

## CASES / VONNISSE

### General Guidelines to be Followed in the Case of Relocation(s) Under ESTA

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

#### 1 Introduction

The Extension of Security of Tenure Act (62 of 1997) (ESTA) is legislation enacted to provide long-term security of land tenure to ESTA occupiers and to give effect to the constitutional provisions of sections 25(6) and 26 of the Constitution of the Republic of South Africa, 1996 (Constitution) (see Preamble of ESTA). The Constitution is not an ordinary piece of legislation; it is the supreme and entrenched law. (Section 2 of the Constitution provides that the Constitution is the “supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.) The rights in the Bill of Rights are furthermore most important as the Bill of Rights itself is regarded as the cornerstone of democracy in the country; essentially the Bill of Rights sets the standard of democracy in the country. (Section 7(1) of the Constitution states that the Bill of Rights is a “cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom”.) However, ESTA occupiers cannot base their cause of action on sections 25(6) and 26 of the Constitution to protect their rights. Section 25(6) of the Constitution provides that “[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.” Section 26 of the Constitution states:

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- “(1) Everyone has the right to have access to adequate housing.  
 (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.  
 (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

To do so would subvert the principle of subsidiarity and entitle ESTA occupiers to bypass the provisions of ESTA in order to protect their rights (see heading 2.2 below, and also heading 3.5. Also of relevance to achieving security of tenure for ESTA occupiers is the deprivation of property in terms of a law of general application – in this instance, ESTA.) ESTA occupiers may only directly rely on the Constitution if they challenge the constitutionality of ESTA because it does not adequately give effect to their constitutional rights (Van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” 2008 *CCR* 100–103; Van der Walt *Property and Constitution* (2012) 49–61; De Vos, Freedman, Boggenpoel, Draga, Gevers, Govender, Lenaghan, Weeks, Namakula, Ntlama, Mailula, Moyo, Sibanda and Stone *South African Constitutional Law in Context* (2021) 528; Muller and Viljoen *Property in Housing* (2021) 441; *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) par 51–52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) par 39–40; *Chirwa v Transnet Ltd* 2008 (2) SA 347 (CC) par 59 and 69; *Walele v City of Cape Town* 2008 (6) SA 129 (CC) par 29–30; *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) par 47–49; *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* 2016 (2) SA 1 (CC) par 53; *My Vote Counts NPC v Speaker of The National Assembly* 2016 (1) SA 132 (CC) par 53; *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC) par 46).

Disputes often arise in the context of ESTA concerning the need for ESTA occupiers to protect their security of tenure. In the case of *Oranje v Rouxlandia Investments (Pty) Ltd* (2019 (3) SA 108 (SCA)), Mr Oranje attempted to rely on ESTA to protect his security of tenure against the landowner who wished to move Mr Oranje from one house to another house on the same farm (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 6). Mr Oranje argued that the house he was being moved to was smaller than the house currently occupied by him, and that the relocation would infringe on his rights in terms of section 5(a) of ESTA (human dignity) and section 6(2)(a) of ESTA (security of tenure), and thus constituted an eviction (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 9, 11, 13 and 14). (The relevant provision of section 5(a) of ESTA provides that “[s]ubject to limitations which are reasonable and justifiable in an open and democratic society based on human rights, dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to ... human dignity”. Section 6(2)(a) of ESTA provides that “[w]ithout prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or the person in charge, an occupier shall have the right – to security of tenure”).

The court differentiated between a relocation and an eviction. The court held that relocation is the movement of ESTA occupiers from one house to another on the same land or property (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 10. See further, *Pharo's Properties CC v Kuilders* 2001 (2) SA 1180 (LCC) par 13; *Chagi v Singisi Forest Products (Pty) Ltd* 2007 (5) SA 513 (SCA) par 19 and 20; *Mjoli v Greys Pass Farm (Pty) Ltd* [2019] ZALCC 25 par 11; *Boplaas Landgoed (Pty) Ltd v Jonkies* [2022] ZALCC 38 par 12; *Pieterse v Drumearn (Pty) Ltd* [2023] ZALCC 13 par 29). In contrast, the court held that an eviction is the removal of ESTA occupiers from one land to another (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 10. See further, *Pharo's Properties CC v Kuilders supra* par 13; *Chagi v Singisi Forest Products (Pty) Ltd supra* par 19 and 20; *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). The court confirmed that a relocation from one house to another on the property itself was not an eviction, and in this particular case, did not impair Mr Oranje's human dignity and security of tenure (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 10 and 27).

