

No Country for Old Women: A Critique of *Grobler v Phillips* 2023 1 SA 321 (CC)

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Abstract

Land and land rights remain a contested issue in South Africa. *Grobler v Phillips* centered on the eviction of an 86-year-old woman, Mrs Phillips, and her disabled son from property she had lived on since she was 11 years old. After a fourteen-year court battle the Constitutional Court granted an eviction order against Mrs Phillips. This case note consists of a discussion of the judgments of the Magistrate's Court, High Court, Supreme Court of Appeal and Constitutional Court. It is found that the Constitutional Court erred in its decision as it applied a formalistic approach, disregarded the narrative of the occupier and did not sufficiently challenge the current neo-liberal regime in which property rights operate.

Keywords

Access to land; evictions; ESTA occupiers; jurisprudence; constitutional property law; PIE.

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1 Introduction

There are few issues more contested and debated in the South African political landscape than land. Land dispossession, often through violent means, form part and parcel of the apartheid and colonial history of South Africa.¹ The legacy of dispossession can be seen in the spatial inequality that was perpetuated during and post apartheid.² Many people who worked on farms also lived on farms through tied housing with their families during apartheid and continue to do so post apartheid.³ In the post-apartheid era, farm dwellers and labourers remain some of the most marginalised groups in South Africa.⁴ This note deals with *Grobler v Phillips*,⁵ which centered on the eviction of an 86-year-old woman and her disabled son from land she had occupied since she was 11 years old.

This note consists of a discussion of the decisions handed down by the Magistrate's court, the High Court and the Supreme Court of Appeal (SCA), as well as the Constitutional Court (CC). The second part of the note consists of critique of the CC judgment based on the formalism in the judgment, the lack of recognition of the occupier's narrative, and lastly the challenge of protecting tenure rights in a neo-liberal regime. This note concludes that the Constitutional Court erred in its judgment by applying formalistic reasoning and by not properly considering the facts of the case, as well as by losing sight of the purpose of the *Extension of the Security of Tenure Act* (ESTA)⁶ and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (PIE)⁷ and the transformative purpose of the *Constitution of the Republic of South Africa* (the Constitution).⁸

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¹ Ntsebeza and Hall *Land Question in South Africa* 3; Natrass *Short History of South Africa* 131-132; Bonner "South African Society and Culture" 275; Ross *Concise History of South Africa* 22-58.

² Magidimisha and Chipungu *Spatial Planning* 3-4.

³ Bonner "South African Society and Culture" 283-285; Spierenburg 2020 *Society and Natural Resources* 284.

⁴ Hall 2003 https://repository.uwc.ac.za/bitstream/handle/10566/4422/elarsa_op_2_rural_restitution.pdf?sequence=1&isAllowed=y.

⁵ *Grobler v Phillips* 2023 1 SA 321 (CC) (hereafter *Grobler v Phillips* CC).

⁶ *Extension of the Security of Tenure Act* 62 of 1997 (ESTA).

⁷ *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (PIE).

⁸ *Constitution of the Republic of South Africa*, 1996 (of the Constitution).

2 The judgments

2.1 Facts

This matter concerns the eviction of Clara Phillips, the respondent, and her disabled son Adam Phillips from their home in Somerset-West in the Western Cape. Willem Grobler, the applicant, brought the eviction application after he had in 2008 bought the property which Mrs Phillips and her son reside on.⁹ Mrs Phillips had been living on the farm, as part of a larger farm, since she was 11 years old (since 1947).¹⁰ Mr Grobler wanted to purchase the farm as a place for his elderly parents to stay, as he stays 500m away from the property.¹¹ After purchasing the property Mr Grobler requested Mrs Phillips, on three separate occasions, to vacate the property and added that he was willing to provide alternative accommodation and pay for the cost of relocation.¹² Mrs Phillips refused to vacate the property, claiming that she had been given a lifelong right to live on the property by the previous owner.¹³

2.2 Court a quo judgment

In the Magistrate's Court Mr Grobler brought an eviction application on the basis that Mrs Phillips was an unlawful occupier.¹⁴ The eviction was brought in terms of PIE.¹⁵ Mrs Phillips argued that she was a protected occupier in terms of PIE.¹⁶ Furthermore, she argued that she had a lifelong right of residence to live on the property, that having been granted by one of the previous owners.¹⁷ The Magistrate's court found that Mr Grobler had a right of ownership in terms of the property.¹⁸ Furthermore, the Court found that Mrs Phillips' habitation was not registered against the title deed of the property and therefore could not be enforced.¹⁹ An eviction order was granted by the Magistrate's court.

2.3 High Court

In the High Court Mrs Phillips relied on a new ground, namely that she was a protected occupier in terms of section 8 of ESTA, in addition to the

⁹ *Grobler v Phillips* CC para 2.

¹⁰ *Grobler v Phillips* CC para 2.

¹¹ *Grobler v Phillips* CC para 2.

¹² *Grobler v Phillips* CC para 4.

¹³ *Grobler v Phillips* CC para 5.

¹⁴ *Grobler v Phillips* CC para 6.

¹⁵ *Grobler v Phillips* CC para 6.

¹⁶ *Grobler v Phillips* CC para 6.

¹⁷ *Grobler v Phillips* CC para 6.

