

The Obligation on Landowners to Accommodate ESTA Occupiers on their Land: Critically Analysing *Daniels v Scribante* 2017 4 SA 341 (CC)

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Abstract

In *Daniels v Scribante* (hereafter the *Daniels* case) the Constitutional Court had to decide whether: (a) the *Extension of Security of Tenure Act* 62 of 1997 (ESTA) afforded Ms Daniels the right to make improvements to her dwelling; (b) if consent from the person in charge, Mr Scribante, was a requirement for Ms Daniels to make such improvements; and (c) if consent was not a requirement, if Ms Daniels could effect improvements to the total disregard of Mr Scribante. The judgment in *Daniels* is important not only because it paved the way for Ms Daniels to effect improvements on her existing dwelling without the consent of Mr Scribante, but also because it showed that under section 8(2) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) on the application of the Bill of Rights Mr Scribante owed a positive obligation to Ms Daniels to ensure that she lived in conditions that afforded her human dignity. In *Daniels* the Constitutional Court indicated that private landowners were enjoined by section 25(6) of the Constitution through ESTA to accommodate ESTA occupiers on their land. According to the Constitutional Court in *Daniels*, the nature of the obligation imposed by section 25(6) of the Constitution was both negative and positive, and in this particular case it rested on Mr Scribante. Against this background, this case note provides at the outset the salient facts and judgment of the *Daniels* case. This is followed by an analysis aimed at critiquing the judgment in *Daniels* pertaining to what is expected of private landowners in the new constitutional dispensation. It is concluded that more may be required from the private landowner – a positive duty – to ensure that ESTA occupiers enjoy fundamental rights.

Keywords

ESTA occupiers; property rights of private landowners; horizontal application of rights; balancing of rights.

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1 Introduction

In *Daniels v Scribante* (hereafter the *Daniels case*)¹ the Constitutional Court had to decide whether: (a) the *Extension of Security of Tenure Act* 62 of 1997 (ESTA)² afforded Ms Daniels the right to make improvements to her dwelling; (b) if consent from the person in charge, Mr Scribante, was a requirement for Ms Daniels to make such improvements; and (c) if consent was not a requirement, if Ms Daniels could effect improvements to the total disregard of Mr Scribante.³ This judgment is important, not only because it paved the way for Ms Daniels to effect improvements on her existing dwelling without the consent of Mr Scribante,⁴ but also because it showed that under section 8(2) of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution) on the application of the Bill of Rights Mr Scribante owed a positive obligation to Ms Daniels to ensure that she lived in conditions that afforded her human dignity.⁵ In *Daniels* the Constitutional Court indicated that private landowners were enjoined by section 25(6) of the Constitution⁶ through ESTA to accommodate ESTA occupiers⁷ on their

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¹ *Daniels v Scribante* 2017 4 SA 341 (CC) (the *Daniels case*).

² The preamble states that the *Extension of Security of Tenure Act* 62 of 1997 (ESTA) was enacted: "To 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."

³ *Daniels case* para 11.

⁴ *Daniels case* paras 57 and 60.

⁵ *Daniels case* para 49.

⁶ Section 25(6) of the *Constitution of the Republic of South Africa, 1996* (the Constitution) states 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".

⁷ Section 1 of ESTA provides that an occupier means: "a person who resides 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 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 a person who has an income in excess of the prescribed amount".

land.⁸ According to the Constitutional Court in *Daniels*, the nature of the obligation imposed by section 25(6) of the Constitution was both negative and positive and in this particular case it rested on Mr Scribante.⁹ Against this background, this case note provides at the outset the salient facts and judgment of the *Daniels* case. This is followed by an analysis aimed at critiquing the judgment in *Daniels* pertaining to what is expected of private landowners in the new constitutional dispensation.

