KWAZULU – NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

REPORTABLE

Case No: 9403/2009

In the matter between:

INGONYAMA TRUST	**APPLICANT**
and	
INKOSI B. G RADEBE	**FIRST RESPONDENT**
AMAHLUBI TRADITIONAL COUNCIL	**SECOND RESPONDENT**
UBUHLEBOMZINYATHI COMMUNITY AUTHORITY	**THIRD RESPONDENT**
THE MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM, REPUBLIC OF SOUTH AFRICA	**FOURTH RESPONDENT**
THE MINISTER FOR CO-OPERATICE GOVERNANCE TRADITIONAL AFFAIRS, REPUBLIC OF SOUTH AFRICA	**FIFTH RESPONDENT**
THE M E C RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, PROVINCE OF KWAZULU-NATAL	**SIXTH RESPONDENT**

JUDGMENT

MADONDO J

Introduction

[1] The applicant in its capacity as the registered holder of certain tracts of land for and on behalf of the members of various tribes and communities in the KwaZulu-Natal Province and the registered owner of the properties: Portion 3 of the farm One Tree and Madadeni farm

seeks an order in the following terms:

"An order declaring the applicant the only recognised and legal entity, authorised and entitled to grant rights and allocations or permissions in respect of the ownership or occupation and use of land presently registered in its name throughout the Province of KwaZulu-Natal (without in any way derogating from any public law authority's capacity to pass public law measures in respect of the occupation and use of the land);

1.2 The first and second respondents be and they are hereby interdicted and restrained from:

1.2.1 Claiming or holding themselves out to be legally entitled to any land presently registered in the name of the applicant and more especially the following land:

1.2.1.1 Portion 3 of the farm One Tree No 8599, Registration Division HT, province of KwaZulu-Natal, in extent 140, 3856 hectares, held by Deed of Transfer no. T3286/1956; and

1.2.1.2 The farm Madadeni No. 15961, Registration Division HT, Province of KwaZulu-Natal, in extent 2565,0022, previously comprising of certain portions of the farms Drycut, Duck Ponds, Shuttleworth, Botha's Dale and Mair's Camp.

(hereinafter collectively referred to as "the land")

1.2.2 Interfering, directly or indirectly, in any way whatsoever, with the lawful

occupiers' use and enjoyment of part of the land being allocated to them by the applicant;

1.2.3 Occupying or cause others to occupy any of the land or portions thereof by purporting to give lawful consent to such occupation;

1.2.4 Dealing with, allocating, granting and / or extending any rights, including the right to graze or purporting to do so in respect of the land or any part thereof.

1.3 The first and second respondents are hereby ordered to pay the costs of this application jointly and severally. The one paying, the other to be absolved;

2. The order in 1.2 above shall operate as interim orders with immediate effect. "

Parties

[2] The applicant is the Ingonyama Trust, a corporate statutory body created and established in terms of the provisions of section 2(1) of the KwaZulu-Natal Ingonyama Trust Act, No. 3KZ of 1994 (the Act).

[3] The first respondent is Inkosi B. G Radebe, an adult male Inkosi (traditional leader) of the Amahlubi Traditional Council.

[4] The second respondent is the Amahlubi Traditional Council, a traditional council

recognised and established in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 and the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005.

[5] The third to sixth respondents are Ubuhlebomzinyathi Community Authority; Minister for Rural Development and Land Reform, Republic of South Africa, Minister responsible for Traditional Affairs, Republic of South Africa and the member of the Executive Council responsible for Local Government and Traditional Affairs in KwaZulu-Natal Province respectively, cited herein for purposes of completeness and any interest they may have in the subject of the litigation and no relief is sought against them.

Factual Background

[6] Prior to constitutional dispensation South Africa was divided and segregated along ethnic and racial lines. Under the Black Land Act No. 27 of 1913 and Development Trust and Land Act No. 18 of 1936, certain land was reserved for Blacks. (See also Lekoma v Dikgole 1947 (2) PHM 45(GW)). The Crown or State owned land was inalienable to persons other than black South Africans, save as was provided for in section 1(2) of the Black Land Act 27 of 1913 and section 18 of the Development Trust and Land Act 18 of 1936. Amongst the areas reserved for black citizens was the homeland of KwaZulu, for the Zulu Nation (the Nation).

