

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?

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*In Daniels, the Constitutional Court had to decide whether the Extension of Security of Tenure Act 62 of 1997 ('ESTA') allows an occupier to bring about improvements on land without the landowner's permission to make the occupier's dwelling habitable. The ESTA would be in conflict with an occupier's rights to tenure security (s 25(6) of the Constitution) and human dignity (s 10 of the Constitution) if it did not provide this right. Madlanga J, for the majority, ruled that this right flows from a natural and proper interpretation of the Act. This finding is unattractive from a single-system-of-law perspective, as it may undermine (instead of promote) the positive characteristics which the Constitution envisions for the whole legal system. We raise two objections against the majority judgment, which stem from the two fundamental principles of subsidiarity. In terms of the first criticism we argue that the majority judgment committed judicial overreach and subverted the rule of law, as it adopted a strained interpretation of s 5(a) of the ESTA by overemphasising the purpose of the Act and abandoning the textual threshold. In the process, the court ascribed vague requirements to s 5(a) which are foreign to the property context within which the ESTA operates, thereby obfuscating the relationship between the ESTA and the common law of unjustified enrichment. Under the second objection, which flows from the first, we argue that the court should instead have developed the common law of unjustified enrichment to come to the occupier's assistance. This could have been done by expanding the categories of lawful occupiers who are permitted to bring about improvements on land without the landowner's permission. From a doctrinal perspective the enrichment liability of the owner could then have been limited by the 'unique relationship' that exists between the owner and the ESTA occupier and could have been further circumscribed by the *ius tollendi*, the common-law definition, and the tests for necessary, useful and luxurious improvements. Such a development would have entailed a more principled solution to the case, one which would have promoted greater systemic coherence between the various sources of law applicable to the dispute.*

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I INTRODUCTION

In *Daniels v Scribante*¹ (*'Daniels'*) the Constitutional Court ('CC') had to decide a novel issue against the backdrop of an otherwise familiar narrative of every-day life in rural South Africa. The case concerned an applicant, a lawful occupier under the Extension of Security of Tenure Act 62 of 1997 ('ESTA' or 'the Act'), and her family, all of whom had lived on the property of the second respondent (the landowner) for over a decade. Ms Daniels wanted to effect certain improvements to the dwelling they occupied to bring it to a habitable standard. These improvements entailed 'levelling the floors, paving part of the outside area ... install[ing] ... an indoor water supply, a wash basin, a second window and a ceiling'.² It was common cause that these improvements were basic in nature. After notifying the first respondent, who was the person in charge,³ of her intention to bring about these improvements and starting construction, he informed her that she did not have permission to effect these changes and had to cease all building operations.⁴ The applicant subsequently instituted proceedings against the respondents in terms of ss 5, 6 and 13 of the ESTA in the Stellenbosch Magistrate's Court. She argued that these provisions, which allowed her to reside on the farm, include the right to make improvements to her dwelling without the owner's permission. Both the Stellenbosch Magistrate's Court and, on appeal, the Land Claims Court ruled that under the ESTA, an occupier does not have the right to effect improvements without permission.⁵ The Land Claims Court held that affording such a right to the applicant would constitute a 'drastic intrusion' on the common-law rights of an owner, and would have required 'an express, unambiguous provision' in the ESTA.⁶ After the Supreme Court of Appeal ('SCA') refused to grant her leave to appeal, the applicant appealed to the CC.

Madlanga J, writing for the majority,⁷ held that a purposive interpretation must be adopted when construing the provisions of the ESTA and s 25(6) of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), which is the constitutional provision to which this statute gives effect.⁸

¹ 2017 (4) SA 341 (CC).

² *Ibid* para 7.

³ For purposes of this discussion we use the term 'owner', as defined in the ESTA, to refer both to owners of land and persons in charge of land.

⁴ *Daniels* supra note 1 paras 8–9.

⁵ *Ibid* para 10.

⁶ *Daniels v Scribante* [2015] ZALCC 12 para 24.

⁷ Cameron J, Froneman J, Khampepe J, Mbha AJ and Musi AJ concurring.

⁸ *Daniels* supra note 1 para 23ff, citing *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53. The long title of the ESTA inter alia stipulates that the Act is meant '[t]o provide for measures with State assistance to facilitate long-term security of land tenure'.

He also referred to s 39(2) of the Constitution, which requires courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation.⁹ He decided that the ESTA must be interpreted in accordance with the right to human dignity.¹⁰ Section 5(a) of the Act played a key role in this interpretation. This provision stipulates that '[s]ubject 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 ... human dignity'. This effectively incorporates s 10 of the Constitution into the Act.¹¹ Madlanga J held that if the ESTA did not allow occupiers to bring about alterations to make their dwellings habitable, it would infringe their right to human dignity.¹² It thus had to be established whether the ESTA provides this right. In this respect, Madlanga J reiterated that courts should interpret legislation in conformity with the Constitution, which entails that if it is reasonably possible to construe legislation in accordance with the Constitution, such an interpretation should be followed.¹³

In determining whether the ESTA includes the right to make improvements, the majority considered ss 5 and 6 of the ESTA, the Act's historical context, its purpose, s 39(2) of the Constitution, the right to tenure security (s 25(6) of the Constitution), and the right to human dignity (as incorporated into s 5(a) of the ESTA) as key interpretive signifiers.¹⁴ Madlanga J held that whilst neither s 5 nor s 6 of the ESTA expressly authorises an occupier to make improvements without permission,¹⁵ if one 'den[ies] an occupier the right to make improvements to the dwelling, you take away its habitability'.¹⁶ Accordingly, not permitting the applicant to effect improvements without permission meant that she would be forced to live in a dwelling unfit for human habitation, which would be at odds with her leading a dignified life.¹⁷ Importantly, the link between security of tenure and human dignity is strengthened via this habitability requirement, which, in turn means that an occupier must have the right to bring about basic improvements to the dwelling to have secure tenure.¹⁸ Madlanga J thus concluded that it is

⁹ *Daniels* supra note 1 para 25.

¹⁰ *Ibid* para 29.

¹¹ Section 10 of the Constitution provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'.

¹² *Daniels* supra note 1 paras 29, 32–4.

¹³ *Ibid* para 36, citing *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2016 (6) SA 596 (CC) para 135 and *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC) para 23.

¹⁴ *Daniels* supra note 1 paras 23–36. Although the majority does not specifically cite s 10 of the Constitution in its judgment, it is difficult to see to what other right the references to the 'right to human dignity' throughout the judgment could refer.

¹⁵ *Ibid* para 27.

¹⁶ *Ibid* para 33.

¹⁷ *Ibid* paras 31–4.

¹⁸ *Ibid* para 32ff.

reasonably possible to construe the provisions of the ESTA, specifically s 5(a), as permitting the applicant to bring about the relevant improvements without the owner's permission.

The respondents argued that the legislature, and not the court, is best placed to afford the applicant the relief sought, as the ESTA does not expressly provide the right to make improvements without the owner's permission.¹⁹ Madlanga J rejected this contention because the ESTA — on his interpretation — does provide this right.²⁰ He made it clear though, that this does not mean an occupier may bring about improvements with total disregard of the owner. Madlanga J identified two qualifications in s 5(a). First, the types of improvements which the applicant may effect must be 'reasonably necessary' to bring the dwelling to a habitable standard.²¹ Secondly, there must be meaningful engagement between the owner and occupier to ensure a proper balance between the rights of these parties.²² These rights are the owner's right to protection of property under s 25(1)–(3) of the Constitution, and the occupier's right to security of tenure under s 25(6) of the Constitution, as given effect to by the ESTA, as well as the right to have access to adequate housing in s 26(1) of the Constitution.

One cannot fault the outcome of the case. The applicant's security of tenure, along with her human dignity, would have been undermined if she were to have been denied the right to make improvements without the owner's permission. To this end the decision vindicates the applicant's rights under the Constitution and is therefore commendable. Yet, it is questionable whether the court's journey (ie the interpretation of s 5(a) of the Act) in arriving at its destination (viz affording Ms Daniels the right to make improvements without the owner's permission) was the most appropriate one in terms of our single-system-of-law approach established by previous CC decisions.²³

Our argument in this article is two-pronged. First, we consider the interpretation of statutes under the first subsidiarity principle, and secondly we consider the application (and development) of the common law in terms of the second subsidiarity principle, where legislation does not properly give effect to a constitutional right. In part II, we first discuss the single-system-of-law principle and the subsidiarity principles which derive from it. Thereafter, the interpretation of the ESTA under the first principle forms the focal point of our initial analysis. We criticise the majority decision from an interpretation-of-statutes perspective and consider its implications for a single-legal-system approach. Here we shall argue that instead of transform-

¹⁹ Ibid para 56.

²⁰ Ibid paras 57, 59–60.

²¹ Ibid para 32.

²² Ibid paras 61–5.

²³ We borrow this metaphor from Z T Boggenpoel 'Can the journey affect the destination? A single system of law approach to property remedies' (2016) 32 SAJHR 71.

ing property law and property relations, the CC's strained interpretation of s 5(a) of the ESTA may end up frustrating the spirit, purport and objects of the Bill of Rights in future cases that concern tenure security. We then investigate a possible alternative approach to the one the majority followed, namely developing the common law of unjustified enrichment under the second subsidiarity principle to provide the relief which the applicant sought.²⁴

II A SINGLE SYSTEM OF LAW

(a) Introduction

When the CC laid down the single-system-of-law principle in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa*,²⁵ it concluded the debate as to which source of law (i.e. the Constitution, legislation, the common law, case law precedent, and indigenous law) ranks supreme in legal disputes.²⁶ In that case, Chaskalson P (as he then was), in a unanimous judgment, emphatically held that 'all law ... derives its force from the Constitution and is subject to constitutional control'.²⁷ Consequently, all sources of law must promote the spirit, purport and objects of the Bill of Rights, as per the directive in s 39(2) of the Constitution.²⁸ Determining which source of law must be used to decide a legal dispute, if more than one source is applicable, should therefore be guided by the Constitution.²⁹ It is in this context that the subsidiarity principles, as developed by the Constitutional Court, present a useful methodology.³⁰

In terms of the first subsidiarity principle, a litigant who claims that a constitutionally protected right has been infringed must rely on legislation enacted to give effect to that right to find a cause of action, and may not rely on the underlying constitutional right itself for a remedy.³¹ By logical extension, such a litigant may also not rely directly on any other right in the

²⁴ Emeritus Justice Moseneke recently criticised the judiciary and academia for failing to integrate the common law into the transformative agenda of the Constitution. See Anonymous 'Moseneke highlights reluctance to transform common law' *BizCommunity* 13 July 2018 at 1, available at <http://www.bizcommunity.com/Article/196/546/179454.html>, last accessed 7 August 2018.

²⁵ 2000 (2) SA 674 (CC) para 44.

²⁶ A J van der Walt *Property and Constitution* (2012) 20ff.

²⁷ *Pharmaceutical Manufacturers* supra note 25 para 44.

²⁸ Van der Walt op cit note 26 at 20.

²⁹ Ibid at 24–5ff.

³⁰ Ibid at 24ff.

