

**IMPROVING AN EXISTING OR ERECTING A  
NEW OR ADDITIONAL STRUCTURE BY ESTA  
OCCUPIERS: AN ANALYSIS OF**

***Daniels v Scribante* 2017 (4) SA 341 (CC), *Erasmus v Mtenje* [2018] ZALCC 12, and *De Jager v Mazibuko* [2020] ZALCC 7\***

## 1 Introduction

The conduct of occupiers (i.e., occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA)) was central in three court judgments in recent years. The first judgment in the matter of *Daniels v Scribante* (2017 (4) SA 341 (CC)) is widely regarded as a progressive and transformative judgment, and as having opened the door for ESTA occupiers to improve their dwellings (Davis “The Right of an ESTA Occupier to make Improvements without an Owner’s Permission after *Daniels*: A Different Perspective” 2019 136 *South African Law Journal* 420 422). In *Daniels v Scribante* (*supra*), the Constitutional Court considered whether an ESTA occupier has a right to make improvements to a dwelling to make it habitable (On the meaning of habitability in the context of ESTA occupiers, see Ngwenyama *A Common Standard of Habitability? A Comparison Between Tenants, Usufructuaries and Occupiers in South African Law* (LLD dissertation, Stellenbosch University) 2020 121–144). The court found that ESTA affords an occupier the right to make improvements to their dwelling without the consent of the owner (*Daniels v Scribante supra* par 57 and 60). However, the court pointed out that meaningful engagement between an owner or person in charge and an ESTA occupier was still necessary, because the exercise of an occupier’s right to make improvements could potentially encroach on an owner’s right to property (s 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution)) (*Daniels v Scribante supra* par 61–62 and 64). Since the judgment in *Daniels* was delivered, some ESTA occupiers, without prior consent or engaging meaningfully with the owner or person in charge, have improved or erected new structures – both inside (*Erasmus v Mtenje* [2018] ZALCC 12 par 1, 9 and 13), and

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outside the demarcated parcel of land where they reside (*De Jager v Mazibuko* [2020] ZALCC 7 par 1).

Despite the ESTA occupiers' need to improve or erect new structures, *Daniels* is context-sensitive (Boggenpoel "Property" 2017 3 *Juta's Quarterly Review of South African Law* 2.1; Boggenpoel & Slade "Where Is Property? Some Thoughts on the Theoretical Implications of *Daniels v Scribante*" 2020 10 *Constitutional Court Review* 391) and is therefore not blanket authority to engage in building operations anywhere on private farmland without prior, meaningful engagement with the owner or person in charge (*De Jager v Mazibuko supra* par 20). Furthermore, reliance on *Daniels v Scribante (supra)* must be clearly justified (*Erasmus v Mtenje supra* par 15). It is in this context that the case note emphasises that, where the current dwellings of ESTA occupiers are not suitable for human habitation and it is necessary to improve them or erect new buildings, the improvement must be done after proper meaningful engagement between the ESTA occupier and the owner or person in charge in accordance with the general guidelines set out in *Daniels v Scribante (supra)*. This is because the principles established in *Daniels v Scribante (supra)* set the scene for the much-needed balancing of rights between ESTA occupiers and owners, by alluding to the fact that ESTA occupiers are obliged to engage meaningfully with owners or persons in charge prior to embarking on improving or building new structures.

The first part of this case note sets out and analyses case law that has dealt with improving or building new structures. The next part explores the competing rights and interests of ESTA occupiers and owners in relation to improving or erecting new structures. The third and final part of the contribution highlights and emphasises the importance of meaningful engagement before an ESTA occupier improves or erects a new dwelling on property belonging to another.

