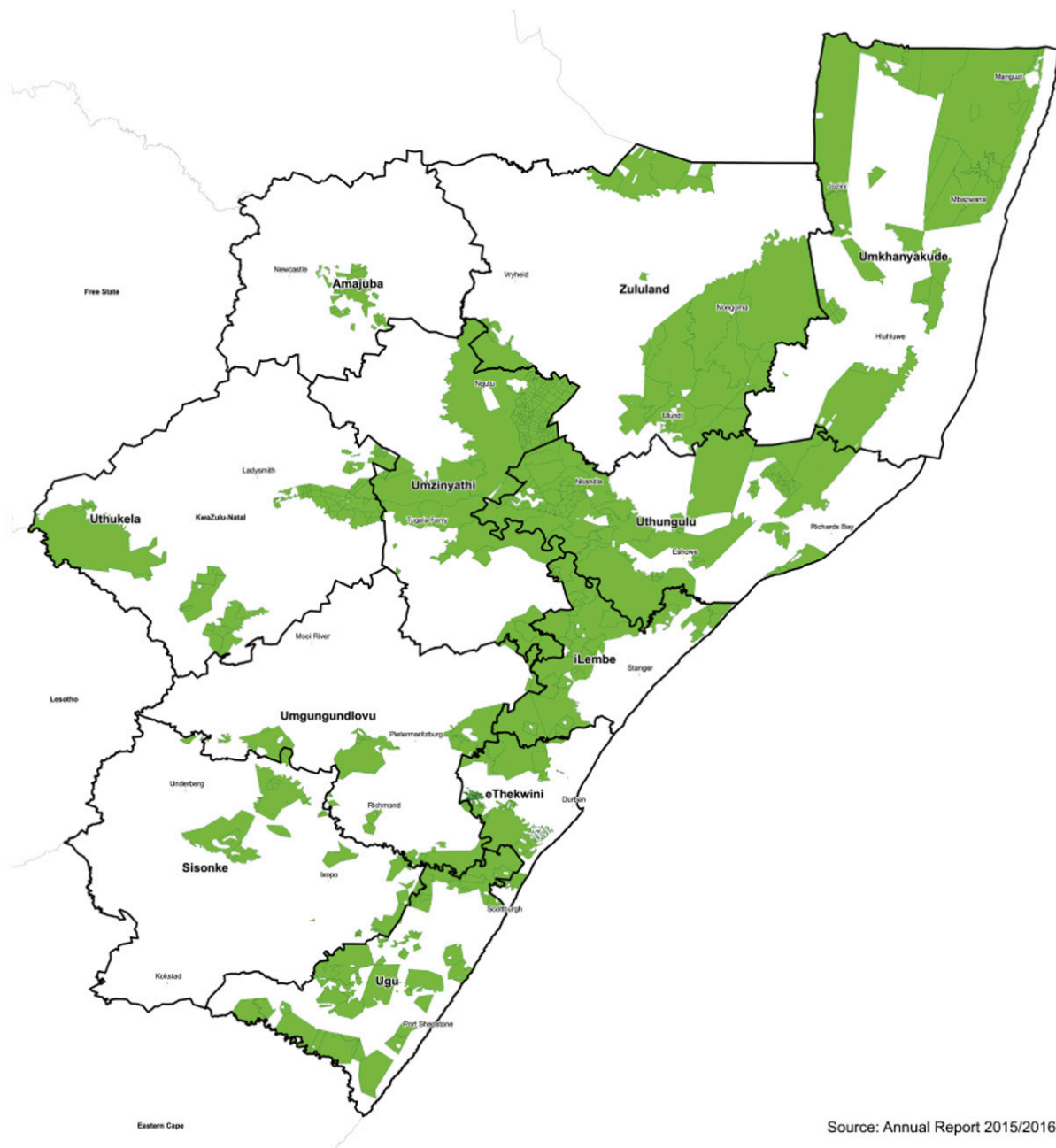
8 This was land that vested in the Government of KwaZulu under Proclamation R232 of 1986 and Proclamation R28 of 1992.

9 'Ingonyama' is defined in the Trust Act as a person referred to in Section 13 of the KwaZulu Amakhosi and Iziphakanyiswa Act, 1990 (Act 9 of 1990), or a person who acts on behalf of the Ingonyama in terms of Zulu indigenous law, and for the purposes of this Act excluding Sections 2(3), 2(6), 2A(3), 3(1), 3(3) and 3(4), means the board established by Section 2A. Section 13 of the KwaZulu Amakhosi and Iziphakanyiswa Act, 1990 provides: Ingonyama: The inkosi of the Usuthu Tribe is the paramount inkosi of the Zulus and is also known as the King of the Zulus, the Ingonyama or Isilo.

10 Trust Act, Section 3(1)(a).

11 Ibid, Section 2A(3)(a).

with perpetual succession<sup>12</sup> while the Board is a management board appointed by the executive authority – the Minister of Agriculture, Land Reform and Rural Development (the Minister) – and the sole purpose of the Board is to administer the Trust.



Source: Annual Report 2015/2016

7. The beneficiaries of the Trust are the members of the tribes, communities and residents referred to in a schedule in the Trust Act.<sup>13</sup> The Trust Act provides that the Trust must be administered for their benefit, material welfare and social wellbeing.
8. The Trust assets are vested in and are held in trust by the Ingonyama in his capacity as Trustee and not in his personal capacity, and the power of the Trust and of the sole trustee, the Ingonyama, to manage the Trust land is subject to important constraints under the Trust Act. Key provisions include:
  - *Section 2(2) – The Trust shall be administered for the benefit, material welfare and social well-being of the members of the tribes and communities referred to in the schedule to the Trust Act.*
  - *Section 2(3) – The Ingonyama shall be the Trustee of the Trust which shall be administered subject to the provisions of the Trust 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 Trust land in accordance with Zulu indigenous law or any other applicable law.*
  - *Section 2(5) – The Ingonyama shall not encumber, pledge, lease, alienate or otherwise dispose of any of the Trust land or any interest or real right in the Trust land, unless he has obtained the prior written consent of the traditional authority or community authority concerned.*
  - *Section 2(7) – Any national land reform programme established and implemented in terms of any law shall apply to the Trust land, provided that the implementation of any such programme on the Trust land shall be undertaken after consultation with the Ingonyama.*
  - *Section 2(8) – In the execution of his or her functions the Ingonyama shall not infringe upon any existing rights or interests.*
9. In terms of the Trust Act, the Minister is empowered to make regulations which are necessary or useful for the attainment of the objects of the Act.<sup>14</sup> In 1998, the KwaZulu-Natal Ingonyama Trust Financial Regulations<sup>15</sup> (the Financial Regulations) and the KwaZulu-Natal Ingonyama Trust Administrative Regulations<sup>16</sup> (the Administrative Regulations) were issued.
10. The 1997 amendment to the founding Trust Act included the establishment of the Ingonyama Trust Board<sup>17</sup> to alleviate the administrative burden on the Trustee.<sup>18</sup>

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13 Trust Act, Section 3.

14 Trust Act, Section 2A(7).

15 Notice R1236 of 2 October 1998: Financial Regulations.

16 Notice R1237 of 2 October 1998: Administrative Regulations.

17 Trust Act, Section 2A.

18 Ingonyama Trust v Radebe & Others (9403/2009) [2012] 2 All SA 212 (KZP), para [12].



### 3. THE INGONYAMA TRUST BOARD

11. The Board is an administrative body, created by statute, that is inextricably linked to the Trust with the sole function to administer the affairs of the Trust and the Trust land. The Trust land does not vest in the Board; it vests in and is held in trust by the Trustee, the Ingonyama. The Trust Act does not confer any corporate capacity or other legal status on the Board, it merely establishes the Board. The former chairperson of the Board, Mr Sipho Jerome Ngwenya, nonetheless has submitted that the effect of the 1997 amendment to the Trust Act was the creation of a board which is a separate and independent legal entity.<sup>19</sup> A legal opinion obtained by the Minister in 2017 noted that the Board is merely a body of natural persons acting as administrators with the Trustee who himself is a board member. Thus, in most respects, the Board is (in all but name) a board of trustees. A board of trustees is not a legal entity, and the Trust Act does not provide otherwise.<sup>20</sup>
12. In terms of the Trust Act, the Board consists of the Ingonyama or his nominee who is the chairperson of the Board.<sup>21</sup> It has eight other members appointed by the Minister, four of whom are appointed after consultation with the Ingonyama, the Premier of KZN and the chairperson of the House of Traditional Leaders in KZN, and four appointed with due regard to regional interests, in consultation with the Premier who in turn consults with the Ingonyama and the chairperson of the House of Traditional Leaders in KZN.<sup>22</sup>
13. Following criticism in Parliament of the management of the Trust and adverse publicity surrounding the Board, the Minister appointed an interim board in September 2020, and took steps to strengthen the management skillset on the Board, including by seconding a CFO from her Department to assist in financial management and accountability. In December 2021, the Minister announced that the Department would be advertising for nominations to a permanent Board to '*ensure stability, good governance and accountability by the entity*'.<sup>23</sup> Following a period of impasse in reaching consensus on the candidates proposed by the Minister,<sup>24</sup> the Minister appointed a new Board in May 2023. As the Ingonyama's nominee, Mr Ngwenya was the longstanding nominee chairperson of the Board, serving initially as acting chairperson, and then as chairperson from the 2013/2014 financial year to early 2023. He is also one of two

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19 See for instance ITB Annual Report 2015/2016, p 43 and ITB Annual Report 2021/2022, p 74.

20 Legal opinion of JJ Gauntlett SC & FB Pelser, 13 June 2017 para [10]. <https://static.pmg.org.za/171025Opinion.pdf>

21 Trust Act, Section 2A(3)(a).

22 Ibid, Section 2A(3).

23 <https://mg.co.za/news/2021-12-01-ingonyama-trust-to-get-permanent-board/>

24 <https://www.iol.co.za/news/south-africa/kwazulu-natal/impasse-over-ingonyama-trust-board-continues-even-after-didiza-had-meeting-with-zulu-king-40754e62-c18f-44b7-9258-9c8019080a74>.



directors of the investment company, Ingonyama Holdings (Pty) (Ltd), established in 2019, of which the Trust is the sole shareholder. In early 2023, the then newly crowned Ingonyama, King Misuzulu KaZwelithini, appointed a new chairperson of the Board, iNkosi Thanduyise Mzimela, which appointment has been the subject of controversy.<sup>25</sup> In February 2024, the King revoked iNkosi Mzimela's appointment, taking up the position of Board chair himself, and stating this was in order to bring stability to the Board.<sup>26</sup>

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25 <https://mg.co.za/news/2023-05-02-ingonyama-board-chair-chosen-by-zulu-king-meets-parliament-despite-buthlezi/>

26 <https://www.iol.co.za/news/politics/king-misuzulu-appoints-himself-as-ingonyama-trust-chair-after-firing-thanduyise-mzimela-b6a01d71-8a5b-42c6-9677-ebf31853b0f9>

## 4. THE BENEFICIARIES

14. The beneficiaries of the Trust are the members of the tribes and communities as contemplated in the KwaZulu Amakhosi and Iziphakanyiswa Act<sup>27</sup> (referred to in the second column of the schedule to the Trust Act and which are established in a district referred to in the first column in the schedule), and the residents of such a district.<sup>28</sup> The beneficiaries are the primary stakeholders in the Trust. Section 10(2) of the Financial Regulations that establish the financial framework for the Trust Act<sup>29</sup> provide that over and above the annual allocation of running costs from the Department of Agriculture, Land Reform and Rural Development, *‘an amount not exceeding 10 percent of the Trust’s income may be utilised for the operational costs of the accounting authority, being costs reasonably incurred by the accounting authority, including ordinary administrative costs, to achieve the objectives of the Trust Act.’* This indicates that the remaining 90 percent of the Trust income should be earmarked for the Trust beneficiaries.

## 5. OVERSIGHT

15. There are various mechanisms built into the Trust Act and other legislation, such as the Public Finance Management Act (Act 1 of 1999) (the PFMA), to ensure oversight of the financial affairs of the Trust. These include oversight by the Minister of Agriculture, Land Reform and Rural Development who is the executive authority of the Trust, Parliament through the Parliamentary Portfolio Committee (PPC) and the Auditor General of South Africa (AGSA).

### 5.1. The Minister of Agriculture, Land Reform and Rural Development

16. The Minister has a significant oversight role in relation to the Trust in that she is the Trust’s executive authority, as well as the appointing authority of the Board and is empowered to make regulations in terms of the Trust Act.
17. As the executive authority of the Trust under the PFMA, the Minister is obliged to account to Parliament in respect of the Trust.<sup>30</sup> Central government, through the Minister, appoints eight of the nine members of the Board following consultation

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27 KwaZulu Amakhosi and Iziphakanyiswa Act (Act 9 of 1990).

28 Trust Act, Section 2(2).

29 KwaZulu-Natal Ingonyama Trust Financial Regulations 1998, as amended by Notice R908, Government Gazette 28012, 16 September 2005.

30 PFMA, Definition of Executive Authority, Section 1(c).

with stakeholders,<sup>31</sup> and designates a vice-chairperson of the Board.<sup>32</sup> The Minister is empowered to make regulations pertaining to the function of the Trust and the Board.<sup>33</sup> The Minister did so in 1998, and amended these regulations in 2005.

18. The Department of Agriculture, Land Reform and Rural Development (the Department) bears the base costs of the administration of the Board.<sup>34</sup> The Financial Regulations require the Board to submit to the Minister an annual written report on the activities of the Trust during a financial year, consisting of at least the following: a balance sheet, an income statement and a report of the auditors.<sup>35</sup> In terms of the PFMA, within one month of an entity such as the Trust receiving an audit report from the AGSA, the Minister must file copies of the annual report, financial statements and the audit report in Parliament, to enable Parliament to consider the reports.<sup>36</sup>

## 5.2. Parliament: The Portfolio Committee

19. The National Assembly establishes portfolio committees with assigned powers and functions in accordance with powers granted to it by the Constitution. There is a portfolio committee corresponding to each government department and the Portfolio Committee (PPC) for Agriculture, Land Reform and Rural Development provides parliamentary oversight for the portfolios falling under the Department, including the Trust. As noted by the Parliamentary Monitoring Group (PMG), the legal advisor for Parliament confirmed in a meeting with members of the Board in 2017 that *'the Trust, ITB and Minister must report to the Committee if requested, as the Committee has authority to call them to account'*.<sup>37</sup>
20. A parliamentary portfolio committee has significant oversight powers. Section 56 of the Constitution provides that the National Assembly or any of its committees may require any person or institution to report to it:

*The National Assembly or any of its committees may— (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a*

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31 Trust Act, Section 2A(3)(b) and (c).

32 Ibid, Section 2A(4).

33 Ibid, Section 2A(7).

34 Ibid, Section 4.

35 The KwaZulu-Natal Ingonyama Trust Financial Regulations, Notice R1236 of 2 October 1998, as amended by Notice R908, GG28012 of 16 September 2005, Regulation 21.

36 PFMA, Section 65.

37 PPC Meeting, 25 October 2017: ITB and accounting procedures on revenue of Board and Trust with Minister. <https://pmg.org.za/committee-meeting/25327/>. Reports of the proceedings of meetings of the PPC by the Parliamentary Monitoring Group (PMG) have been relied upon in this research report as a record of discussions between, variously, the PPC, the Minister, the AGSA and Board representatives relating to financial reporting on the ITB and the Trust.

*summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions.*

21. The Board presents both an Annual Performance Plan (APP) and an Annual Report to the PPC on an annual basis. Notwithstanding its powers, and although the PPC has tried to hold the Board to account by calling on various occasions for the Minister and the Board to provide clarificatory reports and information, it seems that the Board has repeatedly failed to comply with such requests from the PPC. See paragraphs 199 to 206 below for detail.

### *5.3. The Auditor General of South Africa*

22. In terms of national legislation, the Trust Act and the Financial Regulations, the Auditor General of South Africa (AGSA) is mandated to audit and report on the accounts, financial statements and financial management of the Trust:
  - *In terms of the Constitution and the Public Audit Act, the AGSA must audit and report on the accounts and financial statements and financial management of any institution or accounting entity required by national or provincial legislation to be audited by it.<sup>38</sup>*
  - *In terms of Regulation 20 of the Financial Regulations, the financial statements and records of the Trust must be audited annually by the AGSA.*

## 6. INGONYAMA TRUST FINANCIAL REPORTING: LEGISLATION

23. In order to assess the financial reporting obligations of the Trust, it is necessary to set out the legislative framework which determines such obligations. This includes the Financial Regulations issued in terms of the Trust Act and the provisions of the PFMA.<sup>39</sup>

### 6.1. *The Ingonyama Trust Financial Regulations*

24. In 1998, the Minister issued the Financial Regulations<sup>40</sup> under the Trust Act which applied to the financial administration of all income earned or accrued to the Trust and which in the original Regulations excluded application to the funds provided by the Department to cover the costs of the administration of the Board.
25. In terms of the Financial Regulations, the Board's responsibilities in respect of the Trust include:
- Ensuring the efficient, effective and transparent financial management and expenditure control of the Trust,<sup>41</sup> ensuring that the resources of the Trust are used economically and in the most efficient and effective way, taking effective and appropriate steps to ensure that the Trust does not incur expenditure that is not in accordance with its approved budget and implementing an effective and efficient internal system of financial control that safeguards all the assets of and under the control of the Trust, promoting operational efficiency and ensuring compliance with legislation.<sup>42</sup>
  - Preparing the annual financial statements of the Trust. These must consist of a balance sheet, an income statement, a report of the Trustees and report of the auditor in accordance with generally accepted accounting practice so as to fairly present the state of affairs of the Trust as at the end of the financial year concerned.<sup>43</sup>
  - Maintaining accounting records which fairly present the state of affairs of the Trust as at the end of the financial year concerned and the results of the Trust's operations for that year which must be kept in accordance with generally accepted accounting

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39 PFMA (fn 3).

40 The KwaZulu-Natal Ingonyama Trust Financial Regulations. Regulation 2: 'These Regulations shall apply to the financial administration of all income earned and accrued to the Trust, other than funds provided by the Department in terms of section 4 of the Act.'

41 Underlined text highlights the Board's obligations in respect of the Trust. NOTE: Underlining is used throughout this report to indicate author's emphasis.

42 Financial Regulations, Regulation 3.

43 Financial Regulations, Regulation 6.

practice. This includes records showing the Trust's assets and liabilities, a register of fixed assets and entries of monies received and paid out in sufficient detail to enable the nature of the transactions to be identified.<sup>44</sup>

- Preparation of capital and operating budgets of the Trust which must be prepared for the current financial year, draft estimates for the ensuing financial year and a draft capital programme for the following two or more financial years.<sup>45</sup>
- Preparation of an annual report for the Minister on the activities of the Trust during a financial year. The report must be submitted within a period to be set by the Minister and shall include audited financial statements.<sup>46</sup>

## 6.2. *The Public Finance Management Act*

26. The Public Finance Management Act (PFMA) was enacted in 1999 to regulate the financial management of national and provincial governments and statutory entities in South Africa to ensure that all revenue, expenditure, assets and liabilities in those governments and entities are managed efficiently and effectively. The PFMA is important national legislation envisaged in the Constitution<sup>47</sup> to give effect to the values set out therein. The object of the PFMA is to secure transparency, accountability and sound management of public institutions, and sets out the responsibilities of persons entrusted with financial management in those government departments and statutory entities.<sup>48</sup>
27. Schedule 3A of the PFMA comprises a list of national public entities in South Africa to which the PFMA applies. A national public entity is defined as an entity which is established by national legislation, is funded either by the National Revenue Fund or other money imposed in terms of national legislation, and which is accountable to Parliament.<sup>49</sup> Initially, both the Trust and the Board were listed in Schedule 3A of the PFMA. The schedule was issued in 2001.<sup>50</sup> However, in 2003, possibly because of a perceived duplication, the reference to the Trust was removed from the schedule, while the listing referring to the Board was retained.<sup>51</sup>
28. In 2005, amendments were made to the Trust's Financial Regulations to bring the

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44 Ibid, Regulation 4.

45 Ibid, Regulation 7(1).

46 Ibid, Regulation 21.

47 Constitution, Section 216(1): National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing— (a) generally recognised accounting practice; (b) uniform expenditure classifications; and (c) uniform treasury norms and standards.

48 PFMA, Section 2.

49 Ibid, Section 1.

50 Government Notice 402 in Government Gazette 22047, 16 February 2001, effective 1 April 2001.

51 Government Notice 1261 in Government Gazette 24731, 17 April 2003.

regulations in line with the PFMA.<sup>52</sup> Regulation 2, 'Application', was amended to state that the regulations apply '*to the financial administration of all income earned and accrued to the Trust and are subject to the provisions PFMA*'. A reference to 'Accounting Authority' was introduced in accordance with the PFMA which requires that every public entity must have an accounting authority which is accountable in terms of the PFMA.<sup>53</sup> The definition of 'Accounting Authority' in the amended Financial Regulations for the Trust Act reads '**accounting authority** means the Board'.<sup>54</sup> Thus the Financial Regulations make the Board the accounting authority of the Trust, which triggers the accounting obligations of the Board on behalf of the Trust under the PFMA.

29. These amendments to the Financial Regulations which incorporated references to the PFMA took place after the delisting of the Trust from Schedule 3A in 2003. The amendments to the Financial Regulations were confirmed by the Board in the 2005/2006 Annual Report:<sup>55</sup>

*Since the listing of the Board as a schedule 3A public entity with effect from 1 April 2001, it and the Executive Authority (Minister) have taken various steps required to achieve compliance with the requirements of the Public Finance Management Act, 1999 (Act 1 of 1999). This has included the revision of the Financial Regulations of the Trust.*

30. The Board's 2005/2006 Annual Report also confirmed that the Board was the accounting authority of the Trust and noted that the Trust was '*subject to the Public Finance Management Act*'.<sup>56</sup> The 2008/2009 Annual Report again confirmed that the Board was the accounting authority of the Trust, in terms of Section 49 of the PFMA.<sup>57</sup>
31. Section 51 of the PFMA sets out the general responsibilities of an accounting authority which includes ensuring that the public entity has efficient, effective and transparent systems of financial and risk management and internal control, a system of internal audit under the direction of an audit committee, an appropriate, transparent, fair and equitable procurement and provisioning system, and a system for properly evaluating all major capital projects prior to a final decision on a project. An accounting authority must take steps to collect all revenue; prevent irregular, fruitful and wasteful expenditure; and must manage available working capital efficiently

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52 KwaZulu-Natal Ingonyama Trust Financial Regulations 1998, as amended by Notice R908, Government Gazette 28012, 16 September 2005.

53 PFMA, Section 49.

54 Financial Regulations, Regulation 1.

55 ITB Annual Report 2005/2006, p 7.

56 Ibid, p 8.

57 ITB Annual Report 2008/2009 <https://slideplayer.com/slide/7527449/> (Slide 4).

and effectively. An accounting authority is also responsible for the management, including safeguarding, of the assets, and management of the revenue, expenditure and liabilities of the public entity, and is responsible for submission of all reports and notices to Parliament.

32. Under the PFMA, as is the case in the Financial Regulations, an accounting authority must prepare an annual budget and corporate plan,<sup>58</sup> an annual report and annual financial statements which fairly present the state of affairs of the public entity, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned.<sup>59</sup> The PFMA also sets out the fiduciary duties of an accounting authority<sup>60</sup> and consequences for financial misconduct.<sup>61</sup>
33. In the years following the delisting of the Trust from Schedule 3A in 2003, there was no debate that the Trust, through the Board, was subject to the PFMA and the reporting on the financial affairs of the Trust continued to reference obligations imposed by the PFMA.

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58 PFMA, Section 52.

59 Ibid, Section 55(2)(a).

60 Ibid, Section 50.

61 Ibid, Section 83.



## 7. COMPLIANCE WITH THE PUBLIC FINANCE MANAGEMENT ACT

34. However, this changed in 2015/2016 when the then chairperson of the Board raised the view that there existed two legal entities, the Trust and the Board.<sup>62</sup> This was the genesis of a contested narrative which has culminated in the Trust being deemed to fall outside the ambit of the PFMA. The changed narrative regarding the statutory regulation of the Trust has had far-reaching consequences as it effectively removed the assets of the Trust, being the land and the income from the land, from the statutory controls required by the PFMA, a consequence at odds with the purpose and rationale of the constitutionally mandated PFMA.
35. In the 2016/2017 Annual Report, then chairperson Mr Ngwenya referred to the fact that the Board was listed in Schedule 3A of the PFMA and that the Trust was not. He went on to say that the State only made a financial contribution to the Trust in the form of a transfer towards the administrative costs of the Board and that all the projects of the Trust and its assets were ‘*self-funded*’.<sup>63</sup> It is likely that this was intended to make indirect reference to the definition of ‘National Public Entity’ in the PFMA which specifies that entities that are fully or substantially funded either from the National Revenue Fund or by way of a tax, levy or other money imposed in terms of national legislation are subject to the provisions of the PFMA.
36. In 2017/2018, the Board responded to an adverse audit opinion issued by the AGSA by arguing – for the first time – that a Treasury regulation which relates to trust property, Treasury Regulation 14, applied to the Trust.<sup>64</sup> The Board went further in 2018/2019, submitting in response to the AGSA’s report of that year the contention that ‘*save for Treasury Regulation 14, the provisions of the PFMA do not apply to the Trust*’.<sup>65</sup>
37. Over subsequent years, the Board has repeatedly asserted its contention that the listing of the Board as a Schedule 3A public entity in the PFMA has the result that the internal finances of the Board are subject to the PFMA, but that the finances of the Trust are not. This argument has had significant consequences. It has enabled the Board to proceed on the basis that the oversight and accountability provisions contained in the PFMA apply only to the Board, and do not apply to the Trust.