³¹ Ibid at 36, which cites A J van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *CCR* 77 at 100–3, referring to *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51–2; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 39–40; *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC) paras 59 (per Skweyiya J), 69 (per Ngcobo J). See similarly Lourens du Plessis 'Interpretation of statutes and the Constitution' in Lexis-Nexis (ed) *Bill of Rights Compendium* (2013) 2C10. See also *Walele v City of Cape Town*

Constitution to find a cause of action, as the primary source that governs the dispute is the legislation. A litigant may only rely directly on the constitutional right to find a cause of action, in terms of the proviso to the first principle, if he or she challenges the legislation for being unconstitutional, or because it does not properly give effect to the constitutional right at hand.³² This principle presumably holds for both applicants and defendants to a particular case.³³

The second subsidiarity principle states that a litigant who avers that a right in the Bill of Rights has been infringed must rely on the legislation that was specifically enacted to protect that right, and may not rely directly on the common law when bringing an action to protect the right.³⁴ However, the proviso to this principle (which Van der Walt deduces on logical grounds) allows a litigant to rely directly on the common law if the legislation was not intended to, or in fact does not, replace the common law in that specific context. This would only be permitted in two instances, namely where (i) the common law is not in conflict with the constitutional right at hand or with the scheme the legislation introduced, or (ii) in the event that such a conflict exists, the common law can be developed through statutory and/or constitutional interpretation to accord with the Bill of Rights or the legislative scheme.³⁵

The aim of these two principles is to help identify the most appropriate legal source that governs a dispute. According to Van der Walt, they entail a constitutional vision of sources,³⁶ one that requires all sources of law to display positive characteristics, which the Constitution requires of all law, while simultaneously preventing the realization of negative features the Constitution seeks to avoid.³⁷ Examples in the property context include the prevention of arbitrary deprivation of property³⁸ or arbitrary eviction from one's home,³⁹ the promotion of access to land on an equitable basis,⁴⁰ and the

2008 (6) SA 129 (CC) paras 29–30 and *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) paras 47–9.

³² Van der Walt op cit note 26 at 36, which cites Van der Walt op cit note 31 at 101, 104 and 115, referring to *South African National Defence Union* supra note 31 para 52; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) para 437; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 249; and *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 15.

³³ Van der Walt op cit note 26 at 36–7.

³⁴ *Ibid* at 103–5.

³⁵ *Ibid* at 36ff, 115–16.

³⁶ This phrase is taken from Van der Walt op cit note 26 at 24ff.

³⁷ We expand on these features in the next paragraph below.

³⁸ Section 25(1) of the Constitution.

³⁹ Section 26(3) of the Constitution.

⁴⁰ Section 25(5) of the Constitution. Juanita Pienaar & Jason Brickhill 'Land' in Stu Woolman, Michael Bishop & Jason Brickhill *Constitutional Law of South Africa* 2 ed (Original Service, June 2008) ch 48 and A J van der Walt *Constitutional Property Law* (2005) 354–68.

strengthening of tenure security.⁴¹ These goals may be seen as ‘concrete formulations’ of what s 39(2) describes as the spirit, purport and objects of the Bill of Rights.⁴² They also extend beyond the property context and include the protection of each person’s inherent human dignity,⁴³ the promotion of equality and prevention of unfair discrimination,⁴⁴ the right to just administrative action,⁴⁵ and access to courts.⁴⁶ Achieving these features may require amending existing (especially pre-1994) legislation, developing the common law and indigenous law, and, where necessary, promulgating new legislation to give effect to constitutional rights.⁴⁷

The subsidiarity principles find support in the *eiusdem generis* rule, which entails that if a specific rule and a general rule both apply in a given case, litigants must base their arguments on the specific rule and may not rely on deductive argument from the general rule to find a cause of action.⁴⁸ Yet, it must be emphasised that these are not rigid or formalistic rules that create a hierarchy between different sources.⁴⁹ Rather, they present a methodology, an ‘angle of approach’, in terms of which the legal source that governs a dispute is chosen to ensure that the desired features of the Constitution are realized.⁵⁰

The subsidiarity principles do not prevent one from considering other sources (ie constitutional rights, legislation, the common law, indigenous law, constitutional values and principles of constitutional and statutory

⁴¹ Sections 25(6) and 25(9) of the Constitution. See Van der Walt op cit note 26 at 32ff.

⁴² Van der Walt op cit note 26 at 33.

⁴³ Section 10 of the Constitution. See Woolman ‘Dignity’ in Woolman, Bishop & Brickhill op cit note 40 ch 36.

⁴⁴ Section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See Cathi Albertyn & Beth Goldblatt ‘Equality’ in Woolman, Bishop & Brickhill op cit note 40 ch 35.

⁴⁵ Section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000. See Jonathan Klaaren & Glenn Penfold ‘Just administrative action’ in Woolman, Bishop & Brickhill op cit note 40 ch 63; Cora Hoexter *Administrative Law in South Africa* 2 ed (2012); Van der Walt op cit note 26 at 26–33.

⁴⁶ Jason Brickhill & Adrian Friedman ‘Access to courts’ in Woolman, Bishop & Brickhill op cit note 40 ch 59.

⁴⁷ Van der Walt op cit note 26 at 31–2.

⁴⁸ Ibid at 38, citing Lourens du Plessis *Re-Interpretation of Statutes* (2002) 234–6 and *Nkotyana* supra note 31 para 50. See also Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 253.

⁴⁹ See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23. Van der Walt op cit note 26 at 22 observes that this dictum recasts the binary opposition that traditionally exists between protecting vested rights (s 25 of the Constitution) and the interest of promoting equitable access to secure land tenure and housing (ss 25(6) and 26 of the Constitution) into a new, constitutionally inspired process of equal, optimal and simultaneous protection of both interests.

⁵⁰ See Van der Walt op cit note 26 at 105ff, who borrows the term ‘angle of approach’ from Henk Botha.

interpretation) when interpreting the applicable source at hand.⁵¹ This is because these sources may be helpful to construe the applicable legal source from an interpretation-of-statutes perspective to ascertain whether it promotes the desired characteristics the Constitution envisions — i.e. to determine whether the source at hand gives adequate effect to the underlying constitutional right. Using these other sources to construe the applicable source of law must therefore be carefully distinguished from relying on them to decide the dispute.⁵²

The advantage of following a methodology such as the subsidiarity principles when more than one source of law is potentially relevant, is that it ensures the law operates as a single legal system (or, stated differently, in a systemic fashion)⁵³ by preventing counter-transformative and counter-constitutional consequences which may result from arbitrarily choosing or interpreting the legal source that governs a dispute.⁵⁴ This is because both the determination and interpretation of the most appropriate source of law ought to be guided by constitutional considerations.⁵⁵ Not adhering to something like the subsidiarity principles when it comes to choosing and/or interpreting the source of law that governs the dispute has the potential to undermine the positive characteristics the Constitution requires of all law through the creation of fragmented, parallel legal systems.⁵⁶ Another consequence is that it may result in undermining or downplaying legislation promulgated by the post-1994 legislature to give effect to constitutional rights.⁵⁷ The transformative and democratic nature of such statutes, though not immune from constitutional challenge, means they should at least be considered seriously in litigation that pertains to rights to which they give effect.⁵⁸ Ignoring such legislation by relying directly on the Constitution or the common law to find a cause of action (or following a strained interpretation of such legislation to grant a remedy, as we argue happened in *Daniels*) merely because this suits the preferred reasoning or outcome of the case⁵⁹ could thus ‘undermine the legitimacy and authority of democratically elected legislatures’.⁶⁰

Even though there is no single piece of legislation that gives effect to the whole property clause, the subsidiarity principles still have an important

⁵¹ Van der Walt op cit note 26 at 36–42 and footnote 66, 104–7; Elsbé van der Sijde *Reconsidering the Relationship between Property and Regulation: A Systemic Constitutional Approach* (LLD dissertation, Stellenbosch University, 2015) 202.

⁵² Van der Walt op cit note 26 at 40, 104–7.

⁵³ Van der Sijde op cit note 51 at 271–4 identifies the link between Van der Walt’s notion of subsidiarity and a systemic constitutional approach towards the law.

⁵⁴ Van der Walt op cit note 26 at 107ff.

⁵⁵ Ibid at 96ff.

⁵⁶ Ibid at 91–2, 102–4.

⁵⁷ Ibid.

⁵⁸ Ibid at 91–2 citing *Minister of Health NO* supra note 32 para 437. See also Van der Walt op cit note 26 at 102–4.

⁵⁹ Ibid at 104ff.

⁶⁰ Ibid at 104 citing *Minister of Health NO* supra note 32 para 437.

bearing in s 25 cases.⁶¹ They are particularly relevant in instances where partial property legislation is at play — namely where a statute has been enacted to give effect to a specific right in the Constitution, but does not exhaust the constitutional obligation.⁶² The ESTA is an example of such legislation, as it gives effect to the right to tenure security as set out in s 25(6) of the Constitution, read with s 25(9).⁶³ As such, the first subsidiarity principle applies to disputes relating to this right.

(b) *Evaluation of Daniels in terms of the first subsidiarity principle*

(i) *Identifying the applicable legal source*

Madlanga J accurately identified the ESTA as the primary source that governs the dispute.⁶⁴ To ascertain the purpose of the Act, he also correctly identified the link between tenure security and human dignity,⁶⁵ since the former is a specialised manifestation of human dignity in the property context.⁶⁶ This argument finds support in s 26(1) of the Constitution, as habitability relates to the adequate housing requirement in this provision.⁶⁷ Housing that is inhabitable will also be inadequate, which results in tenure security being undermined.⁶⁸ Interestingly, this provision was not used to decide the matter or to construe the ESTA, even though Madlanga J ruled that ‘the rights embodied in section 26 of the Constitution are [also] at issue [in *Daniels*]’.⁶⁹

⁶¹ Ibid at 42ff.

⁶² Ibid at 49ff.

⁶³ Ibid at 49.

⁶⁴ *Daniels* supra note 1 paras 2–3.

⁶⁵ Ibid.

⁶⁶ Ibid paras 32–4. The right to property is informed by the right to dignity: see *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC) (especially Froneman J’s judgment). See similarly *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC); *Jafitha v Schoeman*; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

⁶⁷ South Africa ratified the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 on 18 January 2015. The right to an adequate standard of living in article 11 of the Covenant has been authoritatively interpreted by the UN Committee on Economic, Social and Cultural Rights in General Comment No 4 *The Right to Adequate Housing*, UN Doc E/1992/23 (1991). The committee specifically includes habitability as a characteristic of having access to adequate housing in para 8(d). Habitability is also underpinned by s 152(1)(d) of the Constitution.

⁶⁸ See the definition for ‘habitability’ in the Rental Housing Amendment Act 35 of 2014. This Act defines habitability as a ‘dwelling that is safe and suitable for living in and includes — (a) adequate space; (b) protection from the elements and other threats to health [as read with s 20(1) of the Health Act 63 of 1977]; (c) physical safety of the tenant, the tenant’s household and visitors [as read with s 12 of the National Building Regulations and Building Standards Act 103 of 1977]; and (d) a structurally sound building’. None of the judgments in *Daniels* supra note 1 referred to this definition for purposes of interpreting the ESTA.

⁶⁹ *Daniels* supra note 1 para 12.

