REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023/042194

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

2025/03/31 [redacted]
DATE SIGNATURE

In the matter between:

TREVOR JOHN MCGLASHAN N.O & OTHERS **Applicants**

and

IVY TSHILIMANDILA FHULUFHELO **First Respondent**

CITY OF JOHANNESBURG **Second Respondent**

JUDGMENT: FIRST RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

FRIEDMAN AJ:

[1] On 11 October 2024, I handed down judgment in this matter ("the merits judgment") evicting the applicant for leave to appeal (who, for convenience, I shall describe as "Ms Fhulufhelo" below) from a property owned by the Deane Yates Trust ("the Trust"). The eviction application was brought by the trustees ("the Trustees") who acquired ownership of the property on the death of Mr Deane Yeats ("the deceased").

[2] In January 2025, Ms Fhulufhelo filed an application for leave to appeal my order in the merits judgment, together with an application for condonation for the late filing of the application for leave to appeal. The Trustees oppose the application for leave to appeal, but abide the condonation application. The Trustees brought the eviction application as part of the steps which they needed to take pursuant to their decision to terminate the Trust, which was established by the deceased to pursue certain philanthropic imperatives.

[3] It was common cause in the merits proceedings that the Trustees validly decided to terminate the Trust and dispose of the trust property, and that Ms Fhulufhelo was informed of this. Ms Fhulufhelo occupied the property in terms of a lease agreement with the Trustees, which the Trustees took over from the deceased on his death. In terms of the lease agreement, Ms Fhulufhelo had the right of first refusal in the event that the Trustees decided to sell the property. In this case, she attempted to exercise that right, after the Trustees received an offer to purchase from a third party, but could not obtain a mortgage. As a result, the Trustees decided to sell the property to that third party, and brought the eviction application to facilitate the sale.

[4] In my view, Ms Fhulufhelo has no prospects of overturning the order which I made in the merits judgment and so leave to appeal must be refused. Once that is so, there is no purpose in paying any special attention to the condonation application. Technically, the condonation application should be refused because, although the delay is explained (arguably adequately), the application does not demonstrate reasonable prospects of success in the main proceedings (which, in this case, is the application for leave to appeal). However, since the Trustees

abided the condonation application and I do not wish to become bogged down in technicalities, I intend to grant condonation.

[5] As for the application for leave to appeal, Ms Fhulufhelo was, as she was in the merits proceedings, ill-served by her legal representatives. The answering affidavit in the merits proceedings disclosed no defence to the eviction application. To make matters worse, it gave me no information relevant to ensuring that Ms Fhulufhelo would not be unduly prejudiced by the eviction order (ie, to enable me to exercise a discretion as to the timeframe for eviction, flowing from the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act")). Ironically, since this matter has now been delayed for more than five months by the ill-fated application for leave to appeal, I prioritised speed over comprehensiveness when handing down the merits judgment. I was aided in this by the fact that, in oral argument, counsel for Ms Fhulufhelo conceded that the answering affidavit disclosed no defence to the eviction application and expressly placed on record that Ms Fhulufhelo no longer opposed the eviction application. Once that was so, no purpose was served in me wasting the parties' time by crafting a detailed judgment on the merits. It is important to note, though, that I did not decide the eviction application from the premise that Ms Fhulufhelo no longer opposed the application. I return to this below.

[6] Now, in the application for leave to appeal, Ms Fhulufhelo is represented by a new attorney, *Mr Paile*, who also served as her counsel. He recorded in oral argument that he had drafted the application for leave to appeal. Ms Fhulufhelo's founding affidavit in the condonation application is, in large respects, a cut and paste from the application for leave to appeal. *Mr Paile* acknowledged that he had drafted that affidavit too. The stance taken in the application for leave to appeal and condonation application is that Ms Fhulufhelo's counsel (who represented her in the merits proceedings but lost his brief when Ms Fhulufhelo replaced her instructing attorney, Mr Mamabolo, with *Mr Paile*) should not have placed on record that Ms Fhulufhelo no longer opposed the eviction application. *Mr Paile's* argument was, in essence, that Ms Fhulufhelo filed an answering affidavit which made clear that she opposed the eviction application. In that

context, his argument was that Ms Fhulufhelo's counsel had no right (and implicitly no mandate) to withdraw her opposition.