Notwithstanding the court's ruling in the *Oranje v Rouxlandia Investments (Pty) Ltd (supra)* case, ESTA does not distinguish between relocation and eviction; therefore, ESTA does not provide regulatory procedures for the relocation of an ESTA occupier from one house to another on the same farm, as relocations will differ on a case-by-case basis. However, ESTA extensively sets out the specific requirements that landowners must follow when evicting an ESTA occupier from land (s 8, 9, 10, 11, and 12 of ESTA). (These sections deal with the procedural and substantive requirements of evictions. Section 1 of ESTA defines an "owner" as the person who owns 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"). An ESTA occupier may only be evicted in terms of a court order, and a court may only grant such an order if: the ESTA occupier's right of residence was terminated in terms of section 8 of ESTA; the ESTA occupier has not vacated the farm within the period of notice to vacate given by the landowner; the conditions for eviction in terms of sections 10 or 11 of ESTA have been met; and the landowner has given all relevant persons (including the ESTA occupier) two months' written notice of their intention to obtain an eviction order (s 9 of ESTA, which deal with limitations on eviction). Section 1 of ESTA defines an occupier as a person "residing on land which belongs to another person and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding ... (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and (c) a person who has an income in excess of the prescribed amount".

Generally, relocation means moving occupiers from one land to another (see for e.g., *Residents of Joe Slovo Community, Western Cape v*

*Thubelisha Homes* 2010 (3) SA 454 (CC) par 8; *Pienaar Land Reform* (2014) 776–779), or within the land itself (see for e.g., *Pharo's Properties CC v Kuilders supra* par 13; *Drumearn (Pty) Ltd v Wagner* 2002 (6) SA 500 (LCC) 504F; *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).

The focus of the case note is on the general guidelines to be followed in the case of the relocation of an ESTA occupier within the property itself. There are no guidelines in these circumstances, but the reasoning of the court in *Oranje v Rouxlandia Investments (Pty) Ltd (supra)* could be used to establish a set of guidelines for relocations under ESTA. It is necessary to have proper guidelines for relocations to curb the violation of fundamental rights protected by ESTA. These guidelines are that a landowner is entitled to relocate ESTA occupiers subject to the proviso that none of the occupier's tenure rights under section 6(2)(a) of ESTA are infringed; an ESTA occupier is entitled to resist a relocation in terms of section 5(a) of ESTA; security of tenure is not tied to a specific house, but rather to the manner in which ESTA occupiers reside on land belonging to another; a relocation from one house to another within the property itself does not constitute an eviction; a provision of section 6 of ESTA that encroaches on a landowner's right to property should be restrictively interpreted so as not to impinge on an owner's right to human dignity; and ESTA was not enacted to provide security of tenure to an ESTA occupier in the house of their choosing.

The case analysis is divided into four parts. Part one is the introduction; part two sets out the facts and judgment in the *Oranje v Rouxlandia Investments (Pty) Ltd (supra)* case; part three provides an analysis of the general guidelines for a landowner who pursues a relocation of ESTA occupiers in terms of the facts of the present case; and part four concludes the case analysis.

## 2 Facts and judgment

### 2.1 Facts

Mr Oranje was a 51-year-old farm worker (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 2). He lived together with his wife and his two adult children on a farm owned by Rouxlandia Investments (Pty) Ltd (Rouxlandia) (par 2). Mr Oranje was born on the farm and lived there for most of his life (par 2). The Oranje family had the use of a house on the farm as part of Mr Oranje's contract of employment (par 3). In 2001, Mr Oranje suffered serious injuries while driving a tractor in the course and scope of his employment (par 3). He continued working on the farm until he was declared medically unfit thirteen years later (par 3). Mrs Oranje had been medically boarded in 2007 (par 3). Although Mrs Oranje no longer worked on the farm, she and the family continued residing on the farm with Mr Oranje (par 3).

The farm had workers' houses, of which six were upgraded to managers' houses in 2013 (par 4). On 16 December 2013, Mr Oranje entered into a

housing agreement with Rouxlandia in terms of which he and his family became entitled to occupy the manager's house (par 4). It was a specific term of the housing agreement that the house was allocated only to management members. If the primary occupant no longer occupied a management position, the housing agreement would be terminated on 30 days' notice (par 4). Therefore, Mr Oranje's continued occupation of the manager's house was conditional on his remaining permanently employed as a manager on the farm (par 4).

In June 2014, Mr Oranje was declared medically unfit for work and his employment on the farm came to an end (par 5). Rouxlandia requested that he and his family move to a smaller house on the farm, but he refused to do so (par 6). Rouxlandia launched an application in the Land Claims Court (LCC), seeking an order to have Mr Oranje and his family relocated from the manager's house to a smaller one on the same farm. The order was granted (par 7). On appeal, the Supreme Court of Appeal (SCA) had to decide whether the LCC had erred in not appreciating that it had the discretion in terms of section 26(3) of the Constitution to refuse the relocation order based on considerations of equity and justice (par 8). The other two grounds for appeal were, (1) whether the requirements for a final interdict had been met; and (2) that Rouxlandia did not make out a cause of action as it did not allege that it had given the 30 days' notice required by the housing agreement.

## 2.2 Judgment

The SCA held that the appeal concerned the respective rights in terms of sections 5(a) and 6(2)(a) of ESTA, when a landowner wishes to relocate an ESTA occupier from one house to another on the same farm (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 1). It has been established in case law that an eviction in terms of ESTA is limited to the removal of ESTA occupiers from one land to another, and not from one house to another on the same farm (par 10). As such, relocation does not constitute an eviction in terms of ESTA (par 10).