As stated earlier, Madlanga J interpreted the ESTA with reference to ss 5 and 6 of the Act, its historical context and purpose, s 39(2) of the Constitution, the right to tenure security, and the right to human dignity. This approach is commendable, as it corresponds to the constitutional matrix articulated by the CC in *Government of the Republic of South Africa v Grootboom*⁷⁰ and *Port Elizabeth Municipality v Various Occupiers*.⁷¹ Indeed, it is these sources that revealed the link between security of tenure and human dignity from the perspective of the habitability requirement.

The first subsidiarity principle indicates that occupiers who want to protect their right to tenure security must rely on the ESTA to find a cause of action, given that it is partial property legislation enacted to give effect to s 25(6) of the Constitution.⁷² Accordingly, they may only rely on s 25(6), in terms of the proviso to the first principle, if they challenge the constitutionality of the ESTA or if the Act does not exhaust the constitutional obligation in s 25(6). As a result, an occupier would be precluded from relying directly on any other fundamental right, such as human dignity and equality, to find a cause of action.

To remedy a possible defect and/or inadequacy in the ESTA, a court could declare the Act constitutionally invalid under s 172(1)(a) of the Constitution (in as far as it does not adequately protect the applicant's security of tenure), followed by reading words into the statute to remedy the shortcoming.⁷³ Another possibility would have been to declare it unconstitutional and to then have Parliament amend the ESTA by adding a provision that specifically regulates the relationship between an occupier and a landowner in this context.⁷⁴ Striking the necessary balance between the rights at hand (ie an

⁷⁰ *Grootboom* supra note 66 para 22.

⁷¹ *PE Municipality* supra note 49.

⁷² Van der Walt op cit note 26 at 53 notes that while the ESTA is partial legislation, it comprehensively and exclusively covers lawful occupation of land used for residential purposes in rural areas. The Land Reform (Labour Tenants) Act 3 of 1996 affords protection to labour tenants who occupy land lawfully in rural areas and the Interim Protection of Informal Land Rights Act 31 of 1996 provides for the temporary protection of certain rights to and interests in land that are not otherwise adequately protected in law. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 applies to all instances of unlawful occupation in both rural and urban areas where the property is used for residential purposes, but does not apply if the property is used for business or commercial purposes. With the exception of the Rental Housing Act 50 of 1999, which does not override the common law, this is the only area of the law where evictions will still occur in terms of the *rei vindicatio*. All these statutes give effect to ss 25(6) and 26(3) of the Constitution.

⁷³ Reading in was followed in *Jafitha* supra note 66 and *Sarrahwitz v Maritz* NO 2015 (4) SA 491 (CC). See Michael Bishop 'Remedies' in Woolman, Bishop & Brickhill op cit note 40 ch 9 at 9-104 to 9-110 and Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 383-8 for an authoritative exposition of this constitutional remedy.

⁷⁴ As it did with s 6(2)(dA) of the ESTA following *Serole v Pienaar* 2000 (1) SA 328 (LCC) and *Nkosi v Bürmann* 2002 (1) SA 371 (SCA). The constitutionality of this amendment was confirmed in *Nhlabathi v Fick* [2003] 2 All SA 323 (LCC).

occupier's right to security of tenure vis-à-vis an owner's property rights), and bearing in mind the complexities and difficulties which characterise human relations regarding land (which is exacerbated in the South African context due to our apartheid past), this approach might have been preferable to reading words into the ESTA. Indeed, one merely has to consider the type of improvements an occupier may effect on occupied land (necessary, useful or luxurious) to realise that Parliament is probably best placed to address this matter.⁷⁵ A final possibility, one which would have been preferable and upon which we expand in part II(c) below, would have been for the court to develop the common law of unjustified enrichment — in terms of the second subsidiarity principle — to come to an occupier's assistance.⁷⁶ This latter possibility should have received greater attention from the court, as the common law provides a more detailed legal framework for adjudicating the case than s 5(a) of the ESTA. (We expand on this below.)

Madlanga J did not follow any of these approaches to decide the case because, on his construction of the ESTA in terms of the various meaning-generative signifiers mentioned earlier, s 5(a) affords the applicant the right to make improvements on the land without permission.

In terms of the subsidiarity principles, the majority correctly identified the ESTA as the source that governs the dispute. The court also hit the mark by holding that if the ESTA did not afford Ms Daniels the right to make the improvements without permission, it would undermine her human dignity, and this would be contrary to s 25(6) of the Constitution. The ESTA would then be unconstitutional in as far as it did not provide this right to the applicant. Yet, Madlanga J avoided this conclusion by finding that s 5(a) of the ESTA does provide Ms Daniels with this right.

(ii) *Statutory interpretation under the first subsidiarity principle*

When the constitutional validity of law is in dispute, constitutional and statutory interpretation engage two enquiries: (1) to ascertain the meaning or scope of the fundamental right at hand, and (2) to determine whether the impugned law is consistent with that right.⁷⁷ These two enquiries also feature when the first subsidiarity principle is applicable. As regards the first enquiry, Madlanga J was correct by ruling that the ESTA — the source that governs the dispute — must include the right to make improvements without an owner's permission, given the purpose of s 25(6) of the Constitution, read with the right to human dignity and the habitability requirement in s 26(1) of the Constitution. This reveals the ambit of the ESTA.

This leads to the second enquiry, namely whether the source at hand realises that purpose (ie whether it is constitutional). Here, statutory

See J M Pienaar *Land Reform* (2014) 418–23 for an overview of the right to freedom of religion and belief and burial rights in the context of the ESTA.

⁷⁵ We discuss this aspect in more detail below.

⁷⁶ We expand on this principle, and how it could have been used to decide the case, in part II(c) below.

⁷⁷ Currie & De Waal op cit note 48 at 58–9 and 133.

interpretation plays a key role. Under the second enquiry Madlanga J dismissed the respondent's interpretation of the ESTA, which was that the Act does not provide Ms Daniels the right to make improvements without the owner's permission, as 'unduly narrow'.⁷⁸ He held that the ESTA had to be read in conformity with the Constitution to determine whether it provides the applicant with the relief sought.⁷⁹ He concluded that the remedy he identified in s 5(a) 'flows naturally from a proper interpretation of ... [the ESTA]'.⁸⁰

A reading in conformity with the Constitution (which is associated with the presumption of constitutionality and is a key reading strategy in constitutional law)⁸¹ entails that if an impugned statute is susceptible to more than one interpretation, courts must adopt the interpretation that would preserve its constitutionality over one that would render it constitutionally invalid.⁸² This approach derives from s 39(2) of the Constitution,⁸³ and may come in one of two forms: (i) narrowing the scope of an offending provision by following a restrictive interpretation (known as reading down), or (ii) expanding the ambit of the provision in question via an extensive or generous interpretation (also referred to as reading up).⁸⁴

These two interpretive strategies⁸⁵ are only permitted if it is 'reasonably possible' to read the impugned statute as falling within constitutional bounds.⁸⁶ In other words, the interpretation must not be 'unduly strained'.⁸⁷ Here, the principles of statutory interpretation are central to ascertain whether such a construal is, in fact, reasonable. The rationale behind this qualification is that it ensures that the textual threshold of constitutional and

⁷⁸ *Daniels* supra note 1 para 29.

⁷⁹ *Ibid* para 35.

⁸⁰ *Ibid* para 57.

⁸¹ Du Plessis op cit note 31 at 2C13; Du Plessis op cit note 48 at 140–1; J R de Ville *Constitutional and Statutory Interpretation* (2000) 223–5.

⁸² *Van Rooyen v The State (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 88; *Investigating Directorate* supra note 13 paras 21–6; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) paras 21 and 23. The presumption of constitutionality forms part of the 'reading strategy' of reading in conformity with the Constitution: see Du Plessis op cit note 31 at 2C13; Du Plessis op cit note 48 at 135–6, 140–3, 147–8. See also Antonin Scalia & Bryan A Garner *Reading Law— The Interpretation of Legal Texts* (2012) 247–51.

⁸³ *Investigating Directorate* supra note 13 paras 21–4.

⁸⁴ *National Coalition for Gay and Lesbian Equality* supra note 82 para 24. See also Du Plessis op cit note 48 at 140–143; Du Plessis op cit note 31 at 2C13.

⁸⁵ Lourens du Plessis 'Interpretation of the Bill of Rights' in Woolman, Bishop & Brickhill op cit note 40 ch 32 at 32–43.

⁸⁶ *Investigating Directorate* supra note 13 paras 23–6 (specifically para 24); *National Coalition* supra note 82 para 23; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 72; *Daniels v Campbell* NO 2004 (5) SA 331 (CC) para 83.

⁸⁷ See the sources cited in the previous footnote.

statutory interpretation is maintained.⁸⁸ Distorting or straining the meaning of a statute to ensure that it conforms to the Constitution not only amounts to judicial overreach (which undermines the separation-of-powers doctrine) but also subverts the rule of law.⁸⁹

It is questionable whether the majority's construction of s 5(a) amounts to a reasonable interpretation because the provision merely incorporates s 10 of the Constitution into the ESTA. It does not govern the relationship between an occupier and landowner in any greater detail than would have been the case had it been omitted, as both landowners and occupiers under the ESTA enjoy protection under s 10 of the Constitution, irrespective of whether the Act mentions this. Furthermore, from a literal perspective, neither s 5 nor s 6 of the ESTA regulates the matter of making improvements without the owner's permission in any way — a fact which the court acknowledges.⁹⁰ The only exception to this statement appears in s 13(1)(a) of the ESTA, which requires an owner to pay 'just and equitable' compensation to the occupier for improvements she made to the property.⁹¹ However, the owner's liability to pay compensation is affected by whether the improvements were made without the owner's consent⁹² and whether 'the improvements were necessary or useful to the occupier'.⁹³ This exception affirms our argument that the ESTA does not adequately regulate the matter, and that the Act should have been remedied by declaring it unconstitutional to the extent that it is defective, followed by reading in and referring it to Parliament for amendment, or (the option we prefer) by developing the common law. Indeed, the fact that 'necessary' and 'useful' improvements are not defined in s 1 of the Act supports the argument that the Act should be read in conjunction with the common law of unjustified enrichment to promote greater systemic coherence between the various sources of law.⁹⁴ Consequently, it is difficult to see how the court could have interpreted s 5(a) as

⁸⁸ Wessel le Roux 'Directory provisions, section 39(2) of the Constitution and the ontology of statutory law: *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC)' (2006) 21 *SAPL* 382 at 383, 391–2, citing *De Lange v Smuts* NO 1998 (3) SA 785 (CC) para 85; Du Plessis op cit note 48 at 116–17; Michael Bishop & Jason Brickhill '“In the beginning was the word”: The role of text in the interpretation of statutes' (2012) 129 *SALJ* 681. See also *S v Mhlungu* 1995 (3) SA 867 (CC) para 84, per Kentridge J. See further Scalia & Garner op cit note 82 at 343–6.

⁸⁹ *Daniels v Campbell* supra note 86 para 104. We expand on these negative features in part II(b)(iii) below.

⁹⁰ *Daniels* supra note 1 para 27.

