Speculum Juris

Vol 37 No 1 (2023)
Published 28 July 2023

ISSN 2523-2177

University of Fort Hare
Together in Excellence

Cite as: Ngwenyama "Meaningful Engagement or Mediation or Structural Interdict? An Appropriate Remedy to Resolve Disputes under ESTA" 2023 (37) Spec Juris 73–84

Meaningful Engagement or Mediation or Structural Interdict? An Appropriate Remedy to Resolve Disputes under ESTA

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Abstract

This article assesses meaningful engagement, mediation, and structural interdict as remedies to resolve disputes. The purpose of this article is to determine the appropriate remedy to resolve disputes under ESTA. It is argued that meaningful engagement or a structural interdict should be reconsidered with reference to the case law where these "remedies" have been used and imposed. This is because meaningful engagement or a structural interdict are remedies used to compel the State to fulfil its constitutional obligations. Arguably, it does not make sense to use and impose similar remedies to purely private parties. The article proposes that mediation (in terms of section 21 of ESTA) might be an effective alternative. This is because private landowners and ESTA occupiers are involved in an on-going relationship, and they will have to live on the same land with each other after the dispute has been resolved. Therefore, mediation will potentially enable private landowners and ESTA occupiers to create a platform to forge respectful and good neighbourliness relationship for the future.

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Keywords: Meaningful engagement – Mediation – Structural interdict – Appropriate remedy under ESTA

1 INTRODUCTION**

The Extension of Security of Tenure Act 62 of 1997 ("ESTA")[1] provides for a mechanism to resolve disputes. This mechanism is evident in the provisions of section 21 of ESTA, which states that:

> (1) [a] party may request the Director General to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act.
>
> (2) The Director General may, on the conditions that he or she may determine, appoint a person referred to in subsection (1): Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the Director General may determine.
>
> (3) A person appointed in terms of subsection (1) who is not in the fulltime service of the State may, from moneys appropriated by Parliament for that purpose, be paid such remuneration and allowances as may be determined by the Minister in consultation with the Minister of Finance for services performed by him or her.
>
> (4) All discussions, disclosures and submissions which take place or are made during the

** This article is partly based on the ideas developed in parts of Ngwenyama *A Common Standard of Habitability? A Comparison Between Tenants, Usufructuaries and Occupiers in South African Law* (LLD dissertation, Stellenbosch University, 2020). The article is an extended version of a paper presented at the 1st Virtual Alternative Dispute Resolution Colloquium. The colloquium was hosted by the North-West University's Faculty of Law on 23 November 2021. This article is also an extended version of an article presented at the 2nd Virtual Alternative Dispute Resolution Colloquium. The colloquium was hosted by the North-West University's Faculty of Law on 19 October 2022. I extend my thanks to the colloquium organisers and to all the other delegates whose papers and contributions during the colloquium influenced my approach to this article. I want to express my gratitude to Lebogang Masemola and France Richia for reading and commenting on an earlier draft of this article. I am also thankful to the two anonymous peer reviewers for their valuable feedback. The opinions expressed in this article are my own and should not be attributed to any of the institutions and/or persons mentioned above. All remaining errors are my own.

1 The preamble of ESTA states the primary objective of ESTA thus: "[t]o provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith." For an analysis of ESTA as legislation that was introduced to address tenure security for ESTA occupiers, see generally Pienaar "Farm Workers: Extending Security of Tenure in terms of Recent Legislation" 1998 *SAPL* 423 423–437; Keightley "The Impact of the Extension of Security of Tenure Act on an Owner's Right to Vindicate Immovable Property" 2017 *SAJHR* 277 277–307.

mediation process shall be privileged, unless the parties agree to the contrary.[2]

