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OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 23256/17

In the matter between:

DIE AFRIKAANSE CHRISTELIKE VROUE VERENIGING

VAN ROBERTSON 1st Applicant

DEDRIKA MAGDALENA SMIT 2nd Applicant

and

THE HONOURABLE MAGISTRATE OF ROBERTSON,

MR JH FOLSCHER 1st Respondent

MICHAEL CASPARUS SWART 2nd Respondent

COURT: **HENNEYJ et CLOETE J**

HEARD: **12 OCTOBER 2018**

DELIVERED: **29 OCTOBER 2018**

JUDGMENT

CLOETE, J:

INTRODUCTION

[1] This is an application for the review and setting aside of the decision of the first respondent ("the magistrate") on 27 October 2017 postponing an application brought by the applicants for the summary eviction of the second respondent ("Swart") pending determination of a High Court action in which Swart seeks to hold the first applicant ("ACVV") to a sale agreement in which he purchased a life right of occupation of a particular unit at a retirement centre in Robertson. The second applicant ("Smit") is the person to whom that life right was on-sold after ACVV advised Swart in writing that the sale agreement was cancelled. The applicants also seek an order for Swart's eviction by this court under PIE[1]. The application is only opposed by Swart.

[2] The ground of review is that the magistrate committed a gross irregularity in acting *ultra vires* the powers conferred upon him by the Magistrate's Court Act 32 of 1944 (and rules promulgated thereunder). It is contended that he did not have the power to effectively stay the determination of the eviction application for such a period and was instead obliged to determine it on its merits.

[3] The special circumstances upon which the applicants rely in seeking to have this court make a finding on the merits of the eviction application pertain primarily to the nature of the prejudice which Smit and her daughter will

[1] Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.

continue to suffer if Swart is not evicted until the pending High Court action is finally determined.

[4] Swart contends that it fell within the magistrate's powers to make the order that he did. He also maintains that in any event he is not an unlawful occupier but that, even if this is the case, there is insufficient information before this court to determine whether it is just and equitable to evict him[2].

BACKGROUND

[5] On 1 June 2016 ACVV and Swart, currently 78 years old, concluded the sale agreement in which Swart purchased the life right for the sum of R750 000. It is common cause that the life right is a personal and not a real right.

[6] Clause 1.2 of the sale agreement stipulated that the purchase price was payable when Swart sold his house. According to ACVV no date by which this was to occur was specified because it accepted, in good faith, Swart's assurances that the sale of his house was imminent. Clause 2 provided that Swart was entitled to occupy the unit (the subject matter of his life right) as from 1 July 2016 and after all terms and conditions in the sale agreement were fulfilled. However the same clause makes provision for occupational rental to be paid should the date of signature not coincide with

[2] Occupiers, Berea v de Wet NO and Another 2017 (5) SA 346 (CC).

the date of occupation, namely R2 500 per month for so long as Swart does not physically occupy the unit and R5 000 per month thereafter.

[7] Clause 3 stipulates that risk and benefit pass on occupation, from which date Swart is also liable for levies, and clause 4 that the life right is only acquired on payment of the purchase price. Finally, clause 10 provides that the sale agreement may only be varied, supplemented or cancelled by way of a further written agreement. During argument before us it was conceded by counsel for Swart that a clause such as this does not apply in the case of a breach of the agreement.

[8] Swart paid R2 500 plus the levy of R665 monthly in advance for the period July 2016 to January 2017, it being common cause that he did not physically occupy the unit during that period, although he had been provided with a key for the unit and a remote control device for the entrance gate.

[9] After 5 months Swart's house had still not been sold, nor had he paid the purchase price. The ACVV came under increasing pressure from the previous owner who required reimbursement from the proceeds of the sale to Swart. On 29 November 2016 ACVV wrote to Swart placing on record that his house had not yet been sold despite the elapse of 5 months from conclusion of the sale agreement. He was given a final opportunity to sell same under an unconditional sale by not later than 31 December 2016, failing which ACVV would cancel the sale agreement on the basis that he had not complied with

clause 1.2 within a reasonable period. He was informed that, should the sale agreement be cancelled, the life right would be on-sold to a third party.

