IN THE LAND COURT OF SOUTH AFRICA

HELD AT RANDBURG

Reportable

In the matter between:

JAKOBUS PETRUS MARAIS N.O. AND OTHERS

and

JACQUES DANIELS AND OTHERS LCC 130/2023

CAPESPAN AGRI (PTY) LTD t/a THEEWATERSKLOOF

and

MICHAEL JOHN DANIELS AND OTHERS LCC 63/2023

CAPESPAN AGRI (PTY) LTD t/a THEEWATERSKLOOF

and

KAROOLS BRETT AND OTHERS LCC 98/2023

LODSWORTH INVESTMENTS (PTY) LTD AND ANOTHER

and

HENRY HENDRICO RICARDO OPPERMAN AND OTHERS LCC 27/2023

CARLOS DA SILVA BELEGGINGS (PTY) LTD

and

ALFRED NYANGANE MOKWENA LCC 145/2022

CHARLES LAMBRECHTS N.O. AND OTHERS
and

PIET BOOYSEN AND OTHERS LCC 163/2023

HESTER FRANCINA BLACKBURN N.O. AND OTHERS

and

SOPHIA KERNEELS AND OTHERS LCC 162/2023

DEORISTA 113 (PTY) LTD AND OTHERS

and

ELSIE JENEKE AND OTHERS LCC 105/2024

and

MINISTER OF LAND REFORM
AND RURAL DEVELOPMENT First interested party

MINISTER OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT Second interested party

Coram: CARELSE JP, COWEN DJP and SPILG J

Heard: 3-5 March 2025

Reserved: 28 March 2025

Delivered: 30 September 2025

Summary: Extension of Security of Tenure Amendment Act 2 of 2018; Extension of Security of Tenure Act 62 of 1997; Land Court Act 6 of 2023. Implications of Land Court Act amendments to ESTA on ESTA Amendment Act. Land Court Act does not repeal mediation requirement introduced to section 11(2) of ESTA. Mediation requirements introduced by ESTA Amendment Act to section 10(1) and 10(2) mandatory. Good faith attempts at settlement or meaningful engagement do not constitute mediation. Mediation requirements do not apply to pending proceedings instituted in the Land Court Act or Magistrates Court prior to 1 April 2024.

ORDER

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1. It is declared that:

    a. The Land Court Act 6 of 2023 did not repeal the amendment of section 11(2) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) effected by the Extension of Security of Tenure Amendment Act 2 of 2018 (ESTA Amendment Act).

b. Following the commencement of the ESTA Amendment Act, section 11(2) of ESTA is interpreted as:

'(2) In circumstances other than those contemplated in subsection (1), the Court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997, if –

(a) The Court is of the opinion that it is just and equitable to do so; and
(b) The owner or person in charge of the land and the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.'

2. It is declared that the mediation requirements in section 10(1)(e) and section 11(2)(b) of ESTA are mandatory.

3. It is declared that good faith efforts at settlement and meaningful engagement do not constitute mediation for purposes of the mediation requirements in section 10(1)(e) and section 11(2)(b) of ESTA.

4. It is declared that the mediation requirements in section 10(1)(e) and section 11(2)(b) of ESTA do not apply to:

   a. eviction proceedings that were instituted in and pending before the Land Claims Court (now Land Court) or the Magistrates Court before 1 April 2024; or
   b. eviction proceedings under automatic review that were pending before the Land Claims Court (now Land Court) on 1 April 2024.

5. There is no order as to costs.

JUDGMENT

THE COURT

Introduction

[1] This case concerns the role of mediation in facilitating land justice in South Africa and ensuring tenure security for those whose rights in land are insecure as a result of past racially discriminatory laws and practices. It arises in the wake of recent legislative amendments which entrench mediation as a central means through which land-related disputes are to be resolved. It arises from eight eviction matters instituted in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA).

[2] Land dispossession in South Africa is rooted in a long and painful history of colonialism and apartheid. To redress the resultant injustices, the democratic government enacted land reform legislation envisaged by the Constitution including, amongst others, the Restitution of Land Rights Act 22 of 1994 (the Restitution Act), ESTA and the Land Reform (Labour Tenants Act) Act 3 of 1996 (the Labour Tenants Act). The Restitution Act established the Land Claims Court to meet the urgent need to give effect to land reform legislation.

[3] ESTA is intended to protect the tenure rights of individuals and families residing on rural land, who have historically been vulnerable to arbitrary evictions. It seeks to strike a fair and constitutional balance between the rights of landowners

and those of occupiers, thereby promoting justice, and secure and equitable land relations in post-apartheid South Africa.

[4] The issues in this case arise from two amendments to ESTA. The amendments were introduced by the Extension of Security of Tenure Amendment Act 2 of 2018 (the ESTA Amendment Act), which came into force on 1 April 2024. The two amendments introduced mediation as requirements for the grant of certain eviction orders under ESTA, thereby meeting the objective of 'further [regulating] the eviction of occupiers by enforcing alternative resolution mechanisms provided for in the Act'. The amendments, which are in similar but not identical terms, were made to subsecs 10(1) and 11(2) of ESTA, which, respectively, govern evictions of persons who were ESTA occupiers on or after 4 February 1997. Section 10 occupiers, being those who were ESTA occupiers on 4 February 1997 (now 28 years ago), are generally afforded stronger protection against eviction than s 11 occupiers, who became occupiers thereafter.

[5] The mediation requirements can only be understood having regard to their fuller legislative context but for present purposes, ESTA as amended provides that an eviction may be granted under subsecs 10(1) and 11(2) if, amongst other things, the parties 'have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.'

[6] On 5 April 2024, four days after the amendments to ESTA came into force, the Land Court Act 6 of 2023 (the Land Court Act) came into force. The Land Court Act is ambitious legislation intended, amongst other things, to ensure that land

reform in its entirety be accelerated in a lawful and equitable manner guided by progressive jurisprudence.[1] Centrally, the Act established the Land Court, to replace the Land Claims Court, as a permanent Court with jurisdiction in relation to matters arising from the application of the Restitution Act or any other legislation providing therefor.[2] This includes ESTA.

[7] The Land Court Act marks a historic moment for land reform in South Africa and the Land Court has a critical role to play in the social transformation of our country. Restorative land justice necessitates a proper understanding of the pernicious effects of the apartheid resettlement policy which, through dispossession and forced removals, has aptly been described as 'the cornerstone of the whole edifice of apartheid'.[3] With its unique constitutional mandate, anchored in s 25 of the Constitution,[4] the Land Court has a duty to dismantle the architecture and reshape

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[1] Preamble to the Land Court Act.
[2] Section 3.
[3] Cosmas Desmond in the Forward to L Platzky and C Walker 'The Surplus People: Forced Removals in South Africa' Ravan Press, Johannesburg p xviii.
[4] 25 Property
(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
(2) Property may be expropriated only in terms of law of general application
(a) for a public purpose or in the public interest; and
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.
(4) For the purposes of this section
(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
(b) property is not limited to land.
(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

the landscape of apartheid to achieve the Act's purpose to 'enhance and promote the ideal of access to land on an equitable basis, promote land reform as a means of redressing the results of past discrimination and facilitate land justice.'[5]

[8] The Land Court Act introduced various far-reaching changes to the legal landscape, in part by substantially expanding the scope of the Court's jurisdiction.[6] A material change, for present purposes, is that it entrenched mediation as a central means to resolve disputes in all matters under its jurisdiction. This was one of its key purposes and it did so in various ways referred to below. The Land Court Act also introduced a series of amendments to ESTA, amongst other laws.

[9] As matters transpired, these legislative developments introduced a level of uncertainty amongst litigants. Uncertainty prevailed, most pertinently, as to the implications of the Land Court Act for the mediation requirements introduced by the ESTA Amendment Act to subsec 11(2) of ESTA. Uncertainty also prevailed about the nature of the mediation requirements introduced by the ESTA Amendment Act and whether they applied to pending proceedings.

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(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
(9) Parliament must enact the legislation referred to in subsection (6).

[5] Section 2(1) of the Land Court Act.

[6] Although the relevant provisions are not yet in force, the Land Court Act will bring under the Court's jurisdiction the following legislation: Upgrading of Land Tenure Rights Act 112 of 1991; Land Reform: Provision of Land and Assistance Act 126 of 1993; KwaZulu-Natal Ingonyama Trust Act 3KZ of 1994; Communal Property Associations Act 28 of 1996 and the Interim Protection of Informal Land Rights Act 31 of 1996.

[10] In the result, a Full Court was constituted to deal with the related disputes arising in various ESTA eviction matters that were then before the new Land Court.[7] As indicated there are eight eviction matters before the Full Court which form part of these proceedings.[8] It was agreed that the arising legal issues would be separated from the merits of the individual cases, which will be dealt with after this decision is delivered by the Judges to whom the Judge President allocates the cases.

