THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 945/2023

1081/2023

In the matter between:

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD	**FIRST APPELLANT**
LETLHONGONOLO OBED SEGADIKANA TSHIKANE	**SECOND APPELLANT**
TEBOGO RENEILWE MOTHEO MAMOGALE	**THIRD APPELLANT**

and

MASTER OF THE HIGH COURT NORTHWEST PROVINCE	**FIRST RESPONDENT**
REBONE EUGENE MOREBODI	**SECOND RESPONDENT**
PATRICK MOTSAMAI MOGOTSI	**THIRD RESPONDENT**
MOTLALEPULE CHRISTINE MATHIBEDI	**FOURTH RESPONDENT**
MACHAKE LUCAS MOSANE	**FITH RESPONDENT**
DANIEL MAKENA	**SIXTH RESPONDENT**
NICKY JOSEPH LEBETHE	**SEVENTH RESPONDENT**
JIM MATSHO N.O	**EIGHTH RESPONDENT**
BAKWENA-BA-MOGOPA TRADITIONAL COUNCIL	**NINTH RESPONDENT**
LAWRENCE MASHIGO	**TENTH RESPONDENT**

Neutral citation: *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).

Coram: DAMBUZA, MOCUMIE, MBATHA and SMITH JJA and KOEN AJA

Heard: 22 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 19 December 2024.

Summary: Trust Property Control Act 57 of 1988 – whether the second to seventh respondents were lawfully appointed as trustees to the trust – whether the master of the high court had the power to authorise the second to seventh respondents to act as trustees, if not lawfully appointed – whether the counter-application was vitiated by lack of standing – whether the jurisdiction prerequisites to the amendment of a trust deed, laid down by s 13 of the Trust Property Control Act 57 of 1988 were complied with.

ORDER

On appeal from: Northwest Division of the High Court, Mahikeng (per Djadje J, sitting as court of first instance):

1 The appeal succeeds. The second to sixth respondents, in their personal capacities, and the ninth respondent (the Bakwena-ba-Mogopa Traditional Council) are ordered to pay the costs of the appeal, including the costs of two counsel, where so employed, jointly and severally, one or more paying, the others to be absolved.

2 The order of the high court is set aside and replaced with the following:

'(a) It is declared that none of the second to seventh respondents is a trustee of the Bakwena-ba-Mogopa Trust (the trust).

(b) The authorisation issued by the Master to the second to seventh respondents, authorising them to act as trustees of the trust, is declared invalid and is set aside.

(c) The counter-application is dismissed.

(d) The second to sixth respondents, in their personal capacities, and the tenth respondent (the Bakwena-ba-Mogopa Traditional Council) are ordered to pay the costs of the application and counter-application, including the costs of two counsel, where so employed, jointly and severally, one or more paying the others to be absolved.'

JUDGMENT

Mbatha JA (Dambuza, Mocumie and Smith JJA and Koen AJA concurring):

[1] The central issue in this appeal is whether the trustees of the Bakwena-ba-Mogopa Trust, number IT 33/2009 (the trust) were lawfully appointed. This arises from the appeal by the first appellant, Glencore Operations South Africa (Pty) Limited (Glencore) and the second appellant, Mr Letlhongonolo Obed Segadikana Tshikane (Mr Tshikane) against the judgment and order of the Northwest Division of the High Court, Mahikeng, per Djadje J (the high court). The high court dismissed their application for an order, first, declaring that 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, otherwise they will be referred to individually by their surnames) were not trustees of the trust.

[2] Second, the high court dismissed the appellants' application to review and set aside the appointment of the respondents as trustees as well as the authorisation issued by the first respondent, the Master of the High Court Northwest Province (the Master) authorising the respondents to act as trustees. Alongside the dismissal of the appellants' application, the high court granted the orders sought in the counter-application, that the trust deed be amended in line with the proposed amendments set out in annexure REM41 to the respondents' answering affidavit. In addition, Glencore was ordered to co-operate with the respondents in the execution of their duties as trustees, and to provide certain documents relating to the trust to the respondents.

