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# The Interim Protection of Informal Land Right Act

## HOW DOES IT PROTECT YOUR RIGHTS TO LAND?

By Zenande Booi

LARC
Land & Accountability Research Centre

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*The Land and Accountability Research Centre (LARC) is based in the University of Cape Town's Faculty of Law. LARC forms part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights and living customary law in the former homeland areas of South Africa. LARC is particularly interested by the ways in which laws and policies frame power relations within these areas and threaten ongoing initiatives for democratic change and accountability at the local level.*

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# THE INTERIM PROTECTION OF INFORMAL LAND RIGHT ACT

## *How does it protect your rights to land?*

Under colonialism and apartheid, rights to land held by black people were denied legal recognition through various laws, policies and practices. Rights of ownership, occupation, use, and access to land held in terms of customary law and other group tenure systems were ignored, distorted and weakened depriving millions of black people of secure tenure to land.

### THE CONSTITUTION – A BREAK FROM THE PAST

When the Constitution came into effect in 1996, it sought to restore what had been lost by recognising and protecting the underlying land rights of vulnerable people. Its aim was to give secure tenure to land for people that had been deprived for hundreds of years because of racist and sexist colonial and apartheid laws, policies and practices.

**There are two important sections in the Constitution that deal with land rights and tenure security. Section 25(6) of the Constitution provides a right to tenure security:**

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

**And section 25(9) of the Constitution requires that Parliament pass a national law that gives effect to the right to tenure security:**

*25(9) Parliament must enact the legislation referred to in subsection (6).*

**SECURE TENURE**

A person has secure tenure when they are legally and practically able to defend their ownership, occupation, use and access to land against interference from other people or institutions.

This means that people's insecure, informal or living customary law rights to land are protected in the Constitution and that Parliament must pass a law that provides additional protection and strengthens these rights (or provides for these people to be financially compensated for the rights that they lost as a result of these laws).

## THE INTERIM PROTECTION OF INFORMAL LAND RIGHTS (IPILRA)

The Interim Protection of Informal Land Rights Act (IPILRA) was passed by Parliament in 1996 to give effect to section 25(6) and (9) of the Constitution – the right to secure tenure in land. IPILRA is one of the only laws that currently exists that aims to give effect to section 25(6) of the Constitution. It specifically deals with customary rights holders in the former homelands. IPILRA gives effect to the Constitutional promise that rights that were made weak under colonialism and apartheid by racist laws, policies, and practices – such as rights to land held in terms of Permission to Occupy Certificates (PTOs) and other certificates that were issued by the apartheid government and rights held in terms of living customary law systems – must be respected and treated on a similar basis to "formal" rights like title deeds.

IPILRA was intended to be a temporary law that would work as a safety net by protecting people against the deprivation of their land rights until a more comprehensive, permanent law could be passed to clarify the nature of people's rights and strengthen them. No such law yet exists in relation to the rights of people living in the former homelands. This has meant that IPILRA has been renewed by Parliament annually.

Although IPILRA provides important protection to rural citizens, government officials, landowners and magistrates often say they do not know about it. This has meant that IPILRA is often not implemented. IPILRA rights remain legally valid however, people can insist that they have the right to say no to developments which deprive them of informal land rights. If they say no, then government or the developer must go to court to apply for an **expropriation order.**

## *Rights protected by IPILRA*

**IPILRA recognises different kinds of informal and customary land rights. These include:**

- The right to occupy, use, or access land that is situated in one of the former homelands or that had previously been in the hands of the South African Development Trust (SADT). This would include rights people hold in their household plots, fields, grazing land and other shared land resources like forests. IPILRA recognises and protects rights held in terms of customary law in these areas.[1]

- The land rights of people who are beneficiaries in terms of a trust that was created by a law passed by Parliament. This includes the rights of people living on land registered in the name of a trust like the Ingonyama Trust.[2]

- The rights of people who use or occupy land as though they hold rights to the land as set out in the Upgrading of Land Tenure Rights Act (ULTRA) even if the person is not formally registered as the holder of the right. This would include PTO Certificates. [3]

- The rights of anyone who has continuously lived on the same piece of land (anywhere in South Africa) since the beginning of 1993 as if they were the owner of the land. These people are called beneficial occupiers.[4]

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[1] **Section 1(1)(iii)(a) of IPILRA:**
"the use of, occupation of, or access to land in terms of-
(i)any tribal, customary or indigenous law or practice of a tribe;
(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time 'vested 15 in-
(aa) the South African Development Trust established by Section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);
(bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or
(cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei."