## **2 Case law on ESTA occupiers improving an existing (or erecting a new or additional) structure**

### *2.1 Improving an existing structure: Daniels v Scribante*

In *Daniels v Scribante (supra)*, the occupier was residing on a farm owned by a private owner, with rights protected in terms of ESTA (par 3). The ESTA occupier wished to effect basic improvements, at her own expense, to her dwelling (par 8). She had resided in the dwelling with her family for 16 years (par 4). The owner and the person in charge accepted that the dwelling was in an uninhabitable state and lacked the most basic of human amenities such as running water (par 7). The ESTA occupier successfully argued in the Constitutional Court that her rights in terms of sections 5 and 6 of ESTA included the right to make improvements to her dwelling (par 10). The owner and the person in charge made a counter-argument that all the ESTA occupier's rights were located in section 6 of ESTA (par 27). The right to make improvements to the ESTA occupier's dwelling was not one of the rights specified in section 6 of ESTA and therefore, they argued, this meant

that the occupier had no rights in terms of ESTA to effect any improvements to her dwelling (par 27).

The Constitutional Court rejected this approach to the interpretation of ESTA (par 28–29, citing with approval the cases of *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) par 12 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) par 90). The court found this reading of section 6 of ESTA to be unduly narrow, considering the constitutional context and the purpose for which ESTA was enacted (par 29). The Constitutional Court found that the living conditions of the ESTA occupier did not accord with human dignity in terms of section 5 of ESTA (par 31). Moreover, the court pointed out that the notion of “reside” in section 6(1) of ESTA and “security of tenure” in section 6(2)(a) must mean, at the very least, that the dwelling be habitable (par 32). This statement points towards a standard of habitability in the context of ESTA occupiers (On the standard of habitability, see Ngwenyama *A Common Standard of Habitability?* 121–144). While the Constitutional Court accepted that the constitutional rights enjoyed by ESTA occupiers were circumscribed to the extent provided for in ESTA (which does not mention the right to make improvements), the court said that to deny an occupier the right to make the dwelling habitable was to deprive that occupier of her human dignity (par 27 and 33–34). As a result, the court concluded that ESTA affords an occupier the right to make improvements to her dwelling without the consent of the owner (par 57 and 60). However, the court said that it was necessary for the owner or person in charge and the ESTA occupiers to engage meaningfully regarding any improvements to the existing structure (par 62). This is because when an ESTA occupier exercises her right to make improvements, this conduct has the potential to infringe an owner's right to property in terms of section 25 of the Constitution (par 61). As the parties had failed to engage meaningfully regarding the implementation of the proposed improvements, the court ordered them to do so (par 64 and 71). The conduct of occupiers erecting a new structure in the context of ESTA was also highlighted in *Erasmus v Mtenje* (*supra*). This case is discussed below.

## 2.2 *Replacing tents by erecting a new structure: Erasmus v Mtenje*

In *Erasmus v Mtenje* (*supra*), the occupier had a guaranteed right to reside on land in terms of ESTA. The ESTA occupier and his family were residing on a portion of immovable property belonging to the owner (par 3). The ESTA occupier was living in a small, rented room and was found by the owner to be operating an illegal spaza shop on the property (par 9). On the instructions of the owner, the building in which the ESTA occupier resided and operated the small store was subsequently destroyed (par 9). Owing to the building being demolished, the ESTA occupier and his family were left destitute in three army-styled tents in the same area where the destroyed building was initially built (par 9). After some time, the tents were no longer fit for human habitation as they started to fall apart. Importantly, the tents could not protect the ESTA occupier from, for example, weather conditions.

This led the ESTA occupier, without obtaining the owner's permission, to build a structure for himself and his family to ensure that he was protected from harsh conditions (par 12–13). It should be mentioned that the structure was not completely built (par 14). Furthermore, the ESTA occupier erected the structure to avoid living in the undignified conditions that he had endured for a decade, while residing in tents (par 13). The structure was temporary as it was built out of corrugated iron sheets and poles. The floor of the structure consisted of combined sand and concrete and there were no internal partitions. The structure had seven windows, a double door at the front and a single door at the back, but not all the windows had glass (par 15).

