

ESTA Occupiers and the Construction of Buildings and Homesteads on Farmland: Addressing Critical Issues in Light of

Prinsloo NO v Ngcongwane [2023] ZALCC 22 and
Basfour 3327 (Pty) Ltd v Thwala (Leave to Appeal)
[2023] ZALCC 28*

1 Introduction

The purpose of the Extension of Security of Tenure Act (62 of 1997) (ESTA) is to enhance and promote the ideal of long-term security of tenure for occupiers of land on an equitable basis, promote land-tenure reform as a means of redressing the results of past discrimination and facilitate land-tenure justice (Preamble of ESTA; see further, Pienaar “Farm Workers: Extending Security of Tenure in Terms of Recent Legislation” 1998 *SAPL* 423 423–437; Scheepers and Du Plessis “Extension of Security of Tenure Act: A Bone of Contention” 1998 *THRHR* 473 473–482; Keightley “The Impact of the Extension of Security of Tenure Act on an Owner’s Right to Vindicate Immovable Property” 1999 15 *SAJHR* 277 277–307). The history of land dispossession and labour tenancy is important to this context and connects with the purpose of ESTA. (For the cause and the result of the historical discrimination, how people ended up landless and with insecure tenure, see generally Pienaar 1998 *SAPL* 423 423–428; *Daniels v Scribante* 2017 (4) SA 341 (CC) par 14–21; *Sibanyoni v Holtzhausen* [2019] ZALCC 11 par 43–50). To fulfil the purpose of ESTA as contemplated in the Preamble, the objects of ESTA are, among others, to afford certain rights and duties to persons who reside on land that they do not own (Preamble of ESTA; ss 5 and 6 of ESTA).

These rights and duties are as follows: an ESTA occupier has the right to reside on and use land and have access to certain services, subject to the landowner’s consent or agreement (s 6(1) of ESTA; see also *Nkosi v Buhrmann* [2001] ZASCA 98 par 48). Section 1 of ESTA defines “consent” to mean

“express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or

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eviction by a holder of mineral rights, includes the express or tacit consent of such holder”.

A person in charge is the person who also has the legal authority to give consent to another person to reside on and use land (s 1 of ESTA).

The rights of an ESTA occupier must be balanced against those of an owner in case there is a tension in the exercise of their rights (s 6(2) of ESTA). An ESTA occupier has the right: to security of tenure (s 6(2)(a) of ESTA (for the meaning of security of tenure, see generally Pienaar *Land Reform* (2014) 384–385); to receive postal or other communication (s 6(2)(c) of ESTA); to family life in accordance with the culture of their family; to bury a deceased family member who resided on the land at the time of their death in accordance with their religion or cultural belief (s 6(2)(d) of ESTA); to have access to water, educational or health services (s 6(2)(e)–(f) of ESTA); and to take reasonable measures to maintain the existing dwelling occupied by them or members of their family (s 6(2)(dB) of ESTA).

A family member of an ESTA occupier has the right to bury the deceased occupier in the land on which they resided in accordance with their religion or cultural belief (s 6(5) of ESTA). An ESTA occupier has the right to receive *bona fide* visitors at reasonable times and for reasonable periods (s 6(2)(b) of ESTA). An owner may impose reasonable conditions applicable to visitors to safeguard life, property or prevent undue disruption of work on the land (s 6(2)(b)(i) of ESTA). An ESTA occupier is liable for any harm or damage caused by a visitor (s 6(2)(b)(ii) of ESTA).

The duties of an ESTA occupier are stated in the negative (Miller *Land Title in South Africa* (2000) 496). They may not intentionally and unlawfully harm, threaten or intimidate any other person occupying the land (s 6(3)(a) and (c) of ESTA). Nor may an ESTA occupier cause material damage to the property (s 6(3)(b) of ESTA) or assist unauthorised persons to establish new dwellings on the land (s 6(3)(d) of ESTA).

Despite the fact that ESTA occupiers must exercise their rights of residence, use and access to services subject to the owner’s consent and/or agreement, occupiers sometimes do engage in the construction of buildings and homesteads without the consent of the owner or person in charge. In the case of *Prinsloo NO v Ngcongwane* ([2023] ZALCC 22), Prinsloo NO (Prinsloo) sought an interdict directing Mrs Ngcongwane to demolish a building she had constructed without the consent of Prinsloo, and an order declaring her to be in contempt of a previous court order (*Prinsloo NO v Ngcongwane supra* par 1). The previous court order prohibited Mrs Ngcongwane from constructing any further buildings on Prinsloo’s farm (*Prinsloo NO v Ngcongwane supra* par 1). Mrs Ngcongwane constructed a new building without the written consent of Prinsloo (*Prinsloo NO v Ngcongwane supra* par 1). She was found in contempt of court because of her wilful intent to disobey the order (*Prinsloo NO v Ngcongwane supra* par 13).