[7] The Nation was composed of various tribes under immediate traditional leadership of the Chiefs (Amakhosi) and their headmen (izinduna). At the head of the nation was Ingonyama / Isilo (the King) who was during the colonial era referred to as the Paramount Chief. At the head of each respective tribe was the Chief (Inkosi), under him or her were his or her izinduna, councillors and tribal constables. Below them were the family heads, the kraal

heads in colonial parlance. However, Amakhosi and their respective tribes, in turn, owed allegiance to the King.

[8] Though the tribes owed allegiance to the King, they remained autonomous entities with indigenous governance structures known as tribal authorities (now traditional councils). Each tribal authority had a defined area of jurisdiction in respect of the piece of land a particular tribe or community occupied.

[9[The KwaZulu Homeland had also townships and towns falling under its jurisdiction which did not form part of the tribal arrangement. The apartheid regime from time to time released land in order to expand and consolidate KwaZulu Homeland (Proclamation R232 of 1986, Government Gazette 20. 10560 and Proclamation R26 of Government Gazette 18906). On 24 December 1986 by Proclamation R232 of the Government Gazette no. 10560 the then National Government transferred ownership of vast pieces of land to the Government of KwaZulu. Such land included the farms Duck Ponds and Shuttleworth, referred to in the order sought herein. On 31 March 1992 the National Government also transferred the State land in excess of 30 000 hectares to KwaZulu Government by section 1(d) of Proclamation R28 of Government Gazette 13906.

[10] However, prior to the first democratic elections, on 24 April 1994, in order to ensure certainty and effective control over all the land in KwaZulu Homeland not privately owned or falling under the township or owned by the State the KwaZulu-Natal Ingonyama Trust Act was promulgated.

[11] In terms of section 3 of the Act any land (or real right therein) in which ownership immediately prior to 24 April 1994 vested in or had been acquired by KwaZulu Government, with effect from the 24th of April 1994, became invested in the applicant and it was then transferred to and held in trust by the applicant. The King was appointed the sole trustee of the trust.

[12] However, in order to alleviate administrative burden on the King, the Act was amended by the KwaZulu-Natal Ingonyama Trust Amendment Act no. 9 of 1997. Though in the Amendment Act the King remained the sole trustee, a board known as Ingonyama Trust Board (the board) was established to administer the Trust land and the affairs of the Trust. The board comprises the King as the Chairperson and a number of board members appointed by the Minister after consultation with relevant sole players.

[13] All land which constituted townships and utilised by the State for domestic purposes was excised from the control of the trust and transferred to relevant local municipalities and State departments respectively.

[14] The effect of the amendment was that the land which remained vested in and owned by the applicant fell into one of the two categories: The land which applicant owned and held in trust on behalf of the beneficiaries listed in the schedule to the Amendment Act, represented by various traditional authorities or leaders. The respective land or areas of jurisdiction of the beneficiaries were identified. The remainder of the land whether urban or rural, not connected to any tribe or traditional authority fell under the sole and exclusive control and authority of

the applicant.

[15] Owing to the shortage of land some of the tribes were and still are landless. In an effort to address the question of landless tribes or communities, certain traditional authorities or community authorities were created. These were essentially an amalgamation of a number of clans or tribes into one legal entity which would then control and administer the pieces of land released to such authorities. However, such arrangement was not adequate and created resentment amongst the tribes or clans since each tribe or clan wanted to retain its own identity and autonomy and to have an exclusive use of the land.

[16] The first respondent's predecessor in title was subjected to such an arrangement and his clan or tribe was amalgamated with others for the purpose of land use. The second respondent as one of the landless traditional authorities was amalgamated with Ingwe, Khathide and Emalangeni clans, and the third respondent was established.