However, this dispute resolution mechanism is not used by parties such as ESTA occupiers[3] and private landowners.[4] This is because a formal mediation structure is not established in terms of ESTA.[5] The absence of a formal mediation structure means that persons with expertise in dispute resolution focusing on ESTA disputes have not been appointed.[6] As such, whenever a dispute arises between ESTA occupiers and private landowners, the parties have often approached the courts to resolve their dispute. These disputes may relate to evictions,[7] relocations,[8] improvements,[9] and access to electricity.[10] In this regard, the courts have ordered the parties to meaningfully engage with each other to resolve their dispute.[11] However, this article argues that the use of meaningful engagement or structural interdicts might be flawed considering the following questions. Would meaningful engagement or structural interdicts make any sense between private parties? Is meaningful engagement not a tool that is used to compel the State to abide by its duties and listen to beneficiaries' needs? Is a structural interdict not a remedy that is used to require the State to report back to the court with updates on how a constitutional breach is rectified? Practically speaking, once private parties approach a court to settle a dispute, it could be assumed that they have not been able to reach an agreement amongst themselves. Where and how would meaningful engagement or a structural interdict assist? The assumption is that these parties cannot solve the issue themselves. The purpose of this article is to determine the appropriate remedy to resolve disputes under ESTA. It is argued that meaningful engagement or a structural interdict should be reconsidered with reference to

2 Subsection (3A) provides that "[t]he Director-General may refer the disputes contemplated in this section to the Board for mediation or arbitration as contemplated in section 15C(1)(d)." Section 15C(1)(c) further provides that the functions of the Board are to advise the Minister and the Director-General on tenure security matters and generally, the Board shall, *inter alia*, assist in the provision of mediation and arbitration of land rights disputes arising from the application of ESTA. Subsection (3A) and s 15C(1) are pending amendment and will be inserted into the principal Act by ss 8 and 9 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.

3 Section 1 of ESTA defines an occupier as: "a person residing 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— (b) 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 (c) a person who has an income in excess of the prescribed amount."

4 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 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."

5 Stander *Developing a Framework for Mediating Farm Evictions and Security of Tenure Related Disputes in South Africa* (LLM thesis, Stellenbosch University, 2022) 10–12; Moolman "Mediation can Contribute to Sustainable Relationships on the Farm" 2021 *Stockfarm* 60 60.

6 Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis, Stellenbosch University, 2022) 10–12; Moolman 2021 *Stockfarm* 60.

7 See for instance, *Chagi v Singisi Forest Products (Pty) Ltd* 2007 SCA 63 (RSA); *Molusi v Voges NO* 2016 3 SA 370 (CC); *Snyders v De Jager* 2017 3 SA 545 (CC); *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC); Moolman 2021 *Stockfarm* 60.

8 See for instance, *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA); *Mjoli v Greys Pass Farm (Pty) Ltd* (LCC45R/2018) [2019] ZALCC 25 (15 October 2019).

9 See for instance, *Daniels v Scribante* 2017 4 SA 341 (CC); *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018); *De Jager v Mazibuko* (LCC57/2020) [2020] ZALCC 7 (25 August 2020).

10 See for instance, *T.M Sibanyoni & Sibanyoni Family v Van Der Merwe & Any other person in charge of Farm 177, Vaalbank Portion 13 Hendrina, Mpumalanga* (LCC 119/2020) [2021] ZALCC 33 (7 September 2021).

11 See for instance, *Daniels*; *Erasmus*; *De Jager*; *Oranje*; *Mjoli*; *T.M Sibanyoni*.

the case law where these "remedies" have been used and imposed. The article proposes that mediation (in terms of section 21 of ESTA) might be an effective alternative.[12] To answer the questions mentioned above and to support the proposition, the next section assesses the remedy of meaningful engagement, mediation, and structural interdict to determine the aptness of these remedies to resolve disputes under ESTA.

2 MEANINGFUL ENGAGEMENT

2 1 Origins of meaningful engagement with reference to *Olivia Road*

Meaningful engagement has been used by the courts to help deepen democracy and empower citizens.[13] Meaningful engagement, therefore, raises an obligation for the State to respond to the concerns of the affected parties.[14] Arguably, meaningful engagement would not make sense in the context of private parties. This is because meaningful engagement is a tool that is used to compel the State to abide by its duties and listen to beneficiaries' needs, as further indicated below. The concept of meaningful engagement generally means a process in which two or more parties talk and listen to each other meaningfully 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.[15] Meaningful engagement has a similar effect to a structural interdict usually in terms of socio-economic rights.[16] The remedy of meaningful engagement was first used and imposed by the Constitutional Court in the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* ("*Olivia Road*").[17] This case concerned the eviction of more than 400 unlawful occupiers of two buildings in the inner