[10] Swart's response was that the sale agreement could only be varied or cancelled by means of a further written agreement and that, in the absence thereof, ACVV could not compel him to sell his house within 30 days. He consequently ignored the ultimatum. On 11 January 2017 ACVV cancelled the sale agreement (the letter of cancellation was not included in the record before us).

[11] On 25 January 2017 ACVV on-sold the life right to Smit for R740 000. She paid the purchase price within a few days. But, because she still resided in Kempton Park, Gauteng at the time, the key and remote control were retained by ACVV on Smit's behalf for collection upon her arrival. Smit has a 44-year old severely mentally disabled daughter, Marika, and it was a term of the sale agreement between ACVV and Smit that Marika would be able to reside with her, and be cared for by ACVV in the event of Smit, who is 67 years old, predeceasing her. ACVV duly settled the amount owing to the previous owner from the purchase price received from Smit.

[12] Swart was informed of the on-sale to Smit immediately after payment was received from her by ACVV. He was called upon to hand over the key and remote control device, and to furnish his bank account details so that he could be refunded occupational rental and levies paid subsequent to

cancellation of the sale agreement. Swart ignored these requests, steadfastly continuing to pay the monthly occupational rental and levy.

[13] On 24 April 2017 ACVV became aware that Swart had moved certain personal items into the unit. A demand was sent to his attorney for him to desist. This had the opposite effect, and Swart moved more of his possessions into the unit under cover of darkness, despite an undertaking provided by his attorney to the contrary. The ACVV advised that it intended taking back possession on the basis of counter-spoliation and proceeded to place a chain and lock on the entrance gate, thereby preventing Swart from gaining access.

[14] Swart then obtained an interim spoliation order ex parte in the magistrate's court on 4 May 2017, with a return date of 26 May 2017. The ACVV opposed the granting of final relief. The matter was argued on 2 and 23 June 2017 and on 15 August 2017 the magistrate handed down judgment, setting aside the interim order and dismissing the application with costs.

[15] Swart noted an appeal against the magistrate's order. The appeal was heard by Gamble and Sher JJ on 23 February 2018 and dismissed with costs on 29 March 2018. It is apparent from the appeal judgment that Swart had moved into the unit permanently on 25 May 2017, i.e. one day before the scheduled return date of the interim spoliation order. This was not disclosed to the magistrate and only to the appeal court when it insisted on being

provided with this information. The appeal was dismissed on the basis that it would have no practical effect in the circumstances.

[16] On 2 May 2017 Swart issued summons in this court under case no 7573/17 for orders declaring his sale agreement with ACVV valid and enforceable and that ACVV "*take all necessary steps to give effect to the said agreement, including respecting (or alternatively giving) Plaintiff unfettered occupation of the property*". He simultaneously tendered payment of the purchase price, alleging that his house had been sold for R1.4 million on 5 April 2017. He referred to the relevant deed of sale in his particulars of claim as an annexure thereto but it does not form part of the record before us. Although Smit was cited as a co-defendant, no relief was sought against her.

[17] The ACVV delivered its plea on 20 June 2017. It pleaded at paragraph 4.3.1 thereof that (as set out in clause 4 of the sale agreement) Swart only acquired the life right upon payment of the purchase price. It was also pleaded at paragraph 8.1 thereof that on 5 April 2017 Swart (it would appear, for the first time) tendered payment of the purchase price on 30 April 2017, which payment date was 3½ months after ACVV had cancelled and about 3 months after the life right was transferred to Smit. ACVV denied that in the circumstances it was obliged to accept payment of the purchase price.

