

SOUTH AFRICA / JUDGMENT

Glencore Operations South Africa (Pty) Ltd and Another v Master of The High Court, North West and Others (M584/2020) [2022] ZANWHC 38 (30 September 2022)

[2022] ZANWHC 38

COURT

North West High Court, Mafikeng

BEFORE

DJAJE

CASE / FILE NUMBER

M584/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION – MAHIKENG

CASE

NO: M584/2020

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

the matter between:

GLENCORE
OPERATIONS SOUTH AFRICA
(PTY)
LTD
1ST APPLICANT
LETLHOGONOLO
O. SEGADIKANA TSHIKANA 2ND
APPLICANT
AND
MASTER
OF THE HIGH COURT, NORTH WEST 1ST
RESPONDENT
REBONE
EUGENE MOREBODI 2ND
RESPONDENT
PATRICK
MOTSAMAI MOGOTSI
3RD
RESPONDENT
MOTLALEPULE
CHRISTINE MATHIBEDI
4TH
RESPONDENT
MACHAKE
LUCAS MOSANE
5TH
RESPONDENT
DANIEL
MAKENA
6TH
RESPONDENT
NICKY
JOSEPH LETHEBE
7TH
RESPONDENT
KGOSI
TEBOGO R. MOTHEO MAMOGALE 8TH
RESPONDENT
JIM
MATSHO N.O.
9TH
RESPONDENT
BAKWENA
BA MOGOPA TADITIONAL
COUNCIL
10TH
RESPONDENT
LAWRENCE
MASHIGO
11TH
RESPONDENT

Heard: 13 MAY 2022

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be on 30 SEPTEMBER 2022

ORDER

1.
The application is dismissed;

2.
The second to seventh respondents'

counterclaim is granted
as follows:

2.1
The Trust Deed registered with the First Respondent under IT33/2009 be amended as per 'REM41' as attached to the answering affidavit of the second to seventh respondents;

2.1.1
The First Applicant [Glencore] be directed and ordered to comply with the Second to Seventh Respondents in the execution of their duties as trustees;

2.1.2
The First Applicant be directed and ordered to provide the Second to Seventh Respondents with the following documents relating to the Trust.

(a)
Surface Lease Agreement;

(b)
Pooling and Sharing Agreement;

(c)
Loan Agreement;

(d)
Structure and Umbrella Agreement;

(e)
VAT Loan Agreement;

(f)
Cession Agreement; and

(g)
Mortgage Bond.

3.
The applicants are ordered to pay costs which shall include costs of the main application, the counterclaim and the joinder application, jointly and severally the one paying the other to be absolved.

JUDGMENT

DJAJE J

- [1] The applicants brought an application for a declaratory order that the second to seventh respondents are not the trustees of the Bakwena-ba-Mogopa Community Trust and to interdict them from acting as such. The applicants also seek an order to set aside the first respondent's endorsement of the said respondents as trustees and their authority to act as such. The second to seventh respondents in opposing the application also filed a counter-application directing that the first applicant treat them as trustees and provide them with the trust documentation. Further that the trust deed be amended. The counter-application of the second to seventh respondents is supported by the tenth and eleventh respondents.

BACKGROUND

- [2] The first applicant herein is a private company known as Glencore Operations South Africa. The second applicant is a member of the community of Bakwena-ba-Mogopa and a Mining Superintendent at Rhovan Mine. The community of Bakwena-ba-Mogopa owns the Rhovan properties (or they are held in trust on its behalf) and therefore the surface rights over them. The community of Bakwena-ba-Mogopa concluded agreements with the first applicant in terms of which the community acquired a 52% share in the Rhovan Mining Right and entitled to 26% participation interest in the pooled resources of the Rhovan Mine. The rest of the shares are held by the first applicant. This mine operates on the properties owned by the community of Bakwena-ba-Mogopa. These agreements necessitated the registration of a trust for the community. The Bakwena-ba-Mogopa Community Trust was registered on 4 August 2009.
- [3] In terms of the trust deed the Kgosi, who is the traditional leader of the community is the founder and first trustee. The trust deed further provides that there would be eight additional trustees to be appointed within a period of eight months after the establishment of the trust. The said appointments would be done on the basis that:
- (a) The Kgosi or his successor in title would remain a trustee for the duration of the trust;
 - (b) The Kgosi with approval of the Community's Traditional Council would appoint two independent trustees, one of whom would be an attorney and the other an accountant;
 - (c) The Traditional Council would appoint two trustees;
 - (d) The Council of Headmen would appoint one trustee;
 - (e) The wards of Bethanie, Jericho and Hebron would each appoint one trustee.

