

## CASES / VONNISSE

### **Does Section 15 of ESTA Apply to Urgent Relocations and Not Only to Evictions? An Assessment of**

*A Re Shomeng Holdings Proprietary Limited v Sibeko* [2024] ZALCC 7\*

#### **1 Introduction**

Owners of land or persons in charge have pursued relocations of occupiers through application for mandatory interdicts under the Extension of Security of Tenure Act (62 of 1997) (ESTA) (*Oranje v Rouxlandia Investments (Pty) Ltd* 2019 (3) SA 108 (SCA) par 6 and 7; *Boplaas Landgoed (Pty) Ltd v Jonkies* [2022] ZALCC 38 par 1; *Pieterse v Drumearn (Pty) Ltd* [2023] ZALCC 13 par 2, particularly fn 1; *Du Plessis v Kriel NO* [2023] ZALCC 43 par 32; *A Re Shomeng Holdings Proprietary Limited v Sibeko* [2024] ZALCC 7 par 7).

Section 1 of ESTA defines an owner as

“the owner of the land at the time of the relevant act, omission or conduct, and includes, in relation to the proposed termination of a right of residence by a holder of mineral rights, such holder in so far as such holder is by law entitled to grant or terminate a right of residence or any associated rights in respect of such land, or to evict a person occupying such land.”

The same section defines a person in charge as “a person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question.” An occupier is defined in section 1 of ESTA as

“a person residing on land which belongs to another person and who has on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding – ... (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but

---

\* The author sincerely appreciates the useful comments or editorial suggestions of Khanya Motshabi, Obakeng van Dyk, Chevaure du Pokoy, Shelton Mota Makore, Lwandile Msimanga, Moffat Ndou, Tertia Möller and the two anonymous reviewers on this case note. Any faults and inaccuracies remain the author's (and could possibly be attributed to the heat wave in the City of Tshwane).

including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and (c) a person who has an income in excess of the prescribed amount.”

Section 20(1) of ESTA gives the Land Claims Court (LCC) the “ancillary powers necessary or reasonably incidental to the performance of its functions” in terms of ESTA. This includes the power to grant interdicts in terms of section 20(1)(b) of ESTA (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 24; *A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 7; Scheepers and Du Plessis “Extension of Security of Tenure Act: A Bone of Contention” 1998 61 *THRHR* 473 479; Pienaar “Farm Workers: Extending Security of Tenure in Terms of Recent Legislation” 1998 13 *SAPL* 423 433–434; Keightley “The Impact of the Extension of Security of Tenure Act on an Owner’s Right to Vindicate Immovable Property” 1999 15 *SAJHR* 277 282, especially fn 29; Carey Miller and Pope *Land Title in South Africa* (2000) 512). A magistrates’ court enjoys a similar power to grant interdicts under section 19(1)(b)(i) of ESTA (Carey Miller and Pope *Land Title in SA* 512; *Pharo’s Properties CC v Kuinders* 2001 (2) SA 1180 (LCC) par 14; *Boplaas Landgoed (Pty) Ltd v Jonkies supra* par 1; *Pieterse v Drumearn (Pty) Ltd supra* par 2, particularly fn 1; *Du Plessis v Kriel NO supra* par 32, particularly fn 12. The scope of the power given to a magistrates’ court in terms of section 19(1)(b) of ESTA, and its operation beyond evictions, reinstatements, and criminal proceedings under ESTA, was considered in *Tsotetsi v Raubenheimer NO* 2021 (5) SA 293 (LCC) par 25–26).

An owner or person in charge seeking an order to relocate an ESTA occupier in terms of sections 20(1)(b) or 19(1)(b)(i) of ESTA is not enforcing a common-law right to relocate (*Boplaas Landgoed (Pty) Ltd v Jonkies supra* par 13–14; *Du Plessis v Kriel NO supra* par 32). The nature of the right to relocate flows from a housing or employment agreement that is entered into between the owner or person in charge and an ESTA occupier (*Chagi v Singisi Forest Products (Pty) Ltd* 2007 (5) SA 513 (SCA) par 3; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 4; *Du Plessis v Kriel NO supra* par 32). Such an agreement contains provisions in which the owner or person in charge provides housing to an ESTA occupier in terms of a lease or fixed-term contract (*Chagi v Singisi Forest Products (Pty) Ltd supra* par 3; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 4; *Du Plessis v Kriel NO supra* par 32). The agreement confers on an ESTA occupier an entitlement to reside in a particular house for the period of the lease or fixed-term contract (*Chagi v Singisi Forest Products (Pty) Ltd supra* par 3; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 4; *Du Plessis v Kriel NO supra* par 32). It is upon the termination of the agreement that the owner or person in charge initiates the relocation process (*Chagi v Singisi Forest Products (Pty) Ltd supra* par 3–6; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 4–7; *Du Plessis v Kriel NO supra* par 32).