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62 ITB Annual Report 2015/2016, p 12.

63 ITB Annual Report 2016/2017, p 11.

64 ITB Annual Report 2017/2018, p 70.

65 ITB Annual Report 2018/2019, p 53.

38. It is necessary to examine the chronology of submissions and events relating to the Board's contention in order to understand the development of the narrative that the Trust does not fall within the ambit of the PFMA. Firstly, for context, a summary of the changes that occurred is presented below:

### *7.1. Ingonyama Trust and PFMA: A Timeline of Change*

#### **PRE 2015/2016**

Financial Statements for Trust and Board are prepared in accordance with the provisions of the PFMA.

#### **2015/2016**

Chairperson submits that Trust and the Board are separate legal entities.

#### **2016/2017**

Chairperson states that the Board is listed in Schedule 3A of the PFMA and that the Trust is not.

#### **2017/2018**

Board responds to AGSA opinion with the argument that Treasury Regulation 14 (relating to Trust Money and Trust Property) applies to the Trust.

#### **2018/2019**

Board submits that save for Treasury Regulation 14, the provisions of the Public Finance and Management Act do not apply to the Trust.

#### **2019/2020**

Financial Statements for Trust and Board reported on separately by AGSA.  
Financial statements for Trust no longer prepared in accordance with the PFMA.

#### **2020/2021**

Board fails to present Ingonyama Trust's financial statements to the Parliamentary Portfolio Committee in contravention of Trust Act.

#### **2021/2022**

Financial Statements for Trust and Board reported on separately by AGSA.  
Financial Statements for Trust not prepared in accordance with the PFMA.

## 7.2. ITB Assertion 1: Separate Legal Entities

40. Up until the 2015/2016 financial year, consolidated financial statements for the Trust and the Board were routinely prepared. However, in the Chairperson's Foreword for that year's Annual Report, Mr Ngwenya stated that the assets of the Board and the Trust had become conflated and that once this had been pointed out to the AGSA, the AGSA had required that two sets of financial statements, both separate and consolidated, be prepared '*in recognition of the existence of the two legal entities*'.<sup>66</sup>
41. Under 'Approval of Financial Statements' later in the report, the Board went into some detail about the effects of the amendments to the Trust Act in 1997 and stated that one of the effects was to create a Board which was '*a separate and independent legal entity*'.<sup>67</sup> This was a new argument, and such an extended explanation is not found in any previous annual reports. The amended act came into effect in 1997 – but it would be sixteen years before the Board expressed this interpretation. The Chairperson expressed it as a fault of the AGSA that the 'conflation' of entities – and hence 'technical non-compliance' – had not been recognised for 15 years.<sup>68</sup>
42. In the presentation by the Board of the 2015/2016 annual report to the PPC on 13 October 2016,<sup>69</sup> the committee queried why the annual report had been submitted late. According to a report on the meeting, it was here that Mr Ngwenya stated that there had been an '*oversight or error on both sides for not emphasising the existence of two entities*', and that when the AGSA had finally been '*in agreement with the Board that there were two entities*', it was four days before the close of the audit. He added that until the AGSA had been convinced that there were two entities, the Board could not prepare its financials and that on 26 July an email from the AGSA had been received to the effect that their legal opinion and technical advice concurred with the opinion that there were two entities. That was why the financials were prepared late, he indicated, as this was just four days before July 31.
43. The writer has been unable to trace a copy of this AGSA legal opinion which does not appear to be publicly available.
44. However, in a report for Parliament prepared by the AGSA on 26 of September 2016,<sup>70</sup> setting out reasons why it was late in finalising audits of various state entities, the

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66 ITB Annual Report 2015/2016, p 12.

67 Ibid, p 43.

68 Ibid, p12

69 <https://pmg.org.za/committee-meeting/23414/>

70 <https://www.agsa.co.za/Portals/0/Reports/PFMA/201516/GR/Part%209%20PFMA%202015-16%20Sect%206%20Outstanding%20audits.pdf>

AGSA made a key statement that appeared to reflect a fundamentally altered AGSA position, and included a misstatement of the chronology of events that led to the creation of the Ingonyama Trust: *‘The ITB formed a separate trust, namely the Ingonyama Trust entity in 1998, which required separate financial statements for the Ingonyama Trust to be prepared based on enabling legislation.’* This statement failed to understand that the 1998 amendment to the Trust’s 1994 founding legislation had created the Board – four years **after** the Trust’s formation.

45. The AGSA demonstrated a basic misunderstanding of the structure of the Trust and its management board in this 2016 report. In the Annual Report for the following year, 2016/2017, the AGSA representative repeated the erroneous notion stating, *‘I have audited the consolidated and separate financial statements of the Ingonyama Trust Board and its subsidiary [the Trust]’*. This view was again expressed in the 2018/2019 financial year.<sup>71</sup> The view that the Trust was a subsidiary of the Board is unfortunate and may have shaped the events that followed, culminating in the AGSA reporting on the financial statements of the Trust and of the Board completely separately in 2019/2020 and accepting that the Trust does not fall within the ambit of the PFMA.
46. It is unclear how the AGSA reached such an erroneous opinion given that the AGSA had audited the financial statements of the Trust from the time that it was required to do so under the Financial Regulations. It had also audited the consolidated financial statements of the Trust and the Board as prepared by the Board from the time that the Board was established by the Trust Act in 1998 and it did so in accordance with the PFMA from the time this legislation was enacted in 1999.
47. Nonetheless, in the 2015/2016 period, the AGSA does still seem to correctly have regarded the entities as being interdependent. This is confirmed by the words of the then CEO of the Board who stated in the 2016/2017 Annual Report that *‘In 2016/2017 ITB operate[d] like a learning organisation as this was for the first time that it was managing two entities i.e. Ingonyama Trust and Ingonyama Trust Board following confirmation of these entities by the Auditor General during the 2015/2016 audit as separate but interdependent.’*<sup>72</sup>
48. In its presentation that year to the PPC, the AGSA stated that it was based on the Board’s position of two separate entities that one set of financial statements was deemed an inadequate reflection of financial performance and that there was a discrepancy between the number of financial statements and the number of entities.<sup>73</sup>

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71 ITB Annual Report 2016/2017, p 60 and ITB Annual Report 2018/2019, p 47.

72 ITB Annual Report 2016/2017, p 12.

73 PPC Meeting, 25 October 2017: ITB and accounting procedures on revenue of Board and Trust with Minister: <https://pmg.org.za/committee-meeting/25327/>

49. In the 2016/2017 Annual Report, the chairperson of the Board reiterated the ‘separate entities’ interpretation of the previous year and stated, *‘The year under review starts with the common understanding by all concerned that there are two legal entities that are the subject of discussion and audit here. The Ingonyama Trust Board (ITB) which is a unique and extra-ordinary board and Ingonyama Trust. The distinction between these two entities is important to emphasise.’* He goes on to note that it is the Board that is a listed entity under the PFMA and that the Trust is not.<sup>74</sup>
50. In the ‘Statement of Board’s responsibility for Financial and Performance Information’ in the 2016/2017 Annual Report, the Board says that the effect of the amendments to the Ingonyama Trust Act in 1997 *‘was to create a Board which is a separate and independent legal entity’.*<sup>75</sup> This statement is included in all subsequent Annual Reports up to and including 2019/2020. Following the change in approach by the AGSA whereby the AGSA audited the annual financial statements of the Trust and the Board differently – the Board under the PFMA and the Trust not – this statement no longer appears.
51. In its meeting with the PPC on 3 October 2017 to answer questions on that year’s Annual Report<sup>76</sup>, the AGSA’s representative told the meeting that ITB and Ingonyama Trust were separate entities.
52. At the meeting, the AGSA was asked to explain how the AGSA distinguished between the Trust and its Board. The AGSA provided a written response to the PPC that correctly set out the legal position describing the relationship, namely that the Board had been established to administer the affairs of the Trust. At no point did the AGSA state in its response that the Trust and the Board were separate legal entities. It merely set out the background as to how it distinguished between the two and concluded that the Board must comply with all the provisions of the PFMA relating to a public entity (the Trust), including, providing a separate set of financial statements.<sup>77</sup>
53. The question of the Trust and the Board being separate legal entities came to a head at a meeting on 25 October 2017 attended by the Minister, the members of the PPC, the AGSA, the Board and parliamentary legal advisors.<sup>78</sup> The meeting was specifically called to examine the issue of separate entities, separate reports and separate financial statements of the Trust and the Board.

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74 ITB Annual Report 2016/2017, p 10-11.

75 Ibid, p 59.

76 3 October 2017: DRDLR Audit: Auditor-General input; Ingonyama Trust Annual Report, with Minister and Deputy Ministers: <https://pmg.org.za/committee-meeting/25117/>

77 Letter from the AGSA to the PPC dated 19 October 2017. <https://static.pmg.org.za/171025ag.pdf>

78 PPC Meeting: ITB & Accounting procedures on revenue of Board & Trust with the Minister, 25 October 2017. Ingonyama Trust Board on 2015/2016 Annual Report <https://pmg.org.za/committee-meeting/25327/>

54. At this meeting, the Minister also submitted a legal opinion which the Minister had obtained, dated 13 June 2017, relating to ‘Legal aspects arising in respect of the Ingonyama Trust and the Ingonyama Trust Board’.<sup>79</sup> The opinion considered whether the Trust Act had created two separate legal entities, namely the Trust and the Board, and if two legal entities had been created, what were the duties and responsibilities of each entity under the Trust Act, the PFMA and the regulations under the PFMA.
55. Counsel, amongst other findings, reached the following conclusions:
- *The Trust Act only created one legal entity: the Trust.*
  - *Under the Trust Act, most rights and responsibilities are conferred and imposed on the Board and for the purposes of the PFMA, it is the Board which is the Trust’s accounting authority bearing public finance obligations.*
  - *Financial accountability under the PFMA and the Trust Act vests in the Board.*
  - *The Minister is vested with all ordinary and public finance accountability in respect of the Board and the Trust serving as the executive authority of the Trust and appointing authority of the Board.*
56. Counsel was of the opinion that nothing in the original Act or amendment Act confers any juristic personality, corporate capacity or other legal status on the Board itself. Although the Act expressly establishes the Trust and confers on it the status of a ‘*corporate body ... with perpetual succession and the power to sue and be sued and, subject to the provisions of this Act, to do all such acts and things bodies corporate may lawfully do*’, it makes no similar arrangement and contains no comparable provision in respect of the Board. It merely ‘establishes’ the Board.
57. In the meeting, the Parliamentary legal advisor responded to committee members’ queries and pointed out that the Trust Act, in Section 2, spoke of the Trust as a corporate body. Though the Trust had separate legal existence, for purposes of financial reporting, Section 3 and 55(c) of the PFMA held that both entities were to submit financial statements and report financially.
58. In the meeting, the Minister also stated that nothing in the Amendment Act conferred any jurisdictional personality, the Act merely established the Board and therefore created only one legal entity (the Trust), thus the Board was an administrative body. The Minister cited the PFMA and highlighted that the designated accounting authority for the Trust was the Board. The Minister confirmed that the Department agreed with the legal opinion that there was only one entity.
59. In his presentation to this meeting, the representative of the AGSA made reference



to Section 2(1) of the Trust Act and indicated the AGSA agreed with the Board's position that the Trust was a separate body, and later agreed that there were 'two entities'. He stated that the Board was expected to comply with all provisions in the PFMA relating to public entities and, therefore, should provide separate financial statements. These statements were to be audited by the AGSA, as per section 55(c) of the PFMA. In this meeting, there is no indication by the AGSA that separate sets of financial statements and separate entities would mean that the Trust would not be required to comply with the provisions of the PFMA; it merely noted that the statements for the Trust and the Board would no longer be conflated and would be set out separately. Thereafter, from 2016/2017 to 2018/2019, the AGSA audited both consolidated and separate financial statements for the Trust and the Board. During this period, the AGSA did not refer to Treasury Regulation 14, nor did it express that the Trust was not subject to the PFMA; it merely confirmed in its Audit Report that the Board (the accounting authority) is responsible for the preparation and fair presentation of the consolidated and separate financial statements in accordance with GRAP and the requirements of the PFMA.<sup>80</sup>

60. Notwithstanding the presentation of the legal opinion at this 2017 meeting and the Minister's views expressed then, the Board continued to press its argument that the Trust and the Board were separate and independent legal entities.
61. For its part, perhaps as a consequence of its 2016 misapprehension that the Trust was established by the Board as a subsidiary entity (see paras **43-46** above) and its acceptance that the PFMA Schedule listed only the Board, hence distinguishing it from the Trust, the AGSA appeared to accept this notion and from this point onwards, the Trust and the Board have been regarded by the AGSA as separate entities, auditing both separate and consolidated financial statements for the Trust and the Board initially, and from 2019/2020, auditing each separately and issuing separate audit reports.
62. It is possible that at the crucial juncture in 2017 when the ITB was pressing its argument, the AGSA did not appreciate the consequences of the separate legal entity position, perhaps because the Board as an administrative arm had (and still has) little financial muscle, particularly in comparison to the Trust. Indeed, in the AGSA budgetary Review and Recommendations Briefing to Parliament of September 2017 the ITB was excluded by the AGSA from a 'Health Check' of Department entities as it was classified as a 'small entity'.<sup>81</sup>

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80 ITB Annual Report 2016/2017, p 61, ITB Annual Report 2017/2018, p 65, . ITB Annual Report 2018/2019, p48.

81 <https://static.pmg.org.za/4/171003AGSA.pdf> (AGSA PFMA 2016/17, p 18)

63. In the two years preceding the 2017 AGSA shift, a parliamentary process had been running – quite separately – that would have implications for the Ingonyama Trust and for the Board: a High Level Panel chaired by the former President, Mr Kgalema Motlanthe, had been appointed to review and assess the impact of post-apartheid legislation in South Africa (HLP).<sup>82</sup> In its report released in 2017, the HLP proposed actions and identified laws that required strengthening, amendment or change. Amongst these laws was the Trust Act.
64. In its report, following investigations and community consultation, the HLP recommended that the Trust Act be repealed, and it recommended the dissolution of the Trust. The HLP motivated further that if repeal were not immediately possible, substantial amendments to the Trust Act should be made, to include a trust fund, a land register and a dispute resolution mechanism.<sup>83</sup>
65. This produced a strong reaction from the Board, reflected in statements in the 2017/2018 Annual Report which dismissed the HLP Report.<sup>84</sup> In the years following the HLP report, the Board made the following far-reaching submissions, fundamental to which is the contention that the Trust and the Board are separate legal entities:
- 2017/2018: That Trust property and money is regulated in terms of Treasury Regulation 14.<sup>85</sup>
  - 2018/2019: That save for Treasury Regulation 14, the provisions of the PFMA do not apply to the Trust.<sup>86</sup>

### 7.3. ITB Assertion 2: Trust Money Regulated by Treasury Regulation 14

66. In the Annual Report for 2017/2018, the second year in which the AGSA audited both the consolidated and separate financial statements for the Trust and the Board, the Board, for the first time, asserted that Trust property and money is regulated in terms of Treasury Regulation 14.<sup>87</sup>
67. Treasury Regulation 14 provides that *‘Trust money or property is money or property that does not belong to the State and that is held by an institution on behalf of other persons or entities in terms of a deed of trust or equivalent instrument that details the specific purposes for which it may be used.’*<sup>88</sup>

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82 High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (November 2017) [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Report/HLP\\_report.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf)

83 Ibid, p 278.

84 ITB Annual Report 2017/2018, p 13-14.

85 Ibid, p 70.

86 ITB Annual Report 2018/2019, p 53.

87 ITB Annual Report 2017/2018, pp 70, 72.

88 Treasury Regulation 14.2.1 (The Treasury Regulations issued in terms of the PFMA, GG 22141 dated 9 March 2001).



68. The background to this assertion appears to relate to an adverse audit opinion issued in this financial year by the AGSA in respect of the consolidated and separate financial statements of the Trust and the Board. One of the bases for this adverse opinion was that the Board incorrectly recognised expenditure relating to the Trust in the (separate) financial statements of the Board, resulting in an overstatement of expenditure of the Board and an impact on the recorded surplus of the Trust.<sup>89</sup> The Board responded to the AGSA opinion with the comment that it had a different view from the AGSA on expenditure allocation between the Trust and the Board. It sought to clarify that the Board was responsible for the administration of the Trust and that the disputed expenditure of the Board related to administrative costs of the Board which included costs of administering the Trust, such as staff salaries. The Board then claimed that Trust property and money was regulated under Treasury Regulation 14.
69. In addition, the Board referred to Treasury Regulation 14 in relation to a dispute with the Department of Mineral and Energy Affairs (MRE) concerning the ownership of mining royalties, stating that *'funds held in trust are to be retained in trust which does not exclude contractual royalties held in Trust'*.<sup>90</sup>
70. The Board stated that it was clear from Treasury Regulation 14 that Trust money was to be utilised for the benefit of communities which was the mandate of the Trust and that Trust-generated funds were to be retained for the benefit of communities after the payment of Trust expenditure. In this argument, Trust expenditure related to non-administrative and operational expenditure relating to land and tenure management.
71. The Board seemed to rely on this regulation to argue that the funds held in trust were to be retained by the Trust, and administrative and operational expenditure was to be borne by the Board. This is indeed how the Trust was structured under the Trust Act: the State would provide funds to a management board for the administration of a trust with the balance of administrative costs reasonably incurred to achieve the objects of the Act drawn from a maximum of 10 percent of the revenue of the Trust. Accordingly, the relevance of the Board's reliance on Treasury Regulation 14 in this context is unclear.
72. Notwithstanding, in the notes to the financial statements thereafter, the Board stated that the consolidated annual financial statements (and later the separate financial statements for the Trust, see below) were prepared in accordance with Standards of

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89 Ibid, p 64.

90 ITB Annual Report 2017/2018, p 72.

Generally Recognised Accounting Practice (GRAP) including any interpretations and directives issued by the Accounting Standards Board and in a manner required by the Trust Act and Treasury Regulation 14.<sup>91</sup> At no point however does the AGSA make any reference to Treasury Regulation 14 in its opinions in any of the annual reports.

73. The Board's reliance on Treasury Regulation 14 has been fundamentally misplaced and misunderstands the role of the regulation. The Treasury Regulations are issued by the National Treasury in terms of the PFMA<sup>92</sup> and if the Board is correct in its contention that the PFMA does not apply to the Trust, it means that the Treasury Regulations (including Treasury Regulation 14) do not apply to the Trust at all.
74. Furthermore, Treasury Regulation 1.2.1 sets out the entities to which the regulations apply. On the Board's approach, the Trust does not fall within any of those categories. The Board's position would mean that an organ of state which holds a vast amount of public land, and which has a substantial income from the public purse, is not subject to the Treasury Regulations. The only basis the Board can offer to validate its reliance on this interpretation is that Schedule 3A of the PFMA refers to the 'Ingonyama Trust Board' and not the 'Ingonyama Trust'. However, the Trust and the Board are inextricably linked, and the sole function of the Board is in relation to the Trust and the Trust land. The CEO of the Board confirmed this to the Parliamentary Portfolio Committee in 2021, stating the *'Board exists to administer the affairs and the land of the Trust. Without the Trust, land and beneficiaries there was no need for the Board.'*<sup>93</sup>
75. To make the argument that apart from Treasury Regulation 14, the PFMA does not apply to the Trust, or for this to even possibly be the case, the following conditions contained in Treasury Regulation 14 would need to be met:
- *that the Trust money or property is money or property that does not belong to the State, and*
  - *that the Trust money or property is held by an institution on behalf of other persons or entities in terms of a deed of trust or equivalent instrument that details the specific purposes for which it may be used.*

#### 7.4. ITB Assertion 3: Trust money or property does not belong to the State

76. The then chairperson of the Board in his overview in the 2015/2016 Annual Report stated that land vested in the Trust is money or property that does not belong to the State. He said: *'It should be noted that the land which the Trust owns and for which the*

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91 See for instance ITB Annual Report 2017/2018 p 78, 2018/2019 p 59 and 2021/2022 p 74. See also Section 9.2 Accounting Standards in this report.

92 PFMA, Section 76.

93 Presentation of the ITB to the PPC, 16 November 2021. <https://pmg.org.za/committee-meeting/33802/>

*ITB is to account, is not State land. So are the proceeds derived from it.*<sup>94</sup> This statement contradicts the Trust's own argument in litigation with the eThekweni Municipality over the ratability of Trust land just two years earlier, in which the Court agreed with the gist of the Trust's submission that it was '*the State in one of its guises*'. State land is exempt from rates.<sup>95</sup> (The rates dispute began with the 1997 amendment of the Trust Act which caused proclaimed townships to vest in local municipalities rather than the Trust. For more details, please see [Section 10.3](#) of this report).

77. The Trust land was historically State land. In terms of the Interim Constitution, the former homelands in South Africa were abolished and the areas that had been situated in the homelands were reincorporated into the greater South Africa which became a unitary state.<sup>96</sup> In KZN, unlike the land which comprised all the other former homelands, the Trust Act meant that the land which had vested in the former Government of KwaZulu immediately prior to the commencement of the Trust Act henceforward vested in, was transferred to and was held in trust by the Ingonyama for and on behalf of the tribes and communities and the residents listed in the Act.<sup>97</sup>
78. In the litigation referred to, the Supreme Court of Appeal (SCA) held that Trust property constituted State property which was exempted from rates. It also summarised the various provisions in legislation which indicate that the Trust's property was State property, in this case for the purposes of the Rating Act. These included the National Forests Act, the National Veld and Forest Fire Act and the South African Schools Act, each of which define the Trust land as State land.<sup>98</sup>
79. In addition, the following provisions in the Trust Act further indicate that it was the intention of the legislature that the Trust land remain State property:
  - *Section 3(1)(b): Any functions in respect of the land or any real right therein which were performed by a department of the Government of KwaZulu in terms of any law immediately before the date of commencement of the Trust Act, shall be performed by the national or provincial government succeeding the Government of KwaZulu in terms of the Constitution.*
  - *Section 2(7): Any national land reform programme established and implemented in terms of any law shall apply to the Trust land.* In this regard, the SCA stated in its judgment in the litigation referred to above, '*One can hardly imagine the State reserving to itself the right*

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94 ITB Annual Report 2015/2016, p 12.

95 Ingonyama Trust v eThekweni Municipality 2013 (1) SA 564 (SCA) para [8]. In this case the Board was disputing a claim for outstanding rates by the eThekweni Municipality on the basis that Trust land was in effect State land and therefore not rateable as the State is exempt from Municipal rates.

96 Interim Constitution Act 200 of 1993, Schedule 1.

97 Trust Act, Section 3(1)(a).

98 Ingonyama Trust v eThekweni Municipality 2013 (1) SA 564 (SCA) paras [8-10].

*to apply its land reform programme to land that it considers it has truly divested itself of.*<sup>99</sup>

80. More recently, Counsel for the Minister in the KZN High Court argued that the Minister had no legal authority to grant Permission to Occupy (PTO) certificates on Trust land on the basis that the land vested in the Trust and was not government land in terms of the KwaZulu Land Affairs Act (Land Affairs Act).<sup>100</sup> However, the Court held that this argument *‘does not hold water’* and that Section 1 of the Land Affairs Act, defines ‘Government land’ as *‘the land which was transferred to the Government of the former self-governing territory of KwaZulu in terms of Proclamation R232 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 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’*. It noted further that *‘[a] similar definition is contained in Proclamation R63 of 1998, which amended the Land Affairs Act to include the land held by the Trust’*.<sup>101</sup> The Court also referred to the fact that both the SCA and the Constitutional Court (CC) held that the Trust is an organ of state as defined in section 239 of the Constitution.