On behalf of Mr Oranje, it was argued that while a relocation does not constitute an eviction under ESTA, it amounted to an eviction in terms of section 26(3) of the Constitution (par 11). (Section 26(3) of the Constitution provides that "no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances. No legislation may permit arbitrary evictions.") However, the SCA determined that such an argument was not in line with the subsidiarity principle. In terms of this principle, where legislation was enacted to give effect to a constitutional provision, a litigant must first rely on the provisions of the specific legislation and may not directly rely on the constitutional provision to protect their infringed rights (*Van der Walt 2008 CCR 100–103*; *Van der Walt Property and Constitution 49–61*; *De Vos et al South African Constitutional Law in Context 528*; *Muller and Viljoen Property in Housing 441*; *South African National Defence Union v Minister of Defence supra* par 51–52; *MEC for Education: KwaZulu-Natal v Pillay supra* par 39–40; *Chirwa v Transnet Ltd supra* par 59 and 69; *Walele v City of Cape Town supra* par 29–30;

*Nokotyana v Ekurhuleni Metropolitan Municipality supra* par 47–49; *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being supra* par 53; *My Vote Counts NPC v Speaker of The National Assembly supra* par 53; *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality supra* par 46). In this regard, it was impermissible for the SCA to bypass ESTA (as the designated legislation was specifically enacted to give effect to a constitutional right to security of tenure under section 25(6) of the Constitution) and decide the matter based on the constitutional provision that gives effect to the right (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 12).

Mr Oranje's representation further sought to locate their right to resist the relocation in terms of sections 5 and 6 of ESTA (par 13). The SCA confirmed that, where a relocation infringes an ESTA occupier's right to human dignity, such a relocation could be successfully resisted by invoking sections 5(a) and 6(2)(a) of ESTA (par 17). However, where suitable alternative accommodation was provided and the right to human dignity was not infringed, the mentioned sections relied on by Mr Oranje's representation could not be relied on to resist his relocation (par 22). Therefore, the appeal was dismissed (par 28).

### 2.3 Was the SCA's decision to order relocation correct?

The SCA's decision that Mr Oranje may, in this particular case, be ordered to move from a manager's house to a labourer's accommodation on the same farm was correct. This is because the relocation was not in conflict with any constitutional imperatives contained in ESTA or the Constitution (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 27). The relocation could not result in the homelessness of Mr Oranje, as suitable alternative accommodation was provided, even though it was not as spacious as Mr Oranje's previous house (par 27). More importantly, the occupation on the relocated site was in line with standards of human dignity (par 27). This reaffirms an earlier *dictum* by the Constitutional Court in *Daniels v Scribante* (2017 (4) SA 341 (CC)) that the occupation of ESTA occupiers

“is not simply about a roof over the occupier's head. Yes, it is about that. But it is about more than just that. It is about occupation that conduces to human dignity and the other fundamental rights itemised in section 5. That much is plain from reading section 6 conjointly with section 5.” (*Daniels v Scribante supra* par 31)

It is important that relocation not deny an ESTA occupier their existing constitutional right to housing and other fundamental rights. The court's approach in *Oranje v Rouxlandia Investments (Pty) Ltd (supra)* should therefore be welcomed because it was in line with established jurisprudence and applicable constitutional and legislative provisions.

The SCA correctly found that ESTA is legislation primarily designed to give effect to the constitutional right of security of tenure (in line with the subsidiarity principle). However, the court did not go to lengths in traversing the principle of subsidiarity. This is because ESTA, as the primary piece of legislation that regulates this area of the law, was not itself *ex facie*

unconstitutional. The principle of subsidiarity is flexible in the eventuality of unconstitutionality of legislation. ESTA occupiers are thus entitled to challenge the unconstitutionality of the legislation if it does not adequately give effect to their constitutional rights (Van der Walt *Property and Constitution* 49–71). If the legislation is unconstitutional, an approach to the interpretation of legislation that allows for a holistic reading of both the Constitution and ESTA, for instance, would demand using the Constitution as the starting point to test the constitutionality of a specific provision in ESTA. The subsidiarity principle has a lot to answer for (as a stand-alone doctrine), considering the all-important principle of constitutional supremacy (s 2 of the Constitution). Answers to any legal dispute are to be found in how the courts apply the principle of subsidiarity *vis-à-vis* the principle of constitutional supremacy.

#### 2 4 *When should a relocation be permitted under ESTA?*

A relocation should be allowed in terms of ESTA after considering the purpose for which ESTA occupiers are relocated. This purpose could be that:

- a) the landowner wishes to use the house to accommodate current employees, as shown in *Oranje v Rouxlandia Investments (Pty) Ltd* (*supra* par 4–6); or
- b) the house is not habitable (see, for e.g., *Mjoli v Greys Pass Farm (Pty) Ltd* *supra* par 4–5. 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* (doctoral dissertation, Stellenbosch University) 2021 119–171); or
- c) the landowner needs the land for agricultural purposes (Pienaar *Land Reform* 313); or
- d) there needs to be an on-site development of the land for public benefit (Pienaar *Land Reform* 313).