12 In the context of Prevention of Illegal Eviction from and Unlawful Act 52 of 1952 (PIE), s 7 might be an alternative. Section 7 of PIE reads as follows:
"(1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.
(2) If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her nominee, may, on the conditions that he or she may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.
(3) Any party may request the municipality to appoint one or more persons in terms of subsections (1) and (2), for the purposes of those subsections.
(4) A person appointed in terms of subsection (1) or (2) who is not in full-time service of the State may be paid the remuneration and allowances that may be determined by the body or official who appointed that person for services performed by him or her.
(5) All discussions, disclosures and submissions which take place or are made during the mediation process shall be privileged, unless the parties agree to the contrary."

13 De Vos, Freedman, Boggenpoel *et al.* "Socio-Economic Rights" in De Vos and Freedman (eds) *South African Constitutional Law in Context* 2ed (2021) 501.

14 De Vos *et al.* (2021) 501.

15 See generally, *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 14–15. See further, Mahomedy *The Potential of Meaningful Engagement in Realising Socio-Economic Rights: Addressing Quality Concerns* (LLM thesis, Stellenbosch University, 2019) 3–8; Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" 2012 *AHRLJ* 1 13–28; De Vos *et al.* (2021) 817–818.

16 De Vos *et al.* (2021) 501.

17 *Olivia Road*.

city by the City of Johannesburg.[18] The buildings were declared to be unsafe and unhealthy for human occupation in terms of the National Building Regulations and Buildings Standard Act 103 of 1977.[19] The Constitutional Court in *Olivia Road* found that the City of Johannesburg could not evict unlawful occupiers without first, individually and collectively, meaningfully engaging with the unlawful occupiers.[20] In the context of eviction, if an unlawful occupier and the State do not meaningfully engage with each other, the unlawful occupier would be faced with an eviction that renders the unlawful occupier homeless.[21] As such, the unlawful occupier and the State should meaningfully engage with each other to see if the State can address the issues that might affect unlawful occupiers relating to suitable alternative accommodation.[22] The Constitutional Court in *Olivia Road* highlighted the advantages of meaningful engagement as follows:

> Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage, and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.[23]

The advantage of meaningful engagement points towards a more appropriate context where meaningful engagement should be applied, which is between the State and the beneficiaries of fundamental rights. In such a context, meaningful engagement could be useful to compel the State not to abdicate its constitutional obligations as the guardian of the well-being of society.[24] There is no exhaustive list of the objectives of meaningful engagement.[25] However, the Constitutional Court in *Olivia Road* pointed out that, with regard to eviction with the effect of rendering unlawful occupiers homeless, the following concerns must be addressed, namely (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c) whether it would be possible to render the building concerned relatively safe and conducive to health for an interim period; (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and (e) when and how the city could fulfil these obligations.[26] In light of these objectives, the Constitutional Court in *Olivia Road* ordered the State and the unlawful occupiers to meaningfully engage with each other so as to address the concerns raised by the affected parties, the duties of the municipality, and the rights and duties of the parties affected.[27] The State and the unlawful occupiers were also ordered to meaningfully engage with each other regarding how the two buildings could be made safe and

18 *Olivia Road* para 1.

19 *Olivia Road* para 1.

20 *Olivia Road* para 16.

21 *Olivia Road* paras 15–18.

22 *Olivia Road* paras 15–18.

23 *Olivia Road* para 15.

24 Section 7(2) of the Constitution provides that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." As pointed out by the CC in *Glenister v President of the Republic of South Africa*: "This obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the state to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights." For a discussion of the constitutional obligations, see generally De Vos *et al.* (2021) 795–798.

25 *Olivia Road* para 14.

26 *Olivia Road* para 14.