2 Salient facts

Ms Daniels was residing on a farm owned by Chardonne Properties CC. Her occupational rights on the farm were protected in terms of ESTA.¹⁰ Ms Daniels wished to effect basic improvements at her own expense on her existing dwelling.¹¹ The nature of these improvements included levelling the floor, paving a part of the area outside, and installing an indoor water supply, a washbasin, a window and a ceiling.¹² She had resided in the dwelling with her family for sixteen years.¹³ Mr Scribante, the person in charge,¹⁴ accepted that the dwelling was uninhabitable and lacked the most basic human amenities, such as running water.¹⁵ Ms Daniels successfully argued in the Constitutional Court that her rights in terms of sections 5 and 6 of ESTA included the right to make improvements to her existing dwelling.¹⁶

Mr Scribante, however, argued that Ms Daniels' rights, in terms of ESTA, were contained in section 6 of ESTA.¹⁷ Section 6 of ESTA does not expressly grant Ms Daniels the right to improve her existing dwelling. Therefore, per Mr Scribante's argument she did not have a right in terms of ESTA to effect any improvements to her existing dwelling.¹⁸ Furthermore, Mr Scribante contended that since in terms of section 13 of ESTA he may be ordered to compensate Ms Daniels for improvements made on her existing dwelling, affording Ms Daniels the asserted right would effectively impose a positive obligation on him to finance the improvements on the existing dwelling. This meant that a positive obligation could not be imposed on Mr Scribante.¹⁹

⁸ *Daniels* case para 49.

⁹ *Daniels* case para 49.

¹⁰ *Daniels* case para 3.

¹¹ *Daniels* case para 8.

¹² *Daniels* case para 7.

¹³ *Daniels* case para 4.

¹⁴ Section 1 of ESTA states that a person in charge is: "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".

¹⁵ *Daniels* case para 7.

¹⁶ *Daniels* case para 10.

¹⁷ *Daniels* case para 27.

¹⁸ *Daniels* case para 27.

¹⁹ *Daniels* case para 37.

3 Judgment

In *Daniels* the Constitutional Court rejected Mr Scribante's approach to the interpretation of ESTA.²⁰ It held the reading of section 6 of ESTA to be unduly narrow, considering the constitutional context and the purpose for which ESTA was enacted.²¹ The Constitutional Court further found that the living conditions of Ms Daniels did not accord with standards of human dignity in terms of section 5 of ESTA.²² Moreover, the Constitutional Court pointed out that the notion of "reside" in section 6(1) of ESTA and "security of tenure" in section 6(2)(a) of ESTA must mean, at the very least, that the existing dwelling must be habitable.²³ This statement points towards the standard of habitability in the context of ESTA occupiers.²⁴

While in *Daniels* the Constitutional Court acknowledged that the constitutional rights enjoyed by Ms Daniels were circumscribed to the extent provided for in ESTA, which does not mention the right to make improvements on an existing dwelling, the Court found that to deny Ms Daniels the right to make the existing dwelling habitable was to deprive Ms Daniels of her right to human dignity.²⁵ As a result, the Court concluded that ESTA afforded Ms Daniels the right to make improvements to her existing dwelling without the consent of Mr Scribante.²⁶

However, the Court held that Mr Scribante and Ms Daniels needed to engage meaningfully regarding any improvements to the existing dwelling.²⁷ This was because if Ms Daniels exercised her right to make improvements on the existing dwelling her conduct could have the potential to infringe on Mr Scribante's right to property in terms of section 25 of the Constitution.²⁸ As Mr Scribante and Ms Daniels had failed to engage meaningfully regarding the implementation of the proposed improvements on the existing dwelling, the Court ordered them to do so.²⁹

Concerning the imposition of a positive obligation on a private landowner, the Constitutional Court found that it would be unreasonable to require private landowners to bear the exact same obligations (i.e. positive duties)

²⁰ *Daniels* case paras 28-29, citing with approval the cases of *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 52.

²¹ *Daniels* case para 29.

²² *Daniels* case para 31.

²³ *Daniels* case para 32.

²⁴ On the standard of habitability, see Ngwenyama *Common Standard of Habitability* 121-144.

²⁵ *Daniels* case paras 27 and 33-34.

²⁶ *Daniels* case paras 57 and 60.

²⁷ *Daniels* case para 62.

²⁸ *Daniels* case para 61.