*7.5. ITB Assertion 4: The Trust money or property is held by an institution on behalf of other persons or entities in terms of a deed of trust or equivalent instrument that details the specific purposes for which it may be used.*

The Trust is a unique entity; it was created by statute and it is excluded from private trust legislation. In terms of the Trust Act, the Trust is also a corporate body<sup>102</sup> which the KZN High Court noted *‘is a concept quite inconsistent with the South African law of trusts, but that be that as it may, the Trust was established subject to the provisions of the Trust Act to do all things that corporate bodies are lawfully entitled to do’*.<sup>103</sup>

82. The SCA held that the Trust is a statutory trust established by the Trust Act: *‘It appears to be undisputed on the papers that the Trust’s property was held by the State (Government of KwaZulu) prior to 1994. The Trust is a statutory Trust’*.<sup>104</sup> In the 2018/2019 Annual Report the Trust is listed as a statutory trust under ‘General Information’<sup>105</sup> and in the Annual Report of the following year, 2019/2020, under ‘Governance’, the report states that *‘the Trust is primarily governed by the law of trust and some provisions of the*

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99 Ibid, para [9].

100 KwaZulu Land Affairs Act (Act 11 of 1992).

101 Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others (12745/2018P) [2021] 2022 (1) SA 251 (KZP) (11 June 2021), paras [168 -171].

102 Trust Act, Section 2(1).

103 Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others (12745/2018P) [2021] 2022 (1) SA 251 (KZP) (11 June 2021) [para 77].

104 Ingonyama Trust v eThekweni Municipality 2013 (1) SA 564 (SCA) [para 2].

105 ITB Annual Report 2018/2019, p 3.

*various laws including Zulu customary law as it is a statutory trust*'.<sup>106</sup> In the 2021/2022 Annual Report, under 'Related parties' the Trust is described as a '*statutory trust administered by the Board appointed by and in consultation with the Minister*'.<sup>107</sup>

83. Statutory trusts are trusts created by statute and are *sui generis*, meaning, of a class of their own. Statutory trusts historically were common in British colonies where 'reserved' land was placed under the control of statutory trustees. A common feature of such 'State land trusts' was that indigenous communities were not permitted to exercise title, and as such the actions of the trustees in statutory trusts were regarded as acts of government. Writing in relation to the South African Development Trust (in which much of the Trust land formerly vested), AJ Kerr argues that a statutory trust resembles trusteeship under the law of sovereignty and, therefore, such a trust should be regarded as state owned in a *sui generis* sense, in other words, unique.<sup>108</sup>
84. Notwithstanding legal precedent which has confirmed that Trust land is State land, the former chairperson of the Board has drawn a distinction between the Ingonyama Trust and a trust held privately under a deed of trust, and in 2018 stated that '*it is just the goodwill of the King that he agreed that the land he holds in Trust be so held under a statutory trust. If he so wishes he could seek a mandate from his people and hold the same land under a private trust. Perhaps this avenue may have to be explored*'.<sup>109</sup>
85. The suggestion that the Ingonyama could somehow dissolve a statutory trust and replace it with a common law trust is absurd – the Ingonyama does not have the power to repeal or amend an act of Parliament.
86. The land is vested in the Ingonyama to hold in trust on behalf of people who hold constitutionally protected land rights. The Ingonyama holds the Trust land through a statutorily created institution considered by the Constitutional Court and the Constitution to be an organ of state that is subject to oversight and regulation by the Minister and Parliament, and which remains subject to land reform laws and policies. There is no indication that the Trust land was ever meant to be out of the State's reach, especially in the context of the land in the other homelands which vested in the State.

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106 ITB Annual Report 2019/2020, p 35.

107 ITB Annual Report 2021/2022, p 115.

108 Kerr, AJ: The Customary Law of Immovable Property and Succession (Rhodes University, 1990, 3 Ed) 69.

109 ITB Annual Report 2018/2019 p 7.



## 7.6. ITB Assertion 5: *The Delisting from Schedule 3A of the PFMA means that the PFMA does not apply to the Trust.*

87. The Financial Regulations issued in terms of the Trust Act regulate the financial administration of all income earned or accrued to the Trust and clearly state that its provisions are subject to the provisions of the PFMA.<sup>110</sup> However, as noted above, in the 2016/2017 Annual Report, the former chairperson of the Board highlights that the Board is a listed entity under the PFMA and that the Trust is not,<sup>111</sup> referring to the listing of the Board in Schedule 3A of the PFMA, and that the Trust and the Board are separate legal entities.
88. The Board is indeed listed as the Schedule 3A entity in the PFMA. However, the Board is a statutory body in effective control of the Trust, whose sole function is to administer the affairs of the Trust and the Trust land, as the ‘accounting authority’ of the Trust. It has no legal function separate from the Trust.
89. On the basis of the Board’s contention that the two are legally separate entities, the Board submitted in the 2018/2019 Annual Report that save for Treasury Regulation 14, the provisions of the PFMA do not apply to the Trust.<sup>112</sup> This claim represented a significant change in approach by the Board. The background to the way the contention is expressed in the 2018/2019 report appears to be that the AGSA had again issued an adverse audit opinion in respect of the consolidated and separate financial statements of the Trust and the Board. In this year, one of the bases for the adverse audit opinion related to municipal rates; the AGSA noted that the Trust’s financial reporting did not recognise expenditure relating to municipal rates which meant that total expenditure and current liabilities for the Trust were understated, with a resultant impact on the stated surplus and the accumulated surplus for the period.<sup>113</sup>
90. In its response to the adverse audit opinion the Board raised the following arguments:<sup>114</sup>
- *The Trust is not a listed public entity in terms of the PFMA,*<sup>115</sup>
  - *The Trust does not receive any funding from the State,*
  - *The Trust is neither a constitutional institute nor a government department,*

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110 Financial Regulations, Regulation 2.

111 ITB Annual Report 2016/2017, p 11.

112 ITB Annual Report 2018/2019, p 53.

113 Ibid, p 47.

114 Ibid, p 53.

115 PFMA, Section 3(1)(b): Institutions to which the PFMA applies includes public entities listed in Schedule 2 or 3 of the PFMA.

- *The Trust is only associated with the State by virtue of being created by statute, ‘nothing more and nothing less’, and*
  - *As a result it is bound to be administered in accordance with the founding legislation and the provisions of such must first be exhausted before other legislation could be looked at.*
91. Based on the above arguments the Board concluded that the AGSA’s findings pertaining to rates expenditure and payables was ‘erroneous’.<sup>116</sup> It went on to conclude that since the AGSA did not provide any reason why Treasury Regulation 14 did not apply to the Trust, that the beneficiary was liable for rates and that no obligation had arisen to the Trust as a result of the invoices referred to.<sup>117</sup>
92. It is difficult to follow this line of argument which contends that the Trust is not required to recognise expenditure relating to municipal rates (an action that results in non-compliance with the South African Standards of Generally Recognised Accounting Practice – GRAP) because the provisions of the PFMA do not apply to the Trust. The AGSA’s opinion was raised in terms of GRAP (Presentation of Financial Statements) and not under the PFMA, and the AGSA has continued to audit the Trust’s financial statements on the basis that the Board is responsible for the preparation and presentation of the financial statements in accordance with GRAP.
93. Nonetheless, the arguments presented by the Board in the 2018/2019 Annual Report – the year that the Board’s narrative was consolidated – require analysis since, should they stand, they would have significant implications for the Trust’s financial accountability obligations.

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116 ITB Annual Report 2018/2019, p 55.

117 Ibid, p 56.

## 8. THE 2018/2019 ANNUAL REPORT ARGUMENTS

### 8.1. Argument 1: The Trust is not a listed public entity in terms of the PFMA.

94. As mentioned, the Trust and the Board were originally listed in Schedule 3A of the PFMA as ‘Public Entities’ in 2001<sup>118</sup> and the Trust was subsequently delisted in 2003,<sup>119</sup> likely because of a perceived duplication and because the Board, as the accounting authority of the Trust, is in any event obliged to comply with the PFMA for and on behalf of the Trust. The argument that, save for Treasury Regulation 14, the provisions of the PFMA do not apply to the Trust has been based on the premise that the delisting of the Trust from Schedule 3A in 2003 removed PFMA obligations from the Trust.
95. The argument is without merit. It does not make any sense to suggest that the listing of the Board as a Schedule 3A public entity in the PFMA has had the result that the internal finances of the Board are subject to the PFMA, but the finances of the Trust are not. If this argument were correct, it would mean that the Board, the Trust’s administrative and operating arm, would be required to comply with the PFMA only in respect of the financial affairs of the Board and not those of the Trust. It also would mean that the weight of legislation such as the PFMA applies only to the funds provided by the Department to the Board to cover the administrative costs of the Board. However, the Trust Act and its Financial Regulations make it clear that it is the Trust’s operations and income that need to be accounted for, and the Board, as its accounting authority, is tasked with actioning compliance with applicable laws – including the PFMA.
96. The original wording of the Financial Regulations (issued In 1998 before the PFMA was enacted), provides that the Financial Regulations apply to *‘the financial administration of all income earned or accrued to the Trust, other than funds provided by the Department in terms of section 4 of the Trust Act.’*<sup>120</sup> In other words, the regulations specifically excluded the finances relating to the payment to the Board made by the Department. The Financial Regulations were amended in 2005 and provisions and definitions therein were amended to bring them in line with the definitions contained in the PFMA.<sup>121</sup> Regulation 2 was amended to state that the Financial Regulations

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118 Government Notice 402 in Government Gazette 22047, 16 February 2001, effective 1 April 2001.

119 Government Notice 1261 in Government Gazette 24731, 17 April 2003.

120 Financial Regulations, original Regulation 2.

121 Government Notice R908 in Government Gazette 28012, 16 September 2005.



applied ‘to the financial administration of all income earned or accrued to the Trust and are subject to the provisions of the PFMA’.

97. The Board’s revenue emanates from an allocation from the Department and a contribution to administrative costs (incurred to achieve the objects of the Act) from the Trust, as provided for in the Financial Regulations. The Board now places great emphasis on the contention that the PFMA applies only to the financial administration of the Board, which seems contrary to what was originally intended by the legislature.
98. The concept of ‘accounting authority’ as provided for in section 49 of the PFMA was also introduced into the amended Financial Regulations.<sup>122</sup> The amended Financial Regulations included the definition: ‘accounting authority *which means the Board*’. This clearly envisages an authority accountable for an entity and it seems unlikely that the legislature envisaged a situation where an accounting authority, such as the Board, would be the accounting authority for itself.
99. The Trust’s Administrative Regulations were also amended.<sup>123</sup> In the original Administrative Regulations, there was reference to the ‘Board’. In the amendment of 2005, the word Board is substituted entirely by the words ‘accounting authority’.<sup>124</sup> These amendments all took place after the delisting of the Trust from Schedule 3A of the PFMA.

## 8.2. *Argument 2: The Trust does not receive any funding from the State.*

100. The Trust receives considerable funding from the State in that the State, via the Department, bears the costs of the administration of the accounting authority, the Board. This amount was around R18 million per year in 2016 and is reflected as R23 517 million in 2022. This transfer payment is in line with the provisions of the founding Trust Act which provided:<sup>125</sup>

*The Government of KwaZulu-Natal and its successors-in-law shall out of funds in an annual budget voted for by its legislature provide for financial assistance to the Ingonyama as Trustee of the Ingonyama Trust to administer the Trust.*

And the Amended Trust Act which provides:

*The Department of Land Affairs shall bear the cost of the administration of the Board.*

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122 Section 49(1) of the PFMA provides that every public entity must have an accounting authority which must be accountable for the purposes of the PFMA and if a public entity has a board, that board is the accounting authority for that entity.

123 KwaZulu-Natal Ingonyama Trust Administrative Regulations, Government Notice R1237, 2 October 1998.

124 Government Notice R907 in Government Gazette 29012, 16 September 2005.

125 Trust Act, Section 4.

101. In addition, the Trust benefits from an exemption from paying Income Tax in terms of Section 10 of the Income Tax Act.<sup>126</sup> This exemption transfers the revenue streams from the fiscus to the Trust. Lease income, for instance, is not taxed in the hands of the Trust and, in respect of commercial leases, would be allowed as a tax deduction by lessees. This effectively ring-fences the asset and revenue base within the Trust. This exemption adds significantly to the revenue of the Trust which in turn adds to revenue available for the Trust's administration.

102. Nonetheless, the former chairperson of the Board has continued to argue that the Trust does not receive any funding from the State, including stating in a meeting with the PPC in 2021 that the Trust is 'not granted a cent' by the State.<sup>127</sup>

### *8.3. Argument 3: The Trust is neither a constitutional institution nor a government department.*

103. This argument is presumably intended to indirectly compare the Trust to the institutions to which the PFMA applies, which includes departments and public entities listed in Schedule 2 or 3 of the PFMA and constitutional institutions.<sup>128</sup> The Trust is indeed neither a constitutional institution nor a government department (as defined in the PFMA). However, this is not relevant as the Trust does meet the requirements of a 'National Public Entity' under the PFMA<sup>129</sup> in that the Trust is a fund or other entity established in terms of national legislation (the Trust Act) and which is fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation, and which is accountable to Parliament.

### *8.4. Argument 4: The Trust is only associated with the State by virtue of being created by statute – 'nothing more and nothing less'.*

104. Again, this argument is without merit. The Trust was created by national statute, the Trust Act, and performs public functions in terms of national legislation. The Trust is not only associated with the State by virtue of being created by statute, it is an organ of state.

105. While there is no definition of 'state' in the Constitution, 'organ of state' is defined in Section 239 and includes any department of state or administration in the national,

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126 See ITB Annual Report 2018/ 2019, p 71: No provision is made for taxation as the Ingonyama Trust is exempt from income tax in terms of Section 10 of the Income Tax Act.

127 PPC Meeting, 16 November 2021: Presentation of ITB Annual Report 2020/2021: <https://pmg.org.za/committee-meeting/33802/>

128 PFMA, Section 3.

129 Ibid, Section 1.

provincial, or local sphere of government or any functionary that exercises a power or performs a public function in terms of the Constitution or any legislation. The Constitutional Court in the eThekweni Rates matter held that the Trust is an organ of state: *‘There can be little doubt that the Trust exercises public power and performs functions in terms of legislation. Therefore, it constitutes an organ of state.’*<sup>130</sup>

106. To place this in context, all the land which vested in the Trust originally vested in the KwaZulu Government, consisting of land held by the South African Development Trust and other State land. All the land vested in the Trust is held by it subject to the constitutionally protected pre-existing land rights of community members.

107. The Board has also involved itself in the workings of government departments, for example engaging in a dispute with the eThekweni Municipality in terms of the Intergovernmental Framework Act of 2005 in regard to rates claimed by the Municipality.<sup>131</sup> In addition, in the Board’s response to the AGSA’s adverse opinion in the 2018/2019 Annual Report, the Board challenged the AGSA’s view that the minerals on Trust land had been expropriated by the State – on the basis that the Trust was a creature of the State and therefore the State could not have expropriated itself, since the State cannot expropriate itself.<sup>132</sup>

#### *8.5. Argument 5: The Trust is bound to be administered in accordance with the founding legislation. The provisions of such must first be exhausted before other legislation could be looked at.*

108. The Trust is indeed bound to be administered by the Board under its founding legislation, the Trust Act, which sets out obligations in relation to the financial administration of all income earned or accrued to the Trust in the Financial Regulations. Importantly, the Financial Regulations apply to the financial administration of all income earned or accrued to the Trust and are subject to the PFMA. (See Section 9.2: Accounting Standards in this report.)

#### *8.6. Effect of not listing the Trust under Schedule 3A of the PFMA*

109. There is little doubt that the Trust is an organ of state and that it is a national public entity as defined in the PFMA. One of the points the former chairperson of the Board has relied on in contending that the PFMA does not apply to the Trust is that Schedule 3A to the PFMA lists only the Board as a national public entity, not the Trust. However, a national public entity not being listed in Schedule 3A of the PFMA

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130 eThekweni Municipality v Ingonyama Trust 2014 (3) SA 240 (CC) [para 37].

131 ITB Annual Report 2015/2016, p 70.

132 ITB Annual Report 2018/2019, p 99.

does not absolve the Board from its obligations in terms of the PFMA. Rather, the listing of the Board as a national public entity under Schedule 3A to the PFMA brings the PFMA and its regulations to bear also on the funds, assets and accounting of the Trust, which is the sole function of the Board as accounting authority of the Trust.

110. In the Board's 2020/2021 Annual Performance Plan,<sup>133</sup> then chairperson Mr Ngwenya stated: *'There are many reasons why the Trust is not listed under the PFMA. Among others, the land owned by the Trust is administered in terms of Zulu customary law by Traditional Councils. Therefore, in my opinion if the Trust were to be listed, this will also require more responsibility and details as to how the Traditional Council administers land. This could be a tedious process.'*

111. National Public Entities are subject to the provisions of the PFMA to ensure transparency, accountability and sound management of their revenue, assets and liabilities. Accordingly, if confusion has arisen because the Board and not the Trust is listed under Schedule 3A, this should be immediately rectified by the Board, or the Minister of Finance. Under section 47(1)(a) of the PFMA, the Minister of Finance by notice in the Government Gazette must amend Schedule 3 to include in the list all public entities that are not listed. Thus, as a matter of law, Schedule 3A must be amended either by removing the reference to the Board or by the additional inclusion of the Trust as a Schedule 3A public entity.

112. Under section 47(2) of the PFMA, the accounting authority for a public entity that is not listed in either Schedule 2 or 3 must, without delay, notify the National Treasury, in writing, that the public entity is not listed in the schedule. Treasury Regulation 25.2 also provides that an accounting authority of a public entity not listed in terms of the PFMA must submit specified information to its Executive Authority (in the case of the Trust, this is the Minister) and the Registrar of Public Entities in support of its application for listing.

## 9. IMPACT OF THE BOARD'S ARGUMENTS ON FINANCIAL REPORTING

113. It is clear from an analysis of the AGSA's audit reports for the Trust and the Board since at least 2011/2012 that the narrative that the Trust is not subject to the PFMA has had an impact on financial reporting.

114. Firstly, it is necessary to look at the obligations of the AGSA and the outcome of the AGSA's audits of the Trust and the Board over the years.

### 9.1. AGSA Audit Obligations

115. In terms of the Financial Regulations, the financial statements of the Trust must be audited annually by the AGSA who is required to submit a report on the Trust's financial statements to the Board, the KZN Provincial Legislature, Parliament, the House of Traditional Leaders of KZN, the Minister and the Premier of KZN.<sup>134</sup>

116. The objective of the AGSA's audit of financial statements of entities under its remit is to express an opinion on whether the financial statements fairly present the financial position of an auditee at the end of a financial year and the results of their operations for that financial year. It is the AGSA's responsibility to express an opinion on the financial statements based on its audit.

117. The AGSA can express one of the following opinions:<sup>135</sup>

- *Clean Audit Outcome: The financial statements are free from material misstatements and there are no material findings on reporting on performance objectives or non-compliance with legislation.*
- *Unqualified Audit Opinion: The financial statements contain no material misstatements. Findings have however been raised on pre-determined objectives or non-compliance with legislation or both.*
- *Qualified Audit Opinion: The financial statements contain material misstatements in specific amounts, or there is insufficient evidence for us to conclude that specific amounts included in the financial statements are not materially misstated.*
- *Adverse Audit Opinion: The financial statements contain material misstatements that are not confined to specific amounts, or the misstatements represent a substantial portion of the financial statements.*

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134 Financial Regulations, Regulation 20.

135 <https://www.agsa.co.za/AuditInformation/AuditTerminology.aspx>

118. Since at least 2011/2012<sup>136</sup> the Trust and the Board have consistently received qualified and/or adverse audit opinions from the AGSA, and the Trust has not received a clean audit outcome from the AGSA at all during this period.

<b>ANNUAL</b>	<b>Consolidated</b>	<b>Separate Financial Statements*</b>	
<b>Report</b>	<b>Financial Statements</b>	Ingonyama Trust Board	Ingonyama Trust
<b>2011/2012</b>	Qualified		
<b>2012/2013</b>	Qualified		
<b>2013/2014</b>	Qualified		
<b>2014/2015</b>	Qualified		
<b>2015/2016</b>	Adverse		
<b>2016/2017</b>	Qualified		
<b>2017/2018</b>	Adverse		
<b>2018/2019</b>	Adverse		
<b>2019/2020</b>		Qualified	Adverse
<b>2020/2021</b>		Unqualified	AFS not presented
<b>2021/2022</b>		Unqualified	Qualified

\*From 2019/2020, the AGSA began reporting on the Trust and the Board separately, accepting the Board's contention that there are two separate entities. From 2019/2020 the AGSA accepted that the Trust does not fall within the ambit of the PFMA.

119. The AGSA confirmed its mandate to audit the financial statements of the Trust and the Board in its presentation to the PPC on 25 October 2017 and again in its report to the PPC on 16 November 2021. In this later meeting, the AGSA stated that while the Trust was not listed in Schedule 3A of the PFMA, AGSA audits are not limited to entities listed in the schedule. The AGSA further confirmed in this meeting that its mandate goes beyond listed entities to unlisted entities that have a public interest or receive public funding which is why the AGSA audits the Trust.<sup>137</sup>

120. The Board has had long-standing disagreements with the AGSA concerning specific aspects of its audit outcomes which are dealt with more fully below.

136 ITB Annual Reports from 2012/2013 – 2019/2020: <http://www.ingonyamatrust.org.za/resource-centre/>

137 Presentation of the ITB to the PPC, 16 November 2021. <https://pmg.org.za/committee-meeting/33802/>



## 9.2. Accounting Standards

121. Section 216(1)(a) of the Constitution provides that national legislation shall prescribe measures to ensure both transparency and expenditure control in each sphere of government by introducing generally recognised accounting practice.
122. The PFMA was duly passed in 1999, in accordance with which an Accounting Standards Board (ASB) was established under the Act. The ASB was required to set standards of generally accepted accounting practice.<sup>138</sup> The standards set out in the financial reporting framework of the South African Standards of Generally Recognised Accounting Practice (GRAP) are issued by the ASB. The South African Standards of GRAP are the reporting standards which apply to the public sector in South Africa, and therefore apply to the Trust and to the Board. GRAP contains guidelines and rules for reliable, accurate and consistent reporting of the financial activities of public sector entities. The Minister of Finance<sup>139</sup> prescribed the financial reporting framework of GRAP as set by the ASB for public entities in 2005.<sup>140</sup>
123. Compliance with recognised accounting principles and standards is fundamental for stakeholders in both public and private entities. Recognised reporting principles and standards provide rigor to the financial oversight of both public and private entities. Recognised accounting principles furthermore require information to be disclosed in a meaningful manner such that the annual reports provide appropriate information to the stakeholders of an entity.

Some high-level references in this regard include:

### **GRAP 1**

- .17 Financial statements shall present fairly the financial position, financial performance and cash flows of an entity. Fair presentation requires the faithful representation of the effects of transactions, other events and conditions in accordance with the definitions and recognition criteria for assets, liabilities, revenue and expenses. The application of Standards of GRAP with additional disclosures, when necessary, is presumed to result in financial statements that achieve a fair presentation.*
- .18 An entity whose financial statements comply with Standards of GRAP shall make explicit and unreserved statement of such compliance in the notes. Financial statements shall not be described as complying with Standards of GRAP unless*

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138 PFMA, Section 89(1)(a).

139 Ibid, Section 91.

140 General Notice R991 of 2005 (GG 28095, 07 December 2005).

*they comply with all the requirements of GRAP.*

*.19 In virtually all circumstances, a fair presentation is achieved by compliance with applicable Standards of GRAP. A fair presentation also requires an entity:*

*(a) to select and apply accounting policies in accordance with the requirements of the Standard of GRAP on Accounting Policies, Changes in Accounting Estimates and Errors (GRAP 3), which sets out a hierarchy of authoritative guidance that management considers in the absence of a Standard that specifically applies to an item;*

*(b) to present information, including accounting policies, in a manner which provides relevant, reliable, comparable and understandable information;*

*(c) to provide additional disclosures when compliance with the specific requirements in Standards of GRAP is insufficient to enable users to understand the impact of particular transactions, other events and conditions on the entity's financial position and financial performance.*

**IAS 1 provides:**

- Financial statements are a structured representation of the financial position and financial performance of an entity. The objective of financial statements is to provide information about the financial position, financial performance and cash flows of an entity that is useful to a wide range of users in making economic decisions. Financial statements also show the results of the management's stewardship of the resources entrusted to it.*
- When items of income or expense are material, an entity shall disclose their nature and amount separately.*
- An entity shall present an analysis of expenses recognised in profit or loss using a classification based on either their nature or function within the entity, whichever provides information that is reliable or more relevant.*

124. Other GRAP standards may be of relevance, which would require consultation with authoritative sources to confirm.

125. The Board is responsible for preparing the financial statements for the Trust and for the fair presentation of the Trust's affairs in conformity with generally accepted accounting practice,<sup>141</sup> and has routinely done so in accordance with GRAP. The AGSA has consistently audited the consolidated and separate financial statements of the Trust and the Board in terms of GRAP and International Standards of Auditing (ISA) as confirmed in their annual reports. However, in the 2019/2020 Annual Report, the

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141 Financial Regulations, Regulation 6.