¹⁸ *Grobler v Phillips* CC para 7.

¹⁹ *Grobler v Phillips* CC para 7.

provisions of PIE.²⁰ The High Court found in the favour of Mrs Phillips. The Court held that the period given to Mrs Phillips to vacate was too short and that she should have been given reasonable notice.²¹ The Court also held that Mr Grobler had not proved that Mrs Phillips was not a lawful occupier for the purposes of PIE.²² The Court held further that the property became commercial property only in 2001 and that Mrs Phillips was therefore entitled to the protection provided by ESTA.²³

2.4 Supreme Court of Appeal

In the SCA it was found that Mrs Phillips could not rely on section 8 of ESTA as the property in question had been changed to an Erf as early as in 1991.²⁴ The court thus found that section 2(1)(b) of ESTA did not apply. Regarding the issue of short notice, the SCA held that the High Court had not taken into account the long period of negotiations between Mr Grobler and Mrs Phillips before the eviction application had been brought.²⁵ The SCA went further to state that the oral right to occupy a property had to be reduced to writing and registered against the title deeds of the property if the occupant was to be protected from eviction. Mrs Phillips could not have been expected to know this.²⁶ The SCA considered whether the eviction was a just and equitable order in terms of section 4(7) of PIE. The Court emphasised the importance of considering all the facts of the matter. In its evaluation the Court considered the following factors:

It bears emphasis that the first respondent has been in occupation of the property since she was 11 years old. She is now (at the time of this appeal), 84 years old. Until 2009 her continued occupation was entirely secured, by reason of the consent of successive owners some of whom accepted that she had been given a lifelong right of occupation and were prepared to honour it. During the greater part of her occupation the property formed part of a farm. Gradually, and in circumstances beyond her control, the farm became absorbed by the growth of urban developments. Until 1991, when the remaining portion of what was previously farmland, was encircled by urban development, the first respondent would undoubtedly have enjoyed the protection of ESTA. While she may have lost the absolute protection conferred by s 2(1)(b) read with s 8(4) of ESTA as a vulnerable person, her status as a vulnerable person, even in the context of PIE, has essentially remained unchanged.²⁷

²⁰ *Grobler v Phillips* CC para 10.

²¹ *Grobler v Phillips* CC para 11.

²² *Grobler v Phillips* CC para 11.

²³ *Grobler v Phillips* CC para 11.

²⁴ *Grobler v Phillips* CC paras 35-36.

²⁵ *Grobler v Phillips* (446/2020) [2021] ZASCA 100 (14 July 2021) (hereafter *Grobler v Phillips* SCA) para 39.

²⁶ *Grobler v Phillips* SCA para 44.

²⁷ *Grobler v Phillips* SCA para 49.

Despite finding that Mrs Phillips was an unlawful occupier, the Court found that the considerations formulated in the above quotation outweighed the right of ownership that Mr Grobler had over the property.²⁸ In finding that the eviction order was not just and equitable the Court took into account the following factors: the period of occupation of the property; the statement that previous owners had given her an oral right to live on the property, which had not been contested; and the fact that had the property not been rezoned into residential property she would have enjoyed the protection of section 8 of ESTA.

The SCA emphasised that the offer of alternative accommodation made by the appellant, albeit its having been made in good faith, did not influence the granting of an order of eviction.²⁹ According to the SCA the case was centred on the dignity of an elderly and vulnerable woman with disabilities rather than on an unlawful occupier's refusal to vacate a property.³⁰

2.5 Constitutional Court

The Constitutional Court dealt with the merits of two issues. Firstly, the court addressed the exercise of discretion during the process of the eviction enquiry. The Court held that an enquiry for the order of an eviction is essentially twofold. It must first be established that the occupation is unlawful, and second it has to be determined whether the granting of an eviction order would be just and equitable. The Court emphasised that section 4(7) of PIE states that an eviction order may be granted after the relevant factors have been considered.³¹ The Court was critical of the fact that the Magistrate's court had granted an eviction order immediately after it had been determined that the occupation was unlawful, without setting out its reasons for finding that an eviction would be just and equitable.³² Nevertheless, the Constitutional Court agreed with the Magistrate court's conclusion that the eviction was a just and equitable order, even though the Magistrate's Court had not considered all the relevant factors.

The second merit point that the court addressed was the consideration whether the eviction order was just and equitable in terms of section 4(7) of PIE. In referencing the Oranje³³ and Snyders³⁴ cases the court emphasised

²⁸ *Grobler v Phillips* SCA para 50.

²⁹ *Grobler v Phillips* SCA para 56.

³⁰ *Grobler v Phillips* SCA para 57.

³¹ *Grobler v Phillips* CC para 29.

³² *Grobler v Phillips* CC para 29.

³³ *Oranje v Rouxlandia Investments* 2019 3 SA 108 (SCA).