27 *Olivia Road* para 5.

conducive to health.[28] The Constitutional Court in *Olivia Road* further ordered the parties to file affidavits reporting on the results of the meaningful engagement.[29] As such, the Constitutional Court in *Olivia Road* held that the process of meaningful engagement between the State and the unlawful occupiers would be successful only if both the unlawful occupiers and the State acted reasonably and in good faith.[30] In this regard, the Constitutional Court in *Olivia Road* mentioned that the unlawful occupier and the State must be open and transparent with each other because a lack of openness, transparency, and even participation is counterproductive to meaningful engagement.[31] It is clear from the *Olivia Road* case analysis that meaningful engagement is a mechanism created by the courts and is more suitable to compel the State to respect, protect, promote, and fulfil constitutional rights.[32]

Meaningful engagement was also granted in the case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* ("*Joe Slovo*").[33] In *Joe Slovo*, the Constitutional Court granted an eviction order against the residents of Joe Slovo informal settlement.[34] Coupled with the eviction order was an order that the parties involved should meaningfully engage with each other in reaching an agreement on how the eviction of the unlawful occupiers should happen.[35] Here again, meaningful engagement was rightfully used and imposed to compel the State to abide by its duties and deliberate with the parties that stand to be affected by the eviction order. This is because meaningful engagement requires the State and the parties to engage on what it means to be in equitable terms, in order to find a solution.[36] The following subsection highlights the current position on how disputes are resolved using meaningful engagement in the context of ESTA.

2 2 How Have Courts Resolved Disputes Arising from and out of ESTA Using Meaningful Engagement?

When an ESTA occupier wants to improve or build new structures or install electricity, it is required that the occupier must approach the private landowner or person in charge to raise the question of the proposed improvements.[37] Moreover, the ESTA occupier must have regard for the private landowner's right to property (in terms of section 25 of the Constitution), which is informed by the right to human dignity.[38] If an ESTA occupier acts in a manner that does not consider the private landowner's right to property, such an omission might be found to be unreasonable.[39] It is on this aspect that the concept of meaningful engagement, which was developed in *Olivia Road*, was used and imposed by the Constitutional Court in *Daniels v Scribante* ("*Daniels*"). Although *Olivia Road* was concerned with the eviction of unlawful occupiers, the obligation of meaningful engagement was extended to other contexts in which an ESTA occupier wishes to improve or build new structures or install electricity to attain a

28 *Olivia Road* para 5.

29 *Olivia Road* para 5.

30 *Olivia Road* para 20. See further, De Vos *et al.* (2014) 718.

31 *Olivia Road* paras 20–21. See further, De Vos *et al* (2014) 718.

32 Section 7(2) of the Constitution; *Olivia Road* para 16.

33 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC).

34 *Joe Slovo* para 7.

35 *Joe Slovo* para 7.

36 *Joe Slovo* 244.

37 *Daniels* para 64.

38 *Daniels* para 61.

39 *Daniels* paras 61 and 65.

standard of habitability and conditions that conform to human dignity.[40]

This position stems from the Constitutional Court's remarks in *Daniels* where the Constitutional Court considered whether an ESTA occupier has a right to make improvements to a dwelling to make it habitable.[41] The Constitutional Court in *Daniels* found that ESTA affords an ESTA occupier the right to make improvements to their dwelling without the consent of the owner.[42] The Constitutional Court in *Daniels* further pointed out that, although consent from a private landowner is not a requirement to make improvements, meaningful engagement between the private landowner or person in charge and an ESTA occupier is necessary before the implementation of the proposed repairs or improvements.[43] In the context of improving or erecting new structures or installing electricity, if the ESTA occupier and the private landowner or person in charge do not engage meaningfully, the ESTA occupier may be faced with two equally unsatisfactory options: (a) automatic eviction, leading to homelessness, if the ESTA occupier leaves the dwelling due to intolerable living conditions; or (b) to continue to reside in a property that is undignified and which is not habitable.[44] In such circumstances, the ESTA occupier and the private landowner or person in charge should engage meaningfully with each other to see if they can agree on the nature of the improvements and how they will be implemented.[45] 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.[46]