[17] The third respondent, Ubuhlebomzinyathi Community Authority, was established on 19 October 1970 by Proclamation 1946, Government Gazette no. 4052, for the district of Newcastle and was allocated a specific area of jurisdiction (See also section 5(4) of the repealed KwaZulu Amakhosi and Iziphakanyiswa Act, 9 of 1990).

[18] The third respondent has a very small piece of land over which it exercises jurisdiction. The said piece of land is held by the applicant in trust for the third respondent. The second respondent and other three landless traditional authorities exercise joint jurisdiction over that

small piece of land.

[19] The applicant in the exercise of its powers and in the performance of its duties in terms of the Act acquired two pieces of land, namely; portion 3 of the farm One Tree no 8599 in extent of 140,3856 held by the Deed of Transfer no. T3286/1956 and the farm Madadeni no. 15961 in extent of 2565, 0022, held under the Certificate of Consolidate Title no. T41735/2000. The said properties are not being held by the applicant in trust for any recognised traditional authority. In which event in terms of section 3 of the Act the applicant claims the sole and exclusive right to deal with the land in question. The applicant also avers that it has the sole jurisdiction to give rights to the land in question to individuals or groups.

[20] The third respondent's land is surrounded by the said properties, over which the applicant enjoys the unfettered authority. The applicant has allocated portions of the said properties to certain individuals for their exclusive use, and in return for such use and enjoyment the said individuals pay an undisclosed amount of money to the applicant.

[21] The applicant has discovered that the first and second respondents have usurped jurisdiction over the properties in question and given permission to certain individuals or groups of people to occupy the properties in question, and caused certain people to enter upon the applicant's land.

[22] On enquiring the applicant has been informed that all the people who occupy the property without its permission have been authorised by the Induna of the first respondent with the blessing or approval of the first respondent. The first respondent has also allowed his

people to graze their livestock on the land in question. Moreover, the first respondent holds himself out to be in charge and control of the properties in question.

[23] According to the applicant the actions and the behaviour of the first and second respondents have resulted in the members of the second respondent intimidating the lawful occupiers of the properties in question.

[24] The first and second respondents have allowed their members to graze their livestock on the property lawfully occupied by one Mr Kubheka and this has resulted in legal proceedings being instituted in the Amahlubi Traditional Court, which does not have jurisdiction in the matter.

[25] A certain Mr Patel has also been authorised by the applicant to occupy a portion of the farm Madadeni as a cattle farmer. However, the first and second respondents have allocated a portion of that farm to one Mr Ndaba. This, has not only interfered with Patel's use and enjoyment of the portion of the farm, but it has also led to him being evicted from the said portion by the Induna of Amahlubi tribe. According to the applicant this has also made it impossible for the applicant to pay rates and taxes in respect of the land in question. The applicant has limited financial resources and in consequence thereof, it derives its income from the rental payable by the people it has granted permission to occupy certain portions of its land. The alleged illegal occupation of the land in question according to the applicant also hampers the water project in the area since its illegal occupants refuse to allow the construction to commence its work on the land they occupy.

[26] The applicant avers that the first and second respondents by their unlawful conduct interfere with its rights in and to land over which it enjoys exclusive authority.

[27] The first and second respondents do not dispute that they allotted land to some people and that they have caused some people to enter upon the properties in question. The respondents purportedly claim ownership of the land in question on the basis, firstly, that the grave of the first respondent's grandfather is located in the disputed area and, secondly, that following such claim the respondents have allegedly lodged an application for the restitution of the land in question with the Land Claims Commissioner.

[28] The dispute between the parties and the alleged respondents` interference with the applicant's sole and exclusive right to the deal with the pieces of land in question have resulted in the order being granted by consent on 9 December 2009 in the following terms:

> " 1. The orders in paragraph 1.2 of the notice of motion shall operate as interim orders with immediate effect with orders in paragraph 1.2.3 (save for the last 2 words) and paragraph 1.24 also mutatis mutandisi applying to the Applicant as represented by Mr Ngwenya or any other representative of the trust.
>
> 2. Costs are reserved.
>
> 3. … "

Powers and Functions of Ingonyama Trust vis-a-vis the Recognised Tribe or Traditional Authority

[29] Section 2(2) of the Act provides that the trust shall administer the trust land for the benefit, material welfare and social well-being of the members of the tribes and communities as contemplated in the repealed KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990, referred

to in the second column of the Schedule, established in the districts referred to in the column of the Schedule and the residents of such districts.