Board appears to query the qualification applied by the AGSA, which it stated was based on the AGSA's interpretation of GRAP:

*'The AGSA has qualified the books of the Trust on matters based on its interpretation of GRAP standards, on which the accounting authority has its own views due to the legal nature and circumstances impacting on these matters.'* The Board further references disagreements with the AGSA and that *'the Board has noted that for many years the audit qualification matters have become a subject of dispute for which there has been no common mutual understanding by the Board and the AGSA. The Board is therefore convinced that these matters can only be amicably resolved by means of invoking the dispute resolution process in terms of the signed engagement letter.'*<sup>142</sup>

126. Again, in 2021/2022 Annual Report, Mr Ngwenya stated that there remained an ongoing discussion as to how the Trust should be audited.<sup>143</sup>

127. It is unclear why the Board seeks to query the application of GRAP standards to the Trust. In a meeting in January 2021 on the Department's audit outcomes report from the AGSA, the AGSA in its report expressed concern that there were 'significant disagreements' with the Board on audit outcomes and audit findings and that compliance from previous years remained a key disagreement.<sup>144</sup>

128. To understand the disputes fully, it is worth examining the issues raised by the AGSA.

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142 ITB Annual Report 2019/2020, p 110-111.

143 ITB Annual Report 2021/2022, p 74.

144 Department's meeting with AGSA on Audit Outcomes on 26 January 2021. [https://static.pmg.org.za/210126PFMA\\_\\_DRDLR\\_Portfolio.pdf](https://static.pmg.org.za/210126PFMA__DRDLR_Portfolio.pdf)

## 10. ISSUES RAISED BY THE AGSA

129. A review of the Board's Annual Reports available from 2011/2012 indicates that there are recurring items which the AGSA has raised which form the basis of its qualified and adverse audit opinions of the Trust and the Board. These include issues relating to property, plant and equipment, mining royalties and municipal rates as well as failure to prepare financial statements in accordance with the PFMA, internal control deficiencies and expenditure management.

### *10.1. AGSA concern no. 1: PPE – Property, Plant and Equipment*

130. The AGSA has at least since 2011/2012 noted property, plant and equipment (PPE) as one of the bases for its qualified or adverse audit opinions of the Trust, specifically in relation to the valuation of Trust land. The AGSA has requested that since the land was acquired by the Trust at nil or nominal consideration, it should be recognised at 'fair value' as at the date of acquisition in accordance with the provisions of one of the categories of GRAP, GRAP 17 – Property, Plant and Equipment, in order that values for subsequent years may be established for financial reporting purposes. The Board has pushed back on this request, arguing in the annual reports from 2011/2012 to 2014/2015 that the cost of valuing 2.8 million hectares of land would be 'exorbitant/enormous' and that funds could be put to better use.

131. In 2017/2018 the Board stated that it had not determined or disclosed land value previously but had included a valuation of land of R28 billion in the Annual Financial Statements of the 2017/2018 year based on municipal valuations. In order to verify this, the AGSA had asked for a sample of survey diagrams and title deeds. The Board said it had requested additional time to provide the information required but this was not granted. Had it been given additional time, it argued, it would have averted the adverse opinion which was then issued.<sup>145</sup> In 2018/2019, the Board responded to the AGSA's again-adverse opinion in this regard by stating that it was working on a 'land register' which would satisfy audit requirements.

132. In 2019/2020, the first year in which the AGSA reported on the financials of the Board and of the Trust separately, the AGSA issued an adverse opinion for the Trust, again based on the following facts: that the Trust did not recognise and measure PPE in accordance with GRAP 17; that land controlled by the Trust was not reflected in the financial statements; and that land values were incorrectly determined due to

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145 ITB Annual Report 2017/2018, p 70. See Note 28.1 p 99: 'Land vested to the Ingonyama Trust in 1994 was valued at R28 billion in 2017/2018 based on municipal valuations. A prior year adjustment was made to fairly present the land value of the prior year (previously reported at R34 590 410). Land and accumulated surplus has been increased by R28 billion.'

inadequate controls being in place to value the land. Consequently, the AGSA was not able to determine the full extent of PPE of over R24 billion, as it was impracticable to do so. The Trust did not recognise land held to earn rentals in accordance with the requirements of GRAP 16 (Investment Property) by recognising it at fair value from the acquisition date. Consequently, Property, Plant and Equipment was overstated and Investment Property understated.<sup>146</sup> The Board responded that the Trust had a land register in place that itemised land vested in the Trust and its extent, which was submitted for audit purposes. In his overview, the CEO of the Board addressed the adverse audit opinion for the Trust stating that these findings had been referred to a dispute resolution mechanism and that their validity would be tested in that process. He stated, *'It should be noted that Ingonyama Trust is not a subject of the PFMA evaluation as it does not get any grant from Government.'*<sup>147</sup>

133. In 2020/2021, the Board failed to publish the Annual Financial Statements for the Trust and did not deal with Trust property at all in its (incomplete) Annual Report.

134. In the 2021/2022 Annual Report, it seemed that the AGSA and the Board had resolved the issue and the AGSA, for the first time in ten years, did not raise PPE as a basis for its qualified opinion for the Trust. (The qualification instead related primarily to another ongoing issue – municipal rates). During the presentation by the Board of the 2021/2022 Annual Report in October 2022, which included the Trust's financial statements, the CFO responded to questions from members of the committee relating to PPE. He stated that the Trust had struggled to deal with land in a way that would comply with GRAP 17 as requested by the AGSA because it would have required identification and valuation of land for all the properties available. As a result, *since this had been a contentious issue for a long time*, this issue had been discussed with the AGSA and the Board had arrived at the *'correct accounting treatment'* which had been implemented in the previous year.<sup>148 149</sup>

135. Thus, in the 2021/2022 financial statements, the manner that Trust land is dealt with is fundamentally different from that of previous years. In 2019/2020, the fair value of Ingonyama Trust land is reflected as R24 billion.<sup>150</sup> However, in 2021/2022 the notes to the financial statements on land state, *'Due to the unique nature of the Trust, the [Trust] land has been split into two main categories'*.<sup>151</sup>

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146 ITB Annual Report 2019/2020, p 107.

147 Ibid, p 14.

148 Presumably a reference to in the financial statements of the Trust in 2020/2021 which cannot be confirmed as the Trust's financial statements for 2020/2021 were not presented to the PPC and have not been published.

149 PPC Meeting, 12 October 2022: ITB presentation of Annual Report 2021/2022. <https://pmg.org.za/committee-meeting/35715/>

150 ITB Annual Report 2019/2020, p 139.

151 ITB Annual Report 2021/2022, Note 4, p 97.

- *Trust land that is within the control of the Trust:* This appears to be a reference to land that is not within the proclaimed jurisdiction of any traditional or community authority. The notes states, ‘*Land that is legally held by Ingonyama as Trustee and is not within the proclaimed jurisdiction of any Traditional Authority or Community Authority is in direct control of the Trust due to the absence of restrictions on such land.*’ The carrying value of this land is disclosed as being approximately R2.9 billion, consisting of approximately 250 755 hectares.
- *Trust land that is legally held by the Ingonyama as Trustee and not wholly within the control of the Trust.* The note states, ‘*Due to the nature of restrictions imposed by section 2(5) of the KwaZulu Ingonyama Trust Act neither the Ingonyama Trustee or the Trust has the right to direct access to land, and to restrict or deny access of others to land.*’ This appears to refer to land which falls within the proclaimed jurisdiction of traditional and community authorities. It is itemised in a table included in the Annual Report under the name of each authority in the notes to the financial statements but there is no detail as to the fair value of the land. Only the extent is reflected.

136. This is a highly significant departure from the way in which Trust land was previously dealt with and valued. The Trust Act specifically provides that all the Trust land is held by the Trustee for and on behalf of the Trust beneficiaries, in other words, this remains true whether or not the land falls within the jurisdiction of a traditional or community authority. Indeed, there are no sub-categories of land in the Trust Act and no reference to proclaimed jurisdictions of traditional or community authorities other than in relation to consent provisions. In the context of the Trust, this reporting change may have far-reaching consequences for land tenure and land rights on Trust land going forward.

137. The categorisation of land reported in the 2021/2022 Annual Report implies that a certain amount of Trust land with a carrying value of R2.9 billion and consisting of approximately 250 755 hectares is separately owned or different from Trust land which the Trust has listed as falling under traditional and community authorities. This category appears to ignore that there may be communities and residents referred to in the Trust Act who are living on this land, as well as historical situations that may have bearing, for instance where certain traditional communities and authorities were deprived of their land during colonialism and apartheid (such as the AmaHlubi). The differentiation between land under traditional councils and the remainder, which is purportedly fully Trust-controlled, reinforces the narrative that communal land is owned directly by traditional councils where they exist, and by the State where they do not. This is contrary to the rights of the beneficiaries which are set out in the Trust Act and the strength of customary ownership rights confirmed by

the Constitutional Court in the Alexkor judgment.<sup>152</sup> It is also contrary to judgement of the KZN High Court relating to the conversion of Permission to Occupy Rights on Trust land into leases in 2022, in which the Court held that the persons living on the Trust land are the true and beneficial owners of Trust held land.<sup>153</sup>

138. It is unclear how or why the AGSA accepted this fundamental change in reporting relating to land, or whether this change resulted from the discussions with the AGSA referred to by the Board CFO as described in para **133**. At the very least, the AGSA should ensure that both these new categories of land are properly identified, disclosed and individually valued in order that the relevant rates and taxes, including transfer duty payable thereon, can be assessed. In addition, a reassessment of the Trust's exemption from income tax in relation to this land should be considered.

139. Furthermore, statutory oversight of this development is critical in light of the fact that private trust legislation does not apply to the Trust.<sup>154</sup> By falling outside the ambit of private trust legislation, the Ingonyama as Trustee is exempted from furnishing any form of security in dealing with any Trust property, and the provisions of the Trust Moneys Protection Act<sup>155</sup> and the Trust Property Control Act<sup>156</sup> do not apply to the Trustee or to the Trust. If the Trust persists in regarding some land as not being wholly in control of the Trust, application of private trust legislation to such land should be considered.

140. At the very least, the PPC should urgently interrogate this change in reporting and a legal opinion regarding the legality of the creation of these land categories should be obtained without delay.

## *10.2. AGSA concern no. 2: Mining Royalties*

141. The Board has had a long-standing disagreement with Treasury, and more latterly with the Department of Mineral Resources and Energy (DMRE), regarding entitlement to royalty income on Trust land. In its reports in 2011/2012 and 2012/2013, the AGSA noted that there was a lack of effective controls to ensure royalty revenue was properly recorded, and that the Board did not take steps to properly collect royalty revenue due. Both of these were necessary in terms of Section 51(1)(b)(i) of PFMA which requires an accounting authority to take effective and appropriate steps to collect all revenue due to the public entity concerned. The Board responded that

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152 Alexkor Ltd and Another v The Richtersveld Community and Others, 2003 (12) BCLR 1301.

153 Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others (12745/2018P) [2021] 2022 (1) SA 251 (KZP) (11 June 2021).

154 Trust Act, Section 2(6).

155 Trust Moneys Protection Act (Act 34 of 1934).

156 Trust Moneys Property Control Act (Act 57 of 1988).

the Trust was not able to monitor each ton of mineral extracted and that they were unsuccessful in obtaining audit certificates from mining operators.

142. The AGSA from 2013/2014 to 2017/2018 repeatedly noted the incorrect recognition of royalties as revenue as being contrary to one of the GRAP categories, GRAP 9 (Revenue from Exchange Transactions), which it raised as a basis for its qualified or adverse audit opinions. The Board noted its disagreement with the AGSA in 2013/2014 on this issue and in that year requested that the matter be referred to an arbiter.<sup>157</sup>

143. In 2017/2018 the Board stated that the Trust had lost a significant portion of royalties to the State due to the Mineral and Petroleum Royalties Act of 2009. The Board felt that these royalties should accrue to the beneficiary communities in KZN and pointed out that there was no record that communities living on Trust land received direct benefit from the royalties paid to the State. The Board stated that the Trust was of the view that the royalties should be retained by the Trust and that it had contacted the then Department of Mineral Resources (DMR – now the DMRE) to state its view that contractual royalties should be paid to the Trust.

144. The then-DMR asked the Board to prepare a five-year plan for approval by National Treasury detailing how funds were to be used for purposes of local economic development and social upliftment of communities. The chairperson of the Board acknowledged this request, stating that it could not be done by the end of that financial year *‘as it required the inputs from various stakeholders including Amakhosi, also the huge extent of Ingonyama Trust Land that is mined by a large number of mining operators’*.<sup>158</sup> It is not clear from subsequent annual reports whether the requested five-year plan was prepared and submitted to the DMR. It is also not clear whether the DMRE approved the retention of royalties by the Trust.

145. The issue of royalties revenue was not raised by the AGSA in its report in 2018/2019, which is the financial year in which the Board contends that save for Treasury Regulation 14, the PFMA does not apply to the Trust. The issue was however dealt with in detail by the Board in the notes to the financial statements. The Board referred to an ongoing debate with the AGSA regarding royalties, the Board being of the view that all royalties paid to the State were due to the Trust for the benefit of the beneficiaries. The Board challenged the notion that minerals on Trust land could be expropriated by the State with the reasoning that *‘The Ingonyama Trust being a creature of the [S]tate and therefore the [S]tate could not have expropriated itself, since the [S]tate cannot expropriate itself’*.<sup>159</sup> From 2018/2019, the AGSA does not raise the issue

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157 ITB Annual Report 2013/2014, p 38.

158 ITB Annual Report 2017/2018, p 72.

159 ITB Annual Report 2018/2019, p 99.



of royalties in its reports. From 2020/2021 royalties are no longer reflected in the Trust's annual financial statements.

### 10.3. AGSA concern no. 3: Municipal Rates

146. The payment of municipal rates by the Trust is an ongoing issue in KZN and has been the subject of extensive litigation going back to 2003.

147. This is a perplexing issue in that in terms of Section 4A of the Trust Act, any land that was situated in a township which vested in the Ingonyama prior to the amended Trust Act of 1997, would vest in the local authority having jurisdiction over such township after the amendment was enacted. If the township existed on the date of commencement of the amended Trust Act, vesting took place on the date of the amended Trust Act, and if the township was established, approved or proclaimed after the amended Trust Act, on the date of such establishment, approval or proclamation. The amended Trust Act gives the Registrar of Deeds the authority to endorse the title deeds for such township land accordingly. Thus, the rates issue arises only because the Trust has retained ownership of such urban land contrary to the law.

148. Liability for municipal rates has been raised by the AGSA as one of the bases for its qualified/adverse audit opinions since 2011/2012. The Trust was involved in lengthy litigation in this regard with the eThekweni Municipality, for which it noted a contingent liability of over R100 million in 2015/2016 (increased to R126 million in 2017). It was also party to a dispute with the Mandeni Municipality for which it noted a contingent liability of over R26 million<sup>160</sup> (increased to R37 million in 2017<sup>161</sup>). In 2022 the Msunduzi Municipality disconnected the electricity for the Board's offices in Pietermaritzburg in relation to an outstanding debt.<sup>162</sup> Following an urgent application by the Board, power was restored; however, this matter is also now the subject of litigation.

149. In setting out the basis for its adverse opinion for the Trust in the 2018/2019 year, the AGSA again noted that the Trust did not recognise expenditure relating to municipal property rates in the financial statements, which resulted in non-compliance with GRAP 1 (Presentation of Financial Statements). The AGSA stated that adequate systems were not in place to ensure that all municipal rates payable were identified and recognised and that consequently total expenditure and current liabilities were understated. This had a resultant impact on the surplus for the period and on

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160 ITB Annual Report 2015/2016, p 71.

161 ITB Annual Report 2016/2017, p 92.

162 <https://www.iol.co.za/mercury/news/msunduzi-cuts-power-to-offices-of-ingonyama-trust-over-a-rates-debt-f7dd63d1-5d69-4b74-8a52-0ebf87247691>

the accumulated surplus.<sup>163</sup> The Board responded by stating that save for Treasury Regulation 14, the provisions of the PFMA did not apply to the Trust and set out a detailed premise for this submission.<sup>164</sup>

150. In 2019/2020, the AGSA recorded an adverse audit opinion for the Trust and again the failure by the Trust to recognise expenditure relating to municipal rates was one of the bases for this. Instead, the Board noted, a contingent liability for rates was reflected as over R195 million in the financial statements. The notes state that the uncertainty relating to the Trust's liability to municipalities for rates had led to a legal impasse and that COGTA had facilitated a discussion between the Board and municipalities with a view to finding a solution. The Board argued that it did not disclose municipal rates as a liability because the submission of invoices to a ratepayer did not automatically make the ratepayer liable to pay rates, and stated again that it had engaged with COGTA and municipalities to resolve the matter. Hence, a liability had not been recognised.<sup>165</sup>

151. Since the Board failed to publish the 2020/2021 annual financial statements for the Trust, and since municipal rates are a liability under the Trust and not the Board, this matter was not dealt with in the Board's financial statements. In 2021/2022, the AGSA in issuing another qualified opinion, once again noted that municipal property rates relating to land held by the Trust were not recognised in the annual financial statements (as required by GRAP), thus total expenditure and current liabilities were understated. This impacted on the deficit for the period and on the accumulated surplus. The municipal rates were disclosed as a contingent liability, when they should have been disclosed as an expense. As such, contingent liabilities, expenditure and payables were misstated.<sup>166</sup> The Board did not respond specifically to the qualified opinion, but again noted that COGTA was facilitating discussions with the Board and the municipalities with a view to finding a solution.<sup>167</sup>

152. The Chairperson of the Board expressed his view in his 2021/2022 overview that the rating on Trust land was hugely flawed and that this was one of the reasons that a dispute had been declared with the AGSA.<sup>168</sup> In its presentation to the PPC in October 2022,<sup>169</sup> the CEO of the Board confirmed that there were ongoing discussions with COGTA and three of the larger municipalities, eThekweni, Mandeni and Newcastle, to resolve this issue.

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163 ITB Annual Report 2018/2019, p 47.

164 See Section 7.6 above.

165 ITB Annual Report 2019/2020, p 111.

166 ITB Annual Report 2021/2022, p 75.

167 Ibid, p 114.

168 Ibid, p 6.

169 PPC Meeting, 12 October 2022; ITB presentation of Annual Report 2021/2022, with Deputy Minister of Agriculture, Land Reform and Rural Development. <https://pmg.org.za/committee-meeting/35715/>



153. The issue has now dragged on for more than a decade, placing municipalities in KZN in a difficult position. Although the issue remains unresolved, talks are understood to be ongoing.

#### 10.4. AGSA concern no. 4: Compliance with the PFMA

154. Generally, from 2013/2014 to 2018/2019, the AGSA audited the financial statements of the Trust and the Board in accordance with the PFMA and noted that the financial statements for the Trust and the Board submitted for auditing were not prepared in accordance with the prescribed financial reporting framework as required by section 55(1) of the PFMA.

155. This section of the PFMA concerns annual reports and financial statements and requires that the accounting authority for a public entity such as the Board for the Trust, must amongst other obligations:

- *keep full and proper records of the financial affairs of the public entity such as the Trust,*
- *and prepare financial statements for each financial year in accordance with generally accepted accounting practice for that public entity.*

156. The contention by the Board that the Board and the Ingonyama Trust should be audited separately and that the Board should prepare separate financial statements for the two entities was a key point of dispute with the AGSA between 2015 and 2019. The history of this is discussed in Sections 7.1 to 7.6 of this document which examine how the Board has shifted the narrative regarding its reporting responsibilities for the Trust, and how it has arrived at a point where it is no longer held to an obligation to report on the Trust's finances in terms of the PFMA. The AGSA has taken some important positions which have played into this change. In particular, an opinion expressed in a report to the PPC in 2016 (see para 43) revealed a misunderstanding of the relationship of the Board and the Trust and may have ultimately fundamentally affected the AGSA view of the Board's obligations.

157. In 2019/2020 when the AGSA began auditing the Trust and the Board separately, the AGSA (for the first time) did not comment on the preparation of the annual financial statements of the Trust in accordance with Section 55 of the PFMA. This was also the first year in which the AGSA stated that the Trust did not fall within the ambit of the PFMA (it made this remark in relation to whether the Trust had an obligation to report on pre-determined objectives).<sup>170</sup> This significant comment by the AGSA was repeated in its subsequent reports. There has been no explanation for the AGSA change in view.

158. Over the years, the AGSA and the Board have been in discussion regarding numerous issues that the AGSA raised in relation to qualified or adverse audits and by 2019/2020 it appeared that the AGSA had been fully persuaded that the Trust and the Board were separate entities and that the PFMA did not apply to the Trust.

159. The following year, representatives of the AGSA attended the presentation of the ITB's 2020/2021 Annual Report to the PPC on 16 November 2021, where the representatives briefed the committee on the Board's 2020/2021 audit outcomes. This included noting that the financial statements had not been submitted within the prescribed time periods as required under the PFMA, and that the Board's financial statements were not prepared in accordance with the PFMA. In fact, the financial statements for the Trust had been submitted so late that the AGSA was unable to brief the committee on the Trust's audit outcomes.

160. Representatives of the AGSA informed the committee that previously the reporting on the annual financial statements of the Board and the Trust had been consolidated. According to the PMG record of the meeting, *'With further evaluation of the statute applicable to the two entities, that consolidation was no longer applicable. The two entities now reported independently of each other.'* The AGSA representative said *'the Ingonyama Trust Board and the Ingonyama Trust are two separate entities. The fact that the audit of the Ingonyama Trust is outstanding has no impact on the ITB audit outcome because they are two separate audits.'* They further reportedly said, *'There will be no direct impact caused by the delayed signing of the Trust audit on the ITB audit.'*<sup>171</sup>

161. The AGSA did however confirm that it would continue to audit the Trust in accordance with Financial Regulation 20 which specifically states that its financial statements must be audited by the AGSA, and Section 4 of the Public Audit Act which requires the AGSA to audit the Trust.

### 10.5. AGSA concern no. 5: Internal Controls

162. The AGSA has consistently raised deficiencies relating to internal controls in its reports. From 2011/2012 to 2018/2019, the AGSA found that the Board's leadership did not establish effective oversight and monitoring over financial reporting processes and compliance with legislation. The AGSA noted in its separate reports for both the Trust and the Board in the 2019/2020 Annual Report that the leadership did not establish effective oversight and monitoring over financial reporting processes.<sup>172</sup> In addition it found in relation to the Board that the processes followed by management

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171 Ingonyama Trust Board 2020/21 Annual Report: <https://pmg.org.za/committee-meeting/33802/>  
172 ITB Annual Report 2019/2020, p 63, p 109.

were inadequate to ensure reliable financial reporting and adherence to laws and regulations. In relation to the Trust, it found that the processes followed by management were inadequate to monitor the preparation of the financial statements.

163. In 2020/2021 the financial statements for the Trust were not published. In 2021/ 2022, in its separate report for the Board and notwithstanding issuing an unqualified audit opinion, the AGSA stated that the leadership did not effectively monitor compliance with laws and regulations, evidenced by non-compliance findings and repetition of findings. Action plans were also not adequately monitored for progress in addressing issues raised by external auditors in prior years.<sup>173</sup> In relation to the Trust, which received a qualified audit opinion, the AGSA noted that the leadership did not effectively review the requirements of the financial reporting framework in order to provide oversight and ensure full and proper implementation thereof in the financial statements of the Trust and of the Trust's subsidiary, Ingonyama Holdings.<sup>174</sup>

#### *10.6. AGSA concern no. 6: Expenditure Management*

164. The PFMA requires that an accounting authority such as the Board, for a public entity such as the Trust, must ensure that the public entity takes effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct and expenditure not complying with the operational policies of the public entity.<sup>175</sup>

165. Over the years, the AGSA has raised concerns relating to expenditure. In 2011/2012 and 2012/2013 the AGSA noted that management did not exercise oversight over the funds disbursed to traditional councils to ensure compliance with the operational policies of the Trust as required under the PFMA.<sup>176</sup> In 2014/2015 and 2015/2016 the AGSA found that steps were not taken to prevent irregular expenditure under the PFMA. In 2017/2018 (the second year in which both consolidated and separate financial statements were prepared), the AGSA noted that the Board did not recognise expenditure on a comparable basis and incorrectly recognised expenditure relating to the Trust in the separate financial statements of the Board, resulting in non-compliance with GRAP 1. This meant that expenditure was overstated in the financial statements of the Board and impacted on the Trust's surplus for the period.<sup>177</sup> In 2018/2019, the AGSA identified irregular expenditure of R1.9 million which was not disclosed in terms of Section 55(2)(b)(i) of the PFMA relating to a contravention

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173 ITB Annual Report 2021/ 2022, p 37.