Basfour 3327 (Pty) Ltd v Thwala ((Leave to Appeal) [2023] ZALCC 28) was an application for leave to appeal on the basis that the Land Claims Court (LCC) misconstrued the application as a contempt-of-court application,

while it was an application to have a building that was constructed declared unlawful and therefore demolished (*Basfour 3327 (Pty) Ltd v Thwala supra* par 6). An order was handed down in favour of Basfour 3327 (Pty) Ltd (Basfour) declaring a particular building unlawful, and that Mr Thwala had to demolish the said structure (*Basfour 3327 (Pty) Ltd v Thwala supra* par 1). This order also prohibited Mr Thwala from the construction of any new buildings without the written consent of Basfour (*Basfour 3327 (Pty) Ltd v Thwala supra* par 1). Mr Thwala constructed a new building without the written consent of Basfour in an attempt to improve his existing dwelling to comply with *obiter* remarks made by the court. He was not found in contempt of court because a wilful intent to disobey the order was absent (*Basfour 3327 (Pty) Ltd v Thwala supra* par 7).

These judgments are important in that the court spoke vehemently against the conduct of ESTA occupiers. This case note would like to critically address five issues. First, the case note questions where *ubuntu* is in light of the conduct of ESTA occupiers in the cases of *Prinsloo NO v Ngcongwane (supra)* and *Basfour 3327 (Pty) Ltd v Thwala (supra)*. Secondly, what was the legislative intent in circumscribing the exercise of the rights of residence, use and access to services? Is this a good approach, and why? Thirdly, is requiring consent too burdensome for ESTA occupiers? Is giving consent by owners for improvements and building onerous? Fourthly, is it generally permitted for ESTA occupiers to construct buildings and homesteads? Or is this issue sufficiently dealt with in section 6(1) of ESTA? Fifthly and finally, what is the balance between the rights and/or interests of owners and ESTA occupiers? Should a balance even be required? Does the balance work?

This case note is divided into four parts. Part one provides the introduction. A discussion of two court cases for context in relation to ESTA and the construction of buildings and homesteads is set out in part two. The critical issues on the conduct of ESTA occupiers are addressed in part three. Part four concludes the case note.

2 ESTA occupiers and the construction of buildings and homesteads on farmland: two recent court judgments

2 1 *Prinsloo NO v Ngcongwane*

2 1 1 Facts

In *Prinsloo NO v Ngcongwane (supra)*, Prinsloo sought an interdict in the form of a *mandamus* directing Mrs Ngcongwane to demolish a building she had constructed without the consent of Prinsloo, and an order declaring her to be in contempt of a previous court order (*Prinsloo NO v Ngcongwane supra* par 1). The previous court order related to a prohibition on the construction of any further buildings on Prinsloo's farm (*Prinsloo NO v Ngcongwane supra* par 1).

When Mrs Ngcongwane arrived on the farm in 1990, she and her husband were allowed to establish a home and stay with their family on the farm and had consent to keep cattle (*Prinsloo NO v Ngcongwane supra* par 2). After Mrs Ngcongwane's husband passed away, she continued to reside on the farm, which was at some point taken over by Prinsloo, the son of the previous owner (*Prinsloo NO v Ngcongwane supra* par 2).

In 2010, a court order was issued against Mrs Ngcongwane regarding the removal of excess cattle, coupled with an order not to construct any further buildings without Prinsloo's prior written consent (*Prinsloo NO v Ngcongwane supra* par 3). In 2023, a notice was further served on Mrs Ngcongwane, instructing her to demolish an unlawfully constructed building (*Prinsloo NO v Ngcongwane supra* par 4).

The issue before the court was whether the new constructed building by Mrs Ngcongwane was erected with the consent of Prinsloo (*Prinsloo NO v Ngcongwane supra* par 5). The difficulty arose as Prinsloo alleged that Mrs Ngcongwane had constructed a building outside the original premises of her homestead, but within the unlawfully extended homestead area (*Prinsloo NO v Ngcongwane supra* par 5). Further, Mrs Ngcongwane averred that, while a court order was handed down against her in 2010, it was not explained to her in Zulu (*Prinsloo NO v Ngcongwane supra* par 6).