As already mentioned, there is no fixed or definite list of the objectives of meaningful engagement.[47] However, the Constitutional Court in *Daniels* pointed out with regard to the implementation of repairs or improvements that the ESTA occupier and the private landowner 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 the building plans relating to the improvements.[48] In the case of improving or building new structures or installing electricity, an ESTA occupier who wishes to effect repairs or improvements or install electricity is obliged to make reasonable efforts to meaningfully engage with the private landowner or person in charge before the ESTA occupier effects such improvements.[49] If an ESTA occupier tries to engage with the private landowner meaningfully and the private landowner refuses that any improvements be made, the ESTA occupier should approach a court to have their dispute resolved and not resort to self-help.[50]

2 3 Assessment

In light of the above assessment, meaningful engagement should be reconsidered in the context of disputes arising from ESTA between purely private parties, especially with reference to

40 On the standard of habitability, see Ngwenyama *A Common Standard of Habitability?* (LLD dissertation) 121–144.

41 On the meaning of habitability, see Ngwenyama *A Common Standard of Habitability?* (LLD dissertation) 121–144.

42 *Daniels* paras 57 and 60.

43 *Daniels* para 62.

44 *Daniels* paras 32 and 52; *Erasmus* paras 8–9 and 12–14.

45 *Daniels* paras 64, 68 and 71. Compare *Olivia Road* paras 13–14.

46 *Daniels* para 62.

47 *Olivia Road* para 14.

48 *Daniels* para 71.

49 *Daniels* para 64; *Erasmus* paras 33, 35 and 37; *De Jager* paras 20 and 22.

50 *Daniels* para 65; *Erasmus* para 35. See further, *Motswagae v Rustenburg Local Municipality* 2013 2 SA 613 (CC) para 14; *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) paras 87 and 152.

the case of *Olivia Road* where this "remedy" was first used and imposed. The reason is that meaningful engagement is a tool that was created by the judiciary to enforce engagement between the State and unlawful occupiers in the context of evictions and relocations. This is mainly so because the State has a duty to assist unlawful occupiers and provide them with forms of housing. Meaningful engagement is therefore not a remedy that can be used in a purely private dispute considering the origin of this measure with reference to *Olivia Road*. If private parties go to court, the assumption is that they cannot settle a dispute amongst themselves. Consequently, meaningful engagement would hardly assist. It is suggested that meaningful engagement is more apt in the context of disputes between the State and private individuals as opposed to purely private parties. The section that follows assesses mediation to determine whether it is an appropriate remedy to resolve disputes under ESTA.

3 MEDIATION

Mediation has not been used and imposed in the context of ESTA disputes. This is because there are no mediation experts specifically appointed to deal with dispute resolution under ESTA.[51] The concept of mediation is also not defined in ESTA. Nevertheless, mediation is generally defined as a confidential process in which two or more parties who are in conflict with each other voluntarily appoint an independent third party (known as the mediator) to assist them in reaching a mutually acceptable agreement regarding the issues that cause a dispute between them.[52] The Constitutional Court ordered this remedy in *Port Elizabeth Municipality v Various Occupiers* ("*PE Municipality*").[53] In this case, the applicant, PE Municipality, sought to evict the respondents who occupied shacks that were unlawfully erected and occupied on privately owned property within its area of jurisdiction.[54] The Constitutional Court in *PE Municipality* held that before an applicant approaches a court for an order of eviction, the parties should be encouraged and required to try respectful face-to-face mediation through an independent third party.[55] In its conclusion, the Constitutional Court in *PE Municipality* held that:

> a court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution.[56]

The Constitutional Court's conclusion in *PE Municipality* was prompted by the fact that mediation will help the parties to avoid the tension and frustration associated with court cases and reduce the expenses that may be incurred through court processes.[57] The words of Brassey AJ in *MB v NB*[58] are apt in this regard:

> How much richer would this solution have been had it emerged out of a consensus-seeking

51 Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis) 10–12; Moolman 2021 *Stockfarm* 60.