[2] **Section 1(1)(b) of IPILRA:**
"the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office."

[3] **Section 1(1)(d) of IPILRA:**
"the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991); although he or she is not formally recorded in a register of land rights as the holder of the right in question."

[4] **Section 1(1)(c) of IPILRA**
"beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997."

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**IPILRA does not apply to:**

- People who hold rights as tenants, labour tenants, sharecroppers, or employees if that right is purely contractual in nature.

- People who hold rights that are based only on temporary permission given by the owner or a lawful occupier, on the basis that the permission may at any time be withdrawn by the owner or lawful occupier.

## HOW DOES IPILRA PROTECT RIGHTS TO LAND?

IPILRA says that persons cannot be deprived of their informal or customary law rights to land without their consent, except if those rights are expropriated. Expropriation is a formal legal process which requires compensation to be paid to persons before they are deprived of their rights. In terms of this law, a person cannot have their land rights taken from them without their consent. If the person who holds the right to land refuses to give consent, then the body that wants the land must go to court to seek an expropriation order.

Where the land is held communally – meaning held by the community or a portion of the community on behalf of the members of that community or group – IPILRA specifies that persons of that community may only be deprived of their rights in terms of living customary law. But as a minimum, the process by which the community disposes of community land must ensure that those directly affected are appropriately compensated for the rights to land they lose.

### COMMUNITY

IPILRA defines a community as a group of people, or part of a group of people whose land rights derive from shared rules. This means that decisions can also be made at the level of sub-groups within a larger community who shared rules in respect of specific areas.

**IPILRA places minimum protections for people's rights by placing requirements for what a community's customary law related to disposal of land must include:**

- A community can only decide to deprive someone of their informal right if a majority of the community agrees to this. This means that most of the people in the community that have similar rights must agree to deprivation.
- To ensure a proper majority is reached, a special community meeting must be called to specifically discuss the possibility of disposing of the land in question. There must be enough notice given to the members of the community about when and where the meeting will be held, and all members must be given an opportunity to participate in the meeting.[7]

What is set out above is the bare minimum protection that IPILRA gives. But where living customary law requires more than this, living customary law must be complied with.

Importantly, where holders of IPILRA rights to land are not properly deprived of their rights then any sale or other disposition of the land will be subject to any existing informal rights to that land. Meaning, the IPILRA rights to land will continue to exist despite the sale or transfer of the land until holders of the rights are **lawfully deprived of their rights.**

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

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

[7] **Section 2(4) of IPILRA:**
"For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have bad a reasonable opportunity to participate."

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## WHO IS REQUIRED TO COMPLY WITH IPILRA?

The provisions of IPILRA bind all persons, including the State. This means that everyone must first comply with IPILRA to be able to lawfully deprive holders of these rights. "All persons" includes companies such as development companies, mining companies; also, private individuals; traditional leaders; and government departments.

They **must negotiate with the people who have informal land rights and get their consent to use the land.** Without the consent of the community members, these developments cannot take place. They also need to pay compensation to the people who are losing their land. IPILRA means that no one, including traditional leaders and government officials, can make decisions about the land without the consent of the members of the community who are holders of rights to land.

## HOW ARE THE DIFFERENT RIGHTS PROTECTED BY IPILRA?

A good way to understand what rights IPILRA covers, how the rights must be treated, and how to lawfully deprive someone of those rights is to think about who holds the rights: Is it an individual? A household? Or is the right held by the community – or part of a community – on behalf of its members?

The answer to this question will tell you what type of obligation arises and who must give their consent to lawfully deprive them of the right.

Where an individual or a household holds rights to the land in question – such as a homestead, ploughing fields, or family grazing fields – then that individual or family's **free, prior and informed consent** must be obtained before they can be lawfully deprived of their rights in terms of IPILRA. If they are deprived of their land rights, they must be appropriately compensated for their loss.

Where land is held communally – either by a whole community or a group within a community – then the minimum provisions of IPILRA that regulate how communally held land can lawfully be disposed of must be followed. And if living customary law requires more to be done, then living customary law must be complied with.