The purpose of the relocation must then be viewed in light of the right to security of tenure guaranteed in section 6(2)(a) of ESTA and, in particular, the constitutional obligation of private landowners not to impair such a right (*Daniels v Scribante* *supra* par 49; see further, *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 (4) SA 744 (CC) par 78; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 34; *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 703 (CC) par 46; *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) par 33–34; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 721 (CC) par 68–71; *Governing Body of the Juma Masjid Primary School v Essay* [2011] ZACC 13 par 58 and 60; *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44 par 267). This will ensure that relocations are not at odds with the spirit and purport of both ESTA and the Constitution: they both aim to deal in part with arbitrary and unreasonable relocations as well as grant protection against

unlawful eviction (s 26(3) of the Constitution, given effect by s 8, 9, 10 and 11 of ESTA; *Baron v Claytile (Pty) Ltd* 2017 (5) SA 329 (CC) par 11–12).

Relocation from one house to another on the same farm should be permitted under ESTA if this process does not infringe on ESTA occupiers' fundamental rights contained in section 5 of ESTA, such as human dignity, as shown in *Oranje v Rouxlandia Investments (Pty) Ltd* (*supra* par 17–18 and 22. See, for e.g., *Mjoli v Greys Pass Farm (Pty) Ltd* *supra* par 5–6 and 11–12). It is important to note here that the fundamental rights listed in ESTA are equally available to the ESTA occupier, the landowner and any person in charge of the management of the farm.

## 2.5 *When is a relocation in contravention of ESTA?*

A relocation is in contravention of ESTA if it is used as a guise to secure the eviction of ESTA occupiers by avoiding the protections afforded to them under section 8 of ESTA, which deals with circumstances that may lead to the right of residence being terminated (*Boplaas Landgoed (Pty) Ltd v Jonkies* *supra* par 19) – for instance, where a landowner wants to relocate ESTA occupiers from one land to another (*Boplaas Landgoed (Pty) Ltd v Jonkies* *supra* par 11) or to another property owned by a different person or entity (*Pieterse v Drumearn (Pty) Ltd* *supra* par 32–38). Clearly, these instances constitute evictions and cannot be allowed under ESTA because they violate the very rights that ESTA has been enacted to protect and they go against the primary purpose of ESTA (*Boplaas Landgoed (Pty) Ltd v Jonkies* *supra* par 11; *Pieterse v Drumearn (Pty) Ltd* *supra* par 32–38). This calls for a narrow interpretation that courts should follow when confronted with similar situations where ESTA occupiers are moved from one house to another on the same farm (*Pharo's Properties CC v Kuilders* *supra* par 13; *Drumearn (Pty) Ltd v Wagner* *supra* 504F; *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 28). Having established that a relocation is permitted by ESTA, and that it can become unlawful if it contravenes the fundamental rights protected in ESTA, the next part of this case note analyses the general guidelines relating to relocations.

## 3 **General guidelines when a relocation is pursued in light of *Oranje***

### 3.1 *A landowner is entitled to relocate an ESTA occupier*

In *Oranje*, in addition to the house being the landowner's property, there was a contract that terminated lawful occupation. The occupation of the manager's house was no longer valid and legally binding between the parties, but the court and owner recognised the existence of established tenure security – hence, the owner wished to relocate Mr Oranje and the

willingness to provide alternative accommodation (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 19). A landowner is entitled to relocate an ESTA occupier from one house to another on the same farm on any lawful ground, provided that the occupier's right to security of tenure is not infringed (cf s 8(1) of ESTA; see also *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 23).

It is against this background that, before a court grants an order for the relocation of ESTA occupiers, certain factors should be considered. These factors include the legal basis upon which the landowner relies (cf s 8(1)(a) and (e) of ESTA; see also *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 4–7 and 19); the interests of the parties, including comparable hardship to the parties (compare s 8(1)(c) of ESTA; see also *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 19–23 and 26–27; Pienaar *Land Reform* 313); and the fairness of the procedure followed by the landowner – including whether the ESTA occupiers were given an opportunity to make representations before the actual relocation (cf s 8(1)(e) of ESTA; see also *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 5–6). When courts consider these factors, such an approach will ensure that the security of tenure of ESTA occupiers is not negated and the purpose for which ESTA was enacted is not defeated or is achieved or remains intact.

### 3.2 *An ESTA occupier has the right to resist a relocation*

In *Oranje*, the court found that where the relocation contravenes fundamental rights protected in ESTA, such as human dignity, an ESTA occupier has a right to resist a relocation (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 17–18; Pienaar “Farm Dwellers: Eviction Versus Relocation” 2023 *Stockfarm* 67). In such instances, an ESTA occupier may rely on the provisions of sections 5 and 6 of ESTA to resist the relocation (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 17–18). However, it should be mentioned that these provisions do not amount to a blanket prohibition on any relocation, and every case has to be decided on its own facts (par 18). The protection afforded by the provisions of sections 5 and 6 of ESTA is to ensure that an ESTA occupier will not be relocated to an uninhabitable house and/or inhumane conditions on the other part of the farm (par 17–18). This statement is a reminder that the constitutional right to an acceptable house links to other rights like human dignity.

