CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 50/16

In the matter between:

YOLANDA DANIELS	Applicant
and	
THEO SCRIBANTE	First Respondent
CHARDONNE PROPERTIES CC	Second Respondent
and	
TRUST FOR COMMUNITY OUTREACH AND EDUCATION	Amicus Curiae

Neutral citation: *Daniels v Scribante and Another* 2017 ZACC 13

Coram: Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Musi AJ and Zondo J

Judgments: Madlanga J (first judgment / majority): [1] to [71]
Froneman J (second judgment / Afrikaans): [72] to [108]
Froneman J (second judgment / English): [109] to [144]
Cameron J (third judgment): [145] to [155]
Jafta J (fourth judgment): [156] to [204]
Zondo J (fifth judgment): [205] to [218]

Heard on: 17 November 2016

Decided on: 11 May 2017

ORDER

On appeal from the Land Claims Court (hearing an appeal from the Stellenbosch Magistrate's Court):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Stellenbosch Magistrate's Court, Land Claims Court and Supreme Court of Appeal are set aside.
4. It is declared that the applicant is entitled to make the following improvements to her dwelling at Chardonne Farm (farm), Blaauwklippen, Stellenbosch:
   (a) levelling the floors;
   (b) paving part of the outside area; and
   (c) installing water supply inside the applicant's dwelling, a wash basin, a second window and a ceiling.
5. The parties are ordered to engage meaningfully regarding the implementation of the improvements, particularly on—
   (a) the time at which the builders will arrive at, and depart from, the farm;
   (b) the movement of the builders within the farm; and
   (c) the need for, and approval of, building plans in respect of the improvements.
6. If the parties are unable to reach agreement within 30 days of the date of this order, either party may approach the Stellenbosch Magistrate's Court for appropriate relief.

JUDGMENT

MADLANGA J (Cameron J, Froneman J, Khampepe J, Mbha AJ, and Musi AJ concurring):

Introduction

> "The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals. Our people have many problems; we are beaten and killed by the farmers; the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world."[1]

[1] This impassioned, painful cry highlights the effects of the dispossession of African people[2] of their land by whites. It is this dispossession and other stratagems[3] that forced people off their land. The result was that some found themselves living and working on land that was now in the hands of whites. As Mr Petros Nkosi says, their way of life had been torn asunder. They had been stripped of their dignity.

[2] This takes us to the nub of this matter: the right to security of tenure. An indispensable pivot to that right is the right to human dignity. There can be no true security of tenure under conditions devoid of human dignity. Though said in relation

[1] These words are reported to have been uttered by an old man, Mr Petros Nkosi, at a community meeting in the then Eastern Transvaal. I found them in Rugege "Land Reform in South Africa: An Overview" (2004) 32 *International Journal Legal Information* 283 at 286.

[2] Ordinarily I would use "blacks", which is a term often used to denote black Africans, "Coloureds" and Indians, but later I refer to the three groups separately. It is this that has necessitated the use of "Africans".

[3] More on these later.

to the right to life, the words of O'Regan J are apt: "without dignity, human life is substantially diminished".[4] Addressing herself directly to human dignity, she said:

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]."[5]

[3] Here the right to security of tenure and the right to human dignity are implicated in the context of a person who is an occupier of farmland under the Extension of Security of Tenure Act (ESTA).[6] That her occupation is in terms of this Act is common cause.

Background

[4] The applicant, Ms Daniels, is a domestic worker and the head of her household. She and her minor children[7] have lived in a dwelling on Chardonne Farm (farm) for the past 16 years. The first respondent, Mr Scribante, manages the farm. Under ESTA he is thus "the person in charge".[8] And the second respondent, Chardonne Properties CC,[9] owns it.

[5] In what appears to have been a move calculated to get rid of Ms Daniels from the farm, in January 2014 Mr Scribante removed or tampered with the door to Ms Daniels's dwelling and cut the electricity supply.[10] Ms Daniels obtained an

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[4] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 327.

[5] Id at para 328.

[6] 62 of 1997.

[7] At the time the application was launched before this Court, they were aged 6, 9 and 13.

[8] Section 1 of ESTA provides that—

> "'person in charge' means a person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question."

[9] Mrs Anita Scribante, the first respondent's wife, is the sole member of the second respondent.

[10] I deduce these facts from reading an affidavit filed before the Stellenbosch Magistrate's Court, which forms part of the record, together with an interim order granted by that Court.

interim order from the Stellenbosch Magistrate's Court for the restoration of her undisturbed occupation on the farm. The order required Mr Scribante specifically to repair and replace the door and restore the electricity supply.

[6] That was not the end of the woes besetting Ms Daniels. Mr Scribante ceased to maintain the dwelling. Again, Ms Daniels had to approach the Stellenbosch Magistrate's Court. This time she sought – and was granted – a declarator that: she was an occupier under ESTA; the respondents' failure to maintain the roof with the result that it leaked constituted an infringement of her right to human dignity; and the respondents' failure to maintain and ensure the safety of the electricity supply to the dwelling also constituted an infringement of her human dignity. Consequently, the Court ordered the respondents to repair and maintain the roof and electricity supply. The respondents complied.

[7] Following the maintenance work, Ms Daniels wanted to make certain improvements which were by no means luxury items. They included levelling the floors, paving part of the outside area and the installation of an indoor water supply, a wash basin, a second window and a ceiling. These are basic human amenities. A letter Ms Daniels addressed to the respondents advising them of her intentions said as much.[11] Unsurprisingly, the respondents accept that, without the improvements, the dwelling is not fit for human habitation. In particular, they admit that the condition of the dwelling constitutes an infringement of Ms Daniels's right to human dignity. I make no holding on what it is exactly that would make the condition of the dwelling inconsonant with human dignity. I proceed on the assumption that, based on the respondents' concession, the condition of the dwelling did not accord with human dignity.

[8] Crucially, Ms Daniels indicated that she would carry the cost of the improvements. It is worth mentioning that Ms Daniels was not asking for the

[11] The parties' correspondence emanated from their respective attorneys.

respondents' consent. She was merely alerting them to the fact that she was to effect the improvements. She received no response.[12]

[9] After works had commenced, Ms Daniels received a letter demanding their immediate cessation. In it the respondents stated that they had not given consent that the improvements be made. They noted that no building plans had been submitted to them and that, without plans, the improvements were unlawful. Yet again Ms Daniels brought proceedings before the Stellenbosch Magistrate's Court. This time she was seeking an order declaring that she was entitled to make the improvements.

[10] Ms Daniels placed reliance on sections 5, 6 and 13 of ESTA. She argued that the right to reside accorded to her in ESTA includes the right to make improvements to her dwelling. The Court dismissed the application with costs. It held that an occupier under ESTA does not have a right to effect improvements to her dwelling without the consent of an owner or person in charge. A subsequent approach to the Land Claims Court (LCC) was also unsuccessful. The LCC held that allowing Ms Daniels to effect improvements on her dwelling without consent is so drastic an intrusion that it requires an express, unambiguous provision in ESTA which, on the LCC's reading, there wasn't. Both the LCC and Supreme Court of Appeal refused leave to appeal. That is how Ms Daniels has landed before us persisting in her quest for leave to appeal.

Issues

[11] The matter raises the following issues:

(a) Should leave to appeal be granted?

(b) Does ESTA afford an occupier the right to make improvements to her or his dwelling?

[12] In a letter sent after Ms Daniels had commenced with the improvements, the respondents suggest that they were yet to respond but were delayed by an intervening weekend and public holiday.

(c) If it does, is the consent of an owner required for an occupier to make the improvements?

(d) If consent is not necessary, may an occupier effect improvements to the total disregard of an owner?

Leave to appeal

[12] This matter concerns the interpretation of ESTA. ESTA is an Act passed to give effect to the constitutional right contained in section 25(6) of the Constitution. We thus have jurisdiction.[13] In addition, the rights embodied in section 26 of the Constitution are at issue.[14] The application raises issues of great import. And, as I will soon demonstrate, it bears prospects of success. It is in the interests of justice to grant leave.

Is there a right to make improvements?

[13] Section 25(6) of the Constitution provides that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, *to the extent provided by an Act of Parliament*, either to tenure which is legally secure or to comparable redress. ESTA affords secure tenure – as envisaged in section 25(6) – to persons who reside on land that they do not own. This means it is ESTA that sheds light on the extent of the rights conferred on occupiers. The respondents deny the existence of an occupier's right to improve her or his dwelling. I elaborate later on the nature of the submission. Next I render a historical perspective which is necessary to understand ESTA's context.

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[13] See *Hattingh v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) at para 24; *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at para 23; and *Klaase v van der Merwe N.O.* [2016] ZACC 17; 2016 (6) SA 131 (CC); 2016 (9) BCLR 1187 (CC) at para 30.

[14] See *Mamahule Communal Property Association v Minister of Rural Development and Land Reform* [2017] ZACC 12 at para 11, where this Court reaffirmed what it said in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*) at para 36.

[14] Dispossession of land was central to colonialism and apartheid. It first took place through the barrel of the gun and "trickery".[15] This commenced as soon as white settlement began, with the Khoi and San people being the first victims.[16] This was followed by "an array of laws" dating from the early days of colonisation.[17] The most infamous is the Native Land Act[18] (subsequently renamed the Black Land Act) (Black Land Act). Mr Sol Plaatje, one of the early, notable heroes in the struggle for freedom in South Africa who lived during the time this Act was passed, says of it, "Awaking on Friday morning June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth".[19]

[15] The effects of this Act are well known to many South Africans:

> "The Native Land Act . . . apportioned 8% of the land area of South Africa as reserves for the Africans and excluded them from the rest of the country, which was made available to the white minority population. Land available for use by Africans was increased by 5% [in terms of the Native Development and Trust Land Act 18 of 1936] bringing the total to 13% of the total area of South Africa, although much of the land remained in the ownership of the state through the South African Development Trust supposedly held in trust for the African people. Thus 80% of the population was confined to 13% of the land while less than 20% owned over 80% of the land. This apportionment of land remained until the end of apartheid and remains virtually unchanged."[20]

[16] The purpose of it all was, first, the obvious one of making more land available to white farmers.[21] The second "was to impoverish black people through dispossession and prohibition of forms of farming arrangements that permitted some self-sufficiency. This meant they depended on employment for survival, thus creating

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[15] Rugege above n 1 at 284.

[16] Lephakga *The Significance of Justice for True Reconciliation on the Land Question in the Present Day South Africa* (Master of Theology thesis, University of South Africa, 2012) at 32.

[17] Id.

[18] 27 of 1913.

[19] Plaatje *Native Life in South Africa* (Picador Africa, South Africa, 2007) at 21.

[20] Rugege above n 1 at 284.

[21] Id.

a pool of cheap labour for the white farms and the mines. White farmers had repeatedly complained that African people refused to work for them as servants and labourers".[22] The third was the enforcement of the policy of racial segregation,[23] which assumed heightened proportions during the apartheid era.

[17] The Black Land Act, together with other stratagems, succeeded in pushing Africans off their land and into white farms, mines and other industries. These other stratagems, like the imposition of a variety of taxes including property taxes,[24] created the need for cash. Selling livestock for this purpose was unsustainable. Cash could be obtained only by working for whites.[25]

[18] Other African people found themselves working as labour tenants on land now in the hands of whites. That dispensation subjected them to untold cruelty and suffering.[26] Sol Plaatje cites an example:

> "The baas exacted from him the services of himself, his wife and his oxen, for wages of 30 shilling a month, whereas Kgobadi had been making £100 a year, besides retaining the services of his wife and of his cattle for himself. When he refused the extortionate terms, the baas retaliated [by requiring] him to betake himself from the farm . . . by sunset of the same day, failing which his stock would be seized and impounded, and himself handed over to the authorities for trespassing on the farm."[27]

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[22] Id at 284-5. According to Lephakga above n 16 at 34, continuing farming activity by Africans was a "problem" for white people who wanted them to provide labour in the mines and on the farms.

[23] Rugege above n 1 at 285.

[24] Saunders *Land Reform in South Africa: An Analysis of the Land Claim Process* (Submitted in partial fulfilment for the degree Masters in Public Management and Governance, Potchefstroom University for Higher Education, 2003) at 13.

[25] Id.

[26] Lephakga above n 16 at 37.

[27] Plaatje above n 19 at 72. I must make the observation that "baas" (Afrikaans for "boss") had little to do with being the boss of the African person concerned. It had more to do with white supremacy. In the South Africa of that time all grown white men who subscribed to the notion of white superiority regarded themselves as the baas of every African regardless of whether they were employed or not or who their employer was. And each expected to be addressed as baas by every African he encountered. And it was required to address their little sons as "klein baas" (Afrikaans for "little boss"). Likewise, in her mind each grown white woman of that ilk was the "madam" of all Africans.

[19] Lest I appear to suggest that land dispossession affected only South Africa's African people, the truth is that "Coloured" and Indian people also suffered this heart-wrenching pain. The apartheid government used the Group Areas Act[28] "to complete the policy of racial segregation by removing 'Coloured' and Indian people from so-called white areas".[29] I cite a few examples. A "rich closely knit" Indian community that used to live in an area called the Magazine Barracks close to the Durban CBD was removed under this Act to Chatsworth many kilometres away from their place of work.[30] A community that comprised 3 500 "Coloured" and 50 Indian families was removed from an area called Die Vlakte within the town of Stellenbosch.[31] The excuse was that the area was a slum.[32] But, says Hector-Kannemeyer:

> "'Die Vlakte' was anything but a slum area, with no overcrowding and unclean conditions and no real reason for commissioning such a traumatic relocation of thousands of 'coloured' residents. . . . Besides the removal of 3 500 'coloured' families and 50 Indian families, the heartbeat of the 'coloured' community located in 'Die Vlakte' was affected by the destruction of six schools, four churches, a mosque, a cinema and ten businesses."[33]

[20] African, Indian, "Coloured" and Chinese people were removed from Sophiatown. The Indians, "Coloureds" and Africans were moved many kilometres away and the Chinese to the city close by.[34] There were also the District Six removals

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[28] 41 of 1950.

[29] Rugege above n 1 at 285. Of course, this Act was used on African people as well. According to Rugege:

> "Pockets of black farmers who had escaped the 1913 Land Act because they had title deeds to their land, were removed under the Group Areas Act in a process that was dubbed cleaning up the 'black spots'. The 'black spots' were usually fertile land whereas the areas in the Bantustans where the people were moved to were over-crowded, over-grazed and over-cultivated."

[30] Gopalan *the Destruction and Remaking of 'Community': a case study of the Magazine Barracks residents relocation to Chatsworth* (A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy, University of KwaZulu-Natal, Durban) at 196.

[31] Hector-Kannemeyer *Current Manifestation of Trauma Experienced During Forced Removals under Apartheid: Interviews with a Former "Vlakte" Inhabitant* (A mini-thesis submitted in partial fulfilment of the requirements for the degree of Magister Artium in the Department of Social Development, University of the Western Cape 2010) at 7.

[32] Id.

[33] Id.

[34] Mapungubwe Institute for Strategic Reflection (MISTRA) *Nation Formation and Social Cohesion* (Real African Publishers, Johannesburg 2014) at 151. Indians were taken to Lenasia, "Coloureds" were moved to

in Cape Town. Like the removals of Sophiatown, the District Six removals, which affected "Coloured", Cape Malay, Indian and African alike, gained worldwide notoriety.

[21] Earlier I referred to racial segregation under apartheid. Apartheid sought to divest all African people of their South African citizenship. According to the grand scheme of apartheid, Africans were to be citizens of so-called homelands.[35] The consequence was a variety of tenuous forms of land tenure for victims within what – to apartheid – was "South Africa proper".[36] This meant throughout the length and breadth of our country victims were made strangers in their own country. On farmland – which this case is about – their residence was particularly precarious. They could be, and were often, subjected to arbitrary evictions. Needless to say, they could not have much say on the conditions under which they lived on the farms, however deplorable. This was a life bereft of human dignity. This is poignantly articulated by the lament and exhortation by Mr Nkosi: "When the whites took our land away from us, we lost the dignity of our lives . . . . But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world".[37]

[22] Painfully, in some instances this is not just history. To this day, some of the poorest in our society continue to keep homes under the protection of ESTA.

Eldorado Park, and Africans settled in Meadowlands. See Ngwabi *The Emergence of the Market-Based Approach to Urban Regeneration in South Africa* in Urban Regeneration and Private Sector Investment: Exploring Private Sector Perception of Urban Regeneration Initiatives in the Johannesburg Inner City (Submitted in partial fulfilment of the requirements for the degree Philosophiae Doctor (Town and Regional Planning) in the Faculty of Engineering, Built Environment and Information Technology, University of Pretoria 2009) at 110-111.

[35] There were ten homelands, which followed tribal lines. They were: Transkei (for amaXhosa), Ciskei (also for amaXhosa), KwaZulu (for amaZulu), KwaNdebele (for amaNdebele), Bophutswana (for Batswana), Qwaqwa (for Basotho), Venda (for VhaVenda), Gazankulu (for the Tsonga people), KaNgwane (for amaSwati) and Lebowa (for Bapedi). These were meant first to be "self-governing" entities within South Africa and later to attain "complete independence". Indeed, a few of these homelands – like Transkei, Ciskei, Bophuthatswana and Venda did attain this sham independence.

[36] I should not be understood to suggest that in the homelands the picture was rosy. Quite the contrary. The land assigned to Africans in the homelands was the least fertile and hardly sufficient for grazing. It was not meant for them to earn a livelihood from it. To this day a significant number of the poorest in our country are to be found in the former homelands.

[37] Rugege above n 1 at 286.

Needless to say, occupiers under ESTA are a vulnerable group susceptible to untold mistreatment. This is especially so in the case of women.[38]

[23] With all this background in mind, the mischief that section 25(6) of the Constitution and ESTA are seeking to address is not far to seek.[39] Addressing that mischief is not only about securing the tenure of ESTA occupiers. It is also about affording occupiers the dignity that eluded most of them throughout the colonial and apartheid regimes. We must adopt an interpretation that best advances this noble purpose of section 25(6) and ESTA. That purpose provides context.