⁹¹ It must be emphasised that this provision appears in ch 4 of the Act, which deals with the termination of a right of residence and eviction, and not ch 3, which deals with the rights and duties of occupiers and owners. Stated differently, the duty to pay compensation for improvements appears in a post-termination of occupation setting, which is a distinctly different context to the preceding chapter that deals with the occupier-owner relationship during its existence.

⁹² Section 13(1)(a)(i) of the ESTA.

⁹³ Section 13(1)(a)(ii) of the ESTA.

⁹⁴ Our argument is that the common-law definition, tests and examples for necessary, useful and luxurious improvements in the law of unjustified enrichment are able

providing the relief Ms Daniels sought other than through straining its meaning.

Importantly, in making these statements we should not be understood as supporting a return to literalism-cum-intentionalism.⁹⁵ Rather, we advocate an interpretive approach that has due regard to both the legislative text *and* its context and purpose, along with s 39(2) of the Constitution.⁹⁶ This brings us to one of the main pitfalls in statutory interpretation (specifically in terms of purposive interpretation), namely that losing sight of the legislative text — through overemphasising the purpose of a statute — could result in an arbitrary interpretation of it.⁹⁷ The majority in *Daniels* seems to have moved beyond the linguistic meaning of s 5(a) (the textual threshold) to come to the aid of the applicant by overstressing the purpose of the ESTA. In this regard it is insightful to consider the objection Le Roux raises against the majority's reading of the impugned provisions⁹⁸ in *African Christian Democratic Party v Electoral Commission*⁹⁹ ('ACDP'):

'The concern with the linguistic meaning of the phrase is ... dismissed as an "unduly narrow" (read textualist or literalist) approach to statutory interpretation. By contrast, the broader (read purposive) approach which the Court favours includes the following distinct steps: (i) establish the central purpose of the provision in question; (ii) establish whether that purpose would be obstructed by a literal interpretation of the provision; if so, (iii) adopt an alternative interpretation of the provision that "understands" (read promotes) its central purpose; and (iv) ensure that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights.'¹⁰⁰

The crux of Le Roux's criticism is that the *ACDP* court placed insufficient emphasis on the text itself and treated the purpose of the Electoral Act as the

to produce, what Emeritus Justice Moseneke refers to as a 'just outcome' for all similarly situated ESTA occupiers. See Anonymous *op cit* note 24 at 1.

⁹⁵ Du Plessis *op cit* note 48 at 107.

⁹⁶ See similarly Bishop & Brickhill *op cit* note 88. In *Grootboom* *supra* note 66 the CC stated that contextual interpretation 'requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of chap[ter] 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context' (para 22). A contextual interpretation that is animated almost exclusively by the latter context is not only incomplete, as Cameron J cautions in *Daniels* *supra* note 1 para 149, but also deprives itself of a textual interpretation that draws on a more nuanced and specific articulation of rights that appear in the Constitution and post-1994 literature. Stated differently, it is because a right to security of tenure or a right of access to adequate housing did not exist in South Africa for black people prior to 1994 that Mr Nkosi could not articulate his deprivation in such specific terms in the text that accompanies footnote 1 in *Daniels* *supra* note 1.

⁹⁷ Du Plessis *op cit* note 48 at 247–9, 255–7 citing *S v Zuma* 1995 (2) SA 642 (CC) para 18; Bishop & Brickhill *op cit* note 88; Le Roux *op cit* note 88.

⁹⁸ Sections 14 and 17 of the Local Government: Municipal Electoral Act 27 of 2000 ('Electoral Act').

⁹⁹ 2006 (3) SA 305 (CC).

¹⁰⁰ Le Roux *op cit* note 88 at 386.

prime consideration when it interpreted the impugned provisions.¹⁰¹ As a result, the text was relegated to a secondary position in the interpretative exercise (namely ascribing meaning to the text) instead of being the point of departure.¹⁰² In the process, the court departed from (and arguably distorted) the linguistic meaning (the requirements and procedures) of the provisions to ensure a reading of the provisions that conforms with the Constitution (ie the purpose of the Electoral Act).¹⁰³

We criticise the majority in *Daniels* on the same count, especially since it forms part of a growing number of judgments where the CC has started to forsake the legislative text in favour of a statute's purpose so as to read it in conformity with the Constitution in terms of s 39(2).¹⁰⁴ The respondent's construction of the provision, though seemingly reasonable when one considers the very limited scope and generality of s 5(a), would definitely have frustrated the ESTA's purpose. Nevertheless, if it would strain the meaning of the provision to avoid this conclusion, the court has no choice other than to declare it constitutionally invalid under s 172(1)(a)¹⁰⁵ or to consider whether the common law, as the residual source of law, may be applied in terms of the second subsidiarity principle. However, the majority dismissed the respondent's interpretation and ruled that the ESTA provides the relief the applicant sought. Ironically, the straining of s 5(a) goes even further in that it does not contain any preemptory or directory provisions, unlike the impugned provisions in *ACDP*.¹⁰⁶ Indeed, s 5(a) does nothing more than state that occupiers and landowners have the right to human dignity. As such, the majority's reading of the provision as providing a remedy to Ms Daniels entails identifying specific requirements in the provision (which is very general in nature) so as to realize what it considers to be the general purpose of the ESTA. This entails judicial redrafting of the legislative text through interpretation. The majority opted for this approach instead of declaring the Act constitutionally invalid, in so far as it is defective, or saving it through reading words into the statute and referring it to Parliament to rectify the shortcoming, or developing the common law.

In terms of the two manifestations that reading in conformity with the Constitution may take, Madlanga J clearly afforded an extensive interpretation

¹⁰¹ *Ibid.*

¹⁰² *Ibid* at 388.

¹⁰³ *ACDP* supra note 99 para 23.

¹⁰⁴ See Bishop & Brickhill op cit note 88 and the cases discussed there. Compare E J Marais 'A common-law presumption, statutory interpretation and section 25(2) of the Constitution — A tale of three fallacies. A critical analysis of the Constitutional Court's *Arun* judgment' (2016) 133 *SALJ* 629.

¹⁰⁵ There is a clear distinction between reading a statute in conformity with the Constitution in terms of s 39(2) and declaring it constitutionally invalid under s 172(1)(a), followed by reading in or severance under s 172(1)(b): see *National Coalition for Gay and Lesbian Equality* supra note 82 para 24.

¹⁰⁶ Whether the provisions in *ACDP* supra note 99 were preemptory or directory was one of the main bones of contention: see Le Roux op cit note 88.

to s 5 (a) (ie he read it up) to avoid a finding of constitutional invalidity. Yet, it is hard to see how this interpretation can be reasonable, as the provision does nothing more than confirm that the parties to the case have the right to human dignity. How is one to locate the remedy the court identified in s 5(a) from a plain reading of the provision?

The majority's extensive interpretation amounts to a judicial alteration of the *ipsisima verba*¹⁰⁷ of the provision¹⁰⁸ by filling a *casus omissus*¹⁰⁹ because the two requirements that Madlanga J identified in s 5(a) do not appear in this provision, or anywhere in the ESTA. The *casus omissus* here is the fact that neither the provision nor the ESTA expressly (or even impliedly) governs the relationship between occupiers and landowners when it comes to making improvements without the owner's permission. Madlanga J filled this gap by identifying the above-mentioned two requirements, even though courts, as a general rule, are very wary about filling a *casus omissus*.¹¹⁰ The ESTA does not use the term 'reasonable' when referring to 'improvements', and neither it nor the majority decision clarifies what reasonableness means in this context. Regarding meaningful engagement, one does not find this notion anywhere in ESTA.¹¹¹ We expand on the problems these two requirements present in the next part below.

There are two reasons why courts should be wary of modifying the *ipsisima verba* of a statute while reading it in conformity with the Constitution. The first is that alterations to the wording of legislative texts is best achieved via the remedial route of s 172(1)(b) of the Constitution, rather than by (strained) interpretations of legislative provisions in terms of s 39(2) of the Constitution.¹¹² The advantage behind this approach is that the textual threshold is maintained, as ignoring the text in favour of a general resort to the purpose of the statute (or constitutional values) would result in 'divination' instead of interpretation.¹¹³ Indeed, the reason why reading in conformity with the Constitution has the reasonable-interpretation qualification is precisely because following an unrestrained construction (ie ignoring the text) presents the danger that 'any legislative provision could be made to conform to the Constitution by a suitably determined exercise of interpretive

¹⁰⁷ '[T]he identical (the very) words': see V G Hiemstra & H L Gonin *Trilingual Legal Dictionary* 3 ed (2006) s v 'ipsisima verba'.

¹⁰⁸ In Afrikaans, a 'woordwysigende uitleg': L C Steyn *Die Uitleg van Wette* 3 ed (1963) at 55–69. Du Plessis op cit note 31 at 2C13 translates 'woordwysigende uitleg' as an 'interpretation altering the very words of a legislative instrument'.

¹⁰⁹ Du Plessis op cit note 48 at 228–32. *Casus omissus* means an 'omission (contingency not provided for by the statute)': see Hiemstra & Gonin op cit note 107 s v 'casus omissus'.

¹¹⁰ *Ibid* at 230 and sources cited there; Du Plessis op cit note 31 at 2C41 and the sources cited there; De Ville op cit note 81 at 135 and sources cited there. See also Scalia & Garner op cit note 82 at 94.

¹¹¹ See the discussion of meaningful engagement in part II(b)(iii).

¹¹² Le Roux op cit note 88 at 383, 390, citing *Daniels v Campbell* supra note 86 para 83.

¹¹³ *S v Zuma* supra note 97 para 18. See also *Daniels v Campbell* supra note 86 para 83.

will'.¹¹⁴ Bishop & Brickhill capture the danger of strained interpretations as follows:

'The risk of the court's expansive approach to interpretation is that it makes all laws vaguer. If the court is able to "interpret" a law by adding exceptions, qualifications or additions to the text it is more difficult (if not impossible) for citizens and government officials to know in advance what *all* laws mean, even when the text appears clear.'¹¹⁵

The second is the 'iudicis est ius dicere non dare' maxim.¹¹⁶ Though this maxim must be applied with circumspection in the context of constitutional interpretation, given its abuse during the apartheid era to insulate the state's racist laws from judicial scrutiny, it continues to play an important role when it comes to statutory interpretation.¹¹⁷ Du Plessis argues that in the constitutional era this maxim should be recast as meaning that 'the province of the interpreter of a statute [is] to give the best possible effect to the statutory text as it stands and not to (try and) re-enact (or even rephrase) it'.¹¹⁸ This adapted version supports the separation of powers, as the legislature, and not the courts, is responsible for enacting — and best placed to enact — law. Our argument here does not deny that courts create law through setting precedent¹¹⁹ or by reading words into statutes (or severing them) to save them from constitutional invalidity. We merely emphasise the importance of the text when adjudicating on its constitutionality, since adopting a strained interpretation in lieu of a finding of unconstitutionality may rob the applicable fundamental rights of their substantive content.¹²⁰ Madlanga J's interpretation of s 5(a) holds the danger that it could undermine the right to human dignity, for instance, because if this fundamental right — which is incorporated into the Act — is read as providing a remedy in instances where the statute does not properly give effect to this right (as we argue is the case with the ESTA), what purpose does the Act serve at all? The right to human dignity can then simply be used to decide any dispute when there is a lacuna in legislation that incorporates it; the implication being that it can basically mean anything the interpreter wants it to mean. Parliament, the lower courts, and legal subjects will not know what the scope and application of this right is and, thus, whether a statute complies with it. The difficulty here is

¹¹⁴ Currie & De Waal op cit note 48 at 59.

