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The Relocation of ESTA Occupiers and the Provision of Suitable Alternative Accommodation

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Abstract

This article evaluates the meaning of suitable alternative accommodation for occupiers when they are relocated from one dwelling to another on the same piece of land in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). It also examines whether ESTA provides for a minimum standard of alternative accommodation for relocated occupiers and if owners could be obliged to provide relocated occupiers suitable alternative accommodation of the occupiers' own choice. In the final instance, the article suggests a more appropriate approach to the relocation of occupiers under ESTA. The article concludes that in terms of ESTA, suitable alternative accommodation provided for relocated occupiers means accommodation that is safe and overall not less favourable than the accommodation from which the occupiers stand to be relocated. This would mean that the suitable alternative accommodation must meet the basic needs of the ESTA occupier and that of his or her household. Furthermore, the existing and newly relocated dwelling should meet a particular standard, meaning that, at the very least, it must be fit for human habitation and provide the ESTA occupier with basic amenities such as running water and sanitation facilities. An owner may not be compelled to provide relocated occupiers under

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ESTA with suitable alternative accommodation of the occupiers' own choice, as the primary purpose of ESTA was not to provide occupiers with housing of their own choice. Therefore, the suggested approach to relocation of occupiers under ESTA is that the parties must resort to mediation through an independent third party, as opposed to litigation to resolve their dispute arising from and out of relocations under ESTA.

Keywords: ESTA; access to adequate housing; suitable alternative accommodation; relocations; ESTA occupiers; mediation

1 INTRODUCTION**

A magnitude of case law dealing with eviction has emerged.¹ Clear rules for eviction exist and a solid body of law is being developed in this regard.² The focus of this article will not be on evictions, per se, but rather and specifically on the Extension of Security of Tenure Act 62 of 1997 (ESTA), relocation and rural areas. Notably, for many years the issue of relocation of occupiers under ESTA has not enjoyed much attention. However, it has increased significantly in recent years.

A relocation under ESTA entails moving ESTA occupiers³ from one dwelling to another on the same piece of land (*ie* under the same title deed description).⁴ Relocations have ordinarily occurred at the owner's⁵ prerogative where property (buildings, structures and dwellings)

** This article is partly based on ideas developed in LR Ngwenyama *A Common Standard of Habitability? A Comparison Between Tenants, Usufructuaries and Occupiers in South African Law* (LLD dissertation, Stellenbosch University, 2021). This article is also an extended version of a paper presented at the 12th Virtual Annual Association of Law, Society, and Property Conference under the theme 'Property, Equity, and Access' hosted by Tulane University Law School, New Orleans Louisiana, on 3 June 2022, Zoom. A big thank you goes to Leigh-Ann Kiewitz, Liline Steyn, Nikita Stander, Juanita Pienaar and Zsa-Zsa Boggenpoel for their helpful comments and editorial suggestions on earlier drafts of this article. I also thank the two anonymous reviewers for their positive feedback in the review process of this article. I take full responsibility for the remaining errors and lapses.

- 1 See, for example, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA); *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* 2012 2 SA 337 (CC); *Molusi v Voges* NO 2016 3 SA 370 (CC); *Occupiers of Erven 87 and 88 Berea v De Wet* NO 2017 (5) SA 346 (CC); *Snyders v De Jager* 2017 3 SA 545 (CC); *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC).
- 2 See generally, Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (LLD dissertation, Stellenbosch University, 2011) 103–146; Pienaar *Land Reform* (2014) 659–811; Cloete *A Critical Analysis of the Approach of the Courts in the Application of Eviction Remedies in the Pre-Constitutional and Constitutional Context* (LLM thesis, Stellenbosch University, 2016) 74–142; Viljoen *The Law of Landlord and Tenant* (2016) 361–378; Muller *et al Silberberg and Schoeman's The Law of Property* 6 ed (2019) 499–500; Mohamed *Landlord and Tenant – Rights and Obligations* (2019) 105–113.
- 3 Under s 1 of ESTA an occupier is: “a person who resides on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so but excluding a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and a person who has an income in excess of the prescribed amount.”
- 4 *Pharo's Properties CC v Kuilders* 2001 2 SA 1180 (LCC) para 13; *Drumearn (Pty) Ltd v Wagner* 2002 6 SA 500 (LCC) 504F; *Chagi v Singisi Forest Products (Pty) Ltd* 2007 5 SA 513 (SCA) paras 19–20; *Mjoli v Greys Pass Farm (Pty) Ltd* [2019] ZALCC 25 (15 October 2019) para 11; *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 10; *Boplaas Landgoed (PTY) Ltd v Jonkies* (LCC 37/2022) [2022] ZALCC 38 (15 August 2022) para 12; *Pieterse v Drumearn (Pty) Ltd* (LCC 135/2022; 3/2021) [2023] ZALCC 13 (19 April 2023) para 29; *Du Plessis v Kriel* NO (LCC88/2022) [2023] ZALCC 43 (14 December 2023) para 33.
- 5 Under s 1 of ESTA an owner is: “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.”

inhabited by ESTA occupiers on farmland undergo renovations, or refurbishments,⁶ or the owner simply wishes to repurpose that part of the property.⁷ In another instance, a relocation occurred where the primary occupant of a dwelling no longer held a management position and the housing unit had to be allocated to a new or current management member.⁸ ESTA occupiers may also initiate a relocation, for example, when a dwelling is not fit for human habitation. The process to be followed by the owner or ESTA occupiers is that either party must approach the other to raise the issue of relocation, as will be explained below. There are no specific requirements set out in ESTA for the relocation of ESTA occupiers. Current relocation practices are in line with case law development.

Where an owner wishes to relocate ESTA occupiers, he/she has accepted the obligation to provide suitable alternative accommodation.⁹ However, ESTA occupiers may not be willing to move for the property to be refurbished¹⁰ or repurposed by the owner.¹¹ ESTA occupiers may complain that the suggested alternative accommodation does not befit their status or comply with their specific needs. Often, ESTA occupiers would want a dwelling of their own choice that must be new, bigger and better.¹²

The meaning or definition of relocated ESTA occupiers' "choice" regarding their new homes would entail important considerations or elements such as the habitability of the structure (including sanitation, access to services such as water, electricity, etc) and/or also the location, the size or even the option of providing housing on the same registered piece of land. For instance, the location of the new house could be on another part of the same registered farm and not on another different farm also belonging to the owner. However, it would not be acceptable for the owner to provide a house with two rooms if the relocated household consists of six members.

If the relocation is intended to be on another farm belonging to the same owner or a different owner, it is not a relocation, but an eviction. This is because the ESTA occupiers are removed from one piece of land to another (*ie* under a different title deed description).¹³ These important issues arguably constitute part of a conceptual understanding of access to adequate housing that will be explained in detail below.

