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## Abstract

This case note highlights the importance of access to electricity for occupiers under the *Extension of Security of Tenure Act* 62 of 1997 (hereafter ESTA). More importantly, the case note questions whose responsibility it is to provide ESTA occupiers with access to electricity on farmland. Moreover, it will comment on whether the Land Claims Court (hereafter LCC) got the decision right (or not). Furthermore, it provides a comment on whether the right to human dignity in section 5 of ESTA requires a dwelling on rural or peri-urban land to have access to electricity. It will also comment on whether the *Sibanyoni* judgment was progressive (or not) and why. The conclusion is that access to electricity is essential in modern life to enjoy adequate living conditions. A dwelling without electricity deprives an ESTA occupier of benefits such as utilising electric equipment, which is necessary for daily living. ESTA occupiers are unable to use stoves, which are crucial and safe for cooking. They are also not able to have lights, which are useful to deter criminality in their dwellings. Very importantly, ESTA occupiers' human dignity would be violated or denied to them by refusing to install electricity in their dwellings. The state therefore has a positive obligation to provide ESTA occupiers with access to electricity. Private landowners have only a negative obligation to refrain from impairing ESTA occupiers' right to access to electricity by not unreasonably refusing consent to have electricity installed by the state. The *Sibanyoni* judgment was progressive, among other reasons because it permitted an ESTA occupier to have electricity installed on his dwelling without the consent of the private landowner.

## Keywords

ESTA occupiers; access to electricity; SDG 7; human dignity; horizontal application of rights; property rights of private landowners.

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## 1 Introduction

This case note is about the need of an occupier under the *Extension of Security of Tenure Act* 62 of 1997 (hereafter ESTA) to vindicate his right of access to electricity on a privately owned farm. It is important to reflect for a moment on the fact that during the apartheid era many black South Africans, including ESTA occupiers,<sup>1</sup> were denied the opportunities necessary for enjoying dignified living conditions.<sup>2</sup> Even in post-apartheid South Africa, as shown in *TM Sibanyoni and Sibanyoni Family v Van Der Merwe and Any Other Person in Charge of Farm 177, Vaalbank Portion 13 Hendrina, Mpumalanga* (hereafter the *Sibanyoni case*),<sup>3</sup> ESTA occupiers were deprived by private landowners or persons in charge of basic human rights such as access to electricity.<sup>4</sup> Thus, the purpose of ESTA is to deal with

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\* Lerato Rudolph Ngwenyama. LLB (UNIVEN) LLM (UJ) LLD (SU). Senior lecturer and Co-project leader for the Justice in Practice project in the Faculty of Law Research Unit, North-West University (NWU), School of Undergraduate Studies, Vanderbijlpark Campus, South Africa. Advocate of the High Court of South Africa. Email: 44748582@nwu.ac.za. ORCID: <https://orcid.org/0000-0003-1256-3903>. This case note is partly based on the ideas developed from the doctoral thesis submitted by the author for the completion of the degree of Doctor of Laws at Stellenbosch University, Cape Town. The case note is an extended version of a paper presented at the Wits Law Conference 2022 under the banner "A conference bringing together academics, practitioners and alumni to discuss and share knowledge and experiences of the law". The conference was hosted by the Wits School of Law, Johannesburg, from 13-14 September 2022. I extend my thanks to the conference organisers and to all the other delegates whose papers and contributions during the conference influenced my approach in this case note. The case note was further developed at a writing retreat organised by the NWU Faculty of Law Research Unit hosted at Emerald Resort and Casino in Vanderbijlpark from 31 October – 2 November 2022. The financial support of the NWU Faculty of Law Research Unit is hereby acknowledged. I want to express my gratitude to Privilege Dhlwayo, Tola Fola Olowolafe, Obakeng van Dyk and Nhlanhla Sono for their very generous and thought-provoking comments on earlier drafts of this case note. I am also thankful to the two anonymous peer reviewers for their positive feedback. The opinions expressed in this discussion are my own and should not be attributed to any of the institutions and persons mentioned above. All remaining errors are my own.

<sup>1</sup> This case note is limited to the *Extension of Security of Tenure Act* 62 of 1997 (hereafter ESTA) occupiers who had consent or a right in law to occupy unless otherwise stated, and not to occupiers of other types of property. S 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."

<sup>2</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 23 (hereafter the *Daniels case*).

<sup>3</sup> *TM Sibanyoni and Sibanyoni Family v Van Der Merwe and Any Other Person in Charge of Farm 177, Vaalbank Portion 13 Hendrina, Mpumalanga* (LCC 119/2020) [2021] ZALCC 33 (7 September 2021) (hereafter the *Sibanyoni case*).

<sup>4</sup> Section 1 of ESTA defines an owner as: "the owner of the land at the time of the relevant act, omission or conduct, and includes, in relation to the proposed

situations that are in part perpetuated by past discriminatory laws.<sup>5</sup> The objective of ESTA is thus to give ESTA occupiers the opportunity to enjoy basic rights such as access to electricity that eluded them during apartheid.<sup>6</sup>

Interestingly, a situation partly perpetuated by past discriminatory laws was up for determination in the *Sibanyoni* case. The *Sibanyoni* case dealt with an application for an interdict restraining Ms Van der Merwe from violating Mr Sibanyoni's right to effect improvements on his household. Furthermore, for Ms Van der Merwe to be ordered and directed to permit connection of electricity to Mr Sibanyoni's homestead.<sup>7</sup> The issue before the court was whether the installation of electricity is an improvement, which was reasonably necessary to make Mr Sibanyoni's dwelling habitable thereby giving effect to his right to human dignity.<sup>8</sup>

The Land Claims Court (hereafter the LCC) decided that Mr Sibanyoni was not entitled to a general right to make improvements to his dwelling.<sup>9</sup> According to the LCC, Mr Sibanyoni was only entitled to an order permitting improvements, which were reasonably necessary to render his dwelling habitable and in turn give effect to his right to human dignity.<sup>10</sup> In the circumstances of this case, the LCC found that Mr Sibanyoni was entitled to have electricity installed in his dwelling.<sup>11</sup> The LCC rightfully confirmed Mr Sibanyoni's assertion that the installation of electricity would be an improvement that was reasonably necessary to make his dwelling habitable and thereby giving effect to his right to human dignity as per section 5(a) of ESTA.<sup>12</sup>

As Prof Willemien du Plessis has shown throughout the course of her career, several pertinent issues remain unresolved and new challenges continuously arise in the area of land. This case note therefore continues to critically engage with the most recent developments in this area of law, such

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termination of a right of residence by a holder of mineral rights, such holder in so far as such holder is by law entitled to grant or terminate a right of residence or any associated rights in respect of such land, or to evict a person occupying such land." S 1 of ESTA further defines a person in charge as: "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."

<sup>5</sup> The preamble of ESTA.

<sup>6</sup> *Daniels* case para 23. Also see UN 2022 <https://unstats.un.org/sdgs/report/2022/The-Sustainable-Development-Goals-Report-2022.pdf> adopted by UN Member States in 2015, where it is reported that hundreds of millions of people still lack access to electricity and huge disparities in access to modern sustainable energy persist, leaving the most vulnerable (including ESTA occupiers) even further behind.

<sup>7</sup> *Sibanyoni* case para 1.

<sup>8</sup> *Sibanyoni* case para 16.

<sup>9</sup> *Sibanyoni* case para 27.

<sup>10</sup> *Sibanyoni* case para 27.