- [4] The appointments as provided for in the trust deed did not materialise within the eight-month period. As a result, the Kgosi remained the sole trustee and despite correspondence to the Kgosi to initiate the appointment of the other trustees, that never materialised. The second to seventh respondent approached the first respondent to have the Kgosi account for the activities of the trust. On 16 November 2018 the first respondent removed the Kgosi as a trustee and appointed the second to seventh respondents as trustees to the Bakwena-ba-Mogopa Community Trust. It is this appointment that resulted in the application before this court.

Submissions

- [5] The applicants' case is that the second to seventh respondents have not been appointed as trustees in terms of the trust deed and as such cannot be allowed to act as such. It was argued that the trustees could only be appointed in terms of the trust deed and that the first respondent could only appoint the trustees if authorised by the trust deed or if the trust deed is silent on how a vacant seat should be filled. In this matter none of these exist and as such the applicants submitted that the appointment of the second to seventh respondents was unlawful. In its argument, the applicants referred to the provisions of section 7(1) and 6(1) of the Trust Property Control Act that the first respondent must only authorise the appointment of a trustee once it has been done in terms of the trust deed. Thus differentiating the powers of the first respondent between authorisation and trustee appointment.
- [6] In contention, the second to seventh respondents argued that the Kgosi who was the sole trustee failed to initiate the appointment of the other trustees and did not account to the community about the monies paid from the first applicant. This resulted in the matter referred to the first respondent who also addressed several correspondences to the Kgosi but to no avail. Subsequently, the Kgosi was removed as a trustee as he failed to account to the first respondent on the activities of the trust. The respondents argued that there was a glaring disregard of the provisions of the trust deed by the Kgosi and failure to account or respond to the letters from the first respondent was unacceptable.
- [7] The respondents' case is that as a result of the removal of the Kgosi who was the sole trustee, the trust was left without a trustee. To protect the interest of the community the Traditional Council resolved on 1 May 2019 to nominate the second to seventh respondents as trustees. The resolution was preceded by a community resolution taken at a community kgothakgothe (gathering). It was submitted that the trust deed accorded the Kgosi unfettered powers by virtue of his office and this created an impasse that affected the community's indebtedness.
- [8] The tenth and eleventh respondents joined the proceedings and for ease of reference will be referred to as the Traditional Council and the secretary of the Traditional Council. It was argued that the Traditional Council plays an integral part in terms of the Trust Deed as some of the trustees should be appointed by the Traditional council. In their argument, the

Traditional Council aligned itself with the contentions of the second to seventh respondents in that with the amended Trust Deed the Council will have the right to appoint trustees who will each serve for a period of up to five years. The Council submitted that the removal of the second to seventh respondents would leave the Trust with no trustees and render it ineffective.

Points in limine by the second to seventh respondents

- [9] It was argued that the first applicant acquiesced with the appointment of the second to seventh respondents as trustees as they gained such knowledge on 24 July 2019. Thereafter, there was an agreement between the first applicant and the Traditional Council that a working committee be formed to attend to the regularization of the Trust. The submission by the second to seventh respondents was that the application stands to be dismissed on that point.
- [10] The second to seventh respondents also raised a point in limine of mis-joinder of the ninth respondent who was appointed as the administrator of the Bakwena-ba-Mogopa Traditional Council. However,

his appointment was reviewed and set aside in October 2020 by this Court. The current application was launched in November 2020 and the order of October 2020 still stands as it is not a subject of appeal. As such, the ninth respondent should not have been joined to these proceedings.

Authority of the Traditional Council

- [11] The applicants argued that the term of office of the Traditional Council has expired and as such the nomination of the respondents as trustees is unlawful. The argument was that in terms of the North West Traditional Leadership and Governance Act 2 of 2005 a Traditional Council is constituted by appointment and election and recognised by notice in the Gazette. In this matter, some members were elected by the community to serve in the council in 2014. As the council's term of office runs for five years, their term was to expire in 2019. However, the Premier of the North West only published the notice recognising the Council on 28 March 2017 and stated that the term of office would run until 20 May 2017. On 11 December 2017 the Department of Culture, Arts and Traditional Affairs issued a notice to the effect that: "This serves to inform all Traditional leaders (Dikgosi), Traditional Councils and Sub District Coordinators that Traditional Council's

service will remain in force up until the new Traditional Councils are elected. This decision is per the judgment against Government

versus Bakgatla Ba Kgafela under the leadership of Kgosi Nyalala Pilane Case No. 582/2011 dated 30 September 2011."

[12] It is the applicants' argument that when the notice was issued the term of office of the council had already expired on 20 May 2017 and the Department and the Premier had no authority to extend the council's term in that way. On that basis the applicant argued that the Council could not have passed any resolution after its term had expired. That also applies to the resolution by the Traditional Council nominating the second to seventh respondents as trustees on 1 May 2019.