[24] This Court has often emphasised a purposive interpretation that is compatible with the mischief being addressed by the statute concerned. In *Goedgelegen* Moseneke DCJ – dealing with the Restitution of Land Rights Act[40] (Restitution Act) – said:

> "It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution . . . . Therefore, in construing 'as a result of past racially discriminatory laws or practices' in its setting of section 2(1) of the Restitution Act, we are obliged to scrutinise its purpose . . . . In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation."[41]

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[38] *Klaase* above n 13 at para 30.

[39] Compare *Molusi* above n 13 at para 7.

[40] 22 of 1994.

[41] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen*) at para 53. This is in line with the lone voice of Schreiner JA who – writing a minority judgment well over six decades ago – said in *Jaga v Dönges N.O.; Bhana v Dönges N.O.* 1950 (4) SA 653 (A) at 662G-H:

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. *Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background*." (Emphasis added.)

[25] Also of importance is the injunction in section 39(2) of the Constitution.[42] On this here is what *Goedgelegen* tells us:

> "As we [construe section 2(1) of the Restitution Act], we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees."[43]

To emphasise the obvious, the two rights contained in the Bill of Rights at issue here are the right to security of tenure and the right to human dignity.

[26] It is with all this in mind that we must establish whether an occupier's rights under ESTA include the right to make improvements. We must look at sections 5 and 6 of ESTA to establish what the rights are. Section 5 deals with the fundamental rights of an occupier, an owner and a person in charge. Of relevance for present purposes is section 5(a) which provides that "[s]ubject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to . . . human dignity". Section 6 stipulates the rights and duties of an occupier. Section 6(1) provides:

> "Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly."[44]

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[42] This section provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[43] *Goedgelegen* above n 41 at para 53.

[44] In order to see in perspective an argument made by the respondents, which I deal with shortly, it is necessary to quote section 6 in full. The rest of the section provides:

[27] The respondents argue that section 25(6) affords an occupier rights to the extent provided by ESTA and that an occupier's rights are listed in section 6. Nowhere, continues the argument, do the listed rights provide that an occupier has the right asserted by Ms Daniels. It is so that section 6 has no provision that explicitly

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"(2) Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right—

(a) to security of tenure;

(b) to receive bona fide visitors at reasonable times and for reasonable periods:

Provided that—

(i) the owner or person in charge may impose reasonable conditions that are normally applicable to visitors entering such land in order to safeguard life or property or to prevent the undue disruption of work on the land; and

(ii) the occupier shall be liable for any act, omission or conduct of any of his or her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage;

(c) to receive postal or other communication;

(d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997;

(dA) to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists;

(e) not to be denied or deprived of access to water; and

(f) not to be denied or deprived of access to educational or health services.

(3) An occupier may not—

(a) intentionally and unlawfully harm any other person occupying the land;

(b) intentionally and unlawfully cause material damage to the property of the owner or person in charge;

(c) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or

(d) enable or assist unauthorised persons to establish new dwellings on the land in question.

(4) Any person shall have the right to visit and maintain his or her family graves on land which belongs to another person, subject to any reasonable condition imposed by the owner or person in charge of such land in order to safeguard life or property or to prevent the undue disruption of work on the land.

(5) The family members of an occupier contemplated in section 8(4) of this Act shall on his or her death have a right to bury that occupier on the land on which he or she was residing at the time of his or her death, in accordance with their religion or cultural belief, subject to any reasonable conditions which are not more onerous than those prescribed and that may be imposed by the owner or person in charge."

says an occupier has a right to make improvements meant to bring her or his dwelling to a standard suitable for human habitation. But surely the matter cannot end there. Whether the right exists must depend on what an interpretative exercise yields. The respondents are correct in saying that in terms of section 25(6) of the Constitution an occupier enjoys rights to the extent provided in ESTA. The question is whether – on a proper interpretation of ESTA – the right contended for by Ms Daniels indeed does not exist.

[28] The respondents' argument typifies the "blinkered peering at an isolated provision" of a statute that Nienaber JA cautions against in *Thoroughbred Breeders' Association*.[45] Quoting this case with approval in *Bato Star*[46] Ngcobo J says:

> "The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in *Thoroughbred Breeders' Association v Price Waterhouse*, the SCA has reminded us that:
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> > 'The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning.'"[47]

[29] The respondents' argument places focus only on the rights of an occupier that section 6 of ESTA specifically itemises. It disregards all else: context counts for nothing; so does the purpose for which ESTA was enacted;[48] and section 39(2) of the Constitution is not taken into account at all. This reading of section 6 is unduly narrow. Part of the context is section 5 of ESTA,[49] which the respondents'

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[45] *Thoroughbred Breeders' Association v Price Waterhouse* [2001] ZASCA 82; 2001 (4) SA 551 (SCA).

[46] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[47] Id at para 52.

[48] In truth, purpose forms part of context. See *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 21 where Mokgoro J said: "The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law".

[49] Before, in *Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 8; 2016 (5) BCLR 577; 2016 (3) SA 487 (CC) at para 27, we have observed that:

interpretation ignores. That section decrees that occupiers enjoy certain fundamental rights, including the right to human dignity. On the respondents' interpretation, occupiers have a right that could well be empty. They could live in conditions that infringe their right to dignity with no remedy available to them. That simply cannot be. How does the respondents' interpretation factor the need for an occupier to live in conditions that conduce to human dignity? It does not. That immediately infringes an occupier's right under section 5.

[30] *Goedgelegen* noted that, when interpreting legislation, courts—

> "must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous."[50]

[31] At the heart of that "grid" is the related section 5 to which the respondents pay no heed in the context of the argument under discussion.[51] For present purposes, the right enjoyed by an occupier in terms of section 6(1) of ESTA is to reside on and use the land in issue. An occupier who lives on property under the most deplorable conditions does "reside" on that property. But is that the right conferred by ESTA? Definitely not. The occupier's right to reside must be consonant with the fundamental rights contained in section 5, in particular – for present purposes – the right to human dignity. Put differently, the occupation is not simply about a roof over the occupier's head. Yes, it is about that. But it is about more than just that. It is about occupation that conduces to human dignity and the other fundamental rights itemised in section 5. That much is plain from reading section 6 conjointly with section 5.

> "In [*Hoban v ABSA Bank Ltd t/a United Bank* [1999] ZASCA 12; 1999 (2) SA 1036 (SCA) at para 20] the Supreme Court of Appeal held that 'context' does not mean only 'parts of a legislative provision which immediately precede and follow the particular passage under examination'; it 'includes the entire enactment in which the word or words in contention appear'."

[50] *Goedgelegen* above n 41 at para 53.

[51] In their general discussion of the constitutional and statutory framework, the respondents do refer to section 5.

[32] ESTA has a carefully delineated process of eviction.[52] It is monitored by courts. A denial of the existence of the right asserted by Ms Daniels might inadvertently result in what would in effect be evictions. This would be a direct result of the intolerability of conditions on the dwelling. And these "evictions" might happen beneath the radar of the carefully crafted eviction process. That would make

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[52] It is provided for in section 9. This section provides:

> "(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.
>
> (2) A court may make an order for the eviction of an occupier if—
>
> (a) the occupier's right of residence has been terminated in terms of section 8;
>
> (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
>
> (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
>
> (d) the owner or person in charge has, after the termination of the right of residence, given—
>
> (i) the occupier;
>
> (ii) the municipality in whose area of jurisdiction the land in question is situated; and
>
> (iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes,
>
> not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.
>
> (3) For the purposes of subsection (2)(c), the Court must request a probation officer contemplated in section 1 of the Probation Services Act, 1991 (Act No. 116 of 1991), or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period—
>
> (a) on the availability of suitable alternative accommodation to the occupier;
>
> (b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;
>
> (c) pointing out any undue hardships which an eviction would cause the occupier; and
>
> (d) on any other matter as may be prescribed."

Chapter IV of ESTA deals with the termination of the right of residence and eviction. For purposes of this decision, it is not necessary to quote all the provisions in this chapter.

nonsense of the very idea of security of tenure. After all, like the notion of "reside", security of tenure[53] must mean that the dwelling has to be habitable. That in turn connotes making whatever improvements that are reasonably necessary to achieve this. Of what use is a dwelling if it is uninhabitable? None.

[33] If you deny an occupier the right to make improvements to the dwelling, you take away its habitability. And if you take away habitability, that may lead to her or his departure. That in turn may take away the very essence of an occupier's way of life. Most aspects of people's lives are often ordered around where they live. Bell says "[a] tenant who fears loss of an interest as vital as his home may forego associations or actions that are a normal part of self-determination and self-expression".[54] Roisman puts it thus:

> "Security of tenure is fundamentally important because it is the basis upon which residents build their lives. It enables people to make financial, psychological, and emotional investments in their homes and neighbourhoods. It provides depth and continuity for children's school attendance and for the religious, social, and employment experiences of children and adults. Security of tenure enables tenants 'to fully participate in social and political life'."[55]

[34] Take away the home that is the fulcrum of security of tenure, the way of life of an occupier will be dislocated. And that will offend her or his human dignity. So, permitting an occupier living in circumstances as we have here to make improvements to her or his dwelling will serve the twin-purpose of bringing the dwelling to a standard that befits human dignity and averting the indignity that the occupier might suffer as a result of the possible departure.

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[53] See section 6(2)(a) of ESTA.

[54] Bell "Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate" (1985) 19 *Georgia Law Review* 483 at 532.

[55] Roisman "The Right to Remain: Common Law Protections for Security of Tenure" (2008) 86 *North Carolina Law Review* 817 at 820.

[35] The respondents' interpretation is completely at odds with established principle. Let me close this part of the discussion by referring to Cameron J's words in *University of Stellenbosch Legal Aid Clinic*:[56]

> "Since *Hyundai*, it has been gold-plate doctrine in this Court that judges must embrace interpretations of legislation that fall within constitutional bounds over those that do not, provided that the interpretation can be reasonably ascribed to the section. Where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved."[57]

[36] Plainly the interpretation that I adopt can reasonably be ascribed to the provisions under consideration.

[37] The respondents have another arrow in their quiver. They argue that, if the Court concludes that an occupier is entitled to make improvements to bring the dwelling to a standard that is constitutionally compliant, that would be tantamount to indirectly placing a positive obligation on the owner or person in charge to ensure an occupier's enjoyment of the section 25(6) right. This indirect obligation is said to arise from the provisions of section 13 of ESTA. Section 13 makes it possible for a court to order an owner or person in charge to pay compensation for improvements made by an occupier upon the eviction of the occupier.[58] The nub of the submission is

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[56] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* [2016] ZACC 32; 2016 (6) SA 596 (CC); 2016 (12) BCLR 1535 (CC) at para 135.

[57] Here reliance was placed on the oft-cited statement of the law by Langa DP in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 23.

[58] Section 13(1) provides:

> "If a court makes an order for eviction in terms of this Act—
>
> (a) the court shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier to the extent that it is just and equitable with due regard to all relevant factors, including whether—
>
> (i) the improvements were made or the crops planted with the consent of the owner or person in charge;
>
> (ii) the improvements were necessary or useful to the occupier; and

that, because a court may order compensation, an owner or person in charge in effect finances the improvements. According to the argument, constitutionally an owner bears no positive obligation to ensure that an occupier lives under conditions that afford her or him human dignity.

[38] This positive / negative obligation argument needs to be confronted head-on. Section 8(2) of the Constitution provides that "[a] provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". Although the right we are concerned with here is expanded on in ESTA, its true source is section 25(6) of the Constitution, which is located in the Bill of Rights. Thus section 8(2) finds application.

[39] I see no basis for reading the reference in section 8(2) to "the nature of the duty imposed by the right" to mean, if a right in the Bill of Rights would have the effect of imposing a positive obligation, under no circumstances will it bind a natural or juristic person (private persons). Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right;[59] what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the "potential of invasion of that right by persons other than the State or organs of state";[60] and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that.

(iii) a written agreement between the occupier and the owner or person in charge, entered into prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement."

[59] In *Khumalo v Holomisa* 2002 [ZACC] 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 33 this Court was partly moved by what it called "the intensity of the constitutional right in question" to hold that "it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2)". That case concerned the media's right to freedom of expression under section 16 of the Constitution.

[60] Id.

[40] I should not be misunderstood. I am not suggesting that the positive nature of the obligation imposed by the right in issue is of no moment. It is relevant. Section 8(2) places "the nature of the duty" imposed at the centre of the enquiry. The quality of being positive is about "the nature of the duty". So, it must come into the equation. Currie and De Waal make the point that "the state is supposed to be motivated by a concern for the well-being of society as a whole" and, in doing something in that regard, it is funded by the public purse.[61] Private persons, on the other hand, fund their conduct from their own pockets. It would be unreasonable, therefore, to require private persons to bear the exact same obligations under the Bill of Rights as does the state.[62]

[41] What I am saying is that the fact that the right in issue imposes a positive obligation is not dispositive; this is but a factor. Yes, an important, weighty factor. The truth is that "questions concerning the horizontal application of the Bill of Rights cannot be determined *a priori* and in the abstract . . . [Section 8(2)] was after all included to overcome the conventional assumption that human rights need only be protected in vertical relationships".[63]

[42] It is in respect of one category of rights that this Court has held that it is the state that bears a *positive* obligation. That is socio-economic rights. *Mazibuko* tracks the Court's jurisprudence in this regard:

> "The primary question in this case, though, is the extent of the State's positive obligation under section 27(1)(b) and section 27(2). This issue has been addressed by this Court in at least two previous decisions: *Grootboom* and *Treatment Action Campaign (No 2).* In *Grootboom,* the Court had to consider whether section 26 (the right to housing) entitles citizens to approach a court to claim a house from the state.

[61] Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) at 50.

[62] Id.

[63] Id.

> Such an interpretation of section 26 would imply a directly enforceable obligation upon the state to provide every citizen with a house immediately.
>
> This Court concluded that section 26 does not impose such an obligation. Instead, the Court held that the scope of the positive obligation imposed upon the State by section 26 is carefully delineated by section 26(2). Section 26(2) provides explicitly that the state must take reasonable legislative and other measures progressively to realise the right of access to adequate housing within available resources. In *Treatment Action Campaign No 2*, this Court repeated this in the context of section 27(1)(a), the right of access to health care services:
>
> > 'We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to "respect, protect, promote and fulfil" such rights.'
>
> Applying this approach to section 27(1)(b), the right of access to sufficient water, coupled with section 27(2), it is clear that the right does not require the State upon demand to provide every person with sufficient water without more; rather it requires the State to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources."[64]

[43] Plainly the decisions in *Mazibuko* and the other cases it discusses turned on the particular provisions of subsection (2) of each of the two sections that were in issue. The two sections were 26 and 27. That context specific interpretation did not mean that under no circumstances does the Bill of Rights impose positive obligations on private persons.[65]

[44] This Court's later judgment in *Juma Musjid* does not alter this. In it Nkabinde J concluded:

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[64] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 48-50.

[65] Compare Liebenberg "Socio-Economic Rights Beyond the Public-Private Law Divide" in Langford et al (eds) *Socio-Economic in South Africa Symbols or Substance?* (Cambridge University Press New York 2014) at 71-2.

> "In order to determine whether the right to a basic education in terms of section 29(1)(a) binds the Trust, section 8(2) requires that the nature of the right of the learners to a basic education and the duty imposed by that right be taken into account. From the discussion in the previous paragraphs of the general nature of the right and the MEC's obligation in relation to it, the form of the duty that the right to a basic education imposed on the Trustees emerges. It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the MEC. There was also no obligation on the Trust to make its property available to the MEC for use as a public school. A private landowner may do so, however, in accordance with section 14(1) of the [South African Schools Act] which provides that a public school may be provided on private property only in terms of an agreement between the MEC and the owner of the property.
>
> This Court, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the 'intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State'. (Footnotes omitted)"[66]

[45] This conclusion must be viewed in the context of the interpretative exercise that the Court had engaged in. That exercise yielded the conclusion that the primary positive duty to provide education to learners rests on the Member of the Executive Council responsible for education in each province. That this was not stating a

[66] *Governing Body of the Juma Musjid Primary School v Essay N.O.* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (*Juma Musjid*) at paras 57-8.

position adopted *a priori* but rather one that was the result of an interpretation of the right to basic education appears from the Court's reference to "the discussion in the previous paragraphs of the general nature of the right and the MEC's obligation in relation to it".[67] It is from this exercise that "the form of the duty that the right to a basic education imposed on the Trustees emerge[d]".[68] The Court concluded that it was clear from this interpretative exercise "that there is no primary positive obligation on the Trust to provide basic education to the learners".[69]

[46] If what the Court was saying is that section 8(2) does not envisage that private persons may bear positive obligations in respect of some rights in the Bill of Rights, I see no reason why it would not have said so directly. Why would it have reached its conclusion through the extensive interpretative exercise in which it engaged?

[47] It is only logical then that even the statements that: (a) "[i]t needs to be stressed however, that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights";[70] and (b) "[i]t is rather to require parties not to interfere with or diminish the enjoyment of a right"[71] must be viewed in this context. Indeed, the first statement does not say that obligations that, although resting on the state, may also be found to rest on private persons should not be imposed on private persons. The judgment of this Court in the second *Certification* case[72] on which reliance is placed in *Juma Musjid* does not make the point that private persons never bear positive obligations under the Bill of Rights.[73] And I do not understand *Juma Musjid* to rely on this case to make that point.

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[67] Id at para 57.

[68] Id.

[69] Id.

[70] Id at para 58.

[71] Id.

[72] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*Certification*) at para 78.

[73] Here is what the Court held in the second *Certification* case:

[48] In sum, this Court has not held that under no circumstances may private persons bear positive obligations under the Bill of Rights.

[49] Ultimately, the question is whether – overall – private persons should be bound by the relevant provision in the Bill of Rights. In the context of that broad formulation, this question is easy to answer insofar as the right to security of tenure is concerned. By its very nature, the duty imposed by the right to security of tenure, in both the negative and positive form, does rest on private persons. People requiring protection under ESTA more often than not live on land owned by private persons. Unsurprisingly, that is the premise from which this matter is being litigated. And I dare say the obligation resting, in particular, on an owner is a positive one. A private person is enjoined by section 25(6) of the Constitution through ESTA to accommodate another on her or his land. It is so that the obligation is also negative in the sense that the occupier's right should not be "improperly invaded".[74]

[50] The issue at hand arises from a matter of detail: what is the extent of an occupier's constitutional entitlement as expounded in ESTA? Does it go so far as to create an entitlement to make improvements to her or his dwelling with the potential – as the respondents argue – of imposing the positive obligation they are complaining about? This is the question on which the respondents peg their argument on section 13 of ESTA. The positive obligation that the respondents argue an owner or person in charge is exposed to is the possibility of an order of compensation upon the eviction of an occupier.