2 1 2 Decision

The court (*per* Ncube J) first considered whether there had been contempt of court, underlining that this sanction existed mainly in order to vindicate the rule of law and was thus more than only a punitive measure (*Prinsloo NO v Ngcongwane supra* par 7, citing *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) par 1). As the requirements for contempt of court were met, the onus shifted to Mrs Ngcongwane to show on a balance of probabilities that her non-compliance with the court order was not wilful or *mala fide* (*Prinsloo NO v Ngcongwane supra* par 8 and 11, referring to *Fakie NO v CC11 Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) par 9–10). The record showed that the content of the court order was explained to Mrs Ngcongwane, and when her cattle were removed under the order, she was not surprised by that act (*Prinsloo NO v Ngcongwane supra* par 11–12). Likewise, the content of the notice regarding the demolition of the building was explained and interpreted to her in Zulu (*Prinsloo NO v Ngcongwane supra* par 13).

In these circumstances, Mrs Ngcongwane was found to be in contempt of court (*Prinsloo NO v Ngcongwane supra* par 13). However, the court did not deviate from its usual approach not to grant cost orders (*Prinsloo NO v Ngcongwane supra* par 14–15). Mrs Ngcongwane was again specifically interdicted from giving consent, enabling or assisting persons to erect or establish new structures and/or dwellings on the farm or to take occupation of the farm without the written consent of the owner (*Prinsloo NO v Ngcongwane supra* par 16).

2 2 *Basfour 3327 (Pty) Ltd v Thwala*

2 2 1 Facts

Basfour 3327 (Pty) Ltd v Thwala (supra) was an application for leave to appeal on the basis that the LCC (*per* Flatela J) misconstrued the application as a contempt-of-court application, instead of an application to have a building that was constructed declared unlawful and therefore to be demolished (*Basfour 3327 (Pty) Ltd v Thwala supra* par 6). In 2022, an order had been handed down in favour of Basfour 3327 (Pty) Ltd (Basfour), declaring a particular building unlawful and that Mr Thwala had to demolish the said structure within a 10-day period (*Basfour 3327 (Pty) Ltd v Thwala supra* par 1). This order also prohibited Mr Thwala from constructing any new buildings or structures without the express written consent of Basfour or the person in charge (*Basfour 3327 (Pty) Ltd v Thwala supra* par 1).

In 2023, Basfour noticed a substantial amount of building materials and, on inspection, noticed that an entirely new building was in the process of being constructed (*Basfour 3327 (Pty) Ltd v Thwala supra* par 3). On application, an interim order was granted, interdicting Mr Thwala from continuing with the building until such time as the matter was decided (*Basfour 3327 (Pty) Ltd v Thwala supra* par 3). In April 2023, the matter was before the court, which was framed as a contempt-of-court application considering the previous 2022 order. The application was unsuccessful (*Basfour 3327 (Pty) Ltd v Thwala supra* par 4–5).

In the application for leave to appeal, Basfour contended that the former application was not “a mere contempt of court application”, but was, instead, an application to have the new building declared unlawful (*Basfour 3327 (Pty) Ltd v Thwala supra* par 6). Basfour did not seek an appeal against the finding that Mr Thwala was not in contempt of court, as the element of wilful intent and *mala fides* to disobey the order was absent (*Basfour 3327 (Pty) Ltd v Thwala supra* par 7). The difficulty was that the consequential prayers would fall away if the contempt-of-court application was unsuccessful. Basfour contended that that had never been the intention of the overall application. Instead, irrespective of the finding on contempt of court, the building nevertheless had to be declared unlawful and thus demolished (*Basfour 3327 (Pty) Ltd v Thwala supra* par 10–19).

2 2 2 Decision

In dealing with the grounds for appeal, the court highlighted that the finding that there had been no contempt of court did not *per se* indicate that the court had made a finding as to the building itself. In other words, the absence of a contempt-of-court finding did not mean that the court held that Mr Thwala could build a new dwelling without the consent of Basfour. It was

specifically highlighted that the court had made no such finding (*Basfour 3327 (Pty) Ltd v Thwala supra* par 15).

Concerning the test for leave to appeal, the court had to consider whether the appeal would have a reasonable prospect of success (*Basfour 3327 (Pty) Ltd v Thwala supra* par 20–24). In this regard, the court considered section 17(1) of the Superior Courts Act (10 of 2013), which states that a court may grant leave to appeal where it is satisfied that the applicant (in this case, Basfour) had shown reasonable prospects of success to suggest that a different court would come to a different finding (*Basfour 3327 (Pty) Ltd v Thwala supra* par 20). Accordingly, if there should be such grounds that were shown to suggest that another court would reasonably find differently, then the application for leave to appeal must succeed (*Basfour 3327 (Pty) Ltd v Thwala supra* par 21, citing *The Mont Chevaux Trust v Tina Goosen* 2014 JDR 2335 (LCC) par 6). In essence, what Basfour argued was that the court