The court conducted an *in loco* inspection to determine the living conditions of the ESTA occupier and his family, as well as the physical condition of the structure (par 2). The court was called upon to decide whether the newly erected structure was fit for human occupation. The inspection showed that the previous structure of the ESTA occupier had double brick walls outside and a concrete floor. Moreover, the inspection indicated that the ESTA occupier's current location lacked lavatory facilities. As such, the ESTA occupier and his family had to use the nearby veld as a toilet facility (par 14). The inspection also revealed that the ESTA occupier had been denied a tap to access water. The only water supply was through a municipal tank or from a tank placed near the fence where the main house was located. Furthermore, the inspection revealed that the new structure was incomplete and not yet habitable. The ESTA occupier and his family were therefore still living in the tents (par 14). According to the court, following the judgment of *Daniels v Scribante* (*supra*) concerning the habitability of a dwelling, the new structure that the ESTA occupier built was not habitable (par 14). However, the court found that replacing tents with an informal structure offers ESTA occupiers better *protection from the elements* and offers the ESTA occupiers of these tents *some measure of human dignity* (par 34). This statement confirms the standard of habitability for ESTA occupiers (For details on the standard of habitability, see further Ngwenyama *A Common Standard of Habitability?* 121–144). The court's reliance on human dignity to inform the standard of habitability of a newly erected dwelling (as shown in *Erasmus v Mtenje supra*) properly upholds the human dignity afforded to ESTA occupiers by section 5 of ESTA, which reinforces the provisions of section 10 of the Constitution.

In *Erasmus v Mtenje* (*supra*), the owner sought interdictory relief and a demolition order from the Land Claims Court. The interdict was sought to prevent the ESTA occupier from continuing to build the structure that was erected without the consent of the owner (par 1 and 16). Moreover, the interdict was sought to prevent the ESTA occupier from living in the structure and to order the occupier to vacate the structure. Furthermore, the owner wanted to be formally authorised to demolish the structure (par 1 and 16). The court had to decide whether the owner had met the requirements for an interdict. These requirements were: the existence of (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy. However, the court was not satisfied that these requirements were met (par 16–18). The court found that

the fact that the applicant (Erasmus) owned the property might have given her a clear right to launch an application of this nature under Roman-Dutch law. However, it was found that this was no longer the position under the new constitutional dispensation (par 19). The court mentioned that an ESTA occupier is entitled to certain residential rights in respect of land they reside on and use. This entails, at the very least, a right to live on habitable land with dignity (par 19). The court concluded that the owner had failed to fulfil the first requirement of an interdict and it was therefore not necessary to deal with the other requirements (par 19). The court in *Erasmus v Mtenje* (*supra*) mentioned that despite a breakdown in the relationship between the ESTA occupier and the owner, it was important for both parties to engage meaningfully with each other concerning the issue at hand, prior to taking the law into their own hands. In this regard, the court essentially reinforced the earlier *dictum* of the court in *Daniels v Scribante* (*Erasmus v Mtenje supra* par 33, citing *Daniels v Scribante supra* par 62). It should be mentioned that the duty to engage meaningfully with the owner rests on the ESTA occupier in relation to ensuring that the ESTA occupier's dwelling is in a habitable state (*Daniels v Scribante supra* par 62–65). Therefore, an ESTA occupier's failure to engage meaningfully with the owner regarding the necessity to upgrade the occupier's living conditions was contentious. To deny an ESTA occupier the right to upgrade his dwelling in the circumstances was, according to the court in *Erasmus v Mtenje* (*supra*), "too formalistic and unjust" in light of South Africa's history of dispossessions (par 33, referring to *Daniels v Scribante supra* par 67).

The conduct of an ESTA occupier in erecting a new and additional structure outside the demarcated area was dealt with in *De Jager v Mazibuko supra*. This case is briefly discussed below.