> "The objectors argued further that socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise. They based this argument on CP II which provides that all universally accepted fundamental rights shall be protected by 'entrenched and justiciable provisions in the Constitution'. It is clear, as we have stated above, that the socio-economic rights entrenched in NT 26-29 are not universally accepted fundamental rights. For that reason, therefore, it cannot be said that their 'justiciability' is required by CP II. Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability."

[74] Compare *Juma Musjid* above n 66 at para 58 and the second *Certification* case above n 72 at para 78.

[51] Whether an owner will be so ordered depends on a variety of considerations. It may or may never happen. This must be weighed against the need of an occupier to improve her or his living conditions and lift them to a level that accords with human dignity. If indeed an occupier is living under conditions that subject her or him to a life lacking in human dignity, the possibility of an order of compensation pales in comparison. The right to security of tenure with the potent cognate right of human dignity are extremely important rights. On the other hand, the possibility of an order of compensation upon the eviction of an occupier, is tenuous at best. That must be compared with the fact that this argument is being made in the context of an occupier who has assumed the truly positive and immediate duty of carrying the cost of the improvements.

[52] Taken to its logical conclusion, the respondents' argument means, just because there is a possibility – not certainty – that the owner or person in charge may be ordered to compensate an occupier, the occupier must be content with her or his lot, however lamentable. I cannot agree. That is anathema to our constitutional ethos and values. Without using the specific facts of this case as an aid to interpretation, I cannot but make this observation: what makes this submission even more jarring is that the respondents themselves admit that Ms Daniels is living under conditions that are at variance with human dignity. According to the argument, nothing can or should be done. That just cannot be.

[53] This Court has previously placed a direct, positive obligation on a private party by enjoining it to continue to house illegal occupiers who – if evicted immediately – would have been rendered homeless.[75] This placed a direct, onerous obligation on a private party. On the contrary, the positive obligation referred to by the respondents may or may not arise, depending on the exercise of discretion by a court. To the extent that my interpretation does impose a positive obligation on an owner, I am not

[75] *Blue Moonlight* above n 14.

in the least deterred in adopting it. That is because the *Blue Moonlight* principle applies more strongly to the present facts.

[54] Ms Daniels's entitlement to occupy her dwelling under conditions that are consistent with human dignity can be limited only on grounds that "are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[76] The respondents are not seeking to thwart Ms Daniels's quest to improve her situation on the basis that there is justification under this provision. Theirs is merely an interpretative exercise: Ms Daniels has no right to effect the proposed improvements. That, as I say, is misconceived.

[55] Ordering compensation of a departing tenant or occupier of another's property is not unknown even at common law.[77] Why the respondents find it so alien in this statutory context is difficult to comprehend.

[56] The respondents raise separation of powers concerns. They call in aid the Supreme Court of Appeal's judgment in *Nkosi*.[78] In that matter the Supreme Court of Appeal did not accept that ESTA affords occupiers a right to create new graves on occupied property. It is the Legislature that later extended that right to occupiers. The respondents argue that, since only the Legislature is best placed to afford occupiers the right at issue before us, we should likewise defer to it.

[57] I cannot accept this contention. Since the legislature remedied the effect of that decision, it is not necessary to consider its correctness here. In any event, the right sought to be asserted in *Nkosi* is very different from that at issue here. The conclusion I reach – which is that Ms Daniels is entitled to effect the proposed improvements – is in line with what Parliament has enacted. It flows naturally from a proper

[76] Section 5 of ESTA.

[77] See *Old Mutual Life Assurance Company (South Africa) Ltd v Glowing Sunset Trading 165 CC t/a English Blazer* [2006] ZAGPHC 200 at para 20.

[78] *Nkosi v Bührmann* [2001] ZASCA 98; 2002 (1) SA 372 (SCA).

interpretation of what Parliament itself has said. Thus no separation of powers issues arise.

[58] The Trust for Community Outreach and Change, which we admitted as an *amicus curiae* (friend of the court), supported Ms Daniels's case on the basis of the right of access to adequate housing.[79] I do not find it necessary to reach this argument.

Is the consent of an owner required?

[59] Not inconceivably, the interests of an occupier and those of an owner or person in charge may diverge. The occupier may be of the view that the dwelling requires improvements to bring it to an acceptable standard. The owner may disagree. Or, as is the case in the instant matter, the owner may accept that the dwelling's condition is not consonant with human dignity but still not be receptive to the idea that improvements be made. Needless to say, if consent were a requirement, none would be forthcoming in those circumstances. Must the occupier then be content with that? No. If the wishes of the owner or person in charge were to carry the day, the occupier's rights would be completely denuded. In the end the occupier must reside under conditions that afford her or him as wholesomely as possible all the rights contained in ESTA. A simple stratagem like the refusal of consent by the owner cannot be allowed to render nugatory an occupier's right that is primarily sourced from the Constitution itself.[80]

[60] This leads to the conclusion that in the final analysis an owner's consent cannot be a prerequisite when the occupier wants to bring the dwelling to a standard that conforms to conditions of human dignity.

[79] Section 26 of the Constitution.

[80] Section 25(6) of the Constitution.

May an occupier effect improvements to the total disregard of an owner?

[61] That an occupier does not require consent cannot mean she or he may ride roughshod over the rights of an owner. The owner also has rights. The very enjoyment by an occupier of rights conferred by ESTA creates tension between that enjoyment and an owner's rights. The most obvious owner's right that is implicated is the right to property under section 25 of the Constitution. If an occupier were to be entitled to act in an unbridled manner, that would mean an owner's rights count for nothing. Under section 5 of ESTA an owner enjoys the exact same rights as does an occupier. The total disregard of an owner's property right may impinge on her or his right to human dignity. That would be at odds with section 5(a) of ESTA. Unsurprisingly, section 6(2) of ESTA requires that an occupier's right to security of tenure be balanced with the rights of an owner or person in charge.[81]

[62] Although consent is not a requirement, meaningful engagement of an owner or person in charge by an occupier is still necessary. It will help balance the conflicting rights and interests of occupiers and owners or persons in charge. In this regard I agree with the submissions of the *amicus curiae*, which argued for the need for meaningful engagement between an owner and occupier.

[63] In *Hattingh* Zondo J said:

> "In my view the part of section 6(2) that says: 'balanced with the rights of the owner or person in charge' calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the inquiry."[82]

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[81] Section 6(2)(a) provides:

> "Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right—
>
> (a) to security of tenure . . . ."

[82] *Hattingh* above n 13 at para 32.

[64] It is necessary that an occupier should approach the owner or person in charge to raise the question of the proposed improvements. That may – not will – make it possible for the occupier and owner or person in charge to engage each other meaningfully.[83] This may yield any number of results. The owner or person in charge may actually grant consent. The owner or person in charge may convince the occupier that the dwelling is, in fact, in an acceptable standard and that the proposed improvements are not reasonably necessary. The owner or person in charge may demonstrate that the improvements do not have to be to the extent the occupier had in mind. The owner or person in charge may show that the proposed improvements will probably compromise the physical integrity of the structure to the detriment of the owner. In that event there might be further engagement on how best to bring the dwelling to an acceptable standard. The occupier may agree in writing that, upon eviction, she or he will not be entitled to compensation for the improvements.[84] That said, the need for meaningful engagement does not detract from the conclusion that the existence of the occupier's right is not dependent on the owner's consent.

[65] If engagement between an occupier and owner or person in charge gives rise to a stalemate, that must be resolved by a court.[85] The occupier cannot resort to self-help.[86]

Relief

[66] In addition to the grant of leave to appeal, what other relief is appropriate? On the facts, after the maintenance work that had been ordered by the Stellenbosch Magistrate's Court had been done, Ms Daniels wrote a letter thanking the respondents.

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[83] The instant matter is an example of a case where an approach by an occupier did not result in meaningful engagement.

[84] Of course, a written agreement by an occupier and owner or person in charge that the occupier shall not be entitled to compensation for improvements upon eviction does not exclude the possibility of compensation. In terms of section 13(1)(a)(iii) of ESTA it is merely one of the factors that a court takes into account when deciding whether an owner or person in charge should compensate an occupier.

[85] Compare *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) at para 152.

[86] Compare *Motswagae v Rustenburg Local Municipality* [2013] ZACC 1; 2013 (2) SA 613 (CC); 2013 (3) BCLR 271 (CC) at para 14.

In the letter she also notified them of her intention to effect the improvements at issue here. She then threateningly added that if they dared evict her, they would be obliged to compensate her for the improvements. This, to me, does not constitute a communication that was meant to commence a meaningful engagement. Although it commenced in somewhat amicable language, it ended on a provocative note. And that note was completely wrong on the law as compensation is dependent on the court's exercise of a discretion. But one's criticism of Ms Daniels should not be exaggerated.

[67] Must Ms Daniels be nonsuited for her failure to approach the respondents for the purpose of meaningful engagement? On the facts, that would be too formalistic and unjust. The respondents were not free of blame either. As I demonstrated when setting out the factual background in the beginning, at every turn they made life intolerable for Ms Daniels. This would have tested the patience of many a mere mortal. Every step they had to take – which was quite obvious in the circumstances – was taken only after they had been ordered by a court. Also, issues concerning the parties' respective rights have been ventilated fully. If we were not to grant effective relief, we would be causing Ms Daniels to continue to live in conditions that are accepted by all to violate her human dignity. Of importance, the respondents are not taking issue with the nature of the proposed improvements.

[68] An order that fully recognises the existence of the right asserted by Ms Daniels must be made. Regarding engagement between the parties, as the *amicus curiae* put it, the order must address only the "mechanics" of how the improvements will be made.

[69] The *amicus* submitted a draft order for which we are grateful and which has been of assistance.

Costs

[70] Ms Daniels very properly did not ask for costs. I will make no order as to costs.

Order

[71] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Stellenbosch Magistrate's Court, Land Claims Court and Supreme Court of Appeal are set aside.
4. It is declared that the applicant is entitled to make the following improvements to her dwelling at Chardonne Farm (farm), Blaauwklippen, Stellenbosch:
   (a) levelling the floors;
   (b) paving part of the outside area; and
   (c) installing water supply inside the applicant's dwelling, a wash basin, a second window and a ceiling.
5. The parties are ordered to engage meaningfully regarding the implementation of the improvements, particularly on—
   (a) the time at which the builders will arrive at, and depart from, the farm;
   (b) the movement of the builders within the farm; and
   (c) the need for, and approval of, building plans in respect of the improvements.
6. If the parties are unable to reach agreement within 30 days of the date of this order, either party may approach the Stellenbosch Magistrate's Court for appropriate relief.

Froneman J wrote a judgment in Afrikaans and provided an English translation. They now follow in that order.

FRONEMAN R (met Cameron R wat saamstem):

Inleiding

[72] Ek het met groot waardering die uitspraak (hoofuitspraak) van my ampsbroer Madlanga R gelees. Ek stem daarmee saam. Maar die lees daarvan het ook gepaardgegaan met skaamte. In sy outobiografie noem die Afrikaanssprekende historikus, Hermann Giliomee, dat die liberale Engelssprekende historikus, C.W. de Kiewiet se stelling dat "for the thoughtful man it is still important to understand how men [the Afrikaners] who are sincere in their Christian beliefs and staunch defenders of their own liberties can become identified with policies of discrimination and restriction",[87] hom laat dink het dat 'n persoon wat apartheid met begrip kan verduidelik, 'n groot bydrae tot geskiedskrywing kon maak.[88] Later, met verwysing na sy eie boek oor die geskiedenis van die verskuiwing van bruinmense van die buurt Die Vlakte vanuit die middel van Stellenbosch, kom hy tot die eerlike en amper bewoë gevolgtrekking: "Ek besef nou dat ek nie daarin geslaag het om hierdie vraag te beantwoord nie".[89]

[73] Dit is vanuit 'n soortgelyke perspektief dat ek genoop voel om hierdie instemmende uitspraak te skryf. Die Grondwet bied ons almal 'n geleentheid om 'n samelewing te probeer ontwikkel wat die onreg van ons verlede aanspreek sonder miskenning van die menswaardigheid, vryheid en gelyke behandeling van al die land se inwoners. Dit is 'n geleentheid wat ons nie mag versmaai nie. Maar die Grondwet vra ook van ons, voordat ons die geleentheid wat dit bied aangryp, dat die onreg van ons verlede erken word.

[74] Elkeen wat deur die pragtige landelike dele van ons land ry kan nie anders as om op te let dat die lewensomstandighede waarin werkers op plase bly nie altyd na wense is nie. Daar is min twyfel dat sake verbeter het, maar dit is ongelukkig nie deurlopend die geval nie. Waarom nie?

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[87] Soos aangehaal in Giliomee *Historikus Hermann Giliomee 'n Outobiografie* (Tafelberg Uitgewers, Kaapstad 2016) op 210-1 (hierna Giliomee (2016)).

[88] Id op 211. Die boek wat Giliomee geskryf het, is sy meesterlike *Die Afrikaners: 'n Biografie* (Tafelberg Uitgewers, Kaapstad 2004) (hierna Giliomee (2004)).

[89] Id op 226.

[75] Dat daar hoegenaamd nog ’n debat kan wees oor of die applikant in die huidige geval, Me Daniels, toegelaat behoort te word om haar woonplek sonder toestemming te verbeter deur doodgewone dinge te doen om dit meer leefbaar te maak, wys dat daar nog ’n lang pad geloop moet word voordat die beloftes van ons Grondwet vervul kan word. Onthou, wat ter sprake is hier is die gelykmaak van vloere, die vestiging van’n lopende waterstelsel met ‘n wasbak binne-in die huis, die byvoeging van nog ’n venster, ’n plafon vir die dak en die lê van plaveisel buite. Alledaagse, basiese goed.

[76] Vele van ons wat hierdie basiese, alledaagse geriewe vir onsself as vanselfsprekend aanvaar, skyn dit egter nie egter as ‘n probleem te sien dat andere dit ontken word nie. Hoekom nie?

[77] Deels mag dit lê in blote rasse- of klasdiskriminasie. Vir sover as wat dit uitdruklik erken word as die rede deur diegene wat daardie houding het, kan korte mette daarvan gemaak word. Die Grondwet laat dit nie toe nie. Maar dikwels skyn ons reaksie een van verbasing en ontkenning te wees as ons as rassisties of andersins diskriminerend gesien word wanneer ons hierdie aanvaarding van die onmenswaardige bestaan van andere aanvaar, maar nie vir onsself nie. Dit is die onderliggende redes vir hierdie ontkenning of ontduiking van ’n duidelik onaanvaarbare en onregverdige stand van sake wat ek probeer aanspreek.

[78] Voordat ons wesenlike en standhoudende vordering kan maak om die ideale van die Grondwet ’n realiteit te maak moet daar minstens drie dinge gebeur:

(a) daar moet ’n eerlike en diepe erkenning wees van die onreg van die verlede;

(b) daar moet ’n herwaardering wees van die aard van ons eiendomsbegrip; en

(c) die gevolge van grondwetlike verandering moet nie verdoesel of ontduik word nie.

Ek behandel elkeen hiervan in die konteks van hierdie saak, naamlik die verblyf op plase van mense wat daar woon en werk, maar nie eienaars is van die grond waarop hulle bly nie.[90]

Erkenning van onreg

[79] Vir vele van ons wat op plase grootgeword het onder die vorige bedeling was die verskil tussen ons bevoorregte lewenswyse en dié van die mense wat op die plaas gewoon en gewerk het, bloot natuurlik. *Ons* en *hulle* was *anders*. Dit het dikwels egter gepaardgegaan met aandrang, deur ouers, op respek op persoonlike vlak deur die kinders teenoor werkers en hulle gesinne, maar selde indien ooit was daar ’n selfkritiese blik op hierdie verskil in lewenswaardigheid tussen die boer en die plaaswerker of -bewoner. Mense wat op plase bly sal self kan oordeel of dit wel nog steeds die geval is in hierdie konteks. Maar wat hier ter sake is, is die erkenning van historiese onreg wat die huidige stand van sake onderlê.

[80] Die historiese onreg word deesdae nie geredelik ontken nie, maar eerder ontduik. Dit is die geneigdheid tot ontduiking wat ek aanvanklik wil aanraak. Die voorbeeld wat ek gebruik is die posisie van deelsaaiers[91] en bywoners.

[81] Die tweede helfde van die negentiende eeu het ongekende verandering aangebring in die lewensomstandighede van almal in wat later Suid-Afrika sou word.

> “The years after 1870 witnessed profound and violent transformations in South Africa. Old patterns of life were shattered, and men and women were hurled into new, foreign, and threatening economic, social and political environments. The rapid development of industry and the largescale proletarianisation of both black and white rural producers intensified these social disruptions in the 1920s and 1930s. Old certainties were destroyed, old world views and moralities undermined; men and

[90] Die lewenswyse op plase is ter sprake in hierdie saak, maar dit beteken nie dat onreg beperk is tot plase nie.

[91] In Engels “sharecropping”. In ons gemenereg is die historiese aanknoping met die Romeinse en Romeins-Hollandse reg die regsposisie van die *colonus partiarius*: sien en vergelyk Van den Heever *The Partiarian Agricultural Lease in South African Law* (Juta, Kaapstad 1943).

women were forced to adapt their values and ideas to totally new relationships, new patterns of life."[92]

[82] Baie arm witmense op plase, bywoners en deelsaaiers het ook swaargekry. Die Afrikaanse skrywer, Jochem van Bruggen se bekende *Ampie*-trilogie,[93] is gebaseer op sy eie ervaring hiervan.

> "In die buurt van ons plaas het kort na die vorige Wêreldoorlog [die Eerste Wêreldoorlog] die ellendigste huisgesin gewoon wat ek ooit geken het. Hulle het bymekaar gehok in die primitiefste skuiling en amper barbaars gelewe. Hul ellende is in die roman glad nie oordryf nie. Hulle het my gedagtes in die boek vergesel."