Part one of the article sets out the introduction. Part two discusses the meaning of access to adequate housing (as set out in section 26(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution). Part three analyses the meaning of suitable alternative accommodation when ESTA occupiers are relocated under ESTA. In this regard, it questions whether there is a minimum standard of alternative accommodation for relocated ESTA occupiers.

Part four determines whether owners could be saddled with an obligation to provide relocated ESTA occupiers with suitable alternative accommodation of the occupiers' own choice. Once that is determined, the sub-section of part four explores reasons why it may not be appropriate to compel owners to do so. Part five proposes an approach to relocation of ESTA occupiers in terms of ESTA. This proposition could assist with solving disputes about suitable alternative accommodation in the context of ESTA relocations. This is followed by a conclusion in part six.

6 See, for example, *Mjoli* para 6.

7 See, for example, *Oranje* para 4.

8 *Ibid.*

9 *Ibid* para 19; *Mjoli* para 6; *Du Plessis* para 37.

10 See, for example, *Mjoli* para 6.

11 See, for example, *Oranje* para 4.

12 *Ibid* para 20; *Du Plessis* para 8.

13 *Pieterse* para 32; *Chagi* paras 19–20; *Oranje* para 10; Pienaar "Farm Dwellers: Eviction Versus Relocation" 2023 *Stockfarm* 67 67.

2 THE CONCEPT OF ACCESS TO ADEQUATE HOUSING

2.1 Constituent Elements of Adequate Housing

In terms of section 26(1) of the Constitution, everyone has the right to access to adequate housing. However, section 26(1) of the Constitution does not define the meaning of “adequate housing”. Interestingly, the Constitutional Court in *Government of the Republic of South Africa v Grootboom* (*Grootboom*)¹⁴ has observed that what constitutes “adequate housing” depends on a particular context.¹⁵ This is because some occupiers may require access to land, housing and/or services.¹⁶

The Constitutional Court in *Grootboom* had an opportunity to shed light on what constitutes “adequate housing”, with reference to international law.¹⁷ In terms of section 39 of the Constitution, a court is obliged to consider international law as an interpretative guide when interpreting the Bill of Rights.¹⁸ The opinion of the court in *Grootboom* about the contextual nature of the term “adequate housing” resembles that which the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has proposed on the meaning of “adequate housing”.¹⁹

The CESCR pointed out that housing would be considered adequate if it is habitable in so far as that it provides its inhabitants with adequate space, protection from the elements (cold, damp, heat, rain, wind), threats to health, structural hazards and the physical safety of the inhabitants.²⁰ This statement means that the right of access to adequate housing implies habitability.²¹

The CESCR also observed that housing is adequate if it contains certain facilities that are necessary for health, security, comfort and nutrition. These include access to basic services such as water, electricity or gas (for cooking and lighting) and facilities for washing, bathing, sanitation, storage for food, refuse and sewage removal.²²

In the final instance, the CESCR pointed out that housing is adequate if it is not situated on polluted locations or sites, nor in immediate proximity to pollution sources that threaten the health of inhabitants.²³ The CESCR’s point of view implies that location is an integral part of adequate housing. However, in South African law could this statement mean that ESTA occupiers have a right of access to adequate housing in the vicinity of the ESTA occupiers’ own choice? In this context, a new house would be in the same demarcated area or preferred spot or location in which the ESTA occupier has resided in since moving to the farm.²⁴ That is not the position since the issue of a preferred spot or location for relocation is determined by

14 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

15 *Ibid* para 37.

16 *Ibid*.

17 *Ibid* paras 26–33.

18 Section 39(1)(b) of the Constitution. See further, *Grootboom* para 26; *S v Makwanyane* 1995 3 SA 391 (CC) para 35; Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* (LLM thesis, Stellenbosch University, 2010) 5 and 13–37; Muller and Viljoen *Property in Housing* (2021) 55.

19 Muller and Viljoen (2021) 177.

20 General Comment No 4 *The Right to Adequate Housing* UN Doc E/1992/23 para 8(d).

21 Muller and Viljoen (2021) 334.

22 General Comment No 4 *The Right to Adequate Housing* UN Doc E/1992/23 para 8(b). See also, Muller and Viljoen (2021) 178.

23 General Comment No 4 *The Right to Adequate Housing* UN Doc E/1992/23 para 8(f).

24 Compare, *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) paras 44 and 75; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 254. Although these judgments deal with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and not ESTA, the same approach should be followed.

considering a number of factors, such as whether land is available on the preferred site.²⁵

In view of location being a contextual factor to consider in South African law, the owner who will provide adequate housing or alternative accommodation and desires to relocate ESTA occupiers under ESTA must, prior to the relocation, consider the location of housing to be inhabited by relocated ESTA occupiers.²⁶ Therefore, housing that is built on polluted sites or close to sources that cause pollution will likely be classified as inadequate.²⁷ This is because such an environment may impact on ESTA occupiers' rights to health,²⁸ and a healthy environment.²⁹ This means that access to adequate housing in South African law must, at the very least, be in a location that is not dangerous to an ESTA occupier's health or safety and does not impair their human dignity.³⁰

2.2 Access to Adequate Housing in the Context of ESTA: An Example from Case Law

In *Daniels v Scribante* ("Daniels"),³¹ more insight into the concept of adequate housing in the context of ESTA was provided, although the decision did not deal with relocation. In this case, an ESTA occupier was residing on a privately owned farm and her rights were protected in terms of ESTA.³² The ESTA occupier lived in uninhabitable conditions, and she wished to effect basic improvements to the dwelling at her own expense.³³ She had resided in the dwelling with her family for 16 years.³⁴ The owner and the person in charge accepted that the dwelling was in an uninhabitable state and lacked the most basic of human amenities, such as running water.³⁵

In the Constitutional Court, the ESTA occupier successfully argued that her rights in terms of sections 5 and 6 of ESTA included the right to make improvements to her dwelling.³⁶ The court found that ESTA's section 6(1) (the right to reside) must mean to reside in adequate housing. This statement, according to the court, includes those facilities that are necessary for an ESTA occupier to live in accordance with human dignity and to enjoy other fundamental rights such as security of tenure.³⁷ The court concluded that adequate housing in terms of ESTA also incorporates the right to make improvements that are necessary to achieve a standard of habitability.³⁸ This brings us to the question of how the concept of access to adequate housing (as set out in section 26(1) of the Constitution and informed by international law and recent case law as outlined above) fits into or inform the relocation rights of ESTA occupiers.

25 *Rand Properties* para 44; *Joe Slovo* para 254. See also, Muller and Viljoen (2021) 418.

26 *Rand Properties* para 44; *Joe Slovo* para 254.

27 General Comment No 4 *The Right to Adequate Housing* UN Doc E/1992/23 para 8(f).

28 The Constitution s 27.

29 The Constitution s 24.

30 General Comment No 4 *The Right to Adequate Housing* UN Doc E/1992/23 para 8(f); *Mpange v Sithole* 2007 6 SA 578 (W) paras 46 and 50–55; *Rand Properties* para 36; *Olivia Road* para 44; *Joe Slovo* para 108.