<sup>11</sup> *Sibanyoni* case para 27.

<sup>12</sup> *Sibanyoni* case para 24.

as access to electricity for ESTA occupiers. Part 1 of the case note will provide an introduction to the subject matter in question, namely the progressive realisation of the right to have access to electricity for an ESTA occupier in his or her own dwelling. Part 2 of the case note will discuss the importance of access to electricity for ESTA occupiers - a right implied in the right to have access to adequate housing. Part 3 will set out the facts and judgment in the *Sibanyoni* case. More importantly, the subsequent sub-parts will comment on whether the LCC got the decision right (or not). Moreover, it will be important to provide a commentary on whether the right to human dignity in section 5 of ESTA requires private dwellings on farmlands to have access to electricity. Furthermore, the question of whose responsibility it is to provide ESTA occupiers with access to electricity on farmlands is asked in this case note. Finally, the case note will also comment on whether the *Sibanyoni* case was progressive (or not) and why. Part 4 of the case note will draw conclusions to the issues identified.

## 2 Importance of access to electricity as a component of adequate housing

The right to access to electricity is not explicitly provided for in the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution).<sup>13</sup> Section 26(1) of the Constitution, however, provides that everyone has the right to access to adequate housing. In *Government of the Republic of South Africa v Grootboom* (hereafter the *Grootboom* case)<sup>14</sup> Yacoob J acknowledged that the right to access to electricity may be included in the obligation to provide access to adequate housing in section 26 of the Constitution.<sup>15</sup> He went on to say that the right to access to adequate housing includes access to:

available land, appropriate services [such as electricity] and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, [and] there must be a dwelling.<sup>16</sup>

Yacoob J's description of what it means to have access to adequate housing, especially services like electricity, indicates that access to

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<sup>13</sup> *Sibanyoni* case para 13; *Mahlangu v Van der Merwe* (LCC: 142/2019) [2022] ZALCC 5 (3 February 2022) para 17 (hereafter the *Mahlangu* case); *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 34 (hereafter the *Joseph* case); *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* (CCT 44/22) [2022] ZACC 44 (23 December 2022) (hereafter the *Eskom* case) paras 22 and 112. See further, Dube and Moyo 2021 *PELJ* 2 and 9.

<sup>14</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter the *Grootboom* case).

<sup>15</sup> *Grootboom* case para 37.

<sup>16</sup> *Grootboom* case para 35. Also see *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mr Miloon Kothari* UN Doc E/CN.4/2002/59 (2002) para 49.

electricity for housing purposes forms part and parcel of the right to access to adequate housing in section 26 of the Constitution.<sup>17</sup> More importantly, Jacob J's description indicates that electricity is a basic service necessary to enjoy adequate living conditions.<sup>18</sup> The words of Roger J in *Makeshift 1190 (Pty) Ltd v Cilliers*<sup>19</sup> are apt in this regard:

In the modern day, a supply of electricity and water to a residential property is a practical necessity in order for the occupant to use the property as a dwelling.<sup>20</sup>

Similarly, in *Joseph v City of Johannesburg* (hereafter the *Joseph case*),<sup>21</sup> the Constitutional Court recognised that:

Electricity is one of the most common and important municipal services and has become virtually indispensable, particularly in [rural or peri] urban society.<sup>22</sup>

Access to electricity is one of the most important basic amenities for an occupant to use and enjoy the property for the purpose for which it was provided. In other words, for a property to be adequately used and enjoyed as a dwelling, an occupant should have an electricity supply. This is because a property used as a dwelling must meet the characteristics identified by the United Nations Committee on Economic, Social and Cultural Rights (hereafter the CESCR).<sup>23</sup> The characteristics identified by the CESCR indicate instances where ESTA occupiers would be regarded as having access to adequate housing for the purposes of Article 11(1)<sup>24</sup> of the *International Covenant on Economic, Social and Cultural Rights*

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<sup>17</sup> Also see Dugard "Power to the People?" 266, where she points out that the right to electricity may be implied in the right to access to adequate housing enshrined in s 26(1) of the *Constitution of the Republic of South Africa, 1996* (the Constitution).

<sup>18</sup> *Sibanyoni case* para 24.

<sup>19</sup> *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 5 SA 538 (WCC) (hereafter the *Makeshift case*).

<sup>20</sup> *Makeshift case* para 25. See also *Eskom case* para 74; Dube and Moyo 2021 *PELJ* 2.

<sup>21</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC).

<sup>22</sup> *Joseph case* para 34.

<sup>23</sup> In terms of s 39(1)(b) of the Constitution, a court is obliged to consider international law when determining the meaning of the rights in the Bill of Rights. Furthermore, s 233 of the Constitution requires a court to prefer any reasonable interpretation of ESTA that is consistent with international law.

<sup>24</sup> Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (1966) (the ICESCR) provides that: "The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."

(hereafter the ICESCR).<sup>25</sup> Housing, according to the CESCR, will be considered adequate if it is:

habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States Parties to comprehensively apply the Health Principles of Housing prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates.<sup>26</sup>

The CESCR has further observed that housing is adequate if there is:

Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services<sup>27</sup>

Although the CESCR General Comment 4 does not explicitly refer to electricity but instead to energy, the United Nations Special Rapporteur on adequate housing has pointed out that the right to adequate housing includes access to essential services such as electricity.<sup>28</sup> The availability of services in the CESCR General Comment 4 is transmitted to the 2030 Agenda for Sustainable Development Goals (hereafter SDGs),<sup>29</sup> which is classified as a decade of action.<sup>30</sup> Access to electricity is viewed not just as an essential service but as a means to achieve the 2030 Agenda in the fulfilment of human rights such as adequate housing. The 2023 Agenda aims to operationalise the seventeen SDGs into tangible deliverables in the respective areas of focus, in particular the elimination of poverty as a primary goal to be achieved by 2030 and to ensure access to affordable, reliable, sustainable and modern energy for all.<sup>31</sup> This would mean that

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<sup>25</sup> The Covenant was adopted by the General Assembly of the UN on 16 December 1966 and came into force on 3 January 1976. As of 19 June 2019, the Covenant has been ratified by 169 countries. South Africa signed the Covenant on 3 October 1994 and ratified it on 15 January 2015.

<sup>26</sup> *CESCR General Comment No 4: The Right to Adequate Housing (Article 11(1) of the ICESCR)* UN Doc E/1992/23 (1991) (hereafter *General Comment 4*) para 8(d).

<sup>27</sup> *General Comment 4* para 8(b).

<sup>28</sup> Tully 2006 *Northwestern Journal of International Human Rights* 524. Also see Dugard "Power to the People?" 266.

<sup>29</sup> Adopted in 2015 by UN Member States. UN 2022 <https://unstats.un.org/sdgs/report/2022/The-Sustainable-Development-Goals-Report-2022.pdf>.

<sup>30</sup> See UN Date unknown <https://www.un.org/sustainabledevelopment/development-agenda/>.

<sup>31</sup> See Goal 1 and 7 of the 2030 Agenda (UN Date unknown <https://www.un.org/sustainabledevelopment/development-agenda/> 15 and 19).