[83] Die Carnegie-kommissie verslag oor die armblanke-probleem het in 1932 tot die gevolgtrekking gekom dat daar 300000,00 armblankes was, 17% van die blanke bevolking.[94] By die Volkskongres in 1934[95] is die ontleding gemaak dat 250,000 van hulle Afrikaners was, 'n kwart van die Afrikanerbevolking.[96] Die Carnegie-kommissie het erken dat swart armoede net so 'n groot probleem was as wit armoede, maar daar is gemeen dat die aanspreek van wit armoede eers moet geskied.[97]

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[92] O'Meara *Volkskapitalisme. Class, Capital and Ideology in the Development of Afrikaner Nationalism. 1934-1948* (Ravan Press, Johannesburg 1983) op 67.

[93] Van Bruggen *Ampie* (Perskor, Johannesburg 1930).

[94] Grosskopf *Verslag van die Carnegie Kommissie rakende die Armblanke Probleem in Suid Afrika* (Stellenbosch Universiteit, Stellenbosch 1932).

[95] Giliomee (2004) n 88 hierbo op 296-297. Die eerste Volkskongres het in 1934 plaasgevind en het uitsluitlik ten doel gehad om die armblanke probleem te ondersoek.

[96] Giliomee (2004) n 88 hierbo op 297.

[97] Id op 300-1:

> "Die voorsitter van die kongres, Ds. William Nicol het dit beklemtoon dat die pogings om die armblankes op te hef nie ten koste van die naturelle moet wees nie. Die besluit om wit armoede eerste aan te pak, is nie op grond van 'n beginsel geneem nie. Dit het volgens Nicol daarmee te doen gehad dat 'hoe sterker die blanke op hulle voete kan staan hoe beter kans het hulle om die naturel op sy beurt te help'. Hoe gouer die armblanke-vraagstuk opgelos is, hoe gouer kan die naturellevraagstuk opgelos word. Malherbe, wat die verslag oor blanke onderwys geskryf het, het daarteen gewaarsku dat armoede gebruik word as verskoning vir 'n strenger beleid van segregasie. 'Om ons superioriteit te wil behou deur die kaffer laer af te druk, is nie alleen onbillik nie maar die toppunt van dwaasheid, selfs van ons eie standpunt gesien'."

Maar beide die Carnegie-kommissie en die 1934 volkskongres het aanbevelings gemaak wat die gaping tussen wit en swart vergroot het.

[84] Volgens Giliomee, was die kommissie se grootste bydrae dat dit die mitologie van armoede as ’n natuurlike uitvloeisel aan die onderent van die menslike skaal as verkeerd bewys het:

> Die kommissie se grootste bydrae was die ontmaskering van die mites rondom wit armoede. . . . Intelligensietoetse wat die kommissie onderneem het, het bevind die armblankes vergelyk goed met die res van die bevolking. . . . N.P. van Wyk Louw [het] dit as die kommissie se belangrikste bydrae bestempel dat die opvatting van ‘n inherente gebrek finaal die nek ingeslaan is.”[98]

[85] Die aanpak en oplos van die armblanke-probleem word met trots bejeën deur vele Afrikaners.[99] Maar dit het ook gekos. Dit is opgelos, ja, deur self-opheffing en harde werk,[100] maar ook deur diskriminasie en die gebruik van politieke mag.

[86] Armoede is nie gedefinieer ingevolge fisiese of ekonomiese data nie, maar in relatiewe terme, naamlik hoe ’n wit persoon uit hoofde van witheid behoort te leef in vergelyking met swart- en bruinmense.[101] So verklaar ’n (wit) kabinetsminister in 1926 dat die “beskaafde” arbeidsbeleid nooit gemik was daarop om aan bruinmense gelyke betaling te verskaf nie:

> “Die gekleurde man verskil van die blanke man wat betref sy vlak van beskawing en moet dienooreenkomstig behandel word.”[102]

In sy deel van die Carnegie-kommissie verslag skryf Professor Malherbe:

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[98] Id op 297.

[99] Vergelyk Giliomee (2016) n 87 hierbo, hoofstuk 16 “Om trots én skaam te wees” op 324.

[100] Giliomee (2004) n 88 hierbo op 348-349.

[101] Id op 318.

[102] Id op 292.

> "'n [A]rmblanke is 'n blanke wat gesink het tot 'onderkant die ekonomiese lewenspeil wat . . . deur die blanke, aangesien hy 'n wit vel het, gehandhaaf moet word teenoor die naturel'."[103]

[87] Ten slotte was die politieke doel van oplossing van die armblanke probleem nie altruisties nie. Inteendeel:

> "Die vertrekpunt . . . was die uitskakeling van die swart deelsaaier. Hertzog het geglo dat indien die situasie nie omgekeer word nie, die deelsaaier 'n swart kieser sou word. Sowel die deelsaaier as die toekomstige swart kieser was 'n direkte bedreiging vir die groeiende aantal armblankes en baie ander Afrikaners wie se posisie nie veel beter was nie – mense wat nie net arm was nie, maar ook sonder vaardighede vir die stedelike ekonomie. Hulle het slegs die stemreg gehad om op staat te maak."[104]

[88] Dit is wat gebeur het. Aan blanke kant, het Afrikaners gaandeweg politieke mag teruggekry. Vanuit 'n sekere perspektief het die Anglo-Boereoorlog die koloniale oorheersing van beide inheemse Afrikane en Republikeinse Afrikaners voltooi. Maar ras het laasgenoemde bevoordeel. Binne 'n paar jaar na hul sukses in die oorlog het die Afrikaners politieke mag verkry in die Vrystaat en Transvaal wat selfregerende gebiede soos die Kaap en Natal geword het. Uniewording volg in 1910. Die verdeling van Suid-Afrika onder wit beheer is bereik.

[89] Teen 1905 was daar 1,057,610 swartmense wat in die Transkei en Ciskei gebly het, terwyl ongeveer 25,000 op plase gewerk het. In die destyds Natal het 228,000 in die reserwes gewoon, 421,000 op plase, meesal as arbeidhuurders ("labour tenants") en nog ander op Kroongrond. In die ou Transvaal was daar 123,000 in die reserwes, ongeveer 430,000 in vorige stamgebiede, 180,000 op Kroongrond en 130,000 op plase wat hulle saamgewerk en aangekoop het. In die Vrystaat het slegs 27,000 in die reserwes gewoon, maar meer as 'n kwartmiljoen het op plase gewoon as deelsaaiers of arbeidhuurders.

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[103] Id op 297.

[104] Id op 254.

[90] Drie jaar na uniewording volg die "Naturellen Grond Wet",[105] vandag beter bekend, of berug, as die "1913 Land Act". Vir Sol Plaatje maak hierdie wet die "South African native a pariah in the land of his birth".[106] Hoewel hierdie wet meer 'n bevestiging was van voorafgaande besitsontneming[107] het dit die toekomstige aspirasies van swartmense vireers 'n nekslag gegee. Waar hulle teen die naderende einde van die negentiende kon verwag het om 'n klas van onafhanklike swart boere te ontwikkel,[108] het die teendeel, en meer, gebeur:[109]

> "The Land Act prohibited purchasing of white land, but not occupation; it demarcated scheduled areas for African communal land ownership; and it controlled the forms of tenancy on white-owned land. Agricultural production on white land was controlled, not prohibited. While each region revealed its own patterns, 'almost all had one thing in common: white-owned land was not occupied exclusively by whites. Black people predominated on the great majority of white-owned farms in South Africa, where they lived as tenants and workers both before and after the 1913 Land Act.' In the Free State sharecropping remained important right into the 1940's, caused by white farmers unable to raise capital to turn into large scale grain producers and cattle. The advent of the tractor changed that. In the Transvaal much land continued, despite the Act, to be purchased by Africans up until 1936. Some of these purchases were for individual ownership outside traditional authority. African occupation and

[105] Naturellen Grond Wet 27 van 1913.

[106] Plaatje n 19 hierbo op 21; Plaatje se perspektief is aanvanklik deur PR King and Son Ltd, Londen in 1916 gepubliseer.

[107] Beinart en Delius "The Natives Land Act of 1913: A Template but not a Turning Point" in Cousins and Walker (eds*) Land Divided, Land Restored; Land reform in South Africa for the 21st Century* (Jacana Media, Johannesburg 2015) op 24.

[108] Bundy *The Rise & Fall of the South African Peasantry* 2 ed (David Philip Publishers, Kaapstad 1988) op 239:

> "A hypothetical projection, then, of trends in the closing years of the nineteenth century might envisage that class formation and differentiation among African agriculturists would lead to: the emergence of a class of black farmers, a diminishing 'traditional' peasantry, and a growing permanently proletarianised urban working force. But various forces, interests and interventions operated to inhibit, check and distort the direction of economic changes in peasant areas, a phenomenon that found its most graphic expression in the 1913 Natives Land Act."

[109] Id.

agricultural production also remained in the Cape and Natal. In the Cape the Act's provisions were inapplicable until 1936."[110]

[91] Oor die lewenswyse, waardigheid en deursettingsvermoë van swart deelsaaiers het ons nie bloot 'n fiktiewe lewe van 'n swart *Ampie* beskikbaar nie,[111] maar die werklike biografie van 'n swart deelsaaier en sy gesin, Mnr Kas Maine. In *The Seed is Mine*,[112] word die verhaal van hierdie swart deelsaaier op die Hoëveld deur die historikus, Charles van Onselen, vertel. Ter aanvang skryf Van Onselen:

> "The Highveld has, for more than a century, also been the site of some of the most intense, intimate and searing interactions between Afrikaner landlords and their predominantly Sotho-speaking labour tenants and farm labourers. Bitter-sweet relationships born of paternalism and unending rural hardship have seen the emergence of peculiar quasi-kinship terms such as outa (venerable father) and ousie (older sister) − nouns that are as embedded in the modern Setswana lexicon as they are in Afrikaans. When an authentic identity eventually emerges from this troubled country it will, in large part, have come from painful shared experiences on the Highveld."[113]

[92] Kas Maine was een van vele goeie swart landbouers wat ten spyte van moeilike omstandighede 'n redelike bestaan kon maak as 'n deelsaaier. Daar was ook

[110] Beinart en Delius n 107 hierbo. Sien ook O'Meara n 92 hierbo op 25:

> "British scorched earth policy during the war had devastated Boer agriculture . . . . Thousands of bywoners and small landlords could no longer survive and were driven off their land. In the immediate postwar years most Boer landlords were able to survive only by populating their farms with ever larger numbers of cultivating African tenants − in many cases driving off Boer bywoners to accommodate them."

[111] Van Bruggen het ook 'n boek oor swartmense se landelike ervaring van die tyd geskryf. *Booia* (De Bussy, Pretoria 1931), is die eerste roman in Afrikaans met 'n swart hoofkarakter en ook 'n eerste wat die tragiek verbonde aan die swart mense se bestaanswyse beskryf. 'n Kommentator merk op: "Die verhaal word geteken uit die oogpunt van Booia, maar die roman doen fragmentaries aan met gebeurtenisse wat beskryf word eerder as 'n karakterontwikkeling en Booia word weinig meer as 'n swart Ampie. Die beskrywing van die leefwyse van die swart gemeenskap is realisties en soortgelyk aan die skrywer se behandeling van die bywonerfiguur. Ten spyte van 'n patriargale wit perspektief wat soms deurskemer, is dit 'n eerlike poging om die swart gemeenskap van binne af te beleef en nie van buite af te beskryf nie." "Jochem van Bruggen" beskikbaar by http://www.wikiwand.com/af/Jochem_van_Bruggen. Sien ook Kritzinger "Booia. Deur Jochem van Bruggen" (1931) Deel 3 No 3 *Nuwe Brandwag* 157.

[112] Van Onselen *The Seed is Mine − The Life of Kas Maine, A South African Sharecropper 1894-1985* (David Philip Publishers, Kaapstad 1996).

[113] Id op vi.

suksesvolle wit landbouers wat ook uit arm omstandighede opgestaan het en met mense soos Kas Maine saamgewerk het. Een van hulle was die suksesvolle seun van ’n wit bywoner met wie hy saamgewerk het, maar uiteindelik mee uitgeval het. Maar die uitval en woorde van Kas Maine by hul skeiding illustreer die bittere verskil:

> “You know, one day God will allow us to purchase property − just like you − and I will hire you, and overwork you just as you are doing to me.”[114]

[93] Die sukses van swart deelsaaiers het ook, ironies, hulle hoogs kwesbaar gemaak. Giliomee stel dit so:

> “Die opkoms van die swart deelsaaiers het ‘n groot bedreiging vir die bywoners verteenwoordig. Die boere wou mense hê met kapitaal en die vermoë om die lande te bewerk. Die bywoner was traag om bevele te gehoorsaam en onwillig om sy aan sy met die swart arbeiders op die land te werk. Hy het ook daarvan gehou om ‘n redelike stuk grond vir eie gebruik re hê. Boere met deelsaaiers het bevind dat ses swart families op ’n stuk grond van 220 akker ’n bestaan kon maak, terwyl ’n enkele wit familie op 100 akker aangedring het.”[115]

En Van Onselen:

> “With the benefit of hindsight, then, we can see that, between the mid-nineteenth and mid-twentieth centuries, the emerging South African state engaged in a hundred year war to seal off the sharecropping frontier so as to deliver to politically privileged white landlords a black labour force that capitalist agriculture demanded. It is within the context of this long march north and west that we must situate our understanding of those black farmers and white landlords whose whispered verbal agreements remain muffled to this day by the sigh of the highveld breeze.”[116]

[94] Die fiktiewe, dog werklike realiteit van Van Bruggen se *Ampie*, die werklikheid van Mnr Kas Maine en die hoofuitspraak se Mnr Petros Nkosi, skets ’n

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[114] Id op 118.

[115] Giliomee (2004) n 88 hierbo op 250-251 en vergelyk ook 249.

[116] Van Onselen n 112 hierbo op 8 en vergelyk ook 5-8.

prentjie van dikwels bittere verweefdheid. Die Grondwet bied ons ’n keuse en geleentheid om in die verweefdheid iets te soek wat ons in die toekoms kan saambind. In Van Onselen se woorde, weer:

> “Old and new social forces, contested in surprising ways in the day-to-day interactions between black and white folk who lived in the Transvaal, lie at the core of this book. Currents of anger, betrayal, hatred and humiliation surge through many accounts of modern South Africa’s race relations, but what analysts sometimes fail to understand is that without prior compassion, dignity, love or a feeling of trust − no matter how small, poorly or unevenly developed − there could have no anger, betrayal, hatred or humiliation. The troubled relationship of black and white South Africans cannot be fully understood by focusing on what tore them apart and ignoring what held them together.”[117]

[95] Wat het dit alles met Me Daniels se appèl te make? Feitlik alles. Die Carnegie-kommissie verslag oor armblankes toon aan dat armoede, ook op plase, niks te make het met ’n inherente minderwaardigheid nie. Sosiale en ekonomiese prosesse buite mense se individuele beheer is grootliks daarvoor verantwoordelik. Die probleem is aangespreek sodat witmense menswaardige lewenstandaarde kon handhaaf. Die skreiende onreg dat hierdie regstelling nie ook uitgebrei is na swart- en bruinmense nie, moet en kan reggestel word. Daar bestaan geen rede om die voortbestaan van onmenswaardige toestande op plase nog vandag te duld nie. In hedendaagse terme, waar die bevoorregtes onder ons gewoond is aan redelike behuising, watertoevoer en elektrisiteit, bestaan daar geen regverdiging daarvoor om dit nie te gun aan andere wat dit nog nie het nie, veral nie waar hulle, soos Me Daniels, dit self wil bekom nie.

Die eiendomsbegrip

[96] Die argument aangevoer namens die respondent, Mnr Scribante, het berus op die aanname dat die eiendomsreg in die plaas die aanvanklike uitgangspunt moet wees

[117] Id op 4. Plaatje n 19 hierbo het ook ’n hoofstuk getiteld “Our Indebtedness to White Women”.

vir die beoordeling van die geldigheid van enige reg wat Me Daniels mag hê. Die hoofuitspraak toon duidelik aan waarom daardie aanname nie in hierdie saak gemaak kan word nie. Maar dit is 'n hardnekkige siening wat dikwels gebruik word om die noodwendige gevolge van ons grondwetlike waardes to probeer vertraag of ontduik. Dit is miskien behulpsaam om verder as die hoofuitspraak te gaan om die onhoudbaarheid van hierdie soort van absolutistiese eiendomsbegrip aan te toon.

[97] Eerstens berus dit op 'n vergestalting daaraan gegee in die Romeins-Hollandse reg in 'n bepaalde tydvak van die geskiedenis van Europa, naamlik die stryd tussen die moderne siviele reg en feodale reg.[118] Dit was belangrik in die stryd om politieke en ekonomiese vryheid van individue om die idee te vestig dat 'n allesomvattende eiendomsreg in een persoon moet vestig om feodale beperkings daarop te verhoed of te verminder.[119] Hierdie konseptualisering stel 'n hiërargie van regte daar, met eiendomsreg bo-aan, en mindere saaklike en persoonlike regte daaronder wat in bepaalde en omskrewe omstandighede daaraan mag afbreuk doen. Dat hierdie siening van eiendomsreg 'n belangrike rol gespeel het in die vestiging van individuele vryheid in die opkoms van westerse kapitalisme beteken egter nie dat die voortgesette bestaan daarvan as vanselfsprekend aanvaar kan word onder die Grondwet nie.

[98] Die redes daarvoor is velerlei. Vir die meer formalistiese onder ons mag die eerste antwoord genoegsaam wees, naamlik dat hierdie Hof al by verskeie geleenthede hierdie verabsolutering van eiendomsreg verwerp het. In die woorde van Sachs R in *PE Municipality*:

> "In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not to be arbitrarily deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to

[118] Van der Walt *Property in the Margins* (Hart Publishing, Oxford en Portland 2009) op 29-34.

[119] Id op 29.

> establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking into account of all the interests involved and the specific factors relevant in each particular case."[120]

[99] Die sosiale gebondenheid van die eiendomsbegrip in ons huidige reg is ook op vele ander gebiede deur hierdie Hof erken en beklemtoon.[121] Die hoofuitspraak is 'n elegante, weldeurdagte en deurslaggewende mylpaal in hierdie ontwikkeling van ons reg.

[100] Maar die dieper, onderliggende redes moet ook verstaan word. Die verduideliking daarvan is deur andere ook gedoen, maar die onlangse afsterwe van Professor André van der Walt bied 'n gepaste geleentheid om sy baanbrekerswerk in daardie opsig te huldig. Soos hy aangetoon het,[122] het die verabsolutering van die eiendomsbegrip en die hiërargie van regte wat daaruit voortgespruit het, nie die doel om persoonlike en ekonomiese vryheid in Suid-Afrika te vestig, vervul nie. Inteendeel, dit het die bestaande ongelykhede in persoonlike, sosiale, ekonomiese en politieke vryheid bevestig en vererger. Swart- en bruinmense is ontneem daarvan om eiendomsreg in hulle vryheidstryd te gebruik. Die laaste woord in hierdie konteks is Professor van der Walt s'n:

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[120] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*) op para 23.

[121] Oorweeg, byvoorbeeld, *Tshwane City v Link Africa (Pty) Ltd* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC); *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC); *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC); *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC); en *Nhlabathi v Fick* [2003] ZALCC 9; 2003 JDR 0226 (LCC); 2003 (7) BCLR 806 (LCC).

[122] Van der Walt en Dhliwayo "The notion of absolute and exclusive ownership: A doctrinal analysis" (2017) 134 *South African Law Journal* 34; Van der Walt *Property and Constitution* (Pretoria University Law Press, Pretoria 2012); Van der Walt "Transformative Constitutionalism and the Development of South African Property Law (Part 2)" (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 1; Van der Walt "Resisting Orthodoxy − Again: Thoughts on the Development of Post-Apartheid South African Law" (2002) 17 *South African Public Law* 258; en Van der Walt "Tradition on Trial: A Critical Analysis of the Civil-law Tradition in South African Property Law" (1995) 11 *South African Journal on Human Rights* 169.

> "[T]raditional notions of property do not suffice in transformational contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions , even when imposed in terms of a broadly conceived notion of the public good, simply cannot do all the transformative work that is required. In this perspective it is not sufficient to demonstrate that property is subject to . . . public-purpose restrictions; the point is to identify and explain instances where transformation justifies changes that question the very foundations upon which the current distribution of property rests."[123]

[101] Hierdie insig kloof dieper as bloot die regstel van historiese ongeregtighede. Wanneer die rasse-ongelykhede van die verlede reggestel word gaan die moontlike onregverdighede van die nuwe verspreiding van eiendom nie noodwendig rasgedrewe wees nie. Maar die Grondwet se waardes slaan nie slegs op die verlede en hede nie, dit is ook van toepassing op die toekoms. 'n Toekomstige "Me Daniels" gaan steeds geregtig wees op 'n menswaardige bestaan, ongeag die ras van die eienaar van die grond.

Gevolge van grondwetlike verandering

[102] Net soos die erkenning van historiese onreg soms indirek ontduik word, word die belangrikheid van beskerming van eiendomsreg dikwels buite-geregtelik geregverdig deur die voordele wat dit sou hê in die moderne mark-ekonomie.[124] Hierdie poging om die gevolge van grondwetlike verandering te vertraag of teen te werk, gaan mank aan dieselfde gebreke waarom die gemeenregtelike verabsolutering van eiendomsreg nie kan slaag nie, naamlik die ahistoriese gebruik daarvan in die Suid-Afrikaanse konteks.

[103] Ekonomiese doeltreffendheidsargumente verskuil dikwels die teoretiese vertrekpunt daarvan. Een daarvan, die "Coase theorem", kom daarop neer dat ongeag hoe eiendomsregte aanvanklik toegeken word, 'n ekonomiese doeltreffende uitkoms bereik sal word vir die hele samelewing solank as wat daardie regte ten volle

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[123] Van der Walt *Property in the Margins* n 118 hierbo op 16.

[124] Id op 215.

gespesifiseer word en die transaksiekoste beperk word, omdat die bate sal vloei na die mees effektiewe verbruiker daarvan. Ander partye sal nie slegter daaraan toe wees nie aangesien die party wat die meeste waarde kan genereer van die bate ander partye kan vergoed wat minder waarde daaruit sou verkry.[125] Dikwels egter word die sprong van beskrywing van 'n teoretiese mededingende situasie gemaak na 'n voorskriftelike waarde-oordeel, naamlik dat die ekonomie nadelig geraak word deur enige verandering wat bestaande beskerming en verdeling van eiendomsregte bedreig. Maar so 'n sprong word nie geregverdig deur die Coase stelling nie. Dit swyg oor die moontlikheid dat 'n ander verdeling van eiendomsregte nie ook 'n ekonomies doeltreffende uitkoms tot gevolg sou kon hê nie. En die tasbare bewys, naamlik dat die partye wat die meeste waarde genereer die ander partye wat daardeur verloor kan vergoed, word nooit voor gevra in praktiese terme nie.[126]

[104] Ekonomiese doeltreffendheid is een moontlike regverdiging vir regsreëls. Maar ekonomiese groei kan ons dikwels verblind vir die beperkinge van mark-gebaseerde transkasies en die onderliggende aannames ten opsigte van die verdeling van eiendom. Me Daniels se lot is 'n goeie voorbeeld van die ontoereikendheid van ekonomiese doeltreffendheid as deurslaggewende regverdiging in 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid. Indien ons die gemeenregtelike absolutisme sou navolg en in die Scribante's die alleenreg vestig om verbeteringe aan die okkupeerder se woning aan te bring, watter prys sou hulle op kon aandring in ruil hiervoor en met watter fondse sou die verarmde Me Daniels haar waardigheid finansier? Die reg op menswaardigheid pas nie gemaklik in as die voorwerp van 'n geldelike mark-transaksie nie.

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[125] Die Coase stelling. Sien Coase "The Problem of Social Cost" (1960) 3 *The Journal of Law & Economics* 1 op 8; sien ook Medema *The Hesitant Hand: Taming Self-Interest in the History of Economic Ideas* (Princeton University Press, Princeton 2009) op 176; en Smith "On the Economy of Concepts in Property" (2012) 160 *University of Pennsylvania Law Review* 2097.

[126] Sien Mercuro en Medema *Economics and the Law: From Posner to Post-Modernism and Beyond* 2 ed (Princeton University Press, Princeton en Oxford 2006) op 20-25, 106, 113; en Singer *Entitlement: The Paradoxes of Property* (Yale University Press, New Haven 2006) op 145.

[105] ’n Ekonomiese doeltreffende uitkoms vereis die intellektuele veronderstelling van perfekte mededinging: grootskaalse kopers en verkopers gemotiveer deur eie-belang; geen kontrole oor mark-pryse nie; pryse as betroubare aanduiding van skaarsheid; gestandardiseerde produkte; geen weerhouding van toetrede of verlating van die mark nie; beide verkopers en kopers met volledige kennis van mark-transaksies; hulpbronne in privaatbesit met regte wat ten volle en omvattend gedefinieer en toegeken is; en gevolglike perfekte afdwinging van die regte deur die Staat.[127] Hierdie perfekte marktoestande bestaan egter natuurlik feitlik nooit nie. En dit het nie in ons koloniale en apartheids-geskiedenis bestaan nie.[128]

[106] Die werklikheid is dat ons koloniale en apartheidsgeskiedenis wys dat daar geen “vrye mark” was nie; dit was deurspek met “mark- en owerheidsmislukkings” wat die behoorlike werking daarvan verhoed het en miljoene mense nes Me Daniels se deelname aan die sogenaamde vrye mark verhoed het. Beskerming van bestaande (oneweredige) patrone van toekenning en verspreiding van hulpbronne kan nie geregverdig word deur die blote steun op die “bestaande doeltreffende ekonomie” argument nie, waar die basiese onderliggende aannames van die teorie juis afwesig is nie. Terwyl regverdigheid nie ’n voorvereiste is nie, kan daar nie aan die basiese vereiste voldoen wees wanneer ’n gedeelte van die samelewing aktief uitgesluit was van die “aanvanklike verdeling” van eiendomsregte nie.[129] Dit is ’n dapper ekonoom wat sal argumenteer dat ons samelewing vandag steeds beter daaraan toe is, in ’n ekonomies doeltreffende sin, op grond van die historiese toekenning van eiendomsreg aan witmense tot uitsluiting van ander. Daar is min rede om te aanvaar dat ’n verskillende aanvanklike verdeling wat nie op rasse- en klasuitsluiting gebaseer was nie, nie ook ekonomies doeltreffend sou gewees het nie. Die mees basiese aannames vir hierdie *status quo* ekonomiese doeltreffendheids-argument makeer.

[127] Sien Mercuro en Medema n 126 hierbo op 20; en Medema n 125 hierbo op 160-196.

[128] Coase n 125 hierbo op 8-9; en Mercuro en Medema id op 20-22.

[129] Mercuro en Medema id op 25.

Samevattend

[107] Die onreg van ons geskiedenis kan nie ontduik word nie. Op die onmiddellike vlak van hierdie saak noodsaak dit dat ons dieselfde menswaardigheid betoon en dieselfde soort regstelling maak teenoor mense in onmenswaardige omstandighede op plase, as wat die oplossing van die "armblanke probleem" in die eerste helfte van die vorige eeu gemotiveer het. Dit beteken ook dat ons moet besef dat die gemeenregtelike beskerming van eiendomsreg en die ekonomiese voordele wat daaruit gespruit het, in ons geskiedkundige konteks nie persoonlike outonomie en ekonomiese vryheid ondersteun het nie, maar dit effektiewelik teëgewerk het. Die argument dat beskerming van hierdie eiendom 'n noodsaaklike voorvereiste is vir persoonlike en ekonomiese vryheid is nie selfverduidelikend in die Suid-Afrikaanse konteks nie. Dit sal slegs in daardie rigting begin beweeg wanneer ons sterker beskerming onder die Grondwet gee aan die prekêre soort eiendom wat minderbevoorregte mense op plase tans het.

[108] Vanuit hierdie verdere perspektief beaam ek weereens my instemming met Madlanga R se belangrike en rigtinggewende uitspraak.

FRONEMAN J (Cameron J concurring):

Introduction

[109] I read the judgment (main judgment) of my brother Madlanga J with great appreciation. I concur in it. But its reading was accompanied by a sense of shame. In his autobiography, the Afrikaans-speaking historian, Hermann Giliomee, mentions that the statement by the liberal English-speaking historian, C.W. de Kiewiet that "for the thoughtful man it is still important to understand how men [the Afrikaners] who are sincere in their Christian beliefs and staunch defenders of their own liberties can

become identified with policies of discrimination and restriction”,[130] made him think that a person who could explain apartheid with understanding could make a big contribution to historical writing.[131] Later, with reference to his book on the history of the removal of “coloured” people from the area known as “Die Vlakte” from the centre of Stellenbosch, he came to the honest and almost solemn conclusion: “I now realise that I have not succeeded in answering that question”.[132]

[110] It is from a similar perspective that I feel constrained to write this concurrence. The Constitution affords us all the opportunity to attempt to develop a society where the injustice of the past can be addressed without the denial of the dignity, freedom and equal treatment of all the inhabitants of this country. It is an opportunity that we dare not ignore. However, the preamble to the Constitution asks more of us before we can seize the opportunity it grants, and that is that the injustices of the past be acknowledged.

[111] Anyone who travels through our beautiful countryside cannot help but notice that the living conditions of workers who live on farms do not always meet a standard that accords with human dignity. There is little doubt that things have improved, but unfortunately not uniformly so. Why not?

[112] That there still can be a debate about whether the applicant, Ms Daniels, should be allowed to improve her home dwelling by doing ordinary things to make it more habitable without consent, shows that we still have a long way to travel before the promises of the Constitution are fulfilled. Remember, what is at stake here is the levelling of floors, the establishing of a system of running water with a washbasin in the house, the addition of another window and the laying of paving outside. Ordinary, basic, things.

[130] Giliomee *Historikus Hermann Giliomee:’n Outobiografie* (Tafelberg Publishers, Cape Town 2016) at 210-1 (hereafter Giliomee (2016)).

[131] Id at 211. The book which Giliomee wrote is his magisterial *The Afrikaners, Biography of a People* (Tafelberg Publishers, Cape Town 2004) (hereafter Giliomee (2004)).

[132] Id at 226. Own translation.

[113] Many of us who take these basic everyday conveniences for granted, appear not to view it as a problem that others are denied them. Why not?

[114] A partial explanation may be that it lies in simply race or class discrimination. To the extent that there is express recognition that discrimination is the reason, the short answer is that the Constitution prohibits that. But often our reaction appears to be one of surprise and denial when we are labelled as racist or otherwise discriminatory when we accept this undignified existence of others, but do not accept it for ourselves. It is the underlying reasons for this denial or avoidance of a clearly unacceptable and unjust state of affairs that I attempt to address.

[115] Before we can make substantial and lasting progress in making the ideals of the Constitution a reality at least three things must happen:

(a) an honest and deep recognition of past injustice;

(b) a re-appraisal of our conception of the nature of ownership and property; and

(c) an acceptance, rather than avoidance or obfuscation, of the consequences of constitutional change.

I deal with each of these in the context of this case, namely the existence on farms of people who live and work on land they do not own.[133]

The recognition of injustice

[116] For many of us who grew up on farms, under the previous dispensation of apartheid, the difference between our privileged lifestyle and those of the people who lived and worked on the farm was merely natural. *We* and *they* were *different*. This was often, however, accompanied by insistence of parents that their children should

[133] The way of life on farms is relevant at present, but it does not mean that injustice is limited to the rural context.

treat workers and their families with respect on an individual level. But seldom, if ever, was there a self-critical look at the difference in dignified living between farmer and farmworker, or other inhabitants on the farm. It is important to consider whether things remain the same in this context because what is relevant here is the recognition of the historical injustice that underlies the present state of affairs.

[117] The historical injustice is nowadays not easily denied, but rather avoided. It is the tendency of avoidance that I initially wish to touch on. The example I will use is the position of sharecroppers[134] and "bywoners".

[118] The second half of the nineteenth century brought unimagined change to the living circumstances of all in what would later become South Africa.

> "The years after 1870 witnessed profound and violent transformations in South Africa. Old patterns of life were shattered, and men and women were hurled into new, foreign, and threatening economic, social and political environments. The rapid development of industry and the largescale proletarianisation of both black and white rural producers intensified these social disruptions in the 1920's and 1930's. Old certainties were destroyed, old world views and moralities undermined; men and women were forced to adapt their values and ideas to totally new relationships, new patterns of life."[135]

[119] White people also suffered hardship. There were many poor white people on the farms, "bywoners" and sharecroppers who suffered. The Afrikaans writer, Jochem van Bruggen's well-known *Ampie*-trilogy,[136] is based on his own experience.

> "In the vicinity of our farm shortly after the previous World War [World War I] there lived the most wretched family that I ever knew. They lived together in the most

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[134] In our common law the historical tie-in with Roman and Roman-Dutch law is the *colonus partiarius*; see and compare Van den Heever *The Partiarian Agricultural Lease in South African Law* (Juta, Cape Town 1943).

[135] O'Meara *Volkskapitalisme. Class, Capital and Ideology in the Development of Afrikaner Nationalism 1934-1948* (Ravan Press, Johannesburg 1983) at 67.

[136] Van Bruggen *Ampie* (Perskor, Johannesburg 1930).

> primitive caged shelter and lived almost barbarically. Their deprivation in the novel is not exaggerated. They accompanied my thoughts in the book."

[120] The Carnegie Commission report of 1932 on the "poor white problem" came to the conclusion that there were 300,000 poor whites, 17% of the white population.[137] At the Afrikaner "Volkskongres" (Peoples' Congress) in 1934[138] an analysis revealed that of those, 250,000 were Afrikaners, one quarter of the white Afrikaner population.[139] The Carnegie Commission recognised that black poverty was as much a problem as white poverty, but opined that white poverty had to be addressed first.[140] But both the Carnegie Commission and the Volkskongres made recommendations that widened the gap between white and black people.

[121] According to Giliomee, the Commission's biggest contribution was to dispel the mythology of poverty as a natural or innate consequence at the lowest level of the human scale:

> "The commission's report heralded a new understanding of the crisis of large-scale poverty. It was not a problem for which the poor themselves were responsible, but the result of social and economic processes over which they had little control. Intelligence tests undertaken by the commission found that the poor whites compared

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[137] Grosskopf *Report of the Carnegie Commission on the Poor White Problem in South Africa* (Stellenbosch University, Stellenbosch 1932).

[138] Giliomee (2004) above n 131 at 346. The first Volkskongres, which took place in 1934, was entirely dedicated to investigating the poor white problem.

[139] Id at 347.

[140] Id at 346:

> "The commission recognised that the problem of black poverty was as acute as that of white poverty. To justify a focus only on whites, it was suggested that solving the poverty of whites would ultimately also benefit other communities. W. Nicol, a prominent Dutch Reformed Church minister in Johannesburg told the 1934 conference: '[We] can do little about a solution for the native question before making progress with the poor-white question.…Once whites stand firmly on their own feet they would have a better chance to help the native in his turn'. Malherbe, who wrote the report on white education, warned against using white poverty as an excuse for intensifying segregation . . . : 'To maintain our superiority by pushing the Kaffer lower down would not only be unfair but the height of folly, even seen from our own point of view'."

> well with the rest of the population. N.P. van Wyk Louw . . . called the rejection of this 'scornful approach' the commission's most important contribution."[141]

[122] The tackling of, and solution to, the poor white problem is regarded with some pride by many Afrikaners.[142] But it came at a cost. It was resolved, yes, by self-help and hard work,[143] but also by discrimination and the wielding of political power.