³⁴ *Snyders v De Jager* 2017 3 SA 545 (CC).

that occupiers do not have the right to choose where they want to live.³⁵ Secondly, the onus to provide alternative accommodation is on the municipality, and one cannot expropriate the owner.³⁶ The Court strongly emphasised the importance of including the interests of the owner, and contrary to the Supreme Court of Appeal, it included the consideration that Mr Grobler had offered alternative accommodation in an upmarket complex.³⁷ The CC stated the following:

The Supreme Court of Appeal failed to balance the rights of both parties. Mr Grobler is the owner of the property and has been enforcing his rights of ownership for the past 14 years. He has offered alternative accommodation on numerous occasions. If this offer were to be accepted, Mrs Phillips will continue to enjoy having a decent home. Furthermore, the Supreme Court of Appeal placed too much emphasis on Mrs Phillips' peculiar circumstances. A just and equitable order should not be translated to mean that only the rights of the unlawful occupier are given consideration and that those of the property owner should be ignored. And it does not mean that the wishes or personal preferences of an unlawful occupier are of any relevance in this enquiry.³⁸

For these reasons the Court found that the eviction order was a just and equitable order.

3 Land tenure reform in South Africa

Before starting with a discussion of the Constitutional Court judgment, it is necessary to reflect on land tenure reform in South Africa. This section does not consider land reform in its entirety but will briefly consider the context of such reform in South Africa.³⁹

Several pieces of legislation enacted by the colonial and apartheid government made it impossible for non-white South Africans to own land in so-called white areas.⁴⁰ During the apartheid era there was little protection

³⁵ *Grobler v Phillips* CC para 35.

³⁶ *Grobler v Phillips* CC para 37.

³⁷ *Grobler v Phillips* CC para 46.

³⁸ *Grobler v Phillips* CC para 44.

³⁹ For sources on land reform see South African Government date unknown <https://www.gov.za/issues/land-reform>; Pienaar *Land Reform*; Pienaar 2015 *Scriptura* 1-20; McCusker, Moseley and Ramutsindela *Land Reform in South Africa*.

⁴⁰ These pieces of legislation include, amongst others, the *Natives Land Act* 27 of 1913 (renamed *Black Land Act*), the *Native Trust and Land Act* 18 of 1936 (renamed *Development Trust and Land Act*), the *Group Areas Act* 41 of 1950, the *Group Areas Act* 77 of 1957, the *Group Areas Act* 36 of 1966, the *Natives Urban Areas Act* 21 of 1923, and the *Pegging Act* 35 of 1943. For a comprehensive discussion on the history of laws and regulations on land in South Africa see Du Plessis and Pienaar 2010 *Fundamina* 73-114; Walker 2017 <https://doi.org/10.1093/acrefore/9780190277734.013.79>; Kloppers and Pienaar 2014 *PELJ* 677-706.

for tenants on farms, who could easily be evicted by farm owners.⁴¹ With the demand for cheap labour in urban settings, many African labourers had to occupy land illegally, which led to many evictions.⁴² Many issues related to land played out in a rural context. African people were forcibly removed to so-called African Bantustans that were overcrowded and under-resourced.⁴³ While many African people continued with subsistence farming in the former bantustans, commercial farming continued on many white-owned farms.⁴⁴ On many of the commercial white-owned farms owners entered into tenancy agreements with the labourers who worked for them.

Many factors have impacted on commercial farming since the early 1980s including declining agricultural prices, the introduction of economies of scale and a decrease in the demand for labour.⁴⁵ These factors have made life precarious for people living and working on farms. It is no surprise that since the end of apartheid there has been a stark increase in the number of people evicted from the farms on which they previously lived.⁴⁶ Various reasons are proffered for this increase, including financial pressures, fear of land tenure legislation and mechanical advancements.⁴⁷ With the increase in evictions, many farm workers have faced the possibility of homelessness after living on farms for many years.

In 1991 the previous government started the process of land reform by abolishing all acts based on racial segregation.⁴⁸ Land reform includes land redistribution, tenure reform and restitution. During 1993 the South African

⁴¹ Wegerif, Russell and Grundling *Still Searching for Security* 34. Where evictions were legal they took place by means of the *Prevention of Illegal Squatting Act* 52 of 1951. There was nothing in the Act that protected farm dwellers or farm labourers.

⁴² Pienaar "'Unlawful Occupier' in Perspective" 309.

⁴³ Muller 2013 *Fundamina* 370.

⁴⁴ Ntsebeza and Hall *Land Question in South Africa* 4; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 116-131.

⁴⁵ Spierenburg 2020 *Society and Natural Resources* 285; Atkinson, Pienaar and Zingel 2004 <http://www.aridareas.co.za/wp-content/uploads/2015/Papers/Atkinson%20D%20%20Pienaar%20D%20%20Zingel%20J%20-%20From%20on%20Farm%20to%20Own%20Farm.pdf> 14-16.

⁴⁶ Wegerif, Russell and Grundling *Still Searching for Security* 46; Nkuzi Development Association and Social Surveys 2005 https://sarpn.org/documents/d0001822/Nkuzi_Eviction_NES_2005.pdf; Advisory Panel on Land Reform and Agriculture 2019 https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_1.pdf V.

⁴⁷ Spierenburg 2020 *Society and Natural Resources* 285.