[30] However, section 2(5) of the Act provides:

> "The Ingonyama shall not encumber, pledge, lease, alienate or otherwise dispose of any of the said land or any interest or real right in the land; unless he has obtained the prior written consent of the traditional authority or community authority concerned and otherwise than in accordance with the provisions of any applicable law."

Under section 2(8) in the execution of its functions in terms of this section the Trust must not infringe upon any existing rights or interest.

[31] The powers exercised and the functions performed by the Ingonyama Trust in the KwaZulu-Natal tribes and communities date back to the pre-colonial era where the Ingonyama (King) of the Zulus was sovereign over all tribes falling under the Zulu kingdom. Under Zulu Traditional Law and Customs the land occupied by the tribes was theoretically regarded the property of the King; in relation to the tribes he was a trustee holding it for the people, who occupied and used it in subordination to him on communistic principles. However, the land falling under the jurisdiction of a particular tribe was and is administered by the chief (Inkosi) and his izinduna and councillors for the people. An individual must live where he is placed by the Inkosi or his own Induna. See also Report and Proceedings of the Government Commission on Native Law and Customs 1883 (Cape) (G4 of 1883), section 108 p40; (1903) Commission , section 143 p 26 ; AJ Kerr: The Customary Law of Immovable Property and of Succession; Schapera , Land Tenure 114 .

[32] However, during the colonial era the Governor, Governor-General and later the

President of the Republic of South Africa respectively substituted the King as the Supreme Chief of all the tribes in Natal and Zululand. See *section 7 of Native Law 44 of 1871; Native Law 19 of 1891, Natal code of Native Law 1932 and Proclamation No. R195, 1967 (Natal Code of Bantu Law).*

[33] The Governor of the Colony of Natal as Supreme Chief assumed the role, exercised the powers and performed the functions of the King over the tribes in the colony. Section 2 of the Natal Code of Native Law 1932 granted the Governor – General as Supreme Chief in respect of the Natives in the Province of Natal authority to exercise and enjoy all powers, authorities, functions, immunities and privileges which according to the laws, customs and usages of natives were exercised and enjoyed by any Supreme Chief or Paramount Native Chief.

[34] The powers, authorities, duties, rights and privileges of the chiefs (amakhosi) and headmen (izinduna) were then prescribed in the Act. In fact they were curtailed and most matters fell under the exclusive jurisdiction of the Commissioner's Court. Amakhosi were subjected to and made answerable to the Native Commissioner for all their actions. They had to perform certain acts only with the approval of the Native Commissioner. *See Black Administration Act 38 of 1927; Proclamation R168 of 193.and KwaZulu Chiefs` and Headmen's Act 8 of 1974.*

[35] In Proclamation No. R195 of 1967 (Natal Code of Bantu Law) the State President substituted the Governor-General as the Supreme Chief and was granted authority in respect of the Bantu in the Province of Natal to exercise and enjoy all powers, authorities, functions, rights, immunities and privileges which according to the laws, customs and usages of Bantu are

exercised and enjoyed by any Paramount Chief.

[36] Although the State had taken the place of the King, this did not make it either the owner of the land in customary law or a trustee in the law of property, or an owner in South African Law. See also Report of the South African Native Affairs Commission 1903-1905 (Commission) section 81 p 14.

[37] Instead, the South African Development Trust, described as "a corporate body" in section 4(1) of the Development Trust and Land Act No. 18 of 1936, and in respect of which the State President delegated his powers and functions to the Minister was a trustee. The land vested in the Trust was held for the exclusive use and benefit of natives. The Governor – General or the State President had power to make regulations providing for the allocation of land held by the Trust for the purposes of residence, cultivation, pasturage and commonage.