[3] Pursuant to a joinder application brought by itself, the Bakwena-ba-Mogopa Traditional Council (the traditional council), and its secretary, Mr Lawrence Mashigo, were joined as tenth and eleventh respondents respectively in the application for leave to appeal before the high court. In this appeal, they have aligned themselves with the views of the respondents. Dissatisfied with the outcome of the application and counter-application, the appellants sought and were granted leave by the high court to appeal to this Court against the judgment of the high court.

[4] The first respondent, the Master; the eighth respondent, Kgosi Tebogo Mamogale (the Kgosi); and the ninth respondent, Mr Jim Matsho (the administrator),[1] though cited, did not enter the fray in the high court. The appeal is opposed by the respondents, the traditional council and its secretary. However, after the delivery of the judgment the Kgosi obtained leave to appeal to this Court against that judgment. In the high court and before this Court he elected to align himself with the grounds of appeal raised by Glencore and Mr Tshikane (the appellants).

[5] In 2009 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, a trust was established and registered on 4 August 2009. The sole and exclusive object and purpose of the Trust, as set out in clause 5 of the Trust Deed is as follows: (a) to enter into the suite of agreement that will entitle it to participate in the Pooling and Sharing Venture constituted in terms of the Notarial Pooling and Sharing Agreement; (b) to accept donations from the

[1] Appointed in terms of the Northwest Traditional Leadership and Governance Act 2 of 2005.

community in terms of the Deed of Donation; (c) that the trustees should strive to attain the object and purpose for which the Trust was established and (d) that the Trust is exclusively and unconditionally a special purpose vehicle which will be utilised only for the aforementioned objects and purpose.

[6] The non-implementation of the trust deeds' provisions gave rise to the dispute which served before the high court. The failure to appoint trustees in terms of the deed of trust resulted in governance deficiencies which ultimately led to the removal of the Kgosi as a trustee. On 16 November 2018 the Master removed the Kgosi from his *fiduciary* position and authorised the respondents to continue to act as trustees.

[7] 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. In their answer to the application, the respondents asserted their valid appointment by the Traditional Council. They averred that Glencore had acquiesced in their lawful appointment and that their appointment substantially complied with the provisions of the trust deed. 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.

[8] The trust deed, in clause 8.4, provides that 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 Traditional Council (one of whom is to be an attorney and the other is to be 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.

[9] It is common cause that since the establishment of the trust, no advancements regarding the appointment of trustees had been made due to internal conflict. The respondents were identified for appointment by a faction in the traditional council, which appointment lacked the endorsement of the Kgosi and other community members in terms of clauses 8.4.2.1 and 8.4.2.2 of the trust deed. This put into question the legitimacy of both their appointment and the authorisation by the Master.

[10] Given the authorisation for the respondents to continue to act as trustees, it must be determined whether the Master was empowered by s 6(1) to do so. Section 6(1) provides as follows:

'Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, *shall* act in that capacity only if authorized thereto in writing by the Master.' (Emphasis added.)

The authorisation therein is only triggered by an appointment as per the trust deed, s 7 of the Act, or the court. Section 6(1) does not empower the Master to authorise a trustee to act outside those three jurisdictional factors. Consequently, the Master could not authorise the purported trustees who had not been validly appointed in terms of the law to act as trustees. The high court's recognition of their unlawful

appointment outside the perimeters of the trust deed was fundamentally irregular and flawed.

[11] In considering the validity of the appointment of trustees, the first port of call is to consider the nature of the office of a trustee. The office of a trustee is regulated by the trust instrument. In *Metequity Limited and Another v NWN Properties Ltd and Others*,[2] the court defined a trustee as 'any person who acts as trustee by virtue of an authorisation under s 6. That section envisages in s 6(1) that the Master's authorisation to act as a trustee is granted to persons appointed as trustees in a trust instrument, by the Master or the court …. The Trust Property Control Act, however, as a regulatory and control measure provides in s 6 that such existing trustee shall not act without the authorisation of the Master'.