### 2 3 *Erecting a new additional structure outside the demarcated residential area: De Jager v Mazibuko*

In *De Jager v Mazibuko* (*supra*), the owner and person in charge launched an urgent application against an ESTA occupier, who had resided on the farm for 20 years with the consent of the owner in accordance with section 6(1) of ESTA (par 1 and 6). The relief sought by the owner and person in charge was to restrain the ESTA occupier from erecting an additional structure on the farm without the owner's written consent (par 1). The structure was situated outside the ESTA occupier's demarcated residential area (par 1). The ESTA occupier and her family were permitted by the person in charge to occupy and use a demarcated area on the farm for residential purposes (par 6). The family was allowed to erect three structures in a demarcated parcel of land (par 6). The family originally comprised nine members, but had since expanded to 28 members (par 6). The ESTA occupier asserted that the existing three structures were in such a state of disrepair that they were not fit for human habitation (For the standard of habitability, see Ngwenyama *A Common Standard of Habitability?* 121–144) and could not accommodate the family. As such, the ESTA occupier had to erect additional dwellings to accommodate all her family members (par 6). The owner and person in charge contended that they did not give the ESTA

occupier consent to erect the additional structures outside the demarcated area and, as such, the structures had to be demolished (par 1 and 13). They also averred that the ESTA occupier knew she only had the right to reside on and use the three structures situated in her demarcated parcel of land (par 8). This position meant that the ESTA occupier could not occupy or reside on any other part of the farm without written consent (par 8). The owner and person in charge further denied that the three structures were unfit for human habitation (par 13).

The Land Claims Court in *De Jager v Mazibuko (supra)* found that the ESTA occupier's conduct, in erecting additional structures outside the demarcated area without the owner's consent, amounted to a deprivation of the owner's property in terms of section 25(1) of the Constitution (par 22). The court also pointed out that the construction of the new additional structures was contrary to the ESTA occupier's rights as set out in section 6(1) of ESTA (par 22). The Land Claims Court referred to *Daniels v Scribante (supra)* and stated that when an ESTA occupier intends to improve her current dwelling, she needs to engage meaningfully with the owner to balance the conflicting rights and/or interests of ESTA occupiers and owners or persons in charge (*De Jager v Mazibuko supra* par 22, citing *Daniels v Scribante supra* par 64). The court was of the view that the same procedural approach endorsed in *Daniels v Scribante (supra)* regarding improvements should be adopted in the context of the building of a new additional structure (par 22). As the ESTA occupier did not engage with the owner or person in charge before building a new additional structure outside the demarcated area, the court mentioned that the occupier must approach the owner or person in charge and inform them that her current dwellings were in disrepair and that it was necessary either to improve or build new structures (par 22). If an inspection of the structures by the parties showed that the dwellings were in need of repair, such repairs or improvements must be conducted in accordance with the principles established in *Daniels v Scribante supra* (par 22 and 24). As the ESTA occupier was not opposed to the idea of making improvements to the dwelling in the demarcated area, the court ordered the ESTA occupier, her family and the builders to stop any construction work on the farm outside the demarcated area without the owner's written consent (par 22, 24 and 28). This order meant that the ESTA occupier had to demolish the erected structures and remove all building materials and equipment outside the demarcated area of the farm (par 28). The following section analyses the cases of *Daniels v Scribante (supra)*, *Erasmus v Mtenje (supra)* and *De Jager v Mazibuko (supra)*.

## 2 4 Analysis

The decisions of *Daniels v Scribante (supra)*, *Erasmus v Mtenje (supra)* and *De Jager v Mazibuko (supra)* are each unique: *Daniels v Scribante (supra)* concerned improving an existing structure; *Erasmus v Mtenje (supra)* was about replacing tents with a new structure; and *De Jager v Mazibuko (supra)* dealt with erecting new additional structures outside the demarcated piece of land. At the centre of each of these cases, however, is the important question about whether the ESTA occupier is living in a dwelling that

protects his or her human dignity. The question of occupation should not primarily be concerned with whether there is a roof over the ESTA occupier's head and four walls to the dwelling (*Daniels v Scribante supra* par 31). According to the Constitutional Court in *Daniels v Scribante (supra)*, occupation for ESTA occupiers is also about ensuring that an occupier's dwelling is in line with the right of access to adequate housing, the right to human dignity, and the right to security of tenure (*Daniels v Scribante supra* par 31). Therefore, the dwelling of ESTA occupiers should be compatible with human dignity and other fundamental rights, as pointed out by Madlanga J in *Daniels v Scribante supra* par 31.