⁴⁸ *Abolition of Racially Based Land Measures Act* 108 of 1991.

government promulgated more comprehensive pieces of legislation.⁴⁹ More pieces of land reform policy and legislation were enacted from 1996.⁵⁰

Section 25(6) of the Constitution protects secure tenure.⁵¹ In 1997 legislation was promulgated by the national government to protect farm workers and farm dwellers against the arbitrary deprivation of land and to ensure access to adequate housing by the enactment of ESTA. ESTA was enacted with the aim of providing security of land tenure and to prevent unfair evictions.⁵² ESTA applies only to land outside of townships or land used for agricultural purposes in a township.⁵³ ESTA protects people who have had consent (express or tacit) to live on another person's agricultural land on or after February 1997 by giving them a right to continue living on the land thereafter. Furthermore, ESTA intends to protect vulnerable farm dwellers such as elderly and disabled people.

ESTA created much-needed protection against arbitrary evictions for farm dwellers. However, despite the well-intentioned aims of ESTA, it has had unintended consequences for farmers and farm dwellers.⁵⁴ The advent of the new legislation gave rise, in many instances, to insecurity among farmers who did not want to be bound by the requirements of ESTA and other labour legislation.⁵⁵ In addition, the newly empowered farm workers that were did not fit into the prevailing paternalistic paradigm.

Shortly after the enactment of ESTA some of the potential pitfalls of the legislation had already been highlighted. One of the points of concern was that ESTA does not protect the tenure of tenants on a farm that has been

⁴⁹ The legislation includes the following: *Distribution and Transfer of Certain State Land Act* 119 of 1993; *Land Titles Adjustment Act* 111 of 1993; *Rural Areas Amendment Act* 112 of 1993; and *Provision of Land and Assistance Act* 126 of 1993.

⁵⁰ Department of Land Affairs *White Paper on Land Policy*; the *Interim Protection of Informal Land Rights Act* 31 of 1996; the *Land Reform (Labour Tenants) Act* 3 of 1996; *Communal Property Association Act* 28 of 1996; ESTA; *Land Restitution and Reform Laws Amendment Act* 78 of 1996; and *Upgrading of Land Tenure Rights Amendment Act* 34 of 1996. See Pienaar *Land Reform* 153-166 on the first phase of land reform.

⁵¹ Section 25(6) of the Constitution provides that "a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress".

⁵² In *Molusi v Voges* 2016 3 SA 370 (CC) para 1 the court stated that ESTA was enacted "to promote the achievement of long-term security of tenure and regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the rights of land owners."

⁵³ Section 2 of ESTA.

⁵⁴ Spierenberg 2020 *Society and Natural Resources* 281; Bourdeaux 2010 *Economic Affairs* 13; Mntungwa *Impact of Land Legislation* 2.

⁵⁵ Rugege 2004 *Int'l J Legal Info* 307; Bourdeaux 2010 *Economic Affairs* 13.

rezoned to residential land.⁵⁶ It has also been a concern that many of the people that are protected by ESTA do not know of the protection or procedures to follow to gain protection.⁵⁷ Furthermore, many are of the view that ESTA does not disrupt the existing power relations between farmers and farm workers.⁵⁸ Wegerif⁵⁹ argues that one of the shortcomings of ESTA is that the Act does not create a procedure for farm dwellers to receive confirmation of their rights. Farm dwellers are rather left to find out for themselves where they stand once an eviction process has been initiated. All these pitfalls came to the fore in *Grobler v Phillips*.

In addition to ESTA, PIE also protects occupiers from unlawful evictions. PIE is applicable to all land in South Africa, including rural land. For a court to order an eviction of an unlawful occupier in terms of PIE, it has to be of the opinion that it is just and equitable to do so.⁶⁰ However, some potential pitfalls of PIE can also be identified. Boggenpoel argues that one of the shortcomings of PIE is that it does not grant substantive rights, leaving land occupiers still in a vulnerable position.⁶¹ Van der Sijde⁶² alludes to the possibility that even though PIE applies to evictions on farmland as well, that the application of the two acts may be different in the context of farms. She states the following:

It is perhaps controversial to treat the ESTA right as a property right (as opposed to a housing right), but it recognises that the interest of farm labourers in the land they occupy goes beyond access to housing.⁶³

Many have argued that land reform, in particular land tenure reform, has failed in South Africa.⁶⁴ Furthermore, many farm workers and farm dwellers

⁵⁶ Pienaar 1998 *SAPL* 436.

⁵⁷ Pienaar 1998 *SAPL* 436.

⁵⁸ Pienaar 1998 *SAPL* 436.

⁵⁹ Wegerif, Russell and Grundling *Still Searching for Security* 36.

⁶⁰ Section 4(7) of PIE provides the following: "If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

⁶¹ Boggenpoel 2023 *SALJ* 410.

⁶² Van der Sijde 2020 *SAJHR* 83.

⁶³ Van der Sijde 2020 *SAJHR* 83.

⁶⁴ Cousins 2016 https://www.nelsonmandela.org/uploads/files/Land__law_and_leadership_-_paper_2.pdf; Bourdeaux 2010 *Economic Affairs* 14.

have been plagued by abuse and discrimination since the implementation of the legislation protecting the rights of farm workers.⁶⁵

The above section has given a brief context to land tenure reform in South Africa. Against the background of the discussion above, the next section considers three points of critique against the CC judgment.