[18] On 25 August 2017 ACVV and Smit launched the urgent eviction application in the magistrate's court which gave rise to the present review

before us. Smit had arrived to take physical occupation of the unit, still occupied by Swart, with her daughter Marika. They were having to be accommodated by ACVV on a temporary basis in a small guest room without private ablutions on any other facilities. I will return to this later in this judgment.

[19] The eviction application was brought in terms of section 5 of PIE, which authorises the owner or person in charge of land to institute urgent proceedings for the eviction of an unlawful occupier pending the outcome of proceedings for a final eviction order. The service order envisaged in section 5(2) of PIE informed Swart that the following relevant relief was sought, namely his summary eviction within 24 hours and "*in case for an order pendente lite, the setting of a date for the hearing of an application for a final order*". A punitive costs order was also sought, but in paragraph 34 of the founding affidavit the deponent, ACVV's manager, Ms Heidi van der Merwe explained that what was asked for on an interim basis was Swart's eviction only, so that he would be afforded the opportunity to address the issue of costs on the return date.

[20] At the time when the eviction application was launched, Swart's appeal against the dismissal of his spoliation application was still pending before this court. For this reason an order was also sought in terms of section 78 of the Magistrate's Court Act that his eviction not be suspended pending the outcome of the appeal. ACVV acknowledged that the dismissal of the

spoliation application did not constitute an order for performance by Swart, but submitted that its effect was that, from at least 15 August 2017 (i.e. the date when the magistrate handed down his judgment in the spoliation application), Swart was an unlawful occupier.

[21] In his answering affidavit Swart contended that the notice of motion did not comply with section 5(1) of PIE "*as relief is sought for a final order as no return date is set*". The other defences raised related to the relief exceeding the monetary jurisdictional limit, which was incorrect given the nature of the application, and that his eviction should not be granted in any event, primarily because he is not an unlawful occupier.

[22] Swart did not contend that he was occupying the unit with either applicant's express or tacit consent. He maintained however that he has a right in law to occupy due to the sale agreement concluded between himself and ACVV "*whom I hold accountable in the terms claimed*" in the High Court action. He also contended that since the magistrate's court has no jurisdiction to determine the issue in the pending High Court action, until such time as it is determined he has a "*clear right*" to occupy the unit. In his words:

> "*I fully occupied the premises as a direct consequence of my contention that I have acquired the life interest or the right thereto by complying with the terms of the agreement … if the court grants an order in the terms requested … I shall suffer irreparable harm and prejudice in that adjudication on the main issue in the High Court would then effectively be circumvented*".

[23] When the matter was argued before the magistrate on 21 September 2017 amended relief was sought in terms of a draft order, namely the summary eviction of Swart pending final determination of the High Court action or the appeal, whichever occurs last.

[24] In his judgment handed down on 27 October 2017 the magistrate referred to the eviction application as one in terms of section 4 of PIE. This appears to have been as a result of van der Merwe's submission in her replying affidavit that, given that Swart had since received at least 14 days notice, section 5(1) of PIE no longer applied. The magistrate reasoned that, since PIE only applies to an unlawful occupier, and that the pending High Court action would ultimately determine whether or not Swart fell into this category, the application should be postponed *sine die* pending that determination, whereafter it would likely resume in the magistrate's court (this is my loose translation of the words used).

[25] During argument before us it emerged that, although pleadings closed in the High Court action in June 2017, Swart and his attorney have nonetheless taken no steps to place the matter on the continuous roll for a trial date. It also emerged that Swart has not been paying R5 000 per month as required for physical occupation in terms of the sale agreement which he contends is valid and enforceable, although vague reference was made by his counsel to a previous tender to this effect. (This is not on the papers, and nor is any such tender contained in the summons in the High Court action.)