IPILRA makes it clear that where the government or companies want to mine or develop land where people hold rights protected by IPILRA, they must negotiate with the rights holders **who are directly affected** and get consent from them to use the land. If the rights holders do not give their consent, then agreements on the land or any intended development cannot take place. In all cases, people that have their rights to land taken away must be compensated for that loss. Traditional leaders and government institutions cannot make decisions or conclude agreements over

land without the consent and compensation of the directly affected rights holders.

## WHAT ARE SOME OF THE CHALLENGES FACED IN THE IMPLEMENTATION OF IPILRA?

Although IPILRA provides important protection for the land rights of rural citizens, the law has various shortcomings which require amendment and strengthening. IPILRA nevertheless provides a key mechanism to protect the rights of the most vulnerable and to build on, in enhancing and expanding those rights.

Non-governmental organisations (NGOs) and community-based organisations (CBOs) have argued that IPILRA must be strengthened and properly enforced. Urgent additions that appropriately protect rights are needed to ensure land rights of people cannot be sold from under them, people need the security of being able to prove the existence of their rights.

The fact that IPILRA needs to be renewed annually also contributes to confusion about its status. IPILRA must be enhanced and made permanent, with a view to replace it later with a more comprehensive piece of legislation.

There is also a need to create legally binding regulations to add more detail to IPILRA and to create clear procedures governing the required form of consultation by government, companies, or traditional leaders if they want to use land where people have informal or customary land rights. Section 4 of IPILRA gives the Minister of Agriculture, Land Reform and Rural Development the power to make regulations, but the Minister has not done so to date. The government has, however, already developed **Interim Procedures Governing Land Development Decisions** which provide the first layer of content for future regulations.

## *What have the Courts said about rights to security of tenure and the obligations in IPILRA*

Over the past few years, there have been a number of very important judgments that give more content to the strength of the rights people hold to their land, and they also give more clarity on the obligations imposed by the Constitution and IPILRA.

As mentioned above, IPILRA is routinely ignored by the state and private companies – people are unlawfully dispossessed of their rights to land as a result and are not properly compensated.

*What are the obligations of a mining company in terms of IPILRA and the Mineral and Petroleum Resources Development Act (MPRDA) to holders of informal rights and customary rights to land protected by IPILRA?*

*Maledu and others v Itereleng Bakgatla Mineral Resources and another (Maledu)*[8]

The Maledu judgment clearly illustrated the continued impact of racist laws, practices and policies that were aimed at ensuring black people were not able to own and control what happens with their land.

In this case, in 1919 – after 4 years of raising money through contributions, 13 families who were members of the Itereleng Bakgatla community came together and bought the land in question. But because of the "six natives" rule that applied then – where if more than 6 black people intended to buy land, they were required to affiliate with a 'tribe' that was recognised by the government, where the land would be vested in the government on behalf of that 'tribe', it was not possible to have it registered in the name of the actual purchasers.

As a result, when the land in question was purchased, it was vested in the government on behalf of the Bakgatla-ba-Kgafela 'tribe', with nothing to reflect who the true owners were – the 13 families who had contributed to the purchase price of the land.

Fast-forward 100 years, a mining right is awarded over the land without properly consulting the descendants of the purchasers of the land and when the true owners of the land refused to let mining happen; the mining company went to court to get them evicted and ask for an order barring them from entering the land. Before they were lawfully deprived of their rights in the land and appropriately compensated.

The community relied on their rights held in terms of IPILRA saying that the mining company had failed to obtain their consent to be deprived of their rights before it attempted to exercise its mining right. They explained to the court that mining companies must first obtain consent from directly affected rights holders before they can exercise their mining rights.

[8]Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 (CC) (25 October 2018

**The Court dealt with the question of whether it was allowed for a mining company to simply apply to evict people from their land and bar them from entering that land without:**

- First, using remedies provided in the Mineral and Petroleum Resources Development Act (MPRDA), and

- Properly extinguishing prior existing rights to land that are protected by IPILRA where the mining right was awarded.

Please note that this case was between the mining company and the community that owned the land. The Constitutional Court focused on what the obligations of a mining company that had been awarded a mining right were in terms of IPILRA and the MPRDA.

Another important thing is that when this case was taken to court it was in a context where the Department of Mineral Resources (DMR) and holders of mining rights were very secure in the fact that the MPRDA trumped all laws that might conflict with it. The mining company believed that it could exercise its mining right and that it was not bound by IPILRA and had no obligation to obtain the consent of the directly affected rights holders or give them compensation before exercising its mining right.

