

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

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

.....

**A. FRIEDMAN**

**11 OCTOBER 2024**

**CASE NUMBER: 2023/042194**

In the matter between:

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

**Applicants**

**and**

**IVY TSHILIMANDILA FHULUFHELO**

**First Respondent**

**CITY OF JOHANNESBURG**

**Second Respondent**

---

**JUDGMENT**

---

**FRIEDMAN AJ**

1 The facts of this matter are straightforward, despite some suggestions to the contrary in the papers. Because the order sought by the applicants is time-sensitive, I have fast-tracked these reasons, and have stripped them to their bare bones. It is not appropriate, in the circumstances, to take any longer than absolutely necessary to hand down this judgment.

2 In short:

2.1 The applicants are trustees of a trust formed to give effect to certain philanthropic intentions of the late Mr Deane Yates. For convenience, in the discussion below, I simply refer to the applicants, collectively, as “**the Trust**”, unless the context requires otherwise.

2.2 Mr Yates’ last will and testament envisaged that, when he died, certain property including the immovable property which is the subject of this application (“**the property**”), would be passed to the Trust. Mr Yates recorded in his will that, if the property had not been transferred to the Trust by the time of his death, the property would be transferred to the Trust on his death subject to an existing lease agreement between him and the first respondent, concluded in 2011.

2.3 It is common cause that the property was only transferred to the Trust after Mr Yates’ death and that the first respondent was living there at the time. It is also common cause that, sometime after Mr Yates’ death, the Trust decided to dissolve and dissipate its property. The trustees informed the first respondent of this.

2.4 In terms of the lease, the first respondent had the right of first refusal to purchase the property in circumstances such as these. She attempted to do so, and made a payment of R40 000. But unfortunately she was unable to make any further payments, or make any alternative arrangement to finance the purchase of the property. Her rental arrears were so substantial that the Trust used the R40 000 to offset some of them. It does not appear to be in dispute (in any meaningful sense) that it was entitled to do so.

2.5 As a result of the first respondent’s inability to purchase the property, it was sold to someone else. The first respondent refused to vacate, which necessitated this application.

3 All sorts of exotic defences were pleaded in the answering affidavit. None of them has any merit. Unsurprisingly, therefore, *Mr Mamabolo*, who appeared for the first respondent, quite properly conceded during the hearing that the first respondent has no valid defence to the eviction application.

4 Regrettably, the misdirected focus of the answering affidavit meant that no evidence was placed before this Court by the first respondent on the question of what order would be just and equitable in the circumstances. No evidence as to the first respondent's current financial position, her prospects of finding alternative accommodation or anything else relevant was mentioned in the answering affidavit at all. Instead, it was left to the second respondent, the City of Johannesburg, to fill in the gaps. The City filed a very helpful report, which explained the scope of its Temporary Emergency Accommodation policy. In doing so, it set out facts which the first respondent provided to the attorney appointed by the City to prepare the report, at an interview conducted not too long before the hearing. These disclose that the first respondent "takes home" R15 000 per month as her salary as a nurse and, as of 24 August 2024, the first respondent lived with a daughter in grade 12 and another daughter in grade 3, along with her mother who is a recipient of an old-age grant and a disability grant.

5 I am indebted to the City for filing the report, because without it I would have had no evidence to assist me in the exercise of my discretion as to a just and equitable order.

6 *Mr Garvey*, who appeared for the Trust, placed on record that the Trustees took the view that an order requiring the first respondent to vacate by 31 December 2024 would be more than reasonable in the circumstances. I agree.

7 Based on the facts in the City's report, and the fact that the first respondent has now been in unlawful occupation for almost two years, I do not consider it appropriate to permit her to remain in occupation for much longer. I sincerely hope that, by the time that 31 December arrives, the first respondent's daughter in grade 12 would have passed her matric exams. The timing of the order should hopefully not, therefore, disrupt her studies. The interview which is reflected in the City's report

was conducted less than two months ago. If it is correct – and there was no suggestion to the contrary by *Mr Mamabolo* – that the first respondent's take-home pay is R15 000 (and her mother can make a modest contribution via her grants), then it should be possible for the first respondent to procure alternative accommodation by 31 December 2024. Either way, for an individual who cannot be described as indigent, who has offered no facts to suggest that eviction by the end of the year would be unfair, almost three full months is more than reasonable in the context of this case.