WHETHER THE MAGISTRATE ACTED *ULTRA VIRES*

[26] The applicants submit that despite the fact that the order issued by the magistrate was characterised as a postponement, in reality it amounts to an order staying the eviction proceedings pending the outcome of the High Court action for specific performance. Put differently, the application was not postponed *sine die* (which would have enabled any of the parties to re-enrol it on not less than 10 days' notice) but on the express condition that it would remain postponed for this undetermined period. During argument counsel for Swart was constrained to concede as much although he maintained that it was nonetheless still a postponement.

[27] It is argued by the applicants that, given that the magistrate's court is a creature of statute and has no inherent jurisdiction[3], it can only issue those orders which it is expressly authorised to make, and is not empowered to protect and regulate its own process, taking into account the interests of justice. Reliance is placed on **Ndamase v Functions 4 All**[4], where the Supreme Court of Appeal, in considering whether a magistrate's court has jurisdiction in respect of claims for provisional sentence, stated:

> *"[4] In terms of s 1 of the Act 'the rules' means the rules referred to in s 6 of the Rules Board for Courts of Law Act 107 of 1985. That section provides that the Board may, with a view to the efficient, expeditious and uniform administration of justice in the lower courts make rules for the lower courts regulating –*
>
> *'(a) the practice and procedure in connection with litigation'. …*

[3] Unlike the Superior Courts in terms of section 173 of the Constitution.
[4] 2004(5) SA 602 SCA.

[5] It is well- established that the magistrate's court has no jurisdiction and powers beyond those granted by the Act … and that in this context, jurisdiction means 'the power vested in a court by law to adjudicate upon, determine and dispose of a matter' … It is also well-established that powers may be conferred expressly or by implication. Where the Act is silent on a matter the general rule is that by expressly conferring on the magistrates' courts jurisdiction in respect of a particular matter, the Act confers by implication the ancillary powers necessary to give effect to that jurisdiction. In regard to matters specifically provided for in the Act, the Act will govern that situation … The primary question to be answered therefore is whether the Act expressly or by implication confers on a magistrate's court jurisdiction to grant provisional sentence."

[28] The applicants also rely on **The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others**[5] where it was held that if, when making an order, a Judge usurps a power expressly reserved by statutory enactment for the Master, such order is a nullity and a pronouncement to that effect is unnecessary. They submit that this means that if a court exceeds its jurisdiction (as they argue the magistrate did in this matter) the consequence at common law is that such an order is null and void. They also refer to **Nedbank Limited v Jones and Others**[6] in which the abovementioned authorities were cited in support of the following finding:

"[16] It is trite that the magistrate's court is a creature of statute and exercises no inherent jurisdiction. It may only exercise the powers conferred upon it by statute and can accordingly not adjudicate matters which fall outside of its jurisdiction. Simply put it may only issue orders which it is expressly authorised to do. And, if that court

[5] 2012 (3) SA 325 (SCA).
[6] 2017 (2) SA 473 (WCC).

exceeds its jurisdiction, at common law the consequence is that such an order is null and void."

[29] However in **Department of Transport and Others v Tasima Pty Ltd**[7] the Constitutional Court held that under section 165 of the Constitution a court order is binding until set aside, irrespective of its validity. Such orders are not nullities, but exist in fact and may have legal consequences. Whether or not an order is enforceable depends on whether the Judge had the authority to make it at the moment it was made.

[30] Section 47(1) of the Magistrates' Court Act provides that where a defendant has a counterclaim exceeding its jurisdiction which the court is satisfied, *prima facie*, has a reasonable prospect of success, the main action may be stayed for a "*reasonable period*" to enable the defendant to institute action in a competent court.

[31] Sections 47(2) and (3) however make it clear that the magistrate must determine what that reasonable period is. Section 47(2) stipulates that should the period (so determined) expire before the defendant has instituted action, the magistrate may, on application, either stay the main action for a further reasonable period or dismiss the counterclaim (irrespective of whether or not it has been reduced to an amount falling within the magistrates' courts jurisdiction). Section 47(3) in turn makes provision for similar steps to be

[7] 2017 (2) SA 622 (CC) at paras 180, 182 and 198.

taken where the defendant nonetheless still fails to institute action timeously in a competent court, or his claim instituted in that other court fails.