¹¹⁵ Bishop & Brickhill op cit note 88 at 697 (original emphasis).

¹¹⁶ See Du Plessis op cit note 48 at 255–7 and the sources cited there. It means that 'it is the province of a judge to expound (interpret) the law not to make it': see Hiemstra & Gonin op cit note 107 s v 'iudicis est ius dicere non dare'.

¹¹⁷ Du Plessis op cit note 48 at 255–7.

¹¹⁸ Ibid at 256.

¹¹⁹ K E van der Linde & M J van Staden 'Judicial development (and activism) in insolvency law: *Sarrahwitz v Maritz* 2015 4 SA 491 (CC)' 2017 *TSAR* 414 at 422.

¹²⁰ Compare Bishop & Brickhill op cit note 88 at 702–3 citing Stu Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *SALJ* 762.

that using human dignity (as a general right) to provide a remedy,¹²¹ without explaining why this choice is preferable or necessary in view of the more specialised common-law rules of unjustified enrichment in view of the subsidiarity principles,¹²² entails the risk of dignity becoming so broad as to be meaningless.

The adapted version of the ‘*iudicis est ius dicere non dare*’ maxim avoids this type of conjecture when it comes to interpreting legislative provisions, as it prevents an interpreter’s subjective preferences from being the dominating force behind the interpretation of a provision.¹²³ Judges are interpreters, not legislators, and a *casus omissus* is therefore best addressed by declaring the provision constitutionally invalid, followed by the remedial measures under s 172(1)(b) of the Constitution,¹²⁴ or by considering the common law as the residual source of law in terms of the second subsidiarity principle.

(iii) *Potential drawbacks of the majority’s strained interpretation of ESTA*

The majority’s decision, though formally complying with the first subsidiarity principle, might undermine the positive characteristics the Constitution envisions for the whole legal system. Although the first principle indicates the legal source that governs a dispute (which is the ESTA in this case), it must still be interpreted to determine whether it properly gives effect to the fundamental right in terms of which it was enacted. Should a court adopt a strained interpretation of the source to read it in conformity with the Constitution, one of several negative features may follow.

The first one pertains to the rule of law, one of the founding principles under the Constitution,¹²⁵ which the remedy in s 5(a) undermines by reason

¹²¹ We acknowledge that the right to human dignity can operate as a first-order rule when deciding cases: see Woolman *op cit* note 43 in Woolman, Bishop & Brickhill *op cit* note 40 ch 36 at 36–19 (for a discussion of the different variations of human dignity, see ch 19 at 19–25). See similarly Currie & De Waal *op cit* note 48 at 253. Yet, it is unclear whether Madlanga J applied the right to human dignity in s 5(a) of the ESTA as a first-order rule (in other words as an enforceable right) to grant a remedy to Ms Daniels or whether he interpreted the provision as providing this remedy in view of the ESTA’s purpose. Madlanga J’s emphasis on the purpose of ESTA throughout his judgment, especially in terms of his historical contextualisation of the Act, indicates that he probably followed the latter approach.

¹²² It is exactly this kind of arbitrary approach towards applicable legal sources and their interpretation which the subsidiarity principles seek to avoid. If it is possible to dispense with a case under a more specific fundamental right or legal source (such as the common law of unjustified enrichment, see part II(c) below), the case should be decided in terms of that source and not under the general right of human dignity: see *Dawood supra* note 66 para 35; *Jaftha supra* note 66 para 21; *Grootboom supra* note 66 para 83, read with part II(b)(i) above.

¹²³ Du Plessis *op cit* note 48 at 255–7.

¹²⁴ *Ibid* at 229ff; Du Plessis *op cit* note 31 at 2C41; De Ville *op cit* note 81 at 135.

¹²⁵ Section 1(c) of the Constitution. On the rule of law and the unity of the legal system, see Frank Michelman ‘The rule of law, legality and the supremacy of the Constitution’ in Woolman, Bishop & Brickhill *op cit* note 40 ch 11 at 11–36 to 11–38.

of its uncertainty.¹²⁶ Its requirements are vague and unusual. Madlanga J did not specify the types of improvements an occupier may effect other than stating that they must be ‘reasonably necessary’ to bring the dwelling to a habitable standard, along with requiring meaningful engagement between the owner and the occupier. Does this mean that another ESTA occupier may in future only effect improvements of the exact nature as those in *Daniels*? Do these improvements amount to ‘necessary’ improvements, or do they include ‘useful’ improvements as well? What if a future occupier would like to bring about ‘luxurious’ improvements, such as installing a jacuzzi for instance. The problem is that the term ‘unreasonable’ is not only unfamiliar to the ESTA,¹²⁷ but also generally foreign to the law of unjustified enrichment and property law. Property law knows this criterion in limited instances, such as neighbour law,¹²⁸ co-ownership law,¹²⁹ possession law,¹³⁰ servitude law,¹³¹ real security law¹³² and the law of estoppel.¹³³ Moreover, none of the manifestations of ‘reasonable’ in any of these contexts indicate how it should be understood when dealing with improvements under the ESTA. Without clear guidelines as to what ‘reasonable’ means here, it is debatable how effective the remedy will be to solve future cases, especially if their facts are not on all fours with those of *Daniels*.

The same problem occurs in relation to the requirement that there must be meaningful engagement between the occupier and the landowner as regards improvements the occupier wants to make. It seems to be out of place in the ESTA context.¹³⁴ Meaningful engagement has a very specific genesis in the

¹²⁶ Compare Bishop & Brickhill op cit note 88, who also raise rule-of-law objections to a number of CC decisions where the court opted for strained interpretations of the legislative provisions at hand in order to read them in conformity with the Constitution.

¹²⁷ At least in the context of improvements, which are dealt with in s 13 of the Act.

¹²⁸ Reasonableness is central to the criterion for determining whether the complained-of conduct is unlawful and thus, whether an interdict for its abatement may be granted: see, for instance, *Gien v Gien* 1979 (2) SA 1113 (T) and *Laskey v Showzone CC* 2007 (2) SA 48 (C).

¹²⁹ Co-owners may only make reasonable use of the common property: see *Erasmus v Afrikaner Proprietary Mines Ltd* 1976 (1) SA 950 (W) at 959.

¹³⁰ Reasonableness is one of the factors for determining whether a spoliatus may institute the mandament van spolie if he or she delayed for longer than a year in bringing an application to court: see P J Badenhorst, Juanita M Pienaar & Hanri Mostert *Silberberg and Schoeman’s The Law of Property* 5 ed (2006) at 305–6.

¹³¹ Reasonableness is one of the factors for granting a right of way of necessity: see *Van Rensburg v Coetzee* 1979 (4) SA 655 (A). Another example is that of a servitude which must be exercised civiliter or ‘with due regard to the other party’: see A J van der Walt *The Law of Servitudes* (2016) 247–60.

¹³² A pledgee must take reasonable care of the security object for the duration of the pledge: see Badenhorst, Pienaar & Mostert op cit note 130 at 393.

¹³³ Reasonableness forms an element of some of the requirements for estoppel, such as misrepresentation by conduct: see *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA).

¹³⁴ The only instances where meaningful engagement is mentioned in the ESTA context appear in *Klaase v Van der Merwe NO* 2016 (6) SA 131 (CC) para 8 and *Baron v*

eviction of unlawful occupiers as an ‘other’ measure that must be taken by the state to realize progressively the right of access to adequate housing within its available resources.¹³⁵ Meaningful engagement is conceptualised as a ‘two-way process’ between a local authority and the unlawful occupiers with the main aim of clarifying the state’s obligations towards the occupiers and determining to what extent the state can accommodate the occupiers’ needs.¹³⁶ It therefore typically features in the vertical application of fundamental rights. It is unclear how effective this notion will be (or how it may be enforced) when fundamental rights find horizontal application, such as in *Daniels*-type cases that may arise in the future.

This vagueness gives rise to the second problem, namely the relationship between statute law and the common law. From a systemic perspective, the *Daniels* judgment obfuscates the relationship between the ESTA and the law of unjustified enrichment. Van der Sijde persuasively argues in favour of following a systemic constitutional approach when more than one legal source is applicable.¹³⁷ This entails a holistic view of the legal system, one that ‘considers the legal system in its totality, with emphasis on the complex nature of the system as well as the interactions between sub-components (such as different areas of law) of the system’.¹³⁸ If the law does not operate in

Claytile (Pty) Ltd 2017 (5) SA 329 (CC) para 28 for purposes of finding alternative accommodation for the occupiers following their eviction.

¹³⁵ See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions & another, Amici Curiae)* 2010 (3) SA 454 (CC); *Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC); *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC). However, meaningful engagement has found some application outside this narrow context. See *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 96 (installation of pre-paid water meters); *Ives v Rajah* 2012 (2) SA 167 (WCC) para 10 (eviction following sale in execution of immovable property); *Maphango v Aengus Lifestyles Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 68 (termination of a lease agreement in terms of an unfair practice); *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* 2013 (6) SA 582 (CC) paras 49, 72–4 and 111–17 (capacity of a public school to accommodate more learners); *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) (policy by school governing body to exclude pregnant learners from the school); *Makwickana v Ethekwini Municipality* 2015 (3) SA 165 (KZD) paras 139–40 and 146 (the regulation of informal trading); *Melani v Johannesburg City* 2016 (5) SA 67 (GJ) paras 46–47 (upgrading of an informal settlement); and *Transcend Residential Property Fund Ltd v Mati* 2018 (4) SA 515 (WCC) para 15.

¹³⁶ *Occupiers of 51 Olivia Road* supra note 135 para 14. See Gustav Muller ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) 22 *Stellenbosch LR* 742 (also published in Sandra Liebenberg & Geo Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 300).

¹³⁷ Van der Sijde op cit note 51 at 12. See also Michelman op cit note 125 at 11–36 to 11–38, who argues that the rule of law’s pursuit of justice aims to ensure the legal-systemic unity of the whole legal system.

¹³⁸ Van der Sijde *ibid*. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister*

a systemic manner, which will happen if constitutional principles and considerations do not inform both the choice between different legal sources and the chosen source's interpretation, it may not only subvert the rule of law but also undermine predictability in cases.¹³⁹

The problem with *Daniels* in this regard is that the majority strained the meaning of s 5(a) of the ESTA to grant relief to Ms Daniels, when the law of unjustified enrichment offered a more established and specialised framework for adjudicating the case.¹⁴⁰ As such, the ESTA effectively replaced the common law on this matter. By using the (vague) s 5(a) remedy instead of the (more specialised) common law in circumstances where this was not justified (ie without indicating why the common law should not be used or why its development, if possible, would be unattractive), the law does not operate as a single legal system. This may result in unnecessary fragmentation in the form of parallel systems of law, which could undermine the positive features that the Constitution envisions for the whole legal system.¹⁴¹ An example of such a feature is the production and protection of expectations in the law, which will be subverted if litigants are allowed to rely on a general legal source to find a cause of action, via a strained interpretation of that source, in situations where a more specific source — such as the common law — applies.¹⁴² This could lead to inconsistent applications of the law, which, in turn, will undermine legal certainty.¹⁴³ It is therefore preferable, when it is not reasonably possible to read legislation in conformity with the Constitution, to at least consider (in terms of the second subsidiarity principle) whether the more specific common-law rules provide relief and, if not,

of *Finance* 2002 (4) SA 768 (CC) para 63, where Ackermann J held that s 25 must 'be construed as part of a comprehensive and coherent Bill of Rights in a comprehensive and coherent constitution'.