4 Discussion

4.1 Formalism

The first point of critique relates to the formalism that underpins the judgment of the Constitutional Court. Legal formalism is perhaps one of the most pernicious and persistent elements of the South African legal system. Hoexter⁶⁶ refers to formalism as

that all too familiar tendency of South African law to rely on technicality rather than substantive principle or policy, and conceptualism instead of common sense.

Hawthorne⁶⁷ writes the following about formalism:

The advent of the Constitution should have signalled, as Mureinik advocated, a shift from a culture of authority to a culture of justification. Formalism should have given way to realism where the emphasis is to be found in the result rather than the mechanical application of the rule.

To be clear, there is no denying that law is a technical field. Law prescribes procedural and formal requirements that must be complied with. There is no field in law that can escape these requirements. It is generally agreed that these procedural requirements exist to promote fairness. In the following quotation Quinot refers to the important point that judges should not do away with formal reasoning but should steer clear of formalism:

The notion of transformative adjudication does not amount to a call for substantive reasoning to the exclusion of formal reasoning. Form plays an important role in all legal reasoning. Indeed one may argue that judges cannot get away from form in adjudication, nor should they. Judges should not be allowed to decide cases with reference to any substantive considerations that they happen to favour, that is, free-floating social and political preferences. The mode of reasoning that transformative adjudication requires allows for formal reasoning, but not formalism. Under this approach judges are allowed and may at times be required to decide cases narrowly with reference to

⁶⁵ Devereux 2019 *Development Southern Africa* 400-401; High Level Panel 2017 https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 203-204, 279; Advisory Panel on Land Reform and Agriculture 2019 https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_1.pdf V.

⁶⁶ Hoexter 2022 *CCR* 123.

⁶⁷ Hawthorne 2006 *Fundamina* 83.

concepts and the text of legal rules for example, but not in an abstract formalistic manner.⁶⁸

As alluded to in the quotation above, it is also generally agreed that strict compliance with the procedural and formal requirements of law without due consideration of the outcomes and context of a matter can lead to unfairness. As much as certainty and predictability are important in law, it is trite law that certain instances may require a relaxation of those strict rules. These considerations are often taken up in principles such as public policy, fairness and good faith. In the South African constitutional dispensation these principles are informed by the notion of transformative constitutionalism as well as constitutional values. The criticism of formalism in the South African context is further informed by the inheritance of a conservative legal culture.⁶⁹

The South African judiciary has approached tenure rights from a substantive point of view. An example of such a case is *Daniels v Scribante*.⁷⁰ In this matter, Ms Daniels had been an occupier in terms of ESTA and had wanted to bring about certain improvements to the property she occupied. The improvements were not lavish but related to basic needs and included things such as a leveled floor, a wash basin and a ceiling. Ms Daniels was willing to pay for the improvements. She requested the permission of the owners and after having received no response she continued with the improvements. When she had started with the improvements she received a letter that demanded that she cease with all improvements immediately as no building plans had been submitted. Relying on sections 5, 6 and 13 of ESTA Ms Daniels approached the Magistrate's Court for an order that she was entitled to bring about the improvements. Her application was dismissed by the Magistrate's Court and on appeal by the Land Claims Court. The matter ended in the Constitutional Court. The essential question was whether an occupier in terms of ESTA had the right to bring about improvements to a home. The Court referred extensively to the context of land dispossession in South Africa. It stated that women occupying land in terms of ESTA are a particularly vulnerable group. It was found by the Court that the purpose of ESTA was not only to secure tenure but to restore the dignity to people that was lost during colonisation and apartheid. Considering the historical context of ESTA and the purpose of the legislation, the court found that an owner's consent cannot be required to

⁶⁸ Quinot 2010 CCR 116.

⁶⁹ Klare 1998 SAJHR 170.

⁷⁰ *Daniels v Scribante* 2017 4 SA 341 (CC) (hereafter *Daniels v Scribante*).

"bring a dwelling to a standard that conforms to conditions of human dignity."⁷¹

In the Klaase case⁷² Mr and Mrs Klaase had been married and lived on a farm for more than thirty years. Mr Klaase had been evicted from the farm after his employment on the farm had been terminated. The matter in the Constitutional Court turned on whether Mrs Klaase, after not having been joined in the initial application, was an occupier and was protected by the provisions of ESTA. Mrs Klaase argued that she qualified as an occupier in terms of ESTA as she had lived on the property for at least 30 years and was an employee in her own right.⁷³ The respondents argued that she had not been given such a right, as she was only a seasonal worker. In considering whether Mrs Klaase was an occupier in terms of ESTA, the Court shed some light on the interpretative approach that should be followed:

In determining the meaning of 'occupier' as defined in section 1(1) of ESTA, the starting point is the Constitution. Section 39(2) of the Constitution enjoins courts, 'when interpreting legislation ... [to] promote the spirit, purport and objects of the Bill of Rights.' In line with a purposive approach to statutory interpretation, a meaning that places the definition within constitutional bounds should be preferred. Because we are concerned with the meaning of 'occupier' as defined, the definition must be read not only in light of the purpose of ESTA but also in the context of the legislation, as a whole.⁷⁴

The court continued, with reference to the *Goedgelegen* case,⁷⁵ that a broad approach is preferred when determining whether someone is an occupier in terms of ESTA. It stated the following:

As this Court said in *Goedgelegen*, ESTA is 'remedial legislation umbilically linked to the Constitution'. It seeks to protect people, like Mrs Klaase, whose tenure to land is insecure. In construing the provisions of ESTA a 'blinkered peering' at the language in the legislation must be avoided. An approach that will 'afford [occupiers] the fullest possible protection of their constitutional guarantees' must be adopted.⁷⁶

In the seminal case of *PE Municipality vs Various Occupiers*⁷⁷ the Court held that when interpreting the provisions of PIE, it must be understood in the broader constitutional framework.⁷⁸ In the judgment the court added that presiding officers have a discretion that has to be exercised while taking into

⁷¹ *Daniels v Scribante* para 60.