ESTA occupiers cannot be said to live in adequate housing if that house lacks electricity. More importantly, a house without electricity impacts on the elements of habitability such as threats to health and the physical safety of the occupants. If you deny ESTA occupiers the right to make improvements in the form of installing electricity to their dwellings, you fail to protect them against threats to health and their physical safety. Failure to protect the ESTA occupier from health threats and failure to guarantee his or her physical safety may lead to the ESTA occupier's using traditional bio-mass stoves and other traditional forms of energy which have the potential to cause respiratory health problems and offer an unsafe environment. It is important to grant ESTA occupiers access to electricity because electrically-operated appliances which modern life takes for granted improve living conditions, habitability and welfare.<sup>32</sup> This confirms a minimum standard of adequate housing. In other words, housing is adequate if at the very least the occupants have access to basic services such as electricity.

The right to access to electricity is closely linked to the enjoyment of other pre-existing socio-economic rights such as the right to housing.<sup>33</sup> Thus, when ESTA occupiers do not have access to electricity, the right to have access to adequate housing may be implicated.<sup>34</sup> Arguably, it is not only the right to access to adequate housing that may be at stake when ESTA occupiers do not have access to electricity.<sup>35</sup> Whenever ESTA occupiers approach a court asserting that their socio-economic rights have been infringed, the right to human dignity may also be implicated.<sup>36</sup> This would mean that any claim based on socio-economic rights such as housing must essentially engage the right to human dignity.<sup>37</sup> In the *Grootboom* case the Constitutional Court acknowledged the link between the right to access to adequate housing and human dignity as follows: "All the rights in our Bill of Rights are inter-related and mutually supporting."<sup>38</sup> The court further recognised that the "[s]ocio-economic rights must all be read together in the

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<sup>32</sup> *Sibanyoni* case para 17. Also see Dube and Moyo 2021 *PELJ* 2; UN 2022 <https://unstats.un.org/sdgs/report/2022/The-Sustainable-Development-Goals-Report-2022.pdf> 40.

<sup>33</sup> *Sibanyoni* case paras 18-23, citing *Grootboom* case para 37; *Joseph* case para 34; *Makeshift* case para 25; *Eskom* case para 22; Dugard "Power to the People?" 266-267; *Convention on the Elimination of All Forms of Discrimination against Women* (1979); *General Comment 4* para 8(b); Löfquist 2020 *IJHR* 716 and 723. See further, Dube and Moyo 2021 *PELJ* 9-10.

<sup>34</sup> *Sibanyoni* case paras 18-23.

<sup>35</sup> *Sibanyoni* case paras 18-23.

<sup>36</sup> *Grootboom* case para 83; *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 21 (hereafter the *Jaftha* case); *Daniels* case paras 2 and 31-34. See further, Dube and Moyo 2021 *PELJ* 9.

<sup>37</sup> *Grootboom* case para 83; *Jaftha* case para 21; *Daniels* case paras 2 and 31-34.

<sup>38</sup> *Grootboom* case para 23. Also see Liebenberg *Socio-Economic Rights* 51-54; Muller and Viljoen *Property in Housing* 179.

setting of the Constitution as a whole."<sup>39</sup> This is because their interconnectedness needs to be taken into account whenever these rights are interpreted.<sup>40</sup> Very importantly, rights must be interpreted and understood in their social and historic context, especially in the context of our history of racism, inequality and deprivation.<sup>41</sup>

The right to human dignity (in terms of section 10 of the Constitution), but also with reference to section 5(a) of ESTA, was therefore established to facilitate a move away from the past by emphasising the significance of human beings' having their inherent human dignity respected and protected against intolerable treatment or living condition in our new constitutional dispensation.<sup>42</sup> Furthermore, the right to human dignity was established in the Constitution and ESTA to rectify the indignity suffered by ESTA occupiers. As pointed out above, the indignity was due to past discriminatory laws or inadequate housing that could not provide ESTA occupiers with access to adequate housing that had electricity and protected their human dignity.<sup>43</sup> As most people who are occupiers with rights and obligations set out in ESTA are people who, under apartheid, were not protected in terms of legislation from suffering intolerable living conditions, section 10 of the Constitution, through the provisions of section 5(a) of ESTA, now aims to protect this group of occupiers from living conditions which do not conform to a standard of human dignity.<sup>44</sup>

The state must therefore strive to respect, protect, promote and fulfil the rights of ESTA occupiers.<sup>45</sup> Section 26(2) of the Constitution further obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access to adequate housing. This obligation of the state to provide access to adequate housing is also coupled with the need to provide basic services such as electricity.<sup>46</sup> In the provision of basic services the state must make sure that the provision to communities takes place in a sustainable manner.<sup>47</sup> The proper fulfilment of the obligation to provide electricity will ensure that the quality of the lives of ESTA occupiers is improved and will be in line with the requirements of the Constitution and international law.<sup>48</sup>

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<sup>39</sup> *Grootboom* case para 24.

<sup>40</sup> *Grootboom* case para 24.

<sup>41</sup> *Grootboom* case para 25. Also see Muller and Viljoen *Property in Housing* 179-180.

<sup>42</sup> *Daniels* case paras 1-2.

<sup>43</sup> *Daniels* case paras 1 and 23.

<sup>44</sup> *Daniels* case paras 31 and 34.

<sup>45</sup> Section 7(2) of the Constitution.

<sup>46</sup> *Grootboom* case para 37.

<sup>47</sup> Section 152(1)(b) of the Constitution. See further the *Eskom* case para 103; Muller and Viljoen *Property in Housing* 181. The authors point out that local governments have a statutory obligation to ensure that basic services are realised in communities.

<sup>48</sup> See the preamble of the Constitution. Also see Dugard "Power to the People?" 266; Löfquist 2020 *IJHR* 716 and 723.



It is here that the horizontal application of the Bill of Rights and the courts prior to the *Daniels* case becomes important.<sup>49</sup> The point of departure on the horizontal application of the Bill of Rights on private parties is the case of *Khumalo v Holomisa* (hereafter the *Khumalo* case).<sup>50</sup> In the *Khumalo* case the Constitutional Court had to determine whether the right to freedom of expression had direct horizontal application and concluded that this question had to be determined in terms of sections 8(2) and 8(3) of the Constitution.<sup>51</sup> Having considered these sections, the Constitutional Court in *Khumalo* 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 persons other than organs of state.<sup>52</sup>

*Governing Body of the Juma Musjid Primary School v Essay* (hereafter the *Juma Musjid* case)<sup>53</sup> is yet another case where the horizontal application of socio-economic rights was considered. In the *Juma Musjid* case the provincial department of education was operating a public school on land privately owned by a trust.<sup>54</sup> 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.<sup>55</sup> The Constitutional Court had to determine whether the trust had any constitutional obligations in terms of the right to basic education that would prevent the eviction of the school. The Constitutional Court found that private parties may, in specific circumstances, be bound by negative and positive obligations of socio-economic rights.<sup>56</sup> The Constitutional Court in *Juma Musjid* 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 is rather to require private parties not to interfere with or diminish the enjoyment of a right."<sup>57</sup> In this particular case, the Constitutional 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 persons other than organs of state. The negative

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<sup>49</sup> 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 and Freedman *South African Constitutional Law* 417-419.

<sup>50</sup> *Khumalo v Holomisa* 2002 5 SA 401 (CC) (hereafter the *Khumalo* case).

<sup>51</sup> *Khumalo* case paras 31-32.

<sup>52</sup> *Khumalo* case para 33.

<sup>53</sup> *Governing Body of the Juma Musjid Primary School v Essay* (CCT 29/10) [2011] ZACC 13 (11 April 2011) (hereafter the *Juma Musjid* case).

<sup>54</sup> *Juma Musjid* case para 1.