8 *Mr Garvey* suggested that this would be an appropriate case for a punitive costs order (which the Trust sought from the outset) to be made against the first respondent. This does not flow from a right under the lease agreement. It flows, on his argument, from the unreasonableness of the first respondent's conduct – ie, to remain in occupation for all of this time without any valid basis to do so, and for her counsel then to concede the entire case as soon as oral argument commenced.

9 I have agonised about this aspect of the case. Undoubtedly, the first respondent's response to this litigation was not objectively appropriate or reasonable. But, lurking at the back of my mind, is a concern for the role played by her legal representatives. *Mr Mamabolo* very reasonably, at the hearing, did not press any of the unsustainable points taken by the first respondent in her answering affidavit. So I make clear that no aspersions whatsoever may be cast on him. However, his instructing attorney filed an answering affidavit which was patently defective. It did not raise any remotely arguable or sustainable defence to the application, and it also failed to provide the only information which actually would have been useful in the circumstances – evidence of the first respondent's personal circumstances, relevant to nature of the order which could be made. For instance, it would have been helpful to have been told more about the first respondent's children, her elder daughter's studies, efforts made to procure alternative accommodation and the like. It was left to the City to provide relevant information. Even though someone who earns R15 000 per month cannot be treated as indigent, he or she is not affluent either. It would have been open to the first respondent to adduce evidence which could have impacted on, at least, the timeframe in which she

should be ordered to vacate the premises. If she was not advised of this by her attorneys, then she was failed by them.

10 The fact of the matter is that, despite my disquiet, I have insufficient evidence before me to justify any form of special costs order against the first respondent's attorneys. That leaves the punitive costs order sought by the Trust. I agree with *Mr Garvey* that the first respondent's conduct objectively constitutes an abuse of process – ie, it was conduct which used rules and/or legislation for purpose A (ie, staying in the property for as long as possible without having any lawful basis to do so) when that legislation and those rules were intended for purpose B (ie, ensuring that people, especially poor people, at risk of losing their homes are treated as humanely and justly as possible). However, sight should not be lost of the nature of the Trust (wholly charitable in its purpose) and what seems to have been an existing relationship between the deceased and the first respondent. It is impossible for me to speculate about what Mr Yates would have wanted in these circumstances. I appreciate that every cent acquired or saved by the Trust is money which will, when the assets of the Trust are dissipated, go to worthy causes. So the issue of Mr Yates' philanthropic intentions, and their impact on the equities here, cuts both ways. However, I choose to assume that he would not have wanted the first respondent, who is clearly not a wealthy person, to be prejudiced by a very onerous costs order.

11 Taking all circumstances into account, I have ultimately decided that an ordinary costs order is sufficient. There is no reason why it should not include the reserved costs reflected in the order made by Justice Crutchfield on 9 October 2023, in which she sent the matter, up to then unopposed, to the opposed roll.

12 I accordingly make the following order:

- 1. The first respondent, and all persons who occupy 2[...] C[...] M[...], O[...] Road, B[...] V[...] Johannesburg (“the property”) with the permission of, and/or at the behest of and/or through the first respondent, are ordered to vacate the property by no later than 31 December 2024.**
- 2. In the event that the persons described in paragraph 1 of this order have not vacated the property by 31 December 2024, the Sheriff of**

**Court is authorised to remove the persons described in paragraph 1 above from the property at any date from 14 January 2025 onwards, if necessary by obtaining the assistance of the South African Police Service.**

**3. The first respondent is ordered to pay the costs of this application, including the costs reserved by this Court on 9 October 2023.**

**A. FRIEDMAN**

Acting Judge of the High Court  
Gauteng Division, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter. The date for hand down is deemed to be **11 October 2024**.

**Heard:** 7 October 2024

**Judgment:** 11 October 2024

Appearances:

|                                      |                                         |
|--------------------------------------|-----------------------------------------|
| <b>For Applicants:</b>               | CB Garvey                               |
| <b>Attorneys for the Applicants:</b> | Cuthbertson &<br>Palmeira Attorneys Inc |
| <b>For Respondent:</b>               | T Mamabolo                              |
| <b>Attorneys for Respondent:</b>     | MT Mamabolo Attorneys                   |