[7] The difficulty which I had, which I put to *Mr Paile* in argument, was that there was no evidence presented to suggest that Ms Fhulufhelo's counsel exceeded his mandate during oral argument. Of course, there may be cases where concessions made by counsel are not binding on his or her client or the court. The most obvious example is of concessions of law. I do not intend to rehash the authorities on that – it is well-accepted that, for reasons of logic, courts cannot be obliged to accept incorrect concessions of law. Furthermore, it may happen from time-to-time that counsel makes a far-reaching concession as to the merits of a matter, which prejudices his or her client and which was done without permission (see, for example, *Ras v Liquor Licensing Board, Area No 11, Kimberley* 1966 (2) SA 232 (CC) (in particular, at 237)). In those cases, it may be appropriate to allow the client to disavow the concession.

[8] The question of the extent to which a party to litigation is bound by concessions made by his or her legal representatives is not straightforward. The decision of the Supreme Court of Appeal in *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2010 (4) SA 112 (SCA) gives a detailed explanation of some of the complexities – admittedly, though, in the slightly different context of the application of rule 37. The main reason why the issue is not straightforward is that there is some indication in the caselaw that a legal representative has no implied mandate to settle a case. This is what triggered a debate about ostensible authority in *Kruizenga* and the extent to which a client may be bound by a legal representative's abandonment of opposition. The context in the present case is different because there is no suggestion that the Trustees placed any reliance on counsel's concession (made, as it was, for the first time in oral argument).

[9] One of the grounds of the application for leave to appeal is that I erred "in finding that [counsel's] concession during the hearing that [Ms Fhulufhelo] had no valid defence to the eviction application was merited as his concession is not evidence".

[10] *Mr Paile's* argument was essentially that counsel's concession was a concession of law. I could understand that submission if it was framed accurately – ie, if counsel had stopped at saying that the answering affidavit disclosed no valid defence. Even then, I am not convinced that the concession would simply be a concession of law. A submission by counsel that the answering affidavit discloses no valid defence comes awfully close, especially in civil litigation where courts are bound by the pleadings and attitude of the parties as to what is and is not in dispute, to a full-blown concession that the application must succeed. In any event, the Trustees' attorneys took the effort of uploading the transcription of the argument in the merits proceedings to Caselines. I therefore was able to take *Mr Paile* to the words used by Ms Fhulufhelo's counsel – ie, that Ms Fhulufhelo no longer opposed the application – during argument in the merits proceedings. *Mr Paile* accepted, if I understood him correctly, that this was not simply a concession of law. And so he was constrained to fall back on his different argument that Ms Fhulufhelo's counsel had no mandate to abandon her opposition to the application. This, in turn, has the potential to raise the question of the circumstances in which someone in Ms Fhulufhelo's position can disavow the purported (and prejudicial) exercise of a mandate by her legal representative.

[11] It is not necessary in this application to get into any of these complexities. As the merits judgment makes clear, I did not decide the eviction application on the basis that Ms Fhulufhelo had withdrawn her opposition to the application. I simply remarked that Ms Fhulufhelo's counsel correctly conceded in argument that her answering affidavit disclosed no valid defence to the eviction application. I did not consider myself (or Ms Fhulufhelo) to be bound by that concession. By remarking that counsel's concession was "quite properly" made, I was expressing agreement with his concession.

[12] One could imagine a situation in which counsel, in open court, recorded that his or her client no longer persisted in opposing a matter. If the judge intended to take action based on that recordal – for instance, by deciding not to make a ruling on contested issues and to make an order by agreement (for example) – one would reasonably expect the judge to ensure that counsel's statement reflected the true intention of the client. So, one would expect the judge at least to take

steps to be sure that the instruction came expressly from the client via the attorney, perhaps by standing the matter down or, in appropriate cases, requiring a statement in writing. But, in this case, I did not go down that road. I simply took the concession of Ms Fhulufhelo's counsel as corroboration of my own view of the merits.