[11] For convenience, reference is made to the parties in three broad groupings. The applicants in each case are the owners and persons in charge of the land and they are referred to as the landowner applicants. As matters transpired, in each case, they were represented by the same counsel and attorneys. The occupiers are referred to as the occupier respondents, and were all represented by Legal Aid South Africa (LASA). The Minister of Land Reform and Rural Development participated in the proceedings and is referred to as the Minister. The Minister is vested with executive authority over the Department of Land Reform and Rural Development (DLRRD). The Minister of Justice and Constitutional Development, responsible for the Land Court Act, was joined as a party and invited to make submissions but decided not to participate.

[12] The Land Court convened at the Western Cape High Court between 3 and 5 March 2025 to hear oral arguments. Shortly before the hearing, the occupier

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[7] The Full Court was constituted in terms of subsec 14(1)(b) read with subsec 14(1)(a) of the Superior Courts Act 10 of 2013.

[8] The cases are *Jakobus Petrus Marais NO and others v Jacques Danies and others* (LCC 130/2023); *Capespan Agri (Pty) Ltd t/a Theewaterskloof v Michael John Daniels and others* (LCC 63/2023); *Capespan Agri (Pty) Ltd t/a Theewaterskloof v Karools Brett and others* (LCC 98/2023); *Lodsworth Investments (Pty) Ltd and another v Henry Hendrico Ricardo Opperman and others* (LCC 27/2023); *Carlos da Silva Beleggings (Pty) Ltd v Alfred Nyangane Mokwena* (LCC 145/2022); *Charles Lambrechts NO and others v Piet Booysen and others (LCC 163/2023); Hester Francina Blackburg NO and others v Sophia Kerneels and others* (LCC 162/2023) and *Deorista 113 (Pty) Ltd and others v Elsie Jeneke and others* (LCC 105/2024).

respondents filed a conditional constitutional challenge. However, it was agreed that argument should proceed, and the constitutional challenge only be dealt with at a later stage should the need arise. In view of the conclusions reached, there is no need to do so. At the close of argument, the parties were called upon to file supplementary heads of argument on two issues that arose during the hearing.

[13] The following issues arise for decision:

(a) Did the Land Court Act repeal the mediation requirement introduced in subsec 11(2) of ESTA by section 6 of the ESTA Amendment Act?
(b) Are the mediation requirements introduced to subsecs 10(1) and 11(2) of ESTA mandatory?
(c) Do good faith attempts at settlement or meaningful engagement constitute mediation?
(d) Do the mediation requirements in subsecs 10(1) and 11(2) only apply to eviction proceedings instituted after 1 April 2024?

Applicable interpretive principles

[14] At the heart of the legal issues arising in this case lies the proper interpretation of ESTA as amended by the ESTA Amendment Act. The task before the Court is to determine the meaning and legal effect of these amendments, an exercise that must be guided by established principles of statutory interpretation.

[15] The basic principles of interpreting statutes were succinctly set out in *Fidelity Security Services*:[9]

[9] *Minister of Police and others v Fidelity Security Services (Pty) Ltd* [2022] ZACC 16; 2022(2) SACR 519 (CC); 2023(3) BCLR 270 (CC) para 34.

'The interpretation of the Act must be guided by the following principles:

(a) Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.
(b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualized; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.
(c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not business-like or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification 'reasonably possible' is a reminder that Judges must guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.'
(d) If reasonably possible, a statute should be interpreted so as to avoid a lacuna (gap) in the legislative scheme.'

[16] ESTA is 'remedial legislation umbilically linked to the Constitution' which seeks to protect people whose tenure of land is insecure.[10] The Constitutional Court has held (footnotes omitted):[11]

'In construing the provisions of ESTA a 'blinkered peering' at the language in the legislation must be avoided. An approach that will 'afford [occupiers] the fullest possible protection of their constitutional guarantees' must be adopted. This court, in *Goedgelegen,* per Moseneke DCJ, remarked:

'(W)e must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values.'

[10] *Klaase and Another v van der Merwe N.O. and Others* [2016] ZACC 17; 2016 (9) BCLR 1187 (CC); 2016 (6) SA 131 (CC) (*Klaase*) para 51. See too *Molusi and others v Voges NO and others* [2016] ZACC 6; 2016(3) SA 370 (CC) 2016(7) BCLR 839 (CC) (*Molusi*) para 1.
[11] Id. Cf *Department of Land Affairs and others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007(6) SA 199 (CC); 2007(10)BCLR 1027 (CC) paras 53 and 55 regarding the Restitution Act.

[17] The social and historical background to ESTA was vividly explored by the Constitutional Court in *Daniels,*[12] where the process of dispossession of land, central to colonialism and apartheid, was traced, from when it commenced 'through the barrel of the gun and 'trickery' when white settlement began. The Court referred to the array of dispossessing laws that followed, most infamously the 1913 Native Land Act,[13] the commencement of which Mr Sol Plaatje described: 'Awaking on Friday morning June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth.'[14] The effect of the 1913 Act was to apportion 8% of the land area of South Africa as African reserves, making more land available to white farmers, and to enforce a policy of racial segregation which 'assumed heightened proportions during the apartheid era.'[15] As the Court noted:[16]

'The Black Land Act, together with other stratagems, succeeded in pushing Africans off their land and into white farms, mines and other industries. These other stratagems, like the imposition of a variety of taxes including property taxes created the need for cash. Selling livestock for this purpose was unsustainable. Cash could be obtained only by working for whites.'

[18] The Constitutional Court emphasized in *Daniels* that the process of dispossession was not limited to African people but extended to 'coloured' and Indian people, also Chinese people, who, through brutal and socially devastating forced removals were removed under the Group Areas Act[17] from so-called white areas.[18]

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[12] *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (*Daniels*) paras 14 to 22.
[13] 27 of 1913, later renamed the Black Land Act.
[14] *Daniels* above fn 16 para 14.
[15] Id paras 15 and 16.
[16] Id para 17.
[17] 41 of 1950.
[18] *Daniels* above fn 16 paras 19 and 20.

[19] Ultimately the process of racial segregation under apartheid divested all African people of their South African citizenship as '(a)ccording to the grand scheme of apartheid Africans were to be citizens of so-called homelands.'[19] The Constitutional Court dealt with the consequences in these terms:

'The consequence was a variety of tenuous forms of land tenure for victims within what – to apartheid – was 'South Africa proper'. This means throughout the length and breadth of our country victims were made strangers in their own country. On farmland – which this case is about – their residence was particularly precarious. They could be, and were often, subjected to arbitrary evictions. Needless to say, they could not have much say on the conditions under which they lived on the farms, however deplorable. This was a life bereft of human dignity.'

[20] It must not be forgotten that it is precisely this legacy that ESTA is designed to redress. And for many, the history remains very much the present and ESTA occupiers remain 'a vulnerable group susceptible to untold mistreatment' especially for women.[20] ESTA is not merely procedural legislation. It is a constitutionally infused statute enacted to give effect to s 25(6) and s26(1) of the Constitution, which promise security of tenure and the right of access to adequate housing. As such, courts are enjoined to interpret ESTA generously and purposively, in a manner that advances its remedial and transformative purposes.

[21] Most pertinently, it must be kept front of mind that ESTA is intended to secure tenure in land for those without it due to our history. This is recognized in ESTA's preamble, which is worth recording in full:

WHEREAS many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction;
WHEREAS unfair evictions lead to great hardship, conflict and social instability;
WHEREAS this situation is in part the result of past discriminatory laws and practices;
AND WHEREAS it is desirable –
that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies;

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[19] Id para 21.
[20] Id para 22.

that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners;
that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognizing the right of landowners to apply to court for an eviction order in appropriate circumstances;
to ensure that occupiers are not further prejudiced;
BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-'

The first issue: the status of the ESTA Amendments

[22] The first issue is whether the Land Court Act repealed the amendment to subsec 11(2) of ESTA introduced by the ESTA Amendment Act. To understand how the issue arose and to answer the question, it is necessary to focus both on the chronology of the legislative amendments and the specific text of the amendments to subsec 11(2) contemplated by the ESTA Amendment Act, and the Land Court Act.

[23] The Minister introduced the ESTA Amendment Bill in Parliament in 2015.[21] By 26 June 2018, the Bill had been passed by both houses of Parliament and referred to the President for assent in terms of subsec 84(2)(a) of the Constitution. The President assented to the ESTA Amendment Bill on 20 November 2018.