While *Daniels v Scribante (supra)* dealt with improvements to an existing building, *Erasmus v Mtenje (supra)* was concerned with the building of a new structure. In principle, there is arguably no difference between improving an existing building, which includes the addition of outside paving, and replacing tents with an informal structure (*Erasmus v Mtenje supra* par 34). This is particularly so as the existing building and the informal structure both aim to ensure better protection from the elements and to give the ESTA occupier some measure of human dignity (*Erasmus v Mtenje supra* par 34). Here, human dignity means that ESTA occupiers are entitled to reside on property belonging to another under conditions that are humane, and which offer a dignified standard of living (*Sibanyoni v Holtzhausen* [2019] ZALCC 11 par 55). This is in line with section 5(a) of ESTA, having due regard to section 10 of the Constitution. The ESTA occupier in *Daniels v Scribante (supra)* was therefore entitled to improve an existing structure to achieve a certain habitable standard and to live with human dignity (*Daniels v Scribante supra* par 31–34). Likewise, it was also correct for the court in *Erasmus v Mtenje (supra)* to allow an ESTA occupier to erect a new structure for the same purpose of achieving an acceptable standard of habitability. This is because occupying tents that are leaking can hardly be said to amount to living in a structure of habitable state and with human dignity (*Erasmus v Mtenje supra* par 35).

The *De Jager v Mazibuko (supra)* case is distinguishable from the *Daniels v Scribante (supra)* case in that Mrs Mazibuko was not involved in improving her current dwelling to make it habitable (*De Jager v Mazibuko supra* par 19). Instead, she was erecting new additional structures outside the area demarcated for her to live in, without the consent of the owner (*De Jager v Mazibuko supra* par 19). Mrs Mazibuko's case is not about the right to make improvements to her current dwelling, aimed at achieving a dignified standard of living. It is about Mrs Mazibuko wanting to erect new additional structures outside the demarcated parcel of land because the three current dwellings in which she and her family live cannot accommodate the expanded family (*De Jager v Mazibuko supra* par 20). In cases such as *De Jager v Mazibuko (supra)*, *Daniels v Scribante (supra)* is not authority for Mrs Mazibuko to engage in building new additional structures anywhere on the owner's farm – particularly if Mrs Mazibuko's current dwellings seem not to offend her right to live in accordance with human dignity, as recognised by the Constitutional Court in *Daniels v Scribante (De Jager v Mazibuko supra* par 20). This finding should not be construed to mean that, where a dwelling is uninhabitable and affects the human dignity of the ESTA occupier, the

occupier may improve or build new structures in total disregard of an owner (*Daniels v Scribante supra* par 61). However, the ESTA occupier must follow proper procedure to challenge the status quo of an uninhabitable dwelling, as elaborated on in more detail below. While it is clear that an ESTA occupier is not entitled to act in a manner that disregards the owner's rights and interests, the next section unpacks the specific rights that ESTA confers respectively on the owner or person in charge, and an occupier.

### 3 Rights conferred by ESTA on owners and occupiers

Section 5 of ESTA provides:

"Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to—

- (a) human dignity;
- (b) freedom and security of the person;
- (c) privacy;
- (d) freedom of religion, belief and opinion and of expression;
- (e) freedom of association; and
- (f) freedom of movement,