However, the Constitutional Court found that rights held in terms of the MPRDA and IPILRA could co-exist and do co-exist. The MPRDA does not trump IPILRA and does not automatically erase rights held in terms of IPILRA.

The Court found that when a mining right holder exercises his mining right by attempting to or beginning mining operations, IPILRA rights holders are deprived of their rights and the consent of the directly affected rights holder must be obtained before mining can continue.

The Court held that an appropriate process to lawfully deprive people who hold rights in IPILRA exists in the MPRDA in terms of section 54, which deals with the determination of compensation by agreement between the parties or through a court order, and that in the case of people who hold rights in terms of IPILRA – those rights can only lawfully be given up through obtaining the consent of the rights holders.[9]

[9]**Section 54 of the MPRDA:**
**Compensation payable under certain circumstances**
(1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question-

(a) refuses to allow such holder to enter the land;
(b) places unreasonable demands in return for access to the land; or (c) cannot be found in order to apply for access.

(2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1)-

(a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit;
(b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act; (c) set out the provisions of this Act which such owner or occupier is contravening; and
(d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.

(3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.

(4) If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965), or by a competent court.

(5) If the Regional Manager, having considered the issues raised by the holder under subsection (1) and any representations by the owner or occupier of land and any written recommendation by the Regional Mining Development and Environmental Committee, concludes that any further negotiation may detrimentally affect the objects of this Act referred to in section 2(c), (d), (f) or (g), the Regional Manager may recommend to the Minister that such land be expropriated in terms of section 55.

(6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the reconnaissance permission, prospecting right, mining right or mining permit, the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or by a competent court.

(7) The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation, in which case this section applies with the changes required by the context.

# SO, WHAT DOES SECTION 54 OF THE MPRDA SAY?

Where a holder of a right in terms of the MPRDA to mine or prospect is prevented from commencing or conducting prospecting or mining because the lawful occupier or owner refuses to give them access or is placing unreasonable demands to be able to access the land or if the owner or lawful occupier suffers or is likely to suffer loss he or she must go to the relevant Regional Manager.

The Regional Manager will write to the owner or lawful occupier to get an explanation about what is going on and what the issues are and explain to the owner what the law says about the prospecting or mining right holder's rights in terms of the MPRDA.

If the Regional Manager, after having considered the issues raised by the mining or prospecting rights holder and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.

If the parties fail to reach an agreement, compensation must be determined by arbitration or by a competent court. If negotiations do not go well or further negotiations will be detrimental, then the Regional Manager can recommend expropriation to the Minister.

What is important with this case is that it gives some sort of process where none existed with the operation of the MPRDA and the rights of people to their land in terms of IPILRA and living customary law.

*Does the DMR have to obtain the consent of IPILRA rights holders before a mining right is granted where these rights exist?*

*Baleni and others v Minister of Mineral Resources and others (Baleni)*

The *Baleni* case that was brought by the Xolobeni community against the Minister of Mineral Resources dealt with the question of whether the consent of the directly affected rights holders is required before a mining right is awarded by the DMR over land where people hold rights in terms of living customary law and IPILRA.

In this case the DMR and the mining company refused to recognise that customary and IPILRA rights holders had a **right to consent to mining before a mining right was awarded.** They stated that the MPRDA explicitly does away with the consent requirement for common law owners and therefore – even though the MPRDA makes no explicit reference to customary law owners – the same exclusion should

automatically apply to customary law as well. They argued that the Constitution requires common law and customary law to be treated the same. Otherwise, they argued, this would mean customary law ownership will be getting special protection in the MPRDA that common law ownership does not.

This argument was rejected by the Court. It made it clear that what the Constitution does is place customary law and common law on an equal footing in our legal system, making both laws subject to the Constitution and constitutional legislation that specifically deals with them. Customary law is no longer subject to common law for its validity. This point has been made clear in Constitutional Court judgments such as *Bhe v Khayelitsha Magistrate and Alexcor v Richtersveld Community.*

But being equal does not mean that these laws are to be treated the same or that statutes that regulate common law automatically also regulate or change customary law in the same way without having to specifically regulate customary law. The MPRDA says nothing about customary law when it comes to nullifying the consent requirement, it can't be assumed that it does.