<sup>55</sup> *Juma Musjid* case para 1.

<sup>56</sup> *Juma Musjid* case para 58.

<sup>57</sup> *Juma Musjid* case para 58.

obligation meant that the trust must not interfere with or diminish the enjoyment of the right to basic education.<sup>58</sup>

In the *Daniels* case the Constitutional Court found that it was unreasonable to require private persons to bear the same obligations as the state (i.e. positive duties).<sup>59</sup> In this particular case the Constitutional Court held that the landowner was bound by the positive obligations imposed by the right of security of tenure.<sup>60</sup> 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.<sup>61</sup>

Now that this part of the paper has outlined the importance of access to electricity in a private home, the next part will analyse the case of *Sibanyoni*, which dealt with the right to access to electricity in the context of ESTA occupiers.

### **3 Access to electricity in light of *Sibanyoni v Van der Merwe***

#### **3.1 Facts of *Sibanyoni v Van der Merwe***

In this case Mr Sibanyoni as the occupier in terms of ESTA resided on a farm belonging to another. Mr Sibanyoni lived in a permanent structure that he had constructed years earlier.<sup>62</sup> Mr Sibanyoni had occupied the farm without interference.<sup>63</sup> Mr Sibanyoni sought an order to interdict Ms Van der Merwe (the private landowner) from violating his rights to make improvements to the dwelling situated on the farm.<sup>64</sup> Moreover, Mr Sibanyoni wanted Ms Van der Merwe to be ordered to allow him to have access to electricity in the dwelling.<sup>65</sup>

Mr Sibanyoni alleged that the son-in-law of Vincent Schalk (the previous private landowner) had signed a consent form to install electricity in his home and had handed the form to the municipality.<sup>66</sup> The son-in-law,

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<sup>58</sup> *Juma Masjid* case para 58.

<sup>59</sup> *Daniels* case para 40.

<sup>60</sup> *Daniels* case para 49.

<sup>61</sup> *Daniels* case para 39.

<sup>62</sup> *Sibanyoni* case paras 2-3.

<sup>63</sup> *Sibanyoni* case para 3.

<sup>64</sup> *Sibanyoni* case para 1.

<sup>65</sup> *Sibanyoni* case para 1.

<sup>66</sup> *Sibanyoni* case para 5.

however, denied signing such a form or giving verbal consent, as alleged by Mr Sibanyoni.<sup>67</sup> Mr Sibanyoni stated that Eskom would not have delivered poles for the installation of electricity if a proper inspection had not been conducted and if consent had not been given, as the farm was privately owned.<sup>68</sup> At Mr Sibanyoni's request a meeting was arranged between him and Ms Van der Merwe at the nearest police station.<sup>69</sup> At that meeting Mr Sibanyoni asked for consent to contact Eskom to install electricity.<sup>70</sup> Ms Van der Merwe informed Mr Sibanyoni that his attorney must contact the attorney of the estate of Mr MJC Van der Merwe (the late private landowner).<sup>71</sup> Ms Van der Merwe stated that, due to the existence of longstanding disputes between Mr Sibanyoni and Mr MJC Van der Merwe (her late father), the executor of the estate had indicated that the issue of electricity could be resolved only once the estate had been wound up and the property transferred to Ms Van der Merwe, and that this was yet to happen.<sup>72</sup> According to Ms Van der Merwe, Mr Sibanyoni seemed to have accepted such an arrangement. However, Mr Sibanyoni denied having done so.<sup>73</sup>

Eskom personnel came to the farm to install electricity in Mr Sibanyoni's dwelling. However, they were denied entry by Ms Van der Merwe, as she claimed she had not given consent for the installation.<sup>74</sup> Ms Van der Merwe stated that when this incident occurred she was surprised to discover that Eskom had, without her consent, commenced dropping off poles for the supply of electricity to Mr Sibanyoni's home.<sup>75</sup> Ms Van der Merwe further indicated that she was not prepared to grant such consent.<sup>76</sup> In her view, for Eskom to establish an electricity supply to any portion of private land the consent of the private landowner would be required.<sup>77</sup> This was particularly so as the impact on the environment and the operations of the private landowner would have to be considered before the electricity supply was provided.<sup>78</sup>

Mr Sibanyoni pointed out that Ms Van der Merwe could not have been surprised by the poles being dropped off.<sup>79</sup> This was because Eskom personnel had come to the farm numerous times to take measurements and

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<sup>67</sup> *Sibanyoni* case para 5.

<sup>68</sup> *Sibanyoni* case para 5.

<sup>69</sup> *Sibanyoni* case para 6.

<sup>70</sup> *Sibanyoni* case para 6.

<sup>71</sup> *Sibanyoni* case para 6.

<sup>72</sup> *Sibanyoni* case para 6.

<sup>73</sup> *Sibanyoni* case para 6.

<sup>74</sup> *Sibanyoni* case para 7.

<sup>75</sup> *Sibanyoni* case para 7.

<sup>76</sup> *Sibanyoni* case para 7.

<sup>77</sup> *Sibanyoni* case para 7.

<sup>78</sup> *Sibanyoni* case para 7.

<sup>79</sup> *Sibanyoni* case para 8.

conduct inspections before the poles were delivered.<sup>80</sup> In response Ms Van der Merwe averred that Mr Sibanyoni's family had prevented her from collecting the poles to place them in safekeeping and that the family members had assaulted her son and daughter.<sup>81</sup> Ms Van der Merwe complained to Eskom about their failure to communicate to her any intention to establish an electricity supply on her farm.<sup>82</sup> As a result, Eskom removed the poles from her property.<sup>83</sup> Ms Van der Merwe stated that Eskom had not responded to her query on how they could deliver electricity poles to Mr Sibanyoni's dwelling without her consent.<sup>84</sup>

The attorney representing the ESTA occupier asserted, with reference to the *Daniels* case, that Mr Sibanyoni had a clear right to make improvements to render his dwelling habitable.<sup>85</sup> The attorney argued further, on behalf of Mr Sibanyoni, that Ms Van der Merwe's refusal to grant consent for the installation of electricity and for Mr Sibanyoni to make improvements to his dwelling was a violation of Mr Sibanyoni's right to human dignity in terms of section 5(a) of ESTA.<sup>86</sup> On the other hand, the attorney for Ms Van der Merwe argued that no such clear right existed.<sup>87</sup> He argued that this matter was distinguishable from *Daniels* because there was no evidence from Mr Sibanyoni that the lack of electricity had rendered his dwelling not habitable and in a condition that impaired his human dignity.<sup>88</sup>

Furthermore, the attorney representing Ms Van der Merwe asserted that neither the Constitution nor ESTA recognised the right to electricity as a fundamental right.<sup>89</sup> Moreover, no agreement between Ms Van der Merwe and Mr Sibanyoni entitled him to have access to electricity.<sup>90</sup> Finally, he argued that the reasonableness or not of Ms Van der Merwe's refusal to grant consent should not be considered.<sup>91</sup> This was because Ms Van der Merwe's refusal was justified when considering the bad relationship between Mr Sibanyoni and Ms Van der Merwe, the assault suffered by the members of Ms Van der Merwe's family, and the fact that an impact or risk assessment of the electrical connection on the environment and farming operations had not been conducted.<sup>92</sup>

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80 *Sibanyoni* case para 8.

81 *Sibanyoni* case para 9.

82 *Sibanyoni* case para 10

83 *Sibanyoni* case para 10.

84 *Sibanyoni* case para 10.