Several different reasons for relocation are possible. The owner or person in charge may wish to use the house to accommodate current employees (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 4–6). The house may not be habitable (*Mjoli v Greys Pass Farm (Pty) Ltd* [2019] ZALCC 25 par 5–6). (On the meaning and standard of habitability in the context of ESTA

occupiers, see generally Ngwenyama *A Common Standard of Habitability? A Comparison Between Tenants, Usufructuaries and Occupiers in South African Law* (LLD dissertation, Stellenbosch University) 2021 119–171.) The owner or person in charge may need the land for agricultural purposes (Pienaar *Land Reform* (2014) 313) or mining purposes (*A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 1). Lastly, an on-site development of the land may be necessary for public benefit (Pienaar *Land Reform* 313).

The owner or person in charge would be best advised to move an ESTA occupier to another house within the boundaries of a registered single unit of land (*Pharo's Properties CC v Kuilders supra* par 13; *Chagi v Singisi Forest Products (Pty) Ltd supra* par 19–20; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 10; *Mjoli v Greys Pass Farm (Pty) Ltd supra* par 11; *Boplaas Landgoed (Pty) Ltd v Jonkies supra* par 12; *Pieterse v Drumearn (Pty) Ltd supra* par 29; *Du Plessis v Kriel NO supra* par 33; *A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 6). These relocations cannot be regarded as an eviction of the ESTA occupier because the occupier is moved from one house to another on the same land (*Pharo's Properties CC v Kuilders supra* par 13; *Chagi v Singisi Forest Products (Pty) Ltd supra* par 19–20; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 10; *Mjoli v Greys Pass Farm (Pty) Ltd supra* par 11; *Boplaas Landgoed (Pty) Ltd v Jonkies supra* par 12; *Pieterse v Drumearn (Pty) Ltd supra* par 29; *Du Plessis v Kriel NO supra* par 33; *A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 6). ESTA defines eviction as a deprivation of a person against their will of residence on land or the use of land or access to water, which is linked to a right of residence in terms of ESTA (s 1 of ESTA; see also *Chagi v Singisi Forest Products (Pty) Ltd supra* par 19–20; *Du Plessis v Kriel NO supra* par 33). The meaning of “eviction” in section 1 of ESTA signals that the basis of the right of residence is the land and not a dwelling (*Chagi v Singisi Forest Products (Pty) Ltd supra* par 9; Pienaar “Farm Dwellers: Eviction Versus Relocation” 2023 *Stockfarm* 67 67). Therefore, an act by the owner or person in charge that removes ESTA occupiers from one land to another (different boundaries of a registered land unit) constitutes an “eviction” (*Pharo's Properties CC v Kuilders supra* par 13; *Chagi v Singisi Forest Products (Pty) Ltd supra* par 19–20; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 10; *Mjoli v Greys Pass Farm (Pty) Ltd supra* par 11; *Boplaas Landgoed (Pty) Ltd v Jonkies supra* par 12; *Pieterse v Drumearn (Pty) Ltd supra* par 32; *Du Plessis v Kriel NO supra* par 33; *A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 6).

Although ESTA grants ESTA occupiers the right to reside and/or use the land on which they reside, this piece of legislation must, however, be so interpreted as to least interfere with existing rights, especially an owner's right to ownership (s 6(1) of ESTA; *Chagi v Singisi Forest Products (Pty) Ltd supra* par 17–18; *Du Plessis v Kriel NO supra* par 33). The ownership of farmland entails the right to move ESTA occupiers. ESTA provides security of land tenure to an ESTA occupier, but not in the house of their own choice (*Snyders v De Jager* 2017 (3) SA 545 (CC) par 77; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 21; *Applethwaite Farm (Pty) Ltd v Jaars* [2023] ZALCC 17 par 82; *Du Plessis v Kriel NO supra* par 33).