31 *Daniels v Scribante* 2017 4 SA 341 (CC).

32 *Daniels* para 3.

33 *Ibid* para 8.

34 *Ibid* para 4.

35 *Ibid* para 7. Under s 1 of ESTA a "person in charge" is: "the 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".

36 *Daniels* para 10.

37 *Ibid* para 31. See also, General Comment No 4 *The Right to Adequate Housing* UN Doc E/1992/23 paras 7–8.

38 *Daniels* para 32.

2.3 A Systemic and Contextual Approach to Housing

ESTA legislation is closely linked to section 26 of the Constitution³⁹ and was enacted to give effect to the provisions of section 26 of the Constitution.⁴⁰ Nonetheless, ESTA occupiers may not directly rely on section 26 of the Constitution itself, but should rely on ESTA to make their case because of the subsidiarity principle.⁴¹ Coupled herewith is the “single-system-of-law” principle, as laid down in the case of *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* (“*Pharmaceutical Manufacturers*”).⁴² In the *Pharmaceutical Manufacturers* case, the court held that there is only one system of law in the Republic. The Constitution as the supreme law shapes the system. The court further mentioned that all law, including the common law, derives its force from the Constitution and is subject to constitutional control.⁴³

The subsidiarity principle applies in the context of ESTA occupiers, unless the provisions of ESTA do not adequately give effect to the relevant constitutional right(s) at stake.⁴⁴ This principle means that ESTA occupiers are not permitted to bypass ESTA and argue their case based on a constitutional provision that gives effect to the right infringed.⁴⁵ Thus, when ESTA occupiers are relocated under ESTA, the right to have access to adequate housing may be implicated.⁴⁶

In *Grootboom*, the Constitutional Court observed that it is not only the right of access to adequate housing that may be at stake when ESTA occupiers are relocated.⁴⁷ Whenever ESTA occupiers approach a court asserting that their socio-economic rights have been infringed, the right to human dignity may also be implicated.⁴⁸ This would mean that any claim based on socio-economic rights must essentially engage the right to human dignity.⁴⁹ Section 26 of the

39 *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53. See also, *Baron* para 38.

40 *Baron* para 10; *Oranje* para 12.

41 *Oranje* para 12; *Baron* para 10. For more information on the subsidiarity principles, see generally Van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” 2008 CCR 77 100–105; Van der Walt *Constitutional Property Law* (2011) 66–69; Van der Walt *Property and Constitution* (2012) 35–91; Pienaar (2014) 187–188; *NAPTOSA v Minister of Education, Western Cape* 2001 2 SA 112 (C) 123; *Ingledeu v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* 2003 4 SA 584 (CC) para 23; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) paras 21–26; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) paras 92–97 and 436–437; *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51–52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 39–40; *Chirwa v Transnet Ltd* 2008 2 SA 347 (CC) paras 59 and 69; *Walele v City of Cape Town* 2008 6 SA 129 (CC) paras 29–20; *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) paras 47–49; *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 73; *PFE International v Industrial Development Corporation of South Africa Ltd* 2013 1 SA 1 (CC) paras 4 and 32; *Sali v National Commissioner of the SA Police Service* 2014 9 BCLR 997 (CC) para 4; *De Lange v Methodist Church* 2016 2 SA 1 (CC) para 53; *My Vote Counts NPC v Speaker of The National Assembly* 2016 1 SA 132 (CC) para 53; *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 8 BCLR 985 (CC) para 178; *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* 2022 1 BCLR 46 (CC) para 112; *Women’s Legal Centre Trust v President of the Republic of South Africa* 2022 5 SA 323 (CC) para 82; *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 2 SA 31 (CC) para 46; *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 4 SA 325 (CC) para 149.

42 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC).

43 *Ibid* para 44. See also, Van der Walt 2008 CCR 100–105.

44 *Oranje* para 12; *Baron* para 10.

45 *Ibid*; *ibid* para 10.

46 *Oranje* para 12.

47 *Grootboom* para 83; *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 21.

48 *Ibid*; *ibid*.

49 *Ibid*; *ibid* para 21.

Constitution protects occupiers in general, and ESTA occupiers in particular, against conduct that may cause them to be removed or even relocated from their homes without prior engagement, as elaborated below.⁵⁰ In this regard, the historical context of forced removals requires an owner to genuinely engage with ESTA occupiers before their relocation.

Section 26 of the Constitution was enacted as a provision to facilitate a move away from the past by emphasising the significance of having access to adequate housing in South Africa's new constitutional dispensation.⁵¹ Furthermore, it was enshrined in the Constitution to rectify the indignity suffered by occupiers as a result of forced removals from their homes, and the relocation to land that was mostly inadequate for housing and could thus not provide the occupiers with access to adequate housing and human dignity.⁵²

Persons who would currently fall within the ambit of ESTA, as occupiers, were previously not protected in terms of the common law from evictions and arguably relocations.⁵³ Section 26 of the Constitution and the provisions of ESTA now aim to protect ESTA occupiers from arbitrary, unreasonable, and unlawful relocations (as well of course protection against unlawful eviction).⁵⁴ Accordingly, the entire discussion on the meaning of "adequate housing" under section 26 shows that access to adequate housing is more than just a roof over one's head. It is for this reason that the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers (PE Municipality)*⁵⁵ remarked that the constitutional provision guaranteeing the right of access to adequate housing:

evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively spectre space of privacy and tranquilly in what (for poor people in particular) is a turbulent and hostile world.⁵⁶

This statement becomes a reality if a minimum standard of access to "adequate housing" is met, as explained above. Now that this part has explained the meaning of "adequate housing" flowing from section 26 of the Constitution, the part that follows indicates the meaning of "suitable alternative accommodation" in terms of ESTA and case law.⁵⁷ It is important to determine whether the meaning of suitable alternative accommodation in terms of legislation and crystallised in case law provides even further reinforcement of a minimum standard that ESTA occupiers are entitled to when they are relocated.

50 *Oranje* paras 4–6 and 12; *Mjoli* para 6. Compare, *Joe Slovo* paras 139, 230 and 237.

51 *Jaftha* para 29; referred to in *Rand Properties* para 30.

52 *Ibid*; *PE Municipality* paras 8–9. See further, Muller "The Legal-historical Context of Forced Evictions in South Africa" 2013 *Fundamina* 367 367–369 382–394; O'Regan "No More Forced Removals? An Historical Analysis of the Prevention of Illegal Squatting Act" 1989 *SAJHR* 361 361–394; Van der Walt "Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State" 2001 *SALJ* 258 258–311; Van der Walt "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation" 2002 *TSAR* 254 254–289.

53 *Baron* para 11.

54 *Oranje* para 12; *Du Plessis* para 45.