85 *Sibanyoni* case para 11.

86 *Sibanyoni* case para 11.

87 *Sibanyoni* case para 12.

88 *Sibanyoni* case para 12.

89 *Sibanyoni* case para 12.

90 *Sibanyoni* case para 12.

91 *Sibanyoni* case para 12.

92 *Sibanyoni* case para 12.

### 3.2 Land Claims Court judgment

Meer AJP began her judgment by explaining that the right to electricity was not explicitly provided for in the Constitution or ESTA.<sup>93</sup> However, she noted that section 5(a) of ESTA does provide that an occupier and a landowner have a right to human dignity.<sup>94</sup> Meer AJP went on to set out the principles in *Daniels*.<sup>95</sup> In line with *Daniels*, the question that she had to answer was whether the installation of electricity was an improvement that was reasonably necessary to make Mr Sibanyoni's dwelling habitable, thereby giving effect to his right to human dignity.<sup>96</sup>

Meer AJP pointed out in detail the importance of access to electricity in modern life and that living in a dwelling without electricity deprived Mr Sibanyoni of certain benefits, such as an electric stove.<sup>97</sup> The court remarked that replacing traditional stoves, at the very least, protected an occupant of a dwelling against health risks and ensured a safer environment.<sup>98</sup> Consequently, "[t]here can be no doubt that electricity improves living conditions, habitability and welfare."<sup>99</sup> In this regard the court took judicial notice of the improvements rendered by electricity.<sup>100</sup>

Relying on various cases and literature, Meer AJP found that the delivery of the implied right to electricity was necessary to exercise other pre-existing rights, such as the right to housing.<sup>101</sup> As was held in *Daniels*, Meer AJP reaffirmed that Mr Sibanyoni's right to bring his dwelling up to a standard that conformed with conditions of human dignity, which in this case entailed installing electricity, was not dependent on Ms Van der Merwe's consent.<sup>102</sup> To the extent that the parties in *Daniels* were required to engage meaningfully, the court found that the meeting at the police station between Ms Van der Merwe and Mr Sibanyoni sufficed as meaningful

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<sup>93</sup> *Sibanyoni* case para 13.

<sup>94</sup> *Sibanyoni* case para 13.

<sup>95</sup> *Sibanyoni* case paras 14-15.

<sup>96</sup> *Sibanyoni* case para 16.

<sup>97</sup> *Sibanyoni* case paras 17-24.

<sup>98</sup> *Sibanyoni* case para 17.

<sup>99</sup> *Sibanyoni* case para 17.

<sup>100</sup> *Sibanyoni* case paras 17 and 25.

<sup>101</sup> *Sibanyoni* case paras 18-24, citing *Grootboom* case para 37; *Joseph* case para 34; *Makeshift* case para 25; Dugard "Power to the People?" 266-267; *Convention on the Elimination of All Forms of Discrimination against Women* (1979); *General Comment 4* para 8(b); Löfquist 2020 *IJHR* 716 and 723.

<sup>102</sup> *Sibanyoni* case paras 15, 25 and 27; citing *Daniels* case paras 59-60, where the court found that: "[i]n 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. 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."

engagement.<sup>103</sup> She rejected Ms Van der Merwe's allegations that her denial of consent was reasonable due to the existence of a bad relationship between Mr Sibanyoni and Ms Van der Merwe or her predecessor.<sup>104</sup> Ms Van der Merwe's assertion regarding an impact evaluation or risk assessment of the environment and farming operations being impacted on was also rejected, as these allegations were all found to be unsubstantiated.<sup>105</sup> Before reaching her conclusion Meer AJP stated that she was pained by the conduct of Ms Van der Merwe and remarked that:

some twenty years into a constitutional democracy based on freedom, equality and dignity, a farm owner can, in antithesis to these very values, refuse an occupier access to electricity, thereby perpetuating the injustices of the past and the stark division and disparity between the 'haves' and 'have-nots' in our society.<sup>106</sup>

This statement shows how much transformation is still needed, in the context of ESTA, to ensure that the promises of the Constitution are not a distant dream for all those who live on farms. Meer AJP found that Mr Sibanyoni was not entitled to a general right to improve his dwelling.<sup>107</sup> Nonetheless, Meer AJP held that Mr Sibanyoni was entitled to an order permitting reasonably necessary improvements to render his dwelling habitable in exercising his right to human dignity.<sup>108</sup> In this case Meer AJP concluded that Mr Sibanyoni was entitled to have electricity installed in his dwelling.<sup>109</sup> Meer AJP correctly confirmed Mr Sibanyoni's assertion that the installation of electricity would be an improvement that was reasonably necessary to make his dwelling habitable and to enable him to exercise his right to human dignity in section 5(a) of ESTA.<sup>110</sup>

### **3.3 Some comments from *Sibanyoni v Van der Merwe***

#### **3.3.1 *Did the LCC get the decision right?***

The LCC got the overall decision right. I have a comment only on the finding by the court that it would be difficult to assert that the installation of electricity would be an improvement that was reasonably necessary to make Mr Sibanyoni's dwelling habitable, to enable him to exercise his right to human dignity in section 5(a) of ESTA. In my opinion it is not difficult to find that a lack of electricity impacts on the habitability of the dwelling. For example, if ESTA occupiers do not have electricity they will use traditional forms of energy such traditional bio-mass stoves, candles for lighting, etc. These

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<sup>103</sup> *Sibanyoni* case para 25, referring to *Daniels* case paras 62-65.

<sup>104</sup> *Sibanyoni* case para 25.

<sup>105</sup> *Sibanyoni* case para 25.

<sup>106</sup> *Sibanyoni* case para 26.

<sup>107</sup> *Sibanyoni* case para 27.

<sup>108</sup> *Sibanyoni* case para 27.

<sup>109</sup> *Sibanyoni* case para 27.

<sup>110</sup> *Sibanyoni* case para 24.

forms of energy may pose a threat to their health and physical safety as traditional bio-mass stoves produce smoke emissions and candles unattended can easily start a fire. Their health and physical safety are impacted on in this example, and these are clearly elements of habitability, as mentioned above.<sup>111</sup> Landman correctly states that a dwelling is more than a mere shelter or physical structure; it should at the very least protect its inhabitants from threats to health and provide them with physical safety.<sup>112</sup> It is for this reason that the LCC went on to rightfully acknowledge that access to electricity reduces potential respiratory health problems and offers an eminently improved and safer environment.<sup>113</sup> Dube and Moyo further state that electricity is better than natural gas, coal and wood in that it provides clean energy for cooking, lighting and heating.<sup>114</sup> Dube and Moyo arguably show the links that exists between electricity and habitability. Access to electricity is important for the habitability of the dwelling. This is because when an ESTA occupier's health is threatened and his physical safety not guaranteed, the occupier may find it necessary to leave the house and move elsewhere. Therefore, allowing Mr Sibanyoni to make improvements to his dwelling was reasonably necessary to bring the dwelling to a standard of habitability and human dignity. More critically, this could avert the indignity that Mr Sibanyoni would suffer as a result of the possible departure from his dwelling because his health would not be protected and his physical safety not guaranteed.<sup>115</sup>

### 3.3.2 *Does section 5 of ESTA require a private dwelling on farmland to have access to electricity?*

The right to electricity is not explicitly provided for in ESTA. Section 5 of ESTA does however provide 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,

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<sup>111</sup> See part 2 above. See further, Ngwenyama *Common Standard of Habitability* 17-19.