⁷² *Klaase v Van der Merwe* 2016 6 SA 131 (CC) (hereafter *Klaase CC*).

⁷³ *Klaase CC* para 27.

⁷⁴ *Klaase CC* para 50.

⁷⁵ *Department of Land Affairs v Goedgelegen Tropical Fruits* 2007 6 SA 199 (CC).

⁷⁶ *Klaase CC* para 51.

⁷⁷ *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) (hereafter *PE Municipality v Various Occupiers*).

⁷⁸ *PE Municipality v Various Occupiers* para 11.

account relevant circumstances. Certain factors listed in the relevant sections of PIE have to be taken into account but the listed factors are not a closed list. The court does not give any guidance as to which factors should weigh more. In the recent case of *Mahlangu v Nkosi* the court reiterated that the enquiry in terms of section 4(7) of PIE is contextual and substantive in nature and depends on the particular circumstances of a matter.⁷⁹

The matter in *Grobler vs Phillips* essentially turned on two questions: whether Mrs Phillips was an unlawful occupier, and whether the eviction of Mrs Phillips would be a just and equitable order if she were found to be an unlawful occupier in terms of PIE. The CC answered the first question in the negative. In answering the second part of the enquiry, the Court focussed largely on the fact that alternative accommodation had been offered by the owner. Although alternative accommodation is a factor that has to be considered in terms of section 4(7) of PIE, the Court paid too little consideration to other factors such as the rights of elderly people, the plight of the disabled and the plight of households headed by women, which it is specifically asked to do in terms of section 4(7) of PIE. Section 4(7) of PIE allows the court to consider other relevant factors. There were many relevant factors that the Court should have considered, including the duration of the occupation, which was over 70 years. In *PE Municipality v Various Occupiers* the Court stated that courts will be more cautious to grant an eviction order where families are more settled. Secondly, the Court should have considered that Mrs Phillips would have been protected by ESTA had the property not been rezoned. The rezoning of the property was a factor that fell out of her control. In the third instance, it was not contested that previous owners had given her the right to occupy the property for life. All these factors weighed heavily against the ownership right of Mr Grobler.

Furthermore, the Court's formalism is clear where it fails to consider the purpose of the legislation and the relevant constitutional values in its application of section 4(7) of PIE. In the jurisprudence of the Constitutional Court laid out above, a value-laden and purposive approach is preferred.⁸⁰ As alluded to by the court in *PE Municipality*, the purpose of PIE is to overcome the abuses of the past based on racial discrimination as well as to ensure that evictions are aligned with constitutional values.⁸¹ The

⁷⁹ *Mahlangu v Nkosi* (43615/21) [2023] ZAGPPHC 120 (23 February 2023) para 18.

⁸⁰ See 4.1 above.

⁸¹ *PE Municipality v Various Occupiers* para 11.

background to land reform legislation such as PIE and ESTA described above informs the purpose of the legislation.⁸²

As mentioned by the SCA in this matter, the matter concerned "the dignity of an elderly and vulnerable woman and a person with disabilities in the circumstances of the first respondent and her son."⁸³ Viewing PIE through the lens of human dignity, equality and freedom together with a broader range of considerations mentioned above would have led the court to a different conclusion.

The next section of this note expands on the link between Mrs Phillips' dignity and her eviction from her home.

4.2 *Non-consideration of the narrative of the occupier*

The failure to consider Mrs Phillips's narrative is connected to the above discussion. The Constitutional Court engaged in an a-historical and a-contextual analysis of the matter. The historical and personal context was important in the case at hand as it reveals the link between the eviction and dignity. As alluded to above, the enquiry in terms of section 4(7) of PIE is contextual in nature.

Land issues in South Africa cannot be separated from the history of dispossession and settler colonialism in South Africa. There is a historical and personal context that is necessary for the application of law. The recent Land Commission report on tenure security states the following:

Section 39 is also relevant to the question of interpreting the property clause since it stipulates that, when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on dignity, equality and freedom. Labour tenants have been denied these three values of dignity, equality and freedom through the historical process of labour tenancy, and it thus becomes necessary to redress the glaring imbalances that have arisen as a result of past racially discriminatory practices in this regard. This accords with the purposive approach to the interpretation of the Constitution that has been adopted by the Constitutional Court and is essentially 'context-orientated.' This includes taking account of the relevant historical and social background, including South Africa's history of racial dispossession and its hope for a new democratic future.⁸⁴

The legislative history of land reform has already been discussed above. However, the personal context of people living and working on farms needs some consideration. There has been documentation by various people of

⁸² See 3 above.

⁸³ *Grobler v Phillips* SCA para 57.