[123] Poverty was not defined in terms of physical or economic data, but in relational terms, namely to what extent a white person should live, by virtue of whiteness, in comparison to black and "coloured" persons.[144] In 1926 a (white) cabinet minister declared that the "civilised" labour policy was not aimed at equal wages for "coloured" people:

> "The Colo[u]red man is different from the white man in his standard of civilisation and must be treated accordingly."[145]

In his portion of the Carnegie Commission report Professor Malherbe wrote:

> "A very appreciable portion of our white population is sinking below the economic standard of living which we consider that a white man should maintain by virtue of his white skin over the native."[146]

[124] In conclusion: the political purpose of solving the "poor white problem" was not altruistic. To the contrary:

> "the common point of departure for Afrikaner politicians was the elimination of the black sharecropper and the potential black voter. Both these categories of blacks posed a direct threat to the rapidly growing class of Afrikaners who were poor, lacked

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[141] Id at 348. Own translation.

[142] Compare Giliomee (2016) above n 130 at 324: Chapter 16 "To be proud and ashamed". Own translation.

[143] Giliomee (2004) above n 131 at 348-9.

[144] Id at 318.

[145] Id at 343.

[146] Id at 347 fn 138.

> skills, and had only the vote to rely on. Without a formula to exclude them, pressure for the qualified franchise would become steadily stronger. This would spell the political demise of the poorer whites and possibly of Afrikaner political domination as well. The reserves offered a justification for black exclusion from both the land and the vote."[147]

[125] That is what happened. On the white side, Afrikaners gradually regained political power. From a particular perspective the Anglo-Boer War completed the colonial domination of both indigenous Africans and Republican Afrikaners. But race favoured the latter. Within a few years after their defeat in the war the Afrikaners managed to regain significant political control in the Transvaal and Free State, which became self-governing territories as the Cape and Natal were. Union followed in 1910. The division of South Africa under white rule was secured.

[126] By 1905 there were 1,057,610 black people living in the Transkei and Ciskei, whilst about 25,000 worked on farms. In the then Natal, 228,000 lived in the reserves, 421,000 on farms, mostly as labour tenants, and others on Crown Land. In the old Transvaal there were 123,000 people in the reserves, about 430,000 in erstwhile tribal lands, 180,000 on Crown Lands and 130,000 on farms that they acquired together. In the Free State only 27,000 lived in the reserves and more than a quarter of a million people lived on farms as sharecroppers or labour tenants.

[127] The infamous Land Act followed three years after Union.[148] For Sol Plaatje the Act made the "South African native a pariah in the land of his birth".[149] Although this Act was more an affirmation of previous dispossession,[150] it nevertheless dealt a fatal blow to the aspirations of black people. Whereas black people could have

[147] Id at 30. Own translation.

[148] Natives Land Act 27 of 1913 (Act).

[149] Plaatje above n 19 at 21. Plaatje's perspective was first published by PR King and Son Ltd, London in 1916.

[150] Beinart and Delius "The Natives Land Act of 1913: A Template but not a Turning Point" in Cousins and Walker (eds) *Land Divided, Land Restored; Land Reform in South Africa for the 21st Century* (Jacana Media, Johannesburg 2015) at 24.

expected, towards the end of the nineteenth century, to develop into a class of independent black farmers, the opposite,[151] and more, transpired:[152]

> "The Land Act prohibited purchasing of white land, but not occupation; it demarcated scheduled areas for African communal land ownership; and it controlled the forms of tenancy on white-owned land. Agricultural production on white land was controlled, not prohibited. While each region revealed its own patterns, 'almost all had one thing in common: white-owned land was not occupied exclusively by whites. Black people predominated on the great majority of white-owned farms in South Africa, where they lived as tenants and workers both before and after the 1913 Land Act.' In the Free State sharecropping remained [an] important right into the 1940's, caused by white farmers unable to raise capital to turn into large scale grain producers and cattle. The advent of the tractor changed that. In the Transvaal much land continued, despite the Act, to be purchased by Africans up until 1936. Some of these purchases were for individual ownership outside traditional authority. African occupation and agricultural production also remained in the Cape and Natal. In the Cape the Act's provisions were inapplicable until 1936."[153]

[128] For the life, dignity and perseverance of a black sharecropper we do not have to rely on the fiction of a black Ampie,[154] for we have the real biography of a black

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[151] Bundy *The Rise & Fall of the South African Peasantry* 2 ed (David Philip Publishers, Cape Town 1988) at 239:

> "A hypothetical projection, then, of trends in the closing years of the nineteenth century might envisage that class formation and differentiation among African agriculturists would lead to: the emergence of a class of black farmers, a diminishing 'traditional' peasantry, and a growing permanently proletarianised urban working force. But various forces, interests and interventions operated to inhibit, check and distort the direction of economic changes in peasant areas, a phenomenon that found its most graphic expression in the 1913 Natives Land Act."

[152] Id.

[153] Beinart and Delius above n 150. See also O'Meara above n 135at 25:

> "British scorched earth policy during the war had devastated Boer agriculture. . . . Thousands of bywoners and small landlords could no longer survive and were driven off their land. In the immediate postwar years most Boer landlords were able to survive only by populating their farms with ever larger numbers of cultivating African tenants − in many cases driving off Boer bywoners to accommodate them."

[154] Van Bruggen also wrote a book about black people's rural experience at the time. *Booia* (De Bussy, Pretoria 1931) is the first novel in Afrikaans with a black protagonist as well as a first in describing the tragedy attached to this rural experience of black people. A commentator remarked: "The story is sketched from Booia's point of view, but the novel fragmentally deals with the events it describes rather than character development, and Booia becomes nothing more than a black Ampie. The description of the way of life of the black community is realistic and similar to the author's treatment of the sharecropper or 'bywoner'. Despite the patriarchal white

sharecropper and his family. In *The Seed is Mine*,[155] the historian, Charles van Onselen, has reconstructed the lives of Mr Kas Maine and his family. At the outset he tells us:

> "The Highveld has, for more than a century, also been the site of some of the most intense, intimate and searing interactions between Afrikaner landlords and their predominantly Sotho-speaking labour tenants and farm labourers. Bitter-sweet relationships born of paternalism and unending rural hardship have seen the emergence of peculiar quasi-kinship terms such as outa (venerable father) and ousie (older sister) − nouns that are as embedded in the modern [Setswana] lexicon as they are in Afrikaans. When an authentic identity eventually emerges from this troubled country it will, in large part, have come from painful shared experiences on the Highveld."[156]

[129] Kas Maine was one of many successful black agriculturalists who, despite difficult odds, managed to make a reasonable living as a sharecropper. There were also successful white agriculturalists who were able to make a success by working with people like Kas Maine. One of them was the son of a "bywoner" who worked with him. But their ways parted in acrimony. Kas Maine's parting words encapsulated the bitter difference between them:

> "You know, one day God will allow us to purchase property − just like you − and I will hire you, and overwork you just as you are doing to me."[157]

[130] Ironically, the success of black sharecroppers became their vulnerability. In Giliomee's words:

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perspective that is evident from time to time, it is an honest attempt to experience the black community from within and to not describe from the outside." "Jochem van Bruggen" available at http://www.wikiwand.com/af/Jochem_van_Bruggen. See also Kritzinger "Booia. Deur Jochem van Bruggen" (1931) Deel 3 No 3 *Nuwe Brandwag* 157.

[155] Van Onselen *The Seed is Mine − The Life of Kas Maine, A South African Sharecropper 1894-1985* (David Philip Publishers, Cape Town 1996).

[156] Id at vi.

[157] Id at 116.

> "The advance of black sharecroppers spelled great danger to the Afrikaner bywoners. Farmers increasingly needed people with capital and ability to work hard in the lands. Bywoners had no capital, were reluctant to obey orders and were unwilling to do manual work side by side with [black people]. They also liked having some space on the farm for their own use. Farmers hiring out land on a share-cropping basis found that six black families could make a living on two hundred acres, while a single white family insisted that it needed at least a hundred acres on which to subsist."[158]

And in those of Van Onselen:

> "With the benefit of hindsight, then, we can see that, between the mid-nineteenth and mid-twentieth centuries, the emerging South African state engaged in a hundred year war to seal off the sharecropping frontier so as to deliver to politically privileged white landlords a black labour force that capitalist agriculture demanded. It is within the context of this long march north and west that we must situate our understanding of those black farmers and white landlords whose whispered verbal agreements remain muffled to this day by the sigh of the highveld breeze."[159]

[131] The fictitious, but nevertheless very real, world of Van Bruggen's Ampie, the actual reality of the world of Mr Kas Maine and that of Mr Petros Nkosi related in the main judgment, sketch a picture of an often recurrent interwovenness. The Constitution provides us with an opportunity and choice to seek, in that interwovennes, something that can bind us to a common future. Again, in Van Onselen's words:

> "Old and new social forces, contested in surprising ways in the day-to-day interactions between black and white folk who lived in the Transvaal, lie at the core of this book. Currents of anger, betrayal, hatred and humiliation surge through many accounts of modern South Africa's race relations, but what analysts sometimes fail to understand is that without prior compassion, dignity, love or a feeling of trust − no matter how small, poorly or unevenly developed − there could have been no anger, betrayal, hatred or humiliation. The troubled relationship of black and white South

[158] Giliomee (2004) above n 131 at 298 and compare 297.

[159] Van Onselen above n 155 at 8 and also compare 5-8.

> Africans cannot be fully understood by focusing on what tore them apart and ignoring what held them together."[160]

[132] What has all this to do with Ms Daniels's appeal? Just about everything. The Carnegie Commission's report on poor whites showed that poverty, also on farms, had nothing to do with inherent inferiority, but everything to do with social and economic processes outside individual control. The problem was addressed so that white people could maintain dignified living standards. The burning injustice, namely that this corrective action was not extended to black and "coloured" people, must and can be rectified. There is no reason to continue countenancing the continuation of inhuman and undignified living on farms any more. It cannot be tolerated in light of the constitutional mandate to heal the divisions of the past. In contemporary terms, where the privileged among us are used to reasonable housing, access to water, and electricity, there is no justification for denying it to others who do not yet have it, especially to those, like Ms Daniels, who want to create those conditions for themselves.

The conception of property

[133] The argument advanced on behalf of the respondent, Mr Scribante, proceeded from the premise that the initial departure point of the enquiry into the evaluation of the validity of any right that Ms Daniels may have, must be ownership of the farm. The main judgment clearly shows why this premise cannot be sustained. But it is a recurrent view of property and ownership that is often used to delay or avoid the consequences of constitutional values. It may be of some assistance to the main judgment to demonstrate the unfeasibility of this absolutist kind of conception of property a bit further.

[134] First, this conception rests on the content given to the nature of ownership and property in a particular period in the history of Europe, namely the struggle between the modern civil law and feudal law, as well as the socio-political struggle against

[160] Id at 4. Plaatje above n 19 also has a chapter titled "Our Indebtedness to White Women".

feudal oppression.[161] It was important for the struggle to attain individual political and economic freedom to ground the idea of an all-encompassing right of ownership in one person in order to prevent or lessen feudal burdens on it.[162] This conception of property creates a hierarchy of rights with ownership at the top, and lesser real and personal rights that may in circumscribed circumstances subtract from it. That this conception of property and ownership played an important role in the establishment of individual freedom in the development of western capitalism does not, however, mean that its continued existence in this form must be accepted as a given under the Constitution.

[135] The reasons for not doing so are many. For the more formalistically minded the first may be sufficient, namely that this Court has already often rejected this absolutist conception of property. In the words of Sachs J in *PE Municipality*:

> "In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."[163]

[161] Van der Walt *Property in the Margins* (Hart Publishing, Oxford and Portland 2009) at 29-34.

[162] Id at 29.

[163] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*) at para 23.

The social boundedness of property in our current law has also been recognised and emphasised in many other areas of our law.[164] The main judgment is an elegant, thoughtful and conclusive milepost in this development of our law.

[136] But the deeper underlying reasons must also be understood. They have been expounded also by others, but the recent death of Professor André van der Walt provides a fitting moment to honour his pioneering work in this regard. As he showed,[165] the absolutisation of ownership and property and the hierarchy of rights it spawned did not fulfil the purpose of founding political and economic freedom in South Africa. To the contrary, it confirmed and perpetuated the existing inequalities in personal, social, economic and political freedom. Black people were deprived of using property and ownership in their freedom struggle. The last word is Professor van der Walt's:

> "[T]raditional notions of property do not suffice in transformational contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply cannot do all the transformative work that is required. In this perspective it is not sufficient to demonstrate that property is subject to…public-purpose restrictions; the point is to identify and explain instances where transformation justifies changes that question the very foundations upon which the current distribution of property rests."[166]

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[164] Consider, for example, *Tshwane City v Link Africa (Pty) Ltd* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC); *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC); *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC); *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC); and *Nhlabathi v Fick* [2003] ZALCC 9; 2003 JDR 0226 (LCC); 2003 (7) BCLR 806 (LCC).

[165] Van der Walt and Dhliwayo "The notion of absolute and exclusive ownership: A doctrinal analysis" (2017) 134 *South African Law Journal* 34; Van der Walt *Property and Constitution* (Pretoria University Law Press, Pretoria 2012); Van der Walt "Transformative Constitutionalism and the Development of South African Property Law (Part 2)" (2006) *Tydskrif vir die Suid-Afrikaanse Reg* at 1; Van der Walt "Resisting Orthodoxy — Again: Thoughts on the Development of Post-Apartheid South African Law" (2002) 17 *South African Public Law* 258; and Van der Walt "Tradition on Trial: A Critical Analysis of the Civil-law Tradition in South African Property Law" (1995) 11 *South African Journal on Human Rights* 169.

[166] Van der Walt *Property in the Margins* above n 162 at 16.

[137] This insight cuts deeper than only the rectification of historical injustices. When the racial inequalities of the past are rectified, the potential injustices of the then existing distribution of property may not be racially tainted any more. But the values of the Constitution are not aimed solely at the past and present, but also the future. A future "Ms Daniels" will still be entitled to live a dignified life, no matter the race of the owner.

Consequences of constitutional change

[138] Just as the recognition of historical injustice is sometimes indirectly avoided, so is the importance of protecting property sometimes extra-judicially justified on the basis of its benefits in a modern market economy.[167] This attempt to slow down or frustrate the consequences of constitutional change suffers from the same defects as why the common law absolutisation of property cannot succeed, namely its ahistorical use in the South African context.

[139] Economic efficiency arguments often hide their theoretical assumptions. For example, the Coase theorem holds that, as long as property rights are secure and transaction costs are absent, an economically efficient outcome will result no matter the initial allocation of property rights because an asset will flow to the highest value user. Other parties need not be worse off because the party who can generate the most wealth from the asset can compensate those who would generate less wealth from it.[168] Often the jump is then made from this description of a theoretical competitive situation to a prescriptive one: that the economy will suffer from any change that upsets the existing protection and distribution of property. But the jump does not follow from the theorem. It says nothing to the effect that a different allocation of property rights might not also produce an economically efficient outcome. And the

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[167] Id at 215.

[168] The Coase theorem. Coase "The Problem of Social Cost" (1960) 3 *The Journal of Law & Economics* 1 at 8; see also Medema *The Hesitant Hand: Taming Self-Interest in the History of Economic Ideas* (Princeton University Press, Princeton 2009) 176; and Smith "On the Economy of Concepts in Property" (2012) 160 *University of Pennsylvania Law Review* 2097.

practical proof of the pudding, namely that the party who generates the wealth from the asset can compensate those who lose, is never asked for in practical terms.[169]

[140] Economic efficiency may be one important justification for legal rules. But economic growth can often blind us to the limits of market-based exchanges and the distributional assumptions that underlie them. Ms Daniels's plight is a good illustration of the inadequacy of mere economic efficiency as a legal justification in an open and democratic society based on human dignity, equality, and freedom. Were we to follow the common law absolutism and vest in the Scribantes the sole right to make improvements to an occupier's property, what price would they demand in exchange for this and with what funds would the impoverished Ms Daniels finance her dignity? The right to dignity does not easily fit into the subject of a market exchange.

[141] To get to this economically efficient outcome, one must assume an intellectual construct of perfect competition: large numbers of buyers and sellers motivated by self-interest to maximise their utilities and profits, without control over market prices; prices serve as indicators of scarcity; products are standardised or homogenous; there are no entry or exit barriers; buyers and sellers are fully informed on the terms of market transactions; resources are held in private property with rights fully defined and assigned; and these rights and prevailing laws are fully enforced through the State.[170] But of course these "necessary conditions" hardly ever exist. And they did not exist in our colonial and apartheid history.

[142] The reality is that our colonial and apartheid history precluded any "free market" and millions of people like Ms Daniels were precluded from participating in any free market. It was fatally flawed by both "market" and "government" failures. Protecting existing (skewed) patterns of allocation and distribution of resources cannot

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[169] See Mercuro and Medema *Economics and the Law: From Posner to Post-Modernism and Beyond* 2 ed (Princeton University Press, Princeton and Oxford 2006) at 20-25, 106, 113; and Singer *Entitlement: The Paradoxes of Property* (Yale University Press, New Haven 2000) at 145.

[170] See Mercuro and Medema id at 20; and Medema above n 168 at 174-196.

be justified with bland reliance on efficiency when such obvious inequality in bargaining power prevents citizens from not only enjoying the benefits of that efficiency, but from protecting their basic rights. While justice and fairness are not necessary preconditions for distribution in terms of economic efficiency arguments, it does not follow that, where people were actively excluded from even some initial distribution, the basic assumptions for economic efficiency have been met.[171] It is a brave economist who argues today that our society is still in a better shape, in an economically efficient sense, on the basis of the historical allocation of property rights to white people only. There is little reason to assume that a different "initial distribution" of property rights, not based on race and class exclusion, would not also have been economically efficient. The most basic assumptions for these *status quo* economic efficiency arguments are lacking.

In summary

[143] The injustice of our history cannot be avoided. At the immediate level of this case it requires that we afford the same dignity, and rectification of indignity, to those living on farms, as that which motivated the solution to the "poor white problem" in the first half of the previous century. It means that we must recognise that the common law protection of property and its attendant economic privileges did not, in our historical context, support personal autonomy and economic freedom, but effectively worked against it. The argument that the protection of existing property is a necessary condition for personal and economic freedom is not self-explanatory in the South African context. It will only start to become convincing when property held in tenuous form by previously disadvantaged people is protected in stronger form under the Constitution.

[144] From this additional perspective I re-affirm my concurrence in Madlanga J's important and path-breaking judgment.