<sup>112</sup> Landman "Stronghold, Shelter or Shack" 127.

<sup>113</sup> *Sibanyoni* case para 17.

<sup>114</sup> Dube and Moyo 2021 *PELJ* 2.

<sup>115</sup> *Daniels* case para 34.

with due regard to the objects of the Constitution and this Act.

Section 5 of ESTA recognises in particular the right to the human dignity of an ESTA occupier and a private landowner. This means that a private landowner enjoys the same rights as an ESTA occupier.<sup>116</sup> 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."<sup>117</sup> Enjoying these rights may sometimes create tension between a private landowner and an ESTA occupier enjoying their respective rights.<sup>118</sup> For example, where an ESTA occupier installs electricity without consent, a private landowner's right to property in terms of section 25 of the Constitution may be implicated.<sup>119</sup> In such circumstances an ESTA occupier must act in a manner such that his or her conduct does not disregard the private landowner's property right under section 25 of the Constitution.<sup>120</sup>

Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of a law of general application, given that no arbitrary deprivation can take place.<sup>121</sup> It is without doubt that private landowners may be limited in the use, enjoyment and exploitation of their property.<sup>122</sup> However, private landowners should be protected against conduct that disregards their right to property. In this regard ESTA requires that the rights of ESTA occupiers should be balanced with the rights of private landowners.<sup>123</sup> If an ESTA occupier were to act in an unlimited or unfettered manner when effecting improvements, for instance, that would mean a private landowner's rights were not worthy of protection. Such a total disregard of a private landowner's right to property would be unacceptable because it would intrude on a private landowner's right to human dignity in terms of section 5(a) of ESTA. This is because the right to human dignity informs the property right.<sup>124</sup> Human dignity has thus been used by the courts to inform, enhance and possibly reinforce all the other

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<sup>116</sup> *Daniels* case para 61.

<sup>117</sup> Section 5 of ESTA, originating from s 36(1) of the Constitution.

<sup>118</sup> *Daniels* case para 61.

<sup>119</sup> *Daniels* case para 61.

<sup>120</sup> *Daniels* case para 61.

<sup>121</sup> For a discussion of s 25 of the Constitution, see generally Van der Walt *Constitutional Property Law* 190-333; Muller *et al Silberberg and Schoeman's Law of Property* 607-671; De Vos and Freedman *South African Constitutional Law* 737-780.

<sup>122</sup> Van der Walt *Constitutional Property Law* 12.

<sup>123</sup> See s 6(2) of ESTA.

<sup>124</sup> Marais and Muller 2018 *SALJ* 774, especially fn. 66. See further, *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) paras 43-51 (hereafter the *Shoprite* case), where the court essentially pointed out that human dignity informs the rights to property; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) (hereafter the *Dawood* case) para 35.



rights enshrined in the Bill of Rights.<sup>125</sup> This is because human dignity serves as a source of many other rights.<sup>126</sup>

The Constitutional Court has decided on human dignity in several cases and emphasised the importance of human dignity in our constitutional dispensation.<sup>127</sup> More specifically, there are a number of cases that have been decided on human dignity, especially in the context of ESTA occupiers, where the right to housing is implicated.<sup>128</sup> The cases show that human dignity relates to the intrinsic worth of all human beings.<sup>129</sup> This would mean that human beings should be treated as human beings and not as objects.<sup>130</sup>

In the context of ESTA occupiers, human dignity is specifically invoked to contradict the result of past discriminatory laws and practices in which the human dignity of occupiers in South Africa was deliberately denied.<sup>131</sup> In this respect human dignity is used to inform the future and develop democratic values in South Africa, where the human dignity of everyone, including ESTA occupiers, is fully respected and protected.<sup>132</sup> This would mean that ESTA occupiers would be entitled to lead their present and future lives in conditions of human dignity irrespective of where they reside.<sup>133</sup> Liebenberg correctly asserts that respect for human dignity may also require that one lives in conditions that befit the maintenance of a standard of human dignity.<sup>134</sup> Concerning ESTA occupiers, therefore, human dignity under section 5(a) of ESTA and as reinforced by section 10 of the Constitution should not be limited to their personal dignity.<sup>135</sup> The human

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<sup>125</sup> *Dawood* case para 35; *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 41; *Shoprite* case paras 43-51.

<sup>126</sup> *S v Makwanyane* 1995 3 SA 391 (CC) (hereafter the *Makwanyane* case) paras 144 and 328. Also see Dube and Moyo 2021 *PELJ* 9.

<sup>127</sup> *Makwanyane* case paras 111 and 328; *S v Williams* 1995 3 SA 632 (CC) para 35; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28 (hereafter *National Coalition* case); *Dawood* case para 35.

<sup>128</sup> *Grootboom* case para 83; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 29 and 42 (hereafter the *PE Municipality* case); *Jaftha* case para 39; *Daniels* case paras 1-34; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) paras 19 and 32-38.

<sup>129</sup> *Makwanyane* case para 328; *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC) para 48; *Dawood* case para 35; *National Coalition* case para 120, particularly fn. 140.

<sup>130</sup> *Grootboom* case para 83; *PE Municipality* case para 29, especially fn. 29.

<sup>131</sup> *Daniels* case para 23. Referred to in *Mahlangu* case para 8, where the court reiterated that ESTA affords occupiers the dignity that eluded most of them throughout the colonial and apartheid regimes.

<sup>132</sup> *Dawood* case para 35. Also see *Daniels* case paras 131 and 137.

<sup>133</sup> *Daniels* case para 137. Also see *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 18.

<sup>134</sup> Liebenberg 2000 *SAJHR* 9.

<sup>135</sup> *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) para 55 (hereafter *Sibanyoni v Holtzhausen* case).

dignity of ESTA occupiers must be understood to include the entitlement to a dignified standard of living despite the insufficient and poor resources at the disposal of ESTA occupiers.<sup>136</sup> It is here that section 6 of ESTA, which contains the rights and duties of the ESTA occupier in respect of where they live, is important. Section 6(1) provides as follows:

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.

Section 6(1) of ESTA is concerned with conferring on an ESTA occupier the rights of residence and the use of land and the related services – but subject to the owner's consent or agreement.<sup>137</sup> Section 6(1) of ESTA therefore prohibits conduct that has the impact of frustrating the exercise of the rights conferred by ESTA, such as the right to reside and have access to services.<sup>138</sup> Arguably, the right to reside and have access to services in section 6(1) of ESTA must mean that ESTA occupiers are entitled to reside in adequate housing with access to services such as electricity.<sup>139</sup> This is because access to electricity will provide the ESTA occupier of a house with the necessary human dignity.<sup>140</sup> The words of Madlanga J in the *Daniels* case are apt in this regard:

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.<sup>141</sup>

Madlanga J's statement arguably supports the idea that the dwellings of ESTA occupiers should conform to the conditions of human dignity. In the *Daniels* case Zondo J (as he then was) further pointed out that the important question to be determined in instances where human dignity is at stake under ESTA is the following:

does a landowner have the right to prevent an occupier as defined in ESTA from effecting improvements to his or her 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?<sup>142</sup>

He went on to respond thus:

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

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<sup>136</sup> *Sibanyoni v Holtzhausen* case para 55.

<sup>137</sup> *Nkosi v Buhrmann* (1/2000) [2001] ZASCA 98 (25 September 2001) para 48

<sup>138</sup> Also see, in this regard the preamble of ESTA, which holds that "the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners"; *Sibanyoni v Holtzhausen* case para 56

<sup>139</sup> See part 2 above.