“decided his case on a wrong footing. If this had been or is the case of the Applicant, then in my view, the Applicant should have prosecuted the matter as a whole new case altogether under a different case number and not piggybacked his application on the previous prohibitory order of Judge Ncube. That a prohibitory order existed and that the Respondents were in breach of it, whether contemptuously or not, would have been the background context of his application. However, this ground of appeal satisfies section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 in that it provides for some other compelling reason why the appeal should be heard. The application ... therefore succeeds.” (*Basfour 3327 (Pty) Ltd v Thwala supra* par 23)

2.3 *Did the Land Claims Court (now the Land Court) decide these cases correctly?*

It is submitted that the LCC decided the cases of *Prinsloo NO v Ngcongwane (supra)* and *Basfour 3327 (Pty) Ltd v Thwala (supra)* correctly. This is because the conduct of Mrs Ngcongwane and Mr Thwala was inconsistent with ESTA and the Constitution of the Republic of South Africa, 1996 (Constitution), as well as the underlying value of *ubuntu*, which permeates the legislation. Furthermore, their conduct was not in line with previous precedent on ESTA and improving existing dwellings. This precedent is *Daniels v Scribante (supra)*, where the court considered whether an ESTA occupier had a right to make improvements to a dwelling to make it habitable (par 11). The court held that ESTA affords an occupier the right to make improvements to their dwelling without the consent of the owner (*Daniels v Scribante supra* par 57 and 60). However, the court made the point that meaningful engagement between an owner or person in charge and an ESTA occupier was necessary. This is because the exercise of an ESTA occupier's right to make improvements to their existing dwelling had the potential to encroach on an owner's right to property in terms of section 25 of the Constitution (*Daniels v Scribante supra* par 61–62 and 64).

The LCC in *Prinsloo NO v Ngcongwane (supra)* correctly highlighted that where an ESTA occupier is aware of a court order prohibiting them from engaging in the construction of buildings and homesteads and such an

occupier wilfully disregards such an order, they could be found in contempt of court. However, in instances where an ESTA occupier has engaged in the construction of buildings and homesteads in an attempt to improve their existing dwelling to comply with *obiter* remarks made by the court, such an occupier might not be found to be in contempt of court because the element of wilful intent to disobey the order was absent (as shown in *Basfour 3327 (Pty) Ltd v Thwala supra*). Therefore, some awareness and wilful conduct/action on the part of an ESTA occupier is required for a contempt-of-court finding.

3 ESTA occupiers and the construction of buildings and homesteads on farmland: addressing critical issues

3 1 *Where is ubuntu in the conduct of ESTA occupiers in the cases of Prinsloo NO v Ngcongwane and Basfour 3327 (Pty) Ltd v Thwala?*

The late Justice Mokgoro explained that *ubuntu* generally

“translates as ‘humaneness’. In its most fundamental sense it translates as personhood and ‘morality’. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises a respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of ‘humanity’ and ‘menswaardigheid’, are also highly prized. It is values like these that [s 39(1)(a)] requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.” (*S v Makwanyane* 1995 (3) SA 391 (CC) par 307.)

Ubuntu has been referred to in many cases (see *Azanian People’s Organisation v President of the Republic of South Africa* 1996 (4) SA 671 (CC) par 3, 19 and 48; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) par 30; *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) par 65; *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) par 45 and 163; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) par 68–9, 86, 112–8 and 121; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) par 145; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 517 (CC) par 37; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) par 50; *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) par 238; *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) par 62; *The Citizen v McBride* 2011 (4) SA 191 (CC) par 217–218; *Afriforum v*

Malema 2011 (6) SA 240 (EqC) 18; *Everfresh Market Virginia v Shoprite Checkers* 2012 (1) SA 256 (CC) par 71; *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) par 174; *Shoprite Checkers v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) par 47; *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC) par 11 and 135. On the subject of *ubuntu*, see generally Mokgoro “Ubuntu and the Law in South Africa” 1998 4 *PER* 16–32; Mokgoro “Ubuntu, the Constitution and the Rights of Non-Citizens” 2010 *Stellenbosch Law Review* 221–229; Bennett “Ubuntu: An African Equity” 2011 14 *PER* 29–61; Gade “The Historical Development of the Written Discourses on *Ubuntu*” 2011 30 *South African Journal of Philosophy* 303; Radebe and Phooko “*Ubuntu* and the Law in South Africa: Exploring and Understanding the Substantive Content of *Ubuntu*” (2017) *South African Journal of Philosophy* 239–251; Kamga “Cultural Values as a Source of Law: Emerging Trends of *Ubuntu* Jurisprudence in South Africa” (2018) *African Human Rights Law Journal* 625–649; Geduld *Ubuntu as a Constitutional Value: A Social Justice Perspective* (doctoral thesis, University of North West) 2020.)