For example, in *Government of the Republic of South Africa v Grootboom (supra)*, it was stated that the right of access to adequate housing cannot be seen in isolation since it is closely linked to other socio-economic rights (par 23–24). Also, in *Jaftha v Schoeman, Van Rooyen v Stoltz (supra)*, the court reminded us that taking away a person's right to housing either through evictions from houses, forced removals and relocation to land or other means, causes a person to suffer indignity (par 27, 29 and 39). Furthermore, in *Sarrahwitz v Martiz NO* (2015 (4) SA 491 (CC)), the court stressed that where access to adequate housing is linked to human dignity and self-worth; consequently, the loss of one's house makes the person suffer indignity (par

42–44). The landowner has, therefore, an obligation to ensure, at the very least, that the relocation of ESTA occupiers on the same farm is fair.

Where the alternative accommodation provided does not impact the human dignity of an ESTA occupier, the occupier cannot delay their relocation by stating that they want alternative accommodation of their own choosing (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 18 and 21). The position is that ESTA was not enacted to provide security of tenure to an ESTA occupier in the house of their choosing, as will be elaborated on below (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 21; see also Pienaar 2023 *Stockfarm* 67).

### 3.3 *The meaning of security of tenure in law or in terms of ESTA*

ESTA is legislation that was enacted to give effect to the constitutional right contained in section 25(6) of the Constitution, which states that “[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress”. ESTA provides secure tenure as envisaged in section 25(6) of the Constitution to persons who live on land or property they do not own (*Daniels v Scribante supra* par 13). This position is underscored by section 6(2) of ESTA, which provides: “Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right – (a) to security of tenure”. ESTA occupiers enjoy continued occupation in relative balance with the rights of the landowner. As such, any conduct that frustrates the exercise of rights enjoyed by either landowners or ESTA occupiers is prohibited. (The Preamble of ESTA states that “the law should extend the rights of occupiers while giving due recognition to the rights, duties and legitimate interests of owners”; see also *Daniels v Scribante supra* par 56.)

Security of tenure is connected to the way in which persons can own or occupy land (Pienaar *Land Reform* 384–386; Pienaar and Kamkuemah “Farm Land and Tenure Security: New Policy and Legislative Developments” 2011 *Stell LR* 724-741; Dhliwayo *Tenure Security in Relation to Farmland* (master’s thesis, Stellenbosch University) 2012 13; Dhliwayo “Tenure Security and Farmland: Will Recent Policy and Legislative Developments Improve the Plight of Rural Dwellers?” 2014 *Stell LR* 145; Mahomed, Benjamin, Barry, Magardie, Naidoo, Yazbek, Mokhoaetsi, Ntuli and Mngwengwe “Tenure Security in SA Law” in Mohamed (ed) *Land Tenure Law* (2013) 2–2; Muller and Viljoen *Property in Housing* 61–62). It may differ depending on the purpose for which the land is used (Pienaar *Land Reform* 384–386; Mahomed *et al* in Mohamed *Land Tenure Law* 2–1; Muller and Viljoen *Property in Housing* 61–62). As the United Nations Committee on Economic, Social and Cultural Rights (CESCR) pointed out:

“Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property.

Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. State parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups” (*General Comment No 4: The Right to Adequate Housing (Article 11(1) of the Covenant)* E/1992/23 (13 December 1991) par 8(a); own emphasises added)

(See also Pienaar *Land Reform* 384, particularly footnote 32; UN General Assembly *International Covenant on Economic, Social and Cultural Rights (ICESCR)* 993 UNTS 3. Adopted: 16 December 1966; EIF: 23 March 1976. As of 18 July 2015, the ICESCR had been ratified by 164 countries. South Africa signed the ICESCR on 4 October 1994 and ratified it on 12 January 2015. According to article 27 of the ICESCR, it entered into force three months after the South African government deposited its instrument of ratification on 12 January 2015.)

Tenure essentially gives occupiers in general, and ESTA occupiers in particular, a sense of security on the land on which they reside or that they use, but which they do not own (Pienaar *Land Reform* 385; Mahomed *et al* in Mohamed *Land Tenure Law* 2–2; Muller and Viljoen *Property in Housing* 61–62). However, in *Oranje v Rouxlandia Investments (Pty) Ltd (supra)*, the court confirmed that the right of residence was not tied to a specific land or house (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 18). In *Snyders v De Jager* (2017 (3) SA 545 (CC)), Mr Brenda was an employee at Stassen Farm and lived in a house on the farm that was previously occupied by Mr Snyders and his family (*Snyders v De Jager supra* par 77–78). Mr Brenda was requested to vacate the house, and he refused (*Snyders v De Jager supra* par 78). The Constitutional Court held that the right of residence to which Mr Brenda and his family were entitled was not tied to the specific house in which they lived (*Snyders v De Jager supra* par 77). This is because ESTA was not enacted to provide ESTA occupiers with security of tenure in the house of their choice (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 21; Pienaar 2023 *Stockfarm* 67. Cf *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) par 44 and 75; *Grobler v Phillips* 2023 (1) SA 321 (CC) par 35–36; see further Ngwenyama “Alternative Accommodation of an Unlawful Occupier’s Choosing: Some Reflections From *Grobler v Phillips* [2022] ZACC 32” 2023 *Obiter* 646–660). The primary purpose of ESTA, as set out in the Preamble, is

“[t]o provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and 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.”