²⁹ *Daniels* case paras 64 and 71.

as the state.³⁰ In this particular case, the Court held that the private landowner was bound by the positive obligations imposed by the right of security of tenure.³¹ However, a private landowner would bear a positive obligation only after a court had taken into account the following considerations: (a) the nature of the right in question; (b) the history behind the right; (c) the aim of the right; (d) the best way to achieve the intended goal of the right; (e) the potential that the right in issue could be interfered with by a private owner other than the state or its arms; and (f) whether not holding the landowner liable for infringing the right would render the right ineffective.³²

4 Analysis

4.1 Horizontal application of rights prior to *Daniels*

Section 8(2) of the Constitution provides that a right in the Bill of Rights binds a private 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". This section signals that the Bill of Rights has horizontal application between private individuals.³³ In relation to private landowners who accommodate ESTA occupiers on their land, they would generally be obliged to refrain from any conduct that infringes upon the rights of ESTA occupiers.³⁴

In the case of *Khumalo v Holomisa* (hereafter the *Khumalo* case),³⁵ a well-known politician sought to sue a media house responsible for the publication of a newspaper on the ground that the house had published a false article that defamed the politician.³⁶ The media house contended that section 16³⁷

³⁰ *Daniels* case para 40.

³¹ *Daniels* case para 49.

³² *Daniels* case para 39.

³³ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 34-35 (hereafter the *Grootboom* case). For academic literature on the horizontal application of the Bill of Rights in South Africa, see generally Cheadle and Davis 1997 SAJHR 44-66; Sprigman and Osborne 1999 SAJHR 25-51; Liebenberg 2008 TSAR 464-480; De Vos *et al* *South African Constitutional Law* 417-419.

³⁴ *Grootboom* case para 34. See further, *Daniels* case para 49; *In re: Certification of the Constitution of the Republic of South Africa* 1996 1996 4 SA 744 (CC) para 78; *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 2 SA 140 (CC) paras 33-34; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) paras 68-71; *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC) para 46; *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) para 13; *S v Baloyi* 2000 2 SA 425 (CC) para 11.

³⁵ *Khumalo v Holomisa* 2002 5 SA 401 (CC) (the *Khumalo* case).

³⁶ *Khumalo* case para 1.

³⁷ Section 16 (1)-(2) of the Constitution provides that: "[e]veryone has the right to freedom of expression, which includes (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. The right in subsection

read with section 8 of the Constitution required that the politician in a defamation action allege and prove falsity.³⁸ The court of first instance dismissed this contention. It pointed out that the Supreme Court of Appeal had confirmed that in terms of the common law, public policy or *boni mores* required that the publication of a *prima facie* defamatory statement was not unlawful only if that statement was true and made in the interest of the public, and therefore justified. Thus, the *prima facie* defamatory statement had to be false in order to meet the requirement of unlawfulness.³⁹ The media house approached the Constitutional Court for leave to appeal against the dismissal by the court of first instance. Leave to appeal was granted.

At the Constitutional Court the media house relied on section 16 of the Constitution guaranteeing the right to freedom of expression. The Constitutional Court in *Khumalo* mentioned that this was an important right that was essential to the practice of democracy and individual freedom. The mass media had a particular role in the protection of freedom of expression to ensure that individual citizens were able to receive information and ideas. The media house was thus a bearer of both constitutional rights to freedom of expression and obligations.⁴⁰ The Constitutional Court had to determine in terms of sections 8(2) and 8(3) of the Constitution whether the right to freedom of expression had direct horizontal application to a private individual.⁴¹ Having considered these sections the Court found that the right to freedom of expression was of direct horizontal application because of the intensity of the right and the potential invasion of the right by private individuals other than organs of state.⁴²

In the case of *Governing Body of the Juma Masjid Primary School v Essay* (hereafter the *Juma Masjid* case)⁴³ the horizontal application of the right to basic education was considered. The provincial department of education was operating a public school on private land owned by a trust.⁴⁴ The trust sought to evict the school from the property because the department had failed to conclude an agreement for the use of the land.⁴⁵ The Constitutional Court had to determine whether the trust had any constitutional obligations

(1) does not extend to (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

³⁸ *Khumalo* case para 2.

³⁹ *Khumalo* case para 5, citing *Holomisa v Khumalo* 2002 3 SA 38 (T) 65-69 and *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA).

⁴⁰ *Khumalo* case paras 21-24.

⁴¹ *Khumalo* case paras 31-32.

⁴² *Khumalo* case para 33.

⁴³ *Governing Body of the Juma Masjid Primary School v Essay* (CCT 29/10) [2011] ZACC 13 (11 April 2011) (the *Juman Masjid* caes).