It is important for ESTA occupiers to demonstrate *ubuntu* as the starting point when exercising their rights involving property belonging to the owner. Such an approach may enable the parties to have respect and concern for each other's rights. ESTA occupiers placing their own interests at the centre, or at the heart of any dispute that involves property belonging to the owner can, in certain circumstances, result in tensions or conflicts that go against building a society based on fundamental values such as *ubuntu*. With reference to ESTA occupiers, constructing buildings and homesteads without the consent of, and/or meaningful engagement with, an owner in the cases of *Prinsloo NO v Ngcongwane* (*supra*) and *Basfour 3327 (Pty) Ltd v Thwala* (*supra*), such conduct does not promote *ubuntu* as this totally disregards the rights and/or legitimate interests of owners.

ESTA and the Constitution do not establish a society where the rights of ESTA occupiers are exercised in total disregard of those of owners. However, ESTA and the Constitution create a value system in terms of which rights are to be claimed, exercised and limited. Section 5 of ESTA clearly sets out these basic values, which are human dignity, equality and freedom. Arguably, *ubuntu* as “part of the deep cultural heritage of the majority of the population” should also permeate the owner-occupier relationship (*Port Elizabeth Municipality v Various Occupiers supra* par 33). This is because *ubuntu* would promote between an owner and ESTA occupier human interdependence, respect and concern in the exercise of their rights (*Port Elizabeth Municipality v Various Occupiers supra* par 33).

Finally, the Preamble of ESTA signals some awareness on the legislature's side regarding the potential tensions or conflicts that might arise in the exercise of rights and/or interests. It is in such circumstances that these values, particularly *ubuntu*, should be infused in the owner-occupier relationship to facilitate a peaceful coexistence between the parties. The Preamble of ESTA arguably requires *ubuntu*, and not hardship, conflict,

social instability, as well as prejudice between the parties. The value of *ubuntu* is therefore an integral part of ESTA, which was enacted to give effect to section 25(6) of the Constitution. Thus, where it concerns the exercise and enjoyment of rights by ESTA occupiers, ESTA (and the Constitution) also did not establish a system where these rights are exercised haphazardly despite the existence of concomitant rights and/or interests of owners. When the two parties (in this case, a White owner and a Black ESTA occupier) are not reconciled, it is submitted that they should try mediation in terms of section 21 of ESTA before approaching the courts. This is because such disputes are costly and lengthy, and mediation is a better dispute-resolution mechanism and much needed in the context of ESTA.

3 2 *What was the legislative intent in circumscribing the exercise of the rights of residence, use and access to certain services? Is this a good approach, and why?*

Section 6(1) of the ESTA provides:

“Subject to the provisions of [ESTA], 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.”

This section confers on ESTA occupiers the rights of residence, use and access to services subject to the consent or agreement of the owner or person in charge. Accordingly, the rights of residence, use and access to services afforded to ESTA occupiers are not “an open-ended, unlimited or unfettered right” (*De Jager v Mazibuko* [2020] ZALCC 7 par 1). These rights must be exercised subject to the owner’s consent or agreement (*Nkosi v Buhrmann supra* par 48).

In *Prinsloo NO v Ngcongwane (supra)* and *Basfour 3327 (Pty) Ltd v Thwala (supra)*, Mrs Ngcongwane and Mr Thwala constructed buildings and homesteads without the written consent of the owner or person in charge. It then becomes important to explore the following two questions. First, what was the legislative intent in circumscribing the exercise of the rights of residence, use and access to services? In terms of the Preamble of ESTA, it is to give “due recognition to the rights, duties and legitimate interests of owners”. This approach, in turn, enhances and promotes the value of *ubuntu* in that concern is given to the rights of owners.

One such right is the right to property in terms of section 25 of the Constitution. The right to property is not protected in terms of ESTA, but is so in the Constitution. However, it suffices to mention that the right to property is inherently linked to the right to human dignity protected in section 5 of ESTA (*Daniels v Scribante supra* par 61).

Section 25(1) of the Constitution provides that “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” It is acceptable and possible that owners may be limited in the use and enjoyment of their property (s 36 of the Constitution). However, such a limitation must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” to ensure that owners’ rights are not infringed (s 36(1) of the Constitution). Thus, if ESTA occupiers do not recognise that owners have rights too and continue to engage in the construction of buildings and homesteads, their conduct amounts to a deprivation of the owner’s property (*De Jager v Mazibuko supra* par 22).