An ESTA occupier is, however, entitled to resist a relocation because of section 5(a) (human dignity rights) read together with section 6(2)(a) of ESTA (tenure security rights) – for example, if the owner or person in charge attempts to move the ESTA occupier to an uninhabitable house, impairing the occupier's dignity or threatening their tenure security (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 17–18; *Applethwaite Farm (Pty) Ltd v Jaars supra* par 81; *Du Plessis v Kriel NO supra* par 34; see further, Pienaar 2023 *Stockfarm* 67).

In *A Re Shomeng Holdings Proprietary Limited v Sibeko (supra)*, the applicants (A Re Shomeng Holdings and A Re Shomang Projects) held a mining right and operated a coal mine called Motshaotshile Colliery in Mpumalanga (*A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 1). The applicants applied on an urgent basis to the LCC in terms of section 15 of ESTA for the temporary relocation of the first to seventh respondents, who had lived on the farm where the applicants operated a mine since before the farms were purchased (*A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 1). However, the respondents opposed the application (*A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 2).

*A Re Shomeng Holdings Proprietary Limited v Sibeko (supra)* raises the important question of whether section 15 of ESTA applies to urgent relocations rather than evictions alone. Importantly, the applicability of section 15 of ESTA to urgent relocations was not directly at issue in *A Re Shomeng Holdings Proprietary Limited v Sibeko (supra)*. The LCC was satisfied that the applicants made out a case for at least some urgent interim relief, applying the test under section 15 of ESTA and the usual requirements for urgent interim relief (*A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 9).

This case note critically assesses and pronounces on the significance of the *A Re Shomeng Holdings Proprietary Limited v Sibeko (supra)* decision. The case note commences by providing the factual background and decision of the case. This is followed by an assessment of the decision of the court. Finally, a conclusion is drawn from the entire body of findings of this case note.

## **2      The factual background in *A Re Shomeng Holdings Proprietary Limited v Sibeko***

The applicants in this matter were A Re Shomeng Holdings (Pty) Ltd (first applicant) and A Re Shomang Projects (Pty) Ltd (second applicant) (*A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 1). The first applicant owned several farms in Mpumalanga province, including Portion 35 of the Farm Kromkrans 208 IS (par 1). There, the first applicant operated a coal mine pursuant to a mining right granted to the second applicant by the Minister of Mineral Resources and Energy in terms of the Mineral and Petroleum Resources Development Act (28 of 2002) (par 1).

The mining area on Portion 35 was known as the Motshaotshile Colliery (par 1). The first to seventh respondents were “occupiers” as defined in ESTA (par 2). The eighth respondent was the Chief Albert Luthuli Local Municipality, and the ninth respondent was the Department of Agriculture, Land Reform and Rural Development (par 2).

In 2021, the applicants conducted surveys of households on the farm. The survey identified safety concerns and risks regarding the respondents’ existing houses that would not withstand the impact of mining and blasting activities (par 15). Having assessed the impact of mining and blasting activities on existing houses in the surrounding community, the court observed that the activities created a real and imminent danger of substantial injury and damage (par 15).

As the applicants expanded mining operations on the farm, they arranged consultations with the respondents for them to vacate their existing houses and move to permanent new ones situated 600 metres away from their current houses on the same farm. The respondents agreed to move (par 15). However, before the new houses were built, the applicants indicated that they wanted to move the respondents to temporary mobile houses and mine in an area close to their current houses (par 5 and 20). The applicants wanted to continue with mining operations to sustain mining and construction operations (par 5 and 22).

The respondents refused to move to temporary accommodation. They argued that this had not been agreed upon during the initial consultations. Relocation to temporary accommodation would greatly disrupt their lives. The temporary accommodation was not suitable for their needs (par 5, 20 and 23). The respondents raised practical concerns such as the size and suitability of the temporary accommodation, whether it would have access to water and electricity, as well as the timeframes for construction of the permanent houses. Further concerns related to the respondents’ ability to graze their cattle, and the disruption that a temporary move entailed (par 24).

In early 2024, mining activities on the farm stopped following the issuing of a directive under section 54 of the Mineral and Petroleum Resources Development Act (28 of 2002) (par 10). The applicants wanted to blast within 500 metres of the respondents’ houses, but the Department of Minerals and Energy indicated that it would not permit further blasting operations until the respondents had been moved (par 10). The applicants argued that should it not be able to blast, it would be unable to meet its commitments to deliver coal to Eskom to supply the Hendrina and other power stations as well as other export contractors, and that it would close, resulting in a loss of numerous jobs, livelihoods and social benefits (par 5 and 10).