174 Ibid, p 77.

175 Section 51(1)(b)(ii) of the PFMA.

176 ITB Annual Report 2011/2012, p 40.

177 ITB Annual Report 2017/2018, p 64.

of supply chain management requirements. Management subsequently made a disclosure but immediately condoned the full amount without any investigation or proper approval. As a result, the AGSA was unable to determine the full extent of the irregular expenditure which was stated as a nil balance at year end.<sup>178</sup>

166. In 2019/2020, the first year in which the AGSA audited the financial statements for the Trust and the Board separately, the Board received a qualified opinion on the basis that it did not disclose the full extent of the irregular expenditure as required under Section 55(2)(b)(i) of the PFMA, relating to payments made in contravention of supply chain management requirements. The payments were not identified in the Board's system of internal controls and consequently the AGSA was unable to determine the full extent of irregular expenditure of R2.84 million.<sup>179</sup> The Board responded that it was not a specific '*requirement of section 55(2)(b)(i) of the PFMA to disclose the full extent of irregular expenditure*' and that the Board had complied with the PFMA in disclosing the extent of irregular expenditure '*based on its assessment of irregular expenditure*' and had amended the financial statements based on the AGSA's opinion.<sup>180</sup> However, Section 55(2)(b)(i) does specifically require that the annual report and financial statements of a public entity must include particulars of any irregular expenditure and fruitless and wasteful expenditure that occurred during the financial year. It is not clear why the Board seeks to argue that this does not mean it is required to disclose to the full extent.

167. In this financial year (2019/2020), in the AGSA's separate report for the Trust, the Trust in turn received an adverse audit opinion. One of the bases for this was that the Trust did not recognise expenditure relating to municipal rates, which was not in accordance with GRAP 1, as discussed above. As previously mentioned, the AGSA also specifically stated that the Trust did not fall within the ambit of the PFMA in relation to obligations to report predetermined objectives, which is required under the PFMA.<sup>181</sup> Thus, in the 2019/2020 financial year, the AGSA had proceeded on the basis that the PFMA was only applicable to the Board and not applicable to the Trust.

168. In 2020/2021 this issue could not be reviewed as the financial statements for the Trust were not submitted to the AGSA in time for it to present its report on the financial statements of the Trust to the PPC and at the time of writing of this report (February 2024) the 2020/2021 financial statements of the Trust had not yet been published.

169. In 2021/2022, the Board reported that management had put in place controls that

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178 ITB Annual Report 2018/2019, p 47.

179 ITB Annual Report 2019/2020, p 59.

180 Ibid, p 64.

181 Ibid, p 107.

had ensured effective monitoring of reporting of irregular expenditure.<sup>182</sup> Irregular expenditure amounting to R17 million for this year was disclosed, relating to employee costs, general expenses and transgressions relating to supply chain management.

170. The AGSA did not make any comment in relation to Trust expenditure. Once again, however, the AGSA noted that the Trust did not fall within the ambit of the PFMA.<sup>183</sup>

### 10.7. *A Non-Trading Entity or a Business Entity?*

171. In 2019/2020, (the year in which the AGSA began to report on the financial statements of the Trust separately from that of the Board) the AGSA found that the financial statements of the Trust did not present, in all material respects, the Trust's financial position in accordance with GRAP and the Trust Act and issued an adverse opinion.

172. In its response to the adverse opinion, the Board stated that the Trust was a 'non-trading' statutory trust created 'to own land for the benefit of its beneficiaries' and that its finances were regulated by Treasury Regulation 14.<sup>184</sup>

173. The reference to 'non-trading' is an interesting turn of phrase. This may be because the AGSA audits the Trust as a business entity, as noted in a comment from the Board in the 2021/2022 Annual Report: *'Neither is the Trust a business entity. Its income is derived from tenure administration. This notwithstanding the AGSA choose to audit the Ingonyama Trust as a business entity.'*<sup>185</sup> This pushback may have something to do with the fact that the PFMA places responsibilities on accounting officers of departments, trading entities and constitutional entities.<sup>186</sup> The reference to the Trust being a non-trading, non-business entity may therefore be an attempt to close the door on another form of PFMA application to the Trust.

174. Trading entities typically provide or sell goods and services in accordance with ordinary business principles with a profit objective. In the 2019/2020 Annual Report, the Trust's provision of goods and services is noted and there is a reference to revenue received from exchange transactions. The note relating to 'Revenue Recognition' stated, *'Revenue comprises the fair value of the consideration received or receivable for the sale of goods and services in the ordinary course of the Ingonyama Trust's activities.'*<sup>187</sup> It is not possible to ascertain further information about these endeavours as details are not disclosed in the financial reports.

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182 ITB Annual Report 2021/2022, p 8.

183 Ibid, p 76.

184 ITB Annual Report 2019/2020, p 110.

185 ITB Annual Report 2021/2022, p 74.

186 PFMA, Section 38.

187 ITB Annual Report 2019/2020 p 125.



# 11. CHANGES FROM 2019/2020

## 11.1. Change in References to Community Beneficiaries

175. From 2019/2020 onwards, there was a noticeable change in the manner in which funds available for community beneficiaries were described in the annual reports.

176. Prior to this, since at least 2011/2012, in annual financial statements under ‘*cash and cash equivalents*’, there was an accompanying note to the effect that that funds were ‘*available for community beneficiaries subject to them complying with the Board’s disbursement policy. Cash and cash equivalent balances held by the Trust are available for use.*’<sup>188</sup> The cash and cash equivalent amount were also reflected under ‘Provisions’, as Funds to be disbursed to beneficiaries (in terms of Board policy).

177. In the 2019/2020 Annual Report, (the first year in which the AGSA audited the financial statements of the Trust and the Board separately), under ‘Approval of Annual Financial Statements for the Trust’ the Board chairperson stated, ‘*From time to time the income earned is distributed to community beneficiaries in terms of the Board’s disbursement policy.*’<sup>189</sup> While ‘cash and cash equivalents’ is again referred to in a note in the 2019/2020 Report, it no longer makes reference to funds being available for community beneficiaries in terms of a disbursement policy.<sup>190</sup> In 2020/2021, the financial statements for the Trust were not presented. In 2021/2022, again the note referring to ‘cash and cash equivalents’ makes no reference to funds being available for community beneficiaries in terms of a disbursement policy, and while in this year a small amount is disclosed as disbursement to beneficiaries/traditional councils, there is no reference to the Board’s ‘disbursement policy’ at all.

## 11.28. Failure to Submit Financial Statements of the Trust

178. In 2020/2021, the second year in which the AGSA audited the financial statements for the Trust and the Board separately, the Board failed to produce the financial statements timeously, submitting the Board’s financial statements to the AGSA two months late and those of the Trust three months late. In fact, the financial statements for the Trust were not presented to the PPC for this financial year at all,<sup>191</sup> in contravention of the Board’s responsibilities as the accounting authority of the

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188 See for instance ITB Annual Report 2011/2012, p 69; ITB Annual Report 2012/2013, p 43; ITB Annual Report 2013/2014, p 59; ITB Annual Report 2014/2015, p 60; 2015/2016, p 67; ITB Annual Report 2016/2017, p 89; ITB Annual Report 2017/ 2018, p 97; ITB Annual Report 2018/2019, p 79.

189 ITB Annual Report 2019/2020, p 106.

190 ITB Annual Report 2019/2020, p 146.

191 PPC Meeting, 16 of Nov 2021, ITB Annual Report 2020/2021. <https://pmg.org.za/committee-meeting/33802/>

Trust under the Financial Regulations.<sup>192</sup> This failure resulted in the AGSA being unable to report on the financial statements of the Trust to the PPC. At the time of writing, the Trust's annual financial statements for 2020/2021 had yet to be presented to the PPC, and had not been published on the Board's website.<sup>193</sup>

179. In the AGSA presentation to the PPC in November 2021, the AGSA commented that the Trust and the Board were two separate entities. It also noted that the fact of the audit of the Trust being outstanding had no impact on the Board's audit outcome because they were separate audits.

180. The AGSA comments indicate a fundamental misunderstanding of the structure and nature of the Trust, and a failure to recognise that the Board, as the Trust's accounting authority, has no separate legal identity from the Trust. The AGSA also appears to have accepted the Board's submission that the PFMA applies only to the Board and not to the Trust, notwithstanding the views of the Minister expressed in 2017 after the Minister obtained legal opinion on the matter, and the concerns which the PPC has on numerous occasions raised.

181. The approach condoned by the AGSA undermines the right of the beneficiaries of the Trust to transparent disclosure of the exact and itemised income of the Trust so that the allocation of 10 percent to the Board to cover costs reasonably incurred to achieve the objects of the Act in terms of Financial Regulation 10(2) can be determined. If details of the income of the Trust are not presented, the stakeholders of the Trust have no way of understanding the amount available for administration and to cover disbursements. This is imperative given the Board's recent complaints to the PPC that it lacks funding which, it has stated, has caused a lack of capacity which in turn has affected its performance. The chairperson of the Board commented at a meeting with the PPC in May 2022 that he did not understand why the Board was criticised, *'especially since [the Department] has not provided additional money to the entity'*,<sup>194</sup> and in the September 2022 meeting, that the Board was only doing what it could do *'based on available resources'*.<sup>195</sup>

182. The chairperson of the PPC, Mr Mandla Mandela responded to the AGSA presentation in November 2021 by saying that annual reports must include audited financial statements reflecting the Trust's financial affairs, consisting of at least a balance sheet income statement and an audit report. Since the report before the PPC did not

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192 Financial Regulations, Regulation 6.

193 PMG website: <https://pmg.org.za/committee-meeting/35715/>; Ingonyama Trust Board website: <http://www.ingonyamatrust.org.za/resource-centre/>

194 PPC Meeting, 3 May 2022: ITB Annual Performance Plan 2022/2023. <https://pmg.org.za/committee-meeting/34775/>

195 PPC Meeting, 13 September 2022: ITB quarterly Performance, with Minister. <https://pmg.org.za/committee-meeting/35536/>

include these, the extent to which the PPC, as an extension of the National Assembly, could hold both the Board and the Trust to account was limited, and without the audited financial statements of the Trust, the annual report which accounted only for the finances of the Board was incomplete. In light of this, the committee would not be doing its duty if it agreed that Board could table a report without the Trust's annual financial statements. Mr Mandela said that an attempt to submit a report without financial statements could be interpreted as a complete disregard for accountability and a disregard for the oversight function of the committee. It also meant that the PPC did not have the opportunity to question the Board on the performance of the Trust. He proposed to the committee that it should not accept the 2020/2021 Annual Report until a comprehensive report that included the audited financial statements of the Trust was presented. This proposal was supported by the committee. Members of the PPC were highly critical of the presentation and called for legal advice, querying what purpose was served by the Board and asking that the Trust be placed under administration, and that a forensic audit of the Trust be undertaken.<sup>196</sup>

## ORGANISATIONAL STRUCTURE

187. Another consequence of the separate entity argument now seemingly being fully entrenched was that there was a noticeable change from all previous years in the way that the organisational structure of the Trust and the Board was presented. In the 2021/2022 document the Trust no longer appears in the organisational structure presented in the Annual Report.<sup>197</sup>

188. In a meeting with the PPC on 12 October 2022, the CEO indicated that the Board was in transition and was redesigning its organisational structure.<sup>198</sup>

189. The graphic below shows changes in the way the organisation has been structured since 2016. This is a matter that should be interrogated by the Minister and the PPC. The founding structure of the Ingonyama Trust as originally envisaged should be reverted to – as a land-holding Trust which is subject to the oversight of the PFMA and managed by the Board as its accounting authority. This would ensure proper management, properly funded by the Trust, with Trust expenses itemised and Board expenses covered by the government grant, and shortfalls for administrative costs covered by the Trust.

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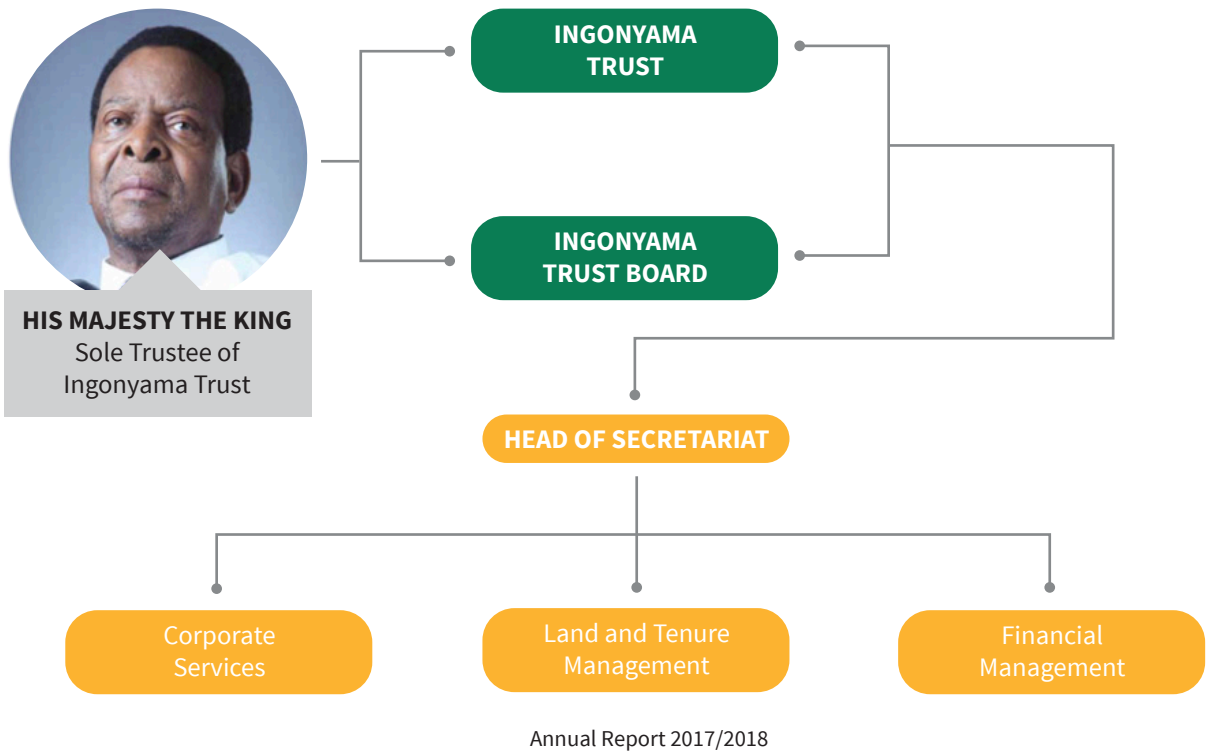
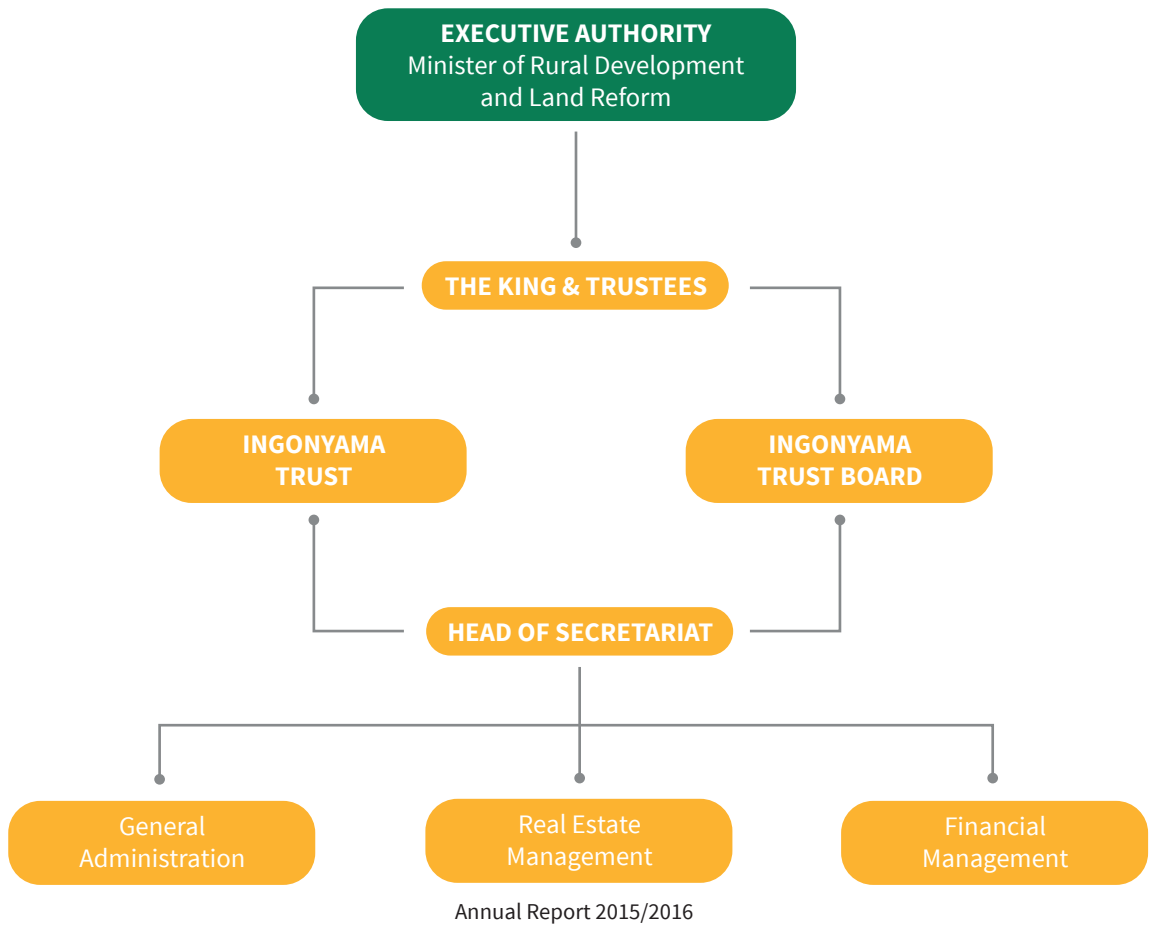
196 PPC Meeting 16 of Nov 2021, ITB Annual Report 2020/2021. <https://pmg.org.za/committee-meeting/33802/>

197 ITB Annual Report 2021/2022, p 16.

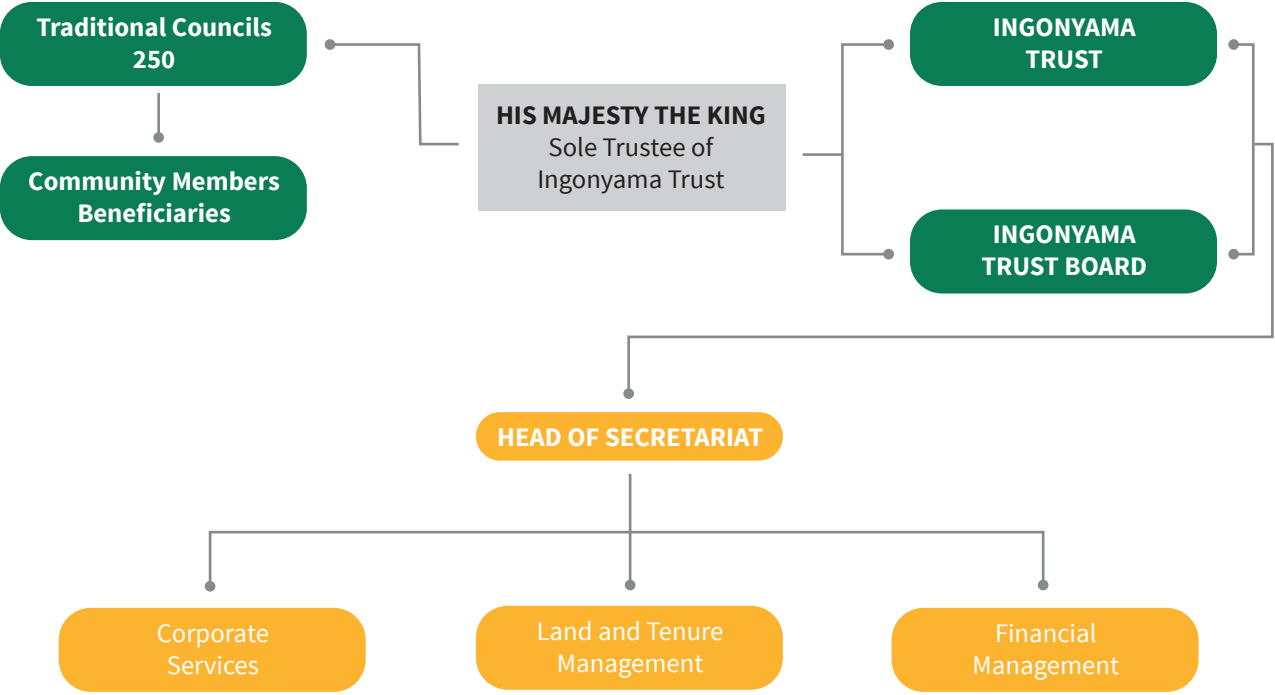
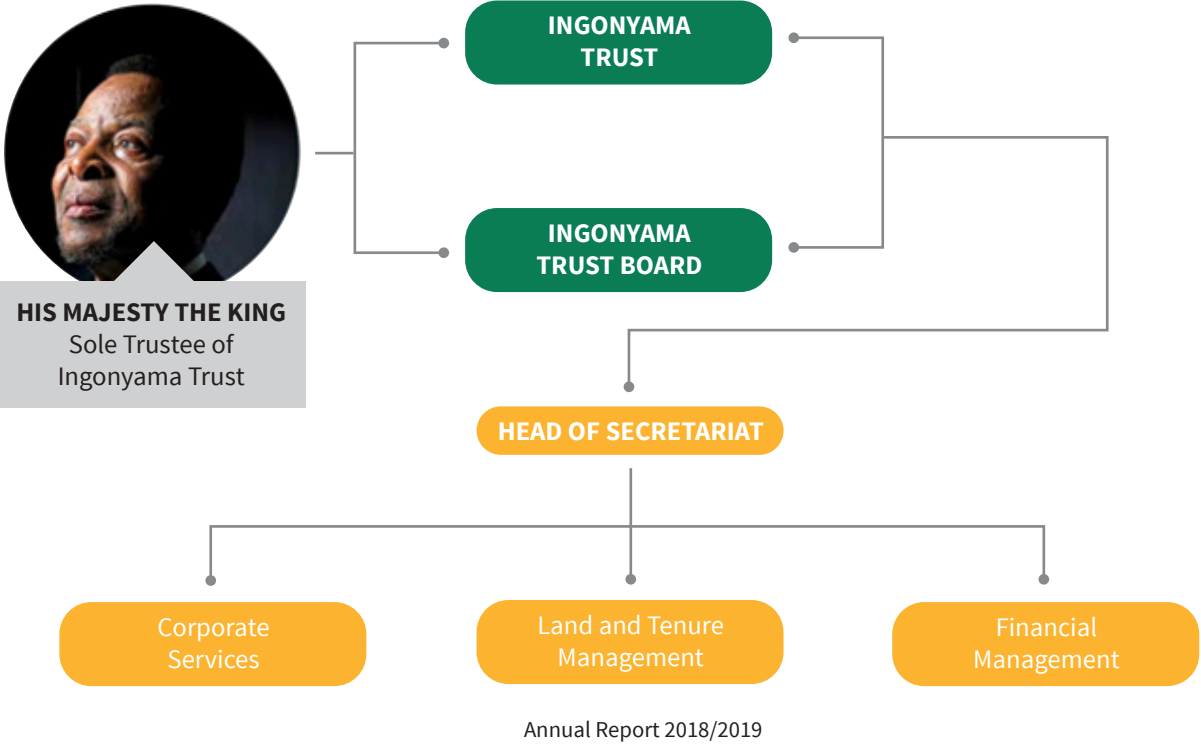
198 Meeting with PPC, 12 October 2022, p 20: <https://pmg.org.za/committee-meeting/35715/>