As such, if ESTA occupiers were to choose exactly where to live on farms, such an entitlement would defeat the intended purpose that the legislature sought to achieve with ESTA. However, if a relocation infringes the security of tenure of ESTA occupiers and threatens their continued residency on a farm, they should resist such relocation as explained above (*Oranje v*

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*Rouxlandia Investments (Pty) Ltd supra* par 17–18; see also Pienaar 2023 *Stockfarm* 67).

### 3 4 The difference between a “relocation” and an “eviction” under ESTA

ESTA does not define “relocation”, which arguably amounts to a shortcoming on the legislature’s part. However, the courts have developed the concept of “relocation” to mean the movement of ESTA occupiers from one house to another on the same farm (*Pharo’s Properties CC v Kuilders supra* par 13; *Drumearn (Pty) Ltd v Wagner supra* 504F; *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). ESTA defines the term “evict” as an act of depriving “a person against his or her 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], and ‘eviction’ has a corresponding meaning” (s 1 of ESTA). The definition of “evict” shows that the basis of the right of residence is land and not a house (*Chagi v Singisi Forest Products (Pty) Ltd supra* par 9; see also Pienaar 2023 *Stockfarm* 67). This could mean that the act of removing ESTA occupiers from one land to another 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; see further Pienaar *Land Reform* 401, 436 and 700).

It is clear that relocation and eviction are two different processes. The right of residence is not terminated when ESTA occupiers are relocated, while it must be lawfully terminated before an eviction occurs (s 8 of ESTA). (Section 1 of ESTA defines “terminate” to mean the withdrawal from a person of consent to occupy or use the land.) The landowner does not have to meet the requirements for an eviction before ESTA occupiers are relocated, while a landowner must meet all the substantive and procedural requirements for the eviction of ESTA occupiers (see s 9, 10 and 11 of ESTA, which deal with the procedural and substantive requirements for evictions; see also Pienaar *Land Reform* 400; Pienaar 2023 *Stockfarm* 67). In an eviction, the proximity to work and other social amenities such as schools, clinics and shopping centres may be an issue (see s 1 of ESTA for the definition of “suitable alternative accommodation”, which requires that prior to an eviction, regard must be had to the need of ESTA occupiers to reside in proximity to opportunities for employment or other economic activities if they are to be economically active); with a relocation, however, proximity to work and other social amenities should not theoretically be an issue because ESTA occupiers are relocated from one house to another on the same land.

In light of the above analysis, the nature, structure and extent of a landowner’s right over property does not trump that of ESTA occupiers (on the fact that ownership is not absolute, see generally Visser “The

'Absoluteness' of Ownership: The South African Common Law in Perspective" 1985 *Acta Juridica* 39–52; Birks "The Roman Law Concept of Dominion and the Idea of Absolute Ownership" 1985 *Acta Juridica* 1–38; Van der Walt and Kleyn "Duplex Dominium: The History and Significance of the Concept of Divided Ownership" in Visser (ed) *Essays on the History of Law* (1989) 213–214; Van der Walt and Dhliwayo "The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis" 2017 *SALJ* 32–52; Dhliwayo *A Constitutional Analysis of Access Rights That Limit Landowners' Right to Exclude* (doctoral dissertation, Stellenbosch University) 2015 79–102 and 136; Van der Walt "Sharing Servitudes" 2015 *EPLJ* 162 200). The right of residence enjoyed by ESTA occupiers *vis-à-vis* that of the landowner to the property must be balanced. If, for instance, a landowner without a legal basis or fairness, and in a manner that contravenes the fundamental rights protected in ESTA, moves ESTA occupiers, a court should not grant a relocation order. If such an argument is disregarded by a court, that would defeat the practical application of the purpose of ESTA to provide ESTA occupiers with secure tenure on the land they reside (see Preamble of ESTA).

The fact that ESTA occupiers are only moved from one part of the land to another part does not vindicate the landowner's decision to do so; the process to relocate ESTA occupiers must be carried out in a fair manner, even though relocation is not an eviction. This is because a relocation may impact the rights of ESTA occupiers, such as to security of tenure and human dignity, which ESTA seeks to protect. The house to which ESTA occupiers will be relocated or evicted must be suitable alternative accommodation that is safe and generally not less favourable than the ESTA occupier's previous situation (s 1 of ESTA; *Drumearn (Pty) Ltd v Wagner supra* 504F; Pienaar 2023 *Stockfarm* 67).