55 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC). Although this judgment deals with PIE and not ESTA, the same approach should be followed.

56 *PE Municipality* para 17.

57 The difference in terminology between s 26 (adequate housing) and ESTA (suitable alternative accommodation/housing) is that the former is a constitutional right while the latter is a right conferred upon ESTA occupiers by ESTA. It should be mentioned that a claimant directly relying on s 26 may be provided with suitable alternative accommodation, as s 26 includes an entitlement to suitable alternative accommodation.

3 THE CONCEPT OF SUITABLE ALTERNATIVE ACCOMMODATION

3.1 ESTA on Suitable Alternative Accommodation

ESTA, the legislation aimed at protecting the rights of ESTA occupiers, who are largely farmworkers,⁵⁸ defines the concept of “suitable alternative accommodation” as

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 [relocation]. . .⁵⁹

In light of this definition, alternative accommodation provided for relocated ESTA occupiers is suitable if, at the very least, it is safe and overall not less favourable than the accommodation from which the ESTA occupiers stand to be relocated to. This means that the alternative accommodation must meet the basic needs of the ESTA occupiers and that of his/her household.⁶⁰ This definition reflects some of the elements of the CESC’s description of “adequate housing”, as mentioned in part two above. Both definitions focus on the fact that ESTA occupiers should enjoy physical safety in the dwelling. The meaning of suitable alternative accommodation has crystallised in recent case law in the context of relocated ESTA occupiers, namely in *Oranje v Rouxlandia Investments (Pty) Ltd (Oranje)*⁶¹ and *Mjoli v Greys Pass Farm (Pty) Ltd (Mjoli)*.⁶² These cases are briefly discussed below.

3.2 Case Law on Suitable Alternative Accommodation

3.2.1 *Oranje*

In this case, the ESTA occupier, with rights protected under ESTA, was residing and working on a privately owned farm.⁶³ The ESTA occupier entered into a housing agreement with the farm owner in terms of which the occupier and his family were entitled to occupy a manager’s house.⁶⁴ The housing agreement contained a term to the effect that the dwelling was allocated only to managers and if the occupant of the house was no longer a manager, the housing agreement would be terminated on 30 days’ notice.⁶⁵ The ESTA occupier’s occupation of the dwelling was thus conditional in that he had to remain employed as a manager to continue his residence in the house.⁶⁶

58 For more information on ESTA, see generally Pienaar (2014) 302–305; Mostert *et al* “Land” in Joubert and Faris (eds) *The Law of South Africa 14* 2 ed Part 1 (2010) paras 127–134; Muller *et al* (2019) 700–715; Scheepers and Du Plessis “Extension of Security of Tenure Act: A Bone of Contention” 1998 *THRHR* 473 473–482; Pienaar “Farm Workers: Extending Security of Tenure in terms of Recent Legislation” 1998 *SAPL* 423 423–437; Keightley “The Impact of the Extension of Security of Tenure Act on an Owner’s Right to Vindicate Immovable Property” 2017 *SAJHR* 277 277–307.

59 ESTA s 1. It bears mentioning that the meaning of suitable alternative accommodation as it has developed in the context of PIE coincide with what is suggested in the context of ESTA. Cases decided under PIE such as *PE Municipality* paras 28–29 and 54, in any event, endorse the definition of suitable alternative accommodation as provided in terms of ESTA. The elements of suitable alternative accommodation were already applied by the courts even though the two pieces of legislation have different purposes and regulate different occupiers.

60 ESTA s 1.

61 *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA).

62 *Mjoli v Greys Pass Farm (Pty) Ltd* (LCC45R/2018) [2019] ZALCC 25 (15 October 2019).

63 *Oranje* paras 2 and 13.

64 *Ibid* para 4.

65 *Ibid*.

66 *Ibid*.

The ESTA occupier was later declared medically unfit for work and his employment on the farm was terminated, but he continued to reside in the dwelling.⁶⁷ A meeting was convened to discuss the ESTA occupier's continued occupation in the house.⁶⁸ At the meeting, the ESTA occupier was informed that he must move with his family from the manager's house to a smaller dwelling on the same farm. He refused to vacate the house.⁶⁹

A letter was sent to the ESTA occupier informing him that he had been offered suitable alternative accommodation, but again, he refused to relocate.⁷⁰ Consequently, the ESTA occupier was given a 30 days' written notice to vacate the manager's house.⁷¹ The owner then launched an application in the Land Claims Court (LCC) where an order was sought to have the ESTA occupier and his family relocated from the manager's house to a smaller house on the same farm. The LCC granted the order.⁷²

Leave to appeal to the Supreme Court of Appeal (SCA) was granted on the ground of, *inter alia*, whether the alternative accommodation was indeed suitable. The SCA started by defining suitable alternative accommodation with reference to section 1 of ESTA. It held that suitable alternative accommodation means accommodation that is generally safe and not less favourable than the ESTA occupiers' previous accommodation.⁷³ In *casu*, the alternative accommodation offered by the farm owner was smaller than the house the ESTA occupier inhabited.⁷⁴ Nevertheless, the court held that the alternative accommodation was suitable, at the very least, it had been newly painted and included running water, a toilet, an inside bathroom and, in terms of the roof structure, was constructed of corrugated iron and was water proof.⁷⁵ This confirms the standard of suitable alternative accommodation in this particular case.⁷⁶ However, the actual criteria for suitability will depend on the facts of each case, as explored in more detail below.

3 2 2 *Mjoli*

In this case, the owner approached the Magistrate's Court for a relocation order of ESTA occupiers. The relocation was to occur from one dwelling to another part of the same farm. In this other part of the farm, the owner intended building new dwellings for ESTA occupiers, should they agree to relocate.⁷⁷ The court heard the matter, allowed oral evidence and conducted an *in loco* inspection.⁷⁸ During the *in loco* inspection, the magistrate noted that the ESTA occupiers' current dwellings were in very poor condition.⁷⁹ The building in which the ESTA occupiers resided had partially collapsed and there was no access to sanitation. Consequently, the building posed a danger to the ESTA occupiers' lives.⁸⁰

67 *Ibid* para 5.

68 *Ibid*.

69 *Ibid* para 6.

70 *Ibid*.

71 *Ibid*.

72 *Ibid* para 7.

73 *Ibid* para 20.

74 *Ibid*.

75 *Ibid*.

76 For a standard of habitability in the context of ESTA occupiers, see specifically Ngwenyama *A Common Standard of Habitability? A Comparison between Tenants, Usufructuaries and Occupiers in South African Law* (LLD dissertation, Stellenbosch University, 2021) 121–144.

77 *Mjoli* paras 1–4.

78 *Ibid* para 4.

79 *Ibid* para 5.

80 *Ibid*.