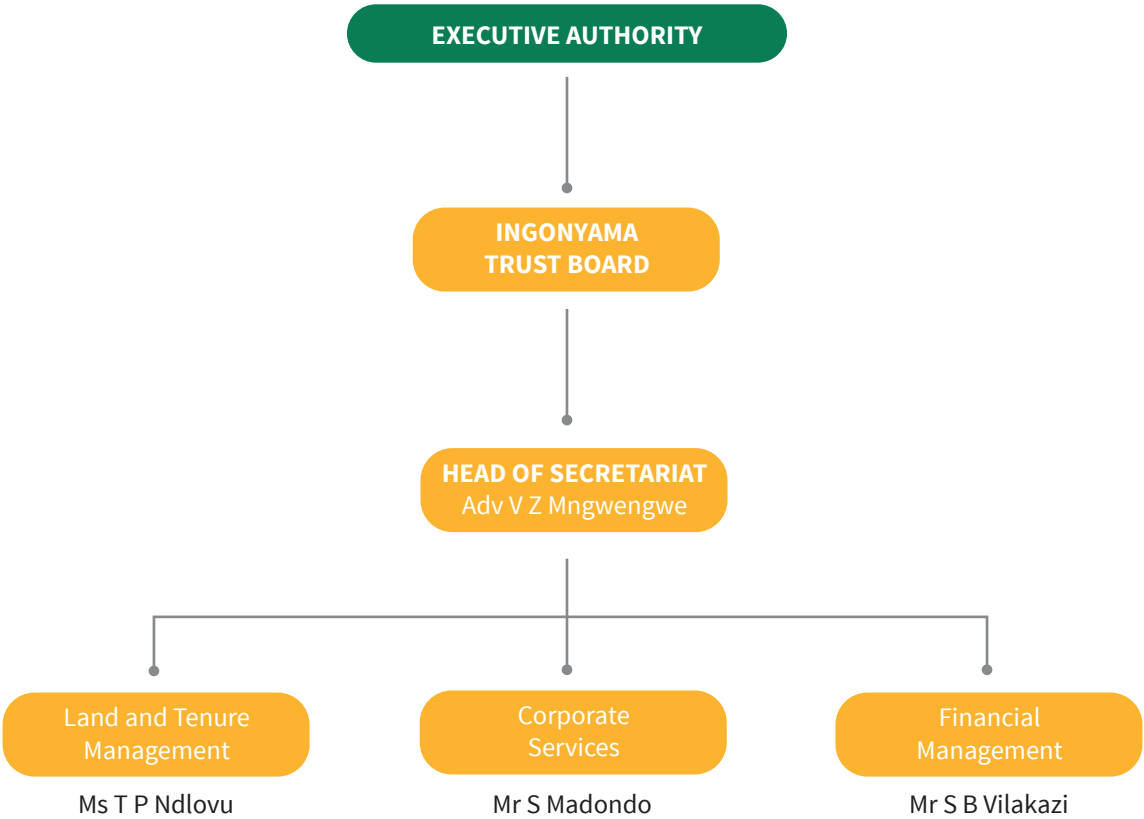
# ORGANISATIONAL STRUCTURE



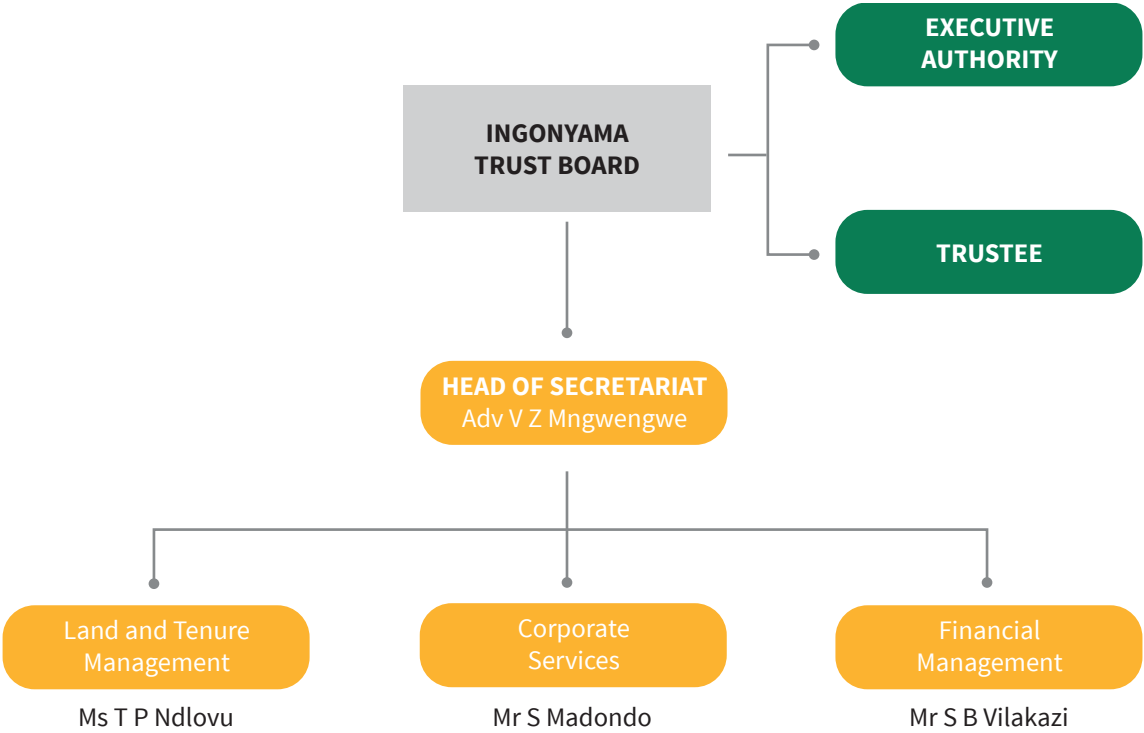
# ORGANISATIONAL STRUCTURE



# ORGANISATIONAL STRUCTURE



Annual Report 2020/2021



Annual Report 2021/2022

## 12. IMPLICATIONS OF THE PFMA NOT APPLYING TO THE TRUST

190. While the financial controls and reporting requirements of the Financial Regulations issued in terms of the Trust Act are comprehensive, those contained in the PFMA are more rigorous and demand a high degree of transparency. The PFMA also sets out fiduciary obligations of accounting authorities, as well as consequences for failure to comply.
191. From 2013/2014 to 2018/2019,<sup>199</sup> the AGSA routinely found that the financial statements submitted by the Board for auditing were not prepared in all material respects in accordance with the prescribed financial reporting framework as required by section 55(1) of the PFMA.<sup>200</sup> In 2019/2020, when it began auditing the Trust separately, the AGSA did not comment on the preparation of the annual financial statements for the Trust in accordance with Section 55 of the PFMA because the AGSA no longer reported on the Trust's financial statements in terms of the PFMA.
192. The question must be asked why the Board has gone to such lengths to argue that save for Treasury Regulation 14, the PFMA does not apply to the Trust. The following matters were noted in the AGSA's reports on the Trust's annual financial statements prior to 2019/2020, when it stopped referencing PFMA requirements, and are examples of the kinds of issues which may escape scrutiny in a scenario where the PFMA does not apply to the Trust.

### 12.1. Revenue Sources

193. Over the years, the Trust has generated significant income from both residential and commercial leases, and from commercial enterprises.
194. In 2007, the Board implemented a policy whereby Permission to Occupy certificates (PTOs) would no longer be issued and existing PTOs would be converted to lease agreements for both residential and commercial properties. This meant that occupants of Trust land would have to pay rental to live on the land they already owned under customary law. The Trust accumulated substantial revenue, reserves and cash as a result of this lease policy: In 2013, rental revenue is shown at R41.6 million and in 2020 this jumped to R172 million.

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199 ITB AR: 2013/2014 – 2016/2017: Sections 55(1)(b); 2017/2018: Sections 55(1)(a) and (b), 2018/2019 Section 55(1).

200 PFMA, Section 55(1): Annual report and financial statements (1) The accounting authority for a public entity (a) must keep full and proper records of the financial affairs of the public entity; (b) prepare financial statements for each financial year in accordance with generally accepted accounting practice, unless the Accounting Standards Board approves the application of generally recognised accounting practice for that public entity.

195. In 2021, however, the KZN High Court unanimously held<sup>201</sup> that the Trust and the Board had acted unlawfully and in violation of the Constitution by concluding lease agreements with persons living on the Trust-held land. The Court held that all residential lease agreements concluded by the Trust and the Board with members of tribes and communities referred to in the Trust Act were unlawful and invalid. The Trust was ordered to refund all monies paid to the Trust or the Board under the lease agreements. The Trust and the Board appealed this judgment and indicated that repayment to the applicants had not taken place pending the outcome of the appeal. In 2021/2022, lease receipts were shown at R63 million. This drop was likely due to the outcome of the case. The Trust and the Board have subsequently withdrawn this appeal.
196. It is well known that the Trust is involved in commercial enterprises on Trust Land, including surface lease arrangements with mining companies, and retail and tourism ventures. There are various references to commercial operations in Annual Performance Plans and Annual Reports over the years. For instance, in the 2018/2019 Annual Report: *'The Ingonyama Trust land is used for residential, institutional, commercial such as: shopping centres, hotels, game reserves, dams and by telecommunications service providers.'*<sup>202</sup> The 2019/2020 Annual Performance Plan refers to forestry leases, sand and quarrying activities on Trust land, and tourism projects.<sup>203</sup>
197. However, the revenue/income of the Trust appears to be under-itemised in this regard. The Board has at least since 2012 also routinely combined income in the financial statements to the extent that it is difficult to distinguish income from residential leases and income from commercial leases; there is no separate disclosure of commercial vs residential lease revenue. Under-reporting of revenue and under-itemisation makes it difficult for the Minister, as the Trust's executive authority, and Parliament to effectively exercise their oversight function over this public institution that holds land on behalf of millions of people. It also means that the beneficiaries on whose behalf the land is held by the Trust are unable to determine whether the land is being administered in a way that respects their pre-existing land rights, and for their material benefit and welfare as is required by the Trust Act. There may also be VAT implications for failing to distinguish between commercial and residential leases in that the supply of commercial accommodation is subject to VAT at the standard rate whereas the letting and hiring of a dwelling is exempt.

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201 Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others (12745/2018P) [2021] 2022 (1) SA 251 (KZP) (11 June 2021).

202 ITB Annual Report 2018/2019, p 75.

203 ITB Annual Performance Plan (incorporating Ingonyama Trust) 2019/2020.

198. The failure to detail sources of revenue has further implications and has skewed the reading of the financial statements, an aspect that was acknowledged by the CEO of the Board in a meeting where the Board presented the 2021/2022 Annual Report to the PPC. The CEO was responding to concerns by the members of the PPC that employee costs of the Board were high, and he explained that it appeared this way as a consequence of the separation of the Trust and the Board in the reporting documents. The CEO explained that the separation resulted in the Board only reflecting what it received from government as a grant in its financial statements. He added that the impression that proportion of expenditure was too high relative to the revenue that was reflected in the financial statements of the Board, was caused by the fact that the Trust had been separated from the Board.<sup>204</sup>
199. In this statement, the CEO was effectively setting out how the structure of the Trust had been intended to work from the outset, and how, rationally, its financial reporting had been intended to be conducted. The intended structure was for a Trust in which substantial land was vested to be administered by an administrative board, the expenses of which were provided for by the Department, with a further 10 percent of Trust revenue available from the Trust for Board costs. His comment that the PPC's unease about the financials was due to revenue being reflected in financial statements which *were not* subject to the PFMA, and expenditure being reflected in different financial statements which *were* subject to the PFMA, reveals the fundamental flaw in the argument that the PFMA does not apply to the Trust. It is not logical to suggest that the legislature would go to lengths to list a public entity with routine expenses and that receives an annual contribution from the State as falling within the ambit of the PFMA, and not also intend to include the associated statutory Trust that manages significant land holdings on which millions of South Africans reside.

## 12.2. Disbursements to Beneficiaries

200. Information relating to distribution to beneficiaries is vaguely reported in the Annual Reports; it is given little prominence and there is little mention of how distributions are put to use, and there is no breakdown of the beneficiary recipients' composition or structure. As indicated, the Trust has accumulated significant revenue, reserves and cash as a result of its residential lease policy. There is, however, an apparently disproportionally low ratio of distribution of these reserves to the beneficiaries.
201. The structure of the Trust indicates that the beneficiaries are the most significant

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204 PPC Meeting, 12 October 2022, ITB presentation. <https://pmg.org.za/committee-meeting/35715/>

and material claimants to the balance of the net asset value of the Trust. The unique nature of the Trust requires an examination of what information should be available and necessary to enable the beneficiaries and other stakeholders to assess, interpret and conclude on matters relevant and important to them in relation to the Trust.

202. As noted, accounting reporting principles (both public and private) require information to be disclosed in a meaningful manner. Since the beneficiaries are primary stakeholders in the Trust, there should be a commitment by the Trust and the Board to voluntarily present and freely provide information in a meaningful and transparent manner for the benefit of the beneficiaries in accordance with generally recognised accounting principles. 203.

204. While the former chairperson of the Board stated that from time to time, the income earned is distributed to community beneficiaries in terms of the Board's disbursement policy,<sup>205</sup> the policy governing allocation and distribution is not explained in any significant manner and there is little evidence that any significant distribution takes place. This has not gone unnoticed.

### 12.3. PPC Requests for Information

207. The PPC has on various occasions asked called on the Minister and the Board to provide information relating to disbursements to the beneficiaries of the Trust. The Board appears to repeatedly ignore requests for such details from the PPC.

208. In the 2016 'Budgetary Review and Recommendations Report of the Portfolio Committee on Rural Development and Land Reform', for example, the PPC recommended that within three months after adoption of the report by the National Assembly, the Minister should (amongst other recommendations):

- *Ensure that the ITB complies with the National Treasury Regulations and the Public Finance Management Act guidelines with regard to accounting on all its funds, irrespective of income generated by the ITB or the funds voted by Parliament.*
- *Conduct a comprehensive socio-economic impact assessment of the performance of the ITB and how the beneficiaries have materially and socio-economically benefited from the ITB programmes.*
- *Develop and submit clear performance indicators that show how the ITB will contribute to improvement of the lives of the rural communities. Further, assist the ITB to conduct socio-economic impact assessment of its performance against the founding legislation and the programmes it implemented over the last five years.*<sup>206</sup>

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206 Budgetary Review and Recommendations Report of the Parliamentary Committee on Rural Development and Land Reform,



It is unclear whether any socio-impact assessment as requested by the PPC was ever prepared or submitted to Parliament.

209. On 9 October 2019, the Chairperson of the PPC asked the Board for clarity regarding the 10 percent fee that the Board was entitled to take from the Trust (for its administrative costs, a reference to Regulation 10(2) in the Financial Regulations) and the 90 percent that was required to go back to the community. He asked the Board to submit a five-year report, detailing what the Trust had been giving back to communities and traditional councils.<sup>207</sup> In response to a follow-up query in this regard, the chairperson of the Board said on 5 May 2020<sup>208</sup> that this information was yet to be finalised on account of time constraints, as well as a pending court case (concerning the Board's introduction of residential leases) in which the requested information was part of the dispute. (It should be noted that there was no reason for this information to be withheld pending the outcome of the case. Even if it had a bearing, the papers in the case had already been filed and submitted to Court). The Chairperson stated that the Board would provide the account as soon as it was available, via the Minister.

210. The request for the information was again raised by members of the PPC during a meeting on 4 June 2020 when the members queried the status of the five-year report the ITB had been asked to prepare detailing what had been given back to the community and traditional councils. Members asked how far the ITB was in completing the report and requested a timeframe for completion.<sup>209</sup> The Board did not respond to this question and, due to time constraints at the meeting, the Board was asked to respond to the members' queries in writing. It is not known whether a response was provided to the committee as one is not publicly available.

211. In the PPC's meeting with the Board on 9 February 2021, members of the committee asked several questions relating to accountability and compliance with AGSA requests and asked for a breakdown of income from residential and commercial leases as well as details of payments to communities. The Chairperson of the Board asked for time to respond to these queries and the PPC gave the Board ten days to respond.<sup>210</sup> Again, it is unknown whether a response was received by the PPC.

212. Expressing frustration with the Board following its presentation of its Annual

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26 October 2016. <https://pmg.org.za/taled-committee-report/2861/>

207 PPC Meeting, 9 October 2019: to discuss ITB 2018/2019 Annual Report. <https://pmg.org.za/committee-meeting/29014/>

208 PPC Meeting, 5 May 2020: Presentation of ITB 2020/2021 Annual Performance Plan. <https://pmg.org.za/committee-meeting/30140/>

209 PPC Meeting, 4 June 2020: ITB Quarter 3 & 4 Performance Review with Minister. <https://pmg.org.za/committee-meeting/30400/>

210 PPC Meeting, 9 February 2021: ITB Annual Report 2019/2020, with Deputy Minister. <https://pmg.org.za/committee-meeting/32159/>

Report in November 2021,<sup>211</sup> committee members called for a legal opinion about the viability of the Trust and for a forensic audit into the financial affairs of the Board and the Trust. The Chair of the PPC noted that Chairperson of the Board, Mr Ngwenya, had previously committed to giving the committee a detailed report on the monies spent in the Trust communities and projects. He said that the Committee had not received anything to date and asked what the status of the report was and what the Board was doing in the communities. In this meeting, the Chairperson of the Board responded that the requested information had been sent to the committee, although the committee does not appear to have received it prior to the meeting.

213. In a meeting with the Minister on 29 November 2022, the Chairperson of the PPC referred to the question of the accountability of the Trust. He noted that the Chairperson of the Board had said on numerous occasions that the Trust was delisted from the PFMA schedules and did not account in terms of the PFMA. The PPC Chairperson said PPC members were concerned about an accounting authority for a public entity that decided that it would not fully account for the finances of the entity it was supposed to account for. The PPC asked the Minister for clarity in this regard.<sup>212</sup>

214. In a further meeting of the Board with the PPC in May 2023, the Chair of the PPC gave the Board ten days to submit in writing its response to the questions put to it by members of the committee. These included questions about the removal of performance indicators relating to the mandate of the Trust from the Annual Performance Plan.<sup>213</sup> Once again, there is no public record of this being provided to the PPC.

12.33. In addition,<sup>217</sup> in 2017, the High Level Panel noted that the PPC had raised serious concerns about the revenue received by the Trust and the apparent failure of the Trust to reroute its revenue back to the Trust's beneficiaries.<sup>214</sup>

218. In 2022, the KZN High Court also noted that '*no countervailing evidence was provided by the Trust and the Board to demonstrate that revenue generated by the leases is used for the benefit of the communities concerned or for their material well-being*'.<sup>215</sup>

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211 PPC Meeting, 16 November 2021: ITB Annual Report 2020/2021. <https://pmg.org.za/committee-meeting/33802/>

212 PPC Meeting 29 November 2022: Minister on Ingonyama Trust Board Matters. <https://pmg.org.za/committee-meeting/36158/>

213 PPC Meeting, 2 May 2023: Presentation of ITB 2023/2024 Annual Performance Plan. The Chairperson of the PPC required the information to enable the committee to present its report to Parliament as its term was coming to an end. <http://pmg.org.za/committee-meeting/36778/>

214 HLP report (2017), p 203

215 Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others (12745/2018P) [2021] 2022 (1) SA 251 (KZP) (11 June 2021), para [129].

## 12.4. The Trust's Obligations

219. The obligation to the beneficiaries rests on the Trust and not on the Board, but this responsibility has been obfuscated by the confusion created by the purported separation of the roles of the Trust and the Board. For instance, in the 2019/2020 Annual Report, the Board provided a table relating to performance information titled 'Traditional Council Support' which included providing training programmes and facilitating corporate social investment to communities living on Trust land. None of the planned targets were achieved (zero). It should be noted that programmes such as these that are introduced for the benefit of beneficiaries of the Trust are managed by the Board, and this administrative function must be financed by the Trust. The Financial Regulations allow for 10 percent of the income of the Trust to be used for costs incurred in achieving the objects of the Act. As such, the Board's comments that these programmes were 'unfunded expenses' and that the Trust from its 'limited resources, has made money available to the Board' cannot be a correct representation of constraints on the programmes. Why the Board should wish to indicate distributions to beneficiaries in this way is unclear, except that pressure to provide a report on distributions undertaken by the Trust may have played a part. The lack of clarity about the entities' respective responsibilities here obscured the fact that the Trust's distribution to beneficiaries remained opaque.
220. During the PPC meeting in May 2020, then Board chairperson Mr Ngwenya responded to members' queries on whether the Board had defaulted on spending 90 percent of its income on beneficiaries and traditional councils. He said the matter had been noted in the press and there was no such obligation on the ITB, '*for starters*', and the ITB did not default at any point.<sup>216</sup> He was indeed correct that the Board has no such obligation in regard to its own income, but he did not assist the committee to settle the confusion that had arisen over the question.
221. Again, in June 2020, Mr Ngwenya stated that listening to the committee's questions it seemed that the assumption was that the projects to which the Board committed itself were projects funded by government. He said that the funding the Board received from government was far too little to be used on community projects and most of it went towards administration. Again, he did not point out the confusion that had arisen over the responsibilities of the Board against those of the Trust. At the presentation of the 2021/2022 Annual Performance Plan in May 2021, the Board was asked by members of the PPC why no educational grants had been budgeted.

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216 PPC Meeting 5 May 2020: Ingonyama Trust Board 2020/2021 Annual Performance Plan with Ministry. <https://pmg.org.za/committee-meeting/30140/>

Board members responded that this was due to budget constraints.

222. As noted above, the Board is well aware that it is the Trust and not the Board which has an obligation to the Trust beneficiaries. The Board's responses, and its failure to clarify the misperceptions of the PPC members, perpetuated this confusion.

### 12.5. *Benefits to Communities*

223. In the 2017/2018 Annual Report, there appeared to be some movement towards providing benefits to communities. The acting CEO at the time highlighted that a number of desired outcomes had been identified including prioritising a focus on proactive development of Trust land. The report included the description of an 'Economic Portfolio' which referred to a development strategy for farms, consolidation of existing forestry leases on Trust land *'and ensuring that the benefication accrues to beneficiary communities'*, as well as *'facilitating the entrance of beneficiary communities in the hospitality industry'*.<sup>217</sup> This 'Economic Portfolio' was never referred to again in subsequent annual reports. However in the 2019/2020 Annual Performance Plan there was a reference to 'Economic Participation' and a comment that there were forestry leases on Trust land *'which benefication does not reach the intended participants which are the community members concerned. To address this, a consolidation of all such forestry leases has to be done and a strategy to ensure benefication to the beneficiary communities and, the organization will facilitate the entrance of beneficiary communities in the hospitality industry. The strategy is to give the Trust first option to buy lodges and game reserves in trust for the benefit of communities.'*<sup>218</sup> Notwithstanding these goals, disbursement of funds to community beneficiaries was not included in the expenditure estimates of the Trust in this performance plan<sup>219</sup> which stated that finances of the Trust were fundamentally regulated in terms of National Treasury Regulation 14 that deals with funds held in trust.<sup>220</sup> There has been no reference to beneficiary economic participation in later annual performance plans.

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217 ITB Annual Report 2017/2018, p 18.

218 ITB Annual Performance Plan 2019/2020, p 7.

219 Ibid, p 16.

220 Ibid p 18.

## 12.6. Developments from 2019/2020

224. Following the separation of financial reporting in respect of the Trust and the Board, and separate auditing by the AGSA in 2019/2020, meaningful reporting on disbursements to beneficiaries has all but fallen away.

225. In the 2018/2019 Annual Performance Plan,<sup>221</sup> under ‘Expenditure Estimates’ for the Trust there were details of budgeted expenditure for community beneficiaries until 2021/2022. This line item was missing from the 2019/2020 Plan.<sup>222</sup> The 2021/2022 Plan contains no reference to expenditure for community beneficiaries, a consequence of the fact that performance reporting seems to be no longer required as a result of the argument that the Trust does not fall within the ambit of the PFMA (which requires performance reporting). In the presentation of the 2022/2023 Annual Performance Plan to the PPC in May 2023, the abridged budget for the Trust contained a reference to ‘General Expenses’. However, the CFO stated at this presentation that disbursements to beneficiaries were not generally budgeted for ‘*as they are based on need and demand from beneficiaries*’. The Chairperson of the PPC responded that without indicators and information regarding the 90 percent that must be spent on beneficiaries it was difficult for the committee to monitor the Trust and the benefits received by the communities under the Trust and that the new Board would need to report on this.<sup>223</sup>

226. As mentioned above, from 2019/2020 to 2021/2022, the notes in the separate financial statements of the Trust no longer made any reference to ‘*funds available to community beneficiaries*’. In this period the only reference to beneficiary funds has been under ‘Approval of Financial Statements’, viz. ‘*from time to time the income earned is distributed to community beneficiaries in terms of the Board’s disbursement policy*’. An amount of R6.2 million was disbursed to community beneficiaries during 2018/2019, and R3 million in 2019/2020. In 2020/2021, the Board failed to present the Trust’s financial statements to the PPC and thus disbursements to beneficiaries, if any, were not disclosed. In 2021/2022, R3.2 million was disbursed to ‘beneficiaries/traditional authorities.’ In the 2021/2022 year, there was also a reference to ‘Transfer funds paid – others’ of R8.7 million (‘others’ was not identified), and to a ‘disbursement to Trustee’ of R4.7 million.

227. Clearly, the Board’s approach is that the Trust’s relationship with beneficiaries is via the Traditional Councils.<sup>224</sup> It is important to note that the Trust beneficiaries are defined as the *members* of the tribes and communities referred to in the Trust Act,

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222 ITB Annual Performance Plan 2019/2020, p 19.