The second question is whether the legislative intent in circumscribing the exercise of the rights of residence, use and access to services is a good approach, and why? As a point of departure, while ESTA provides, protects and promotes long-term security of land tenure, an owner’s right to property should also be protected. This is because the sustainability of commercial farms contributing to the economy may be jeopardised if an owner’s right to property is continuously eroded by an ESTA occupier’s conduct, such as the construction of buildings and homesteads. Also, the State’s objective of promoting and achieving long-term security of tenure for ESTA occupiers of land, especially through the joint efforts of owners, would not be attained. As such, it is good that the legislature circumscribes ESTA occupiers’ exercise of their rights of residence, use and access to services by requiring prior agreement and/or meaningful engagement with the owner or person in charge.

3.3 *Is requiring consent from ESTA occupiers not too burdensome? Is giving consent by owners for improvements and building onerous?*

It is submitted that requiring consent is not too burdensome to ESTA occupiers because ESTA occupiers seem to either neglect to ask for consent (see, for instance, *De Jager v Mazibuko supra* par 8), or are misinformed about the legal position under ESTA regarding the construction of buildings and homesteads (see, e.g., *Basfour 3327 (Pty) Ltd v Thwala* (LCC 160/2017B) [2023] ZALCC 23 par 19). As such, some education or an awareness campaign on farms concerning the rights and duties of ESTA occupiers is important. The education should be conveyed in a language that ESTA occupiers understand to ensure that they are not further prejudiced (as seen in *Prinsloo NO v Ngcongwane supra* par 6).

Although consent is not required for making improvements on an existing dwelling (*Daniels v Scribante supra* par 59–60), it is a requirement for constructing new buildings and homesteads. Whether the ESTA occupier is improving an existing dwelling or constructing a building and homestead to achieve a standard of human dignity, in both instances, meaningful engagement between an owner or person in charge and an ESTA occupier is necessary (*Daniels v Scribante supra* par 62). This is to ensure that the

conflicting rights and/or interests of ESTA occupiers and owners or persons in charge are balanced (*Daniels v Scribante supra* par 62).

Owners appear to find giving consent for improvements and building onerous. First, owners still carry the same understanding of ownership of land as applied in the pre-constitutional dispensation. In other words, ownership is a real right that confers the most complete control over a thing, meaning that the right of ownership entitles the owner to do with their thing as they please, subject to the limitations imposed by the law (Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) 103; see further, *Johannesburg Municipality Council v Rand Townships Register* 1910 TPD 1314 1319; *Regal v African Superlate (Pty) Ltd* [1963] 1 All SA 203 (A) 205–206; *Gien v Gien* 1979 (2) SA 1113 (T) 1120. On the fact that ownership is not absolute, see for instance, Visser “The ‘Absoluteness’ of Ownership: The South African Common Law in Perspective” 1985 *Acta Juridica* 39 39–52; Birks “The Roman Law Concept of Dominium and the Idea of Absolute Ownership” 1985 *Acta Juridica* 1 1–38; Van der Walt and Kleyn “Duplex Dominium: The History and Significance of the Concept of Divided Ownership” in Visser (ed) *Essays on the History of Law* (1989) 213 213–214; Van der Walt and Dhliwayo “The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis” 2017 134 *SALJ* 32 32–52; Dhliwayo *A Constitutional Analysis of Access Rights That Limit Landowners’ Right to Exclude* (LLD dissertation, Stellenbosch University) 2015; Van der Walt “Sharing Servitudes” 2015 4 *European Property LJ* 162 162–222; Boggenpoel (Re)Defining the Contours of Ownership: Moving Beyond White Picket Fences 2019 30 *Stell LR* 234 234–249). However, owners need to recognise that in our constitutional dispensation, ownership of land comes with certain duties or responsibilities (*Baron v Claytile (Pty) Ltd* 2017 (5) SA 329 (CC) par 35). One such duty or responsibility is to provide ESTA occupiers with housing that has secure tenure (*Daniels v Scribante supra* par 49). This differs significantly from the duties and obligations that rested on private owners in the pre-constitutional dispensation (*Baron v Claytile supra* par 35).

Secondly, owners seem to have an issue with the form rather than the substance of the consent or meaningful engagement (see, for example, *Basfour 3327 (Pty) Ltd v Thwala* (LCC 160/2017B) [2023] ZALCC 23 par 60). In other words, the manner in which consent is requested must be formal. The issue of formal consent does not foster egalitarian relations; basically, it mandates that Black ESTA occupiers (the dispossessed) ask for permission to build and improve their homesteads. ESTA occupiers are essentially at the mercy of property owners. This raises concerns about justice, redress and reform from the colonial property regime. However, what is important is not the form of the consent or meaningful engagement, but rather its substance. Mahlanga J explained it thus:

“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. 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.” (*Daniels v Scribante supra* par 64)

This approach reflects the concept of *ubuntu* in that the parties work together to find common ground; thus, it comes with an outcome that is mutually beneficial to them. If engaging each other does not work, it is recommended that the parties resolve their dispute through mediation. In case the parties to the mediation are not able to resolve the matter to the satisfaction of all the parties, they may approach the court.

