

# Trusts & Estates Law

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*'community trusts'*



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## A cautionary tale for well intentioned 'community trusts'



Trusts are created by corporates for various reasons, including to promote Black economic empowerment initiatives, create employee share incentive schemes, and extend a corporate's social responsibility reach.

However, all too often, a failure to properly understand the complexities involved in trust administration derails the corporate's efforts in this regard. Further, an ill-considered trust deed will only serve to aggravate matters.

In *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), a trust was created for the benefit of the Bakwena-ba-Mogopa community, to hold and manage the community's share of an interest in a mining right.

The trust deed required that the community be represented on the board of trustees, together with independent trustees. However, when internal community conflict emerged, there was a stalemate as the provisions of the trust deed could not be met in terms of the composition of the board of trustees.

This left the trust in a precarious position as, without a duly constituted board of trustees, the trust could not be properly administered for the benefit of the ultimate beneficiary – the community.

The community's traditional council took matters into its own hands, applying to the Master of the High Court (Master) for the appointment of several community trustees. The council failed to comply with the provisions

of the trust deed, which set out the process to be followed when obtaining nominations for such community trustees to be appointed by the Master.

The Master, without applying its mind to the provisions of the trust deed, appointed the community trustees in contravention of the trust deed. The board of trustees thus failed to comply with the composition requirements set out in the trust deed and could not act on behalf of the trust as a result.

Glencore Operations South Africa (Pty) Ltd and others challenged the Master's appointment in this regard. The court *a quo* dismissed the challenge. Its ruling was then appealed.

The Supreme Court of Appeal (SCA) overturned the court *a quo*'s decision, ruling that the Master's appointment of the disputed community trustees was unlawful as the appointment ignored the provisions of the trust deed, which prescribed the manner in which the board of trustees had to be constituted.



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Had the court *a quo's* ruling stood, the trust's governance would have shifted from a framework designed to protect community interests to one prioritising trustee self-interest. The SCA noted that governance structures must adhere to legal formalities – merely “*substantially complying*” with a trust deed is insufficient when it comes to trustee appointments.

### Key takeaways based on this case

A trust deed must be drafted with due consideration to:

- Who will act as trustees of the trust. It is important that trustees have an understanding of their obligations in terms of the trust deed and relevant legislation. They should also be aware that they act in a fiduciary capacity and should conduct themselves accordingly; training of trustees in this regard is encouraged.
- How the board of trustees will be constituted. It is always recommended that there is professional trustee or administrator involvement to ensure proper administration of the trust.
- The manner in which trustees are to be nominated by relevant third parties – in this case, the community, but in other cases it could also be the corporate responsible for creating the trust.
- Circumstances where there are governance issues or disputes which may prevent such nominations being obtained (alternative measures should always be considered).

It is recommended that, when considering the creation of a trust, a holistic approach is taken that interrogates the ultimate intention in creating the trust, potential stakeholders, including trustees, and the possible risk which arises as a result of their involvement in the trust. The deed must be carefully drafted to address such considerations and possible concerns, to ensure that the trust can be administered properly.

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