Although the adjacent corrugated iron building, also inhabited by the ESTA occupiers was better, it was clearly not of a standard fit for human habitation.⁸¹ During the inspection, the owner indicated that suitable alternative accommodation could be made available to the ESTA occupiers on another part of the same registered farm.⁸² The inspection party thereafter proceeded to the other relevant portion of the farm where alternative accommodation could be provided for ESTA occupiers.⁸³

The other relevant portion of the farm contained dwellings occupied by certain employees of the owner. The magistrate observed that the living conditions on this section of the farm were conducive to human habitation, as the dwellings had running water and sanitation facilities.⁸⁴ The owner intended to provide housing for ESTA occupiers on this side of the farm, which had suitable living conditions and facilities.⁸⁵ Despite uncertainty regarding the exact numbers, it was clear that some ESTA occupiers refused to relocate.⁸⁶ The magistrate nevertheless went on to order the ESTA occupiers to vacate their original houses and relocate to the new site.⁸⁷

While the area of land had been identified, there were no actual dwellings or homes that constituted alternative accommodation.⁸⁸ In this regard, the magistrate placed the relocation order in abeyance until the owner had made suitable alternative accommodation on the relocated site available to ESTA occupiers.⁸⁹ The findings in *Mjoli* recognise that alternative accommodation is suitable if it is conducive to human habitation and includes running water, sanitation facilities and the building does not pose any threat to the lives of ESTA occupiers. This understanding of what constitutes alternative accommodation will be further analysed in the sub-section below.

3 3 Analysis

3 3 1 Contextualisation of “Relocation”

The *Oranje* and *Mjoli* cases are interesting for a number of reasons. For one, the cases highlight an important issue, namely whether relocations should be permitted under ESTA. The focus here is thus not primarily on the kind of accommodation, but on the pre-question, namely whether relocations should be permitted under ESTA. There is no prohibition in ESTA on relocations because they result in the movement of ESTA occupiers from one dwelling to another on the same parcel of land.⁹⁰

A relocation is the owner’s prerogative and may occur when they would want to use that portion of the farm for another purpose such as to house current employees who are in need of accommodation,⁹¹ or when the extant conditions lead to a relocation such as dilapidated or derelict buildings.⁹² In such instances, the owner can apply for a relocation order. The particular ESTA occupier may also approach the court for a relocation order, for example, where the

81 *Ibid.*

82 *Ibid* para 6.

83 *Ibid.*

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 *Ibid* para 7.

88 *Ibid* paras 6–7 and 11.

89 *Ibid* para 11.

90 *Kuinders* para 13; *Wagner* 504F; *Chagi* paras 19–20; *Oranje* para 10; *Mjoli* para 11; *Jonkies* para 12; *Pieterse* para 29; *Du Plessis* para 33.

91 See *Oranje* para 4–6; *Jonkies* paras 5–6.

92 See *Mjoli* paras 5–6.

dwelling is not fit for human habitation.

The process that is currently followed in the relocation of ESTA occupiers is not provided for in ESTA. In other words, there is no process set out in ESTA for relocations. The practices have been developed by way of case law. If it is the owner who initiates the relocation, he or she must inform the ESTA occupiers in writing about the relocation.⁹³ The ESTA occupiers should be given an opportunity to respond to the owner's correspondence.⁹⁴ The owner should arrange a meeting with the ESTA occupiers. In the meeting, the owner and the ESTA occupiers should discuss the area of relocation, and the owner should assure the ESTA occupiers that he/she would provide them with suitable alternative accommodation.⁹⁵

The ESTA occupiers should be given a chance to participate in the meeting and advise on whether they agree to be relocated.⁹⁶ Should the ESTA occupiers agree to be relocated, the owner and the ESTA occupiers should agree on the time, date, and site to be relocated to. When the ESTA occupiers do not agree to be relocated and unreasonably refuse to participate in the meeting, the owner should approach a court to have the ESTA occupiers relocated in terms of an order of the court.⁹⁷ In instances where it is the ESTA occupiers who initiate the relocation, they should follow the same process as explained above.

3 3 2 The Court's Discretion Whether to Order a Relocation

In the case of *Mjoli*, the court exercised its discretion on whether to order the relocation of ESTA occupiers.⁹⁸ In this regard, the court undertook a balancing exercise of the interests of both ESTA occupiers and the owner to determine which outcome would be the most appropriate in each particular case.⁹⁹ The court ordered the owner to provide the ESTA occupiers with suitable alternative accommodation on another portion of the same farm.¹⁰⁰ This is because the owner had not made alternative accommodation available on the other side of the same farm.¹⁰¹ This order shows that the basic human rights of ESTA occupiers such as human dignity (section 5(a) of ESTA) and security of tenure (section 6(2)(a) of ESTA) must not be infringed during the relocation process.¹⁰²

There was no mention in *Mjoli* whether all the ESTA occupiers had agreed to move.¹⁰³ Assuming that not all ESTA occupiers agreed to move in *Mjoli*, it could have meant that there was no participation for the relocation. However, that would be unlikely as ESTA occupiers can drag out the process by, eg, not consenting to a relocation. As such, participation not only requires that all parties reach consensus, but there must also be involvement in the discussions and voicing of opinions even if disagreements exist.¹⁰⁴

Relocations are easier and simpler as ESTA does not set out procedural or substantive

93 Compare, *Oranje* para 6.

94 *Ibid* paras 5–6.

95 *Ibid* para 6; *Mjoli* para 6.

96 Compare, *Oranje* para 6.

97 *Ibid* para 6–7.

98 *Mjoli* paras 6–7 and 11.

99 *Ibid* paras 5–7.

100 *Ibid* para 11.

101 *Ibid* paras 6–7 and 11.

102 Pienaar "Land Reform" (2019) *Juta's Quarterly Review of South African Law* 2.3.

103 *Mjoli* para 6.

104 Mahomed *The Potential of Meaningful Engagement in Realising Socio-Economic Rights: Addressing Quality Concerns* (LLM thesis, Stellenbosch University, 2019) 25–31.

requirements when relocations are at stake.¹⁰⁵ In eviction, a whole host of requirements have to be met — checks and balances are thus in place — which is not the case with relocations.¹⁰⁶ Some exploitation in relocations can take place and may result in hardship¹⁰⁷ when the home to which the ESTA occupier is relocated, is not suitable. Therefore, a court has an obligation to ensure that the relocation is for the protection and in the best interests of the ESTA occupiers.