3 4 *Is it generally permitted for ESTA occupiers to construct buildings and homesteads? Or is this issue sufficiently dealt with in section 6(1) of ESTA?*

ESTA was not enacted to provide for the construction of buildings and homesteads without the consent of an owner or person in charge. The primary purpose of ESTA, as set out in the Preamble, is:

“[t]o provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and the circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from the land; and to provide for matters connected therewith.”

The Preamble of ESTA also states that it is desirable “that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners”. From this statement, one can infer that the State acknowledges the importance of the rights of both ESTA occupiers and owners. Furthermore, the Preamble of ESTA also underlines the fact that we live in a shared society, and every right is worthy of respect and protection.

Furthermore, section 6(3) of ESTA places negative duties on occupiers. ESTA occupiers may not intentionally and unlawfully cause material damage to the property of the owner or person in charge (s 6(3)(b) of ESTA), and may neither enable nor assist unauthorised persons to establish new dwellings on land belonging to the owner (s 6(3)(d) of ESTA). This obligation can arguably be construed to include that ESTA occupiers may not themselves engage in the construction of buildings and homesteads anywhere on farms without prior engagement with the owner or person in charge (see also *De Jager v Mazibuko supra* par 20).

In light of the above brief discussion, it is clear that ESTA occupiers are generally not permitted to construct buildings and homesteads as they wish. This is because the construction of buildings and homesteads without consent and/or after meaningful engagement is contrary to the rights and duties conferred on ESTA occupiers as set out in section 6(1) and (3) of ESTA (see also *De Jager v Mazibuko supra* par 22).

The issue of construction of buildings and homesteads is sufficiently dealt with in sections 6(1) and 6(2)(dB) of ESTA, which provides that, balanced with the rights of the owner or person in charge, an ESTA occupier has the right to take reasonable measures to maintain the dwelling occupied by them or members of their family in a habitable condition (see also, *Daniels v Scribante supra* par 32; see further, Ngwenyama *A Common Standard of Habitability? A Comparison Between Tenants, Usufructuaries and Occupiers* (doctoral dissertation, Stellenbosch University) 2021 119–171).

Section 6(2)(dB) of ESTA clearly extends the rights of ESTA occupiers, while requiring that their rights be balanced so as to give some recognition to the rights of owners. As such, what is permitted in terms of section 6(1) and (2)(dB) of ESTA is not the construction of buildings and homesteads (as shown in *Prinsloo NO v Ngcongwane supra* and *Basfour 3327 (Pty) Ltd v Thwala supra*), but ESTA occupiers are permitted to carry out the maintenance of an existing dwelling by undertaking reasonable measures in line with the general guidelines mentioned in *Daniels v Scribante (supra* par 31–34 and 59–65; see further, Ngwenyama “Improving an Existing or Erecting a New or Additional Structure by ESTA Occupiers: An Analysis of *Daniels v Scribante* 2017 (4) SA 341 (CC), *Erasmus v Mtenje* [2018] ZALCC 12, and *De Jager v Mazibuko* [2020] ZALCC 7” 2024 45 *Obiter* 239–250). Therefore, if an ESTA occupier wishes to improve their current dwelling, they need to rely on section 6(2)(dB) of ESTA as the source of their right to make improvements under ESTA.

3.5 *What is the balance between the rights and/or interests of owners and ESTA occupiers? Is a balance even required? Is it working?*

The first question to explore in this part concerns the balance between the rights and/or interests of owners and ESTA occupiers. Section 6(2) of ESTA 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;
- (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;
- (dB) to take reasonable measures to maintain the dwelling occupied by him or her or members of his or her family;
- (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."

The purpose of section 6(2) of ESTA is to ensure that, despite living on land belonging to another, ESTA occupiers are able to live a life that is as close as possible to the kind of life that they would have lived if they resided on their own land (*Hattingh v Juta* 2013 (3) SA 275 (CC) par 35). However, the extent of the rights set out in sections 5 and 6 of ESTA would generally depend on the striking of a fair balance between enabling the ESTA occupier to enjoy their rights, while also enabling the owner to enjoy their rights. Therefore, depending on the circumstances of each case, if the balance here were unjust and inequitable to the owner of land, this would mean that the ESTA occupier's rights in sections 5 and 6 of ESTA could be appropriately limited (*Hattingh v Juta supra* par 37).