[24] Parliament thereby amended both subsecs 10(1) and 11(2) of ESTA to include the mediation requirements. Sub-section 10(1) was amended to include a new subsec (e)[22] and subsec 11(2) was amended to include a new subsec (b)[23] each of which contains the mediation requirement in the same language.[24]

[25] To focus on the legislative text at the time, prior to the ESTA Amendment Act, subsec 11(2) of ESTA read:

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[21] As B24 of 2015.
[22] By way of s 5.
[23] By way of s 6.
[24] See above para 5.

‘(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.’

[26] The ESTA Amendment Act sought to amend subsec 11(2) in the following terms:

‘**Amendment of section 11 of Act 62 of 1997, as amended by section 25 of Act 61 of 1998**

6.Section 11 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997, if

(a) [**it]** the court is of the opinion that it is just and equitable to do so; and

(b) The owner or person in charge of the land and the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction

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[27] At the moment the ESTA Amendment Act came into force, subsec 11(2) accordingly read:

‘(2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997, if –

(a) The court is of the opinion that it is just and equitable to do so; and
(b) The owner or person in charge of the land and the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.’

[28] Importantly, the ESTA Amendment Act 2018 was not brought into force in 2018 or soon thereafter. Rather, it was to come into operation on a date determined by the President by proclamation in the *Gazette*.[25]

[25] Section 11 of the ESTA Amendment Act.

[29] In the meantime, Parliament passed the Land Court Bill, in May 2023. The President assented to the Land Court Bill, on 16 September 2023. It too did not come into force immediately and would only come into force on a date to be determined by the President.

[30] The Land Court Act also contemplated an amendment to s 11 of ESTA.[26] The Schedule to the Land Court Bill recorded an amendment to s 11 of ESTA in the following terms:[27]

'9. By the substitution in section 11 for subsections (1) and (2) of the following subsection:

' (1) if it was an express, material and fair term of the consent granted to an occupier to reside on the land in question that the consent would terminate upon a fixed or determinable date, **[a court]** the Court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.

(2) In circumstances other than those contemplated in subsection (1), **[a court]** the Court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.'

[31] It was only several years later, in January 2024, that the President determined 1 April 2024 as the date the ESTA Amendment Act 2018 would come into operation. Four days later, on 5 April 2025, the President determined 5 April 2025 as the date on which the Land Court Act would commence.[28]

[26] Section 36. Section 36 provides: 'The laws mentioned in the Schedule are amended to the extent indicated in the third column of the Schedule.'
[27] Item 8.9
[28] GN 162 of 2024 published in GG 50448 of 5 April 2024.

[32] According to the landowner applicants, s 36 of the Land Court Act read with the Schedule repealed the mediation requirement in the new s 11(2) introduced by the ESTA Amendment Act four days earlier. The view was not held in isolation as appears from the fact that online legislation services such as Juta, LexisNexis and Sabinet reflect the same understanding. The question is whether Parliament intended this to be its effect. LASA and the Minister submit that the Land Court Act had no such effect and merely served to substitute the reference in ESTA to the old definition of 'court' with a new definition of 'Court'.

[33] The dispute invokes the principles of statutory interpretation referred to above. In our view, a correct application of these principles leads to the conclusion that Parliament, when enacting the Land Court Act, did not intend to repeal the mediation requirement introduced in s 11(2) by the ESTA Amendment Act. Rather, it intended only to amend the reference in subsec 11(2) to a court with the definition of Court introduced by the Land Court Act. This conclusion is reached by a consideration of text, context, purpose and constitutional imperative.

[34] Textually, Parliament's intentions in item 8 of the Land Court Act are discernible most clearly from how it reflected the intended amendments. First, there is no reference to the ESTA Amendment Act. Secondly, item 8.9 reflects the intended amendment by depicting in bold in square brackets the portion to be deleted and by underlining the portion to be inserted.[29] The only part so reflected is the intended substitution of 'a court' with 'the Court'.

[35] Contextually, this accords with the primary import of the various amendments that the Schedule to the Land Court Act introduced to ESTA.[30] In the main, the

[29] See above para 30.
[30] Specifically, ss 1,8(7), (9), (10), 11, 12, 13, 14, 17, 19, 20, 23 and 25. In items 1 to 7 other laws are amended.

amendments have the effect of replacing references in ESTA to the old Land Claims Court with references to the new Land Court or substituting the definition of a 'court'[31] with a new definition of the Court,[32] which includes both the new Land Court and the Magistrates Court.[33] The further amendments to ESTA are limited amendments to s 20 which affect the High Court's jurisdiction to interpret ESTA[34] and confer on the Rules Board, rather than the President (now Judge President) of the Land Court the power to make its Rules.[35]

[36] A consideration of the purpose of both the ESTA Amendment Act and the Land Court Act fortifies the conclusion that Parliament did not intend to repeal the mediation requirement in s 11(2). The promotion of alternative dispute resolution is expressly stated in their short preambles to be a purpose of both the ESTA Amendment Act[36] and the Land Court Act.[37] In the Land Court Act, Parliament expressly promotes mediation as a tool to secure less expensive and accelerated access to justice both prior to and during the adjudication process. Thus, subsec 2(2) expressly states that one of the objects of the Land Court Act is to 'provide for mediation'. The benefits of mediation are compelling. By encouraging amicable settlements, it relieves the burden on overextended courts, offers a more cost-effective alternative to prolonged litigation and enables swift resolution of disputes.

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[31] ESTA defined a court to mean 'a competent court having jurisdiction in terms of this Act, including a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996).

[32] Section 1 of the ESTA Amendment Act substitutes the definition of court with a definition of Court, which means 'the Land Court established by section 3 of the Land Court Act, 2023, or a Magistrate's Court in whose area of jurisdiction the land in question is situated, including a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No 74 of 1996).'

[33] It is not necessary in this judgment to deal with the effect of these amendments.

[34] Section 22(a) of the ESTA Amendment Act deletes ss 20(3) of ESTA which read: 'If in any proceedings in a High Court at the date of the commencement of this Act that Court is required to interpret this Act, that Court shall stop the proceedings if no oral evidence has been led and refer the matter to the Land Claims Court.'

[35] Section 22(b) of the Land Court Act.

[36] In the short preamble to the ESTA Amendment Act one purpose is recorded as 'to further regulate the eviction of occupiers by enforcing alternative resolution mechanisms provided for in the Act.'

[37] In the short preamble to the Land Court Act one purpose is recorded as' to provide for mediation procedures.'

Mediation encourages constructive dialogue and mutual understanding, often preserving long-standing relationships between parties.

[37] Since 1994, it has always been Parliament's intention that mediation play an important role in the resolution of land disputes. In all three primary statutes which fell under the jurisdiction of the erstwhile Land Claims Court, the Restitution Act, ESTA and the Labour Tenants Act, provision was made for mediation even prior to the adjudicative process.[38] Under ESTA, s 21 has always provided for mediation on request to the Director-General of DLRRD whether prior to or during litigation. Section 21, which lies at the heart of the mediation requirements introduced by the ESTA amendments, provides:

21. Mediation

(1) A party may request the Director-General to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act.
(2) The Director-General may, on the conditions that he or she may determine, appoint a person referred to in subsection (1): Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the Director-General may determine.
(3) A person appointed in terms of subsection (1) who is not in the full-time service of the State may, from moneys appropriated by Parliament for that purpose, be paid such remuneration and allowances as may be determined by the Minister in consultation with the Minister of Finance for services performed by him or her.
(3A) The Director-General may refer the disputes contemplated in this section to the Board for mediation or arbitration as contemplated in section 15C(1)(d).
(4) All discussions, disclosures and submissions which take place or are made during the mediation process shall be privileged, unless the parties agree to the contrary.'

[38] Moreover, under (the now repealed) s 35A of the Restitution Act, at any stage during proceedings under the Act or other Act conferring jurisdiction on the Court it

[38] Section 21 of ESTA, section 13 of the Restitution Act and section 18(3) of the Labour Tenants Act

became evident 'that there is any issue which might be resolved through mediation and negotiation', the Court could make an order 'directing the parties concerned to attempt to settle the issue through a process of mediation and negotiation.'[39]

[39] Section 21 remains in force and although the Land Court Act repealed Chapter 3 of the Restitution Act, under which s 35A fell, s 35A has been materially reproduced in s 29 of the Land Court Act.[40] There are two new mediation provisions in the Land Court Act, which underscore the importance the legislature attaches to its role. The first is found in subsec 13(2) of the Land Court Act in terms of which,

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[39] The full text of section 35A read:

35A Mediation

(1) If at any stage during proceedings under this Act or any other Act conferring jurisdiction upon the Court it becomes evident that there is any issue which might be resolved through mediation and negotiation, the Court may make an order –
  (a) Directing the parties concerned to attempt to settle the issue through a process of mediation and negotiation;
  (b) That such proceedings be stayed pending such process.