[171] Mercuro and Medema id at 25.

CAMERON J:

[145] The judicial business this case places before us is despatched, with convincing power, in paragraphs 23 to 70 of the judgment of my colleague Madlanga J (first judgment). I concur in that reasoning and conclusion.

[146] But the first judgment does more than despatch the dispute. It also gives voice to history: an aching and, for me, shaming, account of dispossession from land of black people by white people – with the grief and pain and dislocation and shocking material deprivation this led to. This serves, in the word the first judgment chooses, as interpretative background to the case's adjudication.

[147] With deliberateness, I concur in that exposition. Equally, I concur in the moving and unusually feelingful Afrikaans-language judgment of Froneman J (second judgment). In both, I do so after hesitating. Why?

[148] Because neither of my colleagues' historical accounts may be taken – could *expect* to be taken – as other than partial and incomplete reflections of our country's fractured past. They are neither impartial nor complete. Yet our country's history is omnipresent when one applies the Constitution and the reparative legislation that flowed from it. That history is not always directly functional to the determination of the case.[172] Yet it often cries out for voice.

[149] And yet I feel hesitation, too, because it is not within the primary competence of judges to write history. The histories in my colleagues' judgments were not expressly in issue during argument before us. Neither side referred to them. We did not have the benefit of the parties' contesting approaches to or submissions on them.

[172] See, in contrast, *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC).

And the parties placed before us none of the historical sources my colleagues refer to and quote from. This means we are on spongy ground. And we could lose our step. Especially where accounts are incomplete and where they are not directly functional to the determination of the dispute.

[150] All these cautions apply here. An application that recently confronted this Court underscores them vividly. An organisation styled the Indigenous First Nation Advocacy South Africa (IFNASA) lodged an application for direct access.[173] The applicants said they spoke on behalf of "our communities also known as Boesman, KhoiKhoi or the collective labels KhoiSan (so-labelled Coloureds)". Their articulated demands included affirmation as an indigenous first nation; the restoration of their land rights; the repeal of the Traditional and Khoi-San Leadership Bill, 2015; and the end of racism "against the Indigenous First Nation in the context of 'Blacks but Africans in Particular'" in what they termed the context of government's "decadent past fabricated identities".

[151] By order dated 16 November 2016, the Court dismissed the application. It was not in the interests of justice to hear it "at this stage because the Traditional and Khoi-San Leadership Bill, 2015 is still before Parliament, and the applicants have failed to show that they will have no effective remedy if the legislation is enacted".

[152] Why all this? To make an obvious point: that some of the very issues my colleagues have written about may yet come before this Court. That application is one example. And it invites an obvious caution, not only judicially, for what we have yet to decide, but more generally, about the perils of writing history. Indeed, the Court's very power to influence what the application calls our country's "collective historical narrative" suggests a diffident approach, and a light footfall.

[153] And yet, despite all this – despite the caution, despite the perils, despite their partiality and incompleteness – I concur in both expositions. I concur because the two

[173] See *Williams v President of South Africa* filed on 23 September 2016 under case number CCT 229/16.

judgments do vital work at an important time in our country – a time of angry rhetoric and intransigent attitudes, whose perils exceed those of history and the frailties of its telling.

[154] The first and second judgments remind us all – and remind white people in particular, people like me, lawyers who grew up with the benefits, both accumulated and immediate, of their skin colour in a society that deliberately set out to privilege them, white people who are still the majority in the profession and probably still the majority readers of these reports – that the past is not done with us; that it is not past; that it will not leave us in peace until we have reckoned with its claims to justice.

[155] When important things are being said, when insufficiently heard truths are being spoken, it is bad to hide behind the indeterminacies of history and the inevitable incompleteness and partiality of its telling. I concur in both the first and the second judgments.

JAFTA J (Nkabinde ACJ concurring):

[156] I have had the benefit of reading the erudite judgment of my colleague Madlanga J (first judgment). I agree with it except on one issue. This is whether the Constitution imposes a positive obligation on a private person to enable bearers of rights guaranteed by the Bill of Rights to enjoy those rights. While I agree with the first judgment that section 8(2) of the Constitution illustrates that the rights in the Bill of Rights are not enforceable only vertically but also horizontally,[174] I don't read this provision as being a source of any obligation, let alone a positive obligation borne by a private person.

[174] Section 8(2) provides:

> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

Purpose of section 8(2)

[157] In my view the purpose of section 8(2) is to ensure that some of the rights entrenched in the Bill of Rights are enforceable against the state (vertically) and against private persons (horizontally). It is evident from the text of section 8(2) that not all rights are capable of being enforced vertically and horizontally. Some of them may be enforced vertically only. With section 8(1) having declared that the Bill of Rights binds all three arms of the state,[175] section 8(2) proceeds to pronounce that some provisions of the Bill of Rights bind "a natural or juristic person" to the extent that they are applicable, taking into account the nature of the rights and the duties they impose.

[158] The question whether any provision of the Bill of Rights applies vertically and horizontally is determined with reference to the nature of the right and the duty it imposes. Take for example administrative justice rights guaranteed by section 33 of the Bill of Rights.[176] The nature and the duty imposed by these rights indicate that they may be enforced vertically only. By way of a contrast the right to equality guaranteed by section 9 is enforceable both vertically and horizontally.[177]

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[175] Section 8(1) provides:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[176] Section 33(1) provides:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[177] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

[159] It is quite plain from the text of section 9(4) that the nature of the right and duty that it imposes on private persons are negative ones. It is the right not to be unfairly discriminated against and the corresponding duty imposed on private persons that prohibit them from unfairly discriminating against another person. The plain reading of the Bill of Rights reveals that the rights which are capable of being enforced both vertically and horizontally are rights which impose both positive and negative obligations. To the extent that such rights bind private persons, they impose negative obligations.[178]

[160] However, negative obligations are not limited to rights framed in negative terms. For example, the right to human dignity and the right to life entrenched by sections 10 and 11 are defined in positive terms and yet they impose negative obligations in the form of prohibitions on the state and private persons alike. Both the state and private persons are prohibited from violating a person's right to life or human dignity. Of course, they may limit those rights provided the limitation meets the requirements of section 36 of the Constitution.[179]

[161] Ordinarily, the breach of a negative obligation is remedied by a negative relief like a prohibition and a violation of a positive obligation is cured by a positive remedy such as a mandatory injunction. Negative remedies are generally less intrusive into the domain of the legislative and executive arms of the state. In contrast, a positive

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(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[178] Examples of this are found in sections 9, 12, 13, 14, 24 and 25 of the Bill of Rights.

[179] Section 36(1) of the Constitution reads:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

remedy is more intrusive as it may require the party against which the claim is brought to do something in order to discharge the positive duty.

[162] Apart from the general positive obligation imposed upon the state by section 7(2), where the Bill of Rights imposes a positive duty, it does so in express terms.[180] There is no provision that expressly imposes a positive obligation on a private person in the entire Bill of Rights. It does not appear to me that any of the relevant provisions may be interpreted as imposing a positive duty on a private person. It would be odd for the Constitution to be express when it imposes a positive duty upon the state and choose to be obscure when imposing such a duty upon a private person.

Meaning of section 25(6)

[163] The first judgment does not identify any provision of the Bill of Rights which imposes a positive obligation upon a private person in express terms. Instead, it holds that the right to security of tenure in section 25(6) of the Bill of Rights imposes a positive duty on private persons.[181] I cannot agree.

[164] Section 25(6) provides:

> "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

[165] What this provision means is that persons or communities who lost security of tenure or never had a secure tenure as a result of discriminatory laws or practices of the apartheid era are entitled to have secure tenure restored in terms of an Act of Parliament. If it is not possible to restore the lost tenure such persons or communities are entitled to comparable redress. There is nothing in the text of section 25(6) which

[180] See sections 19, 24, 25, 26 and 27 of the Bill of Rights.

[181] First judgment at [49].

suggests that the duty to restore the lost tenure rests on private persons. This is not surprising because the loss of tenure that was suffered occurred as a result of discriminatory laws or practices of the state. Innocent private persons could not be saddled with the duty to remedy the wrongs of the state.

[166] That is why, if the land on which the lost tenure was, is now privately owned, tenure can only be restored if the private owner is willing to sell it to the state or if the land is expropriated. If it is expropriated, a just and equitable compensation must be paid for it. If the private owner of the land has a positive duty to give a legally secure tenure, it would not be necessary for the state to buy his or her land or even expropriate it. The claimant would be entitled to enforce his or her right against such private person and the latter would be under an obligation to give the secure tenure on his or her own property. This is not supported by the text of that provision.

[167] Section 25(6) first and foremost is part of section 25 which begins by safeguarding property rights. Together with section 25(7) they form the transformative component of section 25 which seeks to redress the injustices caused by the past racially discriminatory laws or practices in terms of which forced removals were carried out. The positive obligation to address the injustices in relation to loss of tenure or dispossession of land is imposed on the state alone by section 25(5). This provision provides:

> "The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

[168] This duty of the state is buttressed by section 25(8). It proclaims—

> "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)."

[169] Section 25(6) must be read together with section 25(5) to determine the content and scope of the obligation it imposes. The Constitution contemplates that the right of equitable access to land will depend on reasonable legislative and other measures taken by the state, within its available resources. In this way the Constitution recognises that at the time it was adopted, millions of South Africans had no access to land and those that had access had a legally insecure tenure. The purpose of entrenching the rights of access to land and secure tenure was to ensure that the state, through reasonable measures within its budget, progressively makes the realisation of those rights achievable to the millions who did not enjoy them.

[170] In *Mazibuko* this Court laid down the standard applicable to enforcing social and economic rights in courts. It said:

> "Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No 2*, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised."[182]

[171] That standard cannot appropriately apply to a claim against a private person. Enforcing a positive obligation against a private person would also raise a spectre of practical difficulties, like how that private person is identified and what exactly he or she is required to do to fulfil the obligation and what would happen if he or she has no financial means with which to discharge the obligation. Without the internal

[182] *Mazibuko* above n 64 at para 67.

qualifiers available to the state, it is difficult to see how these challenges may be overcome. In contrast, a negative obligation is easy to enforce as it requires a private person to refrain from interfering with the enjoyment of a right.

[172] Before turning to the Extension of Security of Tenure Act[183] (ESTA), it needs to be emphasised that the right to security of tenure provided for in section 25(6) of the Constitution addresses tenure that became "legally insecure as a result of past racially discriminatory laws or practices". This means that the insecure tenure which the right seeks to correct must have been caused by discriminatory laws or practices of the colonial or apartheid eras.

Provisions of ESTA

[173] It is true that ESTA constitutes legislation envisaged in section 25(6) which Parliament was obliged to enact in terms of section 25(9) of the Constitution. As its long title declares, ESTA's objective is to provide for measures, with state assistance, to facilitate long-term security of land tenure and to regulate the conditions on and circumstances under which the right of persons to reside on land may be determined, and to regulate conditions and circumstances under which persons whose right of residence has been terminated, may be evicted from land.

[174] Section 13 of ESTA governs a situation where at the time of ordering eviction, the evictee has crops which were planted with the consent of the landowner or has made improvements to the land in question. In granting an eviction order, a court may, in terms of section 13 order the landowner or a person in charge to pay a just and equitable compensation to the evictee or order that the evictee be afforded a fair opportunity to demolish the improvements erected or "tend standing crops to which he or she is entitled until they are ready for harvesting and then harvest and remove them".[184]

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[183] 62 of 1997.

[184] Section 13(1) provides:

> "(1) If a court makes an order for eviction in terms of this Act—

Blue Moonlight

[175] It is quite plain from the language of section 13 that its purpose is to regulate an eviction in circumstances where the evicted occupier has effected improvements or had planted crops. The section addresses conditions of an eviction where the right of residence has been terminated already.

[176] Therefore, the respondents' submission to the effect that section 13 imposes a constitutional obligation on them to make improvements for the occupier's benefit is misconceived. At the time of an eviction, two options are open to the parties. One is to keep the improvements intact, in which event the value of the property might be enhanced and the landowner might be required to compensate the occupier. The other is to afford the occupier an opportunity to demolish the improvements and to remove salvaged material. In this way, the section seeks to achieve justice and equity between the landowner and the evicted occupier. This has nothing to do with the right to security of tenure created by section 25(6) of the Constitution. This is because an

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(a) the court shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors, including whether—

(i) the improvements were made or the crops planted with the consent of the owner or person in charge;

(ii) the improvements were necessary or useful to the occupier; and

(iii) a written agreement between the occupier and the owner or person in charge, entered into prior to the making of improvements, provides that the occupier shall not be entitled to compensation for improvements identified in that agreement;

(b) the court shall order the owner or person in charge to pay any outstanding wages and related amounts that are due in terms of the Basic Conditions of Employment Act, 1983 (Act No. 3 of 1983) the Labour Relations Act or a determination made in terms of the Wage Act, 1957 (Act No. 5 of 1957); and

(c) the court may order the owner or person in charge to grant the occupier a fair opportunity to—

(i) demolish any structures and improvements erected or made by the occupier and his or her predecessors, and to remove materials so salvaged; and

(ii) tend standing crops to which he or she is entitled until they are ready for harvesting, and then to harvest and remove them."

eviction gets activated only after termination of the right of residence.[185] And when the right of residence is terminated, there is no tenure remaining to be secured by section 13. This section applies to a stage after a lawful termination of tenure.

[177] Returning to the first judgment, I am unable to agree with its conclusion that in *Blue Moonlight*[186] this Court imposed a direct and positive obligation on a private person to continue to house illegal occupiers.[187] What happened in *Blue Moonlight* is that this Court held that, as the owner of the property, *Blue Moonlight* was entitled to an order evicting the occupiers. In this regard, the Court said:

> "The findings are briefly summarised. To the extent that it is the owner of the property and the occupation is unlawful, Blue Moonlight is entitled to an eviction order. *All relevant circumstances must be taken into account though to determine whether, under which conditions and by which date, eviction would be just and equitable.* The availability of alternative housing for the Occupiers is one of the circumstances. The eviction would create an emergency situation in terms of Chapter 12. The City's interpretation of Chapter 12 as neither permitting nor obliging them to take measures to provide emergency accommodation, after having been refused financial assistance by the province, is incorrect. The City is obliged to provide temporary accommodation."[188]

[178] Having concluded that an eviction order ought to be granted, the Court proceeded to determine conditions which would make the eviction just and equitable as required by the Prevention of Illegal Eviction from and Lawful Occupation of Land Act (PIE).[189]

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[185] In this regard see *Klaase* above n 13 para 65, where this Court remarked:

> "An eviction order may be granted against her only if certain conditions are met. The first is that her right of residence must have terminated on lawful grounds, provided that the termination is just and equitable, having regard to certain listed factors. So, for as long as the right of residence of an occupier like Mrs Klaase has not been terminated in terms of section 8, the occupier may stay."

[186] *Blue Moonlight* above n 14.

[187] First judgment at [53].

[188] *Blue Moonlight* above n 14 at para 96.

[189] 19 of 1998.

[179] Section 4(8) of PIE provides:

> "If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and *determine*—
>
> (a) *a just and equitable date on which the unlawful occupier must vacate the land* under the circumstances; and
>
> (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (*a*)."

[180] In accordance with this provision, once a court is satisfied that the requirements of section 4 have been complied with and that the unlawful occupier has no valid defence, the court must grant an order for the eviction of the occupier and determine a just and equitable date on which the occupier must vacate and the circumstances under which he or she may vacate. It was in the discharge of this obligation imposed on a court that this Court determined that it would be just and equitable to set the date of eviction some 14 days after the date on which the City of Johannesburg was ordered to provide temporary accommodation to the evicted occupiers.

[181] On the justice and equity of the date of eviction, van der Westhuizen J said in *Blue Moonlight*:

> "The date of eviction must be linked to a date on which the City has to provide accommodation. Requiring the City to provide accommodation 14 days before the date of eviction will allow the Occupiers some time and space to be assured that the order to provide them with accommodation was complied with and to make suitable arrangements for their relocation. Although Blue Moonlight cannot be expected to be burdened with providing accommodation to the Occupiers indefinitely, a degree of patience should be reasonably expected of it and the City must be given a reasonable

> time to comply. The date should not follow too soon after the date of the judgment."[190]

[182] While it is true that the Court order that determined the date of eviction to be 15 April 2012 had the effect of obliging Blue Moonlight to accommodate the occupiers for a few months from the date of the order, this was not based on any positive obligation imposed by a constitutional right. On the contrary, the Court's order was based squarely on section 4(8) of PIE which enjoined the Court to determine a just and equitable date for eviction. This is not a new phenomenon. Even at common law, courts make allowance for an occupier to have a reasonable time within which to vacate. This is hardly regarded as imposing a positive obligation on the landowners. Instead, it amounts to a prohibition restraining the landowner from removing the occupier from the property before the date determined by the court that granted the eviction order.

[183] To hold that this Court in *Blue Moonlight* imposed a positive obligation to accommodate unlawful occupiers on Blue Moonlight Properties is not consistent with the conclusions reached there. For instance the Court held that the unlawful occupation of the property concerned amounted to deprivation of property under section 25(1) of the Constitution. It was stated:

> "Unlawful occupation results in a deprivation of property under section 25(1). Deprivation might however pass constitutional muster by virtue of being mandated by law of general application and if not arbitrary. Therefore, PIE allows for eviction of unlawful occupiers only when it is just and equitable."[191]

[184] It is apparent from this statement that the Court considered the unlawful occupation not only as a deprivation of property but also that it was a deprivation that passed constitutional scrutiny because it was mandated by PIE. This is not consonant with the proposition that Blue Moonlight Properties had an obligation arising from the

[190] *Blue Moonlight* above n 14 at para 100.

[191] Id at para 37.

Constitution to house the occupiers. If this were to be so, then the occupation could not be regarded as having been unlawful. For what is authorised by the Constitution cannot be unlawful. Nor could it constitute deprivation in terms of section 25(1) of the Constitution.

[185] Indeed this Court was at pains to point out in *Blue Moonlight* that the property owner had no obligation to house the occupiers. It stated:

> "It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course, a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances, an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight's situation in this case has already illustrated. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE."[192]

Socio-economic rights

[186] With regard to socio-economic rights, no positive obligation is imposed by those rights upon private persons. Instead the positive obligation is imposed on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights defined in section 26(1) and 27(1) of the Constitution.[193] These sections define the nature of the rights conferred on

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[192] Id at para 40.