223 PPC Meeting, 2 May 2023: Presentation of ITB Annual Performance Plan. <https://pmg.org.za/committee-meeting/36778/>

224 ITB Annual Report 2016/2017, p 11



not traditional councils which are an administrative structure created by law.

228. In the 2021/2022 Annual Report, the Board gives a description of Traditional Authorities as comprising *'of members of the tribes and communities referred to in the second column of the schedule'* and *'Although the Traditional Authorities do not have control over the Trust, the rights given to them in accordance with the KwaZulu-Natal Ingonyama Trust Act of 1994 results in Traditional Authorities ability to participate in the financial and operational policy decisions of the Trust, through approval of rights to land within their jurisdiction.'*<sup>225</sup> This presumably is a reference to the fact that the Trust may not deal with Trust property (by way of encumbrance, pledge, lease or sale) without the prior written consent of the traditional authority concerned.<sup>226</sup> The Board's framing of 'Traditional Authorities' is however significant as it suggests the Board intended to indicate the Trust's obligation to the beneficiary members of tribes and communities as listed in the Trust Act, was through the Traditional Authorities.

229. Since the 2021/2022 Annual Report the Board's response to inquiries has been that that disbursements are made to traditional leaders who manage how the disbursements can benefit communities. For instance, while presenting the report in November 2021, the CEO responded to a query about Traditional Councils saying that *'the Board administers land that belongs to beneficiaries, who were represented by traditional councils. The utilisation of Trust funds emanate from a request by a traditional council to get their money.'*<sup>227</sup> There is however no information in the annual financial statements that backs this up. Even if income derived from Trust land is paid to traditional councils who in turn distribute this – which is impossible to know – the allocations to traditional councils should be disclosed clearly and in a transparent manner in order that the beneficiaries can in turn hold their traditional councils to account. The Chairperson of the PPC raised this very issue in February 2021 stating that the Board *'should provide a breakdown of the income from leases according to traditional authorities and traditional communities, and whether they were residential or commercial leases, and further show how the funds had been distributed back to the deserving communities.'*<sup>228</sup>

230. Disbursements by the Trust to Traditional Authorities needs to be transparent and detailed in the financial statements in order that Traditional Councils have clarity on the disbursement process and that beneficiary communities in turn are able to hold Traditional Councils to account. The Chairperson of the PPC again raised this in the

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225 ITB Annual Report 2021/2022, p 115.

226 Trust Act, Section 2(5).

227 <https://pmg.org.za/committee-meeting/33802/>

228 ITB Annual Report, Meeting with Dept. Minister, 9 February 2021: <https://pmg.org.za/committee-meeting/32159/>

meeting with the Minister on 29 November 2022<sup>229</sup>, stating ‘Many of the Traditional Councils from which the Ingonyama Trust levies money have never seen a cent of delivery being contributed to their communities. The problem is exacerbated by the fact that the money levied from these communities was not returned in benefits to the communities’ and that ‘This is the issue the Committee was struggling with regarding the ITB because the Committee needed full disclosure from the ITB on the projects of Amakhosi in their traditional authorities that the Trust supported.’

231. The Minister responded in this meeting that ‘The Ministry and Department had the same frustration of trying to understand how the communities benefitted from the Trust. In their engagement with the Board, the chairperson of the Board cited the difficulty of disbursement based on the issues of the configuration of what was Traditional Authorities and what is now Traditional Council, which he stated that they were still engaging with the province of KwaZulu-Natal to deal with those matters.’ She added, ‘This was where the problem was for the Ministry and Department because a Board was established to assist the trustee in land management. The Board is collecting the leases from business entities operating in the land, yet there is no clear policy of how that benefit accrues to that community. Without those clear policies, the Ministry, Department, and the ITB will be going back and forth. That is why the Ministry insisted that the new Board must have clear and transparent policies so that even the Portfolio Committee could know how those benefits accrue to the different communities.’ The Minister and the PPC are encouraged to continue to interrogate the new Board in this regard so that transparent processes are in place recording disbursements to Traditional Councils for meaningful accountability.

232. Of further concern are statements by the Board in the 2020/2021 Annual Performance Plan that ‘Due to the complex nature of the Trust from a policy point of view, over the next five years, the Trust together with other stakeholders will have to seek legislative amendment and realignment. For instance, the mandate that Trust land should be administered ‘for the benefit, material welfare and social well-being of the members of the tribes and communities’ will remain a pipedream. Therefore, among other things to be done is to challenge some legal provisions which are unconstitutional and prejudicial to the Trust. These include funding, clarity on legislation relating to municipal rates, clarity on ownership of mineral royalties and constitutionality of some provisions of the Trust Act which alienate land from the Trust without compensation.’ It states further that the Trust will be left with ‘no option but to seek legal remedies in court’.<sup>230</sup> It is not clear what changes the Board intended to seek, particularly in light of the concern expressed



about whether it is possible to achieve the central mandate of the Trust, being that it be managed *‘for the benefit, material welfare and social well-being of the members of the tribes and communities’*. It is to be hoped that this matter will be clarified and that beneficiary interests are placed at the heart of any amendments.

233. The interests of the Trust’s beneficiaries is the core reason that transparency is fundamentally necessary in the Trust’s finances, and comments by members of the interim Board appointed by the Minister to support Parliamentary oversight and accountability of the Trust were welcomed. In the briefing by the Minister on matters relating to the Board in November 2022, a member of the Board stated that *‘the Trust is a creature of statute. It was created through an Act of Parliament. Therefore, whether it is the PFMA or not, the Trust is accountable to this oversight committee. The Trust is accountable to the beneficiaries, that is, the Traditional Councils. If, for instance, they want information, it is very important that the Board accounts right up to the last R10 in its kitty, which is a principle that needs to be respected.’*<sup>231</sup>

## 12.7. Performance against Predetermined Objectives

### 12.7.i. Performance Information

234. In 2007, the National Treasury published the National Treasury Framework for Managing Programme Performance Information (FMPPPI Framework), noting that performance information indicates how well an institution is meeting its aims and objectives, and which policies and processes are working.<sup>232</sup>

235. Performance information facilitates transparency and accountability enabling legislators and stakeholders (such as the Trust beneficiaries) to track progress, identify the scope for improvement and have a better understanding of the issues involved.<sup>233</sup>

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231 PPC Meeting, 29 November 2022: Briefing by the Minister on matters relating to the ITB. <https://pmg.org.za/committee-meeting/36778/>

232 National Treasury Framework for Managing Programme Performance Information: <https://www.knowledgehub.org.za/system/files/elibdownloads/2019-07Framework%2520for%2520managing%2520Programme%2520Performance%2520Information.pdf>

233 Diedericks, M, 2017, ‘Challenges in reporting on predetermined objectives to the Auditor-General: The case of Limpopo provincial departments’, *The Journal for Transdisciplinary Research in Southern Africa* 13(1), p 386.

## 12.8. *The PFMA and Performance Plans*

236. Section 55(2)(a) of the PFMA includes the requirement that an annual report and annual financial statements of a public entity must fairly present its performance against predetermined objectives as at the end of the financial year.

237. Historically, the Board presented Annual Performance Plans and quarterly reports in respect of the Trust to the PPC. The Board's presentation of performance against predetermined objectives at times resulted in qualified audit opinions from the AGSA. For instance, in 2013/2014, the AGSA noted that 25 percent of indicators were not well defined, or specific by having clear data definitions so that data could be consistently collected and easy to understand and use in terms of the FMPPI Framework for managing programme performance information. Also, performance indicators were not verifiable, and targets were not reliable when compared to source information, which resulted in the basis for a qualified audit opinion.<sup>234</sup> In this year (2013/2014) and in 2014/2015 the Board noted these concerns and undertook to amend future targets and comply with auditing standards.

## 12.9. *Performance Information provided by the Trust and Board*

238. It is challenging to compare Trust programmes from year to year, and to compare performance, because not only the programmes but also the sub-programmes, and their descriptors, have routinely changed, and more recently indicators have been discontinued and removed, a state of affairs which has been noted by members of the PPC.<sup>235</sup>

239. In 2015/2016 the Board changed its business model. In its Strategic Plan 2015-2020, it aligned its programmes with the Department's priorities, and the Medium-Term Strategic Framework Plan for South Africa 2014-2019 (MTSF). The newly aligned programmes included Programme 1: Administration, Programme 2: Land Management, Programme 3: Rural Development, and Programme 4: Traditional Council Support.<sup>236</sup> These programmes were continued into 2016/2017.

240. In 2017/2018 there was a revision of the Annual Performance Plan which the Board

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234 ITB Annual Report 2013/2014, p 36.

235 PPC Meeting, 2 May 2023: Presentation of ITB 2023/2024 Annual Performance Plan.

236 ITB Annual Report 2015/2016, p 19: The Board aligned itself with Outcomes 7, 8 and 12 of the MTSF: Improved land administration and spatial planning for integrated development in rural areas; Sustainable land reform (agrarian transformation); Improved food security; Smallholder farmer development and support (technical, financial, infrastructure) for agrarian transformation; Increased access to quality basic infrastructure and services, particularly in education, healthcare and public transport in rural areas; and Growth of sustainable rural enterprises and industries characterised by strong rural – urban linkages, increased investment in agro-processing, trade development and access to markets and financial services resulting in rural job creation.

attributed to a change in the priorities of the Board, and the splitting of the two entities, the Trust and the Board.<sup>237</sup> The change involved collapsing Programmes 2, 3 and 4 (Land Management, Rural Development and Traditional Council Support) into 'Real Estate', although sub-programmes such as support for beneficiary communities to improve food security, and traditional council support were retained. In this year, only one food security project was identified and there were no new approved agricultural projects. Regarding traditional council support, no training plans were approved, and no traditional councils were trained.

241. In the 2018/2019 Annual Report, the 'Real Estate' programme changed again and was renamed 'Land and Tenure Management'. Under 'General Administration' in the Annual Report, the Board stated that *'the Real Estate Department has a number of sub-programmes including Land and Asset Management, Rural Development and Traditional Council support'*.<sup>238</sup> However, these programmes did not appear in the performance information table relating to Land Tenure Management and no performance information was provided in this regard. This change coincided with the Board's contention that save for Treasury Regulation 14, the PFMA does not apply to the Trust. The new Land and Tenure Management Programme was administratively/ Board-focused, and it related to provision of land tenure rights (leases) and property development. A programme relating to 'Proactive Land Planning' was noted which related to ensuring sustainable land planning which would attract investment on Trust land. This was broken down into (1) number of Traditional Councils with development plans (not achieved); and (2) number of human settlement plans on strategically located land (4 out of a possible 26 achieved).<sup>239</sup>

242. In 2019/2020, the first year that the AGSA prepared a separate audit report for the Trust, no performance-related information was presented in relation to the Trust. The AGSA appeared to have accepted the Board's separate entity argument to the extent that it no longer considered it necessary to report on the Trust's performance against predetermined objectives and stated that *'the Trust does not fall within the ambit of the PFMA'*.<sup>240</sup> The AGSA made no mention of Treasury Regulation 14.

243. In this 2019/2020 financial year, performance information for the Trust was administratively focused. 'Land and Tenure Management' was retained under 'Performance Information' with the addition of a new programme headed 'Traditional Council Support'. In regard to Traditional Council Support, which included providing

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237 ITB Annual Report 2017/2018, p 35.

238 ITB Annual Report 2018/2019, p 28.

239 Ibid, p 29.

240 ITB Annual Report 2019/2020, p 108.

training programmes and facilitating corporate social investment to communities living on Trust land, none of the planned targets were achieved.

244. In its report, the AGSA did not raise any material findings on the usefulness and reliability of the reported performance information for the Land and Tenure Management Programme. It did however note that an explanation had been provided for the underachievement of a significant number of targets.<sup>241</sup>

245. In 2020/2021, the Board failed to present the financial statements for the Trust to the PPC. 'Land and Tenure Management' was retained under 'Performance Information', but the programme headed 'Traditional Council Support' was removed. Land and Tenure Management was broken down into (1) number of land tenure rights approved by the Board (achieved); and (2) number of human settlement plans, (none achieved).<sup>242</sup>

246. In 2021/2022, 'Land and Tenure Management' was again retained under 'Performance Information', and was broken down into (1) number of land tenure rights approved by the Board (underachieved, attributed to the High Court judgement relating to residential leases); and (2) number of human settlement plans, (not achieved).<sup>243</sup>

247. No performance related information was presented in respect of the Trust in 2021/2022. As in 2019/2020, the AGSA stated that the Trust was not required to prepare a report on its performance against predetermined objectives as the Trust did not fall within the ambit of the PFMA and that such reporting was not required under the Trust Act.<sup>244</sup>

248. The then chairperson of the Board, in his response to queries relating to performance by PPC committee members in a meeting in February 2021, stated that the Board had not been defiant by failing to present a report on the Trust's performance against pre-determined objectives. Rather it did not do so because the AGSA had stated that it was not required to do so because the Trust did not fall within the ambit of the PFMA.<sup>245</sup>

249. It is thus apparent that the lack of information relating to the Trust's performance against pre-determined objectives is a direct consequence of the contention that the PFMA does not apply to the Trust. The PPC has raised this issue with the Board. In its presentation of the 2023/2024 Annual Performance Plan to the PPC in May

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241 Ibid, p 61.

242 ITB Annual Report 2020/2021, p 21.

243 ITB Annual Report 2021/2022, p 21.

244 Ibid, p 76.

245 PPC Meeting, 9 of February 2021: Presentation of the ITB Annual Report 2019/2020. <https://pmg.org.za/committee-meeting/32159/>

2023,<sup>246</sup> the members of the PPC queried why indicators had been discontinued/ removed from the Plan and why the indicators failed to speak to the mandate of the Trust. The Chairperson of the PPC said that the Annual Performance Plan reflected indicators of the Board and not of the Trust, and that the Board needed to show the performance indicators of the Trust in order for the committee to understand the purpose for which the Trust was established. The Chairperson of the PPC added that there were no clear indicators to assist the PPC to monitor the Trust, especially relating to benefits accruing to communities.

250. The CEO of the Board responded that with respect to the accountability of the Trust and regarding the indicators not speaking to matters of the Trust, this was '*a function of a deliberate decision by the Board that it is only accountable for that which it receives from the fiscus and therefore not on the general mandate of the Trust*'. He added that there was a history regarding how monies were disbursed to traditional councils and that this had not found its way into the Annual Performance Plan because the Board had '*made a decision*' not to include it. He said that this did not mean it could not be done but that this would require planning and capacity. He asked that the new Board be allowed to amend the Annual Performance Plan after it had met with its new chairperson.

### 12.10. The Public Audit Act

251. The obligation of an organ of state to report on performance information is not limited to a requirement under the PFMA. As confirmed by the AGSA in November 2021,<sup>247</sup> even if the Trust is not subject to the PFMA, the AGSA is still required to audit the Trust under the Public Audit Act (PAA).<sup>248</sup> The PAA gives effect to the provisions of the Constitution in establishing and assigning supreme auditing functions to the AGSA and providing for the auditing of institutions and accounting entities in the public sector.<sup>249</sup> The Trust Act's Financial Regulations provide that the financial statements and records of the Trust shall be audited annually by the AGSA.<sup>250</sup>

252. The PAA obliges the AGSA to audit and report on the accounting, financial statements and management of the Trust as it is an institution required by national legislation to be audited by the AGSA.<sup>251</sup> The PAA requires that the AGSA must prepare a report on

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247 PPC Meeting, 16 November 2021: Presentation of the ITB Annual Report 2020/2021. .<https://pmg.org.za/committee-meeting/33802/>

248 The Public Audit Act (Act 25 of 2004).

249 PAA, Section 2.

250 Financial Regulations, Regulation 20.

251 Ibid.

the audit which must reflect at least an opinion on the reported information relating to the performance of the auditee against pre-determined objectives.<sup>252</sup> The AGSA has also confirmed it has a responsibility to report material findings on the usefulness and reliability of the reported information against predetermined objectives for selected programmes presented in the annual report in terms of the PAA.<sup>253</sup> For the Board, the AGSA refers to the PAA in relation to performance information against predetermined objectives in each report. As noted above, for the Trust, the AGSA states that in accordance with the PAA, the AGSA has a responsibility to report material findings on the compliance of the entity with specific matters in key legislation and states that it did not identify material findings in this regard. The AGSA noted that the Trust was not required to prepare a report on its performance against predetermined objectives as it did not fall under the ambit of the PFMA, and such reporting was not required under the Trust Act.

253. While the PFMA sets out detailed provisions governing financial misconduct by accounting authorities and officials of public entities, the PAA imposes no such penalties. Unlike the PFMA, the PAA does not enable the AGSA to impose remedial action or give it powers to compel and enforce implementation and compliance with its recommendations. However, the 2018 Public Audit Amendment Act<sup>254</sup> does give the AGSA the power to refer any suspected material irregularity identified in the audit process to a relevant public body for investigation,<sup>255</sup> and it can take binding remedial action for non-compliance.<sup>256</sup>

254. In a meeting in January 2021,<sup>257</sup> members of the PPC asked the AGSA if it had ‘teeth’ to deal with the Board. The AGSA responded that the amendment act gave the AGSA additional space to promote accountability; however, the AGSA explained that a phased-in approach was being implemented, from local government to national departments. Rural portfolios had not been included in the phased-in approach because bigger departments had been prioritised and the AGSA does not currently have the capacity to promote accountability more rigorously.

255. In addition to the PAA, the King Code of Governance for South Africa sets out the importance of integrated financial and non-financial reporting and refers to a holistic and integrated representation of an entity’s performance. King III extends

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253 ITB Annual Report 2019/2020, p 60.

254 The Public Audit Amendment Act (Act 5 of 2018).

255 Ibid, Section 3(b).

256 Ibid, Section 4.

257 PPC Meeting, 26 January 2021: Department’s meeting with AGSA on Audit Outcomes. <https://pmg.org.za/committee-meeting/31761/>



to the public sector and recommends that entities should indicate whether the principles of the King Code have been applied to the entity. Over several years, the audit committee of the Board confirmed in its report that the King III Report on Corporate Governance had been implemented to the extent it was applicable.<sup>258</sup> There is no reference to the implementation of King III in the annual reports from 2020/2021 onwards.

256. Reporting on performance information is vital in order to permit monitoring of the Trust's performance in supporting Trust beneficiaries. Without details provided in the financial statements it is impossible to assess the Trust's action in this regard. Accordingly, the AGSA should be called on to report material findings on the usefulness and reliability of the reported information against predetermined objectives for selected programmes for the Trust.

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258 ITB Annual Reports: 2015/2016, p 35; 2016/2017, p 49; 2017/2018, p 53; 2018/2019, p 39; 2019/2020, p 42.



## 13. INGONYAMA HOLDINGS (PTY)(LTD)

257. In November 2019 a private company, Ingonyama Holdings (Pty) Ltd (Ingonyama Holdings) was set up as an ‘investment wing’ of the Trust. Ingonyama Holdings was incorporated as an entity of the Trust by way of a Board resolution with the Trust being the only shareholder.<sup>259</sup> The long-standing former chairperson of the Board, Mr Sipho Jerome Ngwenya is listed as a director of this company together with the Board’s former CEO. Mr Ngwenya declared his directorship in Ingonyama Holdings in the 2020/2021 financial statements. However, there is no further reporting reference to Ingonyama Holdings in this year, presumably because the financial statements for the Trust were not presented to the PPC.

258. In response to queries by the PPC in November 2021 about how people living on Trust land would benefit from the creation of Ingonyama Holdings, Mr Ngwenya responded that the company had come about as a result of a realisation in 2017/1018 that the Trust and the Board were not business enterprises and no matter how the Board tried to manage matters, what was done, in the absence of financial grant or revenue, it would not meet its aspirations as dictated by legislation.<sup>260</sup> The Board had advised the Trustee that it would be better to have an independent profit-driven company to ensure they met all the requirements and ‘to optimise and extract value from the assets of the Trust’.

259. The former chairperson of the Board also stated that the executive authority had been advised of the details of the formation of the company after a legal opinion was obtained and that the Board had followed the PFMA in setting up the investment company.

260. The PFMA provides that an accounting authority for a public entity must submit to the AGSA any information (including returns, documents, explanations and motivations) that the AGSA may require.<sup>261</sup> An accounting authority must also promptly inform the National Treasury on any new entity which that public entity intends to establish and allow the National Treasury a reasonable time to submit its decision prior to formal establishment.<sup>262</sup> In addition, an accounting authority is required to promptly and in writing inform the Treasury before a public entity concludes certain transactions, which include: establishment of or participation in a company; participation in a

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259 Clarified by the CFO of the Board in response to the Minister’s presentation of a report on the Ingonyama Trust Board to the PPC on 29 November 2022 and to queries by committee members. <https://pmg.org.za/committee-meeting/36158/>

260 PPC Meeting, 16 November 2021: Presentation of ITB Annual Report 2020/2021. <https://pmg.org.za/committee-meeting/33802/>.

261 PFMA, Section 54(1).

262 Ibid, Section 51(1)(g).

significant partnership, trust, unincorporated joint venture or similar arrangement and acquisition of a significant shareholding in a company.<sup>263</sup> Given that the Board has forcefully argued that the provisions of the PFMA do not apply to the Trust, it is surprising that the former chairperson sought to make the point that the PFMA would apply to an investment company of which the Trust is the sole shareholder.

261. Accordingly, it is imperative that the Minister make public the legal opinion that the former chairperson said was shared with the Executive Authority in light of the Board's insistence that the PFMA does not apply to the Trust.

262. In the 2021/2022 Annual Report, Ingonyama Holdings was listed as a related party and was described as a '*controlled entity*' and '*the commercial wing*' of the Trust.<sup>264</sup> In issuing a qualified audit opinion for the Trust in this year, the AGSA noted that the Trust had not consolidated the Trust's '*subsidiary*', Ingonyama Holdings, '*as the subsidiary did not prepare financial statements*'.<sup>265</sup> In the notes to the Trust's financial statements, an investment of 100 percent in Ingonyama Holdings was noted, and it was noted that the Trust had not received financial statements for consolidation from Ingonyama Holdings. The notes stated, '*The investment relates to acquisition and capital contribution of Ingonyama Holding (Pty) Ltd, accompany formed on 29 November 2019 as a controlled entity of the Ingonyama Trust at cost.*'<sup>266</sup>

263. In 2021, a loan of R31 million was advanced by the Trust to Ingonyama Holdings.<sup>267</sup> This loan was the subject of discussion in the PPC meeting in October 2022 at which the CEO said that the Board agreed that the financials of Ingonyama Holdings should be consolidated with those of the Trust, but that the information had not been made available by the company. In November 2022, the CFO clarified that because Ingonyama Holdings was in the establishment stage, the Trust had made money available as a shareholder loan so as to make the company operational, and that the issues raised by the AGSA related to a lack of terms of repayment as well as a lack of financial statements of Ingonyama Holdings '*because the money that was transferred from the Trust's funds to the Ingonyama Holdings has to be accounted for*'.

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263 Ibid, Section 54(2).

264 ITB Annual Report 2021/2022, p 115.

265 Ibid, p 75: the Ingonyama Trust has not consolidated its subsidiary, Ingonyama Holdings (Pty) Ltd that was formed during 2019, as the subsidiary did not prepare financial statements. This investment has only been accounted for on the cost basis is without preparing consolidated financial statements as required by SA standards of GRAP 35, Consolidated financial statements. Had Ingonyama Holdings (Pty) Ltd been consolidated, many elements in the financial statements would have been materially affected. The effects on the financial statements due to the failure to consolidate have not been determined.

266 Ibid, p 106.

267 Ibid, p 108.

264. In her report to the PPC on 11 November 2022, the Minister stated that she was considering inter alia the role of Ingonyama Holdings as a subsidiary of the Trust together with its accountability. In this meeting the Chairperson of the PPC expressed concern that the committee could not perform its oversight duties in relation to the company. He said that the Board, the Trust and Ingonyama Holdings arose out of the Trust Act and therefore the committee had a mandate to hold the Trust, the Board and Ingonyama Holdings accountable.