(2) (a) An order contemplated in sub-section (1) shall specify the time when and the place where such process is to start.
(b) The Court shall appoint a fit and proper person as a mediator to chair the first meeting between the parties: Provided that the parties may at any time during the course of mediation or negotiation by agreement appoint another person to mediate the dispute.

(3) A mediator appointed in terms of sub-section (2)(b) who is not in the full-time service of the State may be paid such remuneration and allowances in respect of the services performed by him or her as may be determined by the Minister in consultation with the Minister of Finance and the President of the Court.

(4) All discussion taking place and all disclosures and submissions made during the mediation process shall be privileged, unless the parties agree to the contrary.

[40] Section 29 provides:

29 Mediation

(1) Notwithstanding the provisions of section 13(2)(b) of this Act, if, at any stage during proceedings, but prior to judgment, it becomes evident to the presiding judge that there is any issue which might be resolved through mediation, the presiding judge may make an order –
  (a) directing the parties to attempt to settle the issue through a process of mediation; and
  (b) that the proceedings be stayed pending such process.

(2)(a) If the Judge President as contemplated in section 13(2), or the presiding judge in terms of subsection (1), decides that the matter must be referred for mediation, the Judge President or presiding judge must make an order –
  (i) directing the registrar to transfer the matter in the manner provided for in the rules to the mediator contemplated in subparagraph (iii);
  (ii) specifying the time, date and the place where such process is to start; and
  (iii) appointing a fit and proper person as mediator to chair the first meeting between the parties; Provided that the parties may at any time during the course of mediation, by agreement, appoint another person to mediate the dispute.

(b) When making an order contemplated in paragraph (a), the Judge President or the presiding judge may attach to the order any comments the Judge President or the presiding judge deems necessary for the attention of the mediator.

when proceedings are instituted, the Registrar of the Court must refer the matter to the Judge President of the Court who must decide whether the matter is to be heard in Court or should be referred for mediation in terms of s 29. A second new feature is found in subsec 26(2) of the Land Court Act which similarly underscores the importance the legislature attaches to mediation as a desirable means through which land disputes may be resolved. Section 26(2) finds application when the Judge President does not make an order contemplated in subsec 13(2)(b). It then empowers a Court to stay proceedings and refer a dispute to mediation under s 29 if 'it becomes apparent that it would advance the finalisation of the case if some or all of the disputes between the parties are referred to mediation.' It bears emphasis that the power of a presiding Judge to refer a matter to mediation under s 29 applies irrespective of whether the Judge President has referred a matter to mediation under s 13(2) and a presiding Judge may do so for any number of reasons.

[40] The conclusion is inescapable that in enacting the Land Court Act, the legislature intended to entrench mediation as a central means of resolving land disputes where this is possible. This resonates with the preamble to the Land Court Act which recognizes that land reform initiatives 'have not progressed at the desired pace, sometimes giving rise to expensive and protracted litigation, to the detriment of the poorest of the poor and most vulnerable in society' and which records the need and desirability of having 'specialised, well-resourced, accessible and streamlined adjudication structures in place with the institutional, transformative and social justice wherewithal in land matters, in order to enhance and promote fairness and equity at all stages of the adjudication processes before and during court proceedings.' It also resonates with s 2(2) of the Land Court Act.[41]

[41] See above para 36.

[41] It would squarely defeat these objectives if the Land Court Act were interpreted to repeal the mediation requirement in s 11(2). It would also create a differentiation between s 10 and s 11 eviction adjudication process that is not and has not been justified, and would therefore undermine rather than further the important constitutional imperatives of the Land Court Act.[42]

[42] In the result, we conclude that after the commencement of the Land Court Act, subsec 11(2) of ESTA is interpreted as:

'(2) In circumstances other than those contemplated in subsection (1), the Court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997, if –

(a) The Court is of the opinion that it is just and equitable to do so; and
(b) The owner or person in charge of the land and the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.'

[43] In consequence, the law as it stands is that the mediation requirements introduced to both subsecs 10(1) and 11(2) of ESTA by the ESTA Amendment Act are in force.

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[42] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079 ; 2001 (1) SA 545 (CC); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC).

The second and third issues: the nature of the mediation requirements

[44] The second and third issues may conveniently be dealt with together. They are:

(a) Are the mediation requirements introduced to subsecs 10(1) and 11(2) of ESTA mandatory?
(b) Do good faith attempts at settlement or meaningful engagement constitute mediation?

[45] The landowner applicants submit that mediation by its very nature is a voluntary process, rooted in party autonomy, which if coerced loses its value. Reliance was also placed on *Molefe*[43] where the Court emphasized that mediation is a voluntary process. The landowner applicants submit that Uniform Rule 41A is to the same effect, namely that mediation is a voluntary process and that this reflects the correct constitutional balance. Concerns were raised about the limitation of property rights if mediation is a jurisdictional bar to eviction. LASA submitted it is mandatory emphasising the power imbalances between landowners and occupiers arguing that voluntary mediation often fails to ensure a genuine engagement. It was submitted that mediation enhances security of tenure, and enhances access to justice by reducing costs, narrowing issues, facilitating resolution of disputes and fostering culturally appropriate solutions. The Minister submitted that mandatory mediation is central to the legislative objective of embedding alternative dispute resolution in land reform disputes. The Minister also stressed that mediation is a forum to

[43] *Eskom Pension and Provident Fund v Molefe and others (Leave to appeal)* [2022] JDR 3298 (GP).

integrate State participation to secure tenure, suitable alternative accommodation and tenure grants.

Are the mediation requirements introduced to subsecs 10(1) and 11(2) of ESTA mandatory?

[46] The text of subsec 11(2) as amended has been referred to above[44] and is not repeated here. After the ESTA amendment to s 10, subsec 10(1) reads as follows:[45]

(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if –
(a) The occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
(b) The owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice in writing to do so;
(c) The occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; **[or]**
(d) The occupier –
(i) Is or was an employee whose right of residence arises solely from that employment; and
(ii) Has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act; or
(e) The owner or person in charge or the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.'

Note: the 'or' between (c) and (d) in bold brackets depicts a deletion and the underlining depicts the insertion of a new 'or' between (d) and (e) and a new section 10(1)(e).

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[44] See above para 42.
[45] The language of the amending section 5 of the ESTA amendment Act reads: 'Section 10 of the principal Act is hereby amended by the deletion in subsection (1) of the word "or" at the end of paragraph (c), insertion of the word "or" at the end of paragraph (d) and the addition of the following paragraph: …[see (e) in text to para 46.]

[47] Textually, the import of the mediation requirement in subsec 11(2) appears clear. A literal reading suggests that an eviction order can be granted *only* if both (a) and (b) are met, in other words, if the court is of the opinion that it is just and equitable to do so *and* the mediation requirement is met. On this reading, the mediation requirement is now an additional requirement to be met before an eviction may be granted under subsec 11(2).

[48] Textually, the position regarding subsec 10(1) is unclear because of the legislature's use of the word 'or' rather than 'and' between (d) and (e). Literally, the use of the word 'or' suggests that an eviction may be granted under subsec 10(1) if any one of the conditions in (a) to (e) is met. In turn, that might be taken to mean that provided the mediation requirement is met, an eviction may be ordered under subsec 10(1) irrespective of whether any of the other requirements in (a) to (d) is met. Viewed differently, it would mean that there is no mediation requirement if any of the requirements in (a) to (d) is met.

[49] In our view, Parliament could never have intended that result as it would defeat the very purpose of subsec 10(1), which is to provide strengthened protection against eviction to persons who were occupiers on 4 February 1997. It would also yield arbitrary results.