The applicants then applied to the LCC for urgent interim relief ordering temporary relocation of the respondents to enable the continuation of their open-cast coal mining activities in Mpumalanga (par 1). The application was instituted in terms of sections 15 and 11 of ESTA (par 3). Titled “Urgent proceedings for eviction”, section 15 of ESTA provides:

- 
- “(1) Notwithstanding any other provision of this Act, the owner or person in charge may make urgent application for the removal of any occupier from land pending the outcome of proceedings for a final order, and the court may grant an order for the removal of that occupier if it is satisfied that—
- (a) there is a real and imminent danger of substantial injury or damage to any person or property if the occupier is not forthwith removed from the land;
  - (b) there is no other effective remedy available;
  - (c) the likely hardship to the owner or any other affected person if an order for removal is not granted, exceeds the likely hardship to the occupier against whom the order is sought, if an order for removal is granted; and
  - (d) adequate arrangements have been made for the reinstatement of any person evicted if the final order is not granted.”

Section 11 of ESTA, titled “Order for eviction of person who becomes occupier after 4 February 1997”, states:

- “(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 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 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.
- (3) In deciding whether it is just and equitable to grant an order for eviction in terms of this section, the court shall have regard to—
- (a) the period that the occupier has resided on the land in question;
  - (b) the fairness of the terms of any agreement between the parties;
  - (c) whether suitable alternative accommodation is available to the occupier;
  - (d) the reason for the proposed eviction;
  - (e) the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.”

The application was in two parts, namely Part A and Part B. Part A essentially concerned urgent interim relief under section 15 of ESTA, whereas Part B was intended to secure final relief (*A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 5).

---

### **3      The decision of the court in *A Re Shomeng Holdings Proprietary Limited v Sibeko***

The court commenced by clarifying the legal basis of this case, which was an issue that it canvassed with the parties' representatives during the hearing (*A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 6). Although the language of relocation was used in the affidavits, the court pointed out that the case had been advanced as an eviction case, in that Part A was based on section 15 of ESTA and Part B as an eviction in terms of section 11 of ESTA (par 6). Despite the way the case was argued, the enquiry did not end there. The court mentioned that compliance with section 11 of ESTA was only one consideration determining whether an eviction may be granted under section 9 of ESTA (dealing with limitation on eviction) (par 6). Nonetheless, the court declined to order eviction until all the requirements of section 9 of ESTA had been met (par 6).

The court considered whether this matter was a relocation or an eviction (par 6). It invoked *Oranje v Rouxlandia Investments (Pty) Ltd (supra)*. There, the Supreme Court of Appeal found that removal from one house to another on the same property amounted to a relocation, and removal from the property, an eviction (*A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 7, with reference to *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 10). Accordingly, the court in *A Re Shomeng Holdings Proprietary Limited v Sibeko (supra)* found the facts before it to constitute a relocation and not an eviction. The applicants sought to move the respondents to different houses on the same property and not to different properties (par 1 and 6).

The court applied the provisions of section 15 of ESTA in order to determine whether the applicants were entitled to the relief that they sought (par 27). It ruled that the applicants should succeed in obtaining the relief they sought. This would enable the safe and lawful continuation of mining activities. Simultaneously, due protection would be afforded to the legitimate concerns of the respondents, including their human dignity and security of tenure (par 27).

The court held that the applicants had made a case that the mining activities, which they were entitled to pursue subject to lifting the section 54 notice, posed real and significant safety threats that may result in injury to the respondents' person and property (par 27). It found that the applicants were without an alternative remedy and that the respondents had agreed to be moved to permanent accommodation once built (par 27).

The court held that there were ways to accommodate the hardship and inconvenience that temporary relocation could subject the respondents to. The lack of a temporary relocation plan, however, would cause the mine to close, resulting in hardship and inconvenience to the mine and its many employees and beneficiaries (par 27). The order imposed requirements regarding the provision of temporary accommodation and related services, the process of movement and ongoing consultations, and any necessary dispute resolution (par 27).

Furthermore, the court found that there were adequate arrangements for reinstatement or, as planned, the construction of permanent houses as agreed (par 27). In this regard, the applicants had tendered full reinstatement if a final order was not granted (par 27). As a result, it was just and equitable that the applicants obtain temporary and interim relief (par 27).