[13] This proposed ground of appeal does not, therefore, have any impact on the order which I made – even if Ms Fhulufhelo's counsel did not make the concession, I would still have found that the answering affidavit disclosed no valid defence.

[14] The Trustees came to own the property where Ms Fhulufhelo lives because it used to be owned by the deceased. In his will, the deceased established the Trust, and made clear that the property would be transferred to the Trust on his death (if it had not already been transferred to the Trust in his lifetime). His will recorded that Ms Fhulufhelo occupied the property and instructed that "on the transfer of the properties the occupants remain in the properties subject to the existing leases with the intention that the occupants should become as economically independent as possible" (my underlining).

[15] It must be recalled that, when the deceased made his will, he intended for the Trust to pursue philanthropic purposes. He had very generously allowed Ms Fhulufhelo to live in the property for a very low rental (R200 per month) and his will was clearly dealing with the position immediately after his death. No doubt he would have hoped that, more than ten years later, Ms Fhulufhelo would be able to afford a home or to rent a decent property on commercial terms. But we need not speculate because it seems clear from the context (which I take to be the rest of the will and the Trust Deed) that all the deceased had in mind was that, since the new owner of the property (ie the Trust) was established with philanthropic purposes, Ms Fhulufhelo should be allowed to continue occupying the property in terms of the very generous lease agreement, with the intention that she become as economically independent as possible. In other words, the deceased wished Ms Fhulufhelo to continue to benefit from the generous lease agreement which he concluded with her, by extending its application beyond his death. But, just as he himself would have been entitled to terminate the lease

agreement if his circumstances changed in the future, the Trustees undoubtedly could do so too. To me, therefore, the meaning of this clause of the will is indisputable.

[16] In her answering affidavit, Ms Fhulufhelo alleged that she was a beneficiary of the Trust and was entitled to live in the property in terms of the will. The answering affidavit is drafted poorly and so it is not always possible to understand what it is trying to convey. But it would seem that Ms Fhulufhelo's stance was that she was a beneficiary of the Trust which was designed to assist residents of Alexandra township and that this somehow gave her a right to live in the property forever. Elsewhere in the same answering affidavit, though, Ms Fhulufhelo did seem to accept that her right to occupation was subject to the lease agreement which she had concluded with the deceased and which, in terms of his will, was assigned to the Trustees on his death. The point though, is that the answering affidavit was, regrettably, incoherent and made no attempt to explain how, and in terms of what provisions of the Trust Deed or the will, Ms Fhulufhelo was entitled to remain indefinitely in the property.

[17] *Mr Paile* attempted, when he came on the scene, to cure the defects in the answering affidavit. In the application for leave to appeal, the arguments have been refined. *Mr Paile* seeks to rely on the wording which I have reproduced in paragraph [14] above. His argument is that this clause, properly interpreted, means that Ms Fhulufhelo is entitled to remain in occupation of the property until she is economically independent. His further argument is that, on the basis of the facts set out in the answering affidavit (including that Ms Fhulufhelo attempted to exercise her right of first refusal to purchase the property in the event of the Trustees wishing to sell it), Ms Fhulufhelo is clearly not economically independent.

[18] I have grave doubts as to whether this submission can competently be raised for the first time in the application for leave to appeal, having not been pleaded in the answering affidavit. Since affidavits are pleadings in motion court, Ms Fhulufhelo needed to plead this defence clearly, to enable the Trustees to respond to it. This is not merely a technical point. Had Ms Fhulufhelo pleaded that she was not economically independent, despite being employed as a nurse

and earning R15 000 a month (nett) (which was the evidence before me), the Trustees might have wished to adduce evidence to contest that notion.

[19] But I am willing to leave that deficiency aside for present purposes. As I raised with *Mr Paile* in argument, his proposed interpretation of the clause summarised in paragraph [14] above is untenable.