[50] In *Ngcobo*, the SCA held:[46]

'It is unfortunately true that the words 'and' and 'or' are sometimes inaccurately used by the Legislature and there are many cases in which one of them has been held to be the equivalent of the other (see the remarks of Innes CJ in *Barlin v Licensing Court for the Cape* 1924 AD 472 at 478.) Although much depends on the context and the subject-matter (*Barlin* at 478), it seems to me that there must be compelling reasons why the words used by the Legislature should be replaced; *in casu* why 'and' should be read to mean 'or' or *vice versa.* The words should be given

[46] *Ngcobo and others v Salimba CC; Ngcobo v Van Rensburg* 1999(2) SA 1057 (SCA) at para 11.

their ordinary meaning '… unless the context shows or furnishes *very strong grounds* for presuming that the Legislature really intended' that the word not used is the correct one (see Wessels J in *Gorman v Knight Central GM Co Ltd* 1911 TPD 597 at 610; my emphasis). Such grounds will include that if we give 'and' or 'or' their natural meaning, the interpretation of the section under discussion will be *unreasonable, inconsistent* or unjust (see *Gorman* at 611) or that the result will be *absurd* (*Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and other*s 1982(4) SA 427 (A) at 444C-D) or, I would add, *unconstitutional* or contrary to the spirit, purport and objects of the Bill of Rights (s 39(2) of the 1996 Constitution) …'

[51] Notably, in *Barlin* Innes CJ held: 'Now the words 'and' and 'or' are sometimes inaccurately used; and there are many cases in which one of them has been held to be the equivalent of the other. Much depends on the context and the subject matter.'[47]

[52] This is a case where, if given its ordinary meaning, 'or' appears to be used disjunctively: it is difficult to read it conjunctively. However, this is also a case where the context shows very strong grounds for presuming the legislature really intended that items (a) to (d) continue to be read disjunctively and that the 'or' between (d) and (e) reads as 'and'. Indeed, it appears to be a case of a clear inaccuracy and mistake. To hold otherwise would introduce an unreasonable, inconsistent, unjust, even absurd result that the legislature has now stripped subsec 10(1) of its protective force by allowing a s 10 occupier to be evicted simply on the grounds that attempted mediation failed. On the other hand, a s 11 occupier is provided with additional protection by the introduction of the mediation requirement in subsec 11(2). Such a result could never have been intended, indeed would be arbitrary in its differentiation.

[53] What this means is that, as with subsec 11(2), there is now an additional requirement that must be met before an eviction may be ordered under subsec 10(1).

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[47] *Barlin v Licensing Court of the Cape* 1924 AD 472 at 478.

Put differently, on a proper interpretation of subsec 10(1) as amended, one of the requirements in (a) to (d) must be met *and* the eviction requirement must be met.

[54] In turn this means that, as with subsec 11(2), on a literal reading of subsec 10(1) as amended, properly interpreted, the mediation requirement appears to be mandatory. Put differently, it means that evictions may be ordered under these subsections, only if the mediation requirement is satisfied.

[55] A contextual reading of ESTA as amended, in other words, having regard to the grid of related provisions, also supports the conclusion that the mediation requirements in subsecs 10(1) and 11(2) are intended to be mandatory. Two considerations may be highlighted.

[56] First, the question may fairly be asked why the legislature did not include the mediation requirements in s 9 of ESTA if it was intended to be mandatory, because it is s 9 of ESTA that details the four prerequisites for any eviction order to be granted, specifically subsecs 9(2)(a) to (d).[48] Indeed, the landowner defendants submitted that if the mediation requirement was intended to be mandatory, it would

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[48] 9 Limitation on eviction
(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.
(2) A court may make an order for the eviction of an occupier if—
(*a*) the occupier's right of residence has been terminated in terms of section 8;
(*b*) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
(*c*) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
(*d*) the owner or person in charge has, after the termination of the right of residence, given—
(i) the occupier;
(ii) the municipality in whose area of jurisdiction the land in question is situated; and
(iii)the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes, not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.

have been located in s 9. At first blush, the argument appears to have traction, but on closer scrutiny, it is the very exclusion of the mediation requirement from s 9 and its location in both subsecs 10(1) and 11(2) that reveal its mandatory nature. In this regard, subsec 9(2)(c) is material, which imposes a requirement that 'the conditions for an order for eviction in terms of s 10 or s 11 have been complied with.' Both s 10 and s 11 set out the circumstances in which occupiers may be evicted.

[57] Until now, the focus has been on the text of the amended subsections: subsecs 10(1) and 11(2). What is notable is that the legislature did not introduce the mediation requirement for all circumstances in which an eviction order is granted; more pertinently, there is no such requirement for a subsec 10(2), subsec 10(3) or subsec 11(1) eviction. And this differentiation is susceptible to justification when considering the different circumstances at play. Subsections 10(1)(a) to (d) all refer to circumstances triggering an eviction that might be described as 'relational', or referring to the relationship between the owner or person in charge and the occupier.

[58] In their nature, relational disputes are susceptible to mediated solutions. Also notable is that there is no requirement in subsec 10(1) to consider the availability of suitable alternative accommodation, which – as explained below – may be facilitated through mediation. Sub-section 10(2),[49] rather, postulates a scenario where suitable alternative accommodation is available to an occupier – rendering that purpose of mediation unnecessary – and subsec 10(3)[50] postulates an exceptional scenario where suitable alternative accommodation is not available but the operations of an owner or person in charge may be seriously prejudiced and there have been efforts to secure suitable alternative accommodation. Given the legislature's choice to limit

[49] See above fn 3
[50] See above fn 3.

the mediation requirement to evictions triggered by relational matters and matters where there is no distinct requirement of or relating to access to suitable alternative accommodation, it makes sense that the requirement is not found in s 9. A similar observation may be made of s 11 in that the eviction requirement is applicable only to subsec 11(2) evictions and not to evictions sought under subsec 11(1) which deals with evictions of persons where it was an express, material and fair term of the consent granted to an occupier to reside on the land that the consent would terminate on a fixed or determinable date. Such person would have no reasonable expectation to reside any longer.

[59] A second contextual factor indicating that the legislature intended the requirement to be mandatory arises from a consideration of s 11 more broadly. Specifically, the inclusion of the mediation requirement in subsec 11(2) and its exclusion from subsec 11(3), which lists the considerations to which a court shall have regard when considering whether a subsec 11(2) eviction is just and equitable. Had the legislature intended adherence to the requirement to be voluntary, it would have made more sense to include it as a factor to which the Court would have regard in terms of subsec 11(3).

[60] Importantly, the purposes of both ESTA and mediation under ESTA also support the conclusion that the mediation requirement is mandatory.

[61] First, the eviction process under the Constitution and constitutionally mandated legislation such as ESTA (and for that matter the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)) is infused

with the requirement to have regard to all relevant circumstances[51] and the requirements of justice and equity.[52] It is also premised on a recognition that 'land rights and the right of access to housing and of not being arbitrarily evicted, are closely intertwined.'[53] As the Constitutional Court held in *PE Municipality*, the judicial function in eviction matters is 'not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or *vice versa.* Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each case.'[54] The holding, while made in the context of PIE, is of equal application to ESTA. Moreover, it is frequently emphasized that ESTA is intended, in regulating security of tenure, to strike an appropriate balance between the interests of landowners and occupiers,[55] and that balance – foreshadowed by ESTA's preamble[56] - finds expression throughout the statute.

[62] Mediation provides a modality through which these often competing interests can be mutually accommodated and respected in ways that litigation can often overlook. As held in *PE Municipality* when dealing with the unique role of a Court in eviction matters*:*

'… The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different

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[51] Section 26(3) of the Constitution provides: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'
[52] See centrally, subsecs 8(1), 10(3), 11(2) and 12(1).
[53] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*) para 19.
[54] Id para 23.
[55] See for example *Molusi,* above fn 14 para 39; *Hattingh and Others v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) with reference to section 6(2) of ESTA.
[56] See above para 21.

interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Whereever possible, respectful face-to-face engagement or mediation through a third party should replace arm's length combat by intransigent opponents.'

[63] Secondly, as mentioned above, a central purpose of ESTA is to secure land tenure for persons whose tenure is insecure. That is apparent from ESTA's short and long preambles and has been affirmed by the Constitutional Court.[57] Its short preamble states, amongst other things, that ESTA provides 'measures with State assistance to facilitate long-term security of land tenure'. Its long preamble[58] acknowledges that many South Africans are vulnerable to eviction as they do not have secure tenure, as a result of past discriminatory laws and practices, and that it is accordingly desirable 'that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies …'.

[64] There are at least three primary mechanisms through which ESTA seeks to provide security of tenure for persons who are vulnerable to eviction.

[65] The first is by prescribing that the availability of suitable alternative accommodation is either a relevant consideration[59] or a prerequisite for the grant of an eviction order.[60] Importantly, suitable alternative accommodation under ESTA is defined in a manner intended to secure the dignity of occupiers, with the definition animated by the considerations that it is 'safe and overall not less favourable than the occupiers' previous situation …'.[61]

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[57] *Daniels* above fn 16 para 13.
[58] See above para 21.
[59] See subsec 11(3).
[60] See subsec 10(2).
[61] The full definition is as follows:

[66] The second is through the provision of tenure grants under s 4 of ESTA, which was notably strengthened by the ESTA Amendment Act.[62] These tenure grants are

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'suitable alternative accommodation' means alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to –

(a) The reasonable needs and requirements of all the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
(b) Their joint earning abilities; and
(c) The need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active.'