The court considered the history of engagements where the relocation and blasting plans had previously been discussed, various mooted plans, and the subsequent breakdown in communication and trust between the respondents and applicants (par 19–20). It also considered the Mine Community Resettlement Guidelines of 2022 published on 30 March 2022 by the Minister of Mineral Resources and Energy, which emphasise the need for ongoing consultation and establish dispute resolution mechanisms in resettlement processes (*A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 24, referring to Mine Community Resettlement Guidelines of 2022 GN 1939 in GG 46125 of 30-03-2022). Only during the court proceedings did the applicants clarify arrangements regarding water, sanitation and grazing requirements, and provide details on the dimensions of the temporary mobile houses to which it wished to move the families (par 26).

Having considered the potential hardship if a temporary relocation was granted and the effects of failure to grant a temporary relocation order on the mine, the court temporarily ordered that the respondents be moved to temporary housing on the same property (par 29.2). The applicants had to ensure that the temporary housing included adequate sleeping, kitchen, lounge or dining room and sanitation facilities for each respondent's requirements (par 29.3). The applicants had to provide water and electricity, as well as a generator power at their own cost until it installed solar electricity or provided an Eskom connection (par 29.3).

Once the Eskom connection was supplied, the respondents would be responsible for their own electricity costs (par 29.3). Water would be provided in a JOJO tank, and the applicants had to ensure that the tank remained adequately filled to address the ESTA occupiers' reasonable needs in their mobile houses (par 29.3). The livestock were to continue grazing on the property at all relevant times (par 29.3).

The court ordered that the applicants had to facilitate ongoing engagement with the respondents to communicate relocation plans, enable relocation and ensure that the temporary accommodation was suitable (par 29.4). The applicants had to provide transport and assist in moving furniture and belongings for the families being moved to ensure a safe, orderly and dignified relocation process (par 29.5).

The applicants were ordered to build the permanent houses according to plans that the respondents had to agree to, and the respondents had to move into these houses once constructed (par 29.6). The court further ordered the applicants to expedite the construction of their permanent houses to avoid them having to move to temporary accommodation (par 29.7). These houses also had to be provided in a plan approved by the families (par 29.7). The court ordered that the applicants had to provide the court and respondents within 10 days with their plan and timeframes for the

construction of permanent houses and the process for engaging with the respondents (par 29.8).

The applicants were ordered to engage meaningfully with the respondents about this plan, and their accommodation needs should it be necessary to move them to temporary accommodation at any stage (par 29.9). Meaningful engagement has been defined as a process in which two or more parties talk and listen to each other meaningfully in order to achieve certain objectives. In this regard, meaningful engagement is used as a deliberative tool to resolve disputes and to increase the understanding and sympathetic care of the parties affected, if the parties are willing to participate in the process (see, generally, *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* (2008 (3) SA 208 (CC) par 14–15; see further, Muller “Conceptualising ‘Meaningful Engagement’ as a Deliberative Democratic Partnership” 2011 3 *Stellenbosch Law Review* 472 743–744 and 753–756; Muller “Conceptualising ‘Meaningful Engagement’ as a Deliberative Democratic Partnership” in Liebenberg and Quinot (eds) *Law and Poverty: Perspectives From South Africa and Beyond* (2012) 301–302 and 311–314; Mahomedy *The Potential of Meaningful Engagement in Realising Socio-Economic Rights: Addressing Quality Concerns* (LLM thesis, Stellenbosch University) 2019 3–8; Liebenberg “Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of ‘Meaningful Engagement’” 2012 12 *African Human Rights Law Journal* 1 13–28; Van der Berg “Meaningful Engagement: Proceduralising Socio-Economic Rights Further or Infusing Administrative Law With Substance?” 2013 29 *South African Journal on Human Rights* 376 381–388; De Vos, Freedman, Boggenpoel, Draga, Gevers, Govender, Lenaghan, Weeks, Namakula, Ntlama, Mailula, Moyo, Sibanda and Stone *South African Constitutional Law in Context* 2ed (2021) 717–718). The family members were ordered to comply with any direction given to them by the mine manager or other authorised official to move to a safe place during blasting operations (par 29.11). The sheriff and police service were authorised to take the necessary steps to enforce the order. These steps entailed removing the respondents from their existing houses (par 29.12 and 29.13).

The court order was considered interim. This is because Part B of the case had to be decided first before a final order may be granted. The applicants were directed to deliver papers for Part B within a month (par 29.15). The court would not grant a final relocation order unless and until the permanent new houses were constructed, and the mine was authorised to update its affidavits accordingly (par 29.16).