¹³⁹ Van der Sijde *ibid* at 258, citing Niklas Luhmann *Law as a Social System* (2004; translated by K A Ziegert) 5, 147–8.

¹⁴⁰ *Ibid* at 292, 295.

¹⁴¹ There are interesting parallels between the majority's interpretation of s 5(a) and how the SCA decided *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA). In the latter case, the common-law mandament van spolie should possibly have been the primary source for deciding the dispute: see Van der Walt *op cit* note 26 at 82n186, 86–7; AJ van der Walt 'Developing the law on unlawful squatting and spoliation' (2008) 125 *SALJ* 24. The SCA, however, expressly refused to develop the common law to provide the relief sought by the unlawful occupiers, namely to order the municipality to rebuild their destroyed homes and supply the necessary materials for this purpose. Instead of developing the mandament to come to the aid of the unlawful occupiers, the court created a parallel constitutional remedy (the requirements of which are unclear) by relying on the Constitution as the primary source, specifically the occupiers' right to human dignity: Van der Walt *op cit* note 26 at 82n186, 86–7; *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) paras 15–16 and 18. The CC approved this remedy in *Schubart Park Residents' Association* *supra* note 135.

¹⁴² Van der Sijde *op cit* note 51 at 258, citing Luhmann *op cit* note 139 at 5, 147–8.

¹⁴³ *Ibid* at 261 citing Paul Cilliers 'Complexity, deconstruction and relativism' (2005) 22 *Theory, Culture & Society* 256 at 258.

whether they could be developed to this effect. The *eiusdem generis* rule supports this argument.

Daniels is not the first decision where the relationship between statute law and the common law became muddled. In *Sarrahwitz v Maritz NO*¹⁴⁴ (*'Sarrahwitz'*) the CC declared the Alienation of Land Act 68 of 1981 constitutionally invalid but saved it through an extensive exercise of reading in and severance.¹⁴⁵ It did this in preference to developing the common law, which the applicant requested it to do, or by referring the Act to Parliament. Though the court vindicated the rights of the applicant, it obfuscated the relationship between the Alienation of Land Act and the common-law position regarding contracts for the sale of land.¹⁴⁶ Indeed, even though the court's remedial approach protects vulnerable cash purchasers, such as the purchaser, it leaves other vulnerable common-law purchasers without adequate constitutional protection.¹⁴⁷ Van der Linde & Van Staden persuasively argue that this consequence could have been avoided had the court developed the common law or referred the statute to Parliament to remedy the defect.¹⁴⁸ As a result, the other type of purchaser might in future have to litigate all the way up to the CC to obtain relief. This is one of the major shortcomings of both *Sarrahwitz* and *Daniels* — that the remedies the CC awarded in these cases do not grant effective relief for similarly situated future litigants.¹⁴⁹ Bishop & Brickhill voice a similar concern when they argue that the court's distortion of the meanings of statutes in terms of s 39(2) to decide cases, instead of striking them down as unconstitutional, allows it to decide cases on a 'one-case-at-a-time' basis.¹⁵⁰ In the process, the court does not give meaningful content to fundamental rights, while reserving for itself 'greater freedom to decide future cases [as it deems fit] without the encumbrance of precedent'.¹⁵¹ In this regard it is worth mentioning that the court also missed the opportunity to promote the internal coherence of the

¹⁴⁴ Supra note 73.

¹⁴⁵ Van der Linde & Van Staden op cit note 119 at 423–5. The affected provisions are ss 1, 4, 21 and 22 of the Alienation of Land Act 68 of 1981.

¹⁴⁶ Van der Linde & Van Staden op cit note 119 at 422.

¹⁴⁷ Ibid at 423–4 and the examples mentioned there.

¹⁴⁸ Ibid at 420–4.

¹⁴⁹ See *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC) para 32; *Gory v Kolver NO* 2007 (4) SA 97 (CC) para 42; *Van der Merwe v Road Accident Fund (The Women's Legal Centre Trust as amicus curiae)* 2006 (4) SA 230 (CC) para 71; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 74. Bishop op cit note 73 at 9–70 argues that 'similarly situated people' should be afforded a generous interpretation and that effective relief should only be limited to a particular group of individuals if there is a genuine and meaningful difference. Our argument is simply that all ESTA occupiers who are deprived of their dignity (because they are forced to live in accommodation unfit for human habitation without having a carefully circumscribed right to make improvements from their own pocket without the owner's permission) are similarly situated people.

¹⁵⁰ Bishop & Brickhill op cit note 88 at 703.

¹⁵¹ Ibid.

ESTA by forging a clear link between the right to make improvements in s 6, and the duty of the owner in s 13(1)(a)(ii) to compensate the occupier for necessary and useful improvements upon eviction.¹⁵²

The majority's unwillingness in *Daniels* (and *Sarrahwitz*) to grapple with the common law (and how it could possibly have been developed¹⁵³) is also contrary to the Seventeenth Amendment to the Constitution.¹⁵⁴ Section 167(3)(a) of the Constitution provides that the CC is the highest court of the Republic of South Africa. It is therefore unfortunate that the CC shied away from developing the common law, given the mandate in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*¹⁵⁵ ('*Carmichele*'). There it was found that courts 'should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights'.¹⁵⁶ This is so regardless of whether the parties requested the court to develop the common law. As such, courts have an obligation to develop the common law appropriately where it does not promote the spirit, purport and objects of the Bill of Rights.¹⁵⁷ Although this does not imply that the common law must be developed in every case where it is applicable,¹⁵⁸ *Carmichele* indicates that such development should at least be considered. This is even more so if the common law is capable of providing a solution (either in its current form or through development) to the dispute at hand. We expand on this point below.

The above argument finds support in the presumption that statute law does not alter the existing law more than necessary.¹⁵⁹ In accordance with this presumption, it is presumed that legislation does not alter (or replace) the common law unless this is clear from the statute.¹⁶⁰ As such, the common law applies if a statute (such as s 5(a) of the ESTA) contains a *casus omissus*.¹⁶¹ This presumption, which seems to have been subsumed under the Constitu-

¹⁵² This is arguably what the court should have done in *Mlifi v Klingenberg* 1999 (2) SA 674 (LCC) para 116 for purposes of ss 3(1)(a) and 10(1)(a), read with ss 10(2) and 12(2)(c) of the Land Reform (Labour Tenants) Act 3 of 1996. See Jacques du Plessis *The South African Law of Unjustified Enrichment* (2012) 273 and Pienaar op cit note 74 at 314 and 434.

¹⁵³ This was argued before the court. See paras 36–49 of the applicant's written submissions. A copy of these written submissions is on file with the authors.

¹⁵⁴ Van der Linde & Van Staden op cit note 119 at 421–2.

¹⁵⁵ 2002 (1) SACR 79 (CC).

¹⁵⁶ Ibid para 36.

¹⁵⁷ Ibid para 39.

¹⁵⁸ Ibid.

¹⁵⁹ Van der Linde & Van Staden op cit note 119 at 421 argue that the way the *Sarrahwitz* court decided the matter before it is at odds with this presumption.

¹⁶⁰ De Ville op cit note 81 at 177–9 and the sources cited there.

¹⁶¹ Du Plessis op cit note 48 at 230; Du Plessis op cit note 31 at 2C41 and the sources cited there. See also De Ville op cit note 81 at 136.

tion,¹⁶² both respects the common law as a source of law and promotes legal certainty.¹⁶³

Thirdly, the *Daniels* court is guilty of judicial activism.¹⁶⁴ Though it is difficult to define,¹⁶⁵ judicial activism (also known as judicial overreach) broadly ‘refers to an intrusion by the judiciary into what is traditionally held to be the proper function of other branches of government’.¹⁶⁶ It thus undermines the separation of powers.¹⁶⁷ The term is also understood to include ‘judicial “legislation,” ... departures from accepted interpretive methodology, and ... result oriented-judging’.¹⁶⁸

The s 5(a) remedy is an example of judicial overreach in the form of judicial legislation, specifically through following a strained interpretation of a legislative provision that does not find support in either the provision itself or the context of the Act. As such, it is not so much interpretation as it is legislative drafting by filling a *casus omissus* through interpretation.¹⁶⁹ Parliament, and not the courts, is best placed to address such omissions. Under such circumstances it is more appropriate for the judiciary to apply (and, if necessary, develop) the common law, as this would not amount to judicial activism.¹⁷⁰ This is because the common law, as a residual source of law, is judge-made law and applies whenever it has not been amended or replaced by statute law.¹⁷¹

From the discussion above, it is clear that the *Daniels* court also committed unjustified judicial activism in terms of the second and third manifestations of this concept.¹⁷² In terms of the second manifestation, the court’s strained

¹⁶² Marius van Staden ‘A comparative analysis of common-law presumptions of statutory interpretation’ (2015) 26 *Stellenbosch LR* 550 at 560.

¹⁶³ De Ville op cit note 81 at 177.

¹⁶⁴ Compare Van der Linde & Van Staden op cit note 119 at 422, who make a similar point with reference to *Sarrahwitz* supra note 73.

¹⁶⁵ Van der Linde & Van Staden *ibid* at 418–19 citing Craig Green ‘An intellectual history of judicial activism’ (2009) 58 *Emory LJ* 1195 and Keenan D Kmiec ‘The origin and current meanings of judicial activism’ (2004) 92 *California LR* 1441.

¹⁶⁶ *Ibid* at 419 and the sources cited there.

¹⁶⁷ *Ibid* at 419 citing Sebastian Seedorf & Sanele Sibanda ‘Separation of powers’ in Woolman, Bishop & Brickhill op cit note 40 ch 12 at 12–49ff. See also Bishop & Brickhill op cit note 88; Scalia & Garner op cit note 82 at 94. The separation of powers doctrine is central to our constitutional democracy: see *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) paras 37 and 200.

¹⁶⁸ Kmiec op cit note 165 at 1444.

¹⁶⁹ Scalia & Garner op cit note 82 at 94 citing *Ebert v Poston* 266 US 548 (1925) 554 (per Brandeis J) and *Iselin v United States* 270 US 245 (1926) 251 (per Brandeis J). Compare the minority dissenting opinion of O’Regan J in *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 (2) SA 181 (CC) para 106.

¹⁷⁰ Van der Linde & Van Staden op cit note 119 at 422, citing Antonin Scalia *A Matter of Interpretation: Federal Courts and the Law* (1997) 7.

¹⁷¹ Van der Linde & Van Staden *ibid*; Scalia & Garner op cit note 82 at 96.