The Court also said that the Constitution is aware of the continued impact of our history on the current vulnerability faced by rights held in terms of customary law. A huge aim of the Constitution is to remedy the continued impact of historical injustices. Therefore, it is very much within the purview of the Constitution and the MPRDA for these rights to be given greater protections.

**Like the Court in Maledu Judge Basson found that the MPRDA does not trump IPILRA – the consent of the directly affected holders of IPILRA rights must be obtained before a mining right is granted by the DMR.**

What was also important about this judgment is **it began to set out how to appropriately obtain consent in terms of IPILRA** and it set out what is necessary for that consent to be valid.

In terms of how to obtain consent:

IPILRA, where land is held on a communal basis, requires that consent to deprivation be obtained in terms of the applicable customary law. At the very least a meeting specifically about obtaining consent must be properly convened, proper notice given and that a majority of the directly affected rights holders in attendance must agree to the deprivation, after being given the opportunity to participate in the meeting.

However, the Xolobeni community made it clear – and the court accepted – that what was set out in IPILRA was just the floor of possible protection. Living customary law can require more consent to be validly given by a community. In the case of

their community, majority agreement would not be enough – to minimize conflict, protect vulnerable people, and their way of life – the living customary law in their community required that there be consensus and not just majority agreement for consent to be validly obtained.

**In terms of how to ensure that the consent is valid:**
The Court went into a lot of detail about the need for the principles of Free Prior and Informed Consent to be complied with as is required in terms of South Africa's international law obligations.

- Free, meaning people are free to refuse consent.
- Prior, meaning that the consent is sought and given before any action is taken that could nullify the need to obtain consent.
- Informed, meaning all the information needed to decide is made available and its import explained.

These findings in relation to the relationship between IPILRA and the MPRDA are incredibly important especially for rural communities across the country, especially those dealing with mining operations or the threats of mining operations.

## *How are IPILRA rights protected on land administered by the Ingonyama Trust in KwaZulu-Natal?*

### COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION, RURAL WOMEN'S MOVEMENT AND OTHERS V INGONYMA TRUST AND OTHERS

This case was brought against the Ingonyama Trust and the relevant government departments by the Council for the Advancement of the South African Constitution, the Rural Women's Movement and various community members who live on land administered by the Ingonyama Trust and had been induced into converting their customary law ownership property rights into leases with the Ingonyama Trust.

**Written by Judge Madondo, his findings begin to give clarity about:**

- The strength, nature and content of property rights held in terms of living customary law, IPILRA, and regulated by Upgrading of Land Tenure Rights Act (ULTRA).

- Also, the obligations of land holding entities to act within the law – including the Constitution, IPILRA, and living customary law– and not at the expense of the people on whose behalf the land is held.

## WHAT WERE THE RESIDENTIAL LEASES BEING CONCLUDED BY THE TRUST AND WERE THEY LAWFUL?

Approximately since 2006/7, the Trust has been compelling rural citizens who hold PTO certificates, or IPILRA and customary law ownership rights to land, to sign lease agreements with the Trust and pay rent to continue living on the land.

The Ingonyama Trust has claimed that this 'Conversion Policy' was intended to reinforce and strengthen the land rights of people living on land it administered.

This is simply untrue. Such leases undermine people's rights to land because they change and weaken the underlying ownership rights that people hold in terms of customary ownership, IPILRA, and PTO regulations. Lease agreements imply that the Trust owns the land, and the beneficiaries are mere tenants, even on land they have owned for generations.

**Unlike PTO rights and customary law rights that are protected by IPILRA, the leases created by the Trust have placed unfair and burdensome obligations on people – these include:**

- The leases were issued for a limited time and must be renewed after a 40-year period. The leases were set up such that the Trust could refuse to renew a lease for any reason – and the tenant would have to vacate the land. This puts tenants in a very different position from people holding PTO rights and customary ownership rights to land where there is no time limit on the validity of the right, and right holders cannot easily be removed from their land.

- People who signed leases with the Trust are required to pay rent which increases by 10% every year. Failure to pay rent means that you have breached your lease agreement, and the Trust can remove you from your land. Neither PTO rights nor customary law rights require you to pay rent to continue living on the land.

- If the lease is cancelled or is not renewed by the Trust for any reason, the leaseholder has no right to claim compensation for any buildings or improvements he or she has made on the land.

- Leases cannot be upgraded to ownership.

- It is not possible for lease rights to be inherited on the death of the leaseholder.