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

It is clear that section 5 of ESTA recognises the rights of an ESTA occupier, an owner and a person in charge. This means that an owner or person in charge enjoys the exact same rights as an occupier (*Daniels v Scribante supra* par 61). These rights can only be limited based on grounds that "are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" (s 5 of ESTA, originating from s 36(1) of the Constitution). The enjoyment of these rights may sometimes create tension between an owner and the ESTA occupier enjoying their respective rights (*Daniels v Scribante supra* par 61). For example, where an ESTA occupier without consent improves or erects new structures, an owner's right to property in terms of section 25 of the Constitution may be infringed (*Daniels v Scribante supra* par 61). In such circumstances, an ESTA occupier must act so that their conduct does not disregard the owner's right to property (*Daniels v Scribante supra* par 61). The total disregard of an owner's right to property may intrude on an owner's right to human dignity in terms of section 5(a) of ESTA. This is because the right to human dignity informs the right to property. (See Marais & Muller "The Right of an ESTA Occupier to Make Improvements Without an Owner's Permission After *Daniels: Quo Vadis* Statutory Interpretation and Development of the Common Law?" 2018 4 *South African Law Journal* 766 774, especially fn 66. See further, *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC) par 43–51; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 35.) 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 acknowledges that occupiers have the right to reside and use land as has been agreed upon with the owner or person in charge (see also, *Nkosi v Buhrmann* [2001] ZASCA 98 par 48, where the court mentioned that s 6(1) of ESTA is concerned with conferring on an occupier rights of residence, use of land and services, but subject to the owner’s consent or agreement). Section 6(1) of ESTA therefore prohibits conduct that has the impact of frustrating the exercise of rights conferred by ESTA, such as the right to use land (see also, in this regard the Preamble of ESTA, which holds that “[t]he law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners”; *Sibanyoni v Holtzhausen supra* par 56). In terms of a pending amendment, section 6(2) of ESTA will provide:

“Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with rights of the owner or person in charge, an occupier shall have the right—  
[...]  
(dB) to take reasonable measures to maintain the dwelling occupied by him or her or members of his or her family.”

(Paragraph (dB), is a pending amendment. This paragraph (dB) is to be inserted by section 3(a) of the Extension of Security of Tenure Amendment Act 2 of 2018. The amendment will take effect as from a date determined by the President of the Republic of South Africa in terms of a proclamation in the *Gazette*, which date has not yet been determined.)

According to the Constitutional Court in *Hattingh v Juta* (2013 (3) SA 275 (CC)), the phrase “balanced with the rights of the owner or person in charge” in section 6(2) of ESTA means that a just and equitable balance must be struck between the rights of an ESTA occupier and those of the owner (*Hattingh v Juta supra* par 32). The effect of this statement would be to infuse justice and equity into the matter at hand (*Hattingh v Juta supra* par 32). For example, where there are tensions between an owner’s right to property and an ESTA occupier’s right to improve or build new structures, the rights of the owner and occupier, as required by ESTA, must be balanced and reconciled (*Daniels v Scribante supra* par 61; *Erasmus v Mtenje supra* par 33 and 37; *De Jager v Mazibuko supra* par 14; Pienaar “Land Reform” 2020 3 *Juta’s Quarterly Review of South African Law* 2.4). This position means that the right to use land afforded to an ESTA occupier is therefore not an “open-ended, unlimited or unfettered” right that can be exercised by the occupier without prior consent from the owner (*De Jager v Mazibuko supra* par 14, citing *Nkosi v Buhrmann supra* par 49; Pienaar 2020 *Juta’s Quarterly Review of South African Law* 2.4). Section 6(2) of ESTA allows for the balancing of the rights of the owner and ESTA occupier without prejudice to the rights contained in section 5 of ESTA. This balancing exercise has been embarked upon explicitly by the court when it ordered that an ESTA occupier’s entitlement to make improvements or erect new

structures required that the parties meaningfully engage with each to avoid the violation of an owner's right to property under section 25 of the Constitution and those set out in ESTA (*Daniels v Scribante supra* par 61–65; *Erasmus v Mtenje supra* par 33 and 37; *De Jager v Mazibuko supra* par 20, 22 and 24). Meaningful engagement will ensure respect and concern for the parties' rights to human dignity, equality and freedom.