[12] The most trenchant criticism, from which there is no escape for the respondents, is 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 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. 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.

[2] *Metequity Limited and Another v NWN Properties Ltd and Others* 1998 (2) SA 554 (T) at 557G-H.

[13] The importance of a properly constituted board of trustees was emphasised in *Land and Agricultural Development Bank of SA v Parker and Others*,[3] *(Parker)* where this Court held that the trust could not be bound, while there were fewer trustees than provided in the trust deed. Most significantly, in the same matter this Court stated that '*who the trustees are, their number, how they are appointed and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust's constitutive charter. Outside of its provisions the trust estate cannot be bound*'. [4] (Emphasis added.)
It therefore follows, as held in *Parker*, that '… the Master's authorisation to act as trustee is granted to persons appointed as trustees in the trust instrument, by the Master or by the Court'.[5]

[14] The high court failed to recognise the invalidity of the authority issued by the Master. Its finding that 'it cannot be said that there is irreparable harm to be suffered by the community being stuck with unlawfully appointed trustees', is indicative of its failure to appreciate the unlawfulness of the respondents' appointment as trustees. Once the high court had concluded that the respondent's appointment was unlawful, it should have dismissed the counter-application and upheld the application. There is no room for the exercise of a discretion by the high court in terms of s 6(1). The failure to appoint the trustees in terms of the trust deed should have been dispositive of the matter.

[15] Moreover, the high court erred in finding that 'the Master in appointing the respondents acted in the interest of beneficiaries of the trust, being the community

[3] *Land and Agricultural Development Bank of SA v Parker and Others* [2004] 4 All SA 261 (SCA); 2005 (2) SA 77 (SCA) (*Parker*).
[4] Ibid para 10.
[5] *Parker* at 557.

of Bakwena-ba-Mogopa'. That finding has no foundation in law and is not the yardstick for the appointment of a trustee outside the realm of s 6(1). In *Gowar and Another v Gowar and Others*[6] (*Gowar*), this Court held that for a person to have *locus standi* to bring an application for an amendment of the trust deed, he or she has to show sufficient interest in the trust property. The respondents failed to do so. Referring to Cameron *et al*,[7] this Court in *Gowar* also held that 'the provisions of s 13 have both subjective and objective criteria. The former relate to the founder's lack of foresight or contemplation and the latter relate to the prejudice to the trust object, beneficiaries or public interest'. This Court in *Gowar* ruled that these criteria must be satisfied before the court can intervene.

[16] Following upon my determination that the respondents' appointment was invalid, the orders granted in the counter-application by the high court should follow suit. First, the counter-application lacked the necessary evidentiary support. Second, the finding by the high court, purporting to amend the trust deed following the unlawful appointment of the respondents as trustees, was fundamentally irregular and flawed. It stands to be set aside. Third, the respondents had no *locus standi* to seek the amendment of the trust deed as such amendments are regulated by s 13 of the Act. In terms of that section amendments may only be sought by lawfully appointed trustees or persons with sufficient interest in the trust property.[8] The

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[6] *Gowar and Another v Gowar and Others* [2016] ZASCA 101; [2016] 3 All SA 382 (SCA); 2016 (5) SA 225 (SCA) paras 34-35.

[7] E Cameron et al, *South African Law of Trust*, 2002 at 517.

[8] S 13 of the Act, which governs amendments to trust deed provides that 'if a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which –

(a) hampers the achievement of the objects of the founder, or
(b) prejudices the interests of the beneficiaries or,
(c) is in conflict with the public interest,

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.'.

respondents did not make any allegations to establish their interest in the trust property, and justifying the relief sought. Fourth, the respondents were not competent to hold the office of trustee as Mr Morebodi, the second respondent had been disqualified from holding the office of trustee in terms of a high court judgment, a factor which was ignored by the high court. And, the seventh respondent had also since passed away. Last, the credentials of the other respondents remained shrouded in secrecy despite the call by the appellants that they be disclosed.