The introduction of leases thus significantly eroded the rights of people who live on land vested in the Trust. The leases made people tenants on land that they already owned in terms of living customary law – or could have become the owners of by upgrading their PTOs to title deeds in terms of ULTRA. The leases thus violated constitutional rights, customary law rights, and the land tenure rights protected by IPILRA and ULTRA.

The leases made the tenure of people living on Trust land weaker, not stronger as claimed by the Trust. The Department of Agriculture, Land Reform and Rural Development (the Department) facilitated this unlawfulness by agreeing to halt the process to obtain PTOs.

This meant that in order to obtain written proof of their land rights, community members had no option but to conclude leases with the Trust.

The Trust's Conversion Policy and the Department's support of the policy is what was challenged in court.

**The aim of the case was to have the court:**

1. Declare that the conduct of the Trust in converting the land rights of people living on land it administered into leases was unconstitutional, and that these leases were unlawful.

2. Declare unlawful the failure of the Minister of Land Reform, Agriculture and Rural Development and the Department to issue people with PTOs, thereby forcing people to conclude leases as their only way to obtain recorded land rights.

3. Declare that the Minister of Land Reform, Agriculture and Rural Development had violated her constitutional obligations in terms of section 25(6) of the Constitution which requires her to protect the security of tenure of the people who live on land administered by the Ingonyama Trust.

The judgment is an important statement of the nature of the ownership rights of the people living on Ingonyama Trust land and the role and obligations of government institutions like the Ingonyama Trust and the Department in protecting those rights.

## WHAT THE JUDGMENT SAID ABOUT PTO RIGHTS

As mentioned above, IPILRA also recognises and protects rights regulated by ULTRA, including PTO rights. Meaning, people who hold PTO rights can only be deprived of those rights in terms of IPILRA. Judge Madondo held that by concluding

leases with holders of PTO rights the Trust did not improve their security of tenure. By concluding these leases, the Trust was taking away their rights of ownership.

PTOs enable holders to transfer their land rights which means they can also be inherited when the holder dies. Leases do not allow for either transfers or inheritance. Instead, the leases meant that a tenant could only stay on the land if they paid rent to the Trust and if they complied with the other onerous terms. The court reiterated that none of the permanent rights provided by a PTO applied to leases.

The Court stressed that PTO rights are protected in terms of section 25(1) of the Constitution which prohibits the arbitrary deprivation of land. These rights are also protected by section 25(6) of the Constitution that requires protection and security for previously insecure and unprotected land tenure. These section 25(6) protections are also protected by IPILRA – which requires the informed consent of the rights holders before any deprivation of rights to land.

The Court concluded that the leases issued to people who hold PTO rights were invalid. The Court found that it was unlawful for the Trust to prevent the issuing of new PTOs on land that it administers. The Court also found that requiring people who wanted to get PTO certificates to instead obtain leases from the Trust was unlawful.

## WHAT THE JUDGMENT SAID ABOUT CUSTOMARY OWNERSHIP RIGHTS

In dealing with rights to land held in terms of customary law, the judgment distinguished between different categories of land, being residential (homes), arable (ploughing) land that is usually allotted to individuals and families in terms of living customary law, and communally held land such as grazing land that the community holds for the benefit of the members of that community.

The judgment made it clear that the people who have residential and arable land in terms of customary law are owners of that land – these are their homesteads and fields. Their holding of that land is sacred: it is inviolable and passes from generation to generation. The land is the property of that family. The judgement clarified that exclusive family-based rights exist in respect of residential and arable plots of land.

This land is owned in terms of living customary law and this ownership is protected by the Constitution and IPILRA.

The judgment went into a lot of detail to show that, in all the important ways, ownership in terms of customary law is the same as ownership in terms of common law. All the rights that make up ownership in common law are also present in

ownership in terms of customary law. These rights include:

- The capacity to possess: Possession is the ability to control a thing for one's own benefit.

- The right to use and enjoy a thing: In addition to being entitled to make use of the land, the owner is entitled to the enjoyment of the property and its fruits.

- The right to alienate property: This is an element of ownership that also exists in customary law even if it is not identical to the element as it exists in common law. In common law, being able to alienate land means being able to transfer (for example, to sell or lease) ownership freely and completely to another person regardless of who they are or where they come from. The right to alienate land or rights to land (sell, give, lend, allow use) also exists in customary law. A customary law owner can lend, give or sell part or all the land to another person in the community – even an outsider who would become a member of the community.