[38] However, when KwaZulu Homeland became a self governing state all the tribes fell under the jurisdiction and control of KwaZulu Government. Section 3(1) (a) (b) of the Act provides:

> "(1) notwithstanding the provisions of section 2 of the KwaZulu Land Affairs Act, 1992 (Act 11 of 1992), or any other law-
>
> a) Any land or real right therein of which the ownership immediately prior to the date of commencement of this Act vested in or had been acquired by the Government of KwaZulu shall hereby vest in and be transferred to and shall be held in trust by the Ingonyama as trustee of the Ingonyama Trust referred to in section 2(1) for and on behalf of the members of the tribes and communities and residents referred to in section 2(2).
> b) Any functions which, in respect of land or any real right therein, were performed by a department of the Government of KwaZulu in terms of law immediately before the date of commencement of this Act shall be performed by the national or provincial government department succeeding such KwaZulu department in terms of the constitution."

[39] In terms of section 3(2) (a) (b) the land contemplated in sub section (1) is the land which

fell under the area of jurisdiction of the Legislative Assembly of KwaZulu as contemplated in the Self-Governing Territories Constitution Act, 1971 (Act 21 of 1971), and the land acquired under Proclamation R232 of 1986 and Proclamation R28 of 1992 or any other law.

[40] In terms of section 2(4) the Trust must deal with the land referred to in section 3(1) in accordance with Zulu indigenous law or any applicable law. Under Traditional Law and Customs the land occupied by a particular tribe is administered and held in trust by the Inkosi and his or her izinduna for the benefit of the members of the tribe or community concerned. Each family head has the right to be allotted a family home site, arable land and the right to graze his livestock on the pasture-lands. The land is allotted to an individual without requiring any return in the nature of a purchase price. Individuals' holding of a portion of the land, is inviolable and inheritable. See also Macleans' Compendium of Kafir Laws and Customs (106) p.152; Krige 176 and Bekker; Seymour's Customary Law in Southern Africa 5th Ed p 50. See 1883 Commission 2076 p 122 , AJ Kerr The Customary Law of immovable Property and of Succession , 3rd edition p 29; Schapera, Handbook, 196-7.

[41] An individual coming into another tribe, obtains permission to settle from the head of the homestead in which he settles. The head of the homestead in turn obtains the permission from the Induna of the ward. See also Macleans 123.

[42] When a man enters into marriage in a tribal land and requires land he usually chooses a suitable unoccupied portion and asks his prospective neighbours or the Induna of the area if he may take it. Alternatively, he may approach the Inkosi who would then consult the Induna of the area concerned. See also 1883 Commission 7100/1395. The Inkosi`s right is a power to allot

unallotted land and not a right to enjoy the use of allotted land or to take the fruits thereof. Similarly, the Induna has administrative duties in regard to land, not rights of ownership in land allotted to others .However, he has individual's rights in the portion allotted to himself on the same basis as everyone else.

[43] In respect of the trust land connected to a particular tribe or traditional authority the Act enjoins the Trust to exercise any of the incidents of ownership in respect of such land with the concurrence of the traditional authority concerned. Likewise, the traditional authority concerned is not entitled to alienate the trust land without the permission of the Trust. If the land has been alienated by the traditional authority concerned, for such an act to become complete legal, the Trust must have been given permission. This shows that neither the Trust nor the traditional authority concerned has an exclusive right and control of the land connected to a particular recognised traditional authority.

[44] Though the powers to exercise the incidents of ownership in respect of the trust land theoretically resides with the Trust, under customary law and practice the Inkosi of the tribe concerned and Induna (being in charge of an administrative unit (the ward) still retains the powers to administer the land, control its use and to allot portions to members of his tribe and of the ward respectively as residential, arable and grazing land. Thus individuals wanting land on which to build a house, church, store or school or on which to grow crops may have to approach the Induna of the ward or Inkosi of the tribe to which they are attached. In a settled area the head of the family or homestead obtains permission from the Induna to occupy the site he chooses. See also Schapera: Handbook P197-8 and Reader Zulu Tribe in Transition 65;

Ker at p 45; Schapera Land Tenure p 28.