Perhaps in *Mjoli* it was unnecessary to mention whether all ESTA occupiers agreed to move because the relocation was in the best interests of the ESTA occupiers.¹⁰⁸ In this respect, the court simply confirmed the principles as set out in the earlier case of *Oranje*, in that, before a relocation is allowed, it is necessary that the alternative accommodation be made available to ESTA occupiers and it must be suitable.¹⁰⁹

In the case of *Mjoli*, the court assumed that it had a wide discretion in the relocation of the ESTA occupiers under ESTA and exercised that discretion by deciding the matter purely based on the balance of interests and/or prejudice that could affect the parties. The aspects on which the court focused in its balancing exercise were the following. Firstly, the immediate need to accommodate the ESTA occupiers on the relocation site due to their current housing being unsafe and a health hazard.¹¹⁰ Secondly, whether the living conditions on the relocation site were conducive for human habitation, as opposed to the living conditions in relation to the ESTA occupiers' current dwellings.¹¹¹ Thirdly, whether the alternative accommodation on the relocation site had running water and sanitation facilities, as opposed to the ESTA occupiers' current housing.¹¹²

In the final instance, the owner was willing to provide suitable alternative accommodation to the ESTA occupiers on the relocation site if the occupiers agreed to move,¹¹³ a fact that the court took note of during the *in loco* inspection.¹¹⁴ After considering the possibility of alternative accommodation and the risk to life posed by the buildings occupied by the ESTA occupiers, the court placed the relocation of the occupiers on abeyance until the alternative accommodation was actually built.¹¹⁵

It is noteworthy, that the court recognised that ordering the immediate relocation of ESTA occupiers to the other portion of the farm without suitable alternative accommodation would, for example, constitute a deprivation of property in terms of section 25(1) of the Constitution.¹¹⁶ This is because the housing rights and/or tenure rights of ESTA occupiers are part of property rights that seem to be arbitrarily deprived in these instances and these rights and entitlements are as worthy of protection as those of owners.¹¹⁷

¹⁰⁵ *Chagi* para 20.

¹⁰⁶ See ss 9, 10 and 11 of ESTA. See further, Pienaar (2014) 400; Pienaar 2023 *Stockfarm* 67.

¹⁰⁷ *Du Plessis* para 45.

¹⁰⁸ *Mjoli* paras 7 and 11.

¹⁰⁹ *Ibid* paras 6 and 11. See further, *Wagner* para 504F; *Oranje* paras 19–20; Pienaar 2019 *Juta's Quarterly Review of South African Law* 2.3; *Du Plessis* para 37.

¹¹⁰ *Mjoli* para 5.

¹¹¹ *Ibid* para 6.

¹¹² *Ibid*.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid* paras 5–7 and 11.

¹¹⁶ The Constitution s 25(1). It should be mentioned that ESTA occupiers cannot rely directly on s 25(1) of the Constitution to protect their constitutional rights based on the subsidiarity principles explained above.

¹¹⁷ *Baron* para 10, citing *Agrico Masjinerie (Edms) Bpk v Swiers* 2007 5 SA 305 (SCA) paras 29–31; *Nhlabathi v Fick* [2003] 2 All SA 323 (LCC) paras 20–34.

This view is further underlined by section 6(2)(a) of ESTA, which provides that:

[w]ithout prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with rights of the owner or person in charge, an occupier shall have the right to security of tenure.

Section 6(2)(a) of ESTA therefore prohibits conduct that frustrates the exercise of rights occasioned by either an owner and/or an ESTA occupier.¹¹⁸ The right to security of tenure provided for in section 6(2)(a) of ESTA is thus connected to the manner in which ESTA occupiers can occupy land and housing belonging to the owner.¹¹⁹ Nonetheless, the possible constitutional problem that would have been created by an immediate order of relocation in *Mjoli* did not arise, because the relocation was kept on hold until the owner made alternative accommodation available on the other site on the farm.¹²⁰ It should be noted though, that the court decided the relocation of the ESTA occupiers purely based on the balance of prejudice that could be suffered by the parties and not on any constitutional or doctrinal principle.

3 3 3 Concluding Remarks

The above discussion of the cases of *Oranje* and *Mjoli* included important interpretations of the concept of suitable alternative accommodation. Taking into consideration the particular vulnerabilities of ESTA occupiers, suitable alternative accommodation provided after a relocation must meet stringent standards. To this end, context is also important when interpreting what would constitute suitable alternative accommodation. This is because what may be unsuitable to an ESTA occupier may be based on choice and not actual suitability, as seen in *Oranje*.¹²¹ In such instances, a court should be approached by the owner or person in charge and ESTA occupier so that the court can make a principled decision whether that accommodation qualifies as suitable alternative accommodation in terms of section 1 of ESTA.

On the idea of a minimum standard, the cases of *Oranje* and *Mjoli* indicate that a relocation in terms of ESTA should at least result in alternative accommodation that is fit for human habitation and provides the ESTA occupier with basic amenities such as running water, sanitation facilities, and the dwelling must be safe for the ESTA occupiers to inhabit.¹²² It must be stated that where these elements are present, the alternative accommodation must be regarded as suitable alternative accommodation for relocation purposes.

4 THE PROVISION OF SUITABLE ALTERNATIVE ACCOMMODATION UNDER ESTA

4 1 Alternative Accommodation of the Occupiers' Choice

As mentioned above, one of the pre-conditions of a relocation order is that an owner is obliged to make available suitable alternative accommodation to ESTA occupiers.¹²³ If suitable alternative accommodation is not provided on the site where ESTA occupiers are to be relocated, no relocation should take place until such time as the farm owner makes such alternative accommodation

118 *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) para 56.

119 Mahomed *et al* "Tenure Security in SA Law" in Mohamed (ed) *Land Tenure Law* (RS: 1 2013) 2–1.

120 *Mjoli* para 11.

121 *Oranje* paras 20–21.

122 *Ibid* para 20; *Mjoli* para 6. For more information of this particular standard of habitability, see specifically Ngwenyama *A Common Standard of Habitability* (LLD dissertation, Stellenbosch University, 2021) 121–144.

123 *Oranje* para 11.

available on the relevant site.¹²⁴ Coupled herewith is the question whether owners are obliged or compelled to provide relocated ESTA occupiers with suitable alternative accommodation, to their particular specifics. At the outset, it should be noted that ESTA was enacted to provide ESTA occupiers with access to adequate housing, linked to security of tenure, which does not mean to include a specific house of choice.¹²⁵ The Constitutional Court in *PE Municipality* underscored the link between access to adequate housing and security of tenure as follows:

Land rights and the right of access to housing and of not being arbitrarily [relocated], are closely intertwined. The stronger the right to land, the greater the prospect of a secure home.¹²⁶

The purpose of section 25(6) is to ensure that persons who reside on land that they do not own enjoy a strong form of secure tenure.¹²⁷ In this regard, there cannot be access to adequate housing devoid of security of tenure. This is because security of tenure is a key element of access to adequate housing. Moreover, security of tenure and access to adequate housing are closely linked to habitability in the following terms: if the house is not habitable, the dweller is denied access to adequate housing and correspondingly, a measure of tenure security.¹²⁸ Thus, the need to strengthen the security of tenure of ESTA occupiers living on land belonging to another is recognised in section 25(6) of the Constitution and in the preamble of ESTA more specifically. The preamble states the primary purpose of ESTA as follows:

To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and the circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from the land; and to provide for matters connected therewith.¹²⁹

Within this purpose of ESTA, owners are not obliged to provide relocated ESTA occupiers with suitable alternative accommodation of their own choice. Rather, owners are obliged to provide relocated ESTA occupiers with suitable alternative accommodation that, at the very least, protects and promotes the ESTA occupiers' right to security of tenure and other fundamental rights, such as human dignity, as shown by the *Oranje* case.¹³⁰ Furthermore, such suitable alternative accommodation must be provided to ESTA occupiers within the owner's available resources. This is arguably because ESTA does not only deal with the rights of ESTA occupiers, but also recognises the rights of owners to apply for the relocation of occupiers under certain conditions and circumstances, while balancing the rights of owners and occupiers.