The judgment concluded that by converting into leases the rights of ownership to Trust-administered land, the Trust had violated the constitutional and customary law rights of leaseholders, and the Conversion Policy was a violation of IPILRA.

## WHAT THE JUDGMENT SAID ABOUT THE IPILRA OBLIGATIONS OF THE TRUST

The judgment made it clear that IPILRA applies to Trust-administered land. The judgment stated that the Trust was depriving people of their land rights by converting people's ownership and PTO rights to leases. Before the Trust may deprive people of their residential or arable land, it must first comply with IPILRA. This means that the consent of the directly affected rights holder must be obtained for deprivation to be lawful. The court also made it clear that this consent must be free, full, and informed consent. Furthermore, appropriate compensation must be provided as required by IPILRA.

The community members that approached the court with Council for the Advancement of the South African Constitution and Rural Women's Movement gave accounts of how they were forced to conclude leases. These accounts made it clear that their free, full, and informed consent was not obtained by the Trust before they were deprived of their rights.

Some community members were informed by their traditional leaders that 'a new law' required them to conclude leases with the Trust. Such a law did not exist. Some community members were informed that refusing to conclude a lease would cancel

their community membership. In many instances, people were simply told to present themselves with their ID documents and Trust employees filled out forms on their behalf without explaining what they were for. They were simply instructed to sign forms that requested a lease. No explanation was given as to what leases were or what the impact of converting existing rights to a lease would be. Many people found out only much later that a yearly rent increase would be required.

The judgment found that the Trust had violated its obligations to comply with IPILRA by coercing people to conclude the leases.

The judgment briefly deals with land that is not allocated to an individual or family for residential or ploughing purposes but is held by the community on behalf of members of that community (for example grazing land, forests, and other natural resources). The judgment notes that the Trust Act stipulates that to lease or dispose of land, the Trust must obtain the consent of the traditional or community authority involved. However, our reading of the obligations of the Trust is that it will not be enough just to get the consent of the traditional or community authority in respect of grazing or forest land – the Trust must still comply with IPILRA's provisions relating to the disposal of community land. This means that in addition to obtaining the consent of the traditional or community authority, the Trust must also obtain the consent of the members of the community that access such communal land in terms of their customary law.

At every juncture, the people who live on and use the land must be consulted, their free and informed consent must be obtained, and appropriate compensation must be paid for the loss they suffer when ownership rights are deprived.

## WHAT THE JUDGMENT SAID ABOUT THE GENERAL OBLIGATIONS OF THE TRUST

The judgment made it clear that the role, the powers, and the obligations of the Trust are determined by law, and the Trust is obliged to act within the bounds of the law. The laws that determine how the Trust can lawfully operate include the Constitution, the Ingonyama Trust Act, IPILRA, ULTRA, and Zulu customary law. The judgment also made it clear that the conduct of the Trust in converting the ownership rights of people living on land it administers was a violation of these laws and was beyond their lawful powers. They had no legal authority to implement a policy such as the PTO-to-Leases Conversion Policy and there was no basis in law for the demand for payment of rent for leases from existing rights holders.

The Trust had acted against the interests of the people that live on the land it administers, which was a violation of its central obligation in terms of the Trust Act – to act for "the benefit, material welfare and social well-being of the members of the tribes and communities" on the land vested in the trust.

## THE ORDER MADE BY THE COURT REGARDING RESIDENTIAL LEASES

1. The court declared that the Ingonyama Trust and Ingonyama Trust Board had acted in violation of the Constitution and the law by concluding residential lease agreements with people that hold PTO rights and customary ownership rights to land.

2. All residential leases concluded by the Trust over residential, arable, or commonage land were declared invalid.

3. The Trust was ordered to pay back any and all money paid to it in terms of these leases.

4. The Minister was found to have violated obligations in the Constitution and the law to protect the security of tenure of people that live on land administered by the Trust.

5. The Minister was ordered to make sure that the Department of Rural Development has the necessary capacity to enable it to start issuing PTOs to people who want them in KZN. The Minister must report to the court every three months on its progress in building this capacity.

# *Other leases – Third-Party leases*

## THIRD PARTY LEASES

Third-Party leases are leases the Trust concludes with external investors and agencies. Such leases are usually entered into with mining companies or other companies offering 'development' such as those that build shopping malls or resorts and hotels on communally owned land administered by the Trust.