The court pointed out that its order did not prejudice any rights of the respondents to claim compensation from the applicants arising from the relocation process (par 29.16). It further mentioned that should any dispute arise in respect of the implementation of the court order, the relevant parties must first attempt to resolve the dispute by way of meaningful engagement, failing which they may approach the court to have their dispute resolved (par 29.17). Finally, the court pointed out that if the sought relief in Part B was not

granted, the applicants were ordered to remediate any damage caused to any of the respondents' existing houses by its blasting activities (par 29.18).

#### **4 Assessment of the decision of the court in *A Re Shomeng Holdings Proprietary Limited v Sibeko***

##### **4 1 Does section 15 of ESTA apply also to an application for an urgent relocation and not only to an eviction?**

The court did not consider it necessary to address the issue of whether section 15 of ESTA applied not only to an eviction, but also to an application for an urgent relocation, and it was also satisfied that a case was made out for at least some urgent interim relief both applying the test under section 15 of ESTA and the usual requirements for urgent interim relief. Nonetheless, it is the author's considered view that section 15 of ESTA does not apply to urgent relocations, but only to evictions. The court was therefore incorrect to apply section 15 of ESTA in *A Re Shomeng Holdings Proprietary Limited v Sibeko* (*supra*), even though it reached an acceptable outcome. The order was also just and equitable despite the court misdirecting itself on what governs urgent relocations. Section 15 of ESTA is titled "Urgent proceedings for eviction" and without doubt applies only to eviction applications (for a discussion of section 15 of ESTA, see generally Scheepers and Du Plessis 1998 *THRHR* 478; Pienaar 1998 *SAPL* 433; Carey Miller and Pope *Land Title in South Africa* 509–510; Pienaar *Land Reform* 408–409; Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) 713). This is because section 15 of ESTA clearly envisages an application for the urgent removal of any ESTA occupier from land (and not from a dwelling) if the owner or person in charge has successfully established the existence of the factors set out in section 15(a)–(d) of ESTA (*Karabo v Kok* [1998] ZALCC 2 par 17–19; *Uitkyk Farm Estates (Edms) Bpk v Visser* [1998] ZALCC 19 par 10–14 and 20; *Conradie v Fortuin* 1999 (3) SA 1027 (LCC) 1027–1028; *Leeudoorn Gold Mine v Mnengele* [1999] ZALCC 26 par 1 and 31; *Grand Valley Estates (Edms) Bpk v Nkosi* [1999] ZALCC 30 par 1 and 17–33; *Slaley Farms (Pty) Ltd v Swarts* [1999] ZALCC 50 par 13–14; *Hildenbrand v Plaatjies* [2000] ZALCC 40 par 1–8; *Pannar Research Farms (Pty) Ltd v Magome* [2002] ZALCC 35 par 1–3 and 20; *Green v Gumede aka Silevu* [2000] ZALCC 46 1 and 6; *Mouton v Janse* [2001] ZALCC 9 par 1–7; *Gili Greenworld Holdings (Pty) Ltd v Shisonge* [2002] ZALCC 25 par 1 and 6–19; *Inhoek Varkboerdery (Edms) Bpk v Kok* [2005] ZALCC 1 par 1–14; *Sibanyoni v Umcebo Mining (Pty) Ltd* [2012] ZALCC 4 par 1 and 10–14). Therefore, this urgent act of removal from land constitutes an eviction (and not a relocation) since it deprives an ESTA occupier of residence or use of land (s 1 of ESTA; *Pharo's Properties CC v Kuilders* *supra* par 13; *Chagi v Singisi Forest Products (Pty) Ltd* *supra* par 19–20; *Oranje v Rouxlandia Investments (Pty) Ltd* *supra* par 10; *Mjoli v Greys Pass Farm (Pty) Ltd* *supra* par 11; *Boplaas Landgoed (Pty) Ltd v Jonkies* *supra*

par 12; *Pieterse v Drumearn (Pty) Ltd supra* par 32; *Du Plessis v Kriel NO supra* par 33; *A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 6; cf further, Muller *et al Silberberg and Schoeman's The Law of Property* 689).