The courts' general views on both relocations and evictions are as follows: In *Oranje v Rouxlandia Investments (Pty) Ltd (supra)*, the court mentioned that the landowner must accept an obligation to provide suitable alternative housing when the relocation is on the same land (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 19). In *Baron v Claytile (Pty) Ltd (supra)*, the court found that it is the State's obligation to provide suitable alternative accommodation in the context of evictions. However, the court pointed out that it might be "appropriate to expect the private landowner to assist with the finding of, or, failing that, in truly exceptional circumstances, to provide suitable alternative accommodation" (*Baron v Claytile (Pty) Ltd supra* par 37). The suitability of alternative accommodation may be used as the criteria to determine the reasonableness and lawfulness of the decision to relocate or evict ESTA occupiers (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 19–20 and 27; *Mjoli v Greys Pass Farm (Pty) Ltd supra* par 11; *Baron v Claytile (Pty) Ltd supra* par 38–47; *Grobler v Phillips supra* par 37–38; *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) 769; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) par 15; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) par 28–29). The SCA in the *Oranje* case did not critically engage on the difference between a relocation and an eviction in terms of ESTA and the legal implications that flow from it.

### 3 5 Interpretation of section 6 of ESTA

An ESTA occupier has the right to reside on and use land and have access to services, subject to the landowner's consent or agreement (s 6(1) of ESTA; see also *Nkosi v Buhrmann* ([2001] ZASCA 98 par 48). Section 1 of ESTA defines "consent" to mean the "express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, includes the express or tacit consent of such holder".) The rights of an ESTA occupier and those of a landowner must be balanced (s 6(2) of ESTA). An ESTA occupier has the right to security of tenure (s 6(2)(a) of ESTA); to receive postal or other communication (s 6(2)(c) of ESTA); to family life in accordance with the culture of their family; to bury a deceased family member who resided on the land at the time of their death in accordance with their religion or cultural belief (s 6(2)(d) of ESTA); and to have access to water, educational or health services (s 6(2)(e)–(f) of ESTA).

A family member of an ESTA occupier has the right to bury that occupier in the land on which they resided in accordance with their religion or cultural belief (s 6(5) of ESTA). An ESTA occupier has the right to receive *bona fide* visitors at reasonable times and for reasonable periods (s 6(2)(b) of ESTA). The landowner may impose reasonable conditions applicable to visitors to safeguard life and property or prevent undue disruption of work on the land (s 6(2)(b)(i) of ESTA). An ESTA occupier is liable for any harm or damage caused by a visitor (s 6(2)(b)(ii) of ESTA).

In the exercise of these rights by ESTA occupiers, a landowner's right to property in terms of section 25 of the Constitution (the property clause) may be limited. The property clause provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property" (s 25(1) of the Constitution). ESTA is law of general application in this case. However, a limitation of the right to property is not only legislatively, but also constitutionally permissible in terms of section 36 of the Constitution. In instances where the right to property is limited by the exercise of an ESTA occupier's rights, section 6 of ESTA must be restrictively interpreted in relation to giving effect to a landowner's rights and/or interests (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 10, referring to *Chagi v Singisi Forest Products (Pty) Ltd supra* par 17). For example, if a landowner wishes to relocate an ESTA occupier to use the house to accommodate new or current employees, and such an occupier unreasonably refuses to be relocated, a landowner may not resort to self-help in order to relocate the ESTA occupier. The landowner must approach a court for a relocation order (*Daniels v Scribante supra* par 65, citing *Motswagae v Rustenburg Local Municipality* 2013 (2) SA 613 (CC) par 14 and *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) par 87; see further *Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) par 17–18; *Erasmus v Mtenje* [2018] ZALCC 12 par 35; *Sibanyoni v Holtzhausen* [2019] ZALCC 11 par 99). If a court does not order an ESTA occupier to relocate despite the landowner's need to use the house, such disregard for a landowner's rights and/or interests may infringe on the landowner's property right (*Daniels v Scribante supra* par 61).

Protection of the landowner's property right is not in terms of ESTA, but is informed by the landowner's right to human dignity contained in section 5(a) of ESTA (Marais and Muller "The Right of an ESTA Occupier to Make Improvements Without an Owner's Permission After *Daniels: Quo Vadis* Statutory Interpretation and Development of the Common Law?" 2018 *SALJ* 766 774, particularly fn66; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC) par 43–51; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 35). Thus, a landowner's right to property can only be limited to the extent that it is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" (s 5(a) of ESTA, originating from s 36(1) of the Constitution; see also *Chagi v Singisi Forest Products (Pty) Ltd supra* par 18).

In *Daniels v Scribante (supra)*, the Constitutional Court emphasised the link between the right to property and human dignity in the following terms:

"Under section 5 of ESTA an owner enjoys the exact same rights as does an occupier. The total disregard for an owner's property right may impinge on her or his right to human dignity. That would be at odds with section 5(a) of ESTA." (*Daniels v Scribante supra* par 61)

These statements confirm that all fundamental rights are "inter-related and mutually supporting" and that when rights are interpreted, they must be "understood in their social and historical context", especially our history of land dispossession (*Government of the Republic of South Africa v Grootboom supra* par 23 and 25). As such, the rights afforded to ESTA occupiers in terms of section 6 of ESTA are not "open-ended, unlimited or unfettered", but should be enjoyed in balance with the landowner's rights and/or interests such as the entitlement to relocate another within their property (s 6(2) of ESTA; see also *De Jager v Mazibuko* [2020] ZALCC 7 par 14).