<sup>140</sup> *Daniels* case paras 31-32.

<sup>141</sup> *Daniels* case para 31.

<sup>142</sup> *Daniels* case para 209.

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.<sup>143</sup>

It seems that by permitting an ESTA occupier to install electricity in his or her house without prejudice to the private landowner, two purposes are served, namely (a) it brings the house up to a standard that accords with human dignity, and (b) it protects the ESTA occupier from suffering any form of indignity that might be caused by intolerable living conditions such as a lack of electricity.<sup>144</sup> Accordingly, the right to human dignity in section 5(a) of ESTA requires a private dwelling to have access to electricity. This is because adequate housing that includes access to electricity is important for the human dignity of ESTA occupiers.<sup>145</sup> As Chaskalson J rightfully put it: "[there] can be no human dignity, in a life lived without access to housing, health care, food, water."<sup>146</sup> Similarly, Jacob J in the *Grootboom* case pointed out that "[there] can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter."<sup>147</sup> It is therefore about ESTA occupiers' right to reside in acceptable social conditions. Since Mr Sibanyoni had been deprived of access to electricity, it is proposed that ESTA be amended to reflect the position taken here. This would ensure that similar deprivations do not occur in future. It is suggested that a provision protecting ESTA occupiers against the denial or deprivation of access to electricity may be inserted in section 6 of ESTA under the "rights and duties of occupiers". Such a provision might read something to this effect: "an occupier shall have the right not to be denied or deprived of access to electricity."

### 3.3.3 *Who bears the obligation to provide access to electricity to ESTA occupiers?*

As already mentioned, the right to access to adequate housing includes access to electricity.<sup>148</sup> Section 26(2) of the Constitution places a positive obligation on the state to provide housing and to ensure that this right is realised (including in the context of ESTA occupiers). Section 26(2) of the Constitution was arguably enacted to prevent the state from abdicating its housing obligations. In the *Grootboom* case the Constitutional Court acknowledged that the right to access to electricity may be included in the

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<sup>143</sup> *Daniels* case para 210.

<sup>144</sup> *Sibanyoni* case para 14, quoting *Daniels* case para 34.

<sup>145</sup> *Malan v City of Cape Town* 2014 6 SA 315 (CC) para 127. Also see Dube and Moyo 2021 *PELJ* 9-11.

<sup>146</sup> Chaskalson 2000 *SAJHR* 204.

<sup>147</sup> *Grootboom* case para 23.

<sup>148</sup> See part 2 above.

obligation to provide access to adequate housing. In this regard the Constitutional Court stated that:

the state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building material; some may need access to finance; some may need access to services such as water, sewerage, electricity and roads.<sup>149</sup>

Similarly, the Constitutional Court in *Joseph* found that:

there are constitutional and statutory obligations on local government to provide basic municipal services, which include electricity. The applicants are entitled to receive these services ... Although, in contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide.<sup>150</sup>

Local government is statutorily obliged to provide municipal basic services in terms of the *Housing Act 107 of 1997* (hereafter the *Housing Act*) and the *Local Government: Municipal Systems Act 32 of 2000* (hereafter the *Systems Act*).<sup>151</sup> The *Housing Act* places an obligation on municipalities to ensure that services such as electricity are provided in a manner that is economically efficient.<sup>152</sup> Similarly the *Systems Act* imposes an obligation on local government to ensure that communities have access to basic municipal services.<sup>153</sup> The *Systems Act* defines basic municipal services as those services that are necessary to enable citizens to enjoy an acceptable and reasonable quality of life.<sup>154</sup> If these services are not provided by the municipality, such a failure would pose a risk to public health, safety and the environment.<sup>155</sup> More importantly for the purposes of this case note, the non-provision of basic services may arguably impact on the human dignity of ESTA occupiers.<sup>156</sup> It is for this reason that municipal services must be provided by the state in an equitable and accessible manner to everyone, including ESTA occupiers.<sup>157</sup> An ESTA occupier's right to access to electricity can also be sourced from the *Electricity Regulation Act 4 of 2006* (hereafter *Electricity Regulation Act*). Among the other objectives of the *Electricity Regulation Act* is the objective to facilitate universal access to

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<sup>149</sup> *Grootboom* case para 37.

<sup>150</sup> *Joseph* case para 34.

<sup>151</sup> *Muller and Viljoen Property in Housing* 181-182; *Dube and Moyo* 2021 *PELJ* 7-8; *Eskom* case para 103.

<sup>152</sup> Section 9 of the *Housing Act 107 of 1997*.

<sup>153</sup> Section 73(1) of the *Local Government: Municipal Systems Act 32 of 2000* (hereafter the *Systems Act*).

<sup>154</sup> Section 1 of the *Systems Act*.

<sup>155</sup> Section 1 of the *Systems Act*.

<sup>156</sup> See part 2 and sub-part 3.3.2 above.

<sup>157</sup> Section 73(2) of the *Systems Act*.

electricity.<sup>158</sup> Eskom is the state entity tasked with supplying local government with electricity, and local government is in turn obliged to reticulate the electricity to communities.<sup>159</sup> It should therefore be said that both Eskom and municipalities owe communities the positive obligation to provide them with electricity.<sup>160</sup>

Cases such as *Grootboom* and *Joseph* further strengthen the impression that it is the state that bears the positive obligation to provide basic services, such as access to electricity, as a component of the right to access to adequate housing. It should be mentioned here that the state also has a negative obligation not to impair the delivery of the right.<sup>161</sup> It is important therefore that the right to access to electricity must be fulfilled even on farmland where ESTA occupiers reside.<sup>162</sup> As part of the state obligation to put in place measures to facilitate long-term security of tenure for ESTA occupiers, through the Minister of Rural Development and Land Reform, ESTA will require the state to grant subsidies to compensate private landowners or persons in charge for the provision of services.<sup>163</sup> Arguably such services should be interpreted to include access to electricity to ESTA occupiers and their families. An argument can be made here that if a private landowner or person in charge denies or deprives an ESTA occupier the right to make improvements in the form of installing electricity, such conduct does not facilitate long-term security of tenure for ESTA occupiers. It simply takes away security of tenure since it might lead to the ESTA occupier's leaving the dwelling due to a lack of electricity.<sup>164</sup> The possible departure of the occupier from the dwelling due to a lack of access to electricity would also severely compromise the person's human dignity, as discussed above.

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<sup>158</sup> Section 2(d) of the *Electricity Regulation Act* 4 of 2006.

<sup>159</sup> Part B of Schedule 4 of the Constitution, which states that it is the functional area of local government to provide, among other things, electricity reticulation. See further, *Rademan v Moqhaka Local Municipality* 2013 4 SA 225 (CC) para 17; *Eskom* case paras 83-84.

<sup>160</sup> Dube and Moyo 2021 *PELJ* 6.

<sup>161</sup> *Grootboom* case para 34. See further, *In re: Certification of the Constitution of the Republic of South Africa* 1996, 1996 4 SA 744 (CC) para 78 (hereafter the *Certification* case); *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 703 (CC) para 46 (hereafter the *TAC* case); *Jaftha* case para 34; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 721 (CC) para 69 (hereafter the *Rail Commuters* case); *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) paras 37-38 (hereafter the *Rand Properties* case); *Eskom* case para 267.