52 See generally, Scott-MacNab "Mediation in the Family Context" 1988 *SALJ* 709 715; Nupen "Mediation" in Pretorius (ed) *Dispute Resolution* (1993) 39; Faris "Deciphering the Language of Mediatory Intervention in South Africa" 2006 *CILSA* 427 427–449; Human, Robinson, Smith *et al*. *Family Law in South Africa* (2010) 345; Boulle *Mediation Principles, Process, Practice* (2011) 13; Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with Comparisons drawn mainly with the Australian Family Law System* (LLM thesis, University of KwaZulu-Natal, 2011) 11; Moolman 2021 *Stockfarm* 60.

53 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

54 *PE Municipality* paras 1–2.

55 *PE Municipality* para 39.

56 *PE Municipality* para 61.

57 *PE Municipality* para 42.

58 *MB v NB* 2010 3 SA 220 (GSJ).

> process rather than in adversarial proceedings in which positions were taken up that gave every appearance of callousness and cruelty. This is but an instance of what mediation might have achieved. In fact the benefits go well beyond it. In the process of mediation, the parties would have had ample scope for an informed but informal debate on the levels of their estates, the amount of their incomes and the extent of their living costs. Nudged by a facilitative intermediary, I have little doubt that they would have been able to solve most of the monetary disputes that stood between them. The saving in time and legal costs would have been significant and, once a few breakthroughs had been made, I have every reason to believe that an overall solution would have been reached. … In short, mediation was the better alternative and it should have been tried. On the facts before me it is impossible to know whether the parties knew about the benefits of mediation, but I can see no reason why they would have turned their backs on the process, especially if they had been counselled on the matter by the attorneys. What is clear, however, is that the attorneys did not provide this counsel; in fact, in the course of the pre-trial conference they positively rejected the use of the process. For this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients.[59]

It is clear from the words of Brassey AJ that parties in a dispute arguably have an obligation to first try mediation before they embark on litigation. More importantly, attorneys have an obligation to encourage the parties to seek mediation to resolve their dispute. Such advice will ensure that the delays and costs associated with going to court are avoided. When the parties come together to talk, the mediator will narrow down the issues causing the dispute between the parties and facilitate a mutually acceptable solution.[60] This approach will enable the parties to solve their problems and determine an outcome of their own dispute in a manner that the court process may not be able to do.[61] The money that the applicant will spend on unpleasant and tiresome litigation could be used to facilitate an outcome that promotes respect for human dignity and underscores the purpose for which Parliament enacted legislation such as ESTA.[62] The increasing success of mediation has been noted in labour,[63] family,[64] divorce,[65] and eviction[66] matters before they are brought to court. As such, mediation may also have an important role to play where the rights and/or interests extended to ESTA occupiers by ESTA may sometimes have to be balanced with those of private landowners.[67] This is because mediation has the potential to enable the private landowner and the ESTA occupier to relate to each other in a sensible and practical way.[68] In light of the above considerations, there is no doubt that if a private landowner and the ESTA occupier in the context of ESTA approach evictions, relocations, improvements,

59 *MB v NB* 2010 3 SA 220 (GSJ) paras 57–59. See also, Moolman 2021 *Stockfarm* 60.

60 *PE Municipality* para 42. See further, Nupen "Mediation" 40; Wiese *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 2; Moolman 2021 *Stockfarm* 60; Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis) 17.

61 *PE Municipality* para 42. See further, Human *et al*. *Family Law* (2010) 346; Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis) 16–17.

62 *PE Municipality* para 42; Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis) 17.

63 Nupen "Mediation" 40; Grogan *Labour Litigation and Dispute Resolution* (2014) 118–146; Du Plessis and Fouché *A Practical Guide to Labour Law* 9 ed (2019) 409–410.

64 Scott-MacNab 1988 *SALJ* 709–726; Nupen "Mediation" 40; Human *et al. Family Law* (2010) 345; Schultz *A Legal Discussion of the Development of Family Law Mediation* (LLM thesis) 31–99.

65 Van Zyl *Divorce Mediation and the Best Interests of the Child* (1997) 142–153; Cohen "Divorce Mediation" in Pretorius (ed) *Dispute Resolution* (1993) 73–87.

66 *PE Municipality* para 40–47.