In *A Re Shomeng Holdings Proprietary Limited v Sibeko (supra)*, the ESTA occupiers were moved from their existing houses into temporary housing on the same farm (par 29.2). Consequently, section 15 of ESTA cannot be construed to make provision for or apply to urgent relocations. This is because relocation applications simply result in the movement of ESTA occupiers from one house to another on the same land (*Pharo's Properties CC v Kuilders supra* par 13; *Chagi v Singisi Forest Products (Pty) Ltd supra* par 19–20; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 10; *Mjoli v Greys Pass Farm (Pty) Ltd supra* par 11; *Boplaas Landgoed (Pty) Ltd v Jonkies supra* par 12; *Pieterse v Drumearn (Pty) Ltd supra* par 29; *Du Plessis v Kriel NO supra* par 33; *A Re Shomeng Holdings Proprietary Limited v Sibeko supra* par 6). Therefore, the court in *A Re Shomeng Holdings Proprietary Limited v Sibeko (supra)* should have applied the general requirements for an urgent interim interdict.

The requirements for an urgent interim interdict are set out in *Chief Nchabeleng v Chief Phasha* (1998 (3) SA 578 (LCC)). These requirements are:

“(a) that the right which is the subject matter of the main action and which the applicant seeks to protect is clear or, if not clear, is *prima facie* established though open to some doubt; (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim interdict is not granted and he ultimately succeeds in establishing his right (it is implicit in this requirement that the harm apprehended must be the consequences of an actual or threatened interference with the right referred to in (a); (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other remedy.” (*Chief Nchabeleng v Chief Phasha supra* par 6–8, referred to in *Sokhela v Mhlungu* [2022] ZALCC 12 par 17. See further, *Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) 383C–G; *American Cyanamid Co v Ethicon Ltd* [1957] 1 All ER 504 (HL) 510C–F)

The provisions of section 15 of ESTA can only be used in evictions, and not relocations. Relocation and eviction applications are different and have different aims. Section 15 of ESTA ring-fences the application of its provisions to removal from land (and not movement on the same land). In other words, section 15 of ESTA applies only to urgent proceedings for eviction, containing checks and balances requirements that apply in eviction applications that do not affect relocation applications (see s 15(1)(d) and 15(2) of ESTA).

The requirements for an interim interdict are more applicable to relocations. These requirements for interim relief align with mandatory interdicts for relocation applications sought by litigants under sections 20(1)(b) or 19(1)(b)(i) of ESTA. This is because relocation applications are easier and simpler, as no procedural or substantive requirements are prescribed by ESTA or by the requirements for an interim

interdict. Although relocation procedures are not strictly regulated, it does not mean that they can take place at will or anyhow that the farm owner wishes. Furthermore, applying the general requirements for an urgent interim interdict to urgent relocations (and not transplanting section 15 of ESTA requirements onto relocations) would ensure consistency and certainty in the application of the law. It, therefore, makes practical sense to apply the requirements of interim relief in relocation applications.

**4 2      *Would the court's dealing with urgent relocations under section 15 of ESTA have negative effects in the future?***

The LCC's application of the section 15 test regarding urgent relocations in *A Re Shomeng Holdings Proprietary Limited v Sibeko (supra)* sets the bar too high for future cases owing to its blanket approach to relocations and evictions. It is apparent that section 15 of ESTA sets out certain very stringent requirements to obtain an urgent eviction, and applying these requirements to relocations threatens to discourage owners or persons in charge who wish to move around ESTA occupiers on land in the future. The finding might be seen as making relocations at the owner's prerogative burdensome, which is already the case with evictions. The court's approach in dealing with urgent relocations under section 15 of ESTA may blur the distinction between relocations and evictions because it disregards the confines of section 15. ESTA contemplates that urgent proceedings for evictions in terms of section 15 are to be separate, independent and distinct from relocations because the latter proceedings differ on a case-by-case basis.

**4 3      *Could it work to apply both the test under section 15 of ESTA and the usual requirements for urgent interim interdict in relocation and eviction applications?***

Applying both the test under section 15 of ESTA and the usual requirements for an urgent interim interdict in relocation and eviction applications will not work well. This is because relocation and eviction processes are different and require different approaches. Relocations are less complex, while evictions are more complex. It would, therefore, be appropriate to use the test under section 15 of ESTA only in eviction applications, and the requirements for urgent interim interdict in relocation applications as explained above.

Given that transplanting section 15 of ESTA onto relocation applications is unworkable, should ESTA be amended to include specific provisions on relocations? Although the lack of specific relocation provisions in ESTA amounts to a shortcoming on the legislature's part, there is no need to amend ESTA. The already existing general guidelines on relocations developed by the courts should be followed. The body of case law that has

developed since the commencement of ESTA and the guidelines that have been formulated in the relocation processes seem to have no impact on constitutional imperatives that guide the application of the law.