265. There have subsequently been reports in the press about payments by Ingonyama Holdings in relation to services and a collaboration agreement.<sup>268</sup> In the PPC meeting of May 2023, the CEO of the Board indicated that Ingonyama Holdings was an issue that would be sorted out by the new Board.<sup>269</sup>

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268 <https://www.customcontested.co.za/ingonyama-trusts-r41m-is-gone-next-move-is-to-drain-its-coffers/>

269 PPC Meeting, 2 May 2023: Presentation of the ITB Annual Performance Plan 2023/2024, with the Minister. <https://pmg.org.za/committee-meeting/36778/>

## 14. ACCOUNTABILITY AND TRANSPARENCY

266. Notwithstanding that the Trust argues that it is not subject to the PFMA, and pending an amendment to Schedule 3A of the PFMA recommended below accountability and transparency in relation to the Trust must be pursued. The Trust Act's Financial Regulations specifically require that the Board be responsible for ensuring effective and transparent financial management of the Trust, and that its resources be used economically and in the most efficient and effective way.<sup>270</sup>
267. Yet, the Trust, which is an organ of state that has been entrusted with 2.8 million hectares of land that was worth in the region of R29 billion in the 2019/2020 financial year, is not subject to meaningful public finance oversight. The Trust is furthermore exempt from the Trust Monies Protection Act and the Trust Property Control Act, and it is exempt from paying income tax – thus another layer of scrutiny is avoided. The Board argues, in addition, that the Trust does not fall within the ambit of legislation specifically enacted to comply with the Constitution, the PFMA.
268. The Chairperson of the PPC in his opening address to the committee before the presentation by the Board of its 2019/2020 Annual Report in February 2021 reflected on the words of his grandfather, President Nelson Mandela on 11 February 1990, a few days after being released from incarceration:<sup>271</sup> *'The collapse of good conscience and the absence of accountability and public scrutiny have led to crimes against humanity and violations of international law'*.
269. The Chairperson of the PPC said he wanted to focus in particular on the collapse of good conscience and the absence of accountability as it was a critical issue in the general state of the nation, as well as a critical ingredient in serving the people, regardless of what that capacity was. He stated that the Board and the Trust were inextricably linked, and the Board could not exist on its own because it was the accounting authority of the Trust.
270. On the issue of accountability, the Chairperson said the very submission of an annual report was *'an act of accountability and an acknowledgement that no corporate entity, public or private, was a law unto itself, but that it had a duty to plan, implement and review; extract learning and lessons, and ultimately to report, as the most fundamental part of accountability'*. In respect of a public entity, accountability had to cover both developmental indicators of the delivery on the mandate, as well as the best application of available resources.

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270 Financial Regulations, Regulation 3(a) and (b).

271 PPC Meeting, 9 February 2021: Presentation of the ITB Annual Report 2019/2020. <https://pmg.org.za/committee-meeting/32159/>

271. In November 2022,<sup>272</sup> the Minister briefed the PPC on matters relating to the Trust and the Board. The Minister acknowledged that the Department had grappled with matters relating to the Board and the Trust, which included the Trust's governance issues, transparency in the management of the finances of the Trust and the Board, and assisting the Trust to develop its disbursement policy to assist Parliament in assessing the way the mandate for which the Trust and the Board were established was fulfilled. The Minister noted that she was also considering other matters that the PPC had raised regarding the mandate of the Board vis-à-vis the Trust and the role of Ingonyama Holdings, and the conversion of customary tenure rights and PTOs to leases.

272. Chapter 10 of the Constitution provides for basic values and principles governing public administration in South Africa which includes fostering transparency by providing the public with timely, accessible and accurate information. The PFMA seeks to give effect to, amongst others, the values underpinning Section 195 of the Constitution.<sup>273</sup> As set out above, the Trust is an 'organ of state' and accordingly, the basic values and principles governing public administration enshrined in the Constitution are brought to bear on the Trust. These include that it must be accountable.

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272 PPC Meeting, 29 November 2022: Minister on Ingonyama Trust Board Matters. <https://pmg.org.za/committee-meeting/36158/>  
273 Constitution, Section 195(1): Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

## 15. FIDUCIARY DUTY

273. Under the common law, a trustee has a fiduciary relationship with the beneficiaries of a trust which involves the duty to act in their interests. The concept of fiduciary duty can be defined as the duty of a trustee to act with the care, diligence and skill reasonably expected of one who manages the affairs of another.<sup>274</sup> A fiduciary relationship is thus one in which a person who holds a position of trust or confidence with respect to someone else is obliged to act solely for that person's benefit.<sup>275</sup>

274. The courts in South Africa have not dealt directly with extending the concept of fiduciary duty to statutory institutions (other than local authorities) which flows from the view that the State must act in the public interest. However, in both the United States and Canada, the courts have moved towards applying private trust law concepts such as fiduciary duty to public bodies and to situations where the state (USA) or crown (Canada) has the power to administer land belonging to indigenous people.<sup>276</sup> In these jurisdictions, the courts have held that it is the very vulnerability of beneficiaries and the State's power to manage land that is the reason for imposing a fiduciary duty on the State with scrupulous controls.<sup>277</sup>

275. The Trust is a statutory trust which is unique in structure, in that the Trust Act has bestowed corporate status on the Trust. The Trust differs from a broad-based statutory trust in that the Trust Act provides that the Trust shall be administered for particular beneficiaries, identified as the members of the tribes and communities contemplated in the KwaZulu Amakhosi and Iziphakanyiswa Act (Act 9 of 1990) referred to in the second column of the schedule to the Trust Act, established in a district referred to in the first column of this schedule and the residents of such a district.<sup>278</sup> The Trust Act establishes a fiduciary duty on the part of the Trustee who must administer the Trust for the benefit, material welfare and social wellbeing of these tribes, communities and residents.

276. The KwaZulu-Natal High Court noted that the Trust has a fiduciary duty to hold and use the land for the benefit of the beneficiaries of the Trust, i.e. for the members of communities and residents living on Trust-held land and *'it follows that the Trust does not hold the land in its personal interest or for its personal benefit'*.<sup>279</sup> The court quoted

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274 Rahman, I., 'Defining the Concept of Fiduciary Duty in the South African Law of Trusts' (University of the Western Cape, LLM Thesis, 2006), p 161.

275 Oxford Dictionary of Law (6th Edition), 2006.

276 Bennett TW and Powell CH., 'The State as Trustee of Land', 16 SAJHR (2000), p 608.

277 Ibid, p 619.

278 Trust Act, Section 2(2).

279 Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others (12745/2018P) [2021] 2022 (1) SA 251 (KZP) (11 June 2021) para [93].

Innes CJ regarding fiduciary relationships between the Trustee and beneficiaries of a trust: *‘Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other’s expense – or place himself in a position – where his interests conflict with his duty ... There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent.’* The Court held that Section 2(2) of the Trust Act *‘can be said to be the statutory entrenchment of this fiduciary duty.’*<sup>280</sup>

277. As the accounting authority of the Trust, the Board also has fiduciary obligations in respect of the Trust in terms of Section 50 of the PFMA. Under the PFMA, these fiduciary duties include exercising the duty of utmost care to ensure reasonable protection of the assets and records of the entity, acting with fidelity, honesty, integrity and in the best interests of the public entity in managing the affairs of the public entity.

278. The implications of the argument that the Trust does not fall within the ambit of the PFMA cannot be underestimated. However, by seeking to avoid the application of the PFMA to the Trust, the Board cannot avoid its fiduciary duty in its capacity as representative of the Trustee, who in turn has a fiduciary duty to administer the Trust for the benefit, material welfare and social wellbeing of the tribes, communities and residents mentioned in the Trust Act.



## 16. CONCLUSION

279. Despite having complied with the PFMA when preparing annual financial statements for the Ingonyama Trust and its Board from the time the PFMA was enacted in 1999, in 2016 the then chairperson of the Board submitted that the Trust and the Board were separate legal entities. Notwithstanding the Minister's strong opposition to this argument in 2017, this narrative took hold to the extent that the Board now no longer complies with the provisions of the PFMA in its preparation of the Trust's annual financial statements, and has argued that save for Treasury Regulation 14, the provisions of the PFMA do not apply to the Trust. The Board proceeds on the basis that only the Board is required to comply with the PFMA. The Auditor General has seemingly accepted this arrangement, and no longer requires the Trust's annual financial statements to be prepared in terms of the PFMA.

280. This means that legislation introduced to ensure accountability of public entities in South Africa in accordance with the Constitution does not apply to a trust which holds almost 2.8 million hectares of land on which millions of South Africans reside. Arguing that the PFMA does not apply to the Trust has enabled the Board to be vague in its reporting on sources of Trust revenue and to provide scant detail regarding disbursements to beneficiaries. Once this argument became entrenched, the organisational structure of the Trust was altered in the Annual Reports that were presented for scrutiny. Non-compliance with the PFMA has meant that the Board no longer provides performance information for the Trust, nor does it report on the Trust's performance against predetermined objectives. The Trust has accumulated significant reserves over the years, yet there seems to be a disproportionately low allocation from these reserves to the beneficiaries of the Trust. Failure to comply with the PFMA means that the Trust's finances are not properly transparent nor is it accountable to its primary stakeholders.

281. Late in 2023, the Minister appointed new Board members and the Ingonyama appointed a new chairperson of the Board. This proved, however, to be a point of further controversy as the Ingonyama then also revoked the appointment of the chair, and named himself in this position. Members of the PPC had welcomed the earlier changes and appointments, hoping for a 'new dawn' for the Trust.

282. Notwithstanding further changes, and howsoever the leadership of the Board may be constituted going forward, it is to be hoped that the members of the Board act boldly and take steps to ensure that the Trust complies with the PFMA, or is listed under the PFMA so that the objectives of the Trust Act are adhered to, and that the confusion which resulted following an administrative delisting is rectified. The amended categorisation of Trust land should also be urgently addressed. This is crucial for the beneficiaries of the Ingonyama Trust and for the integrity of the Trust's founding premise that the Trust land be administered for their benefit, material welfare and social wellbeing.

# 17. RECOMMENDATIONS

## 17.1. *Secure the Listing of the Trust in Schedule 3A of the PFMA*

283. There is little doubt that the Trust falls within the ambit of the PFMA. However, the listing of the Board and not the Trust in Schedule 3A of the PFMA has enabled the former Board to argue that save for Treasury Regulation 14, the PFMA does not apply to the Trust. This argument hinges on the Board's interpretation that the Trust and the Board are separate legal entities which is clearly not the case. Unfortunately, notwithstanding the legal opinion obtained by the Minister, the views expressed by the Minister in 2017 and those of the PPC, the AGSA has accepted the Board's contention.

284. The Auditor General must explain to the PPC why the AGSA now proceeds on the basis that the Trust and the Board are separate legal entities and why, since 2019/2020, the AGSA has permitted the Board to proceed on the basis that the PFMA does not apply to a public entity in control of significant public assets and funds and why, by contrast, it agrees that the PFMA should apply to the Board which is an entity that in the AGSA's own view in 2017, was a 'minor entity'. It is recommended that the AGSA consider its view of 2017 that the Trust and the Board were separate but interdependent entities, and that the Board as the accounting authority for the Trust should comply with all the provisions in the PFMA relating to a public entity, including, providing a separate set of financial statements. The present approach condoned by the AGSA undermines the right of the beneficiaries of the Trust to transparent disclosure of the exact and itemised income of the Trust.

285. Under Section 47 of the PFMA (relating to 'Unlisted Public Entities'), the accounting authority for a public entity that is not listed in either Schedule 2 or 3, must, without delay, notify the National Treasury in writing.<sup>281</sup> In addition, the Minister of Finance is obliged by notice in the Gazette to amend Schedule 3 to include in it all public entities that are not listed and the Minister of Finance has discretionary power to make technical changes to the list.<sup>282</sup> Treasury Regulation 25.2 also provides that an accounting authority of a public entity not listed in terms of the PFMA must submit specified information to its executive authority (in the case of the Trust, this is the Minister) and the Registrar of Public Entities in support of its application for listing.

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281 PFMA, Section 47(2): The accounting authority for a public entity that is not listed in either Schedule 2 or 3 must, without delay, notify the National Treasury, in writing, that the public entity is not listed.

282 PFMA, Section 47(1): The Minister, by notice in the national Government Gazette— (a) must amend Schedule 3 to include in the list all public entities that are not listed; and (b) may make technical changes to the list.

286. Therefore, if the AGSA does not address this issue, to undo the confusion which appears to have arisen about the obligation of the Trust to comply with the provisions of the PFMA, the Board, as the Trust's accounting authority, must notify National Treasury to remedy the omission of the Trust from Schedule 3A of the PFMA. The Minister of Finance must amend Schedule 3 of the PFMA to explicitly include the Trust in the list of National Public entities.

### *17.2. Review the AGSA Misstatements of 2016 and 2017*

287. It is recommended that the PPC ask the AGSA to revisit the incorrect assertion its representative made in the AGSA report to the PPC in 2016 (see para **43** above) where it was stated that the Trust had been **created by the Board in 1998** (whereas the Trust was created **in 1994** and the Board was established by legislation **four years later**). The AGSA must also explain why it subsequently expressed the view that the Trust was 'a subsidiary' of the Board in the ITB 2016/2017 Annual Report. The consequences of this assertion may have been significant in informing the position of the AGSA regarding the question of separation of financial reporting for the entities from this point onward, including its ultimate condonation of the Board's position that the Trust does not need to be audited in terms of the PFMA. The misstatement should be urgently reviewed and the correct position must be confirmed. The AGSA's incorrect statement appears not to have been contested or corrected.

### *17.3. Investigate and Secure Information on Disbursements to Beneficiaries*

288. The PPC should follow up on their repeated requests for a five-year report regarding disbursements to beneficiaries. In October 2019, the Chairperson of the PPC told the Board to submit a five-year report for the period 2014–2019, detailing what had been ploughed back into communities and to each Traditional Council. He referenced the fact that only 10 percent of the Board's income is meant to be spent on administration and 90 percent is meant to be distributed to beneficiaries. No such report appears to have been tabled at the PPC, and no valid explanation has been given for why not.

289. In addition, the PPC should call on the Board to make available full details of the 'Board's Disbursement Policy' and specific information regarding the application process it requires that beneficiary Traditional Councils and community members to follow for distribution.

#### *17.4. Secure Full Response to PPC Requests*

291. As indicated, the PPC has on numerous occasions asked the Board to provide reports and information. In the meeting with the PPC in May 2023, the Chairperson of the PPC asked the Board to respond in writing to members' queries within ten days – a request which the Minister supported.<sup>283</sup> The current committee's term ends shortly and it urgently requires the information it has requested in order to prepare its report for Parliament.

#### *17.5. Interrogate Lack of Transparency in Performance Reporting*

292. Reporting on performance information is vital in order to permit monitoring of the Trust's performance in supporting Trust beneficiaries. Without details provided in the financial statements it is impossible to assess the Trust's action in this regard. Accordingly, the AGSA should be called on to report material findings on the usefulness and reliability of the reported information against predetermined objectives for selected programmes for the Trust.

#### *17.6. Interrogate Performance Targets*

293. Pending listing of the Trust under Schedule 3A of the PFMA, the Board should be called upon to provide comprehensive performance objectives of the Trust to be included in the Annual Performance Plans in accordance with the PAA. Performance indicators relating to disbursements to beneficiaries, training of Traditional Councils, bursary support, agricultural development and inclusion of beneficiaries in the Trust's commercial endeavours should be added to the targets. The PPC must continue to interrogate the Trust's performance targets and to closely monitor the quality of quarterly reports and performance plans.

#### *17.7. Authorise a Forensic Audit*

294. The repeated qualified and adverse opinions issued by the AGSA in respect of the Trust indicate that a forensic audit of the Trust's financial statements should be undertaken. A request for a forensic audit of the Trust was made by members of the PPC in November 2021.<sup>284</sup>

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283 PPC Meeting, 2 May 2023: Presentation of ITB Annual Performance Plan 2023/ <https://pmg.org.za/committee-meeting/36778/2024>.

284 PPC Meeting, 16 November 2021: Presentation of ITB Annual Report 2020/2021. <https://pmg.org.za/committee-meeting/33802/>.

### *17.8. Update on Dispute Over Municipal Rates*

295. COGTA should be called upon to report on discussions with the Board and the municipalities regarding finding a solution to the payment of rates on Trust land.

### *17.9. Review Categories of Ingonyama Trust Land*

296. In the 2021/2022 Annual Report, there was a fundamental change in the way in which Trust Land was reflected in the financial statements, with an implication that a certain portion of Trust land is privately owned. The change resulted in land being reflected at cost/valuation of R2.9 billion in 2021/2022,<sup>285</sup> whereas a year prior, in the 2019/2020 Annual Report, the total cost/fair value of Trust land was reflected as being R24 billion.<sup>286</sup> The Minister should obtain a legal opinion regarding the legality of this change as well the legality of the creation of different categories of Trust land. Even if it is deemed that are separate categories of land, the land parcels should be specifically identified in detail so that rates and taxes can be applied to land which the Trust now regards as privately owned. This is particularly important given that the Trust Property Control Act and the Trust Moneys Protection Act do not apply to the Trust.

### *17.10. Secure Financial Information on Ingonyama Holdings (Pty) Ltd*

297. The Minister should require that Ingonyama Holdings (Pty) Ltd produce financial statements for presentation to Parliament or consolidate these with those of the Trust. If the Trust fails to submit financial statements for Ingonyama Holdings, this company should be listed under National Government Business Enterprises in Schedule 3B to the PFMA.

### *17.11. Release Legal Opinion on Formation of Ingonyama Holdings (Pty) Ltd*

298. In November 2021 the former chairperson of the Board told the PPC that the executive authority had been advised of the details of the formation of Ingonyama Holdings after a legal opinion was obtained, and that the Board had followed the PFMA in setting up the investment company. The Minister must make public this legal opinion in light of the Board's prior insistence that the PFMA does not apply to the Trust.

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285 ITB Annual Report 2021/2022, p 96.

286 ITB Annual Report 2019/2020, p 139.

### *17.12. Review ITB Organisational Structure*

299. The shifting argument that the Board and the Trust constitute separate legal entities has been mirrored in changes to the Organisational Structure reflected in the ITB Annual Reports between 2015 and 2022. The changes must be reviewed and a return to the structure of the Trust and its Board as envisaged in the foundational legislation that established both must be implemented.



## 18. POSTSCRIPT: ITB ANNUAL REPORT 2022/2023

275. On 1 May 2023, a new Board was appointed, under a new Chairperson, iNkosi TN Mzimela. The task of finalising and submitting the 2022/2023 Annual Report fell to this new Board, and it was tabled late – an eventuality that the Minister announced formally in Announcements, Tablings and Committee Reports on 29 September 2023<sup>287</sup>. The report was finally presented to the PPC on 7 February 2024, but was not posted to the ITB website or to Parliament's website. Unfortunately, the record of this meeting with the PPC had also not become available by 7 March 2024, when this research report was finalised. The report has been posted to the PMG website. This Postscript is drawn from the document found there.

276. This Postscript serves to highlight significant issues that arise out of the 2022/2023 Annual Report. It must be remarked that while the new Board has released this report, it was based on the work of the previous Board and thus reflects assumptions and implementation of the prior Board. In several important respects there has been no change in the approach to reporting from the 2021/2022 financial year. But there have also been shifts in some areas that are worth observing.

276. A notable change in the tone of the 2022/2023 report from previous years is reflected in the statement in the Chairman's Foreword that the Board has accepted the responsibility of ensuring that the Trust 'fulfils its noble purpose: to administer the land for the benefit, social welfare, and material well-being of its beneficiaries'. This is a sentiment that is repeated in the report. He added that the Board had made strides in ring-fencing beneficiary funds to achieve transparency and accountability and noted that the Board's mandate was 'inherently socio-economic, necessitating the development of a strategic approach that resonates with our beneficiaries'.<sup>288</sup>

277. In the 'Accounting Authorities Responsibilities and Approval' for the Trust, the Chairperson of the Board states that '[t]he KwaZulu Natal Ingonyama Trust Board is tasked with the responsibility of administering the Trust and Trust land. The Trust is administered for the benefit, material welfare and social well-being of the members of the tribes and communities'.<sup>289</sup> This statement does not appear in the previous financial year.

278. A new provision in the financial statements – 'Beneficiaries Disbursement (Note 16)' – was introduced. The opening balance of this Beneficiaries Disbursement allocation was reflected as R186 million in 2023. This amount was also reflected in

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287 <https://www.parliament.gov.za/storage/app/media/Docs/atc/069803e3-41f9-4468-836e-f0894d355cc1.pdf>

288 ITB Annual Report 2022/2023, pp 7–8.

289 Ibid, p 105.

the Statement of Financial Position under ‘liabilities’.<sup>290</sup> This item does not appear in the previous annual report and the figure does not tally with any item in that report. However, the 2022/2023 report notes that an amendment has been made to correctly reflect income from lease earnings from land within Traditional Authority areas as a liability, since this money is received for the benefit of beneficiaries residing on Trust land and accrues to them.<sup>291</sup> The minutes of the meeting in which the Board presented the 2022/2023 Annual Report may shed more light on this development.

279. While Note 16 of the report stated that the Trust has a disbursement policy for beneficiary disbursements in place (approved 6 November 2015), the details of how this policy finds practical implementation remain opaque. It appears that distribution of these funds will continue to be made via traditional councils and beneficiaries will continue to have difficulty obtaining information about such disbursements. The report stated: *‘The policy has been used to establish a pattern of past practice where beneficiaries (through a TC) request for funds generated through leases within their traditional authority boundaries. The nature of the obligation is such that because disbursements are done on request, the entity has a constructive obligation where funds are available to make the necessary disbursement as requested by either the TC, iNkosi or the Trustee subject to policy limits. Because the disbursements are based on request, the entity cannot determine the timing of the outflow of the future economic benefit and service potential. The amount is based on the best available estimates given cash received, allocated to the various TC’s, amaKhosi and the Trustee’.*<sup>292</sup>

280. While a substantial provision was made for disbursements to beneficiaries in the 2023 financial year (R186 million), only R19 million in actual disbursements was paid out. There is no information on who was awarded disbursements and to what use they were put.

281. As was the case in the previous annual report, the 2022/2023 Annual Report asserted authority and rights for Traditional Authorities that are not contained in the Trust Act. It stated, *‘Although the Traditional Authorities do not have control over the Trust, the rights given to them under the Ingonyama Trust Act of 1994 results in the Traditional Authorities ability to participate in the financial and operational policy decisions of the Trust, through approval of rights to land within their jurisdiction.’*<sup>293</sup> While this presumably a reference to Section 2(5) of the Trust Act, the new Board appears to be continuing to operate on the premise that its relationship with the beneficiaries

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290 Ibid, p 110.

291 Ibid, p,164

292 Ibid, pp 154–155.

293 Ibid, p 160

is via Traditional Councils. See discussion in paragraph [218–222] of this Research Report.

282. Notwithstanding that the new Board has said that it is committed to administering the Trust land for and on behalf of the Trust beneficiaries, fundamental issues that have been highlighted in this Research Report remain:

- **Separate legal Entities:** The Annual Report has still persisted with a distinction between the Trust and the Board as separate legal entities, and, in a manner not used in earlier annual reports, in several instances explicitly refers to the Board as ‘the public entity’, while the Trust is always described as ‘the Trust’. This perpetuates the narrative that it is the Board (and not the Trust) that is the public entity for the purposes of the PFMA. The Board flagged its general information section as ‘Public Entity’s General Information’ and noted the ‘Registered name of the Public Entity’ as the KZN Ingonyama Trust Board.<sup>294</sup> There was no such particular information or clarification in the 2021/2022 Annual Report.
- **Reporting under the PFMA:** The fundamental assumptions underpinning the financial reporting requirements which have previously been accepted by the AGSA remain in place. This includes the notion that the PFMA does not apply to the Trust. There has however been a change from the previous year when it was stated that the annual financial statements for the Trust were prepared in accordance with GRAP, the Trust Act and Treasury Regulation 14.<sup>295</sup> In 2022/2023 the Board states that the Annual Financial Statements for the Trust have been prepared in accordance with Generally Accepted Accounting Practice and in a manner required by the Financial Regulations to the Act.<sup>296</sup> It is a departure from the previous narrative that held that save for Treasury Regulation 14, no part of the PFMA applies to the Ingonyama Trust financial reporting. Treasury Regulation 14 is not mentioned once in the 2022/2023 Annual Report.
- The Report persists with **categorising Trust land** in ways that deviate from the way it is set out in the Trust Act. The PPC should interrogate these new categories, as discussed previously in relation to the 2021/2022 Annual Report when new land categories were introduced (see paras 134–139 above).<sup>297</sup>

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294 Ibid, pp 3, 5.

295 ITB Annual Report 2021/2022, p 74.

296 ITB Annual Report 2022/2023, p 51.

297 Ibid, p 146.

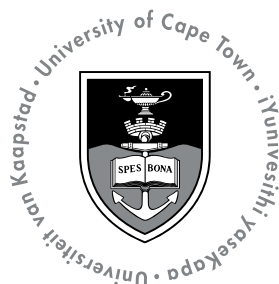
- **Ingonyama Holdings** (Pty) Ltd failed once again to provide annual financial statements for audit and this was the basis for the qualified audit opinion from the AGSA for the Trust. In this financial year, a further loan of R41 million was advanced to Ingonyama Holdings which was referred to as ‘an entity controlled by Ingonyama Trust.’<sup>298</sup>
- In the 2022/2023 Annual Report, the Board repeated its complaint about the amount of **funding** received from the Department and noted that it was necessary to again receive a transfer of funds from the Trust to meet its costs. As pointed out previously, the Financial Regulations permit an amount of up to 10 percent of the Trust’s income to be allocated to the Board for administrative costs.



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