In the context of this case note, the right of ESTA occupiers to make improvements is restricted to *maintaining the existing dwelling* occupied by them in terms of section 6(2)(dB) of ESTA and does not extend to the construction of buildings and homesteads (as seen in *Prinsloo NO v Ngcongwane supra* and *Basfour 3327 (Pty) Ltd v Thwala supra*). An ESTA occupier may effect basic improvements, provided that doing so will not be unjust and inequitable to the owner when the rights of the owner of the land are balanced against the ESTA occupier's rights under sections 5 and 6 of ESTA. Essentially, what matters is that the outcome is just and equitable (in the circumstances of each case) when the rights of the ESTA occupier are balanced against those of the owner of the land (*Hattingh v Juta supra* par 40). Although the current private-property system seems to consistently favour the interests of property owners, where the rights of ESTA occupiers outweigh those of owners, they must be upheld. This is because section 6(2) of ESTA recognises that, in appropriate circumstances, an owner's right to property must give way, in the interests of justice and equity, to the right of vulnerable ESTA occupiers to a secure home. Sachs J in *Port Elizabeth Municipality v Various Occupiers (supra)* pointed out that the term "just and equitable":

"relates to both interests, that is what is just and equitable not only to the persons who occupied the land [belonging to another] but to the landowner as well. He held that the term also implies that a court, when deciding on a matter of this nature, would be obliged to break away from a purely legalistic

approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment.” (*Port Elizabeth Municipality v Various Occupiers supra* par 33)

The second question to examine briefly here is whether a balance is even required. The balancing of the parties’ rights is mentioned in section 6(2) of ESTA, which indicates some awareness from the legislature’s side that extending the rights of ESTA occupiers may sometimes create tension between the owner and an ESTA occupier in enjoying their respective rights (see also, *Daniels v Scribante supra* par 61). As such, a balance is required in the context of ESTA to challenge the historical and persisting hierarchy between owners and ESTA occupiers in order to transform property relations, ensure fairness, and prevent prejudice to both parties.

The third question to determine in this part, is whether the balance is working. It is submitted that the balance is working because the parties generally (a) find it difficult to engage meaningfully with each other, (b) assess the facts of their dispute differently, and (c) represent their own best interests. For example, the owner and the ESTA occupier may differ significantly regarding what reasonable measures to maintain an existing dwelling are. Therefore, it cannot be left solely to the owner to determine whether measures to be implemented by an ESTA occupier on their existing dwelling to make it habitable are reasonable (*Basfour 3327 (Pty) Ltd v Thwala supra* par 14; see also, *Basfour 3327 (Pty) Ltd v Thwala* (LCC 160/2017B) [2023] ZALCC 23 par 54). It is in such instances that a court has to balance out and reconcile the conflicting rights and/or interests of owners and ESTA occupiers. The balance should be determined according to the facts of each case.

4 Conclusion

Although the intention of ESTA, namely, to provide tenure protection, should be welcomed, a lack of respect for the rights of owners by ESTA occupiers in engaging in the construction of buildings and homesteads without consent and/or meaningful engagement raises serious concerns. These concerns include the reduction of the market value of farmland, the sustainability of commercial farms contributing to the economy and the discouragement of a working partnership between the State and owners to achieve long-term security of tenure. It cannot be denied that ESTA has limited the exercise of property rights by extending the rights of ESTA occupiers. However, due recognition should still be given to the rights of owners. Giving recognition to the rights of owners does not mean that the hierarchy between owners and ESTA occupiers should remain intact. ESTA must be interpreted to challenge or transform property relations and give effect to the value of *ubuntu*.

The construction of buildings and homesteads is not permitted in terms of ESTA, as shown in *Prinsloo NO v Ngcongwane (supra)* and *Basfour 3327 (Pty) Ltd v Thwala (supra)*. The construction of buildings and homesteads is

unlawful because such conduct contravenes the fundamental rights of owners protected in section 5 of ESTA and section 25 of the Constitution. However, there is a regulatory provision in section 6(2)(dB) of ESTA relating to taking reasonable measures to maintain an existing dwelling occupied by an ESTA occupier. This provision can be relied on by ESTA occupiers to make their dwelling habitable after meaningful engagement with the owner or person in charge.

It is important that ESTA occupiers or owners do not represent their own interests. The interests of both owners and ESTA occupiers are important in light of ESTA, and where there is a clash, their interests should be balanced out and reconciled in a just manner, taking into account the specific circumstances relevant to each particular case. The success of the owner-occupier relationship is dependent on the parties finding common ground in times of conflict and on how fairly they deal with each other.

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