[32] There is no express provision in either rule 31(dealing with postponements) or rule 55 (dealing with applications) of the magistrates' courts rules which permits a magistrate to stay pending proceedings for an indeterminate period.

[33] Moreover there is direct authority to support the applicants' argument. In **Esterhuizen v Holmes**[8] it was held that:

> "*I know of no provision in the Magistrates' Courts Act whereby a magistrate would be empowered to stay an action instituted by a plaintiff against a defendant in the magistrate's court merely because the defendant had, either previously to or after the issue of summons by the plaintiff in the magistrates' court, issued a summons in the Supreme Court against the plaintiff*."

[34] That a magistrate is precluded from making an order such as that in the present matter is furthermore borne out by section 48 of the Magistrates' Court Act which contains a *numerus clausus* of judgments or orders that a magistrate is permitted to make. **Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa**[9] submit that section 48 also applies

[8] 1947 (2) SA 789 (T) at 797, cited with approval by another full bench in Forrest Crest Properties CC v Matthee and Others (AR194/11) [2012] ZAKZPHC 80 (30 July 2012) at para [43].
[9] Volume 1 (10th Ed) at 322.

to motion proceedings. A stay, even on application, is not permitted by section 48.

[35] Having regard to the aforegoing it is my view that, in making the order that he did, that magistrate indeed acted *ultra vires* the powers conferred upon him by the Magistrates Court Act and the rules promulgated thereunder. To the extent that it may be necessary, I am also persuaded that the order was "*likely in the ordinary course of things to cause substantial prejudice*"[10]. In **R v Kruse**[11] the Court explained that when it is said that the act must be calculated to prejudice, the word "*calculated"* does not refer to the intention of the actor but is used in the sense of "*likely*" and "*the meaning is that the act must be of such a nature as in the ordinary course of things to be likely to prejudice*".

[36] The applicants have suffered severe prejudice as a result of the magistrate's order. The adjudication of their application to have Swart evicted from the premises has been frustrated, and they have effectively been denied access to court and the protection which they are entitled to be afforded by the legal process for an indefinite period. Given that more than a year has elapsed since pleadings closed in the High Court action, but Swart and his attorney have yet to make application for a date on the continuous roll, it is fair to accept that the eviction application is not likely to be heard within the next two years.

[10] Johannesburg Liquor Licensing Board v Short 1946 AD 722.
[11] 1946 AD 524.

[37] Smit and her disabled daughter are especially prejudiced. Their personal circumstances are set out in the papers. Smit has had to store her belongings elsewhere at her own expense at a minimum cost of R800 per month. Her daughter Marika's level of intelligence is akin to that of a 2 or 3-year old child and it is crucially important for her mental wellbeing that she lives in an environment surrounded by familiar furniture and belongings and which is conducive to a stable and predictable routine. She did not even cope when Smit attempted to stay with her own brother and his family who also live in Robertson, apart from the fact that this involved a family member having to make her bedroom available to them. Marika is traumatised by her current living circumstances.

[38] She also has high anxiety levels and is scared of lifts. They therefore have to climb the stairs to the guest bedroom on the top floor. This is painstaking because Marika is scared that she will fall. She is utterly dependent on Smit to attend to her daily needs. Smit explained how it took some time to find a retirement centre that was prepared to also accommodate Marika, and that because of her particular circumstances, accommodation needs to be carefully selected.

[39] It would appear that Smit has a monthly income of around R8 600 and available capital of about R870 000 to provide for the needs of herself and

Marika for the remainder of their lives. She cannot access the capital sum of R740 000 which she paid for the unit in good faith.