[62] Section 4, titled Tenure grants, as amended reads:

(1) The Minister shall, from moneys appropriated by Parliament for that purpose and subject to the conditions the Minister may prescribe in general or determine in a particular case, provide tenure grants-

(a) to facilitate the planning and implementation of on-site and off-site developments;
(b) to enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire land or rights in land;
(c) for the development of land occupied or to be occupied in terms of on-site or off-site developments;
(d) to enable occupiers and former occupiers to acquire suitable alternative accommodation; and
(e) to compensate owners or persons in charge for the provision of accommodation and services to occupiers and their families.

(2) In deciding whether to approve an application for a tenure grant, and if so, the priority to be given to that application, the Minister shall have regard to the extent to which an application complies with the following criteria:

(a) The development entails a mutual accommodation of the interests of occupiers and owners;
(b) the development is cost-effective;
(c) .....
(d) owners and occupiers have made a reasonable attempt to devise a development which complies with the criteria contemplated in paragraphs *(a)* and *(b)*;
(e) the occupiers are the spouses or dependants of persons contemplated in section 8 (4) *(a)*;
(f) there is an urgent need for the development or suitable alternative accommodation because occupiers have been evicted or are about to be evicted; and
(g) the provision of accommodation and services contemplated in subsection (1) *(e)* entails a mutual accommodation of the interests of occupiers and owners:

Provided that where an application is made by or on behalf of occupiers for an off-site development, such an application shall not be prejudiced by reason only of the absence of support from an owner who is not the owner of the land on which the development is to take place.

(3) Where the persons who are intended to benefit from a development have been identified, a tenure grant shall not be provided unless the Minister has been satisfied that the development is acceptable to a majority of the adults concerned.

(4) The Minister may, for the purposes of this section, provide tenure grants through an agreement with a provincial government or a municipality, or a person or body which he or she has recognised for that purpose, where-

(a) a provincial government or a municipality or such person or body will facilitate, implement or undertake or contract with a third party for the facilitation, implementation or undertaking of a development or suitable alternative accommodation; or
(b) the tenure grant is paid to the provincial government or a municipality or such person or body to enable it to facilitate, implement or undertake or contract with a third party for the facilitation, implementation or undertaking of a development or for the provision of suitable alternative accommodation.

(5) No transfer duty shall be payable in respect of any transaction for the acquisition of land in terms of this section or in respect of any transaction for the acquisition of land which is financed by a tenure grant in terms of this section.

(6) A potential beneficiary of a development or of suitable alternative accommodation may apply for a housing subsidy as provided for in terms of the Housing Act, 1997 (Act 107 of 1997).

intended to enable occupiers, amongst other things 'to access land and accommodation on on-site or off-site developments' and to access suitable alternative accommodation.[63] An on-site development is defined to mean 'a development which provides the occupants thereof with an independent tenure right on land on which they reside or previously resided' and an off-site development is defined to mean 'a development which provides the occupants thereof with an independent tenure right on land owned by someone other than the owner of the land on which they resided immediately prior to such development.' Section 4(2) details criteria relevant to whether the Minister should approve an application for a tenure grant and if so the priority to be given to the application. Notably, amongst these are the imminency of an eviction, the attempt made by owners and occupiers to devise a development that entails a mutual accommodation of their interests and whether the development entails a mutual accommodation of the interests of owners and occupiers.

[67] Given the multiple overlapping and competing interests at stake, mediation can provide a suitable vehicle through which the purpose of securing tenure for occupiers may be explored and navigated. By requiring parties to mediate, amongst other things to that end, a central purpose of ESTA is thereby achieved. Moreover, mediation provides a vehicle through which the multiple stakeholders involved in the process of securing tenure can find each other. In the context of ESTA, that would include not only owners or persons in charge and occupiers but also the relevant Municipality and DLRRD. Indeed, to the extent that other government departments, for example, the Department of Human Settlements, may need to be involved, they

(7) The provisions of any law regulating the subdivision of land shall not apply to land on which a development is undertaken in terms of this Act.

[63] See more fully section 4(1) above fn 66 and the definition of 'suitable alternative accommodation' above fn 65.

can readily participate. In this regard, while the duty to provide access to housing is a duty that ordinarily resides with the State and not landowners,[64] it is not infrequent that landowners voluntarily offer to assist in the process and at times make substantial and generous contributions to that end.[65] Conversely, in an appropriate case, the State may consider expropriation[66] for purposes of a development under ESTA and if so, mediation would provide a vehicle for dialogue before such a route is pursued.

[68] Thirdly, as explained above the new mediation requirements strengthen what was an existing commitment to mediation as a modality to resolve ESTA-related disputes. The new mediation requirements are intended to reinforce these. Section 21 has always been available as a voluntary mechanism. Once that is appreciated, it makes little sense to include the further requirements for certain categories of evictions (subsec 10(1)) and subsec 11(2) evictions) if the intention was anything other than to make them mandatory.

[69] In sum, the purposes of ESTA are better achieved if mediation is understood to be mandatory in the context of a subsec 10(1) and a subsec 11(2) eviction. Indeed, unless there is an effective modality in which to achieve tenure security for those vulnerable to eviction, there will be a failure to remedy the grossly unjust historical wrongs that ESTA was intended to redress as set out in *Daniels*.[67] Indeed that the legislature has seen fit to introduce such a requirement appears vital given the minimal efforts that one frequently saw to this end in litigation in the erstwhile Land

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[64] *Baron and others v Claytile (Pty) Limited and Another* [2017] ZACC 24; 2017 (10) BCLR 1225 (CC); 2017 (5) SA 329 (CC).
[65] See for example, albeit in context of PIE, *Grobler v Phillips and others* [2022] ZACC 32; 2023(1) SA 321 (CC); 2024(1) BCLR 115 (CC).
[66] See s 26 of ESTA titled Expropriation Act.
[67] *Daniels* above fn 16.

Claims Court. With the passage of both the ESTA Amendment Act and the Land Court Act, it thus becomes vital that parties to eviction litigation under ESTA approach their disputes with a view to ensuring that tenure security for evictees is ultimately achieved. In practice this will mean that mediation is pursued as early as possible in the dispute resolution process. Section 21 mediation is available to parties in disputes under ESTA at a very early stage. If it is not pursued then, it is now inevitable, in a subsec 10(1) and subsec 11(2) case, that that route will nonetheless still have to be pursued. It is moreover desirable that both parties are legally represented to this end at as early a stage as possible to ensure equality of arms.

[70] Second, although mediation may limit the right of access to Court protected in s 34 of the Constitution,[68] any such limitation would be reasonable and justifiable as contemplated by s 36 of the Constitution.[69] The right of access to Court is a right that is pivotal to the rule of law. Crucially, however, the limitation serves a vital public interest in respect of tenure security and the balancing of rights, and may facilitate amicable resolution between all parties to the litigation, potentially removing the need to litigate further. Moreover, the limitation is not extensive as mediation is intended to be and should be conducted speedily and efficiently and the Court process may be pursued if the mediation fails. In this regard, a direction to mediate is not a direction to settle, rather it is a direction to attempt to settle a matter

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[68] Section 34 of the Constitution provides: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[69] Section 36(1) of the Constitution provides:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) The nature of the right;
(b) The importance of the purpose of the limitation;
(c) The nature and extent of the limitation;
(d) The relation between the limitation and its purpose; and
(e) Less restrictive means to achieve the purpose.'

through mediation.[70] As the Constitutional Court held in *PE Municipality,*[71] 'the compulsion lies in participating in the process, not in reaching a settlement'. Viewed in this way, the limitation may be seen as proportionate to its purpose. Although voluntary mediation may be a less restrictive limitation, it is likely to be ineffective as it is readily avoided. Indeed, it may reasonably be assumed that the legislature appreciated precisely this, as mediation has long been available as a tool to pursue in ESTA evictions,[72] but is only infrequently resorted to and is rarely encountered in this Court as a tool used to achieve tenure security, one of its core purposes.