[17] The high court provided no proper reasoning to justify the orders it made. 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'. In fact, the proposed amendments were 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.

[18] Briefly, I set out some of the proposed amendments which were set out in annexure REM 41. They are as follows: (a) the removal of the Kgosi or his legitimate successor, as first trustee, in the definition of Senior Traditional Leader; (b) the substitution of a definition of trustees, by the removal of any natural or juristic person who may be appointed to hold office as trustee, with any natural person; (c) the extension of the term of office from 3 to 5 years; (d) the removal of the requirement to appoint two independent professionals as trustees to the Trust Board; (e) the removal of the right of the Council of Headmen to nominate a trustee and permitting the Traditional Council to appoint four trustees instead of two; (f) the removal of the right of the three wards to each nominate a trustee; (g) the deletion of the requirement that the nominated trustee be people who are 'fit and proper to be the trustees as shall be determined by the Master'; and (h) that the council would be empowered to

nominate and remove all trustees, to appoint and authorise the remuneration of non-independent advisors or consultants.

[19] The purported amendments granted by the high court had far reaching consequences, as they prioritised the self-interest of the putative trustees, amongst other things, by removing the leader of the community, the Kgosi and his successor in title as the first trustee in the definition of the Senior Traditional Leader. Noticeably, the respondents also sought to extend the term of office of trustees from 3 years to 5 years, whilst insulating the would-be trustees against scrutiny by seeking the removal of the attorney and an accountant as independent trustees, and by further removing from the trust deed 'the fit and proper person' criteria for the appointment of trustees.

[20] The respondents' suggestion that their appointment substantially complied with the terms of the trust deed, and that the traditional council has veto powers in relation to the nomination of trustees, is misplaced. Absent the jurisdictional criteria required in terms of s 6(1) of the Act, it was not legally competent for the high court to authorise the exercise of statutory powers conferred on it by s 13.[9]

[21] Turning to a related issue, namely, that Glencore acquiesced in the appointment of second to seventh respondents as trustees, I emphasise the following established legal principles. Trustees must be appointed in terms of the trust deed. They must accept their appointment and they must be authorised by the Master to act as trustees. Trustees act in a fiduciary capacity, hence they must be lawfully appointed. Even if Glencore acquiesced in the respondent's unlawful appointment such acquiescence cannot make what is unlawful, lawful. Trustees exercise control

[9] Ibid para 35.

over trust assets, with powers to dispose of those assets, hence the stringent requirements for their appointment. The finding by the high court in this regard, can therefore not stand.

[22] In the result, I make the following order:

1 The appeal succeeds. The second to sixth respondents, in their personal capacities, and the ninth respondent (the Bakwena-ba-Mogopa Traditional Council) are ordered to pay the costs of the appeal, including the costs of two counsel, where so employed, jointly and severally, one or more paying, the others to be absolved.

2 The order of the high court is set aside and replaced with the following:

‘(a) It is declared that none of the second to seventh respondents is a trustee of the Bakwena-ba-Mogopa Trust (the trust).

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Y T MBATHA

JUDGE OF APPEAL

Appearances

For the first and second appellants:	S Stein SC with I Goodman SC,
Instructed by:	Werkmans Attorneys, Johannesburg
	Lovius Block, Bloemfontein
For the third appellant:	C Z Muza with SD Mbeki
Instructed by:	Kgomo Attorneys Inc, Mahikeng
	Moroka Attorneys, Bloemfontein
For the second – seventh respondents:	M Mashele
Instructed by:	Sifumba Attorneys, Mahikeng
	Phatshoane Henney Attorneys, Bloemfontein
For the tenth and eleventh respondents:	L Montsho-Moloisane SC
Instructed by:	Lebala Moloi Attorneys Inc, Pretoria
	M M Hattingh Attorneys Inc, Bloemfontein