⁴⁴ *Juma Masjid* case para 1.

⁴⁵ *Juma Masjid* case para 1.

in terms of the right to basic education that would prevent the eviction of the school. The Court found that private parties may, in specific circumstances, be bound by negative and positive obligations of socio-economic rights.⁴⁶ The Court pointed out that the purpose of section 8(2) of the Constitution was "not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It was rather to require private individuals not to interfere with or diminish the enjoyment of rights by others".⁴⁷ In this particular case the Court held that the trust was bound by the negative obligation imposed by the right to basic education because of the importance of the right and the potential invasion of the right by private individuals other than organs of state. The negative obligation meant that the trust must not interfere with or diminish the enjoyment of the right to basic education.⁴⁸

In the light of the *Khumalo* and *Juma Masjid* cases there is no constitutional bar to the imposition of a positive obligation on a private individual if it is reasonable and justifiable under the circumstances. Whether or not such an obligation could be imposed on a private individual depended on factors such as the importance of the right and the potential invasion of the right by private individuals other than organs of state.

4.2 Did the Constitutional Court in *Daniels* get the decision wrong pertaining to the possibility of a positive obligation resting on a private landowner?

The Constitutional Court did not get the decision in *Daniels* wrong. Section 8(2) of the Constitution places "the nature of the duty" imposed by the right to security of tenure at the centre of the enquiry.⁴⁹ This means that a private individual may incur either a positive or negative obligation depending on the nature of the right in question, coupled with the specifics of the case in question. There is therefore nothing novel about the idea that private individuals could, in specific circumstances, incur positive obligations. This is because "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".⁵⁰

Although it would be unreasonable to require private individuals to bear the same obligations (i.e. positive obligation) as the state, in the *Daniels* case the owner was bound by the positive obligation imposed by the right of

⁴⁶ *Juma Masjid* case para 58.

⁴⁷ *Juma Masjid* case para 58.

⁴⁸ *Juma Masjid* case para 58.

⁴⁹ *Daniels* case para 40.

⁵⁰ Currie and De Waal *Bill of Rights Handbook* 50.

security of tenure.⁵¹ This would mean that a private landowner might be required to act in a positive manner or to do something that would enable the ESTA occupier to live in a state of dignity, and a court is not precluded from imposing a positive obligation on that private landowner to enable ESTA occupiers to enjoy certain rights.

4.3 Is more required from the private landowner?

As already mentioned, in *Daniels* the Constitutional Court held that ESTA may, in certain instances, impose a positive obligation on a private landowner. This should not be construed to mean that private landowners should shoulder the same obligations as the state to fulfil the rights set out in the Constitution or ESTA. However, this statement is in line with the ideology that our constitutional dispensation recognises that ownership of land comes with certain obligations such as ensuring that ESTA occupiers live under conditions that afford that occupier human dignity.⁵² Depending on the nature of the right and the obligation imposed by the right, more may therefore be required from the private landowner in terms of a positive obligation. The words of Pretorius AJ in *Baron v Claytile (Pty) Ltd* (hereafter the *Baron* case)⁵³ are apt in this regard:

Is this a case where it is justified to impose an obligation on private landowners? If in the end the result is such that what could be classified as a horizontal obligation is imposed it must be justified. But often adherence to a strict classification of horizontal or vertical application of the Bill of Rights obfuscates the true issue: whether, within the relevant constitutional and statutory context, a greater "give" is required from certain parties. Any "give" must be in line with the Constitution. This Court has long recognised that complex constitutional matters cannot be approached in a binary, all-or-nothing fashion, but the result is often found on a continuum that reflects the variations in the respective weight of the relevant considerations.⁵⁴

If it is clear and justifiable in the circumstances that a private landowner owes a positive obligation to ensure that an ESTA occupier lives under conditions that afford human dignity, a greater effort should be required from that private landowner. This is because where constitutional rights are at stake, the argument that property should be seen to fulfil a social function carries sufficient weight to impose a positive obligation on a private landowner.⁵⁵ The social obligation of ownership means that rights in property come with a share of responsibilities.⁵⁶ Thus, in instances where constitutional rights are at stake, the social obligation of property in contrast

⁵¹ *Daniels* case paras 40 and 49.