In light of the above analysis, the SCA in the *Oranje* case followed a restrictive approach to the interpretation of section 6 of ESTA. This is because the SCA upheld the landowner Rouxlandia's entitlement to relocate Mr Oranje. In this regard, Mr Oranje's right to reside in the manager's house was restrictively interpreted in order to serve the housing agreement entered into between Mr Oranje and Rouxlandia. In terms of their contractual relationship, Mr Oranje was well aware of when it started and ended. If a landowner wishes to relocate ESTA occupiers, they may not choose exactly where to be relocated.

### 3 6 *ESTA occupiers do not have the right to choose which house they would prefer to occupy*

In *Oranje v Rouxlandia Investments (Pty) Ltd (supra)*, the court held that ESTA was not enacted to provide tenure security to an ESTA occupier at a landowner's expense in the house of their choice (in this case, a "bigger and better" house) (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 20–21).

Cf *City of Johannesburg v Rand Properties (Pty) Ltd supra* par 44 and 75). However, a landowner would be failing an ESTA occupier in its obligation to provide suitable alternative accommodation if it were to ignore or fail to have regard to the standard of such accommodation, which must be safe and overall not less favourable than the occupier's previous accommodation (s 1 of ESTA; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 19–20).

The considerations for choosing accommodation should be the suitability of the house (including sanitation, access to services such as water and electricity), location, or size (*Oranje v Rouxlandia Investments (Pty) Ltd supra* par 20). The location of the new house should be on another part of the same registered farm, but not on a different farm that the landowner owns. If the relocation is intended to be on another farm belonging to the same landowner or a different landowner, it is not a relocation, but an eviction (*Pieterse v Drumearn (Pty) Ltd supra* par 32; see also *Chagi v Singisi Forest Products (Pty) Ltd supra* par 19–20; *Oranje v Rouxlandia Investments (Pty) Ltd supra* par 10; Pienaar 2023 *Stockfarm* 67). This is because the farms will have distinct cadastral descriptions, and that cannot be reconciled with the meaning of relocation, as explained above (*Pieterse v Drumearn (Pty) Ltd supra* par 37). For the landowner to provide a house with two rooms if the relocated household consists of six members, and they had more rooms before, is impractical. These are important considerations that may arguably constitute part of one's understanding of a home and should not be disregarded by the landowner. As Sachs J (as he then was) has held:

"To live in a place, and to have established one's own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home." (*Port Elizabeth Municipality v Various Occupiers supra* par 17, citing United Nations Housing Rights Programme, Report No 1, "Housing Rights Legislation: Review of International and National Legal Instruments" (2002) 1)

Therefore, an ESTA occupier's choosing of accommodation should be centred around their need to live a family life in decent conditions suitable for human habitation, and not mere preference (*Grobler v Phillips supra* par 44). Preference obfuscates the true issue – that is, whether the ESTA occupier resides in an acceptable home. As such, in the case of a relocation (and not eviction), a landowner must provide an ESTA occupier with suitable alternative accommodation that does not impact their tenure security and human dignity. If a landowner has made provision for suitable alternative accommodation that meets the stringent requirements of section 1 of ESTA, the accommodation should be regarded by the ESTA occupier and/or courts as an acceptable home in law and in practice.

#### 4 Conclusion

Relocations are permitted by ESTA, as shown in the *Oranje v Rouxlandia Investments (Pty) Ltd (supra)* case. Relocations can *become* unlawful if the landowner moves ESTA occupiers without any legal basis or fairness and in a manner that contravenes the fundamental rights protected in ESTA. There are no regulatory procedures for relocations under ESTA because they differ

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on a case-by-case basis. However, the *Oranje v Rouxlandia Investments (Pty) Ltd (supra)* case should be used to establish a set of guidelines for relocations in order to prevent the violation of fundamental rights protected in ESTA.

With reference to the *Oranje v Rouxlandia Investments (Pty) Ltd (supra)* case, these guidelines are:

- a) A landowner is entitled to relocate ESTA occupiers subject to the proviso that none of the occupier's tenure rights under section 6(2)(a) of ESTA are infringed.
- b) An ESTA occupier is entitled to resist a relocation in terms of section 5(a) of ESTA.
- c) Security of tenure is not tied to a specific house, but to the manner in which ESTA occupiers reside on land belonging to another.
- d) A relocation from one house to another within the property itself does not constitute an eviction.
- e) A provision of section 6 of ESTA that encroaches on a landowner's right to property should be restrictively interpreted so as not to impinge on an owner's right to human dignity.
- f) ESTA was not enacted to provide security of tenure to ESTA occupiers in a house of their choosing.

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