[20] The first problem with his interpretation is that it renders the phrase "subject to the lease agreement" meaningless. His interpretation requires ignoring those words, and simply reading the clause as providing that, on the transfer of the properties to the Trustees, "the occupants remain in the properties with the intention that the occupants should become as economically independent as possible". That does not strike me as a permissible reading, in the light of our well-accepted law on the proper interpretation of documents such as wills.

[21] An equally important problem with *Mr Paile's* interpretation is that *Mr Paile* could not answer me when I asked the simple question: does this mean that the Trustees are obliged to retain the property in perpetuity (or at least until Ms Fhulufhelo is economically independent) so they can continue to lease it to her? This could be the only implication of *Mr Paile's* interpretation. This is because there is no commercially plausible way for the Trustees to sell the property subject to the right of occupation which *Mr Paile* argues that Ms Fhulufhelo enjoys. The only way for the Trustees to sell the property, on his construction, would be to make any sale conditional on the buyer taking up the lease with Ms Fhulufhelo on the terms which she says apply – ie, an indefinite right of occupation at a nominal rental (R200 per month, subject to agreed escalations) until she is "economically independent". Self-evidently, the Trustees would be rather unlikely to find such a buyer, leaving them with no choice but to retain the property.

[22] The Trust Deed confers on the Trustees the "sole, absolute and unfettered discretion to terminate the Trust" if the Trustees are of the opinion that circumstances have arisen to warrant its termination. Importantly, clause 17 of the Trust Deed provides for a precise formula, applicable on termination, of what is to happen to the remaining capital and income that has accrued to the Trust.

The Trust Deed provides that the remaining capital and income should be distributed to one of three named educational institutions or a non-profit organisation with similar objectives. It then expressly says that no capital or income shall be paid to any individual, organisation, institution or company that fails to meet the stated criteria. Clause 17 therefore discloses a clear intention that, on the termination of the Trustees, the trust property is to be liquidated and any remaining capital or income accrued to the Trust should be distributed in terms of the rule described above.

[23] *Mr Paile's* construction of the deceased's will is inconsistent with clause 17 of the Trust Deed and the absolute discretion vesting in the Trustees to terminate the Trust. Mr Paile's interpretation of the deceased's will would prevent the Trustees from terminating the Trust and distributing the trust assets as intended by the deceased.

[24] All of this is a long way of saying that the will must clearly be interpreted as meaning that, on the acquisition by the Trust of the property, Ms Fhulufhelo's right of occupation was preserved, in terms of the existing lease agreement. It follows that the right of the Trustees to seek Ms Fhulufhelo's eviction must be determined by the existing lease agreement. The lease agreement confers the right on each party to terminate the agreement on three months' notice. The Trustees say that they terminated the lease agreement because they gave Ms Fhulufhelo a fair opportunity to purchase the property (as she was entitled to try to do) but she was unable to do so. Once that became clear, and given the decision to terminate the Trust and liquidate its assets, the only remaining option was to sell the property to a third party. There is nothing in Ms Fhulufhelo's answering affidavit, or even in the application for leave to appeal, which explains why the lease agreement does not entitle the Trustees to proceed in this way.

[25] It follows that I was, in my view, correct to grant the eviction application and I do not consider Ms Fhulufhelo to have any prospects of success on appeal. In this regard, I should point out that, in the discussion above, I have been extremely generous to Ms Fhulufhelo (especially taking into account that I do not consider her to have been well-served by any of her legal representatives since the inception of this matter) in my framing of the issues. Any appeal court seized of

this matter will have the full record before it; most notably the answering affidavit. As soon as that is so, it will be apparent to the appeal court that the arguments advanced by *Mr Paile* are inconsistent with the contents of the answering affidavit and that the answering affidavit disclosed no defence. On this narrow basis, the appeal court would be unable to uphold the arguments now advanced for the first time. So even if I considered the new argument based on the "economically independent" premise to be arguable, the appeal court would be unable to entertain it.