This type of lease was not dealt with by the judgment and was not declared unlawful and invalid. However, as the judgment makes clear, the Constitution, the Ingonyama Trust Act, IPILRA, ULTRA, and Zulu customary law protect pre-existing customary ownership rights on any land that the Trust may attempt to lease to third parties.

Where the Trust intends to lease land to a third party, the first issue that needs to be determined is what kind of rights exist on that land and who holds those rights. This will in turn determine who needs to be consulted, whose consent needs to be obtained, and who needs to be compensated before any agreement can be concluded over the land.

Where there are existing rights in relation to residential, arable, or commonage land held in terms of customary law, or where PTOs exist, then IPILRA's provisions must be complied with. The consent of the direct rights holders – whether an individual or a family – must be obtained before any agreement can be concluded over the land.

Where the land in question is held by a community, or by a group on behalf of the members of a community or group, such as grazing land or forest, then the written consent of the traditional or community authority must be obtained in terms of the Trust Act. IPILRA must also be complied with, which requires that the affected community or group that stands to be deprived of their land must consent (or refuse) in terms of applicable customary law. At the very least, a special meeting must be held, of which all rights holders must be informed. All rights holders present in the meeting must have an opportunity to be heard, and a majority of the rights holders present in the meeting must agree to dispose of the rights in question. In addition, the rights holders must be compensated.

# WHAT IF YOUR IPILRA RIGHTS ARE BEING THREATENED?

If people's informal land rights are under threat, they should show those who threaten them a copy of IPILRA:

- **Insist that they need to consent to any deprivation** of their informal or customary land rights. If the state or private individual refuses to comply with IPILRA then the deprivation is unlawful and can be interdicted in Court.

- If a person's rights in communally held land might be deprived, they can:

    - **Insist that many of the rights holders in the community must consent to any deprivation** of their land rights.

    - They should **monitor the procedure to make sure that it happens as is provided for in IPILRA.** This means they should make sure that people are notified of any meetings about the land developments; they have the right to participate in these meetings and they have the right to be compensated if they are deprived of their rights. They can insist that the procedure explained in this article needs to be followed. If the procedure is not followed, it is unlawful, and they can go to Court.

# ORGANISATIONS THAT COULD BE OF ASSISTANCE:

If you would like to find out more about the work these participants do and the organisations they are involved in, please visit these websites or call:

**Mining Affected Communities United in Action (MACUA)**

**Website:**
www.macua.org.za
**Telephone:**
082-707-9860

**Legal Resources Centre**

**Website:**
www.lrc.org.za
**Telephone:**
011-838-6601
**Fax:**
011-838-4876

**Ndifuna Ukwazi**

**Facebook:**
www.facebook.com/NdifunaUkwazi
**Telephone:**
021-012-5094

**Phuhlisani**

**Website:**
www.phuhlisani.com
**Email:**
rick@phuhlisani.co.za
**Telephone:**
021-685-1118

**Rural Women's Movement**

**Facebook:**
www.facebook.com/ruralwomensmovement
**Email:**
ruralwomensmovement@gmail.com

**Tshintsa Amakhaya**

**Facebook:**
www.facebook.com/tamakhaya
**Telephone:**
021-447-5096

**Abahlali baseMjondolo**

**Website:**
www.abahlali.org

**Email:**
abahlalibasemjondolo@telkomsa.net
**Telephone:**
031-304-6420
**Cellphone:**
083-547-0474
**Fax:**
031-304-6436

**Alliance for Rural Democracy (ARD)**

**Facebook:**
www.facebook.com/RuralDemocracy
**Telephone:**
010-021-0572

**Alternative Information and Development Centre (AIDC)**

**Website:**
www.aidc.org.za
**Telephone:**
021-447-5770

**Bench Marks Foundation**

**Website:**
www.bench-marks.org.za
**Telephone:**
011-832-1743/2

**Centre for Applied Legal Studies (CALS)**

**Website:**
www.wits.ac.za/cals
**Telephone:**
011-717-8600


**Land and Accountability Research Centre (LARC)**
**Levels 3 and 4, All Africa House**
**Middle Campus, University of Cape Town,**
**Rondebosch, 7701**

**Tel: +27 21 650 3288 Fax: +27 21 650 1596**
**Email: pbl-larc@uct.ac.za**