[193] Section 26 provides:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

Section 27 provides:

> "(1) Everyone has the right to have access to:
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and

everyone. But their corresponding obligations are found in sections 26(2) and 27(2). Both these latter sections refer back to the rights in sections 26(1) and 27(1).

[187] It was this scheme which motivated this Court in a number of cases to declare that the right approach to construing these provisions is to read section 26(1) and (2) together and section 27(1) and (2) together.[194] In *Treatment Action Campaign* this Court defined the obligation arising from sections 26 and 27 in these terms:

> "We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to respect, protect, promote and fulfil such rights. The rights conferred by sections 26(1) and 27(1) are to have 'access' to the services that the state is obliged to provide in terms of sections 26(2) and 27(2)."[195]

[188] It is apparent that the rights in sections 26(1) and 27(1) may not be enforced independently of the qualifications in sections 26(2) and 27(2). It is also clear that those qualifications apply to the state only. This point was emphasised by this Court in *Grootboom*:

> "Subsection (2) speaks to the positive obligation imposed upon the State. It requires the State to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the State is not an absolute or unqualified one. The extent

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(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[194] *Mazibuko* above n 64; *Khosa v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 515 (CC); 2004 (6) BCLR 569 (CC); *Jaftha v Schoeman, Van Rooyen v Stoltz* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC); *Minister of Health v Treatment Action Campaign No. 2* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*Treatment Action Campaign*); *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*) and *Soobramoney v Minister of Health, Kwazulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

[195] *Treatment Action Campaign* above n 194 at para 39.

> of the State's obligation is defined by three key elements that are considered separately: (a) the obligation to 'take reasonable legislative and other measures'; (b) 'to achieve the progressive realisation' of the right; and (c) 'within available resources'."[196]

[189] Once it is accepted, as it must, that the enforcement of rights conferred by sections 26(1) and 27(1) depends on the state obligations in sections 26(2) and 27(2), which must be read together with sections 26(1) and 27(1), the conclusion that the rights in those sections impose positive obligations on the state only is inevitable. It follows that, properly construed, sections 26 and 27 of the Constitution do not impose a positive duty on private persons. To hold otherwise would mean that the qualifications in sections 26(2) and 27(2) are not available to a private person. This would also be at odds with the construction that requires sections 26(1) and 27(1) to be read together with sections 26(2) and 27(2) respectively.

[190] Of course, socio-economic rights, just like other constitutional rights, are understood as imposing a negative obligation upon the state and private persons, to refrain from interfering with the enjoyment of such rights. In *Mazibuko*, O'Regan J stated:

> "Traditionally, constitutional rights (especially civil and political rights) are understood as imposing an obligation upon the State to refrain from interfering with the exercise of the right by citizens (the so-called negative obligation or the duty to respect). As this Court has held, most notably perhaps in *Jaftha v Schoeman*, social and economic rights are no different. The State bears a duty to refrain from interfering with social and economic rights just as it does with civil and political rights."[197]

[191] Consistent with the jurisprudence of this Court on the enforcement of socio-economic rights this Court held in *Juma Musjid*[198] that a private person bore a

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[196] *Grootboom* above n 194 at para 38.

[197] *Mazibuko* above n 64 at para 47. See also *Jaftha* above n 194 at paras 30-4.

[198] *Juma Musjid* above n 66.

negative obligation not to interfere with the exercise of the right to a basic education on its property but that the private person had no positive obligation to provide learners with basic education.

[192] Defining the obligation imposed on a private person by section 29(1)(a) of the Constitution, Nkabinde J declared:

> "*It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners.* That primary positive obligation rests on [the Member of the Executive Council]. There was also no obligation on the Trust to make its property available to [the Member of the Executive Council] for use as a public school . . . .
>
> It needs to be stressed however, that *the purpose of section 8(2) of the Constitution is not* to obstruct private autonomy or *to impose on a private party the duties of the state in protecting the Bill of Rights.* It is rather to require private parties not to interfere with or diminish the enjoyment of a right."[199]

Application of ESTA to the facts

[193] Accordingly, I uphold the respondents' submission that the second respondent as the owner of the Chardonne Farm had no positive duty to promote and fulfil any of the rights conferred on Ms Daniels by ESTA. On the contrary the farm owner had a negative obligation to refrain from interfering with the exercise of those rights by Ms Daniels. This means that the respondents were under an obligation to refrain from conduct that interfered with the exercise by Ms Daniels of her right to reside on the farm in question. This is consistent with section 7 of ESTA, that deals with the rights and duties of the owner. Section 7(2) provides that "the owner or person in charge *may not prejudice an occupier* if one of the reasons for the prejudice is the past, present or [future] exercise of any legal right". It follows that that right, properly construed in the context of ESTA, included making improvements that were necessary to make the dwelling suitable for human habitation.

[199] Id at paras 57-8.

[194] By preventing Ms Daniels from effecting the necessary improvements, the respondents effectively interfered with the enjoyment by her of the right of residence. This constituted a breach of their negative duty not to interfere with her right of residence.

[195] It must be stressed however that here we are not concerned with the right of access to land or restoration of a lost right in land. The obligation to ensure that every citizen gains access to land falls upon the state. The respondents have no such duty even if they may have large tracks of spare land. It remains a duty of the state to take reasonable legislative and other measures to ensure equitable access to land, within available state resources.

[196] Neither the Constitution nor ESTA imposes such obligation on private persons. In contrast, what these legal instruments do is to protect the security of tenure where the right of access is already enjoyed. This case concerns that protection and nothing more. As the first judgment illustrates, Ms Daniels has been residing on the farm for more than a decade. ESTA safeguards her existing right of residence by prescribing conditions under which that right may be terminated and her eviction from the farm may be obtained. This confirms the simple proposition that the respondents do not bear the duty to give her access to land. If that duty were to exist, they would have no right to terminate her residence so as to avoid the obligation to discharge that duty.

[197] This is another factor which supports the proposition that private persons have no legal obligation to ensure that their fellow citizens have access to land that was denied to them by the government of the past colonial and apartheid eras. But where a private person has voluntarily permitted an individual to reside on his or her property, everyone including the state has a negative obligation not to interfere with the exercise of that right of residence, unless the interference is justified by law which passes constitutional muster.

[198] The right to security of tenure was designed to protect millions of South Africans who lived in sprawling informal settlements outside our towns and cities as well as those living on farms. The tenure of these people was not secure in law. While those living on farms do so with consent of landowners, the people in informal settlement occupy land unlawfully and in some instances they would have lived on such land for long periods of time. Without ESTA they could be evicted any time the landowner wishes that they be removed, regardless of whether the eviction would render them homeless.

[199] However, here we are not concerned with a threat to tenure but with interference that impacted negatively on the enjoyment of the right of residence. The respondents did not seek the eviction of Ms Daniels. Instead, they prevented her from effecting improvements on her dwelling to make it suitable for human habitation. As the first judgment points out, living in a house unsuitable for human habitation cannot constitute a proper exercise of the right of residence protected by ESTA. The respondents conduct, therefore, amounted to interference with Ms Daniel's right and was a breach of the negative duty placed on them by section 25(6) of the Constitution read with ESTA.

[200] ESTA provides a legal framework within which an existing right of access to land may be interfered with or even terminated. Most significantly, ESTA recognises that there is no duty on a private person to make the right of access to land a reality. Central to the security of tenure which the legislation seeks to safeguard is the property owner's consent to an occupier to reside on or use its land. ESTA defines this consent as including both the express and tacit consent of the owner or a person in charge of the land in question.

[201] The consent envisaged in terms of ESTA is the source of the right of residence from which the negative duty of not interfering with that right arises. Once the right of residence is created, the corresponding negative duty comes into existence. But that duty remains alive for the duration of the right of residence. The bearer of the

right of residence is protected by ESTA against interference with the enjoyment of the right from everyone, including the landowner. Once granted, consent to residence on land may only be terminated in terms of section 8 of ESTA.[200] Section 8 prescribes conditions under which the right of residence may be terminated. If the right of residence is lawfully terminated, the negative duty falls away automatically.

[202] In *PE Municipality* this Court delineated the inter-connectedness of the rights in section 25 of the Constitution and their relationship with the housing rights in section 26. Sachs J said:

> "Much of this case, accordingly, turns on establishing an appropriate constitutional relationship between s 25, dealing with property rights, and s 26, concerned with housing rights. The Constitution recognises that land rights and the right of access to housing and of not being arbitrarily evicted, are closely intertwined. The stronger the right to land, the greater the prospect of a secure home. Thus, the need to strengthen the precarious position of people living in informal settlements is recognised by s 25 in a number of ways. Land reform is facilitated, and the State is required to foster conditions enabling citizens to gain access to land on an equitable basis; persons or communities with legally insecure tenure because of discriminatory laws are entitle to secure tenure or other redress; and persons dispossessed of property by racially discriminatory laws are entitled to restitution or other redress. Furthermore, ss 25 and 26 create a broad overlap between land rights and socio-economic rights, emphasising the duty on the State to seek to satisfy both, as this Court said in *Grootboom.*
>
> There are three salient features of the way the Constitution approaches the interrelationship between land hunger, homelessness and respect for property rights. In the first place, the rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self-enforcing. For the main part they presuppose the adoption of legislative and other measures to strengthen existing rights of tenure, open up access to land and progressively provide adequate housing. Thus, the Constitution is strongly supportive of orderly land

[200] Section 3(1) of ESTA provides:

> "Consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of section 8."

> reform, but does not purport to effect transfer of title by constitutional fiat. Nor does it sanction arbitrary seizure of land, whether by the State or by landless people. The involved in s 26(3) are defensive rather than affirmative. The land-owner cannot simply say: This is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers."[201]

[203] However, here the complaint was not that Ms Daniels's right of residence was terminated. It was that the respondents prevented her from enjoying that right fully by stopping her from making her home suitable for human habitation. This is the interference she seeks protection from.

[204] For these reasons I support the order proposed in the first judgment.

ZONDO J:

Introduction

[205] The issue for determination in this matter is whether or not the applicant is entitled to effect certain improvements to the dwelling she occupies on the second respondent's land on Chardonne farm, a farm on Blaauwklippen road outside Stellenbosch, without the consent of the first or second respondent. The dwelling is one half of a small cottage. The half of the small cottage that the applicant occupies has a kitchen and one bedroom.

Brief background

[206] The applicant is an adult woman employed as a domestic worker. She resides on the second respondent's land as an occupier as defined in the Extension of Security of Tenure Act[202] (ESTA) together with her two children one of which is now an adult.

[201] *PE Municipality* above n 163 at paras 19 and 20.

[202] 62 of 1997. Section 1 of ESTA defines an "occupier" as meaning:

> ". . . a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding—

She is divorced. The applicant and her former husband lived in the same house before they got divorced. The applicant's husband was employed by the second respondent when she started living with him in the dwelling. After the two had been divorced, the applicant continued to live in the dwelling together with her children.

[207] The applicant wants to effect certain improvements to the dwelling. It is common cause that the condition of the dwelling is such that living there violates the applicant's right to human dignity as well as the right to human dignity of her children who live with her on the property. It is also common cause that the improvements that the applicant seeks to effect are not luxurious improvements but basic improvements that, once effected, will enable the applicant to live on the property with dignity. The applicant will pay for the improvements from her own pocket. She, accordingly, does not ask the respondents to pay any costs for the improvements. The second respondent is not prepared to give the applicant consent to effect the improvements. Nor is the first respondent who on the farm is a "person in charge" as defined in ESTA.[203]

Jurisdiction and leave to appeal

[208] I have read the judgments of my Colleagues Madlanga J (first judgment), Froneman J (second judgment), Cameron J (third judgment) and Jafta J (fourth judgment). For the reasons given in the first judgment, I agree that this Court has jurisdiction and that the applicant should be granted leave to appeal. With regards to the appeal, I prefer to decide the matter on the basis set out below.

(a) . . .
(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
(c) a person who has an income in excess of the prescribed amount;"

[203] Section 1 of ESTA defines a "person in charge" as meaning: "a person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question".

Appeal

[209] I have already pointed out that the applicant is an "occupier" on the second respondent's land as defined in ESTA. As such, she enjoys certain rights including those in sections 5[204] and 6[205] of ESTA. The question for determination is whether the applicant is entitled to effect improvements on the dwelling she occupies without the consent of the first or second respondent in circumstances where, without those improvements, living in the dwelling means living in conditions of human indignity and the improvements she seeks to effect will enable her and her children not to live in conditions of human indignity. It seems to me that one could also formulate the question for determination this way: does a landowner have the right to prevent an occupier as defined in ESTA from effecting improvements to his or her[206] dwelling which will enable him or her to live in the dwelling under conditions that do not violate his or her right to human dignity?

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[204] Section 5 of ESTA reads:

> "Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to—
>
> (a) human dignity;
>
> (b) freedom and security of the person;
>
> (c) privacy;
>
> (d) freedom of religion, belief and opinion and of expression;
>
> (e) freedom of association; and
>
> (f) freedom of movement,
>
> with due regard to the objects of the Constitution and this Act."

[205] Section 6(1) and (2) of ESTA reads as follows in so far as it is relevant to this case:

> "(1) Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.
>
> (2) Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right—
>
> (a) to security of tenure;
>
> . . .
>
> (d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997. . ."

[206] I say "his or her" dwelling for convenience as the dwelling does not belong to an occupier but belongs to the landowner.

[210] I am of the view that under ESTA an occupier has a right to effect improvements to his or her dwelling without the consent of the owner of the land where, as here, the improvements are basic improvements that will ensure that the occupier ceases to live in conditions of human indignity. In this case there is no suggestion by the respondents that they will suffer any prejudice if the applicant were to effect the improvements she seeks to effect.

[211] The respondents contended that the applicant did not have a right to effect the improvements to the dwelling without their consent. The respondents also contended that there were certain regulations that needed to be complied with before improvements could be effected to the dwelling which had not yet been complied with. Obviously, the applicant would have to ensure compliance with any applicable legal requirements before improvements could be effected if this Court's decision were to be that she does not require the consent of the first or second respondent to effect the improvements. She has indicated that she wishes to have a determination of the dispute first because, if it is determined against her, the issue might fall away but, if it is determined in her favour, she would then need to approach the relevant authorities to ensure compliance with any applicable legal requirements before she could effect the improvements. Therefore, in my view, if the order that this Court makes favours the applicant, it should not be construed as exempting her from the obligation to comply with any applicable legal requirements before effecting the improvements.

[212] The basis for my conclusion that the applicant has a right to effect improvements to the dwelling without the consent of the first or second respondent is this. The applicant made it clear in her founding affidavit that the right to improve the dwelling she occupies is "an incidence of [her] rights as an occupier in terms of ESTA". Some of those rights are to be found in section 5 of ESTA. Those in section 5 include the right to human dignity. In so far as section 5 may be relevant, it reads:

> "Subject to *limitations which are reasonable and justifiable* in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to—
>
> (a) human dignity;
>
> . . .
>
> with due regard to the objects of the Constitution and this Act."

It is to be noted that the section 5 rights are subject to limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[213] The applicant drew attention to the following opening words in section 6(2), namely:

> "Without prejudice to the generality of the provisions of section 5 and subsection (1), and *balanced with the rights of the owner or person in charge, an occupier shall have the right* . . . ."

She stated in her affidavit that it would be submitted on her behalf at the hearing that the rights in section 6 of ESTA do not constitute a closed list. One of the rights in section 6 is the right provided for in section 6(2)(d). That is an occupier's right "to family life in accordance with the culture of that family".[207]

[214] In *Hattingh*[208] this Court dealt, among other things, with the phrase "balanced with the rights of the owner or person in charge" which appears in section 6(2) of ESTA. There, we said:

> "In my view the part of section 6(2) that says: 'balanced with the rights of the owner or person in charge' calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part

[207] See section 6(2)(d) above n 205.

[208] *Hattingh v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) at paras 32 and 33.

> enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity into the inquiry required by section 6(2)(d)."[209]

[215] We also said in *Hattingh* that the purpose of the conferment of the right to family life in section 6(2)(d) that an occupier enjoys is "to ensure that, despite living on other people's land, persons falling within this vulnerable section of our society would be able to live a life that is as close as possible to the kind of life that they would lead if they lived on their own land".[210] Unless there is to be prejudice to the respondents, we should lean towards a conclusion that would assist the applicant and her children to live a life that is as close as possible to the kind of life that they would lead if they lived on their own land.

[216] It seems to me that the provisions of ESTA have infused the requirements of justice and equity into the relationship between an occupier and the land owner or person in charge in a way similar to, though not to the same extent as, the way the unfair labour practice provisions of the now repealed Labour Relations Act, 1956[211] did to the employer-employee relationship after the amendments effected to that Act subsequent to 1979. Therefore, the question for determination may be decided on the basis of what would be just and equitable between the parties when the rights of the occupier are balanced against those of the land owner or the person in charge.

[217] In my view, when considerations of justice and equity are taken into account and a balance is struck between the rights of the applicant and those of the first and/or second respondents there can only be one answer to the question for determination. That is that the applicant is entitled to effect the improvements she seeks to effect and she does not need the consent of the first and/or second respondent. The improvements are basic. If the improvements are effected, there will be no prejudice

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[209] Id at para 32.

[210] Id at para 35.

[211] 28 of 1956, as amended.

whatsoever to the respondents and yet the improvements will mean a great deal to the applicant and her children. However, that the applicant does not need the respondents' consent does not mean that she need not consult them about her intentions so as to look at logistical arrangements that may need to be made to ensure that there is minimal inconvenience to all parties. In this regard I agree with the first judgment that there should be meaningful engagement between the parties.

[218] For the above reasons I agree with the order proposed in the first judgment.

For the Applicants:	P Hathorn SC and M Adhikari instructed by JD Van Der Merwe Attorneys.
For the First Respondent:	C Steinberg and R Tshetlo instructed by Gerhard Gous Attorney.
For the Amicus Curiae:	M Bishop and S Sephton instructed by the Legal Resources Centre.