¹⁷² Compare Van der Linde & Van Staden *ibid* at 420–5, who criticise the majority in *Sarrahwitz* supra note 73 for encroaching the domain of the legislature and for result-oriented judging.

reading of the ESTA was only possible by ignoring the text and overemphasising the purpose of the ESTA. Furthermore, the majority's strong focus on the purpose of the ESTA, while losing sight of the textual threshold, is a prime example of result-oriented judging.¹⁷³

In the fourth instance, the majority's interpretation of the ESTA is tantamount to disrespecting the democratically elected legislature's attempts to give effect to a constitutional right. Van der Walt persuasively argues that Parliament's efforts to give effect to constitutional rights, in terms of the democratic principle, must be afforded due respect, given the long period of minority rule in South Africa and the concomitant abuse of parliamentary sovereignty to further the goals of apartheid.¹⁷⁴ Litigants and courts are therefore not free to sidestep the ipsissima verba of the legislation by attaching to it a meaning that it is incapable of bearing, simply because this provides a preferable or easier solution to the case at hand.¹⁷⁵ Respecting the democratically elected legislature therefore entails duly acknowledging when a legislative provision cannot be read in conformity with the Constitution. In such cases, it is preferable to rectify the defect through reading in or severance under s 172(1)(b), rather than adopting a strained interpretation in terms of s 39(2) of the Constitution.¹⁷⁶ An alternative approach is to apply (and, if necessary, develop) the common law to provide a remedy. Respect in this sense extends to courts recognising when a statute is constitutionally defective, because avoiding such findings through unrestrained interpretative techniques 'makes it far more difficult for the legislature to predict how its laws will be interpreted and whether it is acting constitutionally'.¹⁷⁷ It is odd that the majority in *Daniels* did not remedy the shortcoming in the ESTA by way of direct application of the Constitution, in terms of which it could have read words into the statute, as this would have been a more principled (though perhaps not ideal)¹⁷⁸ way to decide the case.¹⁷⁹ Indeed, the *Sarrahwitz* court had no qualm in addressing the shortcoming in the Alienation of Land Act through an extensive reading-in and severance exercise (even though it arguably amounted to judicial overreach).¹⁸⁰

Finally, by identifying the right to make improvements through a strained interpretation, and tempering it with vague requirements, the court may have unintentionally compromised the tenure security of these occupiers. Pienaar observes that landowners have drawn sufficient impetus from both the ESTA and the Land Reform (Labour Tenants) Act 3 of 1996 to terminate the employment and institute eviction proceedings against many of these

¹⁷³ See the discussion in part II(b)(ii) above.

¹⁷⁴ Van der Walt op cit note 26 at 100ff.

¹⁷⁵ Ibid.

¹⁷⁶ Le Roux op cit note 88 at 383. See also *Daniels v Campbell* supra note 86 para 104.

¹⁷⁷ Bishop & Brickhill op cit note 88 at 699.

¹⁷⁸ See the earlier discussion attached to notes 73–4 above.

¹⁷⁹ Compare Bishop & Brickhill op cit note 88 at 699 ff and 703.

¹⁸⁰ Van der Linde & Van Staden op cit note 119 at 420–3.

occupiers.¹⁸¹ Following *Daniels*, owners may be tempted to expedite these proceedings to preclude engagements with these occupiers about undignified accommodation on the farms and in doing so, avoid potentially endless claims for improvements. Such a position would exacerbate the already pronounced housing shortage in agricultural rural areas of South Africa.¹⁸²

After *Daniels*, it is unclear what will be the outcome in cases where legislation that does not properly give effect to a constitutional right is challenged under that specific right, especially when it incorporates the right to human dignity. One possible explanation for Madlanga J's decision could be that the ESTA perhaps did not suit his preferred reasoning in the case, or the outcome he wanted to achieve.¹⁸³ For instance, if he acknowledged the shortcoming in the ESTA, this would have required him to declare the Act constitutionally invalid. This might have been followed by reading words into the statute to save it from constitutional invalidity, referring it back to Parliament (which would have needed time to address the lacuna in the Act), or developing the common law.¹⁸⁴ A lack of any explanation as to why none of these avenues were pursued creates uncertainty as to why his choice was considered preferable. It is exactly this kind of uncertainty that the subsidiarity principles seek to avoid.

Madlanga J's preferred reasoning not only added a parallel property system, namely the right to make improvements without an owner's permission in terms of s 5(a) of the ESTA. It also overemphasised the purpose of the Act at the expense of the legislative text, while ignoring the existing common law. As a result, the court missed the opportunity to develop the common law as a source of law to bring it in line with the regulatory scheme contemplated by s 25(6) of the Constitution so as to promote security of tenure.¹⁸⁵ In subpart (c) below, we discuss how such a development might have looked and why it might have been a better approach for deciding the case.

(c) *An evaluation of Daniels in terms of the second subsidiarity principle*

Lawful occupiers regularly make improvements to property while they are in occupation, and without the consent of the owner of that property.¹⁸⁶ It is easy to envisage a situation where an occupier wants to repair the property to prevent its destruction or amplify its usefulness. This is because she has an interest in the continued existence of the property as a home and the enhanced utility thereof in the sense that it is fit for human habitation. The owner, on the other hand, might be woefully ignorant of the dilapidation and

¹⁸¹ Pienaar op cit note 74 at 501.

¹⁸² Ibid at 500.

¹⁸³ Van der Walt op cit note 26 at 104ff.

¹⁸⁴ A related reason might have been the high transaction costs of enacting legislation. See Green op cit note 165 at 1223; Van der Linde & Van Staden op cit note 119 at 418.

¹⁸⁵ Compare *Tswelopele* supra note 141 and the criticism of the decision by Van der Walt op cit note 26 at 82n 186, 86–7 and Van der Walt op cit note 141.

¹⁸⁶ Daniel Visser *Unjustified Enrichment* (2008) 596.

uselessness of the property or appear ambivalent about the extent of the maintenance and improvements that should be made. In *Daniels*, Madlanga J described the dissimilar interests of the occupier and the owner as follows:

‘Not inconceivably, the interests of an occupier and those of an owner or person in charge may diverge. The occupier may be of the view that the dwelling requires improvements to bring it to an acceptable standard. The owner may disagree. Or, as is the case in the instant matter, the owner may accept that the dwelling’s condition is not consonant with human dignity but still not be receptive to the idea that the improvements be made.’¹⁸⁷

Despite these dissimilar interests, the general principle in the law of unjustified enrichment is that an occupier may claim enrichment from the owner of the property if the expenses she incurred salvages or improves the property.¹⁸⁸ Du Plessis describes this as a positive development in South African law because it replaces the crude approach that existed in Roman law, in terms of which a claim for restitution was completely denied, with a more nuanced approach, in terms of which the requirements and extent of the relief attempts to strike an appropriate balance between the respective interests of the parties.¹⁸⁹

The enrichment liability of the owner for unauthorised improvements is limited by the kind of expenses that the occupier incurred. In South African law, a distinction is drawn between three kinds of improvements. The first kind results from necessary expenses (*impensae necessariae*) incurred to preserve or protect the property.¹⁹⁰ The necessity implies that the expenses have to be inevitable or unavoidable. Whether or not an expense or improvement is regarded as necessary is determined with reference to an objective test that considers what a reasonable owner would have done in the circumstances. Put differently, but for the incursion of the expense or undertaking of the improvement, the property would have been destroyed, damaged or rendered completely useless. The benefit of this objective test is that it would be difficult for an owner to use a disingenuous or eccentric attitude as a defence against the enrichment claim, namely that she simply does not care whether the property is protected or preserved. By contrast, the downside of the objective test is that it may prejudice an owner who cannot afford the expenses.¹⁹¹ The liability in terms of this claim is not limited to the actual increase in the value of the property because in reality the expense is

¹⁸⁷ *Daniels* supra note 1 para 59.

¹⁸⁸ Visser op cit note 186 at 596 and Du Plessis op cit note 152 at 268.

¹⁸⁹ Du Plessis *ibid* at 269.

¹⁹⁰ *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 (6) SA 605 (SCA) para 6; *Absa Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 (1) SA 939 (C) at 943–4; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 85; *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 265 (A) at 270H; *Nortje v Pool* NO 1966 (3) SA 96 (A) at 131F; *Lechoana v Cloete* 1925 AD 536 at 547; and *United Building Society v Smookler’s Trustee and Golombick’s Trustee* 1906 TS 623 at 627.

¹⁹¹ Visser op cit note 186 at 600 and Du Plessis op cit note 152 at 277–8.

incurred or the improvement is made to retain the value of the property rather than to increase it.¹⁹² However, there would be no liability if the property perishes because the attempt at protecting or preserving the property was unsuccessful.¹⁹³

Useful improvements (*impensae utiles*) are, while not strictly necessary, incurred to enhance the utility/usefulness of the property and increase the ability of the thing to be exploited economically.¹⁹⁴ Whether an improvement serves this purpose is determined with reference to an open-ended test that takes into account the prevailing views of society based on the following considerations: (i) whether the liability would be reasonable in the circumstances;¹⁹⁵ (ii) the financial position of the owner; (iii) whether the owner intends to sell the thing or to retain it for personal use; (iv) whether the improvement was made in an attempt to undermine contractual negotiations;¹⁹⁶ (v) whether the owner knew about the improver's intention to make an improvement, but did nothing to prevent it;¹⁹⁷ (vi) whether the owner would have incurred the expense or made the improvement;¹⁹⁸ and (vii) whether the improvement can be separated from the owner's property without causing damage to it.¹⁹⁹ This subjective test enables a more flexible delineation of the boundary between usefulness, with its associations of benefit and practicability or serviceability, and luxury, which is characterised by desirability or indulgence.²⁰⁰

Luxurious improvements (*impensae voluptuariae*), while not strictly necessary or useful, are incurred to gratify the caprice or fancy of a particular

¹⁹² Du Plessis op cit note 152 at 279.

¹⁹³ Nortje supra note 190 at 131F.

¹⁹⁴ However, in *D'Glaser & Sons (Pty) Ltd v The Master NO* 1979 (4) SA 780 (C) at 791 the court indicated that enhanced utility and increased market value would not be conclusive proof that the improvements were useful.

¹⁹⁵ *FHP Management (Pty) Ltd v Theron NO* 2004 (3) SA 392 (C); *Absa Bank v Stander* supra note 190 at 957; *Wynland Construction (Pty) Ltd v Ashley-Smith* 1985 (1) SA 534 (C) at 538G; *Lodge v Modern Motors Ltd* 1957 (4) SA 103 (SR) at 120; *Ras v Vermeulen* 1927 OPD 5 at 7–8 and 12; *Lechoana* supra note 190 at 547; *Fletcher and Fletcher v Bulawayo Waterworks Co Ltd*; *Bulawayo Waterworks Co Ltd v Fletcher and Fletcher* 1915 AD 636 at 656–7; and *Meyer's Trustee v Malan* 1911 TPD 559 at 568.

¹⁹⁶ J C Sonnekus *Unjustified Enrichment in South African Law* (2008) 80–1.

¹⁹⁷ Du Plessis op cit note 152 at 281 states that this consideration is not yet firmly settled in South African law and suggests that the overview of comparative law in Dirk A Verse 'Improvements and enrichment: A comparative analysis' 1998 *Restitution LR* 85 might be instrumental in the development of our law.