⁵² *Daniels* case para 135, citing *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23 (hereafter the *PE Municipality* case). See further, *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 35.

⁵³ *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) (the *Baron* case).

⁵⁴ *Baron* case para 36, own emphasis added.

⁵⁵ *Daniels* case para 135.

⁵⁶ Dhlwiyano and Dyal-Chand "Property in Law" 309.

to the notion of absolute ownership has been used to argue for a limitation on the use of property by a private landowner and/or the imposition of an obligation on a private landowner to provide others with their constitutional rights.⁵⁷

In the new constitutional dispensation, property further safeguards non-property constitutional rights such as human dignity and is therefore aimed not only at protecting purely economic and/or private interests.⁵⁸ The argument in favour of the social function of property is usually made where there are competing constitutional rights and/or interests of ESTA occupiers and private landowners.⁵⁹ In those circumstances, the argument is used to reconcile and balance the rights and/or interests of private landowners with those of ESTA occupiers in order to promote the democratic rights of the citizenry and allow them to flourish.⁶⁰ It should be mentioned that whether or not a private landowner bears a positive obligation should be decided on a case-by-case basis taking into account the relevant circumstances of the ESTA occupier and the factors stated in *Daniels*.

4.4 The clash between the owner's right to property and the occupier's right to human dignity

In terms of section 5 of ESTA,⁶¹ an ESTA occupier and a private landowner enjoy the same rights, such as human dignity. The enjoyment by a private landowner of the right to property and that of the ESTA occupier of the right to human dignity may sometimes be in tension or may compete.⁶² For example, where an ESTA occupier improves an existing dwelling without consent, a private landowner's right to property under section 25 of the Constitution may be infringed upon.⁶³ It should be mentioned that section 25 of the Constitution is not protected in terms of section 5 of ESTA. There

⁵⁷ Dhliwayo and Dyal-Chand "Property in Law" 309. See further, Mirow 2010 *Fla J Int'l L* 192; Alexander 2011 *Fordham L Rev* 1022-1023; Crawford 2011 *Fordham L Rev* 1089-1134.

⁵⁸ *Daniels* case paras 138-142. See further, Van der Walt *Law of Servitudes* 41.

⁵⁹ Dhliwayo and Dyal-Chand "Property in Law" 309; *PE Municipality* case para 23; *Juma Masjid* case para 70.

⁶⁰ Dhliwayo and Dyal-Chand "Property in Law" 309. Also see Crawford 2011 *Fordham L Rev* 1089-1134.

⁶¹ Section 5 of ESTA provides that: "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."

⁶² *Daniels* case para 61.

⁶³ *Daniels* case para 61.

is no mention of property and protection against arbitrary deprivation. As such, an ESTA occupier must act in such a manner that his or her conduct does not disregard a private landowner's right to property under section 25 of the Constitution.⁶⁴

The total disregard of a private landowner's right to property may intrude on an owner's right to human dignity in terms of section 5(a) of ESTA. This is because the right to human dignity is an acknowledgement of the intrinsic worth of human beings. This statement means that human beings are entitled to be treated as worthy of respect and concern.⁶⁵ The right to human dignity is therefore the foundation of many other rights contained in the Bill of Rights such as the right to property.⁶⁶ As such, if there is a clash between a private landowner's right to property and the occupier's right to human dignity, it is important that a court recognises that while ESTA has extended the rights of ESTA occupiers, the rights and/or legitimate interests of private landowners should be protected as well.

4.5 Is there a need for a limitations clause inquiry?

The fundamental rights set out in ESTA are not absolute. These rights can be limited only on grounds that "are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".⁶⁷ Despite the various factors contained in section 36 of the Constitution,⁶⁸ the most important limitation inquiry in the context of ESTA is an exercise balancing the rights and/or interests of ESTA occupiers and private landowners. To determine whether an infringement of a fundamental right is permissible, the asserted right by the ESTA occupier must be weighed against the conduct of the private landowner to decide whether the conduct could be supported in an open and democratic society based on

⁶⁴ *Daniels* case para 61, where the court stated that an ESTA occupier cannot effect improvements on her existing dwelling to the total disregard of an owner. This is because an owner has a protected right to property under s 25 of the Constitution.