[71] Finally, it may be noted that mandatory mediation has long been a feature of our legal landscape. In *PE Municipality,* the Constitutional Court unanimously endorsed court-ordered mediation in an appropriate case.[73] In doing so it noted that '[c]ompulsory mediation is an increasingly common feature of modern systems',[74] that mediation or conciliation are mandatory in many cases before labour disputes

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[70] *PE Municipality* above fn 57 para 40.
[71] Id.
[72] Mediation through the Director-General of DLRRD has long been available under section 21 of ESTA, referred to above para 37. The erstwhile Land Claims Court was historically able to direct parties to attempt to settle issues through mediation under section 35A of the Restitution Act if it became evident that 'there is any issue which might be resolved through mediation and negotiation'.
[73] Above fn 57 para 45.
[74] This Court has noted the following foreign law developments. In the recent decision of the Court of Appeal in *Churchill v Merthyr Tydfil County Borough Council*; *Steel v Joy and Halliday* [2023] EWCA Civ 1416, it was held (paras 16 to 34, 50 to 53, 76 to 81) that English Courts may stay proceedings or order the parties to undertake mediation or other forms of ADR. In the United States, the Alternative Dispute Resolution Act of 1998 enables United States Districts to set up mandatory mediation schemes. Section 53A of the Federal Courts of Australia Act of 1976 permits court rules to provide for mandatory mediation without a party's consent. Part 28 of the Federal Court Rules 2011 include Mediation provisions. Section 53A reads:
'Arbitration, mediation and alternative dispute resolution processes
(1) The Court may, by order, refer proceedings in the Court, or any part of them or any matter arising out of them:
(a) to an arbitrator for arbitration; or
(b) to a mediator for mediation; or
(c) to a suitable person for resolution by an alternative dispute resolution process;
in accordance with the Rules of Court.
(1AA) Subsection (1) is subject to the Rules of Court.
(1A) Referrals under subsection (1) (other than to an arbitrator) may be made with or without the consent of the parties to the proceedings. Referrals to an arbitrator may be made only with the consent of the parties.

are brought before a court and that mediation in family matters, though not mandatory, are increasingly common.[75]

[72] In conclusion, the application of the principles of statutory interpretation leads to the conclusion that the mediation requirements, properly construed, are mandatory in their nature.

[73] Again, it must be emphasized that the mediation requirements introduced by the ESTA Amendment Act are not the only means through which mediation may be directed. As mentioned above, subsecs 13(2) and 26(2) and s 29 provide important tools to the new Land Court to require that mediation, or further mediation, be embarked upon. These powers may have particular resonance where the Court is engaged in an exercise of determining whether a termination of rights or an eviction is just and equitable or determining a just and equitable eviction date. Moreover, while those provisions apply to the Land Court, Magistrates also have the power to decline to grant an eviction order if of the view that it would not be just and equitable to grant an eviction order in the absence of mediation being tried, under the authority of *PE Municipality,*[76] applied in the context of ESTA.

The third question: Good faith attempts at settlement or meaningful engagement

[74] The third question is whether good faith attempts at settlement or meaningful engagement constitute mediation. In this context meaningful engagement usually refers to the process whereby the parties to the litigation engage with each other and

[75] Above fn 57 para 40. For divorce matters, see Mediation in Certain Divorce Matters Act 24 of 1987. For labour disputes, see Labour Relations Act 66 of 1995.
[76] *PE Municipality,* above fn 57 para 45.

the relevant municipality with a view to avoiding the homelessness of the occupier. The requirement has its origins in the Constitutional Court's decision in *PE Municipality*[77] but was developed in *Olivia Road*[78] and *Joe Slovo.*[79] These cases concern the application of PIE and the latter two concern evictions at the instance of a municipality. However, the requirement of meaningful engagement as a process that must be embarked upon to limit homelessness before an eviction order is granted has long been recognized under ESTA.[80]

[75] To answer the third question the Court is required to interpret the word 'mediation' as used in the mediation requirements. There is no definition of the term 'mediation' in ESTA and for present purposes it is not necessary to venture any definition.[81]

[76] The question may be simply answered by considering the terms in which the mediation requirement is framed. The mediation that must have been attempted to settle the dispute is one 'in terms of section 21[of ESTA]'. Section 21 is referred to in paragraph 37 above and is not repeated here.

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[77] Above fn 57 para 43: Where the CC held that a key factor in determining the fairness of an eviction is whether 'proper discussions, and where appropriate mediation have been attempted'.
[78] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC).
[79] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC).
[80] See *Lebombo Cape Property (Pty) Ltd v Awie Abdol and others* (LCC129/10) at para 39(d); *Diedericks v Univeg Operations South Africa (Pty) Ltd t/a Heldervue Estates* [2011] ZALCC 11 par 20**;** *Miradel Street Investments CC v Mnisi and Others* [2017] ZALCC 13.
[81] In *PE Municipality*, above fn 57 the Constitutional Court noted the following crisp definition by Nupen: 'Mediation is a process in which parties in conflict voluntarily enlist the services of an acceptable third party to assist them in reaching agreement on issues that divide them.' It may be noted that the SA Law Commission has proposed a definition of mediation in its Draft Mediation Bill (Discussion Paper 168) as 'a process in which a mediator facilitates and encourages communication and negotiation between the mediation parties, and seeks to assist the mediation parties in arriving at a voluntary agreement regarding the dispute.'

[77] Put differently, the mediation that is contemplated by the mediation requirements is a mediation as contemplated by s 21. There are various salient features: first, the mediation is conducted by 'one or more persons with expertise in dispute resolution'; second their role is 'to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of [ESTA]'; third the discussions, disclosures and submissions which take place or are made are privileged save where otherwise agreed.

[78] The first two features distinguish the mediation contemplated by the mediation requirements from mere good faith attempts to settle a matter effected between the parties to litigation. Good faith efforts to settle will usually be made between landowner or person in charge and occupier, without the assistance of an independent third party and without the involvement of the relevant Municipality or DLRRD[82] or, for that matter, other interested parties. As LASA submitted, in context of rural evictions, there is often an undesirable inequality of arms in settlement negotiations between landowner and occupier which often manifests, at least at the early stages in already legally represented landowners engaging with still unrepresented occupiers in settlement processes. Equally undesirable, this frequently occurs also at the stage when owners or persons in charge seek to terminate rights of residence under s 8 of ESTA at which point ESTA requires fair process to be followed.[83]

[79] All three features distinguish the mediation contemplated by the mediation requirements from meaningful engagement. Meaningful engagement too is not conducted with the assistance of an independent third party, it may not include all

[82] These parties are usually cited in eviction proceedings for reporting purposes. See section 9(3) of ESTA, also refer to PDs which require Municipal report and the case law that requires it.
[83] Section 8(1)(e) of ESTA. *Snyders and Others v De Jager and Others (Appeal)* [2016] ZACC 55; 2017 (5) BCLR 614 (CC); 2017 (3) SA 545 (CC) para 56.

interested parties and it is not confidential. And as with settlement negotiations, there may be an undesirable inequality of arms between the parties during its processes.

[80] Nonetheless, it cannot be gainsaid that each of these processes are, like mediation, instrumental to finding just and equitable resolutions to eviction disputes and ones that promote tenure security of occupiers and balance the rights of landowners and occupiers. And as with mediation, it is highly desirable that the involvement of both the Municipality and DLLRD be procured throughout, and that the processes commence at the earliest possible stage,[84] so that litigation can either be settled or if adjudicated, can be adjudicated in circumstances where all reasonable efforts have been made to secure occupiers' future tenure.

[81] It is unnecessary in this judgment to consider all of the requirements for fair process or meaningful engagement, or for that matter a mediation. The Court has not heard full argument on this issue and these parameters will be developed as cases come before the Court.[85]

[82] What does, however, warrant emphasis is that for all of these processes to achieve their objectives, it is desirable that those who require access to legal representation have such access at an early stage. Landowner applicants will frequently be legally represented at the stage of termination of rights under s 8 of ESTA, for purposes of any meaningful engagement and during mediation. Occupiers will often be unrepresented in these processes and only have access to representation through LASA once litigation has commenced. An inequality of arms

[84] *Conradie N.O and Others v Van Wyk and Others* [2024] ZALCC 44 para 237.
[85] For some of the issues that may arise see *Kalagadi Manganese (Pty) Ltd and others v Industrial Development Corporation of South Africa Ltd and others [2021] ZAGPJHC 127* at para 32 to 41.

thus presents itself which threatens to undermine the very purposes of these processes with the result that occupiers will be in a relatively weak position to negotiate secure tenure, in turn undermining the purposes of ESTA, the ESTA Amendment Act and the Land Court Act. In our view, it is highly undesirable if occupiers are unable to access legal representation during these non-litigious processes.

The fourth issue: Pending proceedings

[83] The fourth issue is whether the mediation requirements in s 10(1) and s 11(2) apply to eviction proceedings that were pending at the time that the ESTA Amendment Act came into force. There are two separate categories of cases in respect of which this question must be asked:

(a) First, automatic review proceedings in terms of subsec 19(3) of ESTA;[86] and
(b) Secondly, eviction proceedings that had been instituted in the Land Court prior to 5 April but not yet finalised.

[84] In *Veldman*,[87] the Constitutional Court pronounced on the general presumption against retrospectivity. The Court was there dealing with whether a provision that increased the penal jurisdiction of the Magistrates Court applied retrospectively: the Magistrate had imposed a sentence of 15 years under the

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[86] In terms of section 19(3) of ESTA:
'(3) Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, shall be subject to automatic review by the Land Court, which may –
(a) Confirm such order in whole or in part;
(b) Set aside such order in whole or in part;
(c) Substitute such order in whole or in part; or
(d) Remit the case to the magistrate's court with direct ions to deal with any matter in such manner as the Land Court may think fit.'