[40] The guest room which they occupy is 3 m X 4 m and has 2 single beds. There are no cooking facilities, and no laundry and ironing facilities available to them. Smit has to wash and iron their clothing at her brother's home. They have their main meal at ACVV daily (for which Smit pays) and in the evenings have to eat meals which do not require cooking facilities, such as cereal or take-aways. Their circumstances have caused Smit great anxiety as well which in turn badly affects Marika.

[41] The guest room made available to them as an emergency and temporary measure by ACVV is meant to accommodate those who visit residents in frail care and need a place to stay overnight. ACVV rents it out at R150 per person per night but has not charged Smit any rental because of the situation. The consequent inconvenience and loss of income to ACVV, a non-profit organisation, is self-evident.

WHETHER THIS COURT SHOULD SUBSTITUTE ITS OWN DECISION

[42] As stated in **Herbstein and van Winsen: The Civil Practice of the High Courts of South Africa**[12] the general principle is that the matter will be remitted to the court *a quo* unless there are special circumstances giving reason for not doing so.

[12] Vol 2 pp 1299-1300.

[43] Swart was not able to refute the allegations of severe prejudice caused to the applicants by the magistrate's order. He merely submitted that even though her current living circumstances are not her first choice, Smit and Marika are more than adequately accommodated. No explanation was provided.

[44] It is common cause that the circumstances in which the applicants and Marika find themselves have endured for more than a year. Were this court to remit the matter to the magistrate's court for determination on the merits, it is entirely unclear when that determination will be made. Moreover this court is equally equipped to determine the merits. This is not a case where specialised knowledge is required. There is also the distinct possibility that, given the history, Swart will note an appeal if the magistrate finds against him. He has an automatic right to do so and does not first require leave from that court. This will entail further delay while the appeal runs its course in this court. All of these considerations compel me to conclude that special circumstances indeed exist for this court to substitute its own decision.

WHETHER SWART IS AN UNLAWFUL OCCUPIER

[45] As previously stated, Swart relies solely on the sale agreement in contending that he has a right in law to occupy. The trial court in the pending High Court action will determine whether or not the sale agreement is valid. It

is only if that determination is in Swart's favour that, in terms of the sale agreement, it can be found that he has acquired a life right to occupy the unit.

[46] In the eviction proceedings Swart did not dispute the applicants' allegations concerning delivery of the life right by ACVV to Smit. It was only in his answering affidavit in the review that Swart contended, for the first time, that making the key of the unit available to Smit without physically handing it over to her did not amount to delivery.

[47] Suffice it to say that this court must determine the merits on the papers that served before the magistrate. Given the history there is little doubt that if Swart had believed that there was any merit in this "defence" he would have raised it in his answering affidavit in the eviction application. In any event, the legal fiction of *constitutum possessorium* does not require that a key or other symbol of possession has to be physically handed over to the transferee.

[48] The effect of delivery of the life right to Smit is that Swart is precluded from claiming specific performance in terms of the sale agreement but is left only with an action for damages against ACVV. Swart made certain allegations that Smit was forewarned of a potential dispute between himself and ACVV. Not only are these allegations disputed by Smit, but Swart is not able to materially dispute that Smit was a *bona fide* purchaser of the life right on-sold to her by ACVV.

[49] **Kerr, The Principles of the Law of Contract**[13] explains the legal position as follows:

> "*In the case of double sales other than those in which one party has an option in a lease, if transfer is in fact passed to C and C is* bona fide *he is entitled to retain the property and B is left with an action for damages against A. However, if C knew of B's rights when he bought or when he took transfer, then B can claim against C transfer from C to himself or he can claim against A and C cancellation of the transfer to C and transfer from A to himself*."[14]

[50] Moreover, the dismissal of Swart's appeal against the magistrate's order in the spoliation application means that the order of the magistrate stands. For present purposes, there is thus a finding already in place that the unit is now in the possession of a *bona fide* third party, i.e. Smit[15]. I therefore do not accept the submission made by counsel for Swart that because he was initially in lawful possession of the property, it followed that he could also lawfully take occupation of the property at any time, and he therefore cannot be regarded as an unlawful occupier. I also do not accept his counsel's submission that the dispute concerning the lawfulness of his occupation of the unit goes to the heart of the pending High Court Action. I am persuaded that Swart is an unlawful occupier for purposes of the present proceedings.