[45] The members of the tribe or ward possess the right to use and occupy trust land in accordance with the traditional law and customs. The same pattern of powers and rights is replicated in the context of the word, “family “; all land is controlled by the head of the unit, who may only allot it to individual applicants with the sanction of the members of the family concerned. See Lekoma case, supra.

[46] Every member of a ward has access to its common resources, in particular to pasture, but also to wood (for building and fuel) grass and reeds (for thatching and weaving) clay (for pottery) and edible fruits and plants. Similarly, natural sources of water are available to all members of the unit. See Schapera Handbook p211-13.

[47] The trust is obliged to exercise any of the incidents of ownership in respect of the trust land connected to a particular recognised tribe or traditional authority with the concurrence of the tribe or traditional authority concerned. Such connection must in terms of section 3(4) of the Act be endorsed in the title deed of the trust land in question. The Registrar must endorse the title deed concerned to the effect that the land in question vests in the Trust for and on behalf of the members of the said tribe, the community or residents and the Registrar must also in terms of the Deeds Registries Act, 47 of 1937 make the necessary entries in his or her register in that regard. Thereupon, the title deed shall serve as proof that the land is held in trust for the said tribe, community or residents.

[48] In the present case the perusal of the title deeds, annexure “SN1- SN4” in respect of the

disputed properties does not show any endorsement envisaged in section 3(4) of the Act. This provides sufficient proof that the land in question is not held in trust for the benefit of any tribe, community or residents. The land should therefore not be dealt with under customary law and traditions. See also *Dodo v Sabasaba 1945 NAC (C&O) 62 at 63; Umvovo v Umvovo 1952 NAC 80 (5) at 83.*

[49] Where the land is registered in the name of the Trust in the Deeds Office and not connected to any tribe or traditional authority the Trust is entitled to deal with it under the common law and it has the sole and exclusive right to deal with such land.

[50] Section 6(7) of KwaZulu- Natal Traditional Leadership and Governance Act 5 of 2005 provides that if the Premier is satisfied that the provisions relating to the formation of the Traditional Council have been fulfilled, must by notice in the Gazette recognise the traditional council concerned and determine its area of jurisdiction. The recognition certificate thereof is also issued.

[51] No evidence has been tendered by the respondents that the second respondent has been so recognised and allocated any specific piece of land, and that the certificate has been issued thereof. However, it is not in dispute that only the third respondent has been recognised and registered as such and allocated a piece of land, whose land is not in dispute.

[52] Since the applicant is not holding the land in question on behalf of any tribe or community or residents, it does not need a prior written approval of any traditional authority or

community authority to deal with the land in question. It, therefore, follows that the Trust only enjoys the sole and exclusive right to deal with the land registered in its name and not apportioned to any particular tribe or community.

[53] As shown above, the Trust does not enjoy sole and exclusive control and authority over the land connected to a particular traditional authority or community or residents and as a consequence, it cannot be said to be the only recognised and legal entity authorised and entitled to grant rights and allocations or permissions in respect of the ownership or occupation and use of land registered in its name throughout the Province of KwaZulu-Natal. In the case of the trust land held for the benefit of a particular tribe or community, the Trust's rights are fettered by the requirement that before exercising any of the incidents of ownership in respect of the said land it must first obtain a prior written consent of the tribe or traditional authority or community authority concerned. In addition, under customary law and traditions the Inkosi of the tribe and Induna of the ward respectively (being in charge of the administration of the tribe and the ward) still retain powers to allot family sites, arable land and the right to graze livestock on the pasture lands to members of the tribe or ward concerned. I, accordingly, come to the inevitable conclusion that the applicant has failed to show on the balance of probabilities that it is entitled to a declarator it seeks under prayer 1.1 of the Notice of Motion, in such broad terms.

[54] In the premises, I agree with Mr Choudree for the respondents that the granting of the declarator sought by the applicant in such broad terms will not only relate to the trust land registered in its name and not held for the benefit of a particular recognised tribe or traditional authority, but it will also affect the trust land connected to recognised tribes and traditional

authorities. If that was intended, all the traditional authorities whose land is held in trust for their benefit by the applicant ought to have been joined in the proceedings.