¹⁹⁸ *FHP* supra note 195 at 405 and *Eduan Hoogtes (Pty) Ltd v Charin Electronics (Pty) Ltd* 1973 (2) SA 795 (T) at 796F–H.

¹⁹⁹ *De Kock NO v Van Schalkwyk* 1966 (1) SA 696 (O) at 701A and *Meyer's Trustee* supra note 195 at 568–9. However, see Voet 6.1.36 and 9.6 for those instances where the owner prohibits the improver from removing an improvement that can be removed.

²⁰⁰ Du Plessis op cit note 152 at 279 and *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T).

person.²⁰¹ Whether an improvement serves this purpose is determined with reference to the economic and social views of the community. The general rule is that these improvements will not give rise to enrichment liability.²⁰² However, there are two exceptions to this rule. An owner may be liable for an enrichment claim if the improvement enabled the owner to sell the property at a substantially higher price, as a result of the fact that it was impossible to remove the thing without damaging the property.²⁰³ An improver will be denied the right to remove an improvement (*ius tollendi*) if the owner is willing to reimburse her for the thing she wishes to remove.²⁰⁴ These general principles of the law of unjustified enrichment were placed before the court by the applicant and might have triggered an analysis of how the second subsidiarity principle could have found application in this case.²⁰⁵

The second subsidiarity principle states that a litigant who avers that a right in the Bill of Rights has been infringed must rely on the legislation that was specifically enacted to protect that right and may not rely directly on the common law when bringing an action to protect the right.²⁰⁶ However, the proviso to this principle (which Van der Walt deduced on logical grounds) allows a litigant to rely directly on the common law if the legislation was not intended to, or in fact does not, replace the common law in that specific context. This would only be permitted in two instances, namely where (1) the common law is not in conflict with the constitutional right at hand or with the scheme the legislation introduced, or (2) in the event that such a conflict exists, it can be developed — through statutory and/or constitutional interpretation — to accord with the Bill of Rights or the legislative scheme.²⁰⁷

In part II(b), we argued that Madlanga J could have held that the ESTA is unconstitutional to the extent that it does not provide an occupier with the right to make improvements without the owner's permission. He could then have referred the matter to Parliament to remedy the constitutional defect/inadequacy by amending the ESTA with a carefully crafted provision that sets out the parameters of the right to make improvements. In this scenario, the court could then have interpreted the amended text of the ESTA with reference to the common-law definition and tests for necessary and useful improvements. In so doing, the court would not only have been able readily to determine the kinds of improvements an occupier could make, but also to limit the enrichment liability of the owner.

Alternatively (and preferably), Madlanga J could have held that the ESTA is defective, but instead of referring the matter to Parliament to remedy the

²⁰¹ *United Building Society* supra note 190 at 627.

²⁰² *United Apostolic Faith Church v Boksburg Christian Academy* 2011 (6) SA 156 (GSJ) para 30; *Nortje* supra note 190 at 131F–H; and *Lechoana* supra note 190 at 547.

²⁰³ *Fletcher* supra note 195 at 648.

²⁰⁴ Voet 6.1.36.

²⁰⁵ See the discussion of this principle in part II(a).

²⁰⁶ Van der Walt op cit note 31 at 103–5.

²⁰⁷ *Ibid* at 115–16.

constitutional defect/inadequacy, he could have opted to save the ESTA in terms of a constitutionally inspired and doctrinally driven development of the common law following the latter part of the proviso to the second subsidiarity principle. This is because ESTA was never intended to replace, and in fact does not replace, the common law in the specific context of improvements without the consent of the owner. Du Plessis states that the general enrichment liability of owners is subject to the exception that certain lawful occupiers — rural lessees,²⁰⁸ fiduciaries,²⁰⁹ usufructuaries,²¹⁰ and precarious occupiers²¹¹ — have limited enrichment claims for the necessary and useful improvements they made based on the ‘unique relationship’²¹² in which they stand to the property. In our view, the promotion of tenure security and housing that is fit for human habitation provides a sound constitutional reason to expand the list of common-law beneficiaries mentioned above to include another category of lawful occupier, namely an ESTA occupier, who has a claim based on the general principles of unjustified enrichment. The enrichment liability of the owner can then doctrinally be limited by the ‘unique relationship’ that exists between the owner and the ESTA occupier — facilitating the long-term security of tenure for lawful occupiers in agricultural rural areas by regulating the conditions under which they reside — and further circumscribed by the *ius tollendi* and the common-law definition, tests and examples for necessary, useful and luxurious improvements.

In summation, had the court relied on the second subsidiarity principle to decide the case, it would have obviated the necessity of adopting a strained interpretation towards s 5(a) of ESTA so as to grant Ms Daniels a remedy. Had it instead considered (and developed) the common law, it could have

²⁰⁸ Du Plessis op cit note 152 at 285–7.

²⁰⁹ Ibid at 287–8.

²¹⁰ Ibid at 288–9.

²¹¹ Ibid. At common law a precarium was based on a bilateral and bona fide contract in terms of which a gratuitous grant for the use and enjoyment of moveable property or occupation of immovable property was made by the grantor to the precarious occupier. A precarium was generally not entered into for any fixed period of time and conferred a general right to use and enjoy the thing and its fruits. The precarious occupier took possession of the thing in terms of a precarium. The grantor in precarium could terminate the contract with the *interdict de precario*. See Andrew Borkowski *A Textbook on Roman Law* (1997) 305–7, 316; Reinhard Zimmermann *The Law of Obligations — Roman Foundations of the Civilian Tradition* (1990) 188–205; Rudolph Sohm *The Institutes — A Textbook of the History and System of Roman Private Law* (1907, translated by James Crawford Ledlie) 334–7, 376; and W A Hunter *A Systematic and Historical Exposition of Roman Law in the Order of a Code* (1885) 380–3, 411–12.

²¹² Du Plessis op cit note 152 at 285–9 notes that rural lessees have clearly defined rights and obligations in terms of a contract while fiduciaries have an obligation to transfer a benefit upon effluxion of time or the fulfilment of a condition; usufructuaries are under an obligation to return the property *salva re substantia* upon termination of the personal servitude; and precarious occupiers receive a gratuitous grant of occupation.

reconciled the dissimilar interests of the owner and occupiers in a way that arguably provides greater legal certainty than the vague standard of ‘reasonably necessary’ improvements.

III CONCLUSION

The *Daniels* judgment transformed property law by allowing an ESTA occupier to make improvements to her dwelling — in order to make it habitable — without the landowner’s permission.²¹³ As a result, the court vindicated the applicant’s right to tenure security and human dignity. On this count the decision is laudable. However, the route taken to arrive at this decision is likely to promote (instead of prevent) the negative features that the single-system-of-law principle seeks to avoid. Not only did the CC ignore the principles of statutory interpretation by adopting a strained interpretation of s 5(a) of the ESTA, but it also missed an ideal opportunity to develop the common law of unjustified enrichment to protect the applicant’s rights.

Madlanga J mainly relied on the right to human dignity, as one of the purposes of the ESTA, to identify the right to make improvements in s 5(a) of the Act. Though the purpose of a statute is an important element of interpretation, especially in cases that concern property (given South Africa’s apartheid history), this interpretive approach should not be applied without carefully reflecting on the choice and interpretation of legal sources that govern a dispute and how they will best promote the desired characteristics which the Constitution requires of all law. Madlanga J’s (overly) extensive interpretation of s 5(a), though vindicating the applicant’s rights, lost sight of the textual threshold, and entails filling a *casus omissus* in the Act. This is at odds with established principles of statutory interpretation. Moreover, it amounts to judicial overreach in the form of judicial legislation and result-oriented judging, which subverts the rule of law and the separation of powers. Furthermore, the requirements of the remedy (that they should be reasonably necessary improvements and that there must be meaningful engagement between the occupier and landowner) are both vague and foreign to the ESTA context, with the result that the decision may end up not giving effective relief to similarly placed occupiers in future cases.

In this article, we have argued that the applicant’s right to security of tenure could have been upheld by following a different journey, one that relies on the principle of a single system of law and the subsidiarity principles, along with the principles of statutory interpretation. In terms of the first subsidiarity principle the court could have declared the ESTA unconstitutional to the extent that it does not adequately protect the applicant’s security of tenure. Parliament could then have been requested to amend the Act by including a provision that sets out the parameters of the right to make

²¹³ See especially *Daniels* supra note 1 para 136 (per Froneman J, concurring) citing AJ van der Walt *Property in the Margins* (2009) 16.

improvements. In the interim, the court could have granted Ms Daniels relief in accordance with the approach it followed, subject to Parliament amending the ESTA as needed, within a certain period of time. Alternatively, the approach we favour is that the court could have followed the second subsidiarity principle and saved the ESTA through a constitutionally inspired and doctrinally driven development of the common law of unjustified enrichment in terms of s 39(2) of the Constitution. In accordance with this approach, the court could have created a further exception to the general enrichment liability of an owner by including another lawful occupier — an ESTA occupier — to the list of beneficiaries who have limited enrichment claims for the necessary and useful improvements which they have made based on their ‘unique relationship’ with the property. Similarly placed individuals and owners would then have the benefit of clear guidance from the definitions, tests and examples in our common law about what constitutes necessary, useful and luxurious improvements and would not be left wondering what types of improvements are ‘reasonably necessary’. Additionally, the right to remove an improvement (*ius tollendi*) could have been used to reduce or increase the enrichment liability of the owner, depending on whether the improvement could be removed without damaging the property, or whether the owner is willing to reimburse the occupier for luxurious improvements she wished to remove.

At this point in our jurisprudence, the relationship between the first and second subsidiarity principles is unclear when an interpreter is unable to construe the applicable source (namely legislation) in conformity with the Constitution. Under the first principle, a court must interpret the impugned statute to see whether it gives effect to the underlying fundamental right. Here, the principles of constitutional and statutory interpretation play a key role. Courts must avoid straining the meaning of a statute when reading it in conformity with the Constitution. If a reasonable interpretation reveals that it does not give effect to the fundamental right at hand (as was seemingly the case in *Daniels*), should a court then automatically declare it unconstitutional and remedy it in terms of s 172(1)(b) of the Constitution, or should it first consider the common law in terms of the second subsidiarity principle to see if a finding of constitutional invalidity may be avoided? This is where the first and second principles work together: if the impugned statute does not properly give effect to the fundamental right (ie because there is a *casus omissus*), a court must consider — in terms of the *eiusdem generis* rule and the presumption that statute law does not alter the existing law more than necessary — whether the common law applies.

If the common law addresses the dispute adequately in terms of the fundamental right and the spirit, purport and objects of the Bill of Rights, then that is the end of the matter. The common law can be applied to vindicate the rights of the applicant; it is unnecessary to develop it or to declare the impugned statute constitutionally invalid. If it is applicable but does not adequately address the dispute, a court should at least consider developing the common law to provide relief, especially if it can be

developed to this effect (as was the case with the law of unjustified enrichment in *Daniels*). Finally, if the common law does not address the matter adequately and cannot be developed, the statute should be declared unconstitutional, followed by one of the remedies in s 172(1)(b) of the Constitution.

In conclusion, the court in *Daniels* should not have provided a remedy through a strained interpretation of the impugned statute so as to avoid a finding of constitutional invalidity, thereby ignoring the relevant common-law position.