#### 4 4      *The significance of the judgment in A Re Shomeng Holdings Proprietary Limited v Sibeko*

The judgment in *A Re Shomeng Holdings Proprietary Limited v Sibeko* (*supra*) is significant in that it reflects an equitable balance between the interests of an ESTA occupier and the owner, having regard to all relevant circumstances, including the (wrongly applied) four factors listed in section 15 of ESTA (par 27). The judgment promotes the achievement of long-term security of land tenure for ESTA occupiers by ordering the applicants to expedite the construction and provision of permanent suitable accommodation for the occupiers (par 27 and 29.7).

The judgment gave meaning to temporary accommodation and stipulated that the accommodation that ESTA occupiers should be moved must meet stringent standards (par 26 and 29.3). (In *Daniels v Scribante* 2017 (4) SA 341 (CC) par 31, the court held that an ESTA occupier's right to reside must be consonant with the fundamental rights contained in section 5, especially the right to human dignity.) This meant that the temporary accommodation must provide sleeping rooms, a kitchen and lounge, or a dining room and bath facilities commensurate with the family's requirements. The temporary accommodation must also provide access to water, electricity and sanitation (par 26 and 29.3). This confirms the standard of temporary accommodation for relocated ESTA occupiers. The judgment is testament to the court's willingness, where necessary and although ESTA has extended the rights of ESTA occupiers, not to be shy to give due recognition to the rights, duties and legitimate interests of owners balanced with those of ESTA occupiers (par 5, 10 and 27). (For an illustration of how the court balances the various interests to determine whose hardship will be worse in a particular case, as provided for by section 15(1)(c) of ESTA, see further *Mouton v Janse supra* par 3–7; *Grand Valley Estates (Edms) Bpk v Nkosi supra* par 17–31.)

The court's unwillingness to grant the applicants' final relief prevented prejudice to ESTA occupiers. This is because the permanent accommodation that the ESTA occupiers were to move had not yet been built, and the case was pleaded in terms of interim relief without due reference to the legal principles underpinning relocations or evictions (par 9). The respondents faced too many uncertainties. The process of meaningful engagement was not adequate regarding their temporary accommodation, and the respondents had legitimate concerns about their security of tenure that could not be compared to the tenuous position the applicants were facing (par 9). The court dealt with these concerns by ordering the applicants to engage meaningfully with the respondents regarding the relocation plan and accommodation on the relocated site (par 29.4). This is arguably because the right to representation and being heard is very important in our constitutional order.

---

## 5 Conclusion

The LCC's judgment in *A Re Shomeng Holdings Proprietary Limited v Sibeko* (*supra*) affirmed that final urgent relocation relief is not available where permanent accommodation has not yet been made available by the owner on the relocated site. Although this affirmation is welcome, the judgment impairs legal certainty by giving the impression that section 15 of ESTA applies to urgent relocations, while it should only apply to urgent evictions. In not considering it necessary to address this issue, the LCC decided that an urgent relocation interim interdict, irrespective of how it is sought, could be granted without due reference to the legal principles underpinning relocations or evictions. The point of section 15 of ESTA is to guard against exploitation and hardship, such as homelessness, while eviction proceedings are under way. Section 15 of ESTA is meant to protect the tenure of ESTA occupiers. The tenure of ESTA occupiers is threatened during eviction, but not during relocations.

The LCC in *A Re Shomeng Holdings Proprietary Limited v Sibeko* (*supra*) missed the opportunity to develop a legal framework that regulates urgent relocations under ESTA. Recently, the LCC seems to be transplanting provisions relating to evictions into the context of relocations (see *Du Plessis v Kriel NO* *supra* par 30–48; *A Re Shomeng Holdings Proprietary Limited v Sibeko* *supra* par 8), and such an approach is incorrect (see *Du Plessis v Kriel NO* *supra* par 69–82). It is the duty of the courts to interpret or develop the law and not simply apply the provisions of ESTA in a one-size-fits-all manner. It would be a pity if, for some reason, future cases should end up at the Supreme Court of Appeal or the Constitutional Court and these courts confirm such a transplant of eviction provisions onto relocations.

Lerato Rudolph Ngwenyama  
LLB LLM LLD

University of South Africa, Pretoria, South Africa  
<https://orcid.org/0000-0003-1256-3903>