[55] The granting of the order which tends to extend the applicant's exclusive right , control and jurisdiction in the trust land to trust land connected to recognised tribes will, in my view, impact negatively on the rights and powers of the traditional authorities or community authorities under the provisions of the Act. Further, it will detract from the powers and functions of Amakhosi and Izinduna under customary law and traditions to allot residential, arable and grazing land to members of their tribes and wards respectively. It therefore follows that the granting of the order sought in prayer 1.1 of the Notice of Motion in the proposed form will only serve to frustrate the administration, control and use of the trust land connected to recognised traditional authorities or community authorities under customary law and practice by such authorities to their prejudice. Though the applicant has not made a case for the declarator sought, I am not inclined to award the respondents costs on the ground that they have through their actions and conduct forced the applicant to lodge this application for all the reliefs sought in the Notice of Motion.

[56] The first and second respondents do not deny that they have purported to exercise some rights of ownership in respect of the properties over which the applicant enjoys exclusive right, control and jurisdiction.

[57] Notwithstanding all this, the first and second respondents have not shown that any legislation or proclamation or any other law grants them the authority to deal with the land in

question. However, Mr Choudree for the respondents has strenuously argued that the presence of the graves of the forefathers of the first respondent on the disputed land strongly suggests that the respondents have some historical connection to the land in question. However, no such allegation is made in the respondents' papers.

[58] The respondents have glibly stated in their papers that the grave of the first respondent's grandfather lies on one of the pieces of land in question without providing any concrete proof thereof. Accordingly, the respondents have not sufficiently established that the land in question represents the link between the past, the present and the future of their tribe in that the ancestors of the members of the tribe including of the first respondent lie buried there and that the children of the members of the tribe and of the first respondent are and will be born on the land in question.

[59] Nor has any evidence been tendered to prove that the tribe had at any stage after the 19th of June 1913 been dispossessed of the land in question on racial grounds, and that the said land had been resituated to the second respondent in terms of the Restitution of Land Rights Act, 22 of 1994. This could have entitled the first and second respondents to exercise incidents of ownership in respect of the land in question.

[60] In the circumstances, the respondents have failed to establish any legal right which grants them authority to control and allot the land in question. It has been argued on behalf of the respondents that since the land in question belongs to the King they have acted under delegated authority to control and allot it. This submission creates a false impression that every traditional authority or community authority whose land adjoins the trust land is entitled to

control and allot the trust land to individuals and to allow people to enter thereupon simply because it belongs to the King. The respondents have not proved the alleged delegated authority. Under traditional law and customs for the respondents to administer and control the land in question, they must prove that it belongs or has lawfully been allocated to the second respondent or to the first respondent's predecessors in title.

[61] In the premises, I am satisfied that the applicant has succeeded to prove that it has an exclusive right to exercise the incidents of ownership in respect of the trust land in question. It has also proved that the respondents` continued unlawful control and use of the land in question causes it irreparable harm and that it has no other remedy but to approach this Court for a relief.

[62] Order

1.1 The declaratory order sought in prayer 1.1 of the Notice of Motion is dismissed;

1.2 The rule nisi granted by this Court in terms of the prayers 1.2, 1.2.3 and 1.2.4 on December 2009 against the first and second respondents is confirmed;

1.3 The rule nisi granted by this Court against the applicant on 9 December 2009 in terms of prayer 1.2.4 is discharged

1.4 The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying the other will be absolved. Such costs to include any reserved costs.

Date Judgment reserved on:	5 December 2011
Date Judgment delivered on:	25 January 2012
Counsel for Applicant:	Adv Kemp SC / Crots
Instructed by:	NGWENYA & ZWABE INC
	C/O Yashica Chetty Attorneys
	REF: Mr Zwane
Counsel for Respondent:	Choudree SC
Instructed by:	STATE ATTORNEY
	C/O Cajee Setsubi Chetty Inc.
	REF: A Essa / ND