[26] *Mr Paile* has attempted to put forward a case in the application for leave to appeal which improves on the job done in the answering affidavit. But his attempt to do so was substantially undermined by a series of unsustainable arguments which he advanced in the proceedings before me. The majority of the grounds in the application for leave to appeal were based on the flawed premise that the Trustees had made out their case for eviction in reply. *Mr Paile* argued that, by not attaching the deceased's will and the trust deed to their founding affidavit, the Trustees did not make out a case for eviction in their founding papers as they were required to do. The application for leave to appeal goes so far as to accuse the Trustees of "deliberate malicious intent not to disclose to the Honourable Court in their founding affidavit a copy of the Trust Deed and the existence of, and copy of, Mr Deane Yates' last will and testament".

[27] This is a serious and unwarranted accusation. The Trustees pleaded a clear case in the founding affidavit. They explained that they had decided to terminate the Trust, and had informed Ms Fhulufhelo of this, to enable her to exercise her right of first refusal once they received an offer from a third party to purchase the property. When she could not, they informed her that they needed to terminate her lease, to enable them to sell the property and distribute the trust assets. That is a complete cause of action with all of the necessary averments to sustain a claim for eviction. It was only when Ms Fhulufhelo alleged in her answering affidavit that she was a beneficiary of the Trust (which is unsustainable on the wording of the Trust Deed) that the Trustees annexed the Trust Deed in reply. But, as I suggested to *Mr Paile*, this has nothing to do with making out a case in for the first time in a replying affidavit.

[28] The necessary allegations were made in the founding affidavit. If Ms Fhulufhelo had denied that the Trustees had validly decided to terminate the Trust, or validly terminated the lease agreement, then it could well have been decided that, on the basis of *Plascon-Evans*, the application had to be dismissed (depending, of course, on the basis of the denials and the cogency of the allegations supporting them). But Ms Fhulufhelo did not deny that the Trustees had the discretion to terminate the Trust and had legitimately decided to do so. In essence, the Trustees took a chance that, when alleging in the founding affidavit that they had validly decided to terminate the Trust, Ms Fhulufhelo would not deny it. They were entitled to take that chance, given that the contention appears to be objectively unassailable. As it happens, Ms Fhulufhelo did not dispute the Trustees' right to terminate the Trust and liquidate the trust property. Therefore, those allegations became common cause, and the Trustees did not need to rely on the Trust Deed as evidence of their version. In fact, this is amply demonstrated by the fact that the Trustees annexed the Trust Deed to their replying affidavit for an entirely different purpose – ie, to demonstrate that Ms Fhulufhelo was wrong when she said that she was a beneficiary of the Trust.

[29] Once all of this is so, it is simply not sustainable to say that the Trustees somehow failed to make out a case in the founding affidavit by failing to attach the Trust Deed or the will. The case for eviction was based on the terms of the lease agreement, which were pleaded in full, and not the will or the Trust Deed. It was only Ms Fhulufhelo who attempted to bring the latter into play by virtue of her ill-conceived defence in the answering affidavit.

[30] The reason I have gone into all of this, is because, during the merits proceedings, *Mr Garvey*, who appeared for the Trustees, argued for a punitive costs order. I addressed this briefly in the merits judgment. The argument was based on the notion that Ms Fhulufhelo had litigated unreasonably by abusing the rules of court and civil procedure to enable her to stay in occupation for longer. For the reasons given in the merits judgment, I was not willing to go so far as to make a punitive costs order, even though there were various indicators that, objectively, the opposition to the eviction application was an abuse of process.

[31] Now, having seen all of the papers supporting the application for leave to appeal, I would have been willing to make a punitive costs order. There is no way to avoid the conclusion that Ms Fhulufhelo has bought herself more than three months of continued occupation of the property (she was meant to leave by 31 December 2024) by bringing the ill-fated application for leave to appeal. In real terms, she has now occupied the property unlawfully for two years and two months because the eviction application was brought in April 2023, after the lease agreement was cancelled and Ms Fhulufhelo was given until 31 January 2023 to vacate.