⁸⁴ Cowling, Hornby and Oettle 2017 https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Tenure_Security_AFRA.pdf 17-18.

the lived experiences of many who are living and working on farms.⁸⁵ Life on farms, in particular on Western Cape farms, has been described as paternalistic.⁸⁶ Despite the many attempts to improve living and working conditions on some farms, a one-sided power relationship still exists between the farm owner and people living and working on farms. This power relationship has been traced back to the time of slavery.⁸⁷ Williams⁸⁸ notes that labour tenancy refers to a social relationship that can be described as a semi-feudal relationship. Various authors maintain that this dynamic has simply been reproduced in different ways.⁸⁹

Despite the well-documented skewed power-relationship between farmers and farmworkers, Nolan⁹⁰ notes that often Coloured farm workers that she interviewed, who were living and working on farms in the Western Cape, preferred the tied housing of the farm to moving away. There are strong social and community ties that exist on a farm. It is often the case that families end up living and working on farms over generations. This gives rise to a connection to a community and a place. Women are often placed in a double bind as they are in a position subservient to their husbands as well as to the farm owner.⁹¹

The CC had a very narrow understanding of its consideration of alternative accommodation as a factor to take into account in granting an eviction order. The Court stated that an occupier's wishes should not be taken into account. In this regard the Court cited *Snyders v De Jager*. In *Snyders v De Jager* the court stated the following:

⁸⁵ Roodt 2007 *Africanus* 3-12; Lemke and Jansen van Rensburg 2014 *Development Southern Africa* 843-858; Hall *et al* 2013 *Journal of Agrarian Change* 47-70; Evans 2013 *Journal of Agrarian Change* 213-233; Brandt and Ncapayi 2016 *Anthropology Southern Africa* 215-231.

⁸⁶ Bell and Matthews 2022 *Gender Questions* 2-5; Orton, Barrientos and Mcclenaghan 2001 *Women's Studies International Forum* 469-478; Du Toit 1993 *Journal of Southern African Studies* 314.

⁸⁷ Devereux 2019 *Development Southern Africa* 382; Waldman 1996 *African Studies* 62-86; Williams 2016 *Journal of Southern African Studies* 893-909; Walters 2012 *Anthropology Southern Africa* 93; Orton, Barrientos and Mcclenaghan 2001 *Women's Studies International Forum* 470.

⁸⁸ Williams 1996 <https://www.gavinwilliams.org/wp-content/uploads/2014/01/1996-Transforming-Labour-Tenants-Gavin-Williams1.pdf> 3-4.

⁸⁹ Nolan *Paternalism and Law* 37-38; Du Toit 1993 *Journal of Southern African Studies* 320.

⁹⁰ Nolan *Paternalism and Law* 42.

⁹¹ Hall, Kleinbooi and Mvambo 2002 http://mokoro.co.uk/wp-content/uploads/what_land_reform_has_meant_to_farm_workers_sa.pdf; Devereux and Solomon 2011 <https://www.future-agricultures.org/themes/growth-and-social-protection/shooting-the-messenger-controversy-over-farmworker-conditions-in-south-africa/> 3-6.

To this extent, an occupier's right to resist relocation is protected. But these sections do not amount to a blanket prohibition on relocation under any circumstances. If indeed the relocation were to impair an occupiers' human dignity, then the provisions of s 5 and s 6 would apply and the occupiers could invoke their constitutional rights. This does not mean that all relocations necessarily suffer the same fate.

Relying on *Snyders v De Jager* the CC went further to state that the purpose of PIE is to prevent unfair evictions and not to expropriate a land owner. The aim of PIE is indeed to prevent arbitrary evictions. As the court directs in *PE v Various Occupiers*, PIE should be read against the historical background of dispossession in South Africa as well as the constitutional framework. Furthermore, the Court added that PIE and the concepts of justice and equity should be understood through a "defined and carefully calibrated constitutional matrix."⁹²

There is a strong link between the dignity of Mrs Phillips and her relocation. As argued by the SCA, to relocate Mrs Phillips and her son would not be to affirm the dignity of the most vulnerable and marginalised people in society. Mrs Phillips' main reason for wanting to stay on the land was her love of the environment and her connection to it, which should be informed by the history and power dynamics set out above. It is interesting that despite Mrs Phillips' living on a farm that was probably subject to the paternalistic system described above, that same paternalism perpetuated itself in the Court, where her narrative and perspective found little recognition. The fact that Mrs Phillips had lived on the farm for more than seventy years should have had some bearing on the Court's decision. For the Court not to take this factor into account was for the Court to blind itself to the marginalisation of elderly women living on farms. Such an approach is not aligned with the constitutional values of human dignity, equality and freedom. Moreover, the Court's approach was not historically and contextually sensitive, which section 4(7) of PIE requires it to be.

4.3 Protection of land tenure in a neo-liberal regime

The last point of critique against the judgment relates to the maintenance of a legal system that is skewed in favour of a neo-liberal regime. The South African economic policy has been described as neo-liberal.⁹³ Characteristics of a neoliberal regime include "privatisation, austerity and deregulation".⁹⁴ The South African legal system remains to a large extent a pro capitalist system, as it reflects the neo-liberal economic policy of the

⁹² *PE Municipality v Various Occupiers* para 14.