[13] The issue of the term of office of a Traditional Council was dealt with in the judgment of *Pilane and Another v Pheto and Others* (158/2011)

[2011] ZANWHC 63 (30 September 2011) by Hendricks J (as he then was) as follows:

"[18] There can never be a lacuna in that no Traditional Council exists to run the affairs of the traditional community. Although their term of office expired on 24 September 2010, the members of the Traditional Council must remain in office until the process of re-composition of Traditional Council is finalized."

[19] This much was conceded to by Adv Bredenkamp SC on behalf of the Repondents, which concession was in my view well made. For the sake of good governance, a council whose term of office has expired should continue to be in existence until it is replaced by a newly elected council....."

[14] The judgment in *Pilane v Pheto* stands and accordingly provide that to avoid a lacuna a Traditional Council whose term has expired, should continue until appointment of a new Council. It goes without saying that the Traditional Council of the Bakwena-Ba-Mogopa are an interested party in these proceedings and to avoid a lacuna, they continue to be a Traditional Council until the appointment and election of a new Council. The applicants' challenge to the authority of the Traditional Council of Bakwena-ba-Mogopa is without merit and cannot stand.

Removal of trustees

[15] The Kgosi continued to serve as the sole trustee until his removal by the Master. This removal creates a situation where the Trust was left with no trustees. It is common cause to all the parties that the reason for the creation of the trust is to uplift the community of Bakwena-Ba- Mogopa. There are monies to be paid in the trust's bank account for this purpose. According to the first applicant, between 2011 and 2014 an amount of over 28 million rand was paid in the trust's account. As from June 2018 the trust's share has been paid in the trust account of Werksman Attorneys as there were allegations that the Kgosi had been dealing with the trust property improperly.

[16] The respondents' argument that it's been twelve years since the trust was created but the community does not benefit has merit. With the above stated disputes it is clear that the trust is not serving the purpose for which it was created. As matters stand, the Kgosi is no

longer a trustee and his removal has not been challenged. The trust cannot be left without any trustees. The first applicant admits that the trust's share has been paid into their Attorneys' trust account from June 2018 before the Kgosi who was the sole trustee was removed by the first respondent. This action by the first applicant is an illustration that there were concerns how the money due to the community was being utilised. Further to that, the first applicant became aware that there were trustees appointed by the Master in 2019 and despite various correspondence with the trustees only brought this application in November 2020. Hence the point in limine of acquiescence has merit.

- [17] The applicant cannot successfully argue that there was no properly constituted Traditional Council as the Council has always been there. The council acts in the best interest of the community and the applicants have not established any facts to the contrary. The appointment of trustees does not affect the first applicant's interest in the pooling and sharing venture and as such they have not been able to establish any prejudice they suffered. As stated above the only prejudice is the one suffered by the community of Bakwena-Ba-Mogopa not benefiting from the venture due to the trust being without trustees or accountability.
- [18] The first applicant is aware that the creation of the trust is for the benefit of the community but fail to advance a solution that will benefit the community. The order sought by the applicants have the effect of leaving the community of Bakwena-Ba-Mogopa with an ineffective trust with no trustees as the Kgosi failed to have trustees appointed over a period of nine years. The plausible

solution in this matter would be to allow the current trustees to continue and have the Trust Deed amended. In that way the community

would be able to benefit from the venture with the first applicant.

- [19] The applicants argued that the Master did not act in accordance with section 7(1) of the Trust Property Control Act 57 of 1988 which provides that:

"7. Appointment of trustee and co-trustee by Master

- (1) If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee."
- [20] In this matter, the respondents submitted that after the removal of the Kgosi as a trustee, the Traditional Council acting in the interest of the community resolved to nominate the respondents to act as trustees. The Traditional Council is an interested party and the community as well. This was done as the Kgosi failed to act in terms of the Trust Deed for a period of nine years. This was to the detriment of the community as the beneficiary. The first respondent in appointing the respondents acted in the interest of the beneficiaries of the trust, being the community of Bakwena-ba- Mogopa. It cannot be said that there is irreparable harm to be suffered by the community being stuck with unlawfully appointed

trustees. In this instance, the Kgosi failed to act in terms of the Trust Deed to the detriment of the community. The irreparable harm suffered is by the community.

[21] The order sought by the applicants does not have the effect of being favourable to the beneficiaries and as such should fail. The amendment of the Trust Deed as sought by the respondents will have the effect of making the trust practical and to the benefit of the beneficiaries.

Order

[22] Consequently, the following order is made:

- (a) Surface Lease Agreement;
- (b) Pooling and Sharing Agreement;
- (c) Loan Agreement;
- (d) Structure and Umbrella Agreement;
- (e) VAT Loan Agreement;
- (f) Cession Agreement; and
- (g) Mortgage Bond.

J.T. DJAJE

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING :

13 MAY 2022

JUDGMENT

RESERVED

: 13 MAY 2022

DATE OF JUDGMENT :

30 SEPTEMBER 2022

COUNSEL FOR THE APPLICANT :

ADV STEIN SC

With ADV GOODMAN

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