[32] The discussion above does not do full justice to the way in which the application for leave to appeal and condonation application advance submissions which are simply indefensible by a reasonable lawyer. The complexity, though, is that it is patently obvious to any reasonable reader of the papers that Ms Fhulufhelo is not responsible for the irresponsible submissions contained in them. She scraped together what resources she could to procure some form of legal representation and then relied on her lawyers to assist her. I accept that this could be said of many litigants in this country, and I also accept that the default position in our courts – which could almost be described as a form of fiction – is that litigants must be assumed to endorse the conduct of their legal representatives other than in exceptional circumstances. However, in this case, the series of unsustainable arguments were all clearly legal arguments. Ms Fhulufhelo could not have been expected to appreciate, for example, that the argument about making out a case in reply (and accusing the Trustees of malicious intent in apparently doing so) was irresponsible and defective. I would not have been comfortable penalising her with a punitive cost order in these circumstances.

[33] That potentially brought into play the possibility of a costs order *de bonis propriis*. I raised this with *Mr Garvey* because it would go without saying that, if I were even to contemplate such an order, I would need to postpone the hearing to enable *Mr Paile* to make submissions on the issue. That would cause further delay. *Mr Garvey* took an instruction and recorded that the Trustees urgently wish to acquire possession of the property and did not wish to delay matters further by embarking on an inquiry into the possibility of a punitive costs order,

de bonis propriis, being made. Ms Fhulufhelo cannot entirely escape the consequences of having occupied the property for what is now more than two years since she was obliged to vacate, without a lawful basis to do so. For this reason, and because the Trustees made it clear that they do not seek any form of punitive costs order, I am satisfied that it is appropriate simply to dismiss the application for leave to appeal with costs.

Order

[34] It is unusual, in an application for leave to appeal, for the Court to make any order other than granting or refusing the application (and dealing with costs). Here, though, the PIE Act is applicable, and it would not be appropriate for me to leave any ambiguity in relation to when Ms Fhulufhelo should vacate the property. The fact that this application for leave to appeal is defective does not mask the fact that Ms Fhulufhelo is not a wealthy person, and stands to lose the home in which she has lived for roughly fifteen years. I am, though, mindful of how long the Trustees have waited to obtain the eviction order. In the circumstances, I consider it fair for Ms Fhulufhelo to vacate the property by 5pm on 30 April 2025.

[35] I therefore make the following order:

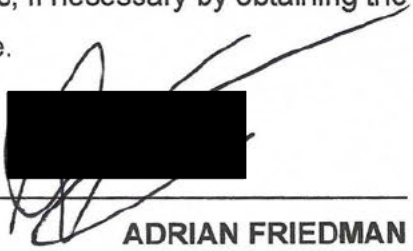
(1) The application for condonation brought under the above-mentioned case number in respect of the application for leave to appeal is granted.

(2) The application for leave to appeal is dismissed with costs.

(3) The applicant for leave to appeal (ie, the first respondent in the main application, Ms Fhulufhelo), and all persons who occupy 24 Crystal Mews, Orchard Road, Bramley View, Johannesburg ("the property") with the permission of, and/or at the behest of and/or through Ms Fhulufhelo, are ordered to vacate the property by no later than 5pm on 30 April 2025.

(4) In the event that the persons described in paragraph 3 of this order have not vacated the property by 5pm on 30 April 2025, the Sheriff of Court is authorised to remove the persons described in paragraph 3 above from the

property at any date from 1 May 2025 onwards, if necessary by obtaining the assistance of the South African Police Service.



ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DATE OF HEARING:
27 MARCH 2025

DATE OF JUDGMENT:
31 MARCH 2025

For the Applicant:

Mr ET Paile, Attorney with right of appearance

For the Respondents (save for the City of Johannesburg, which did not participate in the application for leave to appeal):

Mr C Garvey, instructed by Cuthbertson and Palmeira Attorneys Inc