⁹³ Fourie 2022 *Philosophy and Social Criticism* 8-11; Cheru 2001 *TWQ* 505; Peet 2002 *Antipode* 54; Narsiah 2002 *GeoJournal* 29.

⁹⁴ Narsiah 2002 *GeoJournal* 29.

country. Sibanda⁹⁵ argues that the rights afforded in the Constitution exist in a liberal paradigm. Although they create valid legal entitlements for many people, their realisation relies too heavily on a progressive bench, he argues.⁹⁶ It seems that a deeper interrogation of the feasibility of property rights as they currently exist in South Africa needs to take place.

In *Daniels v Scribante* Froneman J points out that three things need to happen before we can make the Constitution a reality:

- (a) an honest and deep recognition of past injustice;
- (b) a re-appraisal of our conception of the nature of ownership and property; and
- (c) an acceptance, rather than avoidance or obfuscation, of the consequences of constitutional change.⁹⁷

Related to the nature and ownership of property, Froneman held that the hierarchical form of ownership that we know today originates from the battle between feudal and civil law. As part of overcoming the oppression of feudal law, it was important that ownership vested in one person.⁹⁸ Froneman J continued to add that this development as part of Western Capitalism does not suggest that it should necessarily form part of the South African property regime.⁹⁹ In the judgment Froneman also referred to Van der Walt, who has argued that "traditional notions of property do not suffice in transformational contexts."¹⁰⁰ On the topic of eviction Van der Walt specifically states that eviction laws generally tend to protect the landowner more than the tenant. He states the following in this regard:

even the anti-eviction protection that is afforded to tenants and other lawful occupiers in legislation usually turns on factors that are within the landowner's control, such as non-payment or other breaches of the tenancy agreement, changes in the current use of the rental property or the landowner's changing needs and plans with regard to the property, but the landowner's right to evict is seldom curtailed purely with reference to the socio-economic context or the personal or economic circumstances of the tenant.¹⁰¹

Thus, the scales of justice weigh in favour of the interests of property owners. Van der Sijde, in reference to Van der Walt, adds a useful perspective on the type of rights created by ESTA. The authors argue ownership is not the only right that attaches to property, and that it should

⁹⁵ Sibanda 2011 *Stell LR* 488-489.

⁹⁶ Sibanda 2011 *Stell LR* 488-489.

⁹⁷ *Daniels v Scribante* para 115.

⁹⁸ *Daniels v Scribante* para 134.

⁹⁹ *Daniels v Scribante* para 134.

¹⁰⁰ *Daniels v Scribante* para 136; Van der Walt *Property in the Margins* 16.

¹⁰¹ Van der Walt *Property in the Margins* 56.

not necessarily trump other property rights. Similarly, the rights of the owner of land do not necessarily trump the rights of the lawful occupier of that land.

The CC steered away from its role in realising land reform and interrogating land rights that Froneman J refers to above. In its judgment the CC stated that there should be a balance between the rights of property owners and those of occupiers. However, it is argued that the CC did not duly consider the interests of Mrs Phillips and her son, as the Court is instructed to do by section 4(7) of PIE. It referred to Mrs Phillips position only as “peculiar circumstances”. The judgment of the CC cannot be seen as one that advances land reform and tenure security. If the judgment had been such as to advance tenure security, the court would have considered whether Mrs Phillips could have been protected under the *Interim Protection of Informal Land Rights Act*.

Furthermore, the consideration under section 4(7) was a narrow one, as Mr Grobler's ownership right received prominence under the balancing act performed by the Constitutional Court. The judgment of the CC cannot be seen as one that advances land reform and tenure security. In addition to considering the fact that Mrs Phillips had been offered alternative accommodation, the CC should also have considered that Mrs Phillips would have been a protected occupier in terms of ESTA had the property not been rezoned. As stated by the SCA, “her status as a vulnerable person, even in the context of PIE, has essentially remained unchanged.” While Mrs Phillips and her son were not rendered homeless, the judgment of the court did not adequately recognise the tenure rights of socially vulnerable persons.

5 Conclusion

People who live and work on farms are some of the most vulnerable and marginalised people in South Africa. The country is still coming to terms with the effects of decades of dispossession. Commendably, efforts have been made by the government to protect farm labourers and farm dwellers. However, very often land reform legislation fails to protect the people it intends to protect. *Grobler v Phillips* is an example of that failure.

In this note I have argued that the Constitutional Court erred in its judgment as the result of its adopting an overly formalistic, a-historical and a-contextual approach to the application to section 4(7) of PIE.

There is a need to contest the existing idea of property rights in South Africa. Additionally, there is a need to ensure that tenure security is achieved through the realisation of the various housing and property rights in South

Africa. It is hoped that the South African judiciary will change its approach to one that is more aligned with the transformative vision of the Constitution.

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CC	Constitutional Court
CCR	Constitutional Court Review
ESTA	Extension of the Security of Tenure Act 62 of 1997
Int'l J Legal Info	International Journal of Legal Information
PELJ	Potchefstroom Electronic Law Journal
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal

SAPL	Southern African Public Law
SCA	Supreme Court Appeal
Stell LR	Stellenbosch Law Review
TWQ	Third World Quarterly