Apart from section 6(2) of ESTA, requiring that the rights of the owner and ESTA occupier be balanced, section 6(2)(dB) will (perhaps more deliberately and expressly) include the right to make improvements without the owner's consent, as was held in *Daniels* and advocated for by Marais and Muller (2018 *South African Law Journal* 766, 774–791). Arguably, the right to make improvements also comprises the right to build or erect new structures aimed at maintaining the dwelling in a habitable state and to enable the ESTA occupier to live in conditions of human dignity (see, for e.g., *Erasmus v Mtenje supra* par 34 and 35; *De Jager v Mazibuko supra* par 20 and 22). However, to improve or build new structures cannot be done without prior meaningful engagement with the owner or person in charge, as is analysed in more detail below.

#### **4 Necessity of meaningful engagement between owners and occupiers under ESTA**

When an ESTA occupier wants to improve or build new structures, it is required that an ESTA occupier approach the owner or person in charge to raise the question of the proposed improvements (*Daniels v Scribante supra* par 64). Moreover, it is necessary for the ESTA occupier to have regard to the owner's right to property, which is informed by the right to human dignity (see Part 3 above). If an ESTA occupier acts in a manner that does not take into consideration an owner's right to property, such a conduct might be unreasonable (De Vos, Freedman, Brand, Gevers, Govender, Lenaghan, Mailula, Ntlama, Sibanda and Stone "Socio-Economic Rights" in De Vos and Freedman (eds) *South African Constitutional Law in Context* (2014) 717). It is here that the concept of meaningful engagement (developed in *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* (2008 (3) SA 208 (CC)) is important. Although *51 Olivia Road Berea Township (supra)* was concerned with an eviction of unlawful occupiers, the obligation to engage meaningfully could also be applied to other contexts in which an occupier wishes to improve or build new structures to attain a standard of habitability and conditions that conform to human dignity.

This position stems from the Constitutional Court's remarks in *Daniels v Scribante (supra)*, where it pointed out that, although consent from an owner is not a requirement to make improvements, meaningful engagement between the owner or person in charge and an ESTA occupier is necessary prior to the implementation of the proposed repairs or improvements (*Daniels v Scribante supra* par 62). The concept of "meaningful engagement" generally means a process in which two or more parties talk and listen to each other meaningfully in order to achieve certain objectives.

In this regard, meaningful engagement is used as a deliberative tool to resolve disputes and to increase the understanding and sympathetic care of the parties affected, if the parties are willing to participate in the process (see, generally, *51 Olivia Road Berea Township supra* par 14–15. See further, Muller “Conceptualising ‘Meaningful Engagement’ as a Deliberative Democratic Partnership” 2011 3 *Stellenbosch Law Review* 472 743–744 and 753–756; Muller “Conceptualising ‘Meaningful Engagement’ as a Deliberative Democratic Partnership” in Liebenberg and Quinot (eds) *Law and Poverty: Perspectives From South Africa and Beyond* (2012) 301–302 and 311–314; Mahomed *The Potential of Meaningful Engagement in Realising Socio-Economic Rights: Addressing Quality Concerns* (LLM thesis, University of Stellenbosch) 2019 3–8; Chenwi and Tissington *Engaging Meaningfully with Government on Socio-Economic Rights – A Focus on the Right to Housing* (2010) 9; Chenwi “‘Meaningful Engagement’ in the Realisation of Socio-Economic Rights: The South African Experience” 2011 26 *Southern African Public Law* 128 129; Liebenberg “Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of ‘Meaningful Engagement’” 2012 12 *African Human Rights Law Journal* 1 13–28; Van der Berg “Meaningful Engagement: Proceduralising Socio-Economic Rights Further or Infusing Administrative Law With Substance?” 2013 29 *South African Journal on Human Rights* 376 381–388; De Vos *et al* in De Vos and Freedman *South African Constitutional Law in Context* 717–718). In relation to erecting new structures, if the ESTA occupier and owner or person in charge do not engage meaningfully, the occupier may be faced with two equally unsatisfactory options: (a) automatic eviction, leading to homelessness, if they leave the dwelling owing to intolerable living conditions; or (b) continued residence in a property that is undignified and which is not habitable (*Daniels v Scribante supra* par 32 and 52; *Erasmus v Mtenje supra* par 8–9 and 12–14). In such circumstances, the ESTA occupier and the owner or person in charge should engage meaningfully with each other to see if they can agree on the nature of the improvements and manner in which the improvements will be implemented (*Daniels v Scribante supra* par 64, 68 and 71. Compare *51 Olivia Road Berea Township supra* par 13–14). Such an action will help balance and reconcile the conflicting rights and/or interests of an ESTA occupier and an owner or person in charge (*Daniels v Scribante supra* par 62).