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[13] 6th Ed p 673.

[14] See also Gugu and Another v Zongwana and Others [2013] JOL 31018 (ECM) at para 32.

[15] The final paragraph of the judgment at p 16 of the record, relying on Jivan v The National Housing Commission [1997] 4 All SA 156 (W).

WHETHER IT IS JUST AND EQUITABLE TO EVICT

[51] I have already set out the personal circumstances of Smit and her daughter Marika. The rather contrived argument was advanced on Swart's behalf that because the eviction application was brought in terms of section 5 (1) of PIE, Swart is prejudiced by not having been afforded the opportunity to place all relevant circumstances before the court.

[52] In his answering affidavit in the eviction application Swart stated that "*for the reasons … below*" he would suffer far greater hardship than the applicants and Marika if he was evicted. The reasons provided were his age, that he does not possess "*any property*" and that he does not have access to any other accommodation. He also expressly took the view that the "*applicants are asking for a final order against me*" and maintained that "*if I am evicted from the premises I would literally not have a place to stay*". It is thus fair to accept that he already knew, at that stage, that he faced "final" eviction.

[53] In her replying affidavit in the eviction application, van der Merwe pointed out that, on his own version, Swart has R1.4m cash available to him. She also stated that Swart has 2 sons who both live in Robertson who could presumably accommodate him. She attached photographs of the exterior of their respective homes which appear to be fairly large, comfortable properties.

[54] Swart was given a further opportunity in the proceedings before us to place further information before the court if he wished, given that it was made clear by the applicants in their notice of motion that in addition to the setting aside of the magistrate's order, relief was also sought from this court for his eviction, and this court is obliged to take any further information provided into account in light of the decision in **Occupiers, Berea v De Wet NO and Another**[16]. By then of course Swart was aware of van der Merwe's

[16] 2017 (5) SA 346 (CC).

allegations in her replying affidavit. However he simply failed to deal with them.

[55] Swart does not contend that he is disabled or infirm. He must also receive income because he was able to cover his living expenses before he received the proceeds of the sale of his house. He does not appear to have any dependants who rely on him for accommodation or financial support. There is nothing before us to indicate that his sons will not be able to accommodate him on a temporary basis until he can move elsewhere. He has ample available cash resources to pay for alternative accommodation pending determination of the High Court action.

[56] Taking all of these factors into account it is my view that it is indeed just and equitable to order Swart's eviction. Given that he was able to move his belongings into the unit within a day or so, there is no reason why he cannot move them out within a similar period.

[57] The applicants seek costs against Swart on the scale as between attorney and client. However, given that these proceedings also pertain to the review of the decision of the first respondent, the appropriate costs order is the one that follows.

[58] **In the result the following order is made:**

1. **The decision made by the first respondent on 27 October 2017 postponing the eviction application brought by the applicants in the Robertson magistrate's court under case number 411/2017 is reviewed and set aside.**

2. **The second respondent is evicted from the unit occupied by him at the property known as […], ACVV Huis Le Roux Tehuis vir Bejaarde Persone at […] Street, Robertson alternatively […] Street Robertson, pending final determination of the High Court action under case no 7573/17.**

3. **The second respondent shall vacate the unit and remove his belongings, within 14 calendar days from date of this order. In the event of him failing or refusing to do so, the Sheriff is hereby authorised to carry out the eviction.**

4. **The second respondent shall pay the costs of this application.**

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CLOETE, J

I agree.

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HENNEY, J