67 See ss 21 and 22 of ESTA, which provides for the mediation and arbitration of any dispute arising from and out of ESTA. See further, Pienaar *SAPL* 423 433–434; Du Plessis and Fouché *A Practical Guide to Labour Law* 9 ed (2019) 444; Moolman 2021 *Stockfarm* 60; Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis) 148–149.

68 *PE Municipality* para 43; Moolman 2021 *Stockfarm* 60; Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis) 148–149.

and installation of electricity in a fair manner and in good faith, they will both benefit from mediation. It should be mentioned here that an order for the eviction of an ESTA occupier *may* be granted by a court if the private landowner and the ESTA occupier have attempted mediation to settle their dispute.[69] It is fair to mention that conflicts differ, cases differ, and as such, every matter will have to be approached in an appropriate manner. In the context of ESTA, since the private landowner and the ESTA occupier are involved in an on-going relationship and they will have to live on the same land with each other after the dispute has been resolved, mediation is arguably the appropriate approach to evictions, relocations, improvements and installation of electricity.[70] This is because mediation will potentially enable the private landowner and the ESTA occupier to create a platform to forge a respectful and good neighbourly relationship for the future.[71] The next section assesses structural interdict to determine the aptness of this remedy in the context of ESTA.

4 STRUCTURAL INTERDICT

A structural interdict has not been used and imposed in the context of disputes arising from and out of ESTA. This is because while constitutional rights are always binding on the State, it is not always the case when it comes to private parties.[72] Interdicts are usually directed at future events.[73] An interdict normally restrains a party from undertaking certain conduct.[74] An interdict may also be in the form of an instruction to perform certain acts.[75] Interdicts can be structural or supervisory in the sense that the State is required to report back to the court with updates on how a constitutional breach is rectified.[76] Arguably, a structural interdict is not considered appropriate to be granted by the court in the context of ESTA disputes. It is more

69 Section 10 of ESTA dealing with an order of eviction of persons who became ESTA occupiers on 4 February 1997 will be amended by the addition of the following paragraph:
"(e) the owner or person in charge or the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration."
Section 11(2) of ESTA dealing with an order of eviction of persons who became ESTA occupiers after 4 February 1997 will be amended by the substitution for subsection (2) of the following subsection:
"(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997, if—
(a) [it] the court is of the opinion that it is just and equitable to do so; and
(b) the owner or person in charge of the land and the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration."
Paragraph (e) will be added by s 5 and subsection 2 will be substituted by s 6 of the Extension of Security of Tenure Amendment Act 2 of 2018. The actual amendment and substitution of these provisions 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. As argued in the article, it seems that ss 10(e) and 11(2)(b) will (perhaps more deliberately and expressly) make mediation mandatory (and not merely voluntary) in ESTA disputes.

70 Nupen "Mediation" 40; Moolman 2021 *Stockfarm* 60; Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis) 148–149.

71 *PE Municipality* para 43; Moolman 2021 *Stockfarm* 60; Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis) 148–149.

72 De Vos *et al.* (2021) 428.

73 De Vos *et al.* (2021) 508.

74 De Vos *et al.* (2021) 508.

75 De Vos *et al.* (2021) 508.

76 De Vos *et al.* (2021) 508; Roach "Crafting Remedies for Violations of Economic, Social and Cultural Rights" in Squires, Langford and Thiele (eds) (2005) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* 113.

apt in cases where there is a breach by the State (or its departments) of constitutional rights due to no compliance with the obligations imposed by the Constitution and the court must consequently enforce compliance.[77] The Constitutional Court has used and imposed a structural interdict in the case of *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* ("*Pheko*").[78] In *Pheko*, the applicants were forcibly removed from an informal settlement.[79] The applicants' properties were destroyed, and the Municipality relocated them to an area far from their original accommodation and social amenities such as their work.[80] Nkabinde J in *Pheko* succinctly pointed out the purpose of a structural interdict as follows:

> Supervisory orders arising from structural interdicts ensure that courts play an active monitoring role in the enforcement of orders. In an appropriate case, this guarantees commitment to the constitutional values of accountability, responsiveness and openness by all concerned, in a system of democratic governance. By granting the structural interdict a court secures a response in the form of reports and thereby prevents a failure to comply with the positive obligations imposed by its order. Generally, the court's role continues until the remedy it has ordered in a matter has been fulfilled.[81]

A structural interdict is also an invasive remedy in that it allows the court to check the proposed plans to remedy the constitutional breach and ensure that the plans are feasible.[82] As such, the courts must be careful not to violate the separation of powers doctrine when they inspect the proposed plans.[83] This is because the courts are not best suited to formulate the necessary plans that give effect to the Constitution better than the State and its departments.[84] This remedy should thus be applied by the courts with caution.