⁶⁵ *S v Makwanyane* 1995 3 SA 391 (CC) para 328 (hereafter the *Makwanyane* case).

⁶⁶ *Makwanyane* case para 328; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

⁶⁷ Section 5 of ESTA, originating from s 36(1) of the Constitution.

⁶⁸ Section 36 of the Constitution states that: "(1) 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.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

constitutional values such as human dignity. It is here that section 6(2) of ESTA is important. This section provides that:

[w]ithout prejudice to the generality of the provisions section 5 and subsection (1), and balanced with rights of the owner or person in charge, an occupier shall have the right to –

- (a) to security of tenure; ...
- (dB) take reasonable measures to maintain the dwelling occupied by him or her or members of his or her family.⁶⁹

According to the Constitutional Court in *Hattingh v Juta*,⁷⁰ the phrase "balanced with the rights of the owner or person in charge" in section 6(2) of ESTA means that a just and equitable balance must be struck between the rights of the ESTA occupier and those of the private landowner.⁷¹ The effect of this statement would be to infuse justice and equity into the matter at hand.⁷² For example, where there are tensions between the private landowner's right to property (in terms of section 25 of the Constitution) and an ESTA occupier's right to improve an existing dwelling, the rights of the private landowner and ESTA occupier, as required by ESTA, must be balanced and reconciled.⁷³ This position means that the right to use land afforded to an ESTA occupier is therefore not an "open-ended, unlimited or unfettered" right that can be exercised by the ESTA occupier without prior consultation with the private landowner.⁷⁴

As Howie JA stated in *Nkosi v Buhrmann*,⁷⁵ that "[a]s far as section 6(1) is concerned, it confers the rights of residence, 'use' and services, subject to the owner's consent or agreement".⁷⁶ It is here that ESTA allows for the balancing of the rights of a private landowner and an ESTA occupier without prejudice to the rights contained in section 5 of ESTA.⁷⁷ This balancing exercise was explicitly performed by the Constitutional Court in *Daniels* when it ordered that the ESTA occupier's entitlement to make improvements on an existing dwelling required that the parties meaningfully engage with

⁶⁹ Paragraph (dB), the part that provides "to take reasonable measures to maintain the dwelling occupied by him or her or members of his or her family", is pending amendment in terms of the *Extension of Security of Tenure Amendment Act 2* of 2018. The actual amendment will take place with effect from a date determined by the President of the Republic of South Africa in terms of a proclamation in the Gazette. The date for this has not been determined.

⁷⁰ *Hattingh v Juta* 2013 3 SA 275 (CC) (hereafter the *Hattingh* case).

⁷¹ *Hattingh* case para. 32.

⁷² *Hattingh* case para. 32.

⁷³ *Daniels* case para 61.

⁷⁴ *De Jager v Mazibuko* (LCC57/2020) [2020] ZALCC 7 (25 August 2020) para 14, citing *Nkosi v Buhrmann* (1/2000) [2001] ZASCA 98 (25 September 2001) para 49.

⁷⁵ *Nkosi v Buhrmann* (1/2000) [2001] ZASCA 98 (25 September 2001) (hereafter the *Nkosi* case).

⁷⁶ *Nkosi* case para. 48.

⁷⁷ Section 6(2) of ESTA.

each other to avoid the violation of the private landowner's right to property under section 25 of the Constitution and the occupier's rights as set out in ESTA.⁷⁸

5 Conclusion

It is clear that in the new constitutional dispensation more is required from private landowners because they may, in specific circumstances, be bound by negative and positive obligations of socio-economic rights. However, it would be unreasonable to require private landowners to bear the exact same obligations as the state with regard to positive obligations. Where it is justified to impose a positive obligation on a private landowner, the courts should do so in line with the constitutional considerations stated in *Daniels*. Such a process would ensure that ESTA occupiers enjoy the fullest possible protection of their fundamental rights and are not further prejudiced by the conduct of private landowners.

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⁷⁸ *Daniels* case paras 61-65.

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List of Abbreviations

ESTA	Extension of Security of Tenure Act 62 of 1997
Fla J Int'l L	Florida Journal of International Law
Fordham L Rev	Fordham Law Review
SAJHR	South African Journal on Human Rights
TSAR	Tydskrif vir die Suid-Afrikaanse Reg