Consequently, owners may not relocate ESTA occupiers to uninhabitable dwellings¹³¹ that could contravene occupiers' right to live in accordance with basic human dignity.¹³² In the same way, when ESTA occupiers are relocated, they should not unreasonably delay their relocation by insisting on accommodation of their own choice.¹³³ If the alternative accommodation is unbecoming for human habitation and impacts on the ESTA occupiers' security of tenure and

¹²⁴ *Ibid.*

¹²⁵ *Ibid* para 21.

¹²⁶ *PE Municipality* para 19.

¹²⁷ *Daniels* para 13; *Baron* para 10.

¹²⁸ *Daniels* paras 33–34.

¹²⁹ Preamble of ESTA.

¹³⁰ *Oranje* paras 22–23. See also, *Wagner* 504F; *Du Plessis* para 37.

¹³¹ For the meaning of habitability, see specifically Ngwenyama *A Common Standard of Habitability* (LLD dissertation, Stellenbosch University, 2021) 121–144.

¹³² *Oranje* para 17.

¹³³ *Ibid* paras 20–22.

other fundamental rights, occupiers can resist such relocation on the basis of sections 5(a) and 6(2)(a) of ESTA.¹³⁴

The protection afforded by sections 5 and 6 of ESTA, on which ESTA occupiers could rely on to resist their relocation, is to ensure that occupiers are not to be subjected to conditions that are inhumane and infringe their human dignity.¹³⁵ The protective measures in sections 5 and 6 do not amount to a blanket resistance of a relocation under all circumstances, but in instances where the state of disrepair of the dwelling implicates constitutional rights.¹³⁶ While it is clear that owners cannot be compelled to provide alternative accommodation of choice, the next section unpacks the specific reasons for such an approach.

4 2 Grounds for Justifying a No Choice Approach

Owners may not be compelled to provide relocated ESTA occupiers under ESTA with suitable alternative accommodation of the occupiers' own choice for the following reasons. First, the primary purpose of ESTA is not to provide ESTA occupiers with housing of their own choice. However, ESTA was enacted to strengthen the lawful occupation of ESTA occupiers residing on property belonging to the owner, as part of the land reform programme envisaged in section 25(6) of the Constitution.¹³⁷

Second, the suitable alternative accommodation is provided by the owner to relocated ESTA occupiers within his/her available resources. It would be unreasonable, therefore, to require owners, who run their farms from their own pockets, to be saddled with such an obligation.¹³⁸ Third, the right of owners to apply for a relocation order may be frustrated. In this regard, the courts should strike a proper balance between the rights of ESTA occupiers and owners. If the owner has provided suitable alternative accommodation that is safe and not less favourable to the ESTA occupiers' previous accommodation, an order of relocation should be granted, as relocated ESTA occupiers are not prejudiced.

Fourth, ESTA occupiers and owners are not best placed to decide which accommodation is suitable. Although it is the owner's farm and he or she should provide the accommodation and ESTA occupiers are obviously familiar with the farm and its set-up, the crux of the matter is that what is suitable to the owner may arguably not be suitable in the eyes of ESTA occupiers. In such circumstances, a court is better positioned than the actual ESTA occupiers and owners to reach an objective and principled decision on what constitutes suitable alternative accommodation.

It is for this reason that in the *Mjoli*-case, an *in loco* inspection was conducted by the court to ensure that the accommodation was available and conducive to human habitation. It was also conducted to ensure that the relocation was feasible and executable, so that ESTA occupiers were not rendered homeless. The main reason or ground for justifying a no choice approach is essentially based on the fact that ESTA was not enacted to give ESTA occupiers preference in terms of alternative accommodation when they are relocated. It is also not justifiable for ESTA occupiers to choose their own alternative accommodation because if choice accommodation is permitted it could become onerous for owners to provide, especially looking at the limited resources at their disposal.

Given the concerns raised about suitable alternative accommodation in parts 3 and 4 above and

¹³⁴ *Ibid* para 17; *Du Plessis* para 34.

¹³⁵ *Daniels* paras 31–32; *Oranje* para 18; Van der Sijde “Tenure Security for ESTA Occupiers: Building on the *Obiter* Remarks in *Baron v Claytile Limited*” 2020 *SAJHR* 1 5 and 9–11.

¹³⁶ *Oranje* para 18.

¹³⁷ *Baron* para 20.

¹³⁸ Consider *Daniels* para 40; Currie and De Waal *The Bill of Rights Handbook* 6 ed (2013) 50.

the obvious practicalities and costs with requiring the court to be involved as a starting point, the contribution now turns to a more appropriate approach in these circumstances.

5 THE APPROPRIATE APPROACH TO RELOCATION OF ESTA OCCUPIERS UNDER ESTA

Since disputes are to be expected and more than often arise in the context of ESTA relocations, it is observed that case law has played an important role in the development of the procedure to resolve such disputes. This procedure was evident from case law development in that owners approached the court for the relocation of ESTA occupiers under ESTA. Such a relocation may occur, as seen in *Orange* and *Mjoli*, where the dwellings inhabited by ESTA occupiers are not suitable for human habitation.¹³⁹ Owners should apply for the relocation of ESTA occupiers in accordance with case law suggestion and provide ESTA occupiers with suitable alternative accommodation, within the owners' available resources, as explained above.¹⁴⁰

It is proposed that before the owner approaches a court for an order of relocation, he or she must attempt respectful face-to-face mediation¹⁴¹ through an independent third party called a mediator.¹⁴² Mediation will help the owner and ESTA occupiers to avoid the tension and frustration associated with court cases and reduce the expenses that may be incurred through court proceedings.¹⁴³ When the owner and ESTA occupiers attempt mediation, the mediator will narrow down the issues causing the dispute between them and facilitate a mutually acceptable outcome.¹⁴⁴ Mediation will enable the owner and the ESTA occupiers to solve their problems and determine an acceptable outcome in a manner that court proceedings may not.¹⁴⁵

The money that the owner would have spent on litigation could be used to facilitate an outcome that promotes respect for human dignity and underscores the purpose for which ESTA was enacted.¹⁴⁶ As such, mediation has a role to play in the owner and ESTA occupier relationship, where the rights and/or interests extended to ESTA occupiers by ESTA may have to be balanced with those of owners.¹⁴⁷ Mediation has the potential to enable the owner and ESTA occupiers to

139 *Oranje* paras 4–7.