In *Joe Slovo*, the Constitutional Court also issued a structural interdict.[85] In this case, a certain organ of the State obtained an order in terms of section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1998 to evict 20 000 residents of the Joe Slovo informal settlement in order to upgrade the settlement.[86] The Constitutional Court ordered the parties to report back on the implementation of the court order and the allocation of permanent housing opportunities to those affected by the order.[87] The Constitutional Court further ordered that if any party fails to comply, or in the event of facing unforeseen difficulties, any party may approach the Constitutional Court for an amendment, supplementation, or variation of the court order.[88] A structural relief was rightfully used to require the parties to report back on the implementation of the court order. However, such a relief might seem difficult to implement in the context of purely private parties. This is because structural interdicts ordinarily take a number of steps before a mutually acceptable outcome and the proposed plan is implemented to uphold the breached constitutional rights.[89] As such, it may be unreasonable to require a

77 De Vos *et al.* (2021) 508.

78 *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT19/11) [2016] ZACC 20 (26 July 2016).

79 *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (CCT19/11) [2016] ZACC 20 (26 July 2016) para 4.

80 *Ibid.*

81 *Ibid.* para 1.

82 De Vos *et al.* (2021) 508; Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) *New York Univ LR* 1565 1596.

83 De Vos *et al.* (2021) 508.

84 *Ibid*.

85 *Joe Slovo* paras 1–2.

86 *Joe Slovo* para 1.

87 *Joe Slovo* para 13.

88 *Joe Slovo* para 7.

89 De Vos *et al.* (2021) 510.

private landowner who is funded from their private purse to report back to the court on the progress of rectifying a constitutional breach, unlike the State that is funded from a public purse.[90] Therefore, imposing a structural interdict in the context of purely private parties might amount to imposing exact compliance with the positive obligations of a supervisory court order that ought to be imposed on the State.

5 CONCLUSION

Since disputes are to be expected and more than often arise in the context of ESTA evictions, relocations, improvements, or installation of electricity, it is seen that ESTA provides a mechanism to resolve these disputes. This mechanism is evident in the provisions of section 21 of ESTA that entitle a private landowner or ESTA occupier to request a mediator to resolve their dispute. As such, it is suggested that the courts should not grant the remedy of meaningful engagement or structural relief in the context of ESTA disputes. This is because looking at the origin of meaningful engagement, on the one hand, the assessment shows that it is a constitutional remedy that is used by the courts to compel the State to fulfil its obligations and respond to the beneficiaries' concerns. On the other hand, a structural interdict requires the State to report back to the court with updates on how a constitutional breach is rectified. Arguably, these two remedies do not make sense between purely private parties as they are used to compel the State to abide by its obligations. It is thus proposed that the courts should order the parties to seek mediation.[91] This is because mediation is an appropriate remedy to resolve disputes between purely private parties such as ESTA occupiers and private landowners where these parties are engaged in an on-going relationship and will have to live on the same land with each other after the dispute has been resolved. Therefore, mediation will potentially enable private landowners and ESTA occupiers to create a platform to forge respectful and amicable relationships for the future.[92]

90 *Daniels* para 40; Currie and De Waal *The Bill of Rights Handbook* 6 ed (2013) 50.

91 On the recommendations of mediation, see further Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis) 199–145; Moolman 2021 *Stockfarm* 60.

92 On the importance of mediation, see further Stander *Developing a Framework for Mediating Farm Evictions* (LLM thesis) 148–149; Moolman 2021 *Stockfarm* 60.