<sup>162</sup> Dugard "Power to the People?" 268, where she states that the state is under a constitutional obligation to provide more electricity to more people, especially to vulnerable groups such as the poor.

<sup>163</sup> This provision will form part of s 4 of ESTA, which is pending amendment. The exact provision will be subs (1)(e) to be added by s 2(c) 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.

<sup>164</sup> Compare *Daniels* case paras 33-34.

This indicates the interrelated, interconnected and mutually supporting nature of the fundamental rights in chapter 2 of the Constitution and mirrored in ESTA.<sup>165</sup>

The state's grant of subsidies under ESTA further affirms that the state has a positive obligation to ensure that ESTA occupiers enjoy access to services such as electricity. The obligation is positive in the sense that the state, through the Minister, is obliged to pay compensation in the form of state subsidies for the services provided by private landowners or persons in charge. The state in effect finances the services provided by private landowners or persons in charge. In this regard the state must facilitate access to electricity on farms as mandated by the Constitution, ESTA, the *Housing Act* and the *Systems Act*.<sup>166</sup> This would mean that private landowners have a negative obligation to refrain from unreasonably denying or depriving ESTA occupiers connection to a supply of electricity in their private dwellings.<sup>167</sup> In other words, landowners should not preclude ESTA occupiers from pursuing a process to obtain access to electricity through the municipality.<sup>168</sup> Farm owners should therefore create an enabling environment for Eskom or any other basic service provider to install N electricity supply in the dwellings of ESTA occupiers.<sup>169</sup> This statement signals the negative obligations placed on private landowners not to interfere with an existing access to housing or the privileges that the right to housing confers, which obviously include access to electricity.<sup>170</sup> Should an infringement take place, an ESTA occupier may approach a court for possible relief.<sup>171</sup>

### 3.3.4 Was it a progressive judgment?

By progressive I mean whether there is some social reform element to the decision in *Sibanyoni*. The judgment in *Sibanyoni* was progressive for

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<sup>165</sup> *Grootboom* case paras 23-24. See further, Liebenberg *Socio-Economic Rights* 51-54; Muller and Viljoen *Property in Housing* 179.

<sup>166</sup> Muller and Viljoen *Property in Housing* 182.

<sup>167</sup> *Daniels* case paras 193-194 and 201.

<sup>168</sup> *Mahlangu* case para 16.

<sup>169</sup> Dube and Moyo 2021 *PELJ* 6-8. The authors point out that Eskom has a legal obligation to provide access to electricity based on the fact that it is a state entity established solely to provide electricity. See further, *Mahlangu* case para 19, where the court found that an ESTA occupier was entitled to relief that would secure a meaningful engagement to assess whether and how access to electricity could be provided to the ESTA occupier's home. The court further pointed out that a meaningful engagement might require the involvement of the municipality or any other stakeholder such as Eskom, and that private landowners must take such steps as may be necessary and co-operate to enable the provision of electricity.

<sup>170</sup> *Grootboom* case para 34. See further, *Certification* case para 78; *TAC* case para 46; *Jaftha* case para 34; *Rail Commuters* case para 69; *Rand Properties* case paras 37-38; *Eskom* case para 267.

<sup>171</sup> *Mahlangu* case para 19.

various reasons. Firstly, the court upheld an ESTA occupier's right to human dignity over a private landowner's right to property. This is because it was found that the right to access to electricity is an implied right leading to the enjoyment of the right to human dignity. Secondly, the ESTA occupier was allowed to install electricity in his dwelling without the private landowner's consent. This second point shows a promotion of the transformative goals of the Constitution, including land reform goals which ESTA gave effect to, as shown above. The transformative goals were achieved on the one hand by permitting improvements which were basic improvements that ensured that the ESTA occupier ceased to live in conditions of human indignity, thereby giving effect to section 5(a) of ESTA. On the other hand, there was no suggestion in *Sibanyoni* that the private landowner would suffer any prejudice if the ESTA occupier were to effect the improvements he sought to effect, thus not violating the property owner's rights. Thirdly, the *Sibanyoni* judgment shows that the right to electricity, although not expressly stated in the Constitution or ESTA, is a public law right that is constitutionally protected.<sup>172</sup> Finally, the judgment confirms that an unreasonable refusal to grant consent by a private landowner to an ESTA occupier to install electricity is unacceptable and violates the right to access to electricity. Such a violation could be remedied by meaningful engagement between the parties, and if no acceptable outcome is reached, an ESTA occupier can approach a court to resolve the dispute. This is because if an ESTA occupier installs electricity in a dwelling to the total disregard of a private landowner and/or without recourse to a court of law, such an act would amount to self-help. This would effectively encourage the ESTA occupier to take the law into his or her own hands.<sup>173</sup>

#### 4 Conclusion

The importance of access to electricity for ESTA occupiers cannot be denied. Without electricity it cannot be said that ESTA occupiers reside and enjoy adequate housing. For a house to be adequate, it must have electric equipment, which is necessary for daily living. This may include electric stoves, which are crucial and safe for cooking, and electric lights, which are useful to deter criminality in dwellings. Crucially, human dignity would be violated or denied to ESTA occupiers by refusing the installation of electricity in their dwellings. This shows how significant electricity is for property to be used as a dwelling. Section 26(2) of the Constitution guarantees the right to access to adequate housing and places a positive obligation on the state to realise this right. As part of the obligation to provide

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<sup>172</sup> See further, Dube and Moyo 2021 *PELJ* 1-21.

<sup>173</sup> *Daniels* case para 65, referring to *Motswagae v Rustenburg Local Municipality* 2013 2 SA 613 (CC) para 14. See further, *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) para 87.

adequate housing, the state is obliged to provide basic services such as electricity to ESTA occupiers living on farmland. This would mean that private landowners should create a conducive environment for the state or any other provider, such as Eskom, to connect an electricity supply in the dwellings of ESTA occupiers.

More importantly, private landowners have a negative obligation to refrain from impairing ESTA occupiers' right to have electricity installed in their private dwellings. In instances where access to electricity is denied, an ESTA occupier may approach the court for an order preventing a private landowner from unreasonably interfering with his or her right to access to electricity. This is because a basic service such as electricity is important to the dignity of ESTA occupiers. Accordingly, the right to human dignity in section 5 of ESTA should mean that a private dwelling on farmland must have access to electricity to give effect to this right. Since ESTA does not reflect the position of ESTA occupiers to have the right to access to electricity in their dwelling, it should be amended. This provision should be inserted in section 6 of ESTA under the "rights and duties of occupiers". It is proposed that the provision reads thus: "an occupier shall have the right not to be denied or deprived of access to electricity". This would ensure that similar denials or deprivations of access to electricity do not take place beneath the radar of a carefully crafted piece of legislation. The *Sibanyoni* judgment was progressive. The court found that an ESTA occupier could improve his dwelling by installing electricity without the consent of the private landowner. The finding by the court that Mr Sibanyoni should be allowed to have electricity in turn gave effect to his right to human dignity as an ESTA occupier. Therefore the *Sibanyoni* case reaffirms that housing is "more than bricks and mortar",<sup>174</sup> and is about occupation that accords with standards of habitability and human dignity.

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<sup>174</sup> *Grootboom* case para 35.



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## List of Abbreviations

CESCR	United Nations Committee on Economic, Social and Cultural Rights
ESTA	Extension of Security of Tenure Act 62 of 1997
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJHR	International Journal of Human Rights
LCC	Land Claims Court
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SDG	Sustainable Development Goal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UN	United Nations