There is no exhaustive list of the parameters of meaningful engagement (*51 Olivia Road Berea Township supra* par 14). However, the Constitutional Court in *Daniels v Scribante (supra)* made certain points about the implementation of repairs or improvements. The ESTA occupier and the owner or person in charge must agree on: (a) the time at which the builders will arrive and leave the farm; (b) the movement of the builders on the farm; and (c) the need for the approval of building plans relating to the improvements (*Daniels v Scribante supra* par 71). In the case of improving or building new structures, an ESTA occupier who wishes to effect repairs or improvements is obliged to make reasonable efforts to engage meaningfully with the owner or person in charge before that occupier effects such improvements (*Daniels v Scribante supra* par 64; *Erasmus v Mtenje supra*

par 33, 35 and 37; *De Jager v Mazibuko supra* par 20 and 22; Pienaar 2020 *Juta's Quarterly Review of South African Law* 2.4). If an ESTA occupier tries to engage meaningfully with an owner, and an owner refuses, the occupier should approach a court and not resort to self-help (*Daniels v Scribante supra* par 65; *Erasmus v Mtenje supra* par 35. See further, *Motswagae v Rustenburg Local Municipality* 2013 (2) SA 613 (CC) par 14; *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) par 87 and 152). As such, the process of meaningful engagement will be successful only if both the ESTA occupier and the owner or person in charge act reasonably and in good faith (*51 Olivia Road Berea Township supra* par 20; *De Vos et al* in *De Vos and Freedman South African Constitutional Law in Context* 718). In this regard, the ESTA occupier and the owner or person in charge are required to be open and transparent with each other, because lack of openness, transparency and participation is counterproductive to meaningful engagement (*51 Olivia Road Berea Township supra* par 20; *De Vos et al* in *De Vos and Freedman South African Constitutional Law in Context* 718).

## 5 Conclusion

The anticipated impact of the decision in *Daniels v Scribante (supra)* on ensuring that ESTA occupiers live in dwellings that are suitable for human habitation seemingly came to fruition upon a first reading of the judgment in *Erasmus v Mtenje (supra)*, but not in the judgment of *De Jager v Mazibuko (supra)*, delivered three years after *Daniels v Scribante (supra)*. Nevertheless, it is clear from the principles that have been set out above that when an ESTA occupier intends to improve or build new structures, they need to engage meaningfully with the owner or person in charge. In this regard, the ESTA occupier must approach the owner or person in charge and inform them about the current condition of their dwelling, that it is in a state of disrepair, and that it is necessary to improve that dwelling or erect new structures. The parties should then inspect the property and, if the inspection shows that the dwelling is in need of repairs, such repairs or improvements must be conducted in accordance with the principles established in *Daniels v Scribante (supra)*. Such an engagement will ensure that the conflicting rights and/or interests of ESTA occupiers and owners or persons in charge are balanced and not infringed. Where an ESTA occupier tries to engage meaningfully with an owner or person in charge and the engagement does not result in an acceptable outcome, the ESTA occupier should approach a court to have the dispute arising from the failure to engage resolved by a court. This is because self-help in the form of improving existing structures or erecting new structures on private land without prior engagement with the owner or person in charge is not permitted under our law.

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