**IN THE LAND CLAIMS COURT OF SOUTH AFRICA**

**HELD IN RANDBURG**

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

23-01-2018 .....

CASE NO: **LCC 105/2017**

In the matter between:-

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| **GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD** | APPLICANT |
| and | |
| **MEISIE EMILY MNGUNI** | 1st RESPONDENT |
| **THOMAS SUNDAY MNGUNI** | 2nd RESPONDENT |
| **ANNAH GUMEDE** | 3rd RESPONDENT |
| **ZENZILE GUMEDE** | 4th RESPONDENT |
| **PHINDILE ROSELINE GUMEDE** | 5th RESPONDENT |
| **IDA TEREBUSA GUMEDE** | 6th RESPONDENT |

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| **STEPHEN TSEPO MADONSELA** | 7th RESPONDENT |
| **NKOSINATHI MAHLANGU** | 8th RESPONDENT |
| **THANDI GUMEDE** | 9th RESPONDENT |
| **THANDI MICHELLE MAHLANGU** | 10th RESPONDENT |
| **ELIAS MZWANDILE MAHLANGU** | 11th RESPONDENT |
| **MBALI ANNAH PHINDANI** | 12th RESPONDENT |
| **MONTSIWA JAN SEFAWA** | 13th RESPONDENT |
| **JOHN ZAKHELE SEFAWA** | 14th RESPONDENT |
| **AARON KOBI TOLOM** | 15th RESPONDENT |
| **THEMBINKOSI THOMAS MAHLANGU** | 16th RESPONDENT |
| **PETER TOLOM** | 17th RESPONDENT |
| **BEN MOKOENA** | 18th RESPONDENT |

Handed down on 23 January 2018

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**JUDGMENT**

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**CANCA AJ**

**Introduction**

[1] This is an application for the eviction of the respondents from property on which the applicant conducts mining operations.

[2] The applicant seeks the urgent eviction of the respondents from the aforesaid property, both under the provisions of section 15 of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA") and of section 15 of the Land Reform (Labour Tenants) Act, 3 of 1996 ("the Labour Tenants Act"). In the alternative, it seeks their eviction under the provisions of both ESTA and the Labour Tenants Act. The aforesaid relief is sought pending the determination of a prayer for the respondents' final eviction under Part B of the notice of motion.

[3] The applicant alleges that despite its best efforts to persuade the respondents to relocate from the land they presently occupy and resettle in an area where it had identified suitable alternative accommodation, they refuse to do so. According to the applicant, the respondents' continued presence on the mining area threatens not only a very costly disruption of its mining operations, with associated adverse economic consequences for the local community, but also pose a risk to their health and safety.

[4] The respondents oppose the application on a number of grounds, including that:

4.1 the relief sought is not urgent;

4.2 grant of the relief will result in the permanent deprivation of their right to occupy their current dwellings; and

4.3 the applicant has failed to comply with the provisions of sections 8 and 9 of ESTA.

**The parties**

[5] The applicant, Glencore Operations South Africa (Pty) Ltd ("Glencore"), is the registered holder of a coal mining right over an area which includes, *inter alia*, Portion 4 of the Farm Goedgevonden 10 IS ("Goedgevonden"), in the district of Witbank, Mpumalanga. The mine established by Glencore pursuant to its mining right is known as the Goedgevonden Mine ("GGV Mine") on which it is currently conducting, among other things, opencast coal mining operations.

[6] The first to eighteenth respondents reside at and occupy, with the permission of Glencore, houses on a portion of the GGV Mine, known as GGV Village. It is from these houses that Glencore seeks eviction of the respondents. In return, Glencore offers to house the respondents, approximately 8 km from their present location, in eight houses, consisting of three to four bedrooms, in Phola Extension 3 ("Phola"), a township in Ogies, pending the outcome of proceedings for the final eviction order sought in Part B of the application.

[7] The respondents comprise six households, each occupying a house at GGV Village and their details are the following:

7.1 the Mnguni household, of which the first respondent is the head and the second respondent a member, occupies house number 5 (Mnguni Household);

7.2 the Annah Gumede household, of which the third respondent is the head and the fourth, fifth and sixth respondents are members, occupies house number 6 (Annah Gumede Household);

7.3 the Thandi Gumede household, of which the ninth respondent is the head and the seventh and eighth respondents are members, occupies house number 7 (Thandi Gumede Household);

7.4 the Sefawa household, of which the thirteenth respondent is the head and the fourteenth respondent is a member, occupies house number 8 (Sefawa Household);

7.5 the Tolom household, of which the fifteenth respondent is the head and the sixteenth, seventeenth and eighteenth are members, occupies house number 12 (Tolom Household);

7.6 the Mahlangu household, of which the tenth respondent is the head and the eleventh and twelfth respondents are members, occupies house number 22 (Mahlangu Household).

**Background facts**

[8] The following facts, in brief summary, appear from the applicant's founding affidavit, deposed to by the Group Community Development Manager for its coal division, Mathuisen Johannes Marx ("Marx"). The applicant, had as far back as July 2004, identified a number of villages, including GGV Village, and communities in the greater Ogies area for resettlement, as they were located within planned or identified mining areas.

[9] Glencore then undertook a process of consultation with the affected villages and communities in regard to their possible resettlement. Its first engagement, in

this regard, with the occupiers of GGV Village, occurred on 27 July 2004, when they were introduced to a company whose services Glencore had engaged to conduct a baseline socio-economic survey of each household.

[10] There then followed a fraught protracted process where the parties sought agreement on suitable resettlement land. During 2013, 5 households from the GGV Village, which at the time comprised 21 households, agreed to relocate to Rietspruit, a township some 20 kilometres from Ogies. Further households agreed to relocate, this time to Phola. 7 during 2015, 2 during the following year and 1 last year, 2017. The remaining 6 households, comprise the respondents, whom the applicant contends are unreasonably refusing to relocate.

[11] In support of its contention that the respondents have been unreasonable in their refusal to relocate to Phola, the applicant cites the following as examples of its efforts to procure the relocation:

11.1 Investment in the Phola community:

11.1.1 it serviced 453 stands in Phola of which 227 were donated to the Emalahleni Municipality. The rest it retained for purposes of settling persons who were affected by its mining operations.

11.1.2 it built 154 houses at Phola for occupation by relocates. Most of the houses have water and electricity and where municipal electricity was unavailable, it provided the occupants with solar lighting and with gas stoves and cylinders for cooking.

11.1.3 it caused the Makause Combination School, a combined primary and high school, to be built and established, allegedly at a cost of R71 156 690.94.

11.1.4 has conducted and is currently conducting various skills development programmes in Phola.

11.2 Offering at least one member of each household employment at its mining operation.

[12] The applicant commenced opencast mining operations at the GGV Mine during 2006. Over the years, the closest dumping site (the south pit) used to deposit waste material from that particular mining operation has, according to Marx, reached its saturation point. The alternative was to cart the waste to a dumping site, approximately 7km away, in twenty-one 180ton trucks. Because that was not economically viable, a temporary dumping pit was constructed on a partially rehabilitated area, so Marx's averments continued. The GGV Village is approximately 1km from where coal is currently being mined and removed.

[13] The respondents' general opposition to relocating to Phola is that, not only are the allocated houses there too small, both to live in and to graze and crop but that they will not receive title to same. Although there are further factual details, most appear to be relevant to the proceedings for a final order and, in my opinion, it is unnecessary for me to burden this judgment with same. Reference to certain facts, not set out above, is dealt with in relation to the specific requirements for the order sought.

**Litigation history**

[14] This application was launched in April 2017 on an urgent basis. When the respondents failed to oppose the matter within the prescribed time period, it obtained the following order from Molefe J ("the Molefe Order") on 26 May 2017:

> *"The following order is granted:*
>
> 1. *The first to eighteenth respondents and all persons claiming title or occupation through or under them are removed from and ordered to vacate the premises situated on Portion 4 of the farm Goedgevonden 10 IS (mining area) within 5 (five) days from the date of this order, and are ordered to relocate to the eight houses built by the applicant for the first to eighteenth respondents at Phola Extension 3 Registration Division JS, Mpumalanga Province, pending the outcome of proceedings for a final eviction order under Part B of the Notice of Motion.*
> 2. *In the event of the first to eighteenth respondents and all persons occupying through or under them failing to vacate the mining area in compliance with the order in paragraph 1 above, the Sheriff of the High Court is authorized and directed to remove the first to eighteenth respondents and all persons occupying through or under them as well as all their movables and livestock, from the mining area at any time after the expiry of the period mentioned in paragraph 1 above, to the eight houses namely the houses on Stand No 4299 ( Mnguni Household), Stand No 4290 (Annah Gumede Household), Stand No 4300 (Thandi Gumede Household), Stand No 4301 (Sefawa Household), Stand No 4302 (Tolom Household) and Stand No 4289 (Thandi Mahlangu*

*Household) all situated in Phola Extension 3 Registration Division JS, Mpumalanga Province.*

3. *The applicant is to pay the transport costs incidental to the relocation of the respondents' households.*
4. *The costs of the proceedings under Part A to be costs in the cause in the main evictions proceedings under Part B."*

[15] Notwithstanding that the Molefe Order was interlocutory in nature, the respondents filed an application for leave to appeal the order on 13 June 2017. That application had the effect of suspending the Molefe Order. The applicant then sought to have the suspension of the order lifted in terms of Rule 65(2) pending adjudication of the appeal. In response to that application, the respondents changed tack and filed a Rule 65(3) application in which they sought the stay and rescission of the Molefe Order, citing, among other things, that they are labour tenants.

[16] On 24 July 2017, the day set for the adjudication of the various applications, the parties agreed that:

16.1 the respondents would withdraw their application for leave to appeal;

16.2 the applicant's Rule 65(2) application would be postponed sine die;

16.3 the applicant could amend its notice of motion to include relief for the removal of the respondents in terms of section 15 of the Labour Tenants Act;

16.4 the Molefe Order would be suspended pending the filing of an answering affidavit by the respondents by not later than 4 August 2017.

This agreement was made an order of court on that day.

[17] Following the exchange of further pleadings, the matter was set date for re-hearing on 19 September 2017 but was postponed on that day for the holding of an inspection *in loco* and the filing of expert notices in relation to an assessment of the respondents' existing dwellings and the alternative accommodation proposed by the applicant.

[18] Thereafter, an inspection *in loco* was held and the matter was finally argued in the latter half of November 2017.

**The legislative framework**

[19] A comparison of section 15 of ESTA and section 15 of the Labour Tenants Act shows that the requirements for the grant of an urgent interim removal order are essentially identical. In both instances, an applicant for such an order must prove the following:

> 19.1 that there is a real threat and imminent danger of substantial injury, or damage to a person or property if the occupier or labour tenant is not removed from the property;

19.2 there is no alternative remedy available to prevent the said injury or damage;

19.3 the likely harm or hardship to the applicant if the order is not granted exceeds the likely harm or hardship to the occupier or labour tenant if the order is granted;

19.4 adequate arrangements have been made for the reinstatement of any person removed.

**Discussion**

**Is there a real and imminent danger of substantial injury or damage?**

[20] In its endeavour to satisfy the requirement of a real and imminent danger of substantial injury or damage, Marx puts forth 3 broad averments in his founding and supplementary founding affidavits. In brief summary these are that:

20.1 Glencore requires the urgent removal the respondents in order to further its mining operations in terms of its mining work programme. Failure to extend the mining operations onto the GGV Village area will result in the slowdown or even the shutting of Glencore's mining operations at the GGV Mine, impacting not only the life of the mine and the

financial benefits derived therefrom but also the livelihood of the households which are dependent on the mine for making a living;

20.2 Glencore's mining operations, and in particular the proposed construction of a haulage road to the proposed waste dump near the respondents' dwellings, poses a risk of harm, injury and damage to the respondents and their property;

20.3 The blasting zone associated with the ongoing development of the open cast mining pit, is gradually approaching the area of the respondents' residences thereby causing noise and dust. The mining operations were, towards the end of July 2017, approximately 1000m from the GGV Village but would, within a year from then, reach Glencore's own minimum distance for mining closer than 600m from an inhabited area. It would, allegedly, also, in that time-frame, reach the distance of 500m set by health and safety legislation which prohibits mine blasting operations closer that distance from homesteads.

[21] In essence, Glencore's case under this heading is that it and the community, on the one side, will suffer financial harm, and the respondents, on the other hand, will be exposed to physical harm to themselves and their dwellings.

[22] I am satisfied from the averments on papers, and from my observations during the inspection *in loco,* that the establishment of a new dump site, some 580 metres from the respondents' residences and the construction of the haulage road in that vicinity, will pose a grave health risk to the respondents. And, given the immense size of the waste haulage vehicles used on the mine, physical harm

to the respondents, some of whom have young children, is reasonably foreseeable. The applicant has, in my view, shown compliance with the requirements of section 15(1)(a) of ESTA and the Labour Tenants Act.

**Is there no other effective remedy available to Glencore?**

[23] In contending that Glencore does not have any effective remedy at its disposal other than to seek this court's intervention, Marx, in the main, repeats the averments made to satisfy the requirements of section 15(1)(a) referred to above. In addition to his submissions that the coal mining operations are on the brink of being shut down due to the respondents' refusal to vacate the area ear-marked for the new dumping site and road, Marx makes the following averments:

> 23.1 The only resolution to the problem, namely, the dust and the other dangers from the proposed road construction as well as the subsequent transporting of waste poses to the respondents, including the damage the approaching blasting activities will cause their dwellings, would be to remove the respondents from the GGV Village;
>
> 23.2 No other effective remedy exists or has been suggested which would permit the respondents to remain in occupation of their dwellings and to allow the continuation of the open cast mining operation. Glencore has exhausted meaningful engagement with the respondents, so the contention continues.

[24] The respondents countered Glencore's assertions by stating that the waste material could be dumped at an alternate pit (7km away) and that the additional cost of haulage was less prejudicial than the prejudice and trauma uprooting the respondents from an area where they had lived for generations, so the assertion continued. It was further argued on behalf of the respondents that Glencore could, given its financial muscle, bear the costs of a long haulage of the waste to a dump in Ogies.

[25] In response, Marx contends, *inter alia*, that (a) Glencore's mining license requirements obliges it to conduct its operations in terms of an approved mining work programme and that a deviation would require approval from the Department of Mineral Resources ("DMR") and (b) haulage of the waste material to the alternative pit or to the one in Ogies, would render the mining operation uneconomical due to the transport costs.

[26] I am not persuaded that Glencore has satisfied the requirements of this subsection. It is clear from the papers that Glencore's operational plan envisaged moving onto the GGV Village area as far back as July 2004. Glencore should, in my view, given the tardy uptake by the affected persons of its offer to relocation to Phola, set out in paragraph [10] above, have known, or at least, foreseen, during the period 2015 and 2017, that certain occupants of the GGV Village, including the respondents, were unwilling to relocate.

[27] Also, as set forth in paragraph [25] above, Glencore has the option of applying for a deviation of its license conditions from the Department, and

should, in my view, have done so, and, can still do so. Such an application could, conceivably, have been for approval to continue dumping the waste material on the partially rehabilitated land, pending the finalization of Part B of this application.

[28] However, Glencore contends that dumping the waste on the partially rehabilitated area is prejudicial to its future rehabilitation activities. In support of this contention, Marx, avers that the material dumped at that temporary site would have to be moved this year to the new dump which is envisaged to established at the GGV Village and that this would be a costly exercise. The fact that the continuation of dumping waste on that rehabilitated area would be expensive, does not negate the fact that that site constitutes an alternative to the proposed area at GGV Village. As a result, I also see no merit in this contention and find that Glencore has failed to prove that it does not have another effective remedy at its disposal.

[29] However, even if I am wrong in finding that the requirements of section 15(1)(b) have not been met, Glencore has failed to persuaded me that it has brought itself into the ambit of section 15(1)(c).

**Is the harm which Glencore is likely to suffer greater than the harm the respondents will suffer if the order for their removal is not granted?**

[30] I accept, on the totality of the evidence on the papers, that my refusal to grant the temporary removal order sought by Glencore might have a negative

economic impact on it. However, it is reasonable to assume that the respondents will also be negatively impacted by a move to Phola. This would not only be by way of increased transport costs but also in adapting to a new lifestyle. Phola is a township, unlike GGV Village, which is situated on a farm. It is probable that the relocation from a rural to an urban environment might not only be traumatic but would expose the respondents' young children to alien influences. It bears mentioning that during the inspection of the premises which Glencore proposes to temporarily house the respondents, several young men were visibly drunk and openly carrying alcohol at approximately 13h00. Also, a number of the respondents keep chicken and crop on a limited scale, thereby most probably minimizing their grocery bills.

[31] I further accept that, when viewed in strict economic terms, the monetary prejudice Glencore might suffer outweighs that of the respondents. However, notwithstanding that, I find that, when one adds to their financial prejudice alluded to above, the emotional strain, which being uprooted from their homes, albeit temporary, will cause them, tips the hardship scale in the respondents' favour.

[32] Glencore is part of an international resources company and might well be able to absorb a temporary slow-down or short-term cessation of operations at that part of its mine until determination of the final order. The respondents, on the other hand, are persons of limited means, who, it is reasonable to assume, will not have the resources to access medical assistance for whatever emotional

scarring a relocation to a township and the transition to a life-style which neither they or their young children are probably not used to, might afflict them.

[33] I have come to the conclusion that the likely hardship faced by the respondents if the temporary order is granted, is substantially greater than that faced by Glencore if the order is refused. As a result, I find that Glencore has also not shown compliance with the requirements of section 15(1)(c).

[34] It is not necessary to determine whether there has been compliance with the requirements of section 15(1)(d) because the failure to discharge the onus in respect of any one of the requirements is fatal to the for the relief offered by the provisions of section 15 of both Acts.

[35] In the result, I order as follows:

1. The application for the urgent removal of the respondents and all persons claiming title or occupation through or under them from premises situated on Portion 4 of the Farm Goedgevonden 10 IS, Mpumalanga Province, pending the outcome of proceedings for a final eviction order under Part B of the Notice of Motion, is dismissed.

2. The applicant must commence proceedings for a final order against the respondents and those residing with them within 10 (ten) days of this Order.

3. There is no order as to costs.

M P Canca

Acting Judge Land Claims Court

Appearances:

For the Applicant: DM Antrobus SC

H Havenga SC

I Oschman

Instructed by: Norton Rose Fulbright South Africa Inc.

Sandton. (Ref: AP Vos/K Kaylan)

For the Respondents: Z Omar

Partner, Zehir Omar Attorneys,

Springs.