140 *Ibid* 4, 6 and 11.

141 It has been generally defined as a process in which two or more parties who are in conflict voluntarily appoint an independent third party (known as the mediator) to assist them in reaching an agreement regarding issues that cause a dispute. See generally, Scott-MacNab "Mediation in the Family Context" 1988 *SALJ* 709 715; Nupen "Mediation" in Pretorius (ed) *Dispute Resolution* (1993) 39; *PE Municipality* para 40, particularly footnote 38; Faris "Deciphering the Language of Mediatorial Intervention in South Africa" 2006 *Comparative and International Law Journal of Southern Africa* 427 427–449; Human *et al Family Law in South Africa* (2010) 345; Boule *Mediation Principles, Process, Practice* (2011) 13; Schultz *A Legal Discussion of the Development of Family Law Mediation in South African Law, with Comparisons Drawn Mainly with the Australian Family Law System* (LLM thesis, University of Kwa-Zulu Natal, 2011) 11; Patelia and Chicktay *Appropriate Dispute Resolution: A Practical Guide to Negotiation, Mediation and Arbitration* (2015) 24–25; Moolman "Mediation can Contribute to Sustainable Relationships on the Farm" 2021 *Stockfarm* 60 60.

142 *PE Municipality* para 39; Nupen (1993) 40.

143 *PE Municipality* para 42; *MB v NB* 2010 3 SA 220 (GSJ) paras 57–59; Patelia and Chicktay 25.

144 *PE Municipality* para 42; Nupen (1993) 40; Patelia and Chicktay 24 and 26; Wiese *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 2; Stander *Developing a Framework for Mediating Farm Evictions and Security of Tenure Related Disputes in South Africa* (LLM thesis, Stellenbosch University, 2022) 17.

145 *PE Municipality* para 42; Human *et al* (2010) 346; Patelia and Chicktay 24 and 28; Stander *Developing a Framework for Mediating Farm Evictions* (2022) 16–17.

146 *PE Municipality* para 42; Stander *Developing a Framework for Mediating Farm Evictions* (2022) 17.

147 JV du Plessis and MA Fouché *A Practical Guide to Labour Law* 9 ed (2019) 444; Patelia and Chicktay 27; Moolman 2021 *Stockfarm* 60; Stander *Developing a Framework for Mediating Farm Evictions* (2022) 148–149.

relate with each other in a sensible and practical manner.¹⁴⁸

The existing section 21 of ESTA (that provides for mediation) as well as some case law developments relating to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act may be of assistance here.¹⁴⁹ In relation to an eviction, compulsory mediation will feature more prominently in that an eviction order will be granted by a court if an owner and the ESTA occupier have attempted mediation to settle their dispute.¹⁵⁰ In the context of relocations, since the owner and ESTA occupiers are involved in an on-going relationship and will have to live together on the same land after the dispute has been resolved, mediation is therefore appropriate in the circumstances.¹⁵¹ It will ensure that the owner and ESTA occupiers create a platform to forge respectful and good neighbourly relationship for the future.¹⁵²

6 CONCLUSION

Relocated ESTA occupiers' concerns about alternative accommodation not being suitable, cannot simply be ignored. This is because the rights of ESTA occupiers may be affected by a relocation. In the same manner, the rights and/or interests of owners should be protected against unreasonable requests by relocated ESTA occupiers relating to suitable alternative accommodation of their own choice. ESTA occupiers' complaints regarding the alternative accommodation should be properly stated based on the unsuitability of the accommodation for human beings to live in, rather than on mere preference.

Where the owner has provided suitable alternative accommodation within the best of his or her abilities, and taking into consideration that the owner provided such accommodation within his or her available resources, courts should accept such alternative accommodation as suitable only if it meets stringent requirements. However, where the alternative accommodation is not suitable, ESTA occupiers are entitled to resist such a relocation, if it affects their fundamental rights itemised in sections 5 and 6 of ESTA.

In the *Mjoli* case, the court specifically affirmed the procedural requirements for relocations under ESTA. Thus, ESTA itself may be lacking in detail, but the courts have set out the procedure or requirements for the relocation of ESTA occupiers. The procedure requires the owner and ESTA occupiers to work together and if this is not possible or viable, then the court can be approached. Where the court is approached, *Mjoli* clearly showed that the court's involvement can be extensive and hands-on. This may include the court conducting *in loco* inspections to

148 *PE Municipality* para 43; Patelia and Chicktay 26; Moolman 2021 *Stockfarm* 60; Stander *Developing a Framework for Mediating Farm Evictions* (2022) 148–149.

149 *PE Municipality* paras 40–47.

150 ESTA s 10(e), which deals with an order of eviction of persons who became ESTA occupiers on 4 February 1997 and s 11(2)(a) and (b) of ESTA, which deals with an order of eviction of persons who became ESTA occupiers after 4 February 1997. Paragraph (e) will be added by s 5 and sub-s 2 will be substituted by s 6 of the Extension of Security of Tenure Amendment Act 2 of 2018. The actual amendment and substitution of these provisions will take place with effect from 1 April 2024 as determined by the President of the Republic of South Africa in terms of a proclamation in the Gazette. Sections 10(e) and 11(2)(b) will (perhaps more deliberately and expressly) make mediation mandatory (and not be merely voluntary) in the context of ESTA evictions and the same should apply to relocations. Compulsory mediation is increasingly common in certain areas of the law, see generally *PE Municipality* para 40.

151 Nupen (1993) 40; Patelia and Chicktay 28; Moolman 2021 *Stockfarm* 60; Stander *Developing a Framework for Mediating Farm Evictions* (2022) 148–149; Ngwenyama “Meaningful Engagement or Mediation or Structural Interdict? An Appropriate Remedy to Resolve Disputes under ESTA” 2023 *Spec Juris* 73 80–82 and 84.

152 *PE Municipality* para 43; Moolman 2021 *Stockfarm* 60; Stander *Developing a Framework for Mediating Farm Evictions* (2022) 148–149.

ascertain whether the dwellings of ESTA occupiers are fit for human habitation.

The owner-occupier relationship is sometimes beset by conflict when the owner wants to relocate ESTA occupiers from one dwelling to another on the same parcel of land. In such circumstances, the article proposed an approach to relocation of ESTA occupiers under ESTA that would arguably limit disputes. The proposed approach is that the owner and ESTA occupiers should resort to mediation through an independent third party, as opposed to litigation. Mediation will empower the parties to tackle their conflict head-on, avoid litigation costs, save time, and ensure the continuation of the parties' relationship while promoting the underlying values of human dignity, equality, fundamental rights and freedom.