[87] *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* [2005] ZACC 22; 2007(3) SA 210 (CC); 2007(9) BCLR 929 (CC); 2006(2) SACR 319 (CC).

increased jurisdiction when only ten years was competent at the time of plea. The Constitutional Court held that the expanded penal jurisdiction did not apply retrospectively. The Constitutional Court held:[88]

'Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."'

[85] However, it has long been accepted that the presumption against retrospectivity applies differently when substantive rights or procedure are in issue, and that where a law governs a legal procedure, the presumption against retrospectivity may not apply. [89] In *Curtis,* cited with approval by the Constitutional Court in *Veldman,* it was held:

'Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even though the suit may have been then pending.'[90]

[86] In *Veldman*, the Constitutional Court had to grapple with a contradictory line of cases concerning whether an expanded penal jurisdiction was a matter of procedure or substance leading it to conclude:[91]

'[34] This contradictory line of case law demonstrates the illusory distinction between substance and procedure insofar as the retrospective application of legislation is concerned. The fact that section 92(1)(a) regulates a court's procedure is not determinative of its retrospective application. The correct approach to this question was properly constructed in *John* where it was concluded

[88] Id para 26 (footnotes omitted).
[89] *Curtis v Johannesburg Municipality* 1906 TS 308 (*Curtis*) at 312.
[90] Id.
[91] Para 34 (footnotes omitted).

that a procedural law may apply retrospectively unless the application would adversely affect an applicant's substantive rights. In the words of Comrie J:

"To hold that the *procedural* nature of the general increase in the trial court's penal jurisdiction *in res medias* afforded a valid basis to enable the trial magistrate to impose a higher sentence than she could competently have done when the appellant pleaded, would be to ignore the very material *substantive* consequences of the procedural amendment. … It would at the very least be unfair to the appellant."

In a constitutional democracy, if new legislation affects a person in a manner that is detrimental to his or her substantive rights, the application of that law will not escape scrutiny simply on the grounds that it is procedural in nature.'

[87] In our view, the imposition of the mediation requirements is procedural in nature because it requires parties to embark on a mediation process before they can obtain an eviction order from a Court. It does not require parties to settle and it does not deprive a party of substantive rights. However, it does not follow that the mediation requirements are retrospective in their operation.

[88] In our view, they are not, primarily because the impact on parties' (especially applicants') manner of exercise of their substantive rights is substantial. What it would mean is that an applicant who has in good faith pursued eviction procedure would, even at the eleventh hour, be told to resolve their dispute in a wholly different way. For all parties the impact is highly disruptive. While the potential for prejudice and unfairness would be less where eviction proceedings are at an earlier stage, that potential remains especially to those who have, in good faith, embarked on the pre-eviction process contemplated by section 8 of ESTA, seeking to secure an occupier's tenure or find other solutions through active and meaningful engagement.

[89] In arriving at this conclusion, we are also guided by case law where Courts have had to grapple with the elusive distinction between substance and procedure

when dealing with retrospectivity. In 1906, in *Curtis*, the then TPD held that a statute of limitations which imposed a six month time period to bring proceedings against a municipality – while procedural in nature – could only apply from six months after the commencement of the statute so as to give due notice to those affected and not effectively to destroy substantive rights.[92] Moreover, Innes CJ's full discussion in *Curtis* about how the distinction between substantive and procedural matters is to be applied in practice reveals that the scope for retrospective application of procedural matters is narrow and limited to the future conduct of proceedings, not what has ensued before.[93] In *Veldman,* as mentioned above, the Constitutional Court held that the increased penal jurisdiction of the Magistrates Court could not be applied to an accused after plea.[94] In *Raumix Aggregates*[95] a Full Court of the Gauteng High Court, Johannesburg, held that a new Rule governing summary judgment procedures, which imposed more onerous procedures, did not apply to pending proceedings.

[90] The consequence of our finding is that the mediation requirements introduced by subsecs 10(1)(e) and 11(2)(b) of ESTA do not apply to eviction proceedings that were pending before the Land Claims Court (now Land Court) before 1 April 2024. The same would apply to eviction proceedings pending before a Magistrates Court on that date. Our reasoning would apply with equal if not greater force to eviction proceedings that were pending before the Land Court on automatic review under

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[92] See the fuller discussion by Innes CJ in *Curtis*, above fn 93 pp 312 to 317.
[93] Id
[94] The members of the Court were split in their reasoning, but came to the same conclusion.
[95] *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another; Steeledale (Pty) Ltd v Gorrie; Firstrand Bank Limited t/a Wesbank v Sondamase; SA Taxi Impact Fund (RF) (Pty) Ltd v Tau; Masango Attorneys v Transport and Allied Workers Union of South Africa and Another; Hartless (Pty) Ltd v City of Johannesburg Metropolitan Municipality; Standard Bank of South Africa Limited v Schneider; Nedbank v Chibuye and Others; Absa Bank Limited v Mayer Familie Trust and Others* [2019] ZAGPJHC 386; 2020 (1) SA 623 (GJ).

subsec 19(3) of ESTA before 1 April 2024. In these cases, retrospective application would not only affect the exercise of parties', especially applicants' substantive rights but would deprive an applicant of a judgment (albeit subject to review) obtained in its favour.

[91] It must be emphasised, nonetheless, that it remains open to a Court seized with pending proceedings to assess whether mediation should have been pursued. Under the long-standing authority of *PE Municipality,*[96] applied in context of ESTA, one of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried.. As indicated above, this would apply also to Magistrates and may inform a review of their decisions under subsec 19(3) of ESTA. Moreover, as explained above, the Judge President, the presiding Judge and the Land Court have the powers under subsec 13(2), subsec 26(2) and s 29 to refer pending matters to mediation. In the result, both Magistrates Courts and the Land Court are vested with the power to ensure that the laudable constitutional objectives of the ESTA Amendment Act concerning mediation be applied in the context of pending proceedings where appropriate.

[92] We are mindful that our findings above in respect of pending proceedings may not provide guidance on every related issue that may arise. For example, questions may arise should the Land Court decline to grant an eviction order but grant parties leave to supplement their papers, or, should the Land Court, exercising its automatic review powers set aside an eviction order of a Magistrate but remit the matter.[97] Argument was not addressed on these aspects. The applicability of the mediation

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[96] Above fn 57 para 45.
[97] See eg *Denleigh Farms and another v Mhlanzi and others* [1999] ZALCC 29; 2000(1) SA 225 (LCC); *City Council of Springs v Occupants of the Farm Kwa-Thema* [1998] ZALCC 9; 2000(1) SA 476 (LCC); *Landbou Navorsingsraad v Klaasen* [2001] ZALCC 43; 2005(3) SA 410 (LCC).

requirements to cases such as these will have to be dealt with as and should the need arise.

Order

[93] The following order is made:

1. It is declared that:

   a. The Land Court Act 6 of 2023 did not repeal the amendment of section 11(2) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) effected by the Extension of Security of Tenure Amendment Act 2 of 2018 (ESTA Amendment Act).

   b. Following the commencement of the ESTA Amendment Act, section 11(2) of ESTA is interpreted as:

   ‘(2) In circumstances other than those contemplated in subsection (1), the Court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997, if –

   (a) The Court is of the opinion that it is just and equitable to do so; and
   (b) The owner or person in charge of the land and the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.’

2. It is declared that the mediation requirements in section 10(1)(e) and section 11(2)(b) of ESTA are mandatory.

3. It is declared that good faith efforts at settlement and meaningful engagement do not constitute mediation for purposes of the mediation requirements in section 10(1)(e) and section 11(2)(b) of ESTA.

4. It is declared that the mediation requirements in section 10(1)(e) and section 11(2)(b) of ESTA do not apply to:

   a. eviction proceedings that were instituted in and pending before the Land Claims Court (now Land Court) or the Magistrates Court before 1 April 2024; or
   b. eviction proceedings under automatic review that were pending before the Land Claims Court (now Land Court) on 1 April 2024.

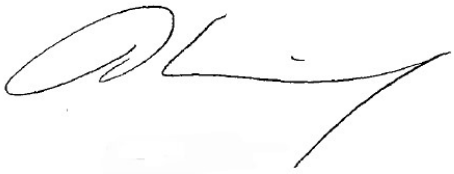
5. There is no order as to costs.

Z CARELSE

Judge President, Land Court

S COWEN

Deputy Judge President Land Court



B SPILG

Judge, Land Court

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Occupier respondents: D Somo, W Mashapa, H Julius, L Mgedezi, R Bodart, S Sekgot, A Nobetus, N Ngcwetsha, Legal Aid South Africa

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