THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Glencore Operations South Africa (Pty) Limited and Others v Master of the High Court, Northwest and Others (945/2023) [2024] ZASCA 179 (19 December 2024).

Today the Supreme Court of Appeal (SCA) upheld an appeal against the judgment of the Northwest Division of the High Court, Mahikeng (the high court).

The central issue in this appeal was whether the trustees of the Bakwena-ba-Mogopa Trust, number IT 33/2009 (the trust) were lawfully appointed. In 2009, the first appellant, Glencore Operations South Africa (Pty) Limited (Glencore) and the Bakwena-ba-Mogopa community (the community) entered into a suite of agreements, in terms of which the community acquired a 52 percent undivided share in the Rhovan Mining right. This entitled the community to a 26 percent participation interest in the pooled resources of the Rhovan Mine. As per agreement between the parties, the trust was established and registered on 4 August 2009.

On 16 November 2018, the Master of the Northwest Division of the High Court, Mahikeng (the Master) removed the third appellant, Kgosi Tebogo Mamogale (the Kgosi) from his fiduciary position. This came after the failure to appoint trustees in terms of the deed of trust, resulting in governance deficiencies which ultimately led to the removal of the Kgosi as a trustee. The Master thereafter authorised the second to seventh respondents, namely, Messrs Rebone Eugene Morebodi, Patrick Motsamai Mogotsi, Motlalepule Christine Mothibedi,

Machake Lucas Mosane, Daniel Makena and Nicky Joseph Lethabe (the respondents) to continue to act as trustees.

In terms of the trust deed, in clause 8.4 the Kgosi, as the traditional leader of the community, is designated to be the founder and the first trustee of the trust. It provides that the Kgosi, or his successor in title shall, for the duration of the trust, remain a trustee and founder. The trust deed further provides for the appointment of additional trustees within a period of eight months from the date of registration of the trust. Two independent trustees are to be appointed by the Kgosi, with the approval of the Bakwena-ba-Mogopa Traditional Council (the traditional council), one of whom is to be an attorney and the other an accountant. Two further trustees are to be appointed by the Traditional Council, one trustee is to be appointed by the Council of Headmen, and the three wards (namely, the Bethanie, Jericho and Hebron communities) are to each appoint a trustee.

The appellants challenged the appointment of the respondents as trustees before the high court, citing the contended illegality and invalidity of their appointment. In addition, the appellants contended that the authorisation granted by the Master in terms of s 6(1) of the Trust Property Control Act 57 of 1988 (the Act) to the respondents is invalid. A counter-application was filed by the respondents, seeking Glencore's co-operation, provision of specified documents and amendment of the trust deed. The high court dismissed the appellants' application and granted the counter-application. Dissatisfied with the outcome of the application and counter-application, the appellants sought and were granted leave by the high court to appeal to the SCA against the judgment of the high court.

The SCA found that the trenchant criticism, from which there was no escape for the respondents, was that the traditional council, whether properly constituted or not, was only entitled to appoint two trustees and not six. The Council of Headmen and the three wards were, by virtue of the trustees' appointments deprived of representation in the trust. In addition, the two independent trustees' positions were also not filled. The SCA held further that high court, in condoning their irregular authorisation by the Master, failed to appreciate that the Master acted outside his powers and that the office of trusteeship must legally exist prior to the issuing of the letters of authority. That the high court also failed to recognise that the Kgosi or his successor in title were to be trustees for the trust's duration, as it simply accepted the Kgosi's removal, which was initiated by the respondents, a faction in the traditional council.

The SCA reasoned that the high court's finding that 'it cannot be said that there is irreparable harm to be suffered by the community being stuck with unlawfully appointed trustees', was indicative of its failure to appreciate the unlawfulness of the respondents' appointment as trustees. Further holding that once the high court had concluded that the respondent's appointment was unlawful, it should have dismissed the counter-application and upheld the application. The SCA highlighted that there was no room for the exercise of a discretion by the high court in terms of s 6(1). That the failure to appoint the trustees in terms of the trust deed should have been dispositive of the matter.

The SCA emphasised that the high court provided no proper reasoning to justify the orders it made. That it merely concluded that the 'amendment of the trust deed sought by the respondents will have the effect of making the trust practical and for the benefit of the beneficiaries', amendments which the SCA found to the detriment of the community as they sought to endow the illegally appointed respondents (who represented a faction in the council) with all the powers. Further finding that those amendments had far reaching consequences, as they prioritised the self-interest of the putative trustees.